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London  
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23 August 2013

Dear Katie,

**Third Party Intermediaries: exploration of market issues and options**

I write in response to Ofgem's Issues and Options paper on the role of Third Party Intermediaries. We appreciate the opportunity to comment on Ofgem's review.

This is an area of increasing focus, for both domestic and non-domestic sectors, and the review presents a valuable opportunity to take stock of the issues and potential impacts on customers. TPIs play an important role in the market and that role should be appreciated. At the same time however, it is vital to ensure adequate consumer protection, for both domestic and micro-business customers.

We think that the current review is timely and that the issues and options identified by Ofgem so far are generally appropriate. This will be an increasingly important area as the energy market evolves and smart metering – and therefore smarter services – bring increased consumer engagement with the market. The benefits of this review are therefore wider than simply improving consumer experiences of the current market. We think that customers will benefit from the ability to engage with their supplier or with energy services through a range of routes and we recognise the benefits that TPI engagement could bring to customers when managed appropriately.

TPI Code of Practice plus standard licence condition

Of the various regulatory options suggested by Ofgem, our preference in the near term would be for Option 4. As a general rule, we think a well-structured TPI Code of Practice, supported by Licence Conditions requiring or incentivising suppliers to pay commissions only to those TPIs signed up to the Code in relation to domestic or micro business marketing, could strike the right balance at this stage. It is important that this Code has a robust and independent governance framework and we think that Ofgem is best placed to administer this.

However, in the longer term, and as TPI activity develops, we think that it would be sensible to keep under review the possible need for an appropriate licensing regime for TPIs. Any proposal to introduce licensing would of course require a full impact assessment and would have to balance the need for increased consumer protection with the impact of such an intervention on the TPI market and the TPIs themselves.

## Domestic TPIs and SLC25

Ofgem raises some important points around the compliance risks faced by suppliers in relation to SLC 25 and their consequent willingness to work with TPIs representing multiple suppliers – who potentially have a valuable role to play in helping certain groups of consumers engage with the market. Each supplier is likely to adopt a different mix of processes and controls to ensure overall compliance with SLC 25, and it will be difficult for a TPI to satisfy all its supplier partners unless those suppliers are willing to compromise on what they consider to be the best approach – which is unlikely in the current climate. Furthermore, if any compliance issues do arise, there may well be uncertainty over which supplier will be held responsible and subject to enforcement action.

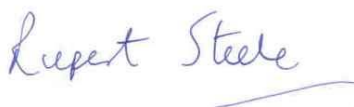
We think an appropriate way of resolving these issues could be to create a ‘safe harbour’ exemption from SLC25 for suppliers who deal with accredited multi-party TPIs. A supplier would be exempt from enforcement action in respect of any contravention by the TPI, provided that the TPI was accredited under an appropriate Code of Conduct, and the contravention was not a result of any action or omission by the supplier (eg provision of incorrect information). This would clearly require a robust and well designed code of practice for TPIs, but we think this could potentially be achieved by extending and adapting the existing Confidence Code to cover face to face and telesales marketing activities.

## Implications of TPI contractual relationship for VAT and CCL

An additional issue with TPIs has been identified which we would like to see included within Ofgem’s review. In certain circumstances the applicable rate of VAT and the eligibility for Climate Change Levy (CCL) relief can depend on the nature of the contractual relationship between the TPI and the end customer. If this relationship is unclear, this can potentially result in customers being billed on incorrect VAT rates and/or having CCL charges applied when they may actually be entitled to relief from CCL. Suppliers have been experiencing significant practical difficulties in ensuring that they are applying the correct rates, and in discussions with HMRC it has been suggested that this is an issue that could usefully be addressed within Ofgem’s TPI review. We would advocate a cross-party working group, involving Ofgem, HMRC, suppliers and TPIs to discuss the practical points around this issue and help to develop an industry solution.

I have provided answers to the consultation questions in Annex 1 attached to this letter. We would be pleased to discuss our views on these issues if this would be helpful.

Yours sincerely,

A handwritten signature in blue ink that reads "Rupert Steele". The signature is written in a cursive style and is positioned above a horizontal line.

**Rupert Steele**  
Director of Regulation

## **THIRD PARTY INTERMEDIARIES: EXPLORATION OF MARKET ISSUES AND OPTIONS**

### **SCOTTISHPOWER RESPONSE TO CONSULTATION QUESTIONS**

#### **Question 1: Do you agree with the scope and range of TPIs operating in the energy market, from the information provided? Do you have any further views on this?**

Yes. The scope and range of TPIs operating in the energy market is particularly broad and we consider that Ofgem has recognised this within its review.

We believe that, for the purposes of this review and in order to better consider the issues affecting the market, TPIs should be categorised under two broad categories: 1) Engagement with Domestic Customers; and 2) Engagement with Non-Domestic Customers. Within these categories, TPIs can be further classified according to their relationship to the customer and supplier. For example:

- acts on behalf of customers, helping them select a supplier and enter into a contract for the relevant services;
- acts on behalf of customers, providing more in-depth contract management, eg receiving and managing bills or managing particular services;
- acts solely on behalf of one particular supplier, eg providing sales and marketing services;
- acts on behalf of multiple suppliers.

We consider that reviewing TPIs within these different categories will help provide a clearer picture of the different interactions and therefore different protections that may be needed in each area. We think it is important to develop clear and practical definitions to assist suppliers in identifying the nature of a TPI and its relationship with the end user.

This is particularly important for suppliers in determining the appropriate VAT or Climate Change Levy (CCL) rate to apply to end user accounts. In the current market there are a number of TPIs that provide comprehensive contract management services behalf of their customers, making it difficult for suppliers to identify whether the customer is a non-domestic customer or a domestic customer despite best efforts. This may mean that in some cases the end user is inadvertently being billed using incorrect VAT rates and / or having CCL charges applied when they may actually be entitled to relief from CCL. We do not think that such cases are likely to be extensive in number. However, this lack of clarity, combined with the current legislation can allow such loopholes. We would appreciate a conversation between Ofgem, HMRC and suppliers to better scope this issue and the practical challenges, and to consider appropriate action to address this.

#### **Question 2: Do you consider our understanding of consumers' experience of TPIs in the retail energy market is accurate?**

Yes, broadly speaking, we consider that Ofgem's understanding of consumer experiences of TPIs in the energy retail market is sound. It is our perception that much of the focus to date has been on TPIs in the non-domestic sector and we think it could be valuable to undertake some further research into domestic consumer views on, and engagement with,

domestic TPIs. In particular, domestic consumers may not understand the commercial arrangements for these TPIs, which might have a bearing on their decision making.

One factor behind the limited activity undertaken by multi-party domestic TPIs in the current environment may be the risks to the supplier from enforcement under SLC 25 from any breaches by Representatives employed by the TPI. In a multi-party context, suppliers may perceive themselves as unable to secure adequate control over the TPI and may conclude that it is necessary not to engage with TPIs.

**Question 3: Do you have further evidence to share regarding consumers' experience of TPIs in the retail energy markets?**

We do not have any further evidence immediately available to share at this time. However, we will review our own research, with a view to providing Ofgem any pertinent evidence separately.

**Question 4: What are your views on the existing regulatory measures applying to TPIs?**

We consider that the existing regulatory measures applying to TPIs are insufficient given the scale of TPI activity and the level of influence that TPIs may have on both domestic and non-domestic customers. While there are general consumer protection regulations that bind TPIs, these have historically been of a lesser administrative priority for enforcers and crucially, there has been no sector-specific regulation which would allow more direct scrutiny of third parties. Given the role that TPIs play in the energy retail markets – and the potential for this to expand in a smarter market – we think that there is a gap in the regulation of TPIs. We welcome Ofgem's actions to address that gap through its application to be an enforcer under the Business Protection from Mis-leading Marketing Regulations (BPMMRs) and through this current review.

**Question 5: Do you consider the current formulation of SLC 25 may be acting as a barrier to the development of more face-to-face multi-party TPI activity?**

SLC 25 applies to all Domestic Face to Face and Telesales Marketing Activities and all Representatives who may carry out those activities on behalf of suppliers. We recognise that suppliers are ultimately responsible for compliance with SLC 25 and to that end we expect that suppliers will now have robust processes in place for managing Representatives that they control. We appreciate Ofgem's recent helpful guidance on the definition of 'Representatives' within the context of SLC 25.

However, despite this guidance, we do think that there remain concerns for suppliers about their ability to comply with SLC 25 where TPIs are acting as Representatives for multiple suppliers, for example in face to face sales environments. The guidance, and our general interpretation and application of SLC 25, would require that multi-party TPIs in this context are subject to the same selection, training, processes, controls and monitoring as directly engaged Representatives. However, individual suppliers are likely to differ in the way they apply these requirements, and indeed which requirements they consider necessary. This results in either a situation where a multi-party TPI would be required to employ different processes or management arrangements in order to satisfy each supplier – which we think may be unworkable for TPIs – or a situation where individual suppliers would be forced to depart from their normal standards of compliance with SLC 25 in order to allow the TPI to act on their behalf. In the latter situation this would potentially mean that some suppliers

are compromising on what they consider to be the best approach to compliance - which is unpalatable within the current context of SLC 25 and associated guidance.

It is important to note that the complexities in this area do not arise solely as a result of SLC 25. For example, there is further uncertainty about the liability in the event of a failure of the TPI to conduct Marketing Activities appropriately and questions as to how complaints would be allocated and managed. However, we think that the need for us to give proper consideration to the risks of non-compliance posed by proposals from TPIs for face to face Marketing activities and how these may be managed takes precedence in this area and is therefore likely to be the biggest challenge in suppliers being comfortable with multi-party TPI Marketing Activities.

We think an appropriate way of resolving these issues could be to create a 'safe harbour' exemption from SLC25 for suppliers who deal with accredited multi-party TPIs. A supplier would be exempt from enforcement action in respect of any contravention by the TPI, provided that the TPI was accredited under an appropriate Code of Conduct, and the contravention was not a result of any action or omission by the supplier (eg provision of incorrect information). This would clearly require a robust and well designed code of practice for TPIs, but we think this could potentially be achieved by extending the existing and adapting Confidence Code to cover face to face and telesales marketing activities.

In any event, we think it would be helpful for Ofgem to co-ordinate a discussion on these issues, in order to determine whether an appropriate and robust compromise can be reached that would allow multi-party TPI activity to be considered more generally.

**Question 6: What are your views concerning our near term work to mitigate consumer harm and promote trust in the TPI market?**

We are fully supportive of Ofgem's work in this area to date and think that it is seeking to achieve some good outcomes. We think that the areas outlined for focus in the near term are important and are the right ones to take forward at this stage. We consider that the review of the Confidence Code should be the priority focus.

**Question 7: Are there any further areas we should consider in the near term?**

As noted above, in our response to Q5, we think that Ofgem could helpfully consider the role of TPIs in providing face to face marketing activities for multiple suppliers in the domestic sector, and in particular our suggestion of a 'safe harbour' exemption from SLC25 for suppliers dealing with accredited multi-party TPIs. This could be linked to Ofgem's review of the Confidence Code but we think that it would be valuable for Ofgem to establish this as a distinct point for consideration.

**Question 8: What are your views on the potential wider scope of third party opportunities as a result of Energy market developments?**

We think that the advent of smart metering and the associated development of smarter markets create significant opportunities for increased TPI activity in both the domestic and non-domestic sectors, which could impact on suppliers' relationships with their customers. Consideration needs to be given in this context to the role of the supplier in interaction with the TPI and to explore the benefits and incentives available to customers through direct supplier involvement, as well as the risks and challenges from the use and management of third parties in this area. We believe that the supplier hub model is best able to provide

customers with consistency and ensure efficient interaction with other services across the retail market.

**Question 9: Have we captured the full range of 'regulatory' options available?**

We consider that the 'regulatory' options outlined in the consultation document are the most appropriate and relevant. We are not currently aware of any alternative options that have not been captured.

**Question 10: Do you agree with the implications of regulatory change into the TPI market?**

It is difficult to comment conclusively on this point, but we think that the implications of regulatory change that have been captured are fair. We think that Option 4 (Code of Practice supported by a Standard Licence Condition) strikes the right balance in the near term between improving consumer protection and increasing the regulatory burden on TPIs. However, as the market develops we think that the case for direct regulation of TPIs is strengthened and therefore should not be ruled out completely.

ScottishPower  
23 August 2013