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Dear Mr MacFaul

Consultation dated 6 June 2013 on Ofgem's proposed REMIT penalties statement and procedural guidelines

1. Thank you for the opportunity to comment on the above consultation with regard to the implementation of new investigatory and enforcement powers in relation to the EU Regulation on wholesale energy market integrity and transparency ("REMIT") under the Electricity and Gas (Market Integrity and Transparency) (Enforcement etc.) Regulations 2013 (the "Regulation(s)").
2. National Grid owns and operates the high voltage electricity transmission systems in England and Wales and operates the Scottish high voltage system. National Grid also owns and operates the gas transmission system throughout Great Britain and, through its low pressure gas distribution business, distributes gas in the heart of England to approximately eleven million businesses, schools and homes. In addition, National Grid owns and operates substantial electricity and gas assets in the US, operating in the states of New England and New York.
3. There are some overarching comments in response to the consultation, which are set out below. A more detailed response is provided in Appendix 1.
4. National Grid appreciates that this consultation is taking place against a backdrop of the wider Enforcement Review taking place over the coming months, and that some issues that have been raised in earlier stages of the Enforcement Review, such as the settlement procedure and communications with those under investigation, will be re-reviewed at a later date. It is National Grid's view that, to the extent possible, all enforcement issues should be looked at together and a consistent approach should be adopted. To this end, National Grid refers Ofgem to its comments on previous related consultations dated 28 February 2012 and 22 May 2013 respectively, which should be read in conjunction with this response. National Grid welcomes Ofgem's assurance that, as far as possible, any change to its policies and procedures arising from the Enforcement Review will apply to its REMIT enforcement activities, unless there is good reason for them not to.

5. Whilst National Grid encourages this consistency of approach where possible, it must be appreciated that the Authority and Ofgem have significantly increased powers by virtue of the Regulations, which will require an increased degree of checks and balances and transparency to ensure the fairness of their application.
6. National Grid is encouraged that some of the provisions in this recent consultation refer to the need for Ofgem and the Authority to exercise their powers in a proportionate way, which accords with the principles of Better Regulation. Proportionality is key to the effective use of Ofgem's enforcement powers both for consumers and regulated entities/persons.
7. There are sections of the Proposed Procedural Guidelines on the Authority's use of its Investigatory and Enforcement Powers under REMIT (the "Proposed Guidelines") which are particularly unclear and where further clarity is required. It is important in order to ensure fairness and due process that a person under investigation clearly knows and understands the process that is being followed by the Authority/Ofgem and the powers and sanctions that are available to the Authority/Ofgem in relation to any alleged breaches.
8. There are various sections of the Proposed Guidelines that do not clearly or accurately replicate the powers made available to the Authority/Ofgem under the Regulations. Amendments to these sections of the Proposed Guidelines are necessary to ensure that the Authority/Ofgem does not act outside of its powers.
9. Further information is required in respect of the right to appeal to the Upper Tribunal. It is National Grid's view that the right to appeal should encompass the right to a full merits based re-hearing of the matters under consideration, as is available to those appealing decisions of the Financial Conduct Authority ("FCA").
10. National Grid is particularly concerned that the Authority/Ofgem is suggesting that it may still investigate and impose penalties in respect of alleged breaches that have already been investigated and sanctioned by other regulatory bodies. This potential re-hearing of the same issue and double recovery is an abuse of process and against the principles of natural justice.
11. If you would like to discuss any points National Grid has raised or have any questions, please contact Charlotte Digby on charlotte.digby@nationalgrid.com or on 01926 655229 or Angie Quinn on angela.quinn@nationalgrid.com or on 01926 655454.

Yours sincerely

[By e-mail]

Paul Whittaker
Director, UK Regulation

Appendix 1

All references to Article are to articles of REMIT. All references to Regulation are to specific sections of the Regulations, as defined in the accompanying cover letter.

Overall Approach

Q. 1: Do stakeholders agree that taking this approach to the REMIT procedures and penalties document is desirable?

1. National Grid welcomes Ofgem's intention to adopt a consistent approach to its enforcement processes in relation to REMIT as are currently adopted under its Enforcement Guidelines on Complaints and Investigations dated 29 June 2012, which deal with the powers of the Authority/Ofgem in relation to potential breaches under: (1) the Gas Act 1986; (2) the Electricity Act 1989; (3) the Competition Act 1998; and (4) the Enterprise Act 2002. (the "Existing Enforcement Guidelines"). However, given the greater powers provided to the Authority under the REMIT Regulation, additional safeguards are necessary to properly protect persons under investigation, as discussed in more detail below.
2. Given that Ofgem's approach set out in the Proposed Guidelines bears a degree of similarity to the Existing Enforcement Guidelines, it will be essential that a person under investigation is informed of the legislation the Authority/Ofgem is acting under and therefore the relevant procedural guidelines which apply. Some of the differences in the procedure are very important, as are the different sanctions available. The person must know which system is being applied by Ofgem/the Authority.
3. National Grid is pleased that the approach to REMIT enforcement will be considered as part of Ofgem's wider enforcement review to ensure that any changes to policies and procedures arising will apply to its REMIT enforcement activities unless there is a good reason for them not to. To avoid confusion between the different procedures, one solution may be to have one core set of procedural guidelines and one penalties statement, which contain variations to the process where appropriate to take account of the different legislative requirements and to provide for relevant safeguards.

Proposed Guidelines

Q. 2: Are the regulatory objectives that the Authority proposes to promote in the exercise of its REMIT powers appropriate? Should any other objectives be included?

4. For the most part, Ofgem's proposed regulatory objectives and principles for achieving them appear to be appropriate.
5. National Grid notes that proportionality is one of the factors that the Authority/Ofgem will have regard to in discharging its functions in respect of REMIT. Given that proportionality is of fundamental importance to ensure that the Authority/Ofgem uses its resources to best

effect, National Grid considers that this key principle of Better Regulation should be elevated to the status of being one of the regulatory objectives that the Authority proposes to promote.

6. National Grid questions whether the proposed regulatory objective in respect of discouraging failures to comply with REMIT requirements should be amended to focus the tone on encouraging compliance. Discouraging failure arguably sets the wrong tone for regulatory objectives, as it draws the focus immediately to punishment and sanctions for non-compliance. National Grid considers that Ofgem's regulatory objectives should focus on changing behaviours and ensuring that regulated entities are acting in accordance with the regulatory standards they are subject to through establishing a transparent, open and co-operative regulatory environment.
7. National Grid considers that, in addition to maintaining confidence in the markets, fostering competition and protecting consumers, a key element of any enforcement vision must be transparency; both for consumers and regulated entities/ persons. Other regulators, such as the Office of Rail Regulation ("ORR") and the Solicitors Regulatory Authority ("SRA") include transparency as part of their central vision as can be seen from their websites and published enforcement policies. This focus on transparency is in line with the principles of Better Regulation. While National Grid notes that Ofgem has provided that it proposes to achieve its regulatory objectives under this consultation by having regard to *"the principles of best regulatory practice"*, it considers that transparency should be a stated cornerstone of Ofgem's regulatory approach and therefore form part of its regulatory objectives. Ensuring transparent enforcement is vital to helping the industry to understand what is expected of it and what it should expect from Ofgem.

Q. 3: Are the factors that we propose to consider in deciding whether to launch REMIT investigations appropriate? Should any other factors be included?

8. The legal test for opening an investigation as set out in paragraph 4.2 of the Proposed Guidelines appears appropriate and as expected, although the second bullet point of the Proposed Guidelines does not appear to reflect Regulation 10(1)(b) accurately. The language used in the Regulation is *"may have failed to comply with a requirement imposed by or under Regulation 8"* and it is perhaps insufficiently clear to summarise these as simply *"a requirement in relation to recording documents and keeping copies of electronic communications"*. Use of a footnote here to refer to Regulation 8 may provide better clarity.
9. National Grid considers that the emphasis contained within the second and third sentences of the Existing Enforcement Guidelines at paragraph 3.1 could usefully be repeated in the Proposed Guidelines, namely that *"in deciding whether to proceed with an investigation it will consider the specific facts of the matter, the legal context and available resources. It is also mindful of the principles of Better Regulation. These principles require that regulation and its use is transparent, proportionate, accountable, consistent and targeted"*.
10. The second part of the test is whether Ofgem considers the matter to be a priority and whether it is the regulatory body best placed to take action. It is accepted that a degree of

regulatory discretion will need to be preserved in relation to these decisions. The matters listed as consideration factors for Ofgem when determining whether an issue is a priority matter also appear appropriate, as expected and are broadly directed at the regulatory objectives.

11. It is of concern that the list of factors to be taken into account in order to decide whether an issue is a priority matter is not an exhaustive list. An attempt to extend the list of relevant factors to unknown items outside the stated list is procedurally uncertain and may create unfairness. There should be transparency as to the factors that Ofgem will take into account in any potential enforcement action.
12. No indication as to the relative weightings of the priority matters is provided and an indication of this would be helpful. For instance, harm to market participants or consumers is listed first: is this Ofgem's main priority, and is the likelihood of such harm a pre-requisite for devoting resources to an investigation?
13. The Existing Enforcement Guidelines contain a helpful additional explanatory paragraph (3.2) which sets out examples of the facts and circumstances which would make an investigation more or less likely. This could usefully be included in the Proposed Guidelines.
14. The Existing Enforcement Guidelines, at paragraph 3.5(i), bullet point 2, includes another factor which would be beneficial to include: *"Is the [person] responsible for the potential breach taking action to address the situation?"*
15. The Proposed Guidelines state that one of the factors to be considered is *"whether action has already been taken, or is to be taken by another body"*. As part of the duty to act proportionately, it should be made clear that there will not be concurrent investigations by different regulatory authorities into the same matter. The Office of Fair Trading's ("OFT") guidance document *"Application in the Energy Sector"*, confirms that the Authority will not levy a financial penalty under the Gas or Electricity Act where a financial penalty under the Competition Act 1998 has already been levied (para 4.10).
16. Paragraph 4.6 also does not cover a situation where there may be conflicting duties under the Regulations and other legislation or an industry code. The Proposed Guidelines should recognise that enforcement proceedings will be inappropriate where conflicting requirements are imposed by another regulatory body.
17. Paragraph 4.3 refers to the criteria Ofgem will apply in deciding whether to open an investigation. In our view, this should also refer to the criteria that Ofgem will apply in deciding whether to continue an investigation at various key stages. There is no concept within the Proposed Guidelines of "stage gates" which would enable Ofgem to review cases at regular intervals and consider whether a continued investigation or enforcement process is necessary or desirable. Such an approach might be particularly necessary where investigations are lengthy and the application of resources to the ongoing investigation on a continuing basis might be subject to challenge. National Grid understands from the FCA Handbook that the FCA is required to review the progress of its investigations at regular

intervals to ensure that resources are being appropriately deployed and that investigations are closed if they are not progressing satisfactorily or if there is no case to answer.

Q. 4: Does the proposed process for REMIT investigations strike an appropriate balance between fairness to those being investigated and ensuring the effectiveness of the Authority's investigations (bearing in mind particularly the requirements of DECC's regulations in relation to Warning and Decision Notices)?

18. National Grid has set out in detail in the table below its general comments on specific sections of the Proposed Guidelines, which should be read in conjunction with the response to this section. In specific response to this question, National Grid notes the following:

- There are various sections of the Proposed Guidelines where further clarity is needed. It is crucial in the interest of fairness for all persons under investigation to know and clearly understand the process to be followed in respect of an investigation and enforcement and also to understand the potential sanctions that could be imposed against them. See the table below for specific examples of where the Proposed Guidelines are currently unclear.
- There are instances where the Proposed Guidelines depart from or do not fully replicate the Regulations, which require amendment. As currently drafted, the Proposed Guidelines could potentially cause confusion or misunderstanding and could result in the Authority/Ofgem acting outside of its powers.
- Serious consideration should be given to the publication of any information pertaining to the investigation in advance of the Final Notice as this could cause reputational harm to the person under investigation, regardless of whether there is any merit in the matters under investigation. We understand that even though the FCA Enforcement Guide provides the FCA with a right to publish in advance of the Final Notice, in practice, in the vast majority of cases, the FCA does not publish information until the Final Notice is issued. This can be seen from the extremely limited number of publications prior to Final Notice stage on the FCA's website.
- The Regulations introduce some significant new powers for the Authority/Ofgem, such as the power to apply to temporarily prohibit professional activity. The Authority/Ofgem should confirm that such applications will be reserved for the most serious of cases and only used where necessary.
- The investigatory and enforcement process set out in the Proposed Guidelines has significantly more stages than those that appear in the Existing Enforcement Guidelines. Whilst National Grid welcomes the increased levels of checks and balances in relation to alleged REMIT breaches taking into account the increased level of sanctions available to the Authority/Ofgem, there is a concern that the time taken to investigate matters will significantly increase. National Grid has been party to investigations under the Enforcement Guidelines in force prior to the Existing Enforcement Guidelines which have taken in excess of 2 years to complete.

Investigations of this length create uncertainty and unfairness for those being investigated and equally do not benefit the Authority/Ofgem. The Authority/Ofgem must try to ensure that the increased level of investigation does not result in unacceptably long investigations and that all investigations are dealt with as efficiently and as proportionately as possible. Linked to this point is the potential cost increase for those being investigated where the investigations are longer in duration.

- National Grid welcomes the right for persons under investigation to appeal to the Upper Tribunal.
- Those under investigation should always be entitled to access material relied upon by the various decision makers. Those under investigation must be given the opportunity to fully understand and respond to the case against them.

National Grid's comments on other aspects of the Proposed Guidelines

In the consultation, the Authority requested any general comments on any aspects of the Proposed Guidelines, in addition to responses to the specific questions. National Grid's further general comments are set out below, with specific reference to the relevant paragraph numbers of the Proposed Guidelines.

Paragraph of Proposed Guidelines	National Grid Comments
<i>General comments</i>	
	The Proposed Guidelines do not always distinguish between a potential breach of a REMIT Requirement as defined in Regulation 4 and a potential breach of Regulation 8 in relation to the obligation to record and retain records. Such a distinction is necessary for clarity and transparency and to ensure that the Authority/Ofgem acts within its powers as some of the powers available differ depending on whether there has been a suspected breach of the REMIT Requirements (in which case wider powers are available) or a suspected breach of Regulation 8.
<i>Introduction</i>	
1.5	It is not clear if the Proposed Guidelines will, when published in their final form, apply automatically in respect of breaches of Article 8 and 9 of REMIT, once further secondary legislation is implemented.
1.7	National Grid welcomes the acceptance of the need for independent decision making. Given that this is a principle of critical importance, the wording of this paragraph could be improved so that it is transparent as to the categories of persons that should and should not be involved in each stage of decision making.
1.10	It is of some concern that any investigations that Ofgem conducts are carried out on behalf of the Authority and it is the Authority that has the power to decide whether or not to find a breach and whether or not to impose sanctions. This questions the true

	<p>independence of the decision making process. It is hoped that if Ofgem's proposals in the wider Enforcement Review to introduce an independent specialist panel (the Enforcement Decision Panel) are adopted, then such a panel would also be utilised in respect of REMIT enforcement. It is also hoped that National Grid's response dated 22 May 2013 to Ofgem's consultation of 28 March 2013 providing comments on the Enforcement Decision Panel will be taken into account.</p> <p>In order to ensure that those taking decisions are truly independent, the Proposed Guidelines should provide for the disclosure to the persons under investigation of all communications between those investigating or proposing publication and the decision makers.</p>
<p><i>The Authority's regulatory objectives in respect of its investigatory and enforcement powers under REMIT</i></p>	
2.2	<p>Further clarification is required in relation to what is meant by the statement that the Authority and/or Ofgem will have regard to the need to use its resources in the most efficient way. It is hoped that this will ensure that Ofgem deals with cases going forward with reference to the regulatory objectives, but also that it deals with cases proportionately with reference to the materiality of the breach and its impact on the market and/or consumers.</p> <p>As Ofgem will no doubt be aware, other regulators also adopt a targeted and proportionate approach to enforcement, this being two of the key principles of Better Regulation. The approach of the ORR, the Office of Communications ("Ofcom") and the Office of Water Services/Water Services Regulation Authority ("Ofwat") is to focus their resources and only bring formal enforcement action to deal with the more serious and/or persistent breaches or individual events of material significance, as is clear from their websites and their published enforcement policies. There is a bias against intervention, and a focus on pursuing constructive, less punitive action with companies where that is the most appropriate means of making sure that they meet their obligations. Similarly, as can be seen from the OFT's website and its guide to investigation procedures in competition cases, the OFT targets its work at the most serious and prevalent market problems, to avoid burdening business with the costs of unnecessary intervention; the aim being to be as robust as necessary to gain compliance while allowing maximum freedom for effective competition within the law.</p> <p>National Grid is pleased that the Proposed Guidelines include the need for the Authority and/or Ofgem to have regard to the need to exercise its powers in a proportionate manner and to ensure its resources are used to best effect. National Grid draws attention to its comment in its response dated 22 May 2013 to Ofgem's consultation of 28 March 2013 that a more proportionate and targeted approach to instances of non-compliance may include the use of alternative sanctions, such as undertakings (formal and informal), warning letters, private notices, regular reporting mechanisms, requirements for additional investment and consumer redress orders, rather than lengthy investigations and financial penalties. National Grid notes that the</p>

	<p>FCA, Ofwat and Ofcom already use a range of these different measures, which again is evident from a review of their enforcement policies.</p> <p>It would also assist if this paragraph specifically stated that the principle of exercising powers in a proportionate manner applies to any and all steps taken to investigate any alleged REMIT breaches.</p> <p>Transparency should be included amongst the factors the Authority and/or Ofgem will have regard to in discharging their functions.</p>
<i>Sources of information about possible REMIT breaches</i>	
3.1	It is not clear whether this is an exhaustive list of the sources of information that can form the basis of an investigation. Clarity in this respect should be provided.
<i>Monitoring of wholesale energy markets</i>	
3.2	<p>Regulation 9(6) states that the powers to require information or documents to be provided may be exercised to impose requirements on a person who <i>“is connected with a regulated person”</i>, rather than as appears in the Proposed Guidelines, <i>“a person who has at any time been connected with a Regulated Person”</i>. The proposed wording is perhaps intended also to capture Regulation 9(7), which states that a Regulated Person includes a person who was at any time a Regulated Person but who has ceased to be a Regulated Person. If this is correct, the following wording may be clearer and may reflect the Regulation more accurately: <i>“In order to do this effectively, Ofgem has the power to request information or documents from a “Regulated Person” (as defined in the Regulations), any person who was at any time, but has now ceased to be a Regulated Person, or a person who is connected with a Regulated Person”</i>. National Grid believes footnote 5 to be an incorrect reference, and that this should be a reference to Regulation 9(9) rather than Article 2(7) of REMIT.</p> <p>National Grid proposes that this section should also include the details set out in Regulation 9, which makes clear that the obligation is in respect of documents or information of a “specified description” (Regulation 9(2)); that the obligation under Regulation 9(3) is to provide such documents within a reasonable period; that the obligation under Regulation 9(4) is to provide such information in such form as it may reasonably require and that under Regulation 9(5) Ofgem may require any information or document to be verified or authenticated in such manner as may reasonably be required.</p>
3.3	This paragraph states that in relation to those persons who are also licensees or otherwise regulated by Ofgem, Ofgem may also use its powers to request information for the purpose of monitoring under that alternative legislation (e.g. the Gas Act 1986 or the Electricity Act 1989). Regulation 9(1) makes it clear that these powers are only to be used in connection with monitoring the integrity and transparency of the

	<p>wholesale energy market, i.e. the purpose of REMIT. The Proposed Guidelines should make clear that Ofgem's powers under REMIT are to be used solely for the purpose of its REMIT enforcement activities, and that, in respect of suspected licence breaches/standards of service breaches/competition law breaches, Ofgem can use its powers to request information under the relevant sections of the relevant legislation. There needs to be transparency as to which compliance regime Ofgem/the Authority are acting under and that the relevant procedural guidelines applicable to that compliance regime are being followed.</p> <p>This paragraph refers to information and documents that Ofgem "<i>reasonably requires in connection with monitoring</i>". National Grid suggests that it would be in keeping with the principles of Better Regulation to include a reference here to "<i>proportionate</i>" monitoring.</p> <p>Failure to provide documents and information that is reasonably required can result in the court making a finding that the defaulter is in contempt pursuant to Regulation 20. This is a serious offence that can result in fines and imprisonment. Therefore, it would be proportionate to provide for a mechanism by which a person asked to provide documents and information can apply to an independent decision maker to determine whether such a request is a reasonable one, without the risk associated with failing to comply.</p>
3.4	<p>As part of the duty to act proportionately, it should be made clear within this paragraph that there will not be concurrent investigations by different regulatory authorities of the same matters. For improved transparency, it would also assist if this paragraph could explain the circumstances when Ofgem may ask another regulatory authority to open an investigation.</p>
3.7	<p>As currently drafted, this paragraph does not accurately reflect the requirements of Regulation 8. The requirement to retain records in a medium that facilitates future access by Ofgem is, according to Regulation 8(4)(b), when it is exercising the powers conferred on it by sections 9,11, 14 or 16, rather than as currently stated in the Proposed Guidelines "<i>should that prove to be necessary</i>". A footnote to clarify this would assist. For greater clarity, it would also be beneficial for this paragraph to include the detail contained in Regulation 8(5) as to how the obligation to ensure storage is accessible should be fulfilled.</p> <p>The footnote to this paragraph is incorrect. Regulation 20 does not state that failure to comply with the requirements of record keeping and retention under Regulation 8 is an offence. Instead, Regulation 26 details the consequences for failing to comply with a requirement of Regulation 8.</p>
3.8	<p>It would better reflect Regulation 26 to state here that Ofgem may impose a penalty or a statement of non-compliance for a failure to comply with the obligation to retain a relevant communication for longer than six months if so notified as required by Ofgem.</p>

	For greater transparency, it would also assist for this paragraph to include reference to the matters stated in Regulation 8(8) that Ofgem is obliged to notify the Regulated Person if it no longer requires the communication to be retained as previously requested.
3.9	National Grid considers it would be helpful for the Proposed Guidelines to include some guidance as to how it will take into account the time required to put in place recording and storage systems. That allowance should also extend to those Regulated Persons that did not have systems to record and store both telephone calls and other electronic communications, rather than being limited to telephone calls as currently stated. Will the allowance mean that Ofgem will close its investigation or the Authority will not impose a penalty or statement of non-compliance where the Regulated Person is working hard to put the relevant systems in place? How long does Ofgem expect any grace period to last? It is appreciated that much will depend on the circumstances in each and every case, but some further guidance would be helpful.
<i>Notification of a Suspicious Transaction Report</i>	
3.12	National Grid appreciates that a person making a Suspicious Transaction Report may not necessarily have all of the relevant information available at the time of making the Report, and that it is in the public interest for some time to be available to complete this process. However, National Grid also has some concerns that this could lead to inappropriate delay and frustrate the ability to respond to the allegations. Therefore, National Grid suggests that a reasonable time limit be set for the notifying person to complete providing the relevant information.
<i>Alleging a breach of a REMIT requirement</i>	
3.15	It is noted that this paragraph mirrors the wording used in paragraph 2.6 of Ofgem's Existing Enforcement Guidelines, but with one omission. The second sentence of this paragraph in the Existing Enforcement Guidelines referred to Ofgem's ability to deal with the complaint with "speed and efficiency". In the Proposed Guidelines, the reference to "speed" has been deleted. National Grid is naturally concerned about this, as the longer an investigation continues, the more resources are required both by Ofgem and the party under investigation. It should continue to be an aim, in the interests of all concerned, for a complaint to be handled with appropriate speed, taking into account the individual circumstances of the case.
3.16	<p>It is noted that this paragraph is broadly based on the wording used in paragraphs 2.7 and 2.8 of the Existing Enforcement Guidelines, but with some notable differences.</p> <p>First, the introductory sentence in the Existing Enforcement Guidelines required complaints to be supported by all "<i>available relevant evidence</i>", but in the Proposed Guidelines, the word "<i>relevant</i>" has been deleted. This is of concern, as it is in the interests of efficiency, speed and fairness for all evidence that is provided to be</p>

	<p><i>“relevant”.</i></p> <p>Second, the Existing Enforcement Guidelines specifically require harm or potential harm to be supported by all available relevant evidence, and this explicit requirement has been deleted in the Proposed Guidelines. Whilst it may be repetitive of the introductory sentence, and this may be the reason for its deletion, its omission might be interpreted to mean that supporting evidence is not as important in respect of this aspect of the complaint, which National Grid do not consider to be the case.</p>
3.17	<p>Other regulators impose a time limit on the age of the complaints that it will normally consider. For example, the General Medical Council will normally only consider complaints about events that took place within the last five years, and will only look at older complaints if there are exceptional reasons in the public interest for doing so (as per the General Medical Council (Fitness to Practise) Rules Order of Council 2004). National Grid suggests that adopting such an approach would be beneficial, as the ability to investigate and respond to such matters declines with the passage of time.</p> <p>As with paragraph 3.12 above, National Grid suggest that a reasonable time limit be set for the complainant to complete providing the relevant information.</p>
3.19	<p>The Existing Enforcement Guidelines at paragraph 2.14 contained an express statement that Ofgem will progress investigations in a timely manner. This is omitted from the Proposed Guidelines and should be added.</p>
<i>Confidential Information</i>	
<i>Notifying the person under investigation</i>	
5.1	<p>The Existing Enforcement Guidelines at paragraph 4.1 include provision for Ofgem to contact the party that is the subject of the complaint to ask them to clarify details of the complaint or to provide information in order that Ofgem might consider if there is a case to answer. As stated in paragraph 4.2 of the Existing Enforcement Guidelines, this could avoid the need to use formal powers. There is no equivalent provision in the Proposed Guidelines, but its inclusion could assist to prevent investigations being commenced unnecessarily.</p> <p>It is appreciated that the subject matter of the complaint may be sensitive but it is vital that the person against whom the complaint is made is notified in order that it can properly respond to the complaint and ensure a fair process.</p> <p>This paragraph is silent as to when the person against whom an allegation is made is to be notified, and National Grid suggests that this be required to take place as soon as possible after the complaint is made, not just after a decision to investigate is taken. The person under investigation needs to know not only the focus of the investigation as is proposed, but also the scope of the investigation so resources can</p>

	properly be allocated.
5.5	Any decision to discontinue an investigation should be communicated to the person under investigation as soon as possible after that decision is taken, to save resources being unnecessarily devoted.
5.6	As is evident from the publications on the FCA's website, save for in very high profile cases, the FCA will not normally make public the fact that it is carrying out an investigation. The fact that an investigation is made public can be very damaging for the person under investigation regardless of whether the complaint is well-founded, or not. Ofgem should reconsider its position on publishing the fact and nature of an investigation. Whilst Ofgem usually publicises a notice of matters it is investigating under the Existing Enforcement Guidelines, the public announcement that a person is being investigated for an alleged REMIT breach, which is likely to relate to the serious offences of market manipulation and/or insider dealing, could have an even greater impact on the person under investigation than if it were being investigated under the Existing Enforcement Guidelines.
<i>Information Gathering – Information requests and interviews</i>	
5.8	Greater certainty may be achieved by including other factors that Ofgem should take into consideration in setting a reasonable period within which information or documents must be provided. National Grid would suggest including matters such as the volume of information required, the number of persons within the business that will need to contribute to the response, the number of sources of information, the location of the information, competing investigation or business critical deadlines. The time frames provided should also take into account time required to assess what information is required in response to a request and to verify and double check that the information being provided is accurate and complete. In order to ascertain this, it would be beneficial for Ofgem to consult with the person under investigation to ascertain what is a reasonable time in the circumstances.
5.9	Will Ofgem be setting a reasonable period for any verification/authentication/explanation to be provided, and will this be in addition to the reasonable period referred to in paragraph 5.8? Explanations can only be required from specified persons as set out in Regulations 14(9)(6) and 14(8). A footnote to clarify this would assist here.
5.10	The Proposed Guidelines provide scant details regarding the interview process, and at present, National Grid has concerns that there is insufficient transparency of this process. Points to be considered and addressed within the Proposed Guidelines include: Will the interview be carried out under caution? Will the interview be recorded? Will the interviewee be compelled to answer? To what extent will the interviewee's responses be admissible in evidence against the person (and how does this fit with privilege against self-incrimination)? Will the interviewee be permitted to

	have a representative present? How long will the interview last, and how frequently will breaks be permitted? Will the interviewee be shown any documents upon which he is asked to comment? Will a statement be prepared following the interview, and will the interviewee have the opportunity to comment on its accuracy? Will the interviewee be provided with a transcript of the interview?
5.11	<p>To more accurately reflect Regulation 13(2), National Grid proposes the following footnote after the word “<i>partnership</i>”: “<i>or any person who has at any relevant time come within any of these categories and who is or was carrying on a business</i>”.</p> <p>For greater transparency, it would assist if Ofgem could provide an indication of the circumstances when the person concerned will be asked to appoint a skilled person to prepare a report, as opposed to when Ofgem will itself appoint a skilled person. In addition, the FCA has significantly more detailed guidance relating to the use of skilled persons’ reports in chapter 5 of its Supervision Handbook. This level of detail should be included in the Proposed Guidelines.</p>
5.12	This paragraph should include a statement that Ofgem will not issue concurrent requests for information and that any request for information will be proportionate to the matters under investigation.
5.14	National Grid welcomes the obligation upon Ofgem to be as clear as possible in its information requests and that clarification may be sought when appropriate. For complex issues, Ofgem should consider discussing the request for information with the recipient before it is issued to agree the scope and time frames, etc.
5.15	Regulation 20(2) is clear that this power extends to failures to comply with Regulations 9 and 11 (requiring information), 12 (attend interview), 13 (report by skilled person, save for the obligation to provide assistance to that skilled person) and 14 (supplemental provisions re information and documents). The Proposed Guidelines should make clear that the possibility of applying to court for the person to be dealt with as if he were in contempt, only applies in respect of the above breaches.
5.17	The Proposed Guidelines do not fully reflect Regulation 20(5) which states that the person will not be guilty of an offence if it can show that it had no intention of concealing facts disclosed by the documents. This paragraph should therefore be amended.
5.18	It should be clarified the extent to which the preceding provisions relating to information requests apply to third parties.
Inspecting Premises	
5.19	The first sentence of this paragraph is not accurate as the power to enter and inspect premises is subject to the acquirement of a warrant to do so. It is also not apparent

	from the Proposed Guidelines as drafted that this power is not available in respect of investigations as to whether a person has failed to comply with the requirements of Regulation 8 (see Regulation 10(3)).
5.20	The provisions of Regulations 16(2) and (3) are not fully reflected in the Proposed Guidelines. The warrant can only be issued if a person has failed to comply with a request for information pursuant to Regulation 11 or where if such a request were made it would not be complied with or that the document or information which it related to would be removed, tampered with, concealed or destroyed. For both cases it also has to be shown that there are reasonable grounds for believing the documents/information are on the premises.
5.21	<p>Bullet points 2 and 3 should be clarified as the power to take documents/information or copies applies only in respect of documents/information of a kind in respect of which the warrant was issued (Regulations 16(4)(c) and (d)).</p> <p>The power to review, remove or copy documents is limited by Regulation 52, which defines protected items. This should be reflected in the Proposed Guidelines. It would assist the smooth conduct of a search for a process to be described to apply in a situation where there is a dispute as to whether a document is a protected item. In such circumstances the document should be placed in a sealed container and reviewed by an independent person before it is disclosed to Ofgem.</p> <p>With regard to the fourth bullet point, the same comments as referred to above in respect of paragraph 5.10 also apply.</p>
5.22	On arrival at the premises, in order to afford the appropriate safeguards to the person under investigation, time should be allowed for legal representatives to arrive before the search commences.
5.23	<p>Under Regulation 18(5)(d) the written record is also required to state what those inspecting the premises did whilst on the premises, and this requirement should be added to this paragraph.</p> <p>This paragraph makes a reference to the situation where Ofgem has taken possession of a “device”. Regulation 16(4)(c) makes no reference to any power to take possession of a device; the power relates solely to any documents or information. The reference to device in paragraph 5.23 should therefore be deleted.</p>
5.24	National Grid notes that this paragraph reflects Regulation 19(1), but a concern arises in respect of the removal of documents/information that are required in order for the person to operate as a business. As a practical solution, we suggest that any documents/information that are removed should be copied and such copies provided to the person under investigation, prior to the original being removed. Where this is not practical, such copies should be provided within 24 hours of the removal of any

	original documents/information. For completeness, this paragraph should also refer to the right of the owner of the seized document to apply to the court for an order for delivery up pursuant to Regulation 19(2).
5.25	This paragraph does not reflect the provisions of Regulations 17(1) and (2), which state that the warrant authorises one entry only, unless it specifies that it authorises multiple entries. Under Regulation 17(3), each set of premises to be searched has to be identified in the warrant. The Proposed Guidelines also do not make clear that if a premises is to be searched for a second or subsequent time under a warrant for multiple entries, a member of the Authority has to authorise that entry in writing (see Regulation 18(2)).
Statement of Case	
5.28	<p>The Existing Enforcement Guidelines at page 5 refer to the same timescales but also include the aim <i>“to achieve the above in shorter timescales where possible, taking into account the need to follow the appropriate processes and procedures”</i>. This is clearly a desirable aim, and it is suggested that this statement should be included in the Proposed Guidelines.</p> <p>The Existing Enforcement Guidelines also include provision for Ofgem to request feedback on the process from the complainant and the person investigated. Given that these are new powers for Ofgem, seeking such feedback would also be advantageous here, so that lessons can be learned as to how the procedures can be improved. In very lengthy investigations, Ofgem might consider it worthwhile to obtain feedback at significant stages of the process.</p> <p>It is not clear from this paragraph if Ofgem envisages whether there is an opportunity part way through an investigation to terminate the investigation. National Grid would suggest that the Existing Enforcement Guidelines provide greater clarity on this, stating at paragraph 4.15 that a decision can be taken at any stage of the investigation not to pursue the case further on grounds of administrative priority for example because the breach is trivial or because the person has taken or is taking appropriate steps to secure compliance. The Existing Enforcement Guidelines also allow Ofgem the opportunity of serving a notice that it is satisfied that appropriate steps are being taken. There is currently no provision in the Proposed Guidelines for such a notice but this could be a proportionate response.</p> <p>The Proposed Guidelines currently make no provision for Ofgem to accept binding commitments which may be appropriate where the concerns are readily identifiable, where the concerns are fully addressed by the commitments offered and are capable of being implemented effectively. Such commitments can be accepted under the Existing Enforcement Guidelines in respect of those suspected of infringing the Competition Act. This is confirmed in the OFT’s Guidance “Application in the Energy Sector” which lists the circumstances in which commitments would not be acceptable</p>

	(save in exceptional circumstances), but in all other cases, binding commitments can be an appropriate remedy. A similar scheme here would provide a proportionate and efficient method of enforcement.
5.29	It is unclear as to what information Ofgem is required to include in the statement of case. National Grid notes that the Warning Notice will explain the extent of any rights of access to any Authority material. However, given that, following service of the statement of case, the person has the opportunity to make representations, it would be more efficient to allow that person access to the Authority material at this stage, in order to formulate those representations properly which may result in the case being closed at an earlier stage.
5.30	The Statement of Case bears some resemblance to the FCA's practice of issuing a preliminary findings letter enclosing a preliminary investigation report. According to the FCA's Enforcement Guide, firms typically have 28 days to respond to this report, whereas the Proposed Guidelines generally expects to allow 21 days. Given the potential complexity of the issues under investigation, and the power of Ofgem to impose unlimited penalties, a longer period is justified.
5.31	Whilst it is recognised that this wording has been taken from paragraphs 4.34 and 4.35 of the Existing Enforcement Guidelines, the position is unsatisfactory as the person being investigated still needs to know the case against them before it can properly negotiate a settlement. It is also contrary to the requirements of certainty and transparency for Ofgem to be able to adopt a process on an ad hoc basis, then to be able to unilaterally change that process.
5.32	<p>It is recognised that this wording has been taken from paragraph 4.36 of the Existing Enforcement Guidelines. However, the circumstances in which the statement of case may be amended is different in the Proposed Guidelines. The Proposed Guidelines refer to the situation where Ofgem retains "<i>a reasonable suspicion</i>". The Existing Enforcement Guidelines referred to the situation where Ofgem "<i>remain[s] persuaded of a breach</i>". This lowering of the threshold could lead to significantly more incidents of an amended Statement of Case being presented, which has the effect of prolonging the investigation. Ofgem should be permitted to carry on its investigations where it remains persuaded of a breach, but this lower threshold should not be used for the equivalent of a "fishing expedition".</p> <p>As a general principle, National Grid has concerns about Ofgem's ability to amend the Statement of Case. At the time the Statement of Case is prepared, the investigation is complete; Ofgem has had the opportunity to seek any relevant information required, and it should be clear whether there is a case to answer, or not.</p>

<i>Oral representations</i>	
5.34	Further clarity is required here regarding the arrangements for the oral hearing. Will this take place in private, or public? Will the person under investigation be entitled to have legal representation? Will a transcript be prepared and provided to participants. How much notice will be allowed in advance of the hearing?
5.35	This provides that additional material cannot be introduced at the oral hearing by the person under investigation. The paragraph states that the agreement of the Enforcement Committee will be required before such material is introduced. This could potentially lead to a breach of the Human Rights Act 1998 in terms of failing to ensure a fair hearing for the respondent. It may be necessary for notice to be provided to the Enforcement Committee of any new information to be introduced at the oral hearing or an opportunity given to allow the investigating team to respond to new material, but it is important that the respondent is able to use the hearing as an opportunity to raise all arguments open to them.
5.37	It is unsatisfactory for the form of the hearing to be determined by the decision maker on an ad-hoc basis. For a consistent and transparent approach, the procedure to be followed should be the same for all cases, and published.
5.37	The paragraph should make clear whether those members of the Enforcement Committee present at the hearing will also be taking the decision in respect of a Warning Notice.
5.38	Where a case is closed, the Existing Enforcement Guidelines require a statement to be published on Ofgem's website. If there had been publication that an investigation was under way, the fact that it is closed, should likewise be published.
<i>Sanctions available to the Authority</i>	
6.1	<p>There is an "or" omitted between the two bullet points as is clear from Regulation 21(1) and (2).</p> <p>Regulation 21(2) refers to a requirement imposed under Regulation 8 rather than as is currently stated in the Proposed Guidelines: "<i>requirement to record conversations and keep a copy of electronic communications</i>". It would be more accurate to use the wording contained in Regulation 21(2).</p> <p>The final sentence should be amended to add the words "<i>or to mitigate its effect</i>", in order to properly reflect Regulation 21(9).</p> <p>To save the cost and time incurred in preparing for an injunction, it would be sensible for the Proposed Guidelines to include provision for the Authority to accept commitments to take action or refrain from taking action.</p>

6.2	This power could have very serious implications for persons under investigation. Whilst it is recognised that the court process brings its own checks and balances, it is important that this power is reserved solely for the most serious cases. It would also assist to have some indication of the circumstances in which it will be thought necessary to exercise this power. With regard to the second factor that the Authority will consider in determining whether to seek such an order, the previous disciplinary record and compliance record should only be considered where it is relevant to the matters to which the current investigation pertains.
6.4	Regulation 21(7) refers to a person “ <i>reasonably</i> ” likely to dispose of assets. The word “ <i>reasonably</i> ” has been omitted from this paragraph of the Proposed Guidelines.
6.5	This is repetitive of paragraph 6.4 and both paragraphs should be condensed and merged.
6.6	Given the time and costs involved in injunctive proceedings, it should be made clear that seeking an injunction will be reserved for only the most serious cases. An additional factor that the Authority may wish to take into consideration is “ <i>whether there is an indication that the person will not co-operate voluntarily</i> ”.
6.7	Whilst the power to request the court to consider whether a penalty should be imposed on a person to whom an injunction application relates is clearly provided for in Regulation 32, it is not clear when this process will be used. Examples would aid understanding of this provision.
<i>Financial penalty or statement of failure to comply</i>	
6.10	This paragraph should also refer to the principles of Better Regulation that the Authority should have in mind when deciding whether to impose a penalty.
<i>Restitution orders</i>	
6.12	<p>It is currently unclear as to the circumstances in which the Authority would apply to court for a restitution order when it has powers to make one itself. Under Regulation 22, it is apparent that the court may order a person to pay a sum to the Authority, whereas under Regulation 23, the Authority’s power is to require a person to make restitution to appropriate persons. However, even when the court orders the sum to be paid to the Authority, those sums must be paid over by the Authority to such persons as the court may direct, and therefore the same result is achieved, albeit by a more circuitous route. Whilst paragraph 6.16 provides some indication of the circumstances in which the Authority will choose to apply to the court, further guidance is sought.</p> <p>There is an “<i>and</i>” missing between the two bullet pointed paragraphs as is apparent from Regulation 22(1)(a).</p>

	The first bullet point does not accurately reflect Regulation 22, as the court has to be satisfied that a person has failed to comply with a REMIT requirement and the Regulation does not envisage the restitution order being available in circumstances where a person has required or encouraged another person or persons to engage in behaviour that would have amounted to a breach if the person had done it himself.
6.15	Another factor that the Authority should take into consideration is the amount of any proposed penalty when deciding whether to exercise its powers to make or apply for a restitution order. It is currently unclear whether a proposed penalty will be reduced if a restitution order is made. What are the circumstances in which the Authority will make/apply for a restitution order as opposed to a penalty? What are the circumstances in which the Authority will apply for a restitution order in conjunction with a penalty? Further clarity is required here.
<i>The decision-making process</i>	
7.2	National Grid notes that this paragraph is similar to paragraph 4.23 of the Existing Enforcement Guidelines, although the provision for the person under investigation to be told of the membership of the Enforcement Committee has been deleted. It is important for the person under investigation to be told of the membership and background of the Enforcement Committee in order that it can be sure that there is no conflict of interest, and also to provide assurance as to the independence of the members of that Committee. Committee members should also be requested to complete and disclose a register of interests.
7.3	<p>As in paragraph 4.23 of the Existing Enforcement Guidelines, the Proposed Guidelines also provide for an Enforcement Committee to be constituted as and when required rather than it being a Standing Committee. If this is the case, it is important that members of the Enforcement Committee are available at the relevant time and that this does not cause unnecessary delay.</p> <p>Paragraph 7.3 refers to there being an independent view of the recommendations of Ofgem staff that have carried out the investigation and established the evidence on which the decision is based. However, it is not completely transparent in the Proposed Guidelines that all members of the Enforcement Committee will be persons who were not involved in the investigation or in forming the recommendations. It is vital this is made clear, as the principle of independence is fundamental to the fairness of the proceedings.</p> <p>With regard to the membership of the Committee, it may assist to have members that are not executives or employees of Ofgem (as is proposed for the Enforcement Decision Panel in Ofgem's consultation of 28 March 2012).</p> <p>The members of the Enforcement Committee must be sufficiently trained in order to</p>

	<p>make decisions in line with the published guidelines and penalty policy.</p> <p>To ensure that the principle of independence is upheld, there should be complete transparency between the investigation team and the Enforcement Committee in order to provide the respondent with reassurance that there is a fair presentation of the issues. National Grid notes from the FCA's handbook that disclosure of correspondence between the investigation and decision making bodies within the FCA is required in order to try to ensure transparency of the investigation.</p>
7.4	<p>The Existing Enforcement Guidelines, at paragraph 4.25, permit decision making to be delegated to senior Ofgem officials but only where the issues raised are non-contentious, unlikely to attract significant interest or where the level of penalty does not exceed £100,000. This paragraph of the Proposed Guidelines is unclear as to whether it is referring to delegation to an Enforcement Committee or to senior Ofgem officials. The latter, National Grid suggests, is inappropriate given the unlimited penalties that can stem from a finding of a breach of a REMIT requirement.</p>
<i>Warning Notices</i>	
7.5	<p>This paragraph states that the Authority will hear the Ofgem investigation team's recommendations on whether to issue a Warning Notice. In order to ensure objectivity, before recommendations are made to the Enforcement or Settlement Committee, they should be reviewed by an independent lawyer within Ofgem who has had no involvement with the investigation. The independent review will ensure that the evidence gathered supports the findings made and that the recommendations are justified by those findings of fact. As is evident from the FCA's Enforcement Guide, this independent review is a key part of the FCA's approach to enforcement and its focus on transparency within investigations.</p> <p>Regulation 26 is clear that where a person has failed to comply with a REMIT requirement or has failed to comply with a requirement imposed by or under Regulation 8, the Authority has a discretion whether to impose a penalty or not, and whether to issue a statement of non-compliance, or not. The Existing Enforcement Guidelines, at paragraph 1.4, state that the Authority is not required to make an order where it is agreed that all appropriate steps will be taken, or are already being taken in order to secure or facilitate compliance, or where it considers that the breach is of a trivial nature. The Proposed Guidelines currently contain no guidance as to the circumstances in which it will, or will not, decide to propose to impose a financial penalty or statement of non-compliance.</p>
7.9	<p>This paragraph refers to the reasonable period in which a person will be permitted to make representations as to the proposals in the Warning Notice. In order to ascertain this, it would be beneficial for the Authority to consult with the person under investigation to ascertain what is a reasonable time in the circumstances.</p>

7.11	<p>National Grid notes that this paragraph reflects Regulations 39 (1), (2) and (3), but it is not clear as to why information might be published relating to the matters contained in the Warning Notice, when the Warning Notice itself cannot be published. Greater clarity is required here.</p> <p>Although the FCA Handbook provides the FCA with a right to publish Warning Notices, National Grid understands that in practice that in the vast majority of cases the FCA does not publish information until the Final Notice is issued. This can be seen from the very limited number of publications on the FCA's website prior to the Final Notice stage. The exception to this appears to be where there is sufficient market concern that there is an interest to satisfy. Further guidance is required as to the circumstances in which Ofgem will wish to publish information relating to the matters contained in the Warning Notice.</p>
7.14	<p>The independence of the decision maker is much more clearly described here than in paragraph 7.3. In order to ensure that those taking decisions are truly independent, and seen to be truly independent, the Proposed Guidelines should provide for all communications between those investigating or proposing publication with the decision makers to be disclosed to those under investigation.</p>
<i>Decision Notices</i>	
7.16	<p>It is not clear if the suggestion here is for the Authority to orally hear the Ofgem investigation team's recommendation on whether to issue a Decision Notice. If that is the case, the person under investigation should equally be afforded the right to make oral representations. If the recommendation is given in writing, this and any other communications between the investigating team and the decision-makers should be provided to the person under investigation.</p> <p>The footnote here states that decisions as to whether to issue Decision Notices are usually taken by an Enforcement Committee or a Settlement Committee. What are the circumstances in which this will not be the case? It is also not clear if the committee taking the decision will be made up of the same persons that considered whether or not to issue the Warning Notice. National Grid considers the decision to issue a Warning Notice should be taken by a further independent Enforcement Committee following an independent review.</p> <p>Where reference is made to the Authority having access to representations made in response to the Warning Notice, will that include any representations from third parties as well? If so, how will that process work? Further clarity is required here.</p>
7.17	<p>There does not appear to be included in the Proposed Guidelines any provision for third parties to be consulted before a decision to impose a penalty is made, as is the case under paragraph 4.42 and 4.43 of the Existing Enforcement Guidelines and under the provisions of the Gas and Electricity Acts. Likewise, National Grid cannot</p>

	see any such provision in the Regulations. Please can confirmation be provided that such a consultation is not envisaged in this procedure. National Grid notes that the FCA does not require any such consultation.
7.18	<p>The Proposed Guidelines do not currently reflect Regulation 36(2) which states that the action to which a Decision Notice relates must be action under the same regulation as the action proposed in the preceding Warning Notice.</p> <p>As per the FCA's Enforcement Guide, Decision Notices must include a brief summary of the key representations made and how they have been dealt with. This would assist to enable those in receipt of a Decision Notice to understand the reasoning for the decision.</p> <p>This paragraph should also include the matters stated in Regulation 45(2) that the Authority cannot take the action stated in the Decision Notice during the period in which the matter may be referred to the Tribunal and until any such reference is finally disposed of.</p>
7.21	The Existing Enforcement Guidelines at paragraph 4.44 contain much more detail as to the terms that the non-compliance statement should contain. This requires the Authority to state the provisions in question and state which acts or omissions constitute the failure. This information is important in order that the person under investigation can properly understand what it has failed to do, and in order that an effective message is sent to deter non-compliance in that respect in the future.
7.22	Whilst this paragraph reflects Regulations 36(3), (4) and (5), it is unclear how this provision will work in practice. Does this mean that the person to whom the Decision Notice is sent has the choice as to which Decision Notice they are prepared to agree to? What are the circumstances in which the Authority would propose a replacement Decision Notice? How will the requirements of paragraph 7.23 with regard to publication be effected in a situation where there are alternative Decision Notices in existence. Further clarification is required.
7.23	The Proposed Guidelines do not currently contain the restriction contained in Regulation 39(3) that a person to whom a Decision Notice is given or copied may not publish the Notice or details concerning it until the Authority has published the Notice or details.
<i>Appeals</i>	
7.26	<p>The Proposed Guidelines do not currently include any timescale within which the appeal to the Upper Tribunal must be made.</p> <p>As is clear from the FCA Handbook, where an appeal is made of an FCA decision, the hearing is a full hearing of the merits of the case. However, it is not clear whether this is to be the case for appeals under the Proposed Guidelines, particularly since</p>

	<p>the Tribunal's review of FCA decisions result in a determination as to what decision the FCA should have made, whereas here matters are remitted back to the Authority with directions. The Proposed Guidelines would benefit from details as to the grounds upon which an appeal can be made and of the background, purpose and constitution of the Upper Tribunal. National Grid considers that the Tribunal should hold a full hearing of the merits of the case, given the extent of the Authority's powers in relation to REMIT enforcement.</p> <p>The Proposed Guidelines do not currently state whether publication is to be delayed until the outcome of any appeal, as fairness would require.</p>
7.28	<p>The Proposed Guidelines do not currently state that the Tribunal may also take into account any failure on the part of the Authority to follow its procedure under Regulation 44(3).</p> <p>Clarification is also required as to whether the Tribunal is subject to the same rules and guidelines as Ofgem and the Authority.</p>
<i>Discontinuance notices</i>	
7.33	<p>This refers to the Authority's power to publish such information as it considers appropriate about a matter in which it has issued a Notice of Discontinuance, provided that the person to whom the notice is given consents. In order for that person to provide consent, the Proposed Guidelines should provide for that person to be informed of the matters that it is intended to publish.</p>
7.34	<p>National Grid proposes adding the following before the first comma in this paragraph: "<i>within the time required by the tribunal procedure rules</i>", in order to accurately reflect Regulation 38(1).</p>
<i>Final notices</i>	
7.35	<p>It would be more accurate to state that the requirement to issue a further Decision Notice arises where the matter has been remitted with a direction for the Authority to reconsider and reach a decision in accordance with the findings of the Tribunal.</p>
7.36	<p>It should be clarified here whether the amount of the financial penalty contained in the Final Notice will always be the same as the penalty stated in the Decision Notice.</p> <p>There is no ability to recover interest stated within the Regulations.</p>
7.37	<p>It should be clarified here whether the restitution sum contained in the Final Notice will always be the same as the sum stated in the Decision Notice.</p>
7.39	<p>Given that unlimited penalties are available to the Authority to impose, it would be appropriate for the Authority to consider representations from the person when</p>

	considering the appropriate timescale for payment.
<i>Access to Authority Material</i>	
7.44	The Proposed Guidelines refer to the extent to which a recipient of a Warning Notice or Decision Notice “ <i>may</i> ” access the material on which the Authority has relied. This does not accurately reflect Regulation 41(1) which states that the Authority must allow access, save for in any of the circumstances set out in Regulation 41(2).
7.47	<p>The Proposed Guidelines reflect Regulation 41(5), but it should also refer to Section 14(4) to explain that where material is withheld because it is privileged, the person still has to be given notice of the existence of the material and the decision not to allow access to it.</p> <p>The use of confidentiality rings could be considered in relation to the disclosure of sensitive information where appropriate.</p>
<i>Settlement Procedure</i>	
8.2	<p>There does not appear to be included in the Proposed Guidelines any provision for third parties to be consulted before a settlement can be finalised as is the case under the provisions of the Gas and Electricity Acts. Please can confirmation be provided that such a consultation is not envisaged in this procedure. National Grid notes that such consultation is not required under the provisions of the FCA’s Enforcement Guide for settlements reached by the FCA.</p> <p>An indication of the percentage reduction in penalty for an early settlement might provide an incentive to enter settlement discussions, depending on the level of that percentage. If there is no requirement to consult third parties as to the level of penalty as is the case under the Gas and Electricity Act, Ofgem may be better placed to specify such percentage discounts in these Proposed Guidelines. As per the FCA’s Enforcement Guide, the FCA adopts this approach of specifying the settlement discount which will apply if the case is settled at various stages of the investigation, although the percentage discount adopted there, is not at the level which is sufficiently persuasive towards settlement.</p>
8.3	Further guidance is required here in relation to what may or may not be a case appropriate for settlement discussions and the extent to which the priority matters set out at paragraph 4.4 will influence which cases are deemed appropriate for settlement. Ofgem also need to provide greater clarity on the wider factors that may influence a decision as to whether a particular case is suitable for settlement.
8.4	It is important that the information Ofgem has to enable it to assess the nature and extent of the breaches, the likely detriment caused and the level of penalty that might be appropriate is shared with the person under investigation, in order that it may make its own assessment as to whether it wishes to enter into settlement

	discussions. Disclosure at this stage, may allow cases to be settled sooner, thus saving the time and cost of prolonged proceedings.
8.6	<p>This paragraph presupposes that an admission in relation to alleged breaches is a pre-requisite to settlement. This could inhibit early settlement. A requirement that the respondent must admit breach is an unnecessary barrier to settlement and likely to create procedural unfairness.</p> <p>This paragraph suggests that where agreement is reached on the breach, there is a presumption that the settlement will always result in the imposition of a financial penalty and/or a restitution order. Such matters do not automatically follow, as had the formal enforcement process been followed, there would have been a discretion whether or not to impose a penalty and/or a Restitution Order. This paragraph also makes no reference to whether a statement of non-compliance could also be the outcome of an agreed settlement.</p>
8.7	In addition to ensuring that neither party can rely on admissions or statements made during the settlement discussions in any subsequent Enforcement Committee hearing or before a court, it should also be made clear that: (i) in the interests of fairness and transparency, the investigation team cannot rely on information received during settlement discussions in making recommendations to the Enforcement Committee; and (ii) all communications between the investigation team and the Enforcement Committee should be copied to the person under investigation.
8.8	<p>Any changes to the proposed settlement terms by the Settlement Committee must be subject to the agreement of the person, and should not be imposed without consultation. The possibility of the Settlement Committee unilaterally changing the terms of settlement would be a serious barrier to settlement.</p> <p>This paragraph states that the person has no opportunity to make oral representations to the Committee. This must also be the case for the Ofgem investigators.</p> <p>There is no detail in this paragraph regarding final steps once the settlement terms are approved by the Settlement Committee, or as to how they are recorded. An indication as to the time to be taken to confirm the terms of settlement or issue any Warning or Decision Notice should be set out in the Proposed Guidelines.</p>
8.9	As the Settlement Committee is a non-standing committee, members of the committee should be available as and when required. In previous cases, National Grid has had to work to unrealistic deadlines because a non standing committee is already meeting on a particular date. A guideline as to the time to be taken by the Settlement Committee to confirm the terms of settlement should be included in the Proposed Guidelines.

	With regard to what is to happen if settlement discussions break down, this paragraph mirrors paragraph 4.33 of the Existing Enforcement Guidelines save that the word “afresh” has been deleted. Clarification is required as to whether Ofgem proposes a different approach given the deletion of the word “afresh”.
8.11	The relationship between the Settlement Committee and the Authority, and their respective duties is unclear here. It needs to be clear that the Settlement Committee is entirely independent of the Enforcement Committee.
<i>Cooperation on Investigations</i>	
9.3	The information that Ofgem shares with ACER should also be copied to the person under investigation where to do so is unlikely to frustrate any investigation.

Proposed Penalties Statement

Q. 5: Are the criteria that the Authority proposes to consider in deciding whether to impose a financial penalty appropriate? Should any other criteria be included?

1. In general, the criteria set out in the Authority’s Proposed Statement of Policy with respect to Financial Penalties under REMIT (the “Proposed Penalties Statement”) appear to be appropriate and as expected.
2. Paragraph 3.2 refers to the need for the Authority to take full account of the particular facts and circumstances of each case when determining whether to impose a financial penalty and/or issue a statement of non-compliance. This wording seems to be based on the October 2003 Statement of policy with respect to financial penalties (the “October 2003 Statement”), save that the following words have been omitted “*including the extent to which the circumstances from which the contravention or failure arose were outside the control of the [person]*”. National Grid suggests that this phrase should also be included in the Proposed Penalties Statement.
3. The OFT’s guidance as to the appropriate amount of penalty dated September 2012 provides at paragraph 1.4 an indication of what the OFT considers to be among the most serious infringements of competition law. It would assist if Ofgem could give a similar indication as to what it considers to be the most serious breaches of REMIT.
4. National Grid has some concerns that the factor referred to at paragraph 3.3, bullet point 3 is potentially too wide. Very minor breaches could potentially impact on the orderliness of the markets, and the factor does not currently refer to the significance of that impact. Consequently, this allows an unlimited financial penalty to be imposed in very wide ranging circumstances, including those where there is a very minor breach.
5. Paragraph 3.3 should also include a factor regarding the duration of the breach. Paragraph 1.3 makes clear that the nature, duration and seriousness of the breach will be reflected in the penalty, so the factors to taken into account should include duration.

6. Correspondingly, paragraph 3.4 should include a factor to provide that a short term breach would make the imposition of a penalty less likely.
7. Paragraph 3.4 should include a factor that provides that where a breach has been self reported, it will make the imposition of a penalty less likely. For example, paragraph 1.7 of the OFT's penalty statement encourages undertakings to come forward with information relating to any cartel activity in which they are involved in return for lenient treatment. Specific guidance is provided as to when self reporting will result in total immunity from, or a significant reduction in the level of penalty.
8. In relation to the final bullet point of paragraph 3.4, as referred to above, there should not be concurrent investigations, and the penalty statement should contain an absolute assurance that a person will not be penalised for the same breach twice under various regulatory regimes. The principle that a person should not be penalised twice for the same anti-competitive effects is stated firmly at paragraph 4.15 of the OFT guidance "Application in the Energy Sector", so that if a penalty or fine has been imposed by the European Commission or by a Court or a body in another Members State in relation to the same anti-competitive conduct, that penalty or fine will be taken into account when determining the amount of penalty.
9. Following on from paragraph 3.4, paragraph 3.5 appears to specifically permit the Authority/Ofgem to impose a penalty, despite the fact that a penalty in respect of the same alleged breach has already been imposed by another regulatory body. This potential for a re-hearing of the same issues and double recovery is an abuse of process and against the principles of natural justice.
10. Paragraph 3.6 appears to have been taken from the FCA's Decision Procedure and Penalties Manual, para 6.3.2. However, two factors that are taken into account in the FCA procedure have been omitted. The first relates to whether guidance has been published on the behaviour in question and the extent to which the person sought to follow that guidance or take account of those materials. National Grid suggests that this should encompass guidance issued by Ofgem, the Authority, ACER, the Office of Fair Trading and any other relevant regulator. The second relates to whether the behaviour complied with the rules of any relevant prescribed market or any other relevant market or other regulatory requirements or any relevant codes of conduct or best practice. Both factors appear to be relevant to the question of a person's belief as to whether his conduct amounted to a breach and to whether all due diligence/ reasonable precautions were taken to avoid breach. These factors should also be included.
11. Further relevant factors to consider are whether the person's conduct was in accordance with custom and practice; and whether the person sought to implement principles extracted from previous decisions published by the Authority.
12. The final bullet point of paragraph 3.6 could be clarified to confirm which market authorities are relevant for the purpose of this factor, and that the person will receive credit for seeking advice from market authorities.
13. The Proposed Penalties Statement does not currently state whether the factors set out are an exhaustive list, or not. This should be confirmed for clarity.

Q. 6: Are the factors that the Authority proposes to consider in determining the amount of a financial penalty appropriate? Should any other factors be included?

14. Again, the factors generally appear to be appropriate and as expected. National Grid notes that some of the bullet points contained in paragraph 4.2 stem from Regulation 27(2), save for some minor differences where the proposed penalties statement could be refined to accord with the Regulations. These include bullet points 1 and 2, where Regulation 27(2)(b)(ii) and (iii) states that this factor is also to be taken into account in respect of a breach of Regulation 8.
15. The Proposed Penalties Statement does not currently include an indication that it will take into account, in determining the level of penalty, the same factors set out at paragraph 3.6 in deciding whether a person believed his conduct did not amount to a breach, or took all reasonable precautions and exercised all due diligence to avoid breach. This is a requirement of Regulation 27(3) and the Proposed Penalties Statement should be explicit that the factors listed in paragraph 3.6 also apply to determining the level of any penalty (i.e. to paragraph 4.2).
16. As above, one of the factors that should be considered is the duration of the breach. This was a factor included in the October 2003 Statement. It is also a factor that the OFT takes into account when determining penalty according to its penalty statement of September 2012 (paragraph 2.12).
17. A further mitigating factor should be when a person has self-reported the breach. Under the FCA regime as set out in the FCA's Enforcement Guide, self-reporting may be taken into account as a mitigating factor. This was a factor included in the October 2003 Statement.
18. Other mitigating factors that are considered by the OFT in its penalties statement include: 1) the circumstance where the undertaking was acting under severe duress or pressure; 2) where the infringement has been terminated as soon as the regulator intervenes; and 3) where there is genuine uncertainty as to whether the conduct constituted an infringement (see paragraph 2.15 of the OFT's penalty statement of September 2012). The proposed penalty statement should include similar factors.
19. The final bullet point of paragraph 4.4 is unnecessary since settlement discounts are dealt with separately at paragraphs 4.5 and 4.6.
20. The Proposed Penalties Statement does not currently state whether the factors set out are an exhaustive list, or not. Clarification in this respect should be provided.

Q. 7: Does the statement provide sufficient clarity about the factors that the Authority will take into account in relation to imposing financial penalties on individuals?

21. National Grid considers that the factors in relation to taking action against individuals in circumstances where an individual's standard of behaviour was below that which would be reasonable in all of the circumstances are very vague and further clarity should be provided where possible. For example, Ofgem could provide some examples of what would be considered to be below standard conduct.
22. It is of concern that the factors listed in the Proposed Penalties Statement is not an exhaustive list. The attempt to extend the list of relevant factors to unknown items outside the stated list

is procedurally uncertain and likely to create unfairness. Individual respondents should have transparency as to the factors that Ofgem will take into account in deciding whether to impose a penalty.

23. With regard to paragraph 4.12, it is National Grid's view that a penalty should reflect the seriousness of the breach rather than be determined by the resources of the person upon whom the penalty is being imposed. Having said that, the Authority may wish to adopt the FCA's approach set out in its Decision Procedure and Penalties Manual at paragraph 6.5d.1(2), which allows a penalty to be reduced if an individual or firm claims the penalty would cause them serious financial hardship. The FCA's threshold for individuals is that they are only eligible to claim serious financial hardship if their net annual income will fall below £14,000, and their capital will fall below £16,000 as a result of payment of the penalty. For firms, payment of the penalty would have to render the firm insolvent or threaten its solvency in order for the FCA to consider reducing the proposed penalty. Ofgem may wish to consider adopting this robust approach.

National Grid's comments on other aspects of the Proposed Penalties Statement

The Authority's Proposed Statement of Policy with respect to financial penalties under REMIT	
Relevant Paragraph Number	National Grid Comment
General	The Proposed Penalties Statement does not always distinguish between a potential breach of a REMIT Requirement as defined in Regulation 4 and a potential breach of Regulation 8 in relation to the obligation to record and retain records. Such a distinction is necessary for clarity and transparency as some of the powers available to the Authority/Ofgem differ depending on whether there has been a suspected breach of the REMIT Requirements (in which cases wider powers are available) or a suspected breach of Regulation 8.
2.1	National Grid refers to its comments above in relation to the regulatory objectives in response to Question 2 of the consultation.
2.2	National Grid refers to its comments above in relation to the regulatory objectives in response to Question 2 of the consultation.
3.2	The Proposed Guidelines do not provide for the Authority to hold any consultation with third parties when deciding whether to issue a Warning Notice, Decision Notice or Final Notice, as is the case for licence breaches where the Gas and Electricity Acts require notices to be published of the intention to impose a financial penalty before it is finally confirmed. It is also noted that, under the FCA's Enforcement Guide, there is no overarching requirement for the FCA to consult with third parties before deciding whether to impose a financial penalty. Please can confirmation be provided that such a consultation is not envisaged in this procedure.
3.4, 3.6, 4.2	Paragraphs 3.4, 3.6 and 4.2 of the Proposed Penalties Statement refer to " <i>all due diligence</i> ". However, Regulation 27 refers to " <i>due diligence</i> ". The wording in the Proposed Penalties Statement is wider than the Regulation and should be amended to ensure that the Authority/Ofgem operates within their powers.

4.6	National Grid repeats its comments in respect of paragraph 8.2 above that an indication of the percentage reduction in penalty for an early settlement might provide an incentive to enter settlement discussions, depending on the level of that percentage.