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REMIT Procedural Guidelines and Penalties Statement

EDF Energy is one of the UK's largest energy companies with activities throughout the energy chain. Our interests include nuclear, coal and gas-fired electricity generation, renewables, and energy supply to end users. We have over five million electricity and gas customer accounts in the UK, including residential and business users.

The proposed revised procedural guidelines and penalties statement represents a significant change to Ofgem's enforcement of REMIT. In particular, the fining proposals in relation to individuals (and the Government's decision to proceed with new criminal offences under REMIT) has very serious implications for individuals of firms who are REMIT market participants and who are involved in a firm's trading activities. In this context, the environment under which the proposed changes are framed is important.

Despite its entry into force in December 2011, REMIT is still relatively new in terms of operational experience, particularly in respect of the understanding and application of inside information and REMIT's market manipulation offences and regulatory oversight. Guidance from ACER and Ofgem on the application of REMIT is crucially important, and any enforcement action must be proportionate to the level of such guidance and understanding currently available. In cases where a large element of interpretation is required by a person under investigation (e.g. in the absence of guidance) the scope for different legitimate views will need to be taken fully into account as part of any enforcement action and any decision on whether a REMIT offence has been committed.

Our detailed responses are set out in the attachment to this letter. Should you wish to discuss any of the issues raised in our response or have any queries, please contact Ian George on 01452 654498, or myself. I confirm that this letter and its attachment may be published on Ofgem's website.

Yours sincerely,

A handwritten signature in blue ink, appearing to read "Paul Delamare".

Paul Delamare
Head of Customer Policy and Regulation

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Attachment

REMIT Procedural Guidelines and Penalties Statement

EDF Energy's response to your questions

Procedural Guidelines

Q1. Do you agree with the proposed vision and strategic objectives for REMIT?

We note the proposed vision and strategic objectives for REMIT enforcement are consistent with the vision and objectives under Ofgem's wider enforcement powers. This seems sensible and appropriate.

Q2. Do you have any comments on the proposed changes to the settlement processes?

Q3. Do you have any comments on our proposals for oral representations?

Q4. Do you have any other comments on the proposed REMIT Procedural Guidelines?

We support retention of the ability to make oral representations at the Issues Letter stage in addition to oral representations at the Warning Notice stage. We note the current REMIT enforcement guidelines include a process flowchart. This is helpful and we ask that it is retained in the revised guidelines.

Penalties Statement

Q5. Do you agree with the proposed factors that affect the decision to impose a financial penalty and/or make restitution or issue a statement of non-compliance?

We do not have any comments on the proposed factors affecting the decision to impose a financial penalty, restitution or statement of non-compliance.

In terms of taking action against an individual rather than a firm, action against employees of firms should only be considered in limited circumstances – for deliberate or reckless behaviour (e.g. where an employee deliberately ignores or circumvents a firm's policies, processes or procedures, or deliberately takes advantage of deficiencies in a firm's policies, processes or procedures), or acted negligently or without integrity (e.g. by failing to report to a firm's management concerns about the firm's policies, processes or procedures), or acted for his own financial gain.

It would be wholly inappropriate to take action against an individual for breaches in circumstances where the individual was merely performing his duties in a reasonable and proper manner, with the required due skill, care and diligence and in accordance with a firm's policies, processes and procedures. This should be made clear in the revised Guidelines and Penalties statement.

Q6. Is the proposed process for determining the amount of penalties and/or restitution appropriate?

Given REMIT's focus on the wholesale gas and power markets, we question whether it will be practicably possible to identify consumer detriment (other than in some highly generalised way) particularly to individual consumers or groups of consumers. For non-market abuse cases, it is difficult to see how consumer detriment would arise, if at all. In this respect we note the Authority expects firms to proactively identify, contact and

compensate affected parties. This is potentially unrealistic in terms of consumer detriment. Similarly, it may not be straightforward to establish a clear linkage between a REMIT breach and an adverse impact on specific firms.

Q7. Do you agree with the proposed approach to assessing the seriousness of a breach and calculating the starting point for a financial penalty?

In respect of individuals, the penalty statement makes a distinction between financial penalties in market abuse and non-market abuse cases. While the introduction section of the penalty statement describes market abuse as insider trading and market manipulation, the penalty statement should explicitly state which requirements are considered as market abuse and those that are not (i.e. market abuse cases means cases under Articles 3 and 5 of REMIT and non-market abuse cases are those under Articles 4, 8, 9 and 15 of REMIT and Regulation 8 of the GB REMIT Enforcement Regulations).

The penalties statement is heavily modelled on the FCA's approach to financial penalties. We question whether the factors that will be taken into account in assessing the seriousness of a breach (impact) are entirely appropriate in the context of wholesale energy markets. As indicated above, we question whether it will be possible to establish a clear linkage between a REMIT breach and an individual consumer or groups of consumers, vulnerable or otherwise (paragraph 6.16 of the penalty statement).

As indicated in our covering letter, given the lack of operational experience of REMIT, and in particular the application of inside information and REMIT's market manipulation offences, any enforcement action must be proportionate to the level of guidance and understanding currently available.

Q8. Do you agree with our proposed approach in relation to representations that a person believed that the behaviour was not a breach or that a person had taken all reasonable precautions and exercised due diligence to avoid the breach?

In determining the amount of a penalty, Ofgem must have regard to whether a person reasonably believed his conduct did not amount to a breach and/or he took all reasonable precautions and exercised due diligence to avoid a breach in the first place. This is modelled on the FCA's approach. However, under the FCA regime, statute prohibits the FCA from imposing a financial penalty if there are reasonable grounds for the FCA to be satisfied that the person involved himself believed on reasonable grounds that his behaviour did not amount to market abuse and/or he took all reasonable precautions and exercised due diligence.

The equivalent statutory limitation does not apply to Ofgem in respect of its REMIT enforcement powers. But in such circumstances there should be a presumption that a penalty will not be imposed. More fundamentally, if the Authority is satisfied that a person has demonstrated that his behaviour was engaged in for a legitimate purpose, we fail to see how the behaviour could then be considered to be a breach.

Q9. Do you agree with the factors that may aggravate or mitigate the level of the penal element?

Q10. Do you agree with the proposed settlement percentage discounts in REMIT cases?

No comment. We note these reflect the arrangements under Ofgem's wider financial penalties statement.

Q11. Do you agree with our proposed approach to restitution under REMIT?

Please see our comments above in response to Q6 and Q7.

Q12. Do you agree with our proposals in respect of serious financial hardship?

Q13. Do you have any other comments on the proposed REMIT Penalties Statement?

No comment.

EDF Energy
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