

FSMA Two Year Review – Changes to Secondary Legislation Volume 1  
Late Response from the Association of Electricity Producers.

30 July 2004

**SUMMARY** The Association became aware of the Treasury consultation on this review when it was contacted by Ofgem. It has polled the views of its members and received responses from many of the major participants in the electricity market within a few days: British Energy, EDF Energy, RWE Npower, Edison Mission, E.ON and Scottish & Southern. Some of the respondents are exempted and some not. They have all seen and are all supportive of the response given by Ofgem. In particular, they do not believe it would be helpful to change the NETA exemption conditions in the near future. The introduction of the new ISD would provide a more appropriate point at which to review the usefulness of this exemption.

The Association of Electricity Producers (AEP) is the UK trade association representing electricity generators. It has over 100 members ranging from small firms to large, well-known PLCs. Between them they embrace nearly every generating technology used in the UK. Many member companies have interests in the production and development of renewable energy

**Detailed Comments** Members were asked their views on a number of questions. The questions are italicized below with responses following:

- *Do you take advantage of these exemptions?*

Some members are currently exempted and some are not. Nevertheless, their views are very similar.

Members' views were that all exempted parties gain from these exemptions. The exemptions provide regulatory clarity because the Balancing and Settlement Code and related activities are already tightly regulated by through transmission, generation and supply licences granted by Ofgem, which has associated enforcement powers and powers to impose fines in addition to competition law powers. The energy markets continue to be 'professional' in nature with little or no retail investor participation. This is likely to remain the case, so the need for protection via other regulation is correspondingly reduced. Furthermore, as Ofgem pointed out in its response, the activities of the Balancing Mechanism (BM) and imbalance settlement "do not naturally look or feel like investments".

The exemption also increases regulatory certainty and predictability as imbalance settlement and bids and offers in the BM could still be considered to be contracts for difference which gives the scope for legal action by affected parties. This is in addition to the possibility of FSA enforcement for a breach of its Rules. The CR Sugar Trading case illustrates the potential for contracts to be ruled unenforceable by the courts where FSA authorisation is required. Therefore, all parties to whom the exemption applies rely upon it to remove the possibility of legal action on areas covered by the exemption such as Balancing Services.

- *Can you provide ballpark estimates of the costs you would incur if they were removed, and for example, you would have to seek FSA authorisation?*

It would typically be necessary to register more staff as FSA approved persons and restructure some energy business activities rather than applying for FSA authorisation of licensed entities. It would probably also be necessary to employ a compliance management

officer at a cost of say £100k-£150k per annum in total. There would also be sizeable costs involved in restructuring, changing procedures and systems as well as training.

- *Overall do you think it would be better to remove the exemptions now rather than later?*

Members strongly believed that the reviewing the continuation of the exemption around the time of introduction of ISD would be a pragmatic way forward, particularly as the current exemption is useful to all.

- *Do you think they should be revised to some partial application rather than the current position?*

Members were strongly of the view that amendment at this time was inappropriate and unnecessary. Participation in the electricity markets is restricted to professionals with detailed knowledge of the market, and they do not believe that there is any evidence of resulting detriment resulting from the provision of unregulated advice to investors.

- *Are there any other issues surrounding the FSMA exemptions that you would like to raise?*

Neither the members nor the Association were aware of this consultation until we were contacted by Ofgem. Can Treasury/FSA please give some consideration of how to help us contribute to the next consultation?