ENERGY BILL

Memorandum from DECC to the Delegated Powers and Regulatory Reform Select Committee

INTRODUCTION

1. This Memorandum identifies the provisions in the Energy Bill which confer power to make delegated legislation. It explains the purpose of the delegated power proposed; why the matter is to be dealt with in delegated legislation; and the nature and justification for any parliamentary procedures that are proposed.

2. Most of the delegated powers are to be exercised by the Secretary of State by statutory instrument. The Bill also confers powers on the system operator.

3. The Bill contains 71 individual provisions for delegated legislation. The Annex provides a reference for all delegated powers in the Bill.

4. The descriptions of the powers are arranged in the order that they appear in the Bill.

5. For reference, Ofgem is the Office of the Gas and Electricity Markets Authority. References to "Authority" in this document refer to the Gas and Electricity Markets Authority by which Ofgem is governed.

PROVISIONS FOR DELEGATED LEGISLATION

PART 1 – Decarbonisation

Clause 1: Power to set or amend a decarbonisation order in relation to a year ("a decarbonisation order")

Power conferred on: *Secretary of State*
Power exercised by: *Order*
Parliamentary procedure: *Affirmative Resolution*

6. Part 1 of the Bill, added at Committee stage in the House of Commons, places duties and confers powers on the Secretary of State in relation to the carbon intensity of electricity generation in Great Britain. The Secretary of State is given the power to set a decarbonisation target range in respect of a year by order (clause 1(2)), and a duty to ensure that the carbon intensity of electricity generation in Great Britain does not exceed the upper limit of the range (clause 1(1)). The remaining provisions restrict what the Secretary of State may do and place duties on him to take certain matters into account, to lay reports before

Parliament and to consult Ministers in the Devolved Administrations at appropriate points.

7. The power in clause 1(2) enables the Secretary of State to make orders (referred to as "decarbonisation orders") for the purpose of setting or amending a decarbonisation target range for the electricity generation sector in Great Britain in relation to a given year. It is a significant aspect of the framework in Part 1 of the Bill, because the duty in clause 1(1), and the duties in clause 3, only have effect once a decarbonisation order is made.

8. Clause 1(8) also contains two narrowly-defined Henry VIII powers to make amendments to primary legislation, which can be exercised when a decarbonisation order is made.

9. Clause 1(8) (a) provides a power to amend section 23(4) of the Climate Change Act 2008. Section 23 of the 2008 Act confers a power on the Secretary of State to alter the length of carbon "budgetary periods" under that Act and the dates on which budgetary periods may begin and end. The purpose of that provision is to allow the UK's carbon budget system to remain compatible with European or international duties and systems relating to carbon emissions. Section 23(4) contains a Henry VIII power allowing the Secretary of State to make amendments to the 2008 Act itself as a consequence of a change in the length of budgetary periods. Clause 1(8)(a) would allow the Secretary of State to extend the power to enable the Secretary of State to amend sections 1 and 4 of the Energy Act 2013 (clauses 1 and 4 of the Bill) if he alters the length of a budgetary period.

10. Secondly, clause 1(8) (b) provides a power to repeal section 5 of the Energy Act 2010. Section 5 of the Energy Act places a duty on the Secretary of State to make triennial reports to Parliament on progress made towards decarbonising electricity generation and in the development and use of carbon capture and storage technology in Great Britain. The making of a decarbonisation order would trigger the introduction of a duty on the Secretary of State to make annual reports on the carbon intensity of electricity generation in Great Britain, which might render triennial reporting unnecessary.

11. The Department believes that it is important that a decarbonisation target range is set in secondary legislation, rather than setting a decarbonisation target range on the face of the Bill. There are three main reasons for this:

    i. Firstly, the Government believes that a 2030 decarbonisation target range, which is the earliest year for which a decarbonisation target range could be set (see clause 1(5)), should not be set now but at the same time as, or after, the carbon budget covering the corresponding period is set in law. This will be the fifth carbon budget, covering the years 2028-2032, which must be set in law by 30th June 2016 in order to comply with the requirements of section 4(2) of the Climate Change Act 2008. This approach ensures that any decarbonisation

target range is set in a time and way that is consistent with the carbon budget for the same period;

ii. Secondly, it is essential that the Secretary of State takes into consideration a number of important matters when setting a decarbonisation target range and before reaching any later decision to amend a range, just as he is required to do by the Climate Change Act when setting carbon budgets. It is appropriate that these matters be considered in view of circumstances and best available information at the point at which a target range is set. These matters are listed in clause 2 and cover a wide set of economic, social, scientific, legal and technical circumstances. This approach ensures that any decarbonisation target range is considered within the context of meeting our economy-wide 2050 target, and helps to ensure that we do this in the most cost effective way possible.

iii. Lastly, setting or amending a decarbonisation target range in secondary legislation ensures that there is an opportunity to consult the Scottish Ministers and the Welsh Ministers at the time at which the range is to be set. Since a decarbonisation target range would extend across Great Britain it is important that the Secretary of State obtains the views of the Scottish and Welsh Ministers to ensure that any target range is set in the right way and implemented effectively.

12. The Department's decision to delegate the powers to amend section 23(4) of the Climate Change Act 2008 and to repeal section 5 of the Energy Act 2010 follows from the conclusion that the decisions in relation to a decarbonisation target range ought to be delegated to the Secretary of State. The Department has therefore provided for the scope of these Henry VIII powers to be as narrow as possible with the amendments that could be made using them set out clearly on the face of the Bill. The additional power to make ancillary provision and savings, found in clause 1(9), will only allow ancillary provision in respect of the power in clause 1(8) and so it follows that the ancillary provision is narrow as well.

13. In order to provide investors with the certainty they need it is important that the process for setting a decarbonisation target range is sufficiently transparent. Parliament has also indicated that it considers the decarbonisation target range to be important. As such, the Department judges it appropriate that a decarbonisation order to set or amend a decarbonisation target range is made by statutory instrument, and subject to the affirmative resolution procedure. Any order must therefore be approved by a resolution of each House of Parliament and is therefore subject to a high degree of parliamentary scrutiny.

Clause 3: Power to make further provision about the meaning and calculation of carbon intensity of electricity generation in Great Britain

Power conferred on: *Secretary of State*
Power exercised by: *Order*
Parliamentary procedure: *Affirmative Resolution*

14. Clause 4(4) enables the Secretary of State to make further provision, by order, on the meaning of "the carbon intensity of electricity generation Great Britain", and to provide details on related definitions if needed, including the means by which carbon intensity is to be calculated and the meaning of "in relation to any year".

15. Clause 4(1) already provides a definition of "carbon intensity of electricity generation in Great Britain" and related definitions the Department considers that this provides enough certainty to enable carbon intensity to be calculated transparently, effectively and consistently with existing carbon reporting methodology.

16. But the Department considers that it is sensible to ask Parliament for a delegated power in order to retain the flexibility to provide further details or amend definitions if circumstances were to change. This may be required, for example, if international carbon accounting practices change as they may no longer provide us with the information we need or which is appropriate for the measurement of a domestic target range. This flexibility ensures that any target range would be set in the right way and could be tailored to future circumstances in order to ensure that the measurement of the carbon intensity of the power sector remains as clear and transparent as possible.

17. There are measures in place to limit the flexibility provided by these delegated powers. For example, in addition to a requirement to consult the Scottish Ministers and the Welsh Ministers prior to using the powers, any provisions made in secondary legislation would also be subject to the affirmative resolution procedure – so will need the approval of both Houses of Parliament. This means that no changes could be made without full transparency and accountability to both Houses.

PART 2 – Electricity Market Reform
CHAPTER 2: Contracts for Difference

Clause 6: Regulations to encourage low carbon electricity generation

Power conferred on:	*Secretary of State*
Power exercised by:	*Regulations*
Parliamentary procedure:	*Negative Resolution unless containing provisions under clauses 9, 10 or 11, in which case Affirmative Resolution*

18. This power allows the Secretary of State to make regulations about Contracts for Difference (CFDs). The regulations will include provisions about the terms of CFDs to be offered; which low carbon generation will be eligible to receive an offer of a contract; and how such offers will be allocated by the system operator and the Secretary of State. The regulations will contain controls over the CFD counterparty (see further clause 7 and 15). They will also contain provision for a supplier obligation which will require licensed electricity suppliers (both those licensed in Great Britain and in Northern Ireland) to enable the funding of the CFD counterparty. The regulations are also able to require the provision of information to enable the functioning of the scheme.

19. Prior to making the regulations, the Secretary of State is required to consult electricity suppliers (who will be subject to the obligations imposed by CFDs) the system operator, the Authority, the Northern Irish Department of Enterprise, Trade and Investment, Welsh and Scottish Ministers, and suppliers.

20. Many of the generic CFD terms are not intended to change substantially, but the terms will be detailed and are likely to require amendment over time. The terms of CFDs will be extremely detailed, representing long term commercial contracts. Flexibility is needed to ensure that market changes can be reflected over the period during which it is expected such contracts will be entered into. It would therefore be inappropriate for terms to appear on the face of the Bill.

21. It is our intention to change the level of support that will be available in CFDs periodically (such changes would only apply to CFDs offered after such changes), making a change where there is evidence of a shift in costs for the technologies. Marine technology, for example, is currently advancing along its learning curve so, whilst we would expect significant savings over the next few years, it is not possible to accurately predict when these may happen. Allowing support levels to be set through secondary legislation allows Government to be responsive to changes and realise any savings as quickly as possible. Equally, if costs rise we would expect to be able respond to this if necessary.

22. The regulations may also confer functions on Ofgem to provide advice and make determinations in relation to the contracts (see clause 14). This is principally intended to be used to enable Ofgem to monitor eligibility of generation stations, audit metering date, ensure biomass sustainability etc (it currently permits such roles under the existing Renewables Obligation, Renewable Heat Incentive and small scale Feed-in Tariffs (FITs) schemes). It may be appropriate for them to continue these functions in relation to the CFD scheme. Providing for such functions is also likely to be a matter of some detail, and will need to relate to the terms of CFD.

23. Regulations made under clause 6 may also include provision to limit the system operator's liability to pay damages if a civil claim was brought against it in respect of its role, or a particular aspect of its role, of delivering the CFD scheme (see clause 52). Such a limit on liability could extend to the acts or omissions of the system operator's directors, employees, officers or agents, however certain categories of liability cannot be limited in this way (for example, where an act or omission is in bad faith or would be unlawful under section 6 of the Human Rights Act 1998).

24. The Department judges that the Negative Resolution procedure is appropriate for these matters, as it gives Parliament the opportunity for scrutiny of important design aspects of the CFD. However, as the provision which may be included in regulations by virtue of clauses 9, 10 and 11 includes the ability to require compulsory payments and/or goes to the fundamental parameters of the scheme and the level of support which may be granted to projects (including strike prices and eligibility of different technologies) it is appropriate for a greater level of parliamentary scrutiny. Because the first set of regulations must include provision made by virtue of clause 9 the result will be that the first set of regulations will be subject to the Affirmative Resolution procedure.

Clause 7: Designation of a CFD counterparty; and
Schedule 1: CFD Counterparties: Transfer Schemes

Power conferred on:	*Secretary of State*
Power exercised by:	*Order*
Parliamentary procedure:	*None*

25. This power enables the Secretary of State to designate an eligible and consenting person to act as the CFD counterparty for CFDs.

26. The appointment of the CFD counterparty is an administrative exercise and would be carried out only with the consent of the person in question. Due to this,

the Department judges that it is appropriate to appoint this body by Order without parliamentary procedure. Other examples of designation orders that do not require parliamentary procedure are section 30A of the Energy Act 2008 (designation of eligible CCS installations) and section 326 of the Financial Services and Markets Act 2000 (designation of professional bodies).

27. The power also enables the Secretary of State to make transfer schemes if a designation under this clause ceases to have effect, for instance because the person designated as CFD counterparty withdraws his consent. This is an unlikely scenario but the Department judges that the powers are necessary in order to ensure continuity of the CFDs, in particular any necessary payments to generators.

28. This power therefore requires the Secretary of State to ensure (as far as reasonably practicable) the designation of another, consenting, person (who must be a company or a public authority). In order to give practical effect to the transfer of the functions, Schedule 1 confers on the Secretary of State a power to transfer property, rights and liabilities in connection with a transfer of the functions.

29. It is also likely that, in any one of the situations described in the power, the Department will wish to take action more quickly than would normally be compatible with the timetable primary legislation allows. That likelihood of the need for a quick response also suggests that a delegated power is appropriate. Failure to provide continuity of CFD counterparties would undermine investor and developer trust in the CFD. Developers and investors are likely to see the need for parliamentary approval as increasing the risk that a new CFD counterparty will not be in place in a timely manner.

30. It is not possible to know at this stage what property rights and liabilities may need to be transferred to effect the transfer of the functions. In addition, transfer schemes tend to be highly technical in nature and it is appropriate for the function of drawing them up to be delegated.

31. As is usual, the power to make transfer schemes is not subject to any parliamentary procedure. Transfer schemes are technical and often contain information that is commercially sensitive, confidential or personal information. It is therefore usually inappropriate for transfer schemes to be published or laid before Parliament.

Clause 10: Direction to offer a contract

Power conferred on: *Secretary of State*
Power exercised by: *Direction*
Parliamentary procedure: *None*

32. This power enables the Secretary of State and the system operator to direct the CFD counterparty to issue a contract in circumstances set out in the regulations under clause 6.

33. The system operator will be generally instructing the CFD counterparty to issue a generic contract on terms set out in the regulations as the result of the allocation process set out in the regulations. There are likely to be a significant number of such contracts allocated.

34. The regulations are likely to provide the Secretary of State with more discretion to individually negotiate CFDs for certain projects directly, and then direct the CFD counterparty to offer a contract on the terms he has directed. This is likely to be the case for particular projects which are outside the generic price setting process, such as CCS, nuclear, and major novel one-off projects (such as tidal barrages). In such circumstances, the Government will consider carefully whether variation to the standard terms is necessary. Therefore the content of any direction from the Secretary of State to the CFD counterparty is likely to be highly technical. The issuing of directions is a particularly administrative exercise and, as is normal, the power to direct is not subject to parliamentary control.

35. The scope of the power and the manner in which it may or must be exercised is in any case governed by the regulations under clause 6, over which Parliament has oversight through Affirmative Resolution procedure.

Clause 17: Order for maximum cost and targets

Power conferred on: *Secretary of State*
Power exercised by: *Order*
Parliamentary procedure: *Affirmative Resolution*

36. This power enables the Secretary of State to set out the maximum cost of the CFD scheme by setting a financial cap on the ability of the system operator to issue CFDs. It also provides for a power to direct the system operator not to direct the CFD counterparty to issue CFDs if the Secretary of State determines that doing so would exceed the cost cap. The Order may also set out targets to be met with respect to the number of CFDs issued. This may assist with ensuring compliance with decarbonisation and renewables targets.

37. The need to introduce a maximum cap on costs of the CFD scheme is necessary to ensure financial control over the scheme.

38. This power may also be used to allow technology specific targets to be set consistent with wider Government targets.

39. The manner of implementing a cost cap will be somewhat technical. Over time, it is highly likely that any cap will need to be changed to reflect future circumstances, and how this is to be calculated will be set out in the order.

40. The Department judges that the Affirmative Resolution procedure is appropriate as this power limits the cost of the CFD scheme and determines how the scheme is controlled to ensure Government achieves wider targets such as decarbonisation and renewables targets. We believe it is appropriate that Parliament should have a high level of control over this Order making power which sets out financial limits and targets for the scheme.

Clause 20: Licence modifications

Power conferred on:	*Secretary of State*
Power exercised by:	*Licence / code modification document*
Parliamentary procedure:	*Draft Negative Resolution*

41. This power enables the Secretary of State to amend transmission and supply licences and documents (and documents maintained in accordance with those licences (such as codes)) in order to give effect to duties and obligations, and enable flexibility to provide services to the CFD Counterparty and allowing enforcement activities in those areas that the contract does not cover.

42. The power is necessary to make amendments to the Balancing and Settlement Code (BSC) to enable the BSC company (Elexon), to assist suppliers and generators in settling payments due under CFDs. The provision is also likely to be used to make amendments to transmission licences to confer some consequential functions on the system operator necessary to allow it to direct the CFD counterparty to issue CFDs and carry out the administration of the application scheme.

43. It is necessary to have some continuing flexibility to make such changes over the course of the scheme to take account of changes to the scheme, and ensure that the settlement mechanism remains appropriate over the course of the life of CFDs.

44. Clause 53 provides that the Secretary of State may only make licence or code

modifications if they are first laid before Parliament for 40 days and neither House disapproves of the measure during that time. In calculating the 40-day period, no account is taken of periods where Parliament is dissolved or prorogued or where both Houses are adjourned for more than four days. This is broadly analogous to the draft Negative Resolution procedure used for statutory instruments. By virtue of clause 53(10), the Secretary of State must publish details of code modifications as soon as is reasonably practicable after they have been made.

45. The Department considers that this is an appropriate level of parliamentary scrutiny for the measures that could be taken using these powers. The procedure being adopted has been used in equivalent situations; see, for example, section 32 of the Energy Act 2010. The procedure allows the Secondary Legislation Scrutiny Committee to scrutinise the modifications and report them to the House if appropriate.

46. Licence and code modifications tend to be technical and complex. Owing to the nature of the documents they are amending they are not drafted in a way that makes it appropriate to include them in a statutory instrument, or for them to be scrutinised by the Joint Committee on Statutory Instruments as though they were legislation. The Committee may also wish to note that the Authority would be able to make equivalent provision with no requirement for parliamentary scrutiny.

CHAPTER 3: Capacity Market

Clause 21: Power to make electricity capacity regulations

Power conferred on:	*Secretary of State*
Power exercised by:	*Regulations*
Parliamentary procedure:	*Affirmative Resolution in the first instance, Negative Resolution for future changes*

47. This power enables the Secretary of State to make regulations for the purpose of 'providing capacity' to meet the demands of consumers for the supply electricity in Great Britain ("electricity capacity regulations"), so that security of electricity supply can be ensured. (Subsection (3) defines "providing capacity" as meaning providing electricity or reducing demand for electricity whilst subsection (3A) makes clear that reducing demand includes reducing demand by reducing consumption). As stated in subsection (4), the Secretary of State can use this power to make provision about the Capacity Market as described by clauses 22 to 30 and clause 52.

48. A significant part of the detail of the Capacity Market design requires the

Department to work closely with the national system operator, the Gas and Electricity Markets Authority (the Authority), industry and other stakeholders to ensure that the mechanism is effective and fully integrated with the complex arrangements governing the operation of the current electricity market. The Department expects to undertake a formal consultation on secondary legislation governing the Capacity Market in late 2013.

49. It is necessary to retain flexibility on the detailed rules in order to respond to changing circumstances within the electricity market, such as the emergence of new electricity generation technologies and changes in the scope for demand reduction. Such flexibility is also required to ensure that the Capacity Market can be adapted to take account of experience gained when the mechanism has been in operation. The Department therefore believes it is appropriate to set out the detail of the mechanism in secondary legislation, through regulations, capacity market rules (see clause 35) and changes to electricity licences and codes (see clause 31). The Department further considers it appropriate to enable the Secretary of State to make consequential amendment to primary legislation in order to ensure that, when the Capacity Market is implemented, it fits effectively within the existing legal framework for the electricity market.

50. The scope of this power is also further set out in clause 52, which provides that regulations made under clause 21 may also include provision to limit the system operator's liability to pay damages if a civil claim was brought against it in respect of its role, or a particular aspect of its role, of delivering the Capacity Market scheme. Such a limit on liability could extend to the acts or omissions of the national system operator's directors, employees, officers or agents, however certain categories of liability cannot be limited in this way (for example, where an act or omission is in bad faith or would be unlawful under section 6 of the Human Rights Act 1998).

51. As subsection (5) of clause 34 sets out, the first set of electricity capacity regulations made under this power is to be subject to the Affirmative Resolution procedure. The Department judges that this is appropriate due to the scale of the initial intervention in the electricity market and the potential significance of the regulations, which will set out in detail the key elements of the mechanism. However, once the Capacity Market has been implemented through the first electricity capacity regulations, the Department believes such intensive parliamentary scrutiny will become unnecessary as such changes are expected to be technical and incremental, reflecting developments within the electricity market and the Capacity Market, and are unlikely to give rise to issues of broader interest.

52. Subsection (6) therefore provides that subsequent electricity capacity regulations should be made subject to the Negative Resolution procedure (unless they amend or repeal an enactment, in which case the Affirmative Resolution procedure must be followed). We note that a similar approach has been taken in the past, including in section 43(2) and (3) of the Welfare Reform Act 2012 and section 66(1) and (2)(c) of the Tax Credits Act 2002.

Clause 22: Capacity agreements

Power conferred on:	*Secretary of State*
Power exercised by:	*Regulations*
Parliamentary procedure:	*Affirmative Resolution in the first instance, Negative Resolution for future changes*

53. This clause defines a 'capacity agreement' and contains details of the provision which the Secretary of State may make about capacity agreements in electricity capacity regulations under clause 21. It explains that the Secretary of State is able to make provision in regulations about capacity agreements as set out in subsections (4) and (5), and confirms that regulations can include provision requiring a person to consent to the inspection of plant and premises either before or after becoming a capacity provider (subsection (6)).

54. The Department believes that these provisions need to be addressed via secondary legislation to ensure that they are, and continue to be, a good fit with prevailing market conditions and as the Capacity Market evolves.

55. Subsection (3) enables electricity capacity regulations to make provision about the meaning of "electricity supplier". This power is included so that the Secretary of State may for example, if he judges it appropriate, exclude suppliers who do not hold electricity licences, or who serve only a very small number of customers from the obligation to make capacity payments to providers of capacity. The power may also be used to make provision for when a person becomes or ceases to be an electricity supplier for purposes related to the Capacity Market.

56. The matters set out in subsection (4) are matters which are essential to address in secondary legislation, so that provisions can be adjusted over time as the particular security of electricity supply requirements change and the Capacity Market evolves. For instance, in the case of the terms and duration of capacity agreements (paragraphs (a) and (e)), if circumstances were to arise where not enough new capacity came forward, it might be necessary to make changes to the terms or duration of capacity agreements to encourage greater participation in capacity auctions.

57. The Department considers it necessary for provision about capacity agreements to be made through secondary legislation in order to ensure that the provision fits with the existing electricity market (including through consultation with affected persons, as is required by clause 34(2)) and clause 35(7)) to ensure that the mechanism can respond to prevailing market conditions.

58. The Department judges that it is appropriate for the first set of electricity capacity regulations to be subject to the Affirmative Resolution procedure, and subsequent regulations to be subject to the Negative Resolution procedure, for the reasons explained under clause 21.

Clause 23: Capacity auctions

Power conferred on:	*Secretary of State*
Power exercised by:	*Regulations*
Parliamentary procedure:	*Affirmative Resolution in the first instance, Negative Resolution for future changes*

59. This clause contains details of the provision which the Secretary of State may make in relation to the determination on a competitive basis of who may be a capacity provider (referred to as a "capacity auction") in electricity capacity regulations made under clause 21. It also enables the Secretary of State to require the national system operator to run capacity auctions and to set out in regulations how auctions are to be run, the process which is to be followed and the amount of capacity required.

60. The Department's view is that flexibility is required for this provision to be addressed in secondary legislation, to allow prevailing market conditions to be taken into account in the design of the auction.

61. It is important that the Secretary of State has flexibility to set out the details of the capacity auction design in secondary legislation to ensure that it can properly reflect any technical considerations that may be raised during formal consultation. Particular considerations include how matters are to be addressed in the auction, such as the location of capacity and the type of capacity.

62. In addition to the need to be able to consult before implementing any capacity auction design choices, on-going flexibility within the auction process is needed to respond to changes in the electricity market. This could include innovation within generation or non-generation technologies. For example, demand side response (DSR) could make up a larger part of the future market as a result of technological advances or further development in the market for aggregation of DSR. There are also likely to be changes to the European market, such as the

extent of interconnection that Great Britain has with other countries, and/or the development of the rules on how interconnection is treated in national markets, which might necessitate amendment of the auction design.

63. Subsection (3) enables the Secretary of State to make provision in regulations requiring the national system operator to prepare and publish rules or guidance about capacity auctions, in accordance with any process set out in the regulations. Given the technical and logistical nature of these rules and guidance, the Department considers it is appropriate for this power to be delegated to the national system operator, provided that it complies with any process specified by the Secretary of State under subsection (3)(b).

64. The Department judges that it is appropriate for the first set of electricity capacity regulations to be subject to the Affirmative Resolution procedure, and subsequent regulations to be subject to the Negative Resolution procedure, for the reasons explained under clause 21.

Clause 24: Settlement body

Power conferred on:	*Secretary of State*
Power exercised by:	*Regulations*
Parliamentary procedure:	*Affirmative Resolution in the first instance, Negative Resolution for future changes*

65. This clause sets out that the Secretary of State is able to make provision in electricity capacity regulations under clause 21 to require electricity suppliers and capacity providers to make payments to or provide financial collateral to a settlement body for certain purposes. Provision would be made under this clause in the event that a settlement body is appointed to administer the settlement of payments and incentives in the Capacity Market, as referred to in clause 22(4)(g).

66. The Department believes that this provision needs to be addressed in secondary legislation so that affected persons can be consulted (as required by clause 34(2)) and to ensure that it is a good fit with the prevailing market conditions.

67. The Department judges that it is appropriate for the first set of electricity capacity regulations to be subject to the Affirmative Resolution procedure, and subsequent regulations to be subject to the Negative Resolution procedure, for the reasons explained under clause 21.

Clause 26: Other requirements

Power conferred on:	*Secretary of State*
Power exercised by:	*Regulations*
Parliamentary procedure:	*Affirmative Resolution in the first instance, Negative Resolution for future changes*

68. This Clause explains that the Secretary of State is able to make provision in electricity capacity regulations under clause 21 to impose other requirements in addition to those arising in relation to capacity agreements, in particular on the persons identified in subsection (2).

69. In making provision regarding the manner in which functions are carried out, the Secretary of State may require a person to follow particular processes (for example, for the national system operator to seek input from the Authority in preparing particular advice), to have regard to certain matters when exercising a function, or to comply with requirements regarding a particular format. The Department considers that this provision needs to be addressed in secondary legislation as the requirements may change with time. The need to consider certain matters, or to seek input, when preparing advice regarding the operation of the Capacity Market may also change as the market evolves. It is also essential that requirements on the holders of generating licences may be changed to reflect the evolution of other aspects of energy policy (for example, Contracts for Difference) and the Capacity Market.

70. In relation to the inspection of plant or property, this provision complements clause 22(6), by enabling the Secretary of State to require compliance with inspection requirements other than as a condition of entry into an auction. Such a requirement may be needed, for example, where a person has ceased to be a capacity provider (i.e. if they have assigned or traded their capacity agreement) in order to determine whether they complied with their obligations while they held that agreement. The Department considers it necessary to take delegated powers to achieve this, to enable the Secretary of State to consult affected persons before imposing any such inspection requirements, as well as enabling these requirements to be developed over time as the Capacity Market evolves.

71. The Department judges that it is appropriate for the first set of electricity capacity regulations to be subject to the Affirmative Resolution procedure, and subsequent regulations to be subject to the Negative Resolution procedure, for the reasons explained under clause 21.

Clause 27: Electricity capacity regulations: information and advice

Power conferred on:	*Secretary of State*
Power exercised by:	*Regulations*
Parliamentary procedure:	*Affirmative Resolution in the first instance, Negative Resolution for future changes*

72. This clause sets out that the Secretary of State is able to make provision in electricity capacity regulations made under clause 21 for the provision, publication and protection of information, in particular requirements that information be provided to the Authority, the national system operator, the Secretary of State or any other person specified in regulations.

73. The Secretary of State will need to seek advice and information for a range of purposes, for example to inform decisions on whether to begin auctioning for capacity and how much capacity to contract in the first and subsequent auctions. Such advice and information will be based on complex modelling forecasts of available capacity and electricity demand. The information required and its form may also change as better, more sophisticated modelling and data become available.

74. Certain information will also be needed by the Authority, the national system operator and/or the Secretary of State in order to effectively carry out responsibilities under the Capacity Market. In particular, the collection and sharing of information about whether capacity providers complied with requirements to provide capacity when required under their capacity agreement will be essential to the effective operation of the Capacity Market.

75. Specifying precisely what information is required for processes, such as those described above, requires complex analysis of the way in which the Capacity Market will operate alongside the electricity market, and will require detailed consultation with the Authority, the national system operator and stakeholders. It is therefore necessary for these arrangements to be put in place through regulations in order to enable full consultation before the obligations are implemented, as provided for in clause 34.

76. The Department judges that it is appropriate for the first set of electricity capacity regulations to be subject to the Affirmative Resolution procedure, and subsequent regulations to be subject to the Negative Resolution procedure, for the reasons explained under clause 21.

Clause 28: Power to make capacity market rules

Power conferred on:	*Secretary of State* (*who may, by Regulations, also confer power on the Authority)*
Power exercised by:	*Capacity market rules*
Parliamentary procedure:	*Negative Resolution in the first instance, no parliamentary procedure for future changes*

77. This power enables the Secretary of State to make capacity market rules, which may include any provision that may be made by electricity capacity regulations, with the exception of the matters described in subsection (2). These rules would be used to set out technical aspects of the Capacity Market and to regulate all participants in the Capacity Market.

78. The matters about which, by virtue of subsection (2), capacity market rules may not make provision include:
    - provision for the national system operator to run a capacity auction;
    - provision about the circumstances in which and intervals at which a capacity auction may or must be held; and about the amount of capacity for which a capacity auction is to be held;
    - provision about the appointment of a settlement body;
    - provision about the calculation, determination and administration of capacity payments and capacity incentives, and of other payments or financial collateral which persons may be required to make or provide to a settlement body;
    - provision about the meaning of the expressions referred to in clauses 21(3) and 22(3).

79. In addition, capacity market rules will not be able to amend enactments, because the power to amend enactments in clause 32 is a separate regulation-making power, not a particularisation of the power to make electricity capacity regulations.

80. Subsection (3) sets out that electricity capacity regulations made under clause 21 may confer the power on the Authority to make subsequent capacity market rules, subject to the conditions that may be specified in the regulations. By virtue of clause 28(2), this includes power to amend, add to or revoke existing capacity market rules, including those made by the Secretary of State. The Secretary of State must, if he exercises this power, impose a duty on the Authority to consult the persons specified in subsection (4) before making capacity market rules.

81. Power to make capacity market rules has been included in this Chapter, in addition to the power to make electricity capacity regulations, to facilitate a

division of responsibility between the Secretary of State and the Authority for the governance of, and future amendments to, the secondary legislation implementing the Capacity Market.

82. We consider it appropriate for the Secretary of State to retain responsibility for fundamental policy matters such as whether and when capacity auctions should be held, the amount of capacity for which capacity auctions should be held, the appointment of delivery bodies, and the financial obligations to be placed on electricity suppliers to fund capacity payments; hence provision about these matters may only be contained in electricity capacity regulations.

83. However, we consider that it is more appropriate for the Authority to be given responsibility for making future changes to provisions about other aspects of the design and operation of the Capacity Market, due to their technical and specialised nature and the need to ensure that consistency and alignment is maintained with existing electricity industry arrangements which the Authority regulates. These will include, for example, provisions about the eligibility criteria and pre-qualification process for participation in a capacity auction, the process by which a capacity auction is to be run, the circumstances in which capacity providers are required to provide electricity or reduce demand for electricity, and the interaction of these requirements with existing arrangements for balancing the electricity transmission system.

84. Accordingly, we envisage that the Secretary of State will use the powers in this clause to include provisions about the technical design and operation of the Capacity Market in capacity market rules, and will include provision in electricity capacity regulations which gives the Authority power to amend or add to those rules. In making the first capacity market rules, Secretary of State will prepare them in close collaboration with the Authority.

85. Flexibility is required to make capacity market rules so that the Capacity Market design can respond to changing circumstances in the electricity market over time, and so that the Authority can make these changes once the mechanism is in operation. Furthermore, the technical content that will need to be provided for the operation of the Capacity Market will be specialist and complex, Given their content, and the probable need to cross-refer to provisions in existing industry licences and codes which are not statutory instruments, we do not consider that it would be appropriate for capacity market rules to be made by statutory instrument.

86. As clause 35 sets out, the first set of capacity market rules to be made by the Secretary of State under this power must be laid before Parliament in draft for 40

days before being made, and is subject to a procedure broadly equivalent to the draft Negative Resolution procedure for statutory instruments. Subsequent amendments to the rules are to be laid before Parliament but not to be subject to any parliamentary procedure. The Department judges this distinction to be appropriate due to the scale of the initial intervention in the electricity market and the potential significance of the rules, which will set out the technical detail of the mechanism. However, given that subsequent amendments to the rules will be incremental and technical and, given that the scope of the rules is limited by the exclusion of the matters set out in subsection (2), the Department believes parliamentary scrutiny is not appropriate as these are unlikely to give rise to any issues of broader interest.

Clause 29: Provision about electricity demand reduction

Power conferred on:	*Secretary of State*
Power exercised by:	*Regulations (made under the power in clause 21)*
Parliamentary procedure:	*As for the power in clause 21, Affirmative Resolution in the first instance, Negative Resolution for future changes*

87. The power in clause 29 applies when, by virtue of the power in clause 21, the Secretary of State makes provision in electricity capacity regulations which relate to providing capacity by reducing the demand for electricity. Where the power in clause 29 applies, the Secretary of State can, by regulations, confer functions on a person or body other than the national system operator.

88. Clause 25 enables the Secretary of State to confer functions on the national system operator (and the Authority) when making electricity capacity regulations. In the specific case where the electricity capacity regulations make provision relating to reducing demand for electricity (as opposed to providing capacity by providing electricity), it may be desirable to appoint a person or body other than the national system operator to administer or deliver functions relating to the regime being implemented to reduce electricity demand. For example, it may prove to be more cost-effective to appoint a person or body other than the national system operator to perform functions relating to the regime being implemented to reduce electricity demand. Alternatively a person or body other than the national system operator may prove to have the necessary skills or experience required to effectively deliver the regime.

89. Until the final design of a regime for electricity demand reduction is finalised it is not possible to know who should administer or deliver functions relating to that regime. Accordingly, it is necessary for the Secretary of State to have the flexibility which this clause provides to appoint a person or body other than the national system

operator in due course and confer functions on that person or body in the electricity capacity regulations made under clause 21.

90. Since the power in this clause will be exercised as part of exercising the power in clause 21 Parliament will have an opportunity to scrutinise the exercise of the power in this clause in accordance with the procedure which is applicable under that clause.

Clause 30: Enforcement and dispute resolution

Power conferred on:	*Secretary of State*
Power exercised by:	*Regulations and capacity market rules*
Parliamentary procedure:	*Affirmative Resolution in the first instance, Negative Resolution for future changes (for regulations); Negative Resolution in the first instance; None for future changes (for capacity market rules)*

91. This power enables the Secretary of State to make provision in electricity capacity regulations under clause 21, and in capacity market rules, about enforcement of any obligation or requirement imposed by the regulations or the rules. The Secretary of State may also make provision for functions to be conferred on any public body or other person in respect of the enforcement of the rules of the Capacity Market, including imposing financial penalties and making provision for appeals and dispute resolution.

92. The electricity market currently provides for various different enforcement, dispute resolution and appeal mechanisms, depending on the particular nature of the obligation. The Electricity Act 1989 enables the Authority to impose enforcement orders and fines on licence holders and certain other persons, and to act as a dispute resolution body in certain cases. Formal and informal dispute resolution processes are set out in industry codes, including in some instances provision for reference to arbitration. Given the need to ensure that the Capacity Market operates effectively in this context, detailed consultation is important before provision is made as to these matters.

93. The Secretary of State needs the flexibility to set out appeal and dispute resolution procedures in regulations, and in capacity market rules as decisions about the most appropriate procedures are dependent on decisions yet to be taken as to the detailed design of the Capacity Market. In addition, flexibility is needed to ensure that these arrangements can be amended over time to account for experience gained in running the Capacity Market.

94. The Department judges that it is appropriate for the first set of electricity capacity regulations to be subject to the Affirmative Resolution procedure, and subsequent regulations to be subject to the Negative Resolution procedure, for the reasons explained under clause 21. For provisions made in capacity market rules, the Department considers that it is appropriate for the first set of rules made by the Secretary of State to be subject to the Negative Resolution procedure, with subsequent amendments to the rules not to be subject to any parliamentary procedure, for the reasons explained in clause 28.

Clause 31: Licence modifications for the purpose of the capacity market

Power conferred on:	*Secretary of State*
Power exercised by:	*Licences*
Parliamentary procedure:	*Negative Resolution*

95. This power enables the Secretary of State to modify the conditions of generation, supply, transmission, distribution and interconnector licences granted under the Electricity Act 1989, and industry codes and agreements which are maintained under those licences. They can also make provision for a new industry code to be created and maintained, if necessary. The power may only be used for a purpose related to provision that may be made by or under the Chapter.

96. Licences granted under the Electricity Act 1989 and codes form a core part of the existing arrangements governing the electricity market in Great Britain. The Department anticipates that various amendments will be required to licences and codes in order to effectively address the complexity of full integration of the Capacity Market with existing electricity market arrangements. The Department may also judge that it is more appropriate to include provisions in a code, rather than electricity capacity regulations, if they are to correspond with or be aligned with provisions in an existing industry code such as the Balancing and Settlement Code. This might be the case, for example, in relation to provisions about the application of existing arrangements for balancing the electricity transmission system to persons holding a capacity agreement.

97. Clause 53 provides that the Secretary of State may only make licence or code modifications if they are first laid before Parliament for 40 days and neither House disapproves of the measure during that time. In calculating the 40-day period, no account is taken of periods where Parliament is dissolved or prorogued or where both Houses are adjourned for more than four days. This is broadly analogous to the draft Negative procedure used for statutory instruments. By virtue of clause 5310), the Secretary of State must publish details of code modifications as soon as is reasonably practicable after they have been made.

98. The Department considers that this is an appropriate level of parliamentary scrutiny for the measures that could be taken using these powers. The procedure being adopted has been used in equivalent situations; see, for example, section 32 of the Energy Act 2010.

99. Licence and code modifications tend to be technical and complex. Owing to the nature of the documents they are amending, they are not drafted in a way that makes it appropriate to include them in a statutory instrument, or for them to be scrutinised by the Joint Committee on Statutory Instruments as though they were legislation. The Committee may also wish to note that the Authority would be able to make licence modifications under section 11A of the Electricity Act 1989 with no requirement for parliamentary scrutiny.

Clause 32: Amendment of enactments

Power conferred on:	*Secretary of State*
Power exercised by:	*Regulations*
Parliamentary procedure:	*Affirmative Resolution*

100. This power allows the Secretary of State to amend or repeal section 47ZA of the Electricity Act 1989 regarding the annual report by the Authority on security of electricity supply; amend section 172 of the Energy Act 2004 regarding the Secretary of State's annual report on security of energy supplies; amend section 25 of, and Schedule 6A to, the Electricity Act 1989 regarding enforcement of obligations of regulated persons; and to make consequential amendments (or repeals or revocations) to any other enactment as the Secretary of State considers appropriate, as part of making provisions for the Capacity Market.

101. In relation to paragraphs (a) and (b) of this clause, the current reporting requirements of the 1989 Act and Energy Act 2004 require that the Authority provide a report to the Secretary of State on the capacity required for electricity security of supply. It is likely that the Authority's statutory reporting requirements and the annual report will not continue to be fit for purpose as the Capacity Market is implemented and evolves. Therefore the provisions in (a) and (b) would be used to amend the Acts to avoid duplication and contradiction.

102. Paragraph (c) allows for the amendment of the 1989 Act to ensure that certain obligations of participants in the Capacity Market can be enforced by the Authority under the civil enforcement regime set out in the 1989 Act. We anticipate that Schedule 6A of the 1989 Act will need to be amended so that the persons subject to the enforcement regime are listed in here, referencing the

particular obligations they are subject to. For example, providers of demand side response are not subject to the current civil enforcement regime and so are not currently mentioned in section 25 or Schedule 6A of the 1989 Act.

103. These amendments could not be set out in primary legislation before the Secretary of State makes electricity capacity regulations setting out the obligations of Capacity Market participants. Consequently it is appropriate for a delegated power to be given to the Secretary of State to use regulations to make any necessary amendments to the existing legislation for effective implementation of the Capacity Market.

104. This is a Henry VIII power and we therefore consider that the Affirmative Resolution procedure is justified. We consider that the power is sufficiently limited in scope that a strengthened scrutiny procedure is not necessary.

CHAPTER 4 AND SCHEDULE 2: Investment Contracts

Schedule 2 Paragraph 5: Investment contract counterparty

Power conferred on:	*Secretary of State*
Power exercised by:	*Order*
Parliamentary procedure:	*None*

105. Paragraph 5 contains a power to designate, by order made by statutory instrument, two categories of person, as a counterparty for investment contracts. These are either a company under the Companies Act 2006 or a public authority – see paragraph 5(2)(a) and (b). Where a person has been designated as an investment contract counterparty, then the Secretary of State may make a transfer scheme transferring rights and liabilities under an investment contract to them (see paragraph 16) and regulation-making powers in this Schedule are exercisable in relation to them (see, for example, paragraph 14).

106. It is considered appropriate to take a power to designate a counterparty to provide for flexibility rather than specify the counterparty on the face of the Bill. For example, an order-making power ensures that an appropriate body can be chosen to be the counterparty, in the event that it is necessary to make a transfer scheme under paragraph 16, and to do this taking on board knowledge of how investment contracts have operated in previous years.

107. The appointment of an investment contract counterparty is, in the Department's view, a largely administrative exercise. In addition, designation can only take place with the consent of the party in question and the party can withdraw their consent to being designated on notice (see paragraph 5(3) and (5)(b)).

108. Consequently, the Department judges that it is appropriate to appoint this counterparty by order without parliamentary procedure – though given an order is made by SI, it will be published. See also the precedents referred to in paragraph 12 above for the power by order to designate a CFD counterparty under clause 7.

Schedule 2 Paragraph 6: Regulations for the purposes of investment contracts

Power conferred on:	*Secretary of State*
Power exercised by:	*Regulations*
Parliamentary procedure:	*Negative Resolution unless containing provisions under paragraph 7 or 8, in which case Affirmative Resolution*

109. This paragraph provides a regulation-making power for the Secretary of State to make further provision about or in connection with investment contracts. These powers are then particularised in paragraphs 7 through to 12, in paragraph 14(2), 16(2) and in the definition of "electricity supplier" in paragraph 4(1) (see paragraph 6(2) of the Schedule).

110. Explanations for most of these particularised powers are provided separately in this document. However, it is worth noting that paragraph 16(2), which is not dealt with separately, expressly provides for regulations to make provision for an investment contract to be treated as a CFD for the purposes of provision made by or by virtue of Chapter 2, if the rights and liabilities under the contract are transferred to a CFD counterparty through a scheme made under paragraph 16. The underlying purpose of the power is to ensure that there can be a unified/common regime for how CFDs and investment contracts are treated where a CFD counterparty body is a contracting party to both. The Department considers that it is appropriate to leave such provision to delegated legislation because what it will say will largely be dependent on what other provision is made in other delegated legislation – namely such legislation made under Part 2. In addition, it considers that the Negative Resolution procedure is appropriate because the power is only likely to be used to apply provision that either already has Parliamentary approval or to apply provision in regulations that have been subjected to the Negative Resolution procedure.

111. Paragraph 6 expressly provides for regulation-making powers to make different provision for different cases etc., and powers to make incidental, supplementary, consequential or transitional etc. provision – which we consider normal drafting practice in order to provide for certainty about the range of regulation-making powers (see, for example, section 104 of the Energy Act 2008).

112. The regulations are to be made by statutory instrument, and will be subject to the Negative Resolution procedure involving both Houses unless they contain provision made under paragraph 7 or paragraph 8 (see below), in which case they will be subject to the Affirmative Resolution procedure (see sub-paragraphs (4) to (6)).

113. The Department considers that it is appropriate for the Secretary of State to have the powers in paragraph 6 to make delegated legislation in connection with investment contracts because they provide for flexibility in connection with the administration or running of such contracts – which will be a new phenomenon and which may last for 15 or more years. Therefore, lessons which may be learned over time about the operation of these contracts could be appropriately incorporated into legislation, which may be quite technical and detailed, without the need to obtain a further Act of Parliament.

114. In addition, the Department considers that generally the Negative Resolution procedure is appropriate for regulations made under paragraph 6. This is, firstly, because the powers here are largely confined to a narrow class of contracts (investment contracts), which must have been entered into before a certain date (31st December 2015 or if earlier, the date on which regulations under clause 10(3) come into force) and which must have been laid in Parliament together with a statement by the Secretary of State covering certain significant matters such as the likely costs to consumers and ensuring security of supply of electricity in the UK (on those matters see clause 5 and paragraph 1(6) of Schedule 2). Secondly, the powers are not, by and large, expressed to cover matters where one would expect the Affirmative Resolution procedure (such as a Henry VIII power or a power to raise a levy). Indeed, where the powers are amplified in other paragraphs in the Schedule, in those appropriate cases the Affirmative Resolution procedure is applied.

115. Finally, it is worth noting that paragraph 13 imposes obligations on the Secretary of State to consult before making regulations. Not only will the Secretary of State be required by the Bill here to consult the three devolved administrations but also those most likely to be directly affected by regulations. Therefore, there is an important procedural constraint imposed on the exercise of the regulation-making powers in Schedule 2. A statutory duty to consult requires that an opportunity is given to make representation within a reasonable time and for any received to be conscientiously taken into account when finalising proposals.

Schedule 2 Paragraph 7: Supplier obligation

Power conferred on: *Secretary of State*
Power exercised by: *Regulations*
Parliamentary procedure: *Affirmative Resolution*

116. This paragraph expressly provides the power for the Secretary of State to make regulations placing obligations on electricity suppliers to make payments to the Secretary of State for various purposes. In addition, it obliges the Secretary of State to make Regulations placing obligations on electricity suppliers to make payments to an investment contract counterparty, or a CFD counterparty for various purposes. These purposes include enabling the Secretary of State or an investment contract or CFD counterparty to make payments under investment contracts, to meet other costs that the Secretary of State considers appropriate, to hold sums in reserve, and to cover losses in the case of insolvency of an electricity supplier. Regulations may also require suppliers to post collateral against future payments (see paragraph 7(4)).

117. Regulations may also include provisions setting out how the Secretary of State must calculate the amounts owed to the Secretary of State, investment contract or CFD counterparty by suppliers, enabling the Secretary of State to issue notices requiring the payment of such amounts, and about the enforcement and settlement of disputes relating to notices requiring payment. Regulations which impose a duty on electricity suppliers for the payment of sums must also impose a duty on the person to whom such sums are to be paid in relation to the collection of such sums.

118. The Department judges that it is appropriate that these powers be delegated to the Secretary of State, as the detailed technical and administrative nature of the provisions makes it inappropriate for them to be included in primary legislation. Furthermore, the powers are limited in scope to cover matters connected with investment contracts. Additionally, before making regulations under this power, the Secretary of State must consult electricity suppliers amongst other parties (see paragraph 13(2)), ensuring that the persons most directly affected by the regulations will have the opportunity to express their views on their design. Precedents for obligations to be imposed on suppliers for payments or other financial requirements through secondary legislation are contained in section 9 of the Energy Act 2010 and in section 33 of the Electricity Act 1989 (as originally enacted).

119. Since the exercise of these powers involve requiring payments from electricity suppliers or imposing other financial obligations, the Department judges that it is appropriate that they should be subject to the Affirmative Resolution procedure to

ensure Parliament has the opportunity for detailed scrutiny and approval before regulations are made.

Schedule 2 Paragraph 8: Payments to electricity suppliers

Power conferred on:	*Secretary of State*
Power exercised by:	*Regulations*
Parliamentary procedure:	*Affirmative Resolution*

120. This paragraph expressly enables the Secretary of State to make regulations about the amounts which must be paid by the Secretary of State, an investment contract counterparty or a CFD counterparty to electricity suppliers out of sums received under an investment contract.

121. Investment contracts will specify that the parties to the contract must make payments to each other based on the difference between a strike price and a market reference price (see paragraph 1(1)(c)), with payments being made by the Secretary of State or a counterparty to the generator if the strike price is higher than the reference price, and vice versa if it is lower. Regulations made under this paragraph would make it possible to ensure that when the reference price was higher than the strike price for a contract, the Secretary of State or counterparty must pass payments received from the generator on to electricity suppliers, where suppliers fund payments under an investment contract by virtue of regulations under paragraph 7.

122. The Department judges that it is appropriate that this power be delegated to the Secretary of State, as the detailed technical and administrative nature of the provisions makes it inappropriate for them to be included in primary legislation. Moreover, it is intended only to make regulations here where regulations are made under paragraphs 7(1) and 7(2) – i.e. in circumstances where suppliers fund an investment contract and should, therefore, benefit where the reference price is higher than the strike price.

123. The Department judges that it is appropriate that regulations made under paragraph 8 should be subject to the Affirmative Resolution procedure. This is to ensure that Parliament has opportunity for detailed scrutiny and to approve any regulations before they are made

Schedule 2 Paragraph 9: Application of sums

Power conferred on: *Secretary of State*
Power exercised by: *Regulations*
Parliamentary procedure: *Negative Resolution*

124. The regulation-making powers in paragraph 9(1) and (2) are concerned with the apportionment of monies received in connection with investment contracts or CFDs in circumstances where the Secretary of State, investment contract counterparty or CFD counterparty is unable to meet all the obligations under an investment contract or CFD in full – such as in the case of where a supplier fails to meet its obligations under regulations made under paragraphs 7(1) and 7(2). For example, regulations made under this paragraph may specify how sums collected through the supplier obligation should be apportioned between investment contracts and CFDs in such circumstances.

125. Paragraph 9(3) and (4) provide that regulations may also make provision about the use of sums held by the Secretary of State or a counterparty, and in particular whether they should or should not be paid into the Consolidated Fund. For example, a surplus might be required to be spent on administration in a forthcoming year or instead paid into the Consolidated Fund.

126. The Department judges that it is appropriate that this power be delegated to the Secretary of State. Any provision in regulations is likely to be very detailed and technical in nature, with a relatively narrow purpose. Additionally, before making regulations under this power, the Secretary of State must consult electricity suppliers and any electricity generator who is party to an investment contract (see paragraph 13(3)), ensuring that the persons most directly affected by the regulations will have the opportunity to express their views and have these taken into account before regulations here are made. The Department also considers that the Negative Resolution procedure is appropriate, since the regulations should deal with the application of sums raised through a supplier obligation, which will need to be made through regulations subject to the Affirmative Resolution procedure and therefore be subject to significant Parliamentary scrutiny.

Schedule 2 Paragraph 10: Information and advice

Power conferred on: *Secretary of State*
Power exercised by: *Regulations*
Parliamentary procedure: *Negative Resolution*

127. This paragraph sets out detailed powers to make regulations about the provision and publication of information, including the giving of advice. For example,

regulations may require an investment contract counterparty, a CFD counterparty, the Gas and Electricity Markets Authority, or the Northern Ireland Authority for Utility Regulation to provide information or advice to the Secretary of State (or, any another person as specified in regulations), or require electricity suppliers to provide information to the Secretary of State or an investment contract or CFD counterparty. Regulations may also make provision to protect against the disclosure of confidential or sensitive information, and for the enforcement of any of requirements imposed under regulations here.

128. One of the purposes behind these powers is to facilitate the Secretary of State and a counterparty body having access to adequate information so that the former can monitor investment contracts or manage and administer them where he remains a party and the latter can properly manage and administer them (where contracts are transferred to them). For example, the Secretary of State could require a counterparty to provide information relating to the payments received and made under investment contracts, to enable the Secretary of State to assess their continuing impact on consumers and to take that information into account when making decisions about the regime for CFDs under Chapter 2 of the Bill.

129. It is considered that details about the provision of information and advice would be most appropriately dealt with in secondary legislation. As the Secretary of State must consult any person upon whom a requirement is imposed by regulations under paragraph 10(2) before making regulations (see paragraph 13(7)), and in view of the administrative nature of the potential provisions, the Negative Resolution procedure is considered to be sufficient. There are precedents for this approach in for example, section 73(5) of the Care Standards Act 2000 (see also section 118(3) of that Act) or section 14(3) of the Teaching and Higher Education Act 1998 (see also section 42(2) of that Act) or section 190 of the Pensions Act 2004 (see also section 316 of that Act).

Schedule 2 Paragraph 11: Investment contracts: functions of the Authority

Power conferred on:	*Secretary of State*
Power exercised by:	*Regulations*
Parliamentary procedure:	*Negative Resolution*

130. This paragraph enables functions to be conferred, by regulations, on the Gas and Electricity Markets Authority (see the definition of “Authority” in clause 131(1)) for the purpose of offering advice to, or making determinations on behalf of, a party to an investment contract. As a statutory body, the Authority can only have the functions that have been expressly or impliedly conferred on it by legislation. Therefore, this provision is primarily intended to be facilitative, to enable the

Authority to be empowered to offer services to the Secretary of State, an investment contract or CFD counterparty (as parties to an investment contract), or a generator which is a party to an investment contract. For example services may relate to monitoring eligibility of generation stations or auditing metering dates for the purpose of assessing when conditions within investment contracts have been met and payments should start flowing.

131. The flexibility provided by regulations is considered suitable here because it would permit any powers to be amended or supplemented from time to time, as experience of administering investments contracts grows with the views of interested parties being taken on board. In addition, the conferring of functions here may need to relate to the terms of certain investments contracts and therefore, could be quite technical or detailed.

132. The exercise of these powers would not directly impact any person other than the Authority. In addition, before making any regulations here, the Secretary of State will be under a statutory obligation to consult the Authority (see paragraph 13(4)). Therefore, the Negative Resolution procedure is considered appropriate by the Department.

Schedule 2 Paragraph 12: Enforcement

Power conferred on:	*Secretary of State*
Power exercised by:	*Regulations*
Parliamentary procedure:	*Negative Resolution*

133. This paragraph expressly enables the Secretary of State to make regulations providing for obligations under regulations under Schedule 2 to be enforceable by either the Gas and Electricity Markets Authority, or by the Northern Ireland Authority for Utility Regulations, as if they were relevant requirements on a regulated person under either section 25 of Electricity Act 1989 or Article 41A of the Energy (Northern Ireland) Order 2003, respectively. The legislation mentioned here permits the authorities in question to make orders (subject to procedural safeguards – see, for example, sections 26 and 27 of the 1989 Act) for the purposes of securing compliance with “relevant requirements” or to impose penalties (again subject to certain procedural safeguards, see for example, section 27A of the same Act) where “relevant requirements” are breached.

134. Before making any regulations here, the Secretary of State will be under a statutory obligation to consult the Authority and the Northern Ireland Authority, and electricity suppliers (see paragraph 13(4),(5), and (6)). The main purpose for which these regulation-making powers are likely to be used is for the purposes of

enforcing requirements under regulations which are imposed on licensed electricity suppliers.

135. It is considered appropriate that such provision should be contained in subordinate legislation because it will relate to the enforcement of obligations contained in subordinate legislation but which in each and every case it may not be appropriate to treat as "relevant requirements". In other words, a regulation-making power enables an appropriate choice to be made in each case.

136. The Negative Resolution procedure is considered appropriate by the Department because the power extends to applying pre-existing legislation for a defined purpose. In other words, the powers are not at large about the methods of enforcement to be used nor about how to go about enforcement.

Schedule 2 Paragraph 14: Duties of an investment contract counterparty and a CFD counterparty

Power conferred on:	*Secretary of State*
Power exercised by:	*Regulations*
Parliamentary procedure:	*Negative Resolution*

137. This paragraph expressly provides regulation-making powers to make provision imposing controls on an investment contract counterparty or a CFD counterparty – to make provision governing the behaviour of such in connection with investment contracts. For example, provision may require the body to enter into arrangements connected with investment contracts (such as contracting with a third party to provide a settlement service), may specify things that the body may or must do or not do, or may confer further powers on the Secretary of State to direct a counterparty (which because of paragraph 14(1)(a) the body would be obliged to comply with).

138. The principal purpose behind this power is to enable the Secretary of State to ensure that the counterparty acts appropriately and in the public interest, specifically in the interests of consumers with regards to investment contracts. For example, regulations could require that where a generator that is party to an investment contract approaches a counterparty with a request to vary a term of the contract, the consent of the Secretary of State must be obtained before agreeing to any variation – see, for example, paragraph 14(3)(b). Or instead, if legal proceedings are commenced against a counterparty in connection with an investment contract, a requirement could be imposed that the Secretary of State must be consulted on how the body conducts its defence (see paragraph 14(3)(c)).

139. It is in the Department's view appropriate that these provisions be made in secondary legislation, given their potentially detailed and technical nature. Moreover, flexibility is needed to ensure that the arrangements under which the Secretary of State exercises control can be amended over time to account for experience gained in overseeing investment contracts. Investment contracts will be long term, potentially running for 15 or many more years, and a power enables controls to be fine-tuned or downgraded to be made less burdensome.

140. It should also be added that the Department considers that the Negative Resolution procedure is appropriate. An investment contract counterparty or CFD counterparty is the only category of person that will be directly affected by regulations under this paragraph and its continued existence as such a body (and therefore, potentially subject to the controls here) is a matter within its control since it can withdraw its consent to be designated as such.

Schedule 2 Paragraphs 16–18: Transfers

Power conferred on: *Secretary of State*
Power exercised by: *Scheme*
Parliamentary procedure: *None*

141. Paragraphs 16 to 18 provide powers to the Secretary of State to make transfer schemes to transfer property, rights or liabilities to and from various parties (which are supplemented in clause 132) and introduce a duty on the Secretary of State to transfer investment contracts to the CFD counterparty once certain conditions are met.

142. Paragraph 16 provides the principal power to transfer property, rights and liabilities:
    i. from the Secretary of State to a person designated as an investment contract counterparty or a CFD counterparty;
    ii. from an investment contract counterparty to a CFD counterparty; or
    iii. from a person who has ceased to be an investment contract counterparty to another designated as such.

143. Paragraph 16 also introduces a duty on the Secretary of State to transfer investment contracts from the Secretary of State or an investment contract counterparty to the CFD counterparty (unless he considers it appropriate in all the circumstances of the case not to do so) once the following three conditions are satisfied:
    i. The Bill provisions relating to investment contract have expired (31 December 2013);
    ii. The CFD counterparty has been designated; and

iii. Supplier Obligation Regulations under clause 9(1) are in effect.

144. Paragraphs 17 and 18 particularise the power in paragraph 16 – so that, for example, under paragraph 17(1)(c) provision might be made substituting a transferee as a party to legal proceedings or a scheme can provide for compensation to be paid.

145. Investment contracts are transitional measures intended to provide confidence to investors / developers ahead of full implementation of CFD regime under Chapter 2. To provide this confidence, it is necessary for the Secretary of State to be able to enter into investment contracts and administer the contracts if necessary.. These provisions enable the Secretary of State to transfer all rights and obligations under investment contracts that he has entered into, to a person designated as a CFD counterparty under the powers in clause 7. To cover a situation where a CFD counterparty has not been established, the provisions also enable the Secretary of State to transfer all rights and obligations under investment contracts to a person designated as an investment contract counterparty under paragraph 5(1) of this Schedule, and to transfer the rights and obligations from a person who has ceased to be an investment contract counterparty to another designated as such.

146. The Department considers that is it appropriate to take delegated powers to make transfer schemes for a variety of reasons. Firstly, the contents of any transfer scheme will need to be tailored to the facts at the time (for example, in relation to the terms of the specific investment contract and what the continuing rights and liabilities are under it) and are likely to be very detailed and technical in nature. Secondly, whilst the making of a scheme is not made explicitly subject to a requirement, to get the consent of the transferee (an investment contract counterparty or CFD counterparty), a person cannot be designated as a counterparty without their consent (which could, therefore, be given around the time a scheme is made if a new counterparty is required) and a counterparty, if dissatisfied with the proposed terms of a transfer scheme, would be entitled to withdraw their consent to be a counterparty – effectively giving a counterparty a veto over a scheme affecting them. Finally, under some circumstances (for example if a counterparty withdrew their consent to be designated as a counterparty), a transfer scheme might be required to be put in place very quickly and certainly sooner that the time it would be likely to take to enact additional primary legislation.

147. As is usual, the power to make transfer schemes is not subject to any Parliamentary procedure – see, for example, section 8 of the Academies Act 2010 or section 106 of the Local Government Act 2003 or section 39 of the

Marine and Coastal Access Act 2009. Transfer schemes are technical and often contain detail that is commercially sensitive, confidential or which are personal data. It is therefore usually inappropriate for transfer schemes to be published and laid before Parliament and scrutinised.

Schedule 2 Paragraph 19: Licence modifications

Power conferred on:	*Secretary of State*
Power exercised by:	*Licence / code modification document*
Parliamentary procedure:	*Draft Negative Resolution*

148. The powers under paragraph 19 enable the Secretary of State to amend electricity generation, transmission and distribution licences, the standard conditions of such licences and documents maintained in accordance with these licences (see sub-paragraph (1)(a) to (c)). The powers are similar to those in clause 20 of the Bill but the purposes for which the power are exercisable are narrower – in the current case limited to allowing or requiring services to be provided to the Secretary of State, an investment contract counterparty or a CFD counterparty, or for the purpose of enforcing obligations under an investment contract.

149. The nature of the licence modification power is detailed in further in clause 48(8) and (9) – which, for example, permit modifications to be very specific (for example, relating to particular licences or to differ between licences) or more general in their application or to allow for transitional, incidental etc provision to be made. Specifically, the powers are expressed (see subsection (9)(c)) to extend to do any of the things authorised by section 7(2A), (3) and (4) of the Electricity Act 1989. (These subsections relate to requiring or restricting licence holders from doing things they are authorised to do under licences, requiring them to comply with directions or obtaining consent before doing or not doing things or getting prior approval, and incorporating contracts or other documents into licences).

150. The powers may be used, for example, to make amendments to the Balancing and Settlement Code (BSC) to enable the BSC company to assist suppliers and generators in settling payments due under investment contracts.

151. Amendments have the potential to be very detailed and technical in nature and would relate to documents issued under powers in primary legislation (section 6 of the Electricity Act 1989) and therefore, it is thought appropriate to leave any necessary amendments to subordinate legislation (rather than amending them directly by the Bill).

152. Clause 53 provides that the Secretary of State may only make licence (or other permitted) modifications if they are first laid before Parliament in draft and if during the 40 days starting on the day they are laid, neither House of Parliament disapproves them. In calculating the 40-day period, no account is taken of periods where Parliament is dissolved or prorogued or where both Houses are adjourned for more than four days. This is broadly analogous to the draft Negative procedure used for statutory instruments. By virtue of clause 44(10), the Secretary of State must publish details of code modifications as soon as is reasonably practicable after they have been made.

153. The Department considers that clause 53 provides for an appropriate level of parliamentary scrutiny for the measures that could be taken using the powers in paragraph 19. The procedure being adopted has been used in equivalent situations; see, for example, section 32 of the Energy Act 2010. The procedure allows the Secondary Legislation Scrutiny Committee to scrutinise the modifications and report them to the House if appropriate.

CHAPTER 5: Conflict of Interest and Contingency Arrangements

Clause 39: Modifications of transmission and other licences: business separation

Power conferred on:	*Secretary of State*
Power exercised by:	*Licence / code modification document*
Parliamentary procedure:	*Draft Negative Resolution*

154. This power allows the Secretary of State to modify the conditions of electricity licences and codes for the purposes of imposing business separation measures between:
    i. the system operator's EMR delivery and system operation functions (or any combination of these); and
    ii. any other functions.

155. The power can only be exercised where the business separation measures are necessary or desirable as a result of the conferral of new EMR delivery functions (relating to the CFD, capacity market and investment contracts) on the national system operator.

156. Subsection (6) gives a non-exhaustive list of the types of business separation measures which the power could be exercised to impose. These include, for example, requiring functions to be carried out in a separate location, or on separate IT systems, or requiring information barriers to be put in place. This

power may also be exercised to impose a requirement for certain functions to be carried out by a wholly separate body corporate, however this sort of measure may only be used to ring-fence the national system operator's EMR delivery functions (not its system operation or other functions) in a wholly separate company. The power is therefore clearly prescribed in the primary legislation.

157. The Department has been working jointly with Ofgem to assess the scale and extent of potential conflicts of interest, and launched a public consultation on the issue alongside the Bill, which closed in January 2013. The response , being prepared jointly by Ofgem and the Department, and published on Monday 22nd April in advance of Commons Report stage, sets out the approach that the Department will take to tackle at potential conflicts of interest. The measures will provide protection against potential conflicts of interest while ensuring that key synergies between National Grid's new EMR role and its existing role are retained. However we will need to keep these measures under review should new conflicts emerge and - so we consider that the flexibility to impose targeted measures in the future, if deemed necessary, justifies the delegation of these powers.

158. It is also important that any business separation measures are tailored to the particular circumstances that exist when a conflict of interest comes to light. The need for an exercise of discretion, tailored to the facts at the time, means that the Department considers that the Secretary of State should be given a power to determine the most appropriate way to deal with a conflict of interest if it should arise.

159. It may also be the case that, in any one of the situations described in the power, the Department will wish to take action more quickly than the usual timetable for primary legislation would allow. The potential need for a quick response also suggests that a delegated power is appropriate.

160. The Department will also carry out consultation before imposing business separation measures. Subsection (8) requires the Secretary of State to consult the holders of licences being modified, Ofgem and any other persons that the Secretary of State considers appropriate before making any modifications.

161. In addition, no codes or related agreements are currently contained in legislation, and it would be extremely unusual for modifications to them to be included in an Act of Parliament.

162. In contrast to the provision made in the draft Energy Bill published in May 2011, the Department has added provision for Parliamentary scrutiny of modifications

made using this delegated power.

163. Clause 53 provides that the Secretary of State may only make licence or code modifications if they are first laid before Parliament for 40 days and neither House disapproves of the measure during that time. In calculating the 40-day period, no account is taken of periods where Parliament is dissolved or prorogued or where both Houses are adjourned for more than four days. This is broadly analogous to the draft Negative procedure used for statutory instruments. By virtue of clause 53(10), the Secretary of State must publish details of code modifications as soon as is reasonably practicable after they have been made.

164. The Department considers that this is an appropriate level of parliamentary scrutiny for the measures that could be taken using these powers. The procedure being adopted has been used in equivalent situations; see, for example, section 32 of the Energy Act 2010. The procedure allows the Secondary Legislation Scrutiny Committee to scrutinise the modifications and report them to the House if appropriate.

165. Licence and code modifications tend to be technical and complex. Owing to the nature of the documents they are amending they are not drafted in a way that makes it appropriate to include them in a statutory instrument or for them to be scrutinised by the Joint Committee on Statutory Instruments as though they were legislation. The Committee may also wish to note that the Authority would be able to make equivalent provision with no requirement for parliamentary scrutiny.

Clause 40: Power to transfer EMR functions

Power conferred on:	*Secretary of State*
Power exercised by:	*Order*
Parliamentary procedure:	*Negative Resolution*

and,

Schedule 3: Orders under section 30: transfer schemes

Power conferred on:	*Secretary of State*
Power exercised by:	*Transfer Scheme*
Parliamentary procedure:	*None*

166. This power enables the Secretary of State to transfer the EMR delivery functions from the national system operator to a different delivery body. The power is exercisable by Order subject to the Negative Resolution procedure (see clause 41(6) and (7)). Clause 41 supplements the power, particularly by including a power to introduce a fee charging regime in certain situations.

167. The Department considers that the system operator is particularly well-suited to carry out the role of delivery body for the CFD and Capacity Market schemes. However, it is possible that circumstances may change, and the Department

considers it prudent to be able to confer the EMR delivery functions on a different delivery body if necessary, in order to ensure that the EMR schemes are successful.

168. This power therefore enables the Secretary of State to transfer the functions to another, consenting, delivery body. The functions may be transferred to the Secretary of State or to any other public or private sector body the Secretary of State considers appropriate. In order to give practical effect to the transfer of the functions, Schedule 3 confers on the Secretary of State a power to transfer property, rights and liabilities in connection with a transfer of the functions.

169. The power may only be exercised in five situations:
    i. upon a request from the system operator for the EMR delivery functions to be removed;
    ii. where an energy administration order is in force under the special administration regime for network companies in the Energy Act 2004;
    iii. where there has been a change of control of the system operator and, as a consequence, the Secretary of State considers that it is necessary or desirable to transfer the functions;
    iv. where the Secretary of State considers that the system operator is failing to perform its EMR delivery functions effectively and efficiently, but only after giving the national system operator an opportunity to improve its performance; and
    v. where the Secretary of State considers that it is necessary or desirable to transfer the functions in order to further the purposes of the EMR schemes (for the CFD, the purpose of encouraging low carbon investment; for the capacity market, the purpose of providing capacity to meet the demands of electricity consumers).

170. Where the Secretary of State has exercised the power to transfer the EMR delivery functions to an alternative delivery body, subsection (7) of this clause contains a further power which allows the Secretary of State to make a further order to transfer these functions either to another alternative delivery body or back to the system operator (in both cases with the consent of the transferee).

171. The powers also enable the Secretary of State to make consequential amendments to legislation. It is envisaged that these would be used to amend the provisions in Chapters 2 and 3 (and Schedule 2) of the resulting Energy Act, and any subordinate legislation made using the enabling powers conferred by those sections; it is not obvious that any other enactments would need to be amended as a result of a decision to transfer the EMR delivery functions to a different person.

172. Clause 41(1) and (2) allows the Secretary of State to include provision requiring fees to be paid to an alternative delivery body. The levels of fees would be set out in the order. The national system operator can recover its administrative costs through existing mechanisms, under the oversight of the Gas and Electricity Markets Authority. However, those mechanisms are unlikely to be available to alternative delivery bodies, so a fee charging system is considered appropriate to cover all or some of an alternative delivery body's costs. Fee levels and any subsequent changes in fee levels would be drawn to special attention of the Joint Committee on Statutory Instruments and the Secondary Legislation Scrutiny Committee of the House of Lords in the explanatory memorandum accompanying the order.

173. The Department cannot foresee a time when it would definitely want the EMR delivery functions to transfer a different body, only situations where it might wish to transfer them. Similarly, the Department cannot be sure which EMR delivery functions might need to be transferred in such a situation. Finally, it cannot tell in advance which person will be in the best position to take over the EMR delivery functions.

174. The need for an exercise of discretion, tailored to the facts at the time, means that the Department considers that the Secretary of State should be given a power to determine the most appropriate way to deal with the situation if it should arise.

175. It is also likely that, in any one of the situations described in the power, the Department will wish to take action more quickly than would normally be compatible with the timetable primary legislation allows. That likelihood of the need for a quick response also suggests that a delegated power is appropriate. In a situation where the national system operator was in a difficult financial situation or where concerns arose from a change of control, a delay in transferring the functions might undermine the market's faith in the administration electricity market reform schemes with subsequent impacts on security of electricity supplies and/or on the cost of the schemes; ultimately the consumer would pay.

176. The power to make transfer schemes cannot be exercised independently of the power to make in an Order under this clause. It is similarly fact-sensitive, and it is not possible to know at this stage what property rights and liabilities may need to be transferred to perfect the transfer of the functions. In addition, transfer schemes tend to be highly technical in nature and it is appropriate for the function of drawing them up to be delegated.

177. The transfer of functions power is exercisable by Order under the Negative Resolution procedure. The Department considers that this is an appropriate procedure because it balances the need for proper scrutiny with the potential need for the power to be exercised quickly in certain circumstances.

178. The power is a Henry VIII power insofar as it enables the Secretary of State to make consequential amendments to primary legislation; however, the Department considers that the nature of that Henry VIII power is particularly narrow, because its main use is likely to be limited only to allowing the Secretary of State to make the very amendments envisaged by the granting of the power itself. In other words, the granting of the power to transfer EMR delivery functions contains within it the natural implication that references "the system operator" in Chapters 2, 3 and Schedule 2 would be changed to some other words.

179. So, while Henry VIII powers are usually subject to the Affirmative Resolution procedure, in this particular case the Department considers that the potential need to act quickly – particularly in a situation where the system operator were to become insolvent or were subject to a significant change of ownership – outweighs the desirability of debate before any amendments to primary legislation could be made. Parliamentary debates cannot in practice be arranged during recess or prorogation, and that might limit the Secretary of State's power to act quickly to ensure the effective delivery of the schemes if an event were to take place at a time incompatible with Parliamentary timetable.

180. As is usual, the power to make transfer schemes is not subject to any parliamentary procedure. Transfer schemes are technical and often contain detail that is commercially sensitive or confidential or which are personal data. It is therefore usually inappropriate for transfer schemes to be published, laid before Parliament and scrutinised.

CHAPTER 6: Access to Markets etc

Clause 43: Power to modify licence conditions etc: market participation and liquidity

Power conferred on:	*Secretary of State*
Power exercised by:	*Licence / code modification document*
Parliamentary procedure:	*Draft Negative Resolution*

181. This power allows the Secretary of State to modify generation and supply licences issued under section 6 of the Electricity Act 1989 and industry codes

and agreements which have been established under those licences. The power may only be used for the purposes of facilitating participation in the wholesale electricity market in Great Britain, whether by licence holders or others, or promoting liquidity in that market.

182. Due to the on-going nature of the Ofgem reforms process and industry action it is not possible to predict at this stage exactly what is or will be required and to set it out in primary legislation. It is also important that any steps taken to improve liquidity in the wholesale electricity market are tailored to the circumstances prevailing at the time and are able to support the electricity market reform measures once the detail of those measures has been decided. In addition, no codes or related agreements are currently contained in legislation, and it would be extremely unusual for modifications to them to be included in an Act of Parliament.

183. The Department would also wish to carry out consultation, in the context of the state of the market at the time any measures are proposed, before taking action in this area.

184. Clause 53 provides that the Secretary of State may only make licence or code modifications if they are first laid before Parliament for 40 days and neither House disapproves of the measure during that time. In calculating the 40-day period, no account is taken of periods where Parliament is dissolved or prorogued or where both Houses are adjourned for more than four days. This is broadly analogous to the draft negative procedure used for statutory instruments. By virtue of clause 53(10), the Secretary of State must publish details of code modifications as soon as is reasonably practicable after they have been made.

185. The Department considers that this is an appropriate level of parliamentary scrutiny for the measures that could be taken using these powers. The procedure being adopted has been used in equivalent situations; see, for example, section 32 of the Energy Act 2010. The procedure allows the Secondary Legislation Scrutiny Committee to scrutinise the modifications and report them to the House if appropriate.

186. Licence and code modifications tend to be technical and complex. Owing to the nature of the documents they are amending they are not drafted in a way that makes it appropriate to include them in a statutory instrument or for them to be scrutinised by the Joint Committee on Statutory Instruments as though they were legislation. The Committee may also wish to note that the Authority would be able to make equivalent provision with no requirement for parliamentary scrutiny.

Clause 44: Power to modify licence conditions etc to facilitate investment in electricity generation

Power conferred on:	*The Secretary of State*
Power exercised by:	*Licence / code modification document*
Parliamentary procedure:	*Draft Negative Resolution*

187. This power allows the Secretary of State to modify supply licences issued under section 6(1)(d) of the Electricity Act 1989 and industry codes and agreements which have been established under those licences. The power may only be used for the purpose of facilitating investment in electricity generation by promoting the availability of arrangements (such as PPAs) for the sale of electricity generated.

188. Although the Government anticipates that the framework introduced by this Bill will better support independent investment, it is uncertain whether there are on-going market failures in the PPA market which will prevent cost-effective investment in electricity generation over the next few years. It is not possible to predict reliably whether there will be any viable market-led solutions to current or potential problems arising during or after the transition to the CFD regime, nor what the most appropriate solutions might be. These uncertainties mean that measures to tackle issues in the PPA market could not be set out in detail in primary legislation and we consider that the flexibility to make a targeted intervention, if deemed necessary, justifies the delegation of these powers.

189. It is also important that any steps taken to promote the availability of PPAs are tailored to the circumstances prevailing at the time and are able to support the electricity market reform measures once the detail of those measures has been decided. The Department would also wish to carry out consultation, in the context of the state of the market at the time any measures are proposed, before taking action in this area.

190. In addition, no codes or related agreements are currently contained in legislation, and it would be extremely unusual for modifications to them to be included in an Act of Parliament.

191. Clause 49 provides that the Secretary of State may only make licence or code modifications if they are first laid before Parliament for 40 days and neither House disapproves of the measure during that time. In calculating the 40-day period, no account is taken of periods where Parliament is dissolved or prorogued or where both Houses are adjourned for more than four days. This is broadly analogous to the draft Negative procedure used for statutory instruments. By virtue of clause 49(10), the Secretary of State must publish details of code modifications as soon as is reasonably practicable after they have been made.

192. The Department considers that this is an appropriate level of parliamentary scrutiny for the measures that could be taken using these powers. The procedure being adopted has been used in equivalent situations; see, for example, section 32 of the Energy Act 2010. The procedure allows the Secondary Legislation Scrutiny Committee to scrutinise the modifications and report them to the House if appropriate.

193. Licence and code modifications tend to be technical and complex. Owing to the nature of the documents they are amending they are not drafted in a way that makes it appropriate to include them in a statutory instrument or for them to be scrutinised by the Joint Committee on Statutory Instruments as though they were legislation. The Committee may also wish to note that the Authority would be able to make equivalent provision with no requirement for parliamentary scrutiny.

CHAPTER 7: The Renewables Obligation: Transitional Arrangements

Clause 46: Power to make a certificate purchase order

Power conferred on:	*Secretary of State*
Power exercised by:	*Order*
Parliamentary procedure:	*Affirmative Resolution*

194. This clause inserts sections 32N to 32Z1 into the Electricity Act 1989 conferring a power on the Secretary of State to make a certificate purchase order. The Electricity Act 1989 contains existing powers in Section 32 to 32M for the Secretary of State to make a Renewables Obligation Order. Those powers are used as a model for the powers to make a certificate purchase Order, but with changes and additional powers to reflect the different characteristics of a certificate purchase scheme. Some of the ways in which the powers for a certificate purchase order differ from the powers for the renewables obligation are mentioned below.

195. This clause includes power to impose a levy in respect of supplies of electricity (s.32P), and for the funds raised by the levy to be used to enable the discharge of the Certificate Purchase Obligation by the purchasing body (s.32Q) or to pay the costs of the bodies exercising functions under the scheme (s.32Q(6)). The levy would act as a replacement for the Renewables Obligation which is currently imposed on electricity suppliers. The clause includes power to provide for the imposition of penalties if a requirement in respect of the levy is breached (s.32P(14)).

196. This clause includes powers to require electricity suppliers to make up shortfalls in the amounts due to be collected by the levy in cases of insolvency or missed

payment (s32P(12)). This is considered appropriate as electricity suppliers can currently be required to make up shortfalls in the amounts due in respect of the Renewables Obligation (s.32G(5) of the Electricity Act 1989).

197. In place of Renewables Obligation certificates, the Authority will issue GB certificates in respect of renewable electricity generation, and the Northern Ireland Authority for Utility Regulation will issue NI certificates. This clause includes power to impose restrictions and conditions on the transfer of GB and NI certificates (s.32U(7)(a) and (b)). This may be necessary to prevent fraud. The clause also includes power to provide for sums to be repaid to the Authority or the Northern Ireland Authority if a certificate has been wrongly issued and subsequently purchased by the purchasing body, and if it is not possible to refuse the issue of another certificate in its place (s.32U(10)(a)and(b)). This is necessary to prevent the operator of a generating station from benefiting from a certificate that they should not have been issued with.

198. This clause includes power to specify the amount of electricity that has to be generated in order to receive a certificate, and for a banding review to be carried out before making a subsequent Order containing such provision. The need for a banding review will not apply if the effect of the subsequent Order is to preserve the effect of the earlier banding provision in a Renewables Obligation Order or in a certificate purchase Order (s.32W(2) to (4)). This will enable a transition from the Renewables Obligation to the certificate purchase scheme without changing the levels of support for grandfathered generating stations.

199. This clause includes power to make the operation of a banding provision conditional upon the repayment of a grant (s.32W(7)). The interest rate and period on the amount repayable may be determined in accordance with the Order or by a person. Given the range of persons that may have paid the grant, this will enable the Order to confer the function on the person who paid the grant, or on some other appropriate person.

200. Currently under the Energy (Northern Ireland) Order 2003, as last amended by the Energy (Amendment) Order (Northern Ireland) 2009, the Northern Ireland Authority for Utility Regulation issues renewables obligation certificates to renewable generating stations in Northern Ireland, excluding those located in the territorial sea adjacent to Northern Ireland. The clause follows that approach by providing for the Northern Ireland authority to issue NI certificates to renewable generating stations in Northern Ireland (s.32T), and Northern Ireland is defined in s.32Z1(5) as excluding any part of the territorial sea. Should the Northern Ireland Department for Enterprise, Trade & Investment decide in due course that the Northern Ireland Authority should take on the function of issuing renewable

obligation certificates to generating stations situated in the territorial waters adjacent to Northern Ireland, s.32Z1(6) enables a certificate purchase order to make a similar change under the certificate purchase scheme.

201. The powers for a Certificate Purchase Order are put in place alongside the existing powers for the Renewables Obligation Order as it is intended to make a certificate purchase Order far in advance of it coming into force in 2027 in order to provide greater certainty for investors in generating capacity.

202. The Department believes that it would not be appropriate to set out the detail of the certificate purchase scheme on the face of the Bill. As with the Renewables Obligation scheme, the detailed design of the Certificate Purchase scheme is suited to secondary legislation as it involves technical issues and ones where consultation on the detail will be necessary.

203. As with the Renewables Obligation Order, we consider Affirmative Resolution procedure is appropriate for a certificate purchase Order given its impact on investment decisions for renewable generating capacity. Another relevant factor is that a certificate purchase Order may impose a levy.

Clause 46: Power to revoke designation of a CFD counterparty as purchasing body

Power conferred on:	*Secretary of State*
Power exercised by:	*Order*
Parliamentary procedure:	*None*

204. The power to make a certificate purchase order includes a power to designate a CFD counterparty as the purchasing body or as the administrator of the levy. Such a designation can only be made with the consent of the CFD counterparty body (s.32R(2)). The clause inserts section 32R(4)(a) into the Electricity Act 1989, which confers a power on the Secretary of State to revoke the designation of a CFD counterparty as purchasing body or as the administrator of the levy.

205. The revocation of the designation of the CFD counterparty is an administrative exercise. As a result, the Department judges that it is appropriate for the revocation to be by Order without parliamentary procedure.

Clause 46: Power to make transitional provision in connection with a designation ceasing to have effect

Power conferred on: *Secretary of State*
Power exercised by: *Order*
Parliamentary procedure: *Negative Resolution*

206. The clause inserts section 32R(5) and (6) into the Electricity Act 1989, which confers a power on the Secretary of State to make transitional provision in connection with a designation of a CFD counterparty as purchasing body or as the administrator of the levy ceasing to have effect.

207. The power is needed to enable transitional arrangements upon a change in the identity of the purchasing body or the administrator of the levy. For example, it may be necessary to require the outgoing purchasing body or administrator to continue to purchase certificates issued before a certain date, or to collect the levy in respect of electricity supplied before a certain date, while the incoming purchasing body or administrator acts in relation to matters occurring after that date.

208. The power is subject to the Negative Resolution procedure due to its narrow scope and the possible need to act quickly if a change in the identity of the purchasing body or the administrator of the levy occurs at short notice.

CHAPTER 8: Emissions Performance Standard

Clause 47(6)(a) – Duty not to exceed annual carbon dioxide emissions limit

Power conferred on: *Secretary of State*
Power exercised by: *Regulations*
Parliamentary procedure: *Affirmative Resolution*

209. The power here enables the Secretary of State to make provision about the interpretation of the emissions limit duty set out under subsection (1) and separately to extend the duty to a range of additional scenarios described in Schedule 4 or apply the duty with modifications.

210. The type of provision which will interpret the emissions limit duty is likely to contain technical details about the circumstances in which a fossil fuel plant and related gasification plants are to be regarded as “associated” for the purposes of determining whether the fossil fuel plant is caught by the emissions limit duty. Provision dealing with this type of situation will need to describe various construction designs and operations and is therefore the type of provision which is better suited to being included in secondary legislation following practical

discussion with stakeholders to ensure that the emissions limit duty is properly interpreted and implemented by those it applies to.

211. The type of provision which can be made by subsection (6)(a) is given more colour by subsection (7).

212. Subsection (7)(a) provides for regulations under subsection (6)(a) to make provision about the circumstances in which a gasification plant should be regarded as "associated" with a fossil fuel plant. Subsection (7)(b) enables provision to be made about calculating the emissions produced by a fossil fuel plant. Describing how the emissions of a plant are to be calculated will involve describing technical calculations which is better suited to being described in secondary legislation.

213. Subsection (7)(c) enables provision to be made for disregarding fossil fuel use in particular circumstances. This is partly to ensure that incidental use of fossil fuels by biomass or energy from waste plant does not cause them to be regarded as fossil fuel plant for the purposes of this Chapter, and partly because gas and coal-fuelled generating stations may sometimes include small generating units used, e.g. for emergency purposes, which are separate from the main plant and whose emissions would not otherwise require separate monitoring. As with the previous examples, the type of provision that may be included under this specific power is very likely to contain technical details about what sort of processes using fossil fuel can be disregarded.

214. Subsection (d) enables provision to be made setting out how emissions produced by a fossil fuel plant are attributable to the use of fossil fuel. There is a growing number of processes for producing electricity. Some may do so relying directly on the use of fossil fuels, others more indirectly for example combined heat and power plants. Describing which processes are to be caught will involve describing complicated processes and possibly require technical drawings in Schedules. Further, as technology and processes develop, the circumstances in which emissions are attributable to particular fossil fuels may need to be amended which again supports using secondary legislation because it provides a more flexible method for updating the legislation.

215. Subsection (7)(e) provides for regulations to determine when plant ceases to be, or to be part of, fossil fuel plant.

216. Subsection (7)(f) provides for regulations to specify the meaning of "installed generating capacity," relevant to calculating a plant's emission limit duty under clause 42(1), "fuel produced by CCS plant", and "constructed pursuant to a

relevant consent". This will provide flexibility for technology development and to clarify the position where a plant is built in stages or under a series of different consents. Each of these concepts will rely on definitions which may be complicated and benefit from prior consultation with stakeholders, especially those who may be affected and who may incur a regulatory cost of compliance which they may not otherwise have expected.

217. The power in subsection (7)(f) will help to minimise administrative burdens on operators by specifying that emissions is to be regarded in the same way as is the case under the UK's regulations which implement the EU Emissions Trading System (EU ETS). By doing this, it will ensures that the emissions that count towards the retirement of EU ETS allowances also count towards the emissions limit duty established in this Chapter. The power in subsection (7)(f) ensures that there is sufficient flexibility to adapt the way reference is made to emissions which are caught by the emissions limit duty where a change is made under the EU ETS.

218. Subsection (8) together with subsection (7)(d) provides for regulations to include provision to exclude emissions associated with the use of fossil fuel for the production and supply of heat from the calculation of a plant's emissions. The Government supports the development of Good Quality (i.e. efficient) use of combined heat and power (CHP), which will be a key technology in helping to deliver our carbon budgets while the electricity generation sector decarbonises, and will still play a pivotal role in providing secure and cost-effective energy supplies, particularly for industry. The Government believes it appropriate to define the exclusions for fossil fuel used for heat supply in CHP in secondary legislation because it may be necessary to reflect developments in technology and changes in the CHP Quality Assurance (CHPQA) programme, which provides the benchmark of what counts as "good quality" CHP. The power in this subsection, therefore, provides the necessary flexibility in a way that would be not be possible if the power was included in primary legislation.

219. The emissions limit duty is the obligation which fossil fuel plant operators must comply with. The various components of this duty, some of which are described above, contain complicated and technical detail, some of which will be controversial to some stakeholders because it will be the difference between the extent to which a plant is caught by an emissions limit duty. Accordingly, the Department believes it appropriate to apply the Affirmative Resolution procedure so that Parliament can consider the extent to which the policy to encourage cleaner fossil fuel plants being consented is being implemented.

Clause 47 (6)(b): Duty not to exceed annual carbon dioxide emissions limit

Power conferred on: *Secretary of State*
Power exercised by: *Regulations*
Parliamentary procedure: *Affirmative Resolution*

220. The objective of this power is to give the Secretary of State the ability to apply or modify the emissions limit duty contained in clause 47(1) in the circumstances contained in Schedule 4. For example, Schedule 4 enables the emissions limit duty to be extended to apply to an existing fossil fuel plant which has new boilers installed or to a fossil fuel plant which has an associated gasification plant – where the gasification plant is itself associated with more than one generating station.

221. Provision is made in relation to new boilers because it is possible that if the main boiler of an existing coal-fuelled plant was replaced, this would increase its operational life by a period similar to the life of a completely new plant. Without a power to cover this type of situation – something which has not yet occurred and may not occur – existing plants could replace their boilers and because the plant was consented before the obligation in clause 47(1) applies fall outside of the scope of an emissions limit duty.

222. The Department believes it appropriate to define in secondary legislation the circumstances in which the emissions limit duty should be modified or extended in particular cases, because it will be necessary to consult on specific technical provisions and proposed definitions with potentially affected stakeholders. Furthermore, the powers here enable the Secretary of State to make provision relatively quickly as and when evidence presents itself warranting provision to be made. Thus, the powers here help to ensure that the emissions performance duty can operate effectively throughout the period it comes into force through to 2045 by enabling the Secretary of State to make provision to, for example, to prevent a loophole from being created. Similarly, it would enable the Secretary of State to make provision to ensure that a plant which is associated to a gasification plant is caught by an emissions performance duty if he becomes aware of a new design preference for fossil fuel plants amongst industry which might otherwise not be caught by the existing emissions limit duty.

223. It is very rare for plant of the size to which the EPS regime applies (50MW or more) not to export power to the Grid (or at least the local distribution network). However, should such a rare case arise in future, it may be necessary to adapt the regime to the special circumstances of such plant (particularly if, in order to avoid the incidental use of fossil fuels for start-up and stabilisation purposes by biomass plants from causing them to be subject to the emissions limit duty,

emissions resulting from generation while a plant is not exporting have been deemed not to count for these purposes, as we expect to be the case). Taking a power now to deal with this scenario in accordance with the Department's policy objectives provides certainty to industry that particular situations will not create regulatory costs which make particular projects uneconomic or undesirable, or result in a cost burden which has no purpose. This is especially important to ensure that we build sufficient generation capacity to improve our security of energy supply.

224. In the case of gasification plant associated with more than one generating station, in the future it is possible that plants will be built which extract fuels that do not produce CO2 when burnt (e.g. hydrogen) from fossil fuels such as coal, with a view to supplying those non-CO2 emitting fuels to power stations that will burn them to generate electricity. In some cases, these extraction plants are likely to be fully integrated into a power station complex, and to supply the non-CO2 emitting fuels wholly or mainly to the on-site power station. In other cases, the gasification plant may be physically separate, and under different management, from any power station they supply (and they may also serve non-power station customers). However, they would still be potentially large emitters of CO2 whose emissions would be related to the generation of electricity, ultimately from fossil fuel sources.

225. This clause, together with paragraph 3 of Schedule 4, gives the Secretary of State the power to make regulations, by way of Affirmative Resolution procedure, to apply a suitably adapted version of the emissions limit duty to such gasification plants where they are serving more than one power station. The modifications necessary may include provision to apply to such plants different annual emissions limits (or limits calculated in a different way) from the default regime operating at the time. It is not possible to include full provision for these plants in the Bill clauses because we do not yet have (nor do we expect to have at any stage prior to Royal Assent) a sufficiently clear picture of how they will operate, or interact with generating stations. The purpose of taking a power is therefore to ensure that the type of scenario described can be regulated in line with the policy behind the emissions limit duty regime if and when the need to do so arises – and to discourage industry from regarding the use of separate gasification plant as a potential "way round" the regime.

226. In the case of generating stations which start or end commercial operation part way through a calendar year, it will be necessary to adjust the limit to reflect the fact that plant will only be operating part of the year, to ensure that they are not given the full limit for the entire year. For this scenario, the power in clause 47(6)(b) coupled with paragraph 4 of Schedule 4, allows the Secretary of State to

make regulations to provide for such adjustments. This is a technical but important point which sits naturally with the other matters, referred to above, that flesh out the details of the emissions limit duty. It is therefore appropriate to include provision for it to be dealt with in the same kind of regulations as those other matters.

Clause 48: Suspension etc of emissions limit in exceptional circumstances

Power conferred on:	*Secretary of State*
Power exercised by:	*Direction*
Parliamentary procedure:	*Laying in Parliament of direction and statement of reasons*

227. This power allows the Secretary of State to suspend or modify the emissions limit duty in Great Britain for a specified period if he considers that there is a significant risk of an electricity shortfall, and that suspending or modifying the emissions limit duty would end or prevent the shortfall or minimise its duration. clause 48(2)(a) describes an electricity shortfall as when the electricity available in Great Britain is insufficient to meet demands in Great Britain.

228. This power is given to the Secretary of State to effect a suspension or modification by direction because if such circumstances were to arise, the potential for an electricity shortage to develop may require rapid and decisive action that could not be achieved through primary or even secondary legislation. A direction must be made in writing, may include incidental, supplementary and transitional provision, and may be varied or revoked by a further direction under this clause.

229. Recognising that responsibility relating to the control of emissions in Scotland and Wales lie with the Devolved Administrations, subsections (4)(a) and (4)(b) require the Secretary of State to consult Scottish and Welsh Ministers prior to suspending or modifying the emissions limit duty in Great Britain.

230. Any directions made by the Secretary of State in accordance with the powers in this clause are subject to parliamentary scrutiny. To enable the Secretary of State to respond to a risk of a shortfall in timely fashion, the Department believes it is appropriate for this parliamentary scrutiny to take place after the direction has been given, but as soon as practicable. Accordingly, subsection (5) requires the Secretary of State to lay before Parliament a document containing both a copy of the direction made and a statement explaining the reasons behind his/her decision as soon as practicable after the direction is given. The power to suspend or modify “for a specified period” carries with it a clear implication that the suspension or modification must be for a specified period and that the power

does not enable a permanent alteration to the emissions limit duty. A permanent alteration of the way in which the emissions limit duty should operate is something that will require primary legislation.

Clause 48(6): Suspension etc of emissions limit in exception circumstances

Power conferred on:	*Department of Enterprise, Trade and Investment, Northern Ireland*
Power exercised by:	*Direction*
Parliamentary procedure:	*Laying of direction and statement of reasons*

231. This power allows the Department of Enterprise, Trade and Investment to suspend or modify the emissions limit duty in Northern Ireland for a specified period if he considers that there is a significant risk of an electricity shortfall, and that suspending or modifying the emissions limit duty would end or prevent the shortfall or minimise its duration. Clause 48(2)(a) describes an electricity shortfall as when the electricity available in Northern Ireland is insufficient to meet demands in Great Britain.

232. This power is given to the Department of Enterprise, Trade and Investment to effect a suspension or modification by direction because if such circumstances were to arise, the potential for an electricity shortage to develop may require rapid and decisive action that could not be achieved through primary or even secondary legislation. A direction must be made in writing, may include incidental, supplementary and transitional provision, and may be varied or revoked by a further direction under this clause.

233. Any directions made by the Department of Enterprise, Trade and Investment in accordance with the powers in this Clause are subject to scrutiny by the Northern Ireland Assembly. To enable the Department of Enterprise, Trade and Investment to respond to a risk of a shortfall in timely fashion, the Department believes it is appropriate for scrutiny by the Assembly to take place after the direction has been given, but as soon as practicable. Accordingly, subsection (8) requires the Department of Enterprise, Trade and Investment to lay before the Northern Ireland Assembly a document containing both a copy of the direction made and a statement explaining the reasons behind its decision as soon as practicable after the direction is given. The power to suspend or modify “for a specified period” carries with it a clear implication that the suspension or modification must be for a specified period and that the power does not enable a permanent alteration to the emissions limit duty. A permanent alteration of the way in which the emissions limit duty should operate is something that will require primary legislation.

Clause 49 and Schedule 5: Monitoring and enforcement

Power conferred on:	*Secretary of State in England, the Scottish Ministers in Scotland, the Welsh Ministers in Wales, and the Department of the Environment in Northern Ireland*
Power exercised by:	*Regulations and Statutory Rules in Northern Ireland*
Parliamentary procedure:	*Negative Resolution unless consequential amendments are being made to primary legislation in which case Affirmative Resolution applies.*

234. The purpose of these powers is to make provision setting out the arrangements for the monitoring and enforcement of the emissions limit duty, while recognising the ability of each of the Devolved Administrations to cater for such matters within their own territories.

235. This clause gives the "appropriate national authority" power to make emissions limit duty enforcement regulations. The "appropriate national authority" is the Secretary of State in England, while Scottish Ministers, Welsh Ministers and the Department of Environment are the "appropriate national authority" for their respective territories.

236. The power here enables the "appropriate national authority" in each territory to determine which organisation will be responsible for the monitoring and enforcement, impose requirements for the provision of information, and for a charging regime to fund the monitoring and enforcement functions. It also provides for specific enforcement powers to be given to those to be made responsible for enforcement.

237. All fossil fuel plants which are subject to the emissions limit duty regime will also be subject to the EU Emissions Trading Scheme, for the purposes of which they will have to measure exactly the same CO2 emissions as will be subject to a limit under the emissions limit duty. The Government's intention is therefore that the monitoring and enforcement mechanisms for the regime should be aligned as closely as practicable with those of the EU ETS. Since the latter are laid down in EU legislation, they may be subject to change from time to time in ways that cannot now be predicted. Providing for monitoring and enforcement rules to be the subject of secondary legislation is consistent:
    i. with the approach taken under other Acts regulating emissions (for example the Pollution Prevention and Control Act 1999); with the need to consult on these matters against the background of clear primary legislative proposals for the main elements of the emissions limit duty regime; with the level of technical detail potentially involved; and

ii. with the need to have the flexibility to keep pace with relevant EU ETS developments as and when they happen, so as to avoid duplication of regulatory burdens where possible.

238. Getting the technical detail of these regulations right will be very important, and the clauses provide for consultation to take place before they are made, see clause 52(13). Once the framework for the emissions limit duty is in place, i.e. when the Bill has received Royal Assent, the underlying policy intentions will be clear and the drafting of the enforcement regulations should not involve significant policy choices.

239. On the strong expectation that enforcement of the emissions limit duty will largely, but not necessarily exclusively, be based on administrative verification of emissions, the Department believes that the enforcement and monitoring regulations should be subject to the Negative Resolution procedure. The emissions limit duty applies to large organisations who are used to dealing with regulatory obligations and who should not therefore feel uncomfortable with how the emissions limit duty will be enforced. Accordingly, the Department does not expect the monitoring and enforcement regime to be controversial.

240. Equally, the Department does not expect to exercise policy choices other than those set out in the monitoring and enforcement powers. The Department therefore feels that the Negative Resolution procedure is the appropriate procedure for regulations containing monitoring and enforcement provision.

241. However, the Department recognises that the power to make consequential amendments to primary legislation in paragraph 4(2) of Schedule 5 should be a power which if exercised is subject to the Affirmative Resolution procedure. The ability to amend primary legislation, albeit for the purpose of making consequential amendments relating to the implementation of an emissions limit duty enforcement regime, is something that the Department recognises should be subject to Parliament’s scrutiny and consent. Therefore, where provision is contained in enforcement regulations which amends primary legislation then those regulations will be subject to the Affirmative Resolution procedure.

PART 3 – Nuclear Regulation

CHAPTER 1: The ONR's purposes

Clause 59: Nuclear security purposes

Powers conferred on: *Secretary of State*
Powers exercised by: *Regulation*
Parliamentary procedure: *Negative Resolution*

242. The purposes of the ONR will include its nuclear security purpose which relates, among other things, to ensuring the security of nuclear material, see for example subsection (1)(a), (b) and (g) of this clause which relate to the security of sites where nuclear material is used or stored, the use and storage of such material and its transportation. Subsection (3) provides a definition of "nuclear material" which covers certain types of fissile material specified on the face of the Bill (i.e. plutonium and uranium metals, alloys and compounds) and any such other fissile materials as may be prescribed in regulations made by the Secretary of State. Such regulations are subject to the Negative Resolution procedure (see clause 101 Subordinate legislation under this Part, subsection (4)).

243. In our view the approach here has precedents in section 77(7) of the Anti-terrorism, Crime and Security Act 2001 (ATCSA) and in section 71(1) of the Energy Act 2004, where in both cases the definition of nuclear material may be added to by prescribing in regulations additional categories of fissile material (on top of those which already expressly constitute such materials on the face of the legislation). We consider section 77(7) of the ATCSA to be particularly suitable precedent because that section also allows for the making of regulations for the security of nuclear material and enables the Secretary of State, through secondary legislation, to decide which additional fissile materials are to be subject to security regulations under that section. Section 71(1) sets a further precedent by enabling the Secretary of State to expand the responsibilities of the Civil Nuclear Constabulary (see section 52 of the 2004 Act) in relation to the security of nuclear materials (to include additional fissile materials)

244. In both cases the powers are subject to the Negative Resolution procedure, see section 77(6) of the ATCSA and section 71(4) of the Energy Act 2004.

245. The reason for these powers of secondary legislation is the need for flexibility in response to developments at an international level about the definition of nuclear material and to changes in security threats. For example, the definition of nuclear material in the Bill was drawn-up to take into account international guidance and best practice in relation to the security of nuclear material (such as

recommendations made by the International Atomic Energy Agency in its publication *The Physical Protection of Nuclear Material and Nuclear Facilities* (INFCIRC/225/Rev.4)). Should international guidance or best practice change in future, the Secretary of State may consider it appropriate to expand the definition in subsection (3) of this clause to give effect to international commitments and to give the ONR a core role. The Secretary of State may consider it appropriate to expand the definition in subsection (3) of this clause, should intelligence be received which highlighted a potential threat using fissile material that was not subject to security regulations, to ensure that the ONR had the ability to regulate the security of any such material in future.

246. We believe that a Negative Resolution procedure is justifiable because of the precedents above. In addition, the powers are narrow in scope. Such regulations may only prescribe fissile material, so any expansion could only be limited to materials with certain chemical or physical properties. In addition the expansion is limited to the substances to which the purposes apply. Such regulations could not, for example, expand the ONR's purposes into areas not specifically set out in this clause.

247. Expanding the materials which fall within the concept of "nuclear material" expands the regulation making power in clause 63;(see subsection(1)(b)) to the extent that regulations could be made for the security of materials that they could not previously have been made for. However, this is a limited extension that does not increase the powers that could be granted by such regulations and as such we consider that the Negative Resolution procedure is appropriate.

Clause 60: Notice by Secretary of State to ONR specifying sensitive nuclear information

Powers conferred on:	*Secretary of State*
Powers exercised by:	*Notice*
Parliamentary procedure:	*None*

248. Amongst the ONR's purposes are its nuclear security purposes (see clause 59) which relate to, amongst other things, ensuring the security of sensitive nuclear information (see subsection (1)(f)). "Sensitive nuclear information" is principally defined in clause 59(3) as information relating to, or capable of use in connection with, the enrichment of uranium – i.e. the treatment of uranium that increases the proportion of isotope 235 contained in it (isotope 235 is fissile and can be used in the production of a nuclear weapon).

249. This power also permits the Secretary of State, by notice to the ONR, to expand on the definition of "sensitive nuclear information". This would have the effect of

amending the ONR's security purposes to the extent that it would be required to ensure the security of such information. Similarly, a notice under this clause would result in a small increase to the matters in respect of which the Secretary of State could make regulations under clause 63(1)(b) (though it would not affect the nature of provisions that could be made under such regulations).

250. The power is intended principally to provide for flexibility to enable the Secretary of State, and in turn the ONR, to respond to new security threats quickly. For example, were intelligence to suggest a threat to national security represented by certain information then the Secretary of State would need the power swiftly to require the ONR to ensure the security of such information. It is possible that the interests of security would be prejudiced by the need to delay this requirement whilst regulations were made so we consider that the power to achieve this by a notice is important. It may also be the case that such information is time sensitive and only requires protection for a limited period. In such circumstances it would not be a productive use of Parliamentary time to make and then revoke the relevant regulations. It might also be the case that a sufficiently detailed description of the information to allow it to be set out on the face of regulations could itself represent a security threat.

251. There are safeguards in place limiting the abuse of this power. It can only be exercised where the Secretary of State considers information should be protected in the interests of national security (see subsection (1)). It could only relate to information held by persons in control of nuclear premises or a person involved in uranium enrichment activities (see clause 59(1)(f)), so the circumstances in which it could be used are narrow in scope. The Secretary of State must also consult the ONR before issuing such a notice; this is to ensure that the ONR's civil nuclear security expertise is fed into any additional definition of sensitive nuclear information. The Secretary of State is also required to make a report (and lay it before Parliament) each year on the exercise of his powers and that report will need to include an assessment of the exercise of this power. There will therefore be some opportunity for Parliament to scrutinise the exercise of this power.

252. There is also existing precedent for such a power. The current regime for civil nuclear security is to be found in Part 8 of the Anti-terrorism, Crime and Security Act 2001 and regulations made under section 77 of that Act. That regime covers "sensitive nuclear information" which includes information (see section 77(7)) which the Secretary of State has concluded needs to be protected. As such, to the extent that this clause allows for regulation-making powers to be expanded by reference to a consideration of the Secretary of State and without reference to

a Parliamentary procedure, there is clear precedent and this power reflects the position under the existing regulatory regime.

253. In addition to expanding the regulation-making power, a notice from the Secretary of State will expand the purposes of the ONR, thereby expanding its powers (see clause 67 (Principal function) and Schedule 7, paragraph 27 (Supplementary powers)) and the areas in which its inspectors can exercise their powers (see in particular Schedule 8). This does not allow for the expansion of the ONR's powers (or those of its inspectors), merely an expansion of the circumstances in which those powers can be exercised. For the reasons set out above we consider that this is justified.

Clause 62: Transport purposes

Powers conferred on:	*Secretary of State*
Powers exercised by:	*Regulation*
Parliamentary procedure:	*Negative Resolution*

254. This clause defines the ONR's transport purposes by reference to the risks of harm arising from the transport of radioactive materials and by reference to the need to ensure their security whilst transported. In turn "radioactive material" is defined in terms of its meaning in three international agreements relating to the carriage of dangerous goods and to which the UK is a party, see subsection (2).

255. These agreements, covering road, rail and inland waterway and known in short as ADR/RID/ADN, are as follows:
    i. "ADN": the Regulations annexed to the European Agreement concerning the International Carriage of Dangerous Goods by Inland Waterway (signed at Geneva on 26 May 2000);
    ii. "ADR": Annexes A and B to the European Agreement concerning the International Carriage of Dangerous Goods by Road (signed at Geneva on 30 September 1957); and
    iii. "RID": the Annex to Appendix C to the Convention concerning International Carriage by Rail (signed at Berne on 9 May 1980) (the Regulation concerning the International Carriage of Dangerous Goods by Rail);

256. This power allows the Secretary of State to amend the definition of "radioactive material" in subsection (2) by means of regulations, which would be subject to the Negative Resolution procedure (see clause 101(4) on subordinate legislation).

257. The reason for this power is to provide for flexibility. The definition of "radioactive material" is linked to the three international agreements, referred to in paragraph 226 above, which are currently implemented in England, Wales and Scotland by

the Carriage of Dangerous Goods and Use of Transportable Pressure Equipment Regulations 2009 (as amended in 2011). It is not possible to foresee how these agreements might be amended or replaced in the future and therefore the power is intended to allow for regulations to take account of such developments. Regulations could amend the definition to take into account new international agreements, or else to ensure that the definition does not replicate any amendments to existing agreements which are not appropriate for the ONR's transport purposes.

258. It is the Department's view that this power should be subject to a Negative Resolution procedure. We consider that this approach is appropriate for three reasons. First, the power is inherently constrained to amending the materials to which the substantive powers in the Bill could apply and even then only to materials which can reasonably be described as "radioactive". This would not permit regulations to be made expanding the ONR's transport purposes to cover other modes of transport, for example, the carriage of radioactive material by air. Secondly, the Carriage of Dangerous Goods and Use of Transportable Pressure Equipment Regulations 2009 that brought into effect the international agreements were made subject to the Negative Resolution procedure. The primary intention here is to give appropriate effect to such agreements where they relate to the transport of radioactive materials. Finally, the principal powers used to make the 2009 Regulations (section 15, and paragraph 3 of Schedule 3 to the Health and Safety at Work etc. Act 1974) may be used to confer functions and create a system for the regulation of the transport of radioactive substances and such powers are also subject to the Negative Resolution procedure.

CHAPTER 2: Nuclear regulations

Clause 63: Nuclear regulations

Powers conferred on:	*Secretary of State*
Powers exercised by:	*Regulations*
Parliamentary procedure:	*Regulations under clause 63(3)(d)(ii) which amend the Safeguards Act 2000: Affirmative Resolution, otherwise Negative Resolution*

259. This power enables the Secretary of State to make regulations for any of the following of the ONR's purposes – nuclear safety, nuclear security, nuclear safeguards, and transport. These regulations are referred to in the Bill as "nuclear regulations".

260. The clause sets out a very wide regulation-making power and Schedule 6, elaborates on the types of provision that may be included in nuclear regulations.

For example, regulations may make provision applying to acts done outside the United Kingdom by United Kingdom persons (see subsection (5)(a)) such as imposing duties on UK nationals in relation to sensitive nuclear information when outside the UK, or in relation to UK ships carrying nuclear materials and operating anywhere in the world (see clause 59(1)(g)). As set out in Schedule 6, provision may for example, be made imposing requirements about training, document and record keeping, or necessitating that approvals must sought and given before certain activities can be undertaken. These powers are deliberately very wide.

261. Before exercising this power, the Secretary of State must consult the ONR, in certain circumstances the HSE, and any other person he considers appropriate (see clause 63(7)).The Secretary of State is not required to consult the ONR if the regulations to be made give effect without modifications to a proposal made by the ONR.

262. Criminal offences may be created under nuclear regulations, see subsection (3)(c) and clause 64, but the power here is circumscribed in two ways. Purely indictable offences cannot be created under the regulations (see clause 64(1)) and the criminal sanctions which may be imposed under nuclear regulations for a conviction (either way) are curtailed in accordance with subsection (2) to (5) of clause 64.

263. Nuclear regulations can make provision for breach of statutory duty (see clause65), consistent with the position under section 47(2) of the Health and Safety at Work etc. Act 1974 (“the 1974 Act”) as amended by the Enterprise and Regulatory Reform Act 2013.

264. It should be noted that clause 98, which contains provision about how notices are to be properly served, provides for the provisions contained in that clause to be subject to any provisions contained in regulations (see subsection (12)). Therefore, nuclear regulations may derogate from the provisions in that clause, for example if they impose requirements about notices needing to be served on ONR inspectors, to provide that such notices cannot be validly served at an inspector’s last known home address.

265. We recognise that these powers are wide but consider that delegated powers are appropriate in this case because they enable regulations to be made to empower the ONR to act quickly and effectively in the areas covered by the relevant purposes. In addition, it is not possible to predict how the nuclear regulatory landscape will change, even in the short term (for example, the events in Fukushima had the potential to cause significant national and international

regulatory upheaval). Also, the pace of change in technological developments is very high, as is the pace of change in the level of international understanding about how best to protect people from the hazards arising from nuclear power stations. Much of the regulation is required to give effect to international obligations and to provide for controls in the relevant areas can be very detailed and technical. In particular, the potential consequences of failure of the nuclear regulatory regime are sufficiently serious to justify the making of wide powers to ensure that the system is flexible enough to not fail.

266. We believe that there are precedents for this approach in relation to the purposes for which nuclear regulations can be made and precedents which permit subordinate legislation to be made subject to the Negative Resolution procedure. For example, regulations may be made under section 15 of the Health and Safety at Work etc. Act 1974 for any of the general purposes of that Act. Another example is section 77 of the Anti-Terrorism, Crime and Security Act 2001 which permits regulations to be made by the Secretary of State relating to civil nuclear security. Both of these are wide regulation making powers which allow for regulations to be made using the Negative Resolution procedure.

267. The clause does contain a Henry VIII power in subsection (3)(d) to modify certain provisions in the Nuclear Installations Act 1965 (sections 1, 3-6, 22 and 24A) and the Nuclear Safeguards Act 2000. Clause 63(3)(e) enables nuclear regulations to provide for exemptions from any prohibition or requirement imposed by or under the relevant statutory provisions (as defined in clause 70 and including the safety provisions of the 1965 Act and the 2000 Act). Nuclear regulations may also provide for defences in relation to any offence under any relevant statutory provisions (clause 63(3)(f)).

268. The powers mentioned above in relation to the Nuclear Installations Act 1965 are currently to be found in section 15 of the Health and Safety at Work etc. Act 1974. These powers enable regulations made for the general purposes of Part 1 of HSWA to replace existing statutory provisions including the safety provisions of the 1965 Act (sections 1 and 15 of the 1974 Act). These powers will, as a result of other provisions of this Bill, cease to be available in relation to these provisions of the 1965 Act.

269. However, it is possible that provisions of or made under 1965 Act may need to be amended, from to time, to take into account developments in the nuclear regulatory landscape. In the Department's view a power to make such modifications should be retained to ensure that legislation keeps pace with developments in the nuclear industry and wider regulatory requirements. Regulations made under the 1974 Act for this purpose are subject to the

Negative Resolution procedure and the Department believes that it is appropriate to retain this model in the Bill.

270. Therefore, the powers similar to those in section 15 of HSWA have been included in this clause. It is important to note that this power would not allow the entire Act to be amended by regulations but only the sections which the ONR enforce as relevant statutory provisions (sections 1, 3-6, 22 and 24A of the 1965 Act. See definition of "relevant statutory provision" in clause 63)). In addition any modifications made using this power could only be made for the purposes in clause 63(1) and must be consistent with the UK's obligations as a matter of EU law and in particular the Nuclear Safety Directive (Directive 2009/71/Euratom).

271. Whilst there is not the same precedent in the 1974 Act for amending the provisions of the Nuclear Safeguards Act 2000, the reasoning behind being able to amend that Act by regulations is the same as for the 1965 Act. The 2000 Act may also need to be amended to take into account developments in international safeguards agreements (specifically the "Additional Protocol" agreement). Additionally, as the ONR seeks to improve (and possibly streamline) the nuclear regulatory landscape it may become necessary to amend the nuclear safeguards regime, which would not be possible without a power to amend the 2000 Act. This would defeat one of the main purposes of the regulations making power. This approach also brings the 2000 Act into line with the rest of the matters covered by the Bill, the provisions of the 2000 Act will be relevant statutory provisions that are enforced by the ONR.

272. Unlike the existing provisions in the 1974 Act and the provisions in the Bill relating to the amendment of the 1965 Act, any regulations which amend the 2000 Act will be subject to the Affirmative Resolution procedure.

CHAPTER 3: Office for Nuclear Regulation

Clause 66: The Office for Nuclear Regulation and Schedule 7: The Office for Nuclear Regulation, paragraph 26: Payments, grants and borrowing

Powers conferred on:	*Secretary of State*
Powers exercised by:	*Order*
Parliamentary procedure:	*Affirmative Resolution (in House of Commons only)*

273. This clause establishes the ONR as a body corporate. Details about the constitution and related matters are set out in Schedule 7, to which subsection (3) gives effect.

274. Paragraph 26 of Schedule 7 includes arrangements for the ONR to borrow

money. The Secretary of State may amend the amount (currently set at £35 million) by order that the ONR can borrow, up to a limit of £80 million.

275. The level of detail required is not appropriate for primary legislation, and sufficient scrutiny of any proposal will be undertaken by means of an Affirmative Resolution procedure.

276. It is the Government's view that the Affirmative Resolution procedure is appropriate because the clause is concerned with the amount of money the ONR as a public body is able to borrow. However, we propose that it should be considered in the House of Commons only since it is a financial matter.

Clause 66: The Office for Nuclear Regulation and Schedule 7: The Office for Nuclear Regulation, paragraph 28: Financial Year

Powers conferred on: *Secretary of State*
Powers exercised by: *Direction*
Parliamentary procedure: *None*

277. This Schedule contains a number of requirements for the ONR to produce specific documents every financial year. For example, paragraph 23 contains a requirement that the ONR must produce an annual plan for every financial year and in paragraph 24 there is a requirement for the ONR to report on the performance of its functions to the Secretary of State as soon as reasonably practicable after the end of the financial year.

278. Paragraph 28 defines 'financial year' as being a period of 12 months ending at 31 March. However, the first financial year is either from the commencement of this clause to 31 March or, if the Secretary of State directs, such other period not exceeding 2 years.

279. The purpose for this power of direction is to give flexibility and avoid unnecessary administrative burdens on the ONR. For example, should this power come into effect near the end of the financial year, the Secretary of State may choose to extend the period of the first financial year to avoid the ONR having to produce reports and plans for a short period of time. More broadly, the Secretary of State may choose to allow the ONR to produce its first annual plan and reports for a longer period in the first year whilst the implementation of the new organisation is underway.

280. This is a delegated power as the Secretary of State's ability to amend the definition of 'financial year' (within the first year of the ONR coming into existence) subsequently amends duties of the ONR as included in this Schedule.

We believe that the absence of a parliamentary process here is appropriate and proportionate as the provision is primarily administrative and limited to the first financial year of the organisation.

281. In any event, clause 96 requires the Secretary of State to file a report on the exercise of his powers under Part 3 every year. Any exercise of this power would have to be included in that report, so there will be some parliamentary scrutiny of the exercise of this power.

CHAPTER 4: Functions of the ONR

Clause 68: Codes of practice

Powers conferred on:	*ONR to issue etc. codes of practice*
Powers exercised by:	*Code of Practice*
Parliamentary procedure:	*None*

282. This power enables the ONR, with the consent of the Secretary of State, to issue, revise or withdraw codes of practice to give duty holders practical guidance on the requirements of any of the relevant statutory provisions. The ONR must consult any government department or person as directed by the Secretary of State, as well as those other powers which it considers appropriate, before seeking consent to issue, revise or withdraw a code of practice. The ONR must publish the code of practice, publish any revisions to it or publish a notice that a code of practice is being withdrawn. The ONR must, in the code of practice, specify to which relevant statutory provisions the code relates.

283. We believe that having no parliamentary procedure is appropriate as codes of practice will be essentially technical documents based on the requirements of existing legislation. Codes of practice, with their non-legislative standing, do not carry immediate penalties if they are not followed by the duty holders, though failure to follow one can be relevant in criminal proceedings (see subsections (9), (10) and (11)). Furthermore, the consent of the Secretary of State, who is answerable to Parliament, is required before the ONR can issue, amend or revoke a code of practice and the Secretary of State must report on any such consent pursuant to the obligations in clause 96. There is precedent for this approach in section 16 of the Health and Safety at Work etc. Act 1974, where no parliamentary procedure is necessary for the issuing of Codes of Practice which have broadly the same effect as those issued under this clause.

Clause 71: Inspectors and;
Schedule 8: Appointment and powers of inspectors

Powers conferred on:	*Secretary of State*
Powers exercised by:	*Regulations*
Parliamentary procedure:	*Negative Resolution*

284. This clause gives effect to Schedule 8, which is concerned with the appointment by the ONR of inspectors and their powers to investigate and enforce the regulatory regime for which the ONR will become responsible.

285. Amongst the powers that may be conferred on inspectors are powers to issue 'improvement' and 'prohibition' notices (see paragraphs 3 and 4). Paragraph 6(2) of Schedule 8 contains a power for the Secretary of State to prescribe by regulations the period within which a person may appeal an improvement or prohibition notice given under the Schedule. Section 24(2) of the Health and Safety at Work etc. Act 1974 provides a precedent for the approach in paragraph 6(2) of the Schedule, where it was considered appropriate to leave this detail to regulations and to subject such regulations to the Negative Resolution procedure (see section 82(3)(b) of the 1974 Act). Paragraph 6(2) of Schedule 8 is effectively a re-enactment of the substantive provisions of section 24(2) of the 1974 Act as it currently applies to the civil nuclear industry in relation to matters of nuclear safety, as well as transport of radioactive materials. We believe that it remains appropriate for this detail to be left to secondary legislation as it provides flexibility for the future in determining the period within which such appeals should be brought.

286. The Schedule contains a second delegated power. Amongst the evidence gathering powers which may be conferred on inspectors is the power to take samples, see paragraph 13(2) of Schedule 8. Paragraph 13(3) of the Schedule contains a power for the Secretary of State to prescribe by regulations the procedure to be followed by inspectors when taking, and dealing with, samples. Section 20(3) of the Health and Safety at Work etc. Act 1974 provides a precedent for the approach in paragraph 13(3) of the Schedule to the Bill, where it was thought appropriate to leave this detail to regulations and to subject such regulations to the Negative Resolution procedure (see section 82(3)(b) of the 1974 Act). This provision re-enacts, with some modifications, the substantive provisions of section 20(3) of the 1974 Act as it currently applies to the Health and Safety Executive. Modifications are made to reflect the transfer of additional functions to the statutory ONR that is proposed in the Bill.

287. We believe that it remains appropriate for the subject matter of these regulations to be left to secondary legislation because they may cover, for example, such

detailed matters as marking samples, giving notices, taking records when samples are taken, or specifying that inspectors must follow certain steps when taking samples from specific types of materials.

Clause 73: Inquiries

Powers conferred on:	*Secretary of State*
Powers exercised by:	*Regulations*
Parliamentary procedure:	*Negative Resolution*

288. This clause confers powers on the ONR to hold an inquiry into any matter related to its purposes with the Secretary of State's consent. Any such inquiry must be held in accordance with regulations made by the Secretary of State, with there being a requirement to hold the inquiry in public and to publish the report of the person holding the inquiry unless regulations specify otherwise, see subsection (3). Subsections (3), (4) and (5) confer the relevant powers on the Secretary of State to make the necessary regulations which will be subject to the Negative Resolution procedure. For example, the regulations may confer powers on the person holding the inquiry (or any person assisting them) to require witnesses to attend and to enable them to enter premises to gather evidence and to take evidence under oath. Also, the regulation-making powers would enable the Secretary of State to derogate from the rule that a public inquiry should be held in public where the evidence being heard may raise implications relating to national security.

289. We consider that it is appropriate for there to be delegated powers here because the regulations are likely to contain detailed provision about the conduct of inquiries which is normally left to secondary legislation subject to the Negative Resolution procedure (see, for example, section 14(3) and (4) of the Health and Safety at Work etc. Act 1974, section 41(6) of the Inquiries Act 2005 and section 323 of the Town and Country Planning Act 1990 – where the regulation-making power is subject to the Negative Resolution procedure in each case). The Department believes that it would not be proportionate for such provisions to be required to be in primary legislation or to be subject to Affirmative Resolution procedure due to the detailed and operational nature of such legislation.

290. This clause re-enacts with modifications section 14 of the 1974 Act as it applies to the Health and Safety Executive in its current role as regulator of the civil nuclear industry. Modifications are made to reflect the transfer of additional regulatory functions to the statutory ONR from the Secretary of State.

Clause 77: Provision of information or advice to relevant authorities

Powers conferred on: *Secretary of State*
Powers exercised by: *Regulations*
Parliamentary procedure: *Negative Resolution*

291. Under this clause, a duty is imposed on the ONR to provide certain information or advice if it is requested to do so by a Minister of the Crown, the devolved administrations, the Health and Safety Executive, the Health and Safety Executive for Northern Ireland, the Civil Aviation Authority or the Office of Rail Regulation (see subsections (1) and (8)).

292. As set out in subsection (5), the ONR may require a person to whom information is provided under subsection (2)(b), or advice is provided under subsection (4), to pay a fee in respect of the costs that were reasonably incurred by the ONR in providing the information or advice. The Secretary of State may by regulations provide that the requirement to pay such a fee will not apply in particular cases or classes of case or in particular circumstances.

293. The Department believes that secondary legislation is appropriate here as it provides the Government with flexibility to determine the circumstances or cases in which it is not appropriate for the ONR to be able to charge a fee for advice or services provided under subsection (2)(b) or (5) of this clause. These circumstances or cases may change over timeor may need to be set out at short notice.

294. It is the Government's view that parliamentary procedure should be aligned with the approach taken in clause 89 (Fees) which is the Negative Resolution procedure. This approach is also in line with the procedure in the Health and Safety at Work etc. Act 1974 for fee making regulations (sections 43 and 82). In addition, it is our view that the decision not to charge fees in particular cases will not be sufficiently contentious to justify the parliamentary time required for Affirmative Resolution procedures.

Clause 80: Directions from Secretary of State

Powers conferred on: *Secretary of State*
Powers exercised by: *Direction*
Parliamentary procedure: *None*

295. This clause would provide three powers that enable the Secretary of State to give directions to the ONR. The first power, which is in subsection (1), is a power of direction (either to give specific or general directions) that may be exercised for any purpose. However, the power here cannot be used to confer new functions

on the ONR, nor may it be used to direct the ONR in relation to the exercise of any regulatory function in any particular case. An example of a direction under this subsection would be where the Secretary of State directs the ONR to undertake a general review of the appropriateness and effectiveness of the conditions which are, in the interests of safety, attached to nuclear site licences granted under the Nuclear Installations Act 1965.

296. The second power which is contained in subsection (3) is a power to make directions to the ONR and includes a power to confer functions on it. This power is intended to ensure that where ONR expertise can be used in an emergency, but in circumstances that are not within its purposes, it should be able to contribute such expertise. For example, in the event of a significant release of toxic chemicals from a research or manufacturing plant, the Secretary of State might direct the ONR to contribute its expertise to the arrangements to deal with the risk to the UK.

297. The power can only be used in the interest of national security and (as with the first direction making power) cannot be used to direct the ONR in relation to regulatory functions in a particular case.

298. We consider that the emergency nature of any such circumstances would preclude making this power subject to a parliamentary process and we therefore consider that a direction making power is appropriate. In addition there is precedent for this power. The existing regulatory regime sets out such a power in the Health and Safety at Work etc. Act 1974 section 12(2)(b) and this provision substantively replicates that power.

299. Finally, the third direction-making power (contained in subsection (6)) allows the Secretary of State to issue directions in a specific instance with regard to a regulatory function, if he is satisfied that there are exceptional circumstances relating to national security and where the direction concerned is only for the ONR's nuclear security purposes. The Department considers that there is a need for the Secretary of State to have exceptional powers here in relation to regulatory functions because security is dependent on the State's "risk appetite" and intelligence on risk levels which are largely Government-generated. For example, the power might be used where the Secretary of State has received particular expert advice or intelligence which means that security measures approved by the ONR for a particular site are inconsistent with the Secretary of State's view of the nature of the threat and appropriate response. As well as there being a difference of opinion between the Secretary of State and the ONR, there would have to be significant additional factors to make it an exceptional circumstance and therefore warrant a direction being given. For example, the

Secretary of State would have to judge that the nature of the vulnerability and the impact it could have on national security were both very serious.

300. Any directions made under this clause must be laid before Parliament to facilitate transparency (see subsection (8)). This is subject to the exception where the Secretary of State considers that a direction under subsection (6) should not be made public for reasons of national security. In such a case a memorandum reporting that a direction has been made and its date must be laid instead, see subsection (9).

301. The Department believes that the approach of not having any Parliamentary scrutiny in case of these direction-making powers is justifiable. Generally, direction-making powers are not made subject to parliamentary approval, in part because they are often administrative in nature but also because they are very specific in their application. Therefore, the directions issued pursuant to these powers here should not be contentious. Additionally, there is a precedent in this respect to be found in section 12(2) and (4) of the Health and Safety at Work etc. Act 1974 which, in the Department's view, permits directions under 12(2)(b) to confer functions on or under 12(2)(a) to modify functions of the Health and Safety Executive.

302. In the more unusual case of the direction-making power to confer functions; this may only be exercised in the interests of national security and is, to some extent, required because the ONR will be a body corporate created by statute. In other words, the ONR cannot do something unless it has express or necessarily implied statutory authority to do it. In the fundamentally important area of national security, it is essential that neither the ONR nor the Secretary of State should be constrained in taking the appropriate action to maintain the security of the United Kingdom.

303. Finally, there is an argument about the suitability of all directions being made subject to parliamentary approval or subject to the Negative Resolution procedure. Firstly, it may require the Secretary of State's directions to be published which might not be the right approach in all cases, particularly where there are national security implications. Secondly, a number of the powers relate to situations where there is a need for the Secretary of State to act quickly and decisively (specifically in the case of the powers in subsections (3) and (6)) and therefore it would be impractical to seek Parliamentary approval in advance of issuing the relevant direction.

Clause 81: Compliance with nuclear safeguards obligations

Powers conferred on: *Secretary of State*
Powers exercised by: *Notice*
Parliamentary procedure: *None*

304. Subsection (1) of this clause imposes obligations on the ONR to take such action as it considers is best calculated to ensure compliance by the United Kingdom with the safeguards obligations and to facilitate compliance with these obligations by Ministers of the Crown.

305. "Safeguards obligations" are defined in subsection (2). The definition makes specific reference to Articles 77 to 85 of the Euratom Treaty, the UK's voluntary offer safeguards agreement made in connection with the Treaty on the Non-Proliferation of Nuclear Weapons, and the additional protocol agreed to that agreement. The definition also includes such other obligations, agreements or arrangements as the Secretary of State notifies to the ONR. The safeguards obligations provide confidence that states do not use nuclear material from civil nuclear programmes to manufacture nuclear weapons. The three specifically identified obligations in the definition require the UK Government to provide information to the International Atomic Energy Agency and the European Commission about civil nuclear material held within the UK and about other specified civil nuclear activities.

306. In addition to those three identified agreements, the clause confers on the Secretary of State the power to require the ONR, by notice, to ensure compliance with other safeguards obligations, agreements or arrangements. The intention is that the ONR should be the body which ensures compliance with all safeguards obligations, agreements and arrangements of the UK and the UK government. However, we do not think it is possible to set out a complete list of such matters either on the face of the Bill or in secondary legislation as the complete list of such matters is difficult to define with sufficient specificity for legislation and is in any event subject to change. For example, existing safeguards matters that would be expected to be included within the initial notice, on creation of the ONR, might include the:

i. Agreement of 25 February 1998 between the United Kingdom of Great Britain and Northern Ireland and the Government of Japan for Co-operation in the Peaceful Use of Nuclear Energy;

ii. Agreement of 24 July 1979 between the United Kingdom of Great Britain and Northern Ireland and the Government of Australia concerning Nuclear Transfers between the United Kingdom and Australia; and

iii. UK commitments under the International Atomic Energy Agency (IAEA) Guidelines for the management of plutonium (1997).

307. There also needs to be flexibility in these arrangements as the number and identity of these obligations, agreements and arrangements can change. New obligations that might be added to the definition of safeguards obligations in the future by notice could arise from a number of sources including: new co-operation agreements with other States, new agreements with the IAEA relating to safeguards, a new international treaty or new domestic undertakings.

308. Rather than attempt to set these matters out on the face of legislation, we think it is preferable for the Bill to impose on the ONR the duty to ensure compliance with safeguards obligations, agreements and arrangements but leave it to the discretion of the Secretary of State to determine how those matters are defined. As the Secretary of State lacks specific powers to ensure such compliance we think it is likely that the ONR will be asked to be responsible for the vast majority of, if not all, such matters.

309. The power here is exercisable by the Secretary of State in the form of a notice to the ONR following consultation with the regulator (see subsection (4)), and any notice must be published, providing transparency to the ONR's safeguards function. In addition the power cannot be exercised in relation to matters that are not "safeguards" matters.

310. This approach broadly replicates the current arrangements for defining safeguards obligations whereby the Secretary of State notifies the interim ONR of the relevant safeguards obligations via a Memorandum of Understanding. The ONR is currently able to exercise the very broad powers of the Secretary of State under the Atomic Energy Act 1946. We considered whether it would be preferable to make the ONR responsible for all matters relating to safeguards, but felt that this conferred too broad a power on the ONR. Instead we felt it was preferable to use a more targeted power and link it to the flexible function of a notice to the ONR from the Secretary of State.

311. The concept of "safeguards obligation" is also linked to the scope of the ONR's purposes. Therefore, giving the ONR a notice that "safeguards obligations" includes a new agreement will expand the ONR's purposes to incorporate ensuring compliance (or facilitating compliance) with that agreement or arrangement. Although this may at first appear to be a wide power to be able to confer without a reference to a Parliamentary procedure, we consider that the flexibility inherent in this approach is necessary, and that the ability of the Secretary of State is limited by the nature of the agreements which can fall within the concept of "safeguards agreement".

Clause 87: HMRC power to seize articles etc. to facilitate ONR and inspectors

Powers conferred on:	*Commissioners of Her Majesty's Revenue and Customs*
Powers exercised by:	*Direction*
Parliamentary procedure:	*None*

312. This power allows an officer of HM Revenue and Customs (HMRC officer) to seize and detain imported goods to facilitate the ONR or its inspectors in the exercise of their functions under the relevant statutory provisions.

313. Subsection (5) sets out the restrictions placed on the seizure of goods. The first of these is an absolute requirement that they are not detained for more than two working days. Subsection (5)(b) provides an additional requirement that anything seized must be dealt with in such manner as the Commissioners for Her Majesty's Revenue and Customs may direct.

314. The Borders, Citizenship and Immigration Act 2009 provides for functions of HMRC that are "general customs matters" to be exercised concurrently by both HMRC and the Secretary of State. It makes specific provision for references to HMRC in enactments, instruments and documents to be interpreted as references to the Secretary of State (see section 1(6) of that Act), but that provision would not apply to provision made in this Bill. In order to ensure that the functions conferred on the HMRC by this clause can be exercised by the Secretary of State (as necessary), a consequential amendment has been made to this section of the 2009 Act. This preserves the split in functions put in place by section 1 of the 2009 Act.

315. Section 7 of the 2009 Act provides for functions of HMRC that are "customs revenue matters" to be exercised concurrently by both HMRC and the Director of Border Revenue. It makes specific provision for references to HMRC in enactments, instruments and documents to be interpreted as references to the Director of Border Revenue (see section 7(7) of that Act), but that provision would not apply to provision made in this Bill. In order to ensure that the functions conferred on HMRC by this clause can be exercised by the Director of Border Revenue (as necessary),a consequential amendment has been made to this section of the 2009 Act. This preserves the split in functions put in place by section 7 of the 2009 Act.

316. The 2009 Act also allows for certain functions of HMRC officers to be exercised by designated general customs officials (see section 3 of that Act) and designated customs revenue officials (see section 11 of that Act). In order to preserve the split in functions between HMRC officers and these officials, similar

consequential amendments to the 2009 Act are not required. Specific provision is, instead, made in sections 3(7)(b) and 11(6)(b) respectively which apply the relevant split in functions to apply to powers conferred on HMRC officers by the Bill.

317. This power is required to ensure that the organisations which might seize goods under this clause (being Her Majesty's Revenue and Customs and the United Kingdom Border Agency), can provide for additional rules or requirements on how such goods are dealt with when detained. We do not think it is proportionate for these requirements to be set out in primary or secondary legislation as they will be simply the operational details for the seizure and detention of goods.

318. There is a precedent for this delegated power in the Health and Safety at Work etc. Act 1974 section (25A)(2) which currently applies to the interim ONR / HSE.

Clause 89: Fees

Powers conferred on:	*Secretary of State*
Powers exercised by:	*Regulations*
Parliamentary procedure:	*Negative Resolution*

319. This is a new free standing power to enable the Secretary of State to make regulations providing for the payment of fees in connection with the performance of functions conferred on the ONR and other persons under the "relevant statutory provisions" of the Bill. Provision can also be made in the regulations for fees to be payable in connection with the performance of functions conferred on the ONR under section 80 of the Anti-terrorism, Crime and Security Act 2001. This power is intended to complement the existing charging provisions in section 24A of the Nuclear Installations Act 1965, section 43 of the Health and Safety at Work etc. Act 1974 and section 77 of the Anti-terrorism Crime and Security Act 2001.

320. The amount of fee to be payable will be specified in, or determined in accordance with, the regulations made by the Secretary of State. The Regulations will also specify by whom the relevant fee is payable. It is, however, made clear that employees and trainees (as well as those seeking employment or training) cannot be required to pay any fee by the regulations (see subsection (4)). Regulations may be made under this clause either on the basis of proposals submitted to the Secretary of State by the ONR (such proposals may be modified) or by the Secretary of State independently of any such proposals.

321. Following Treasury guidance on the matter of fees setting, we have been advised that any changes to fees levels, including those that amount to revalorisation for

inflation levels, will require additional revisionary legislation. In this context, negative resolution is considered appropriate, as affirmative or primary legislative change on what is assumed to be an annual basis would represent a significant burden on Parliamentary timetables, as well as the regulatory body, sponsorship department and Treasury.

322. The detail required for the fees legislation is such that it is more suitable for inclusion in secondary rather than primary legislation. In addition, secondary legislation provides the Government with flexibility to amend the regulations should it be required to reflect the rapidly evolving nature of the nuclear industry. The ONR must carry out consultation before submitting proposals for regulations under this clause to the Secretary of State (see clause 69(3)).

323. We believe that it is appropriate for the regulations-making power contained in this clause to be subject to a Negative Resolution procedure because the setting of fees is unlikely to be sufficiently contentious to justify the Parliamentary time required for Affirmative Resolution procedures. In addition, using the Negative Resolution procedure is consistent with the precedent for this sort of fee charging power to be found in the Health and Safety at Work etc. Act 1974 (sections 43 and 82).

CHAPTER 5: Supplementary

Clause 99: Crown application: Part 3

Powers conferred on: *Secretary of State*
Powers exercised by: *Order*
Parliamentary procedure: *Affirmative Resolution*

324. This clause provides that Part 3 of the Bill applies to the Crown with certain exceptions set out in the clause. It also makes provision for the Secretary of State to exempt the Crown, by order, from any provisions in Part 3 that would otherwise bind the Crown, or apply to the Crown any provisions which otherwise would not bind the Crown or to make modifications to the extent to which the ONR's purposes relate to the Crown, or any purposes of the Crown (see subsection (6)). Therefore, for example, ONR inspectors' powers of entry may be curtailed in relation to Crown property.

325. The power is considered desirable to ensure flexibility if in future it is felt inappropriate for the Act or provision made under it to apply to, or in relation to, the Crown as currently specified in this clause or if it is decided that other changes to the way in which the Bill applies to the Crown are required. Given the

purpose of the orders, the order-making power is subject to the Affirmative Resolution procedure.

Clause 102: Transitional provision etc.

Powers conferred on: *Secretary of State*
Powers exercised by: *Order*
Parliamentary procedure: *Negative Resolution*

326. This power enables the Secretary of State to, by order, make such transitional, transitory and savings provisions as appear appropriate in consequence of the provisions of Part 3 of the Bill. This power is considered necessary to enable a smooth transition of the regulatory powers from the Health and Safety Executive and the Secretary of State to the ONR. The level of detail likely to be required which will primarily be about the mechanics of the transfer of the regulation functions is not appropriate for primary legislation. In addition, this power contains a power to modify any provision of primary legislation passed before the end of the session in which the Bill is passed, or an instrument made before the end of the session. It would not be practical to make such amendments on the face of the Bill.

327. An order made under this provision will be subject to the Negative Resolution procedure. This is considered to be sufficient for orders giving effect to the substantive change in identity of the regulator for the civil nuclear industry as set out in the Bill.

Clause 103: Transfer of staff etc; and Schedule 11: Transfers to the Office of Nuclear Regulation

Powers conferred on: *Secretary of State*
Powers exercised by: *Scheme*
Parliamentary procedure: *None*

328. This clause and Schedule make provision for the transfer of staff and property from HSE and, where relevant, the Secretary of State, to the ONR. Schedule 11 states which staff or property a transfer scheme can apply to and the matters which may be included in such schemes.

329. The work required to transfer the ONR from an agency within the Health and Safety Executive to a separate statutory corporation is significant, and so the clause requires flexibility to allow for the possibility that the commencement of the provisions of Part 3 of the Bill will be phased. As a consequence, the powers in Schedule 11 are sufficient to enable the Secretary of State to make more than one staff transfer scheme and more than one property transfer scheme. It is

possible for modifications to be made to existing schemes (some modifications can only be made with agreement of the parties likely to be affected by those modifications). The Secretary of State will be required to carry out consultation before making any scheme under the Schedule. The persons to be consulted are those who appear to the Secretary of State to be likely to be affected by the making of a scheme, or appear to the Secretary of State to represent such persons. This consultation may be carried out by a person other than the Secretary of State and may be carried out at any time.

330. The Department considers that it is appropriate for these schemes to be made by the Secretary of State under the Bill, rather than on the face of the Bill, as they will contain detailed provision dealing with the mechanics of the transfer of staff from the Health and Safety Executive to the ONR, and the transfer of property from the Health and Safety Executive and the Secretary of State to the ONR. The schemes made under the Schedule will not be subject to any parliamentary procedure. The Department considers this to be appropriate as such schemes are not normally subject to any parliamentary procedure. In addition, the Secretary of State must consult, or ensure consultation with, those likely to be affected by the scheme and their representatives before making any scheme under this Schedule. Modifications which affect a scheme that has already taken effect will require the agreement of the parties affected. In addition, it is possible that such schemes will contain details about employment matters or commercially sensitive material which it is not appropriate to publicise.

Clause 104: Minor and consequential amendments

Powers conferred on:	*Secretary of State*
Powers exercised by:	*Order*
Parliamentary procedure:	*Negative Resolution*

331. This power introduces the minor and consequential amendments to primary legislation which are set out in Schedule 12 (minor and consequential amendments related to Part 3). It also enables the Secretary of State to make further modifications by order to existing legislation, either primary or secondary legislation, that are required to give full effect to the provisions of Part 3 of the Bill. Amendments may be made under this section to primary or secondary legislation which was passed before the end of the session in which the Energy Bill is passed. Primary legislation is defined for these purposes in the clause Interpretation of this Part.

332. Many of the amendments required to be made to primary legislation in consequence of the creation of the ONR will be made on the face of the Bill. However, further amendments to primary legislation are likely to be needed and

so the Secretary of State has the power to make consequential amendments to primary legislation. The creation of the statutory ONR will also require a substantial number of changes to be made to secondary legislation and it is considered more appropriate for them to be dealt with through secondary legislation, rather than on the face of the Bill.

333. As the changes made by an order under this clause will be to give effect to the Bill, and will for the most part contain detailed amendments to secondary legislation, it is considered that the Negative Resolution procedure is sufficient.

334. Specific provision is made in this clause to ensure that this power can be used to amend paragraphs 16-25B of Schedule 12 to the Bill (which restate certain provisions of the Nuclear Installations Act 1965) or to amend those sections of the 1965 Act which are amended by those paragraphs. It is possible that before these paragraphs of Schedule 12 come into force an order under section 76 of the Energy Act 2004 will be made which amends certain provisions of the Nuclear Installations Act 1965. Subsections (3) and (4) are therefore necessary to ensure that any such amendments by such an order can be preserved and are not erased by paragraphs 16-25B.

335. This power could only be used, therefore, to give effect to amendments that had already by approved by Parliament in an order made under section 76 of the Energy Act 2004. Such an order is subject to the affirmative resolution procedure. We therefore take the view that the use of the negative resolution procedure is acceptable here.

Clause 104: Minor and consequential amendments and Schedule 12 Minor and consequential amendments

Powers conferred on:	*Secretary of State*
Powers exercised by:	*Regulation*
Parliamentary procedure:	*Negative Resolution*

336. At House of Commons Report amendments were introduced to improve the clarity of the Nuclear Installations Act 1965. This was necessary because different versions of the 1965 Act have evolved in different jurisdictions over the years making it difficult to understand in places. The amendments restate the terms of the 1965 Act to make those distinctions clearer and in some instances they update the terminology

337. The restatement of section 1 of the 1965 Act includes a delegated power which enables the Secretary of State to make regulations that exempt a nuclear installation from the requirement to operate with a nuclear site licence. This

amendment restates, without substantive amendment, the existing delegated power and updates the drafting of section 1 while retaining the original policy position. For this reason it is the Government's view that it is appropriate to maintain the flexibility that this power provides and to leave the procedure unchanged.

Clause 105: Application of Part 3

Powers conferred on: *Her Majesty*
Powers exercised by: *Order in Council*
Parliamentary procedure: *Negative Resolution*

338. This power provides that Her Majesty may, by Order in Council, extend the application of Part 3 of the Bill outside the United Kingdom.

339. Orders in Council are commonly used to extend United Kingdom legislation to Crown territories outside the United Kingdom (such as the Channel Islands and the Isle of Man). For example, section 28 of the Nuclear Installations Act 1965. In addition, section 84 of the Health and Safety at Work etc. Act 1974 contains a power to extend the application of certain provisions of that Act to persons premises and other matters outside Great Britain as they apply within Great Britain or a specified part of Great Britain.

340. The power in this clause gives flexibility to extend the application of Part 3 to ensure that the provisions of this Part apply to persons, premises, activities, articles, substance or other matters outside the UK just as they would if they were within the UK. It is the Government's view that the appropriate and proportionate procedure for this power is the Negative Resolution procedure. Section 84 of Health and Safety at Work etc. Act 1974 provides for Orders in Council made under that provision to be subject to that procedure. As the power in this clause is equivalent to that in section 84 of the 1974 Act it is considered appropriate to follow the same procedure.

PART 4 – Government Pipe-line and Storage System

Clause 117: Power to dissolve the Oil and Pipelines Agency by order

Power conferred on: *Secretary of State*
Power exercisable by: *Order by Statutory Instrument*
Parliamentary procedure: *Negative Resolution*

341. Clause 113 provides that the Secretary of State may transfer the Government Pipe-line and Storage System. The system consists of around 2,500 kilometres of cross-country pipelines of differing diameters, together with storage depots,

associated pumping stations, receipt and delivery facilities and other ancillary equipment. The system receives, stores, transports and delivers light oil petroleum products for military and civil users. The Oil and Pipelines Agency is a statutory corporation set up for the purposes of exercising and performing functions assigned to it by the Oil and Pipelines Act 1985 (c.62). One of the main functions of the Agency is the management of the system.

342. Clause 113 provides that the Secretary of State may transfer the system. Subsection (1) of clause 117 provides that the Secretary of State may provide by Order for the repeal of the Oil and Pipelines Act 1985 and the dissolution of the Agency. Subsection (2) provides that if the Agency is dissolved under subsection (1), the Secretary of State may make a "transfer scheme" for the transfer to the Secretary of State of property, rights and liabilities. Subsection (3) provides that Schedule 13 makes further provision about any transfer scheme under subsection (2). Paragraph 1 of the Schedule provides that the things that may be transferred under a transfer scheme include certain property. Paragraph 2 provides that a transfer scheme may make consequential, supplementary, incidental or transitional provision and may, in particular, make certain kinds of provision. Paragraph 3 provides that a transfer scheme may provide for its modification. Subsection (4) provides that an Order under this clause may make: incidental, supplementary, consequential, transitory or transitional provision; savings; different provision for different cases or circumstances or for different purposes; or, provision subject to exceptions. Subsection (5) provides that an Order under this clause, but not a transfer scheme, is to be made by statutory instrument subject to the Negative Resolution procedure.

343. These matters are to be dealt with in delegated legislation so that if the system is transferred and the Agency is considered, by the Secretary of State, to have no remaining function the Agency can be dissolved and the Act that created it can be repealed. If the system is transferred, detailed provision will be able to be made for the consequential transfer to the Secretary of State of property, rights and liabilities of the Agency, albeit such a transfer scheme will not be made by statutory instrument. It has not yet been decided if or when the whole, or part, of the system will be transferred or what the effect on the Agency will be. Therefore, it would be inappropriate to provide for the repeal of the Oil and Pipelines Act 1985 and the dissolution of the Agency in the Bill itself.

344. The Government considers it appropriate that an Order under clause 117 should, unlike the Order made under section 3(5) of the Oil and Pipelines Act 1985 for the dissolution of the Agency’s predecessor – the British National Oil Corporation – for which there was no procedure, be made by statutory instrument subject to the Negative Resolution procedure. This is because an Order under clause 117

may provide for the repeal of primary legislation and for the dissolution of the Agency and Parliament should have the opportunity to scrutinise such an Order. However, a transfer scheme may contain details such as the names and employment details of individuals and it is not considered appropriate for a transfer scheme to be made by statutory instrument.

PART 5 – Strategy and Policy Statement (SPS)

Clause 119: Designation of statement

Power conferred on:	*Secretary of State*
Power exercisable by:	*Designation of statement*
Parliamentary procedure:	*Affirmative Resolution*

345. This clause enables the Secretary of State to designate a strategy and policy statement. This is a statement which sets out:
    i. the strategic priorities, and other main considerations, of Her Majesty's Government in formulating its energy policy for Great Britain;
    ii. the particular outcomes to be achieved as a result of the implementation of that policy; and
    iii. the roles and responsibilities of persons involved in implementing that policy or who have other functions in connection with it.

346. The need for this power stems from a review of Authority carried out by the Department for Energy and Climate change in July 2011. One of the findings of this review was that, as the Authority's role has become more complex, there has been a blurring of responsibilities between Government and the Authority. There is a need for Government clearly to take responsibility for setting and communicating strategic direction and for the Authority to take independent regulatory decisions as a logical and coherent part of this broader strategic framework. The provision of a power to designate a strategic policy statement addresses this recommendation.

347. The Authority, and the Secretary of State, will be under a duty to carry out regulatory functions in the manner considered best calculated to further delivery of policy outcomes contained in the strategy and policy statement. It is considered appropriate to give Parliament an opportunity to comment actively on the statement through an Affirmative Resolution procedure, given how the new duty in relation to it fits into the framework which governs how the Authority and the Secretary of State take energy-related decisions.

348. The Bill will also place a duty on the Secretary of State to consult extensively on the draft statement before laying the statement before Parliament for approval by Affirmative Resolution. Once approved, there will be a duty on the Secretary of

State to publish the strategy and policy statement in such a manner as he considers appropriate.

349. The statement will be reviewed every five years (subject to earlier review in particular circumstances, e.g. parliamentary election). If, following a review, the Secretary of State wants to amend the strategy and policy statement, any amended statement will follow the same procedure, including requiring approval by Affirmative Resolution before it can take effect.

Clause 125(2): Reporting requirements

Power conferred on: *Secretary of State*
Power exercisable by: *Secretary of State direction*
Parliamentary procedure: *None*

350. This clause adds a new section 4A to the Utilities Act 2000 and builds on the Authority's current reporting requirements to ensure that the Authority publishes certain information in relation to the Strategy and Policy Statement.

351. Subsection (6) of new section 4A enables the Secretary of State to give the Authority notice that the statement's designation has been or is expected to be withdrawn before the beginning of the financial year, and will thus relieve the Authority of the reporting requirement for that year. This will ensure that the Authority does not incur unnecessary cost or time by including the information related to the statement in the work programme for that year.

352. This simple power of direction does not affect the substantive content of a Strategy and Policy Statement or whether a statement can be withdrawn. On that basis, the Department does not consider that parliamentary scrutiny is necessary or appropriate.

PART 6 – Consumer Protection and Miscellaneous

CHAPTER 1 - Consumer Protection

Clause 127: Power to modify energy supply licences: domestic supply contracts

Power conferred on: *Secretary of State*
Power exercised by: *Order*
Parliamentary procedure: *None*

353. This clause provides the Secretary of State with a number of powers which fall under the following broad categories:
    a. require suppliers to move customers off poor value "closed" tariffs;

b. simplify the tariffs offered to domestic consumers; and
c. provide information for easier comparison with other tariffs.

354. The powers are exercisable by modification of the licence conditions of gas and electricity suppliers (i.e. the conditions on which suppliers are allowed to make such supply).

355. Modifying licence conditions is a technical and detailed process. It would not be appropriate to attempt to make the necessary licence modifications through the Bill's provisions. Before making the modifications, it will be necessary to consult with interested stakeholders such as suppliers and Ofgem in order to understand the practical impact which particular proposals may have and therefore how they might be implemented. Accordingly, in our view, it is appropriate from a practical perspective for the power which is sought to be exercised by the Secretary of State in due course. A power will provide the Secretary of State to tailor the necessary modifications to the circumstances existing at the time they are exercised and also enable him to update any modifications which are necessary in the future.

356. These powers are designed in part to reflect existing powers to amend energy supplier licenses available to Ofgem (the energy regulator) under section 11A of the Electricity Act 1989 and section 23 of the Gas Act 1986. Those powers enable Ofgem to modify licence conditions for broad purposes under those Acts subject to consultation with relevant licensees. Ofgem's powers are not subject to parliamentary scrutiny. We have proposed that no Parliamentary scrutiny attaches to the powers of the Secretary of State for the following reasons:

a. The power being sought will only be capable of being exercised by the Secretary of State to make the kinds of provisions exhaustively specified in subsection (2). Accordingly, the discretion afforded to the Secretary of State by this power is limited to the categories of activity set out on the face of the Bill. If Parliament is content for the Secretary of State to be given a power to make these provisions, we do not believe it would be an appropriate use of Parliamentary time to scrutinise the full detail of those provisions and the mechanics by which they are made – not least because these will have been subject to prior consultation with relevant stakeholders such as Ofgem and energy suppliers.

b. The power is no broader than is necessary to ensure the primary objectives can be met and modified in light of the rapidly changing market in coming years, not least through the rollout of smart meters.

c. The power is partially based on section 11A and section 76 of the Energy Act 2011, neither of which are subject to Parliamentary procedure, nor is a similar power in section 84 of the Energy Act 2008.

357. Modifications to licence conditions are made directly by the Secretary of State rather than by secondary legislation, subject to prior consultation of licence holders and the independent regulator (among others) as specified under clause 122. As mentioned, Ofgem already has statutory powers to make changes to licence conditions and does so without referral to Parliament. The Government's legislation in this area is in support of Ofgem's plans to make such modifications and provides a legal backup to Ofgem's work, in case this work is delayed or frustrated. As there is no requirement for secondary legislation and as licence modifications are already made by the regulator without parliamentary referral, the Department does not propose additional parliamentary scrutiny to the powers under this clause.

358. Subsection (10) of clause 127 provides a power for the Secretary of State to specify by order the terms of domestic supply contracts which are "principal terms", that is, the core terms of a supply contract (which relate to e.g. duration and charges), as opposed to the "discretionary terms", within a domestic supply contract. Whilst this distinction is central to the function of the clause, it will serve only to clarify in technical terms the provisions of a supply contract which are core to that contract and those which are ancillary or discretionary. This subsection also allows the Secretary of State to specify by order the circumstances in which a licence holder is, or is not, to be regarded as offering to supply gas or electricity on a particular tariff and the circumstances in which supplies (or proposed supply) is to be regarded as being on the same tariff or different tariff. In light of the technical complexities of contractual supply terms, and the various possibilities by which different suppliers may manage the process of offering tariffs and supplying energy on a particular tariff (especially in today's market), it is appropriate that these are not included in the face of the Bill and will be subject to consultation.

Clause 131: Powers to alter activities requiring licence: activities related to supply contracts

Power conferred on:	*Secretary of State*
Power exercised by:	*Order*
Parliamentary procedure:	*Affirmative resolution*

359. Section 41C of the Gas Act 1986 allows the Secretary of State to by order provide that specified activities are to become licensable activities. Subsection

(4) of section 41C defines the types of activity which can become licensable activities. For example, subsection (4) provides that an activity can only become a licensable activity if it is an activity which is connected with "(a) the conveyance of gas through pipes to premises or to pipe-line systems operated by gas transporters;" or "(b) the supply to premises of gas conveyed through pipes;". (A similar set of provisions can be found in section 56A of the Electricity Act 1989).

360. Clause 131 inserts a new subsection (4A) into both section 41C of the Gas Act 1986 and section 56A of the Electricity Act 1989. New subsection (4A) widens the scope of the existing power of the Secretary of State to by order specify licensable activities so that the existing gas and electricity licensing regime can be made to apply to third-party intermediaries such as switching websites. Without new subsection (4A) the Secretary of State would be unable to make an order making the activities of third party intermediaries such as switching websites a licensable activity.

361. Although subsection (4A) widens the scope of an existing power for the Secretary of State to make an Order, it does not alter any of the procedural safeguards which attach to the existing power. For example, the Secretary of State is likely to exercise his power only after Ofgem have invited him to do so. Before Ofgem make such an invitation, they will need to consult on the proposal to create a new licensable activity with stakeholders. If the Secretary of State is satisfied that an order should be made, the order is subject to the affirmative resolution procedure and so will enable Parliament to consider whether it is appropriate for the scope of licensable activities to be extended in the way proposed.

Clause 132 – Consumer Redress Orders

Power conferred on: *The Authority*
Power exercised by: *The Authority*
Parliamentary procedure: *None*

362. This clause brings Schedule 14 into effect. Schedule 14 makes amendments to the Gas Act 1986 and the Electricity Act 1989 for the purpose of enabling the Office of the Electricity and Gas Markets ("the Authority") to make a consumer redress order. The Authority can make an consumer redress order where it is satisfied that a regulated person, for example an energy supply company, has contravened a licence condition and that contravention has caused one or more of its consumers loss, damage or inconvenience. In these circumstances, the Authority can make a consumer redress order imposing remedial actions which the regulated person must take in order to remedy the consequences of the contravention.

363. The power for the Authority to make a consumer redress order is not a power to make delegated legislation. A consumer redress order is not made by way of statutory instrument. However, the power to make a consumer redress order is discussed in this Memorandum because, as an enforcement tool, it is similar to a power to issue a direction which the Department recognises is something that the Committee likes to see discussed in the Memorandum.

364. Schedule 14 makes amendments to both the Gas Act 1986 and the Electricity Act 1989. Paragraph 1(2) inserts a new set of provisions into the Gas Act 1986 whilst paragraph 2(2) inserts equivalent provisions into the Electricity Act 1989. Since there is no material difference between the two set of provisions, one applies to gas entities the other to electricity entities, the discussion in the following paragraphs will focus on the provisions of the Gas Act 1986 which enable the Authority to make a consumer redress order.

365. Section 30G(1) of the Gas Act 1986 provides the circumstances in which the Authority can make a consumer redress order. The Authority must be satisfied that (a) a regulated person has contravened, or is contravening, any relevant condition or requirement; and (b) as a result of the contravention, one or more consumers have suffered loss, damage or inconvenience.

366. Energy companies usually require a licence to operate in the market. A licence will have various conditions attached to it. These conditions are referred to as “relevant conditions”. Legislation also imposes conditions on licence-holders. These type of condition are referred to as “relevant requirements”. Contravening either type of condition is a breach of licence and will enable the Authority to take enforcement action under its existing powers. For example, the Authority can issue an enforcement order, known as either a provisional order or a final order, and in that order the licence-holder to stop contravening the relevant condition or requirement. The Authority can also fine the licence-holder up to 10% of the licence-holder’s annual turnover.

367. For the purposes of section 30G and the remaining provisions which are discussed a licence-holder referred to in paragraph 5 is a “regulated person”. So, where a regulated person contravenes a relevant condition or requirement and that contravention causes one or more consumers loss, damage or inconvenience, the power to make a consumer redress order will arise.

368. The power to make a consumer redress order is a power which sits alongside the Authority’s existing powers to issue an enforcement notice and/or issue a fine. Enforcement action will not lead to redress for consumers affected by a contravention which is why the Department has sought to introduce this power to

make a consumer redress order; a consumer redress order focuses on the loss or damage which a consumer has suffered and looks to compensate a consumer for the loss or damage suffered.

369. Accordingly, if the conditions for making a consumer redress order are satisfied, section 30G(2) enables the Authority to make a consumer redress order requiring a regulated person to do such things as appear to the Authority to be necessary for the purpose of (a) remedying the consequences of a contravention; or (b) preventing a contravention of the same or similar kind from being repeated.

370. The way in which a contravention might cause a consumer loss, damage or inconvenience is difficult to predict. A similar type of contravention may adversely affect consumers in different ways. For example, a contravention arising from an energy company mis-selling energy tariffs might cause loss, damage or inconvenience to consumers in very different ways. Some may be left out of pocket, some only inconvenienced whilst some will be affected in both of these ways. The power of the Authority to make an order for the purpose of remedying the consequences of a contravention is deliberately a broad power to enable the Authority to tailor the remedial action to the circumstances of a particular case.

371. The types of remedial action which the Authority may decide to impose on a regulated person are described in section 30H(1). The list is not intended to be exhaustive but to illustrate the more common ways in which remedial action might be ordered. Subsection (1)(a) enables the Authority to order compensation to be paid by a regulated person to affected consumers, subsection (1)(b), coupled with subsection (3) enables the Authority to order a regulated person to make a written statement setting out, for example, the circumstances giving rise to the contravention, the consequences caused by the contravention and the steps which the regulated person has taken to ensure that the contravention is not repeated. The intention behind this provision is to require energy companies to bring a contravention to the attention of their affected customers and thereby act as a form of deterrent against future contravening.

372. Subsection 30H(1)(c), coupled with subsection (5), enables the Authority to order a regulated person to terminate or vary any contracts entered into between a regulated person and affected consumers. The provision enables the Authority to ensure that where a contravention is reflected in the terms of a contract which has been entered into between the parties, that those terms are varied or the contract terminated, if that is the best way to remedy the contravention and the loss or damage that is being caused to a consumer.

373. An important safeguard protecting the principles relating to privity of contract is

contained in subsection 30H(5)(b). Where the Authority orders a contract between the parties to be varied or terminated, that requirement only has effect if, and to the extent that, the affected consumer consents to the variation or termination proposed.

374. Section 30G sets out the circumstances in which a consumer redress order can be made and some of what it must contain along with how it must be served. Section 30H builds on 30G and provides greater detail of the content that might be included in a consumer redress order. Section 30I sets out some procedural requirements which must be met before a consumer redress order can be made. These procedural requirements ensure that a regulated person is given an opportunity to understand the case against it and respond to that case so that a consumer redress order is not made against it.

375. Section 30I(1) requires the Authority to give notice stating that it proposes to make a consumer redress order. The notice must specify the person to whom the order will apply, the contravention in respect of which the order is being made, the affected consumers, or a description of such consumers, the requirements to be imposed and the period within which the requirements are to be complied with and the time period within which representations or objections must be made to the Authority, see subsection (2) of section 30I. The notice must be served on the regulated person and on affected consumers, see subsection (5) of section 30I. Collectively, these provisions ensure that the a regulated person and affected consumers are both given a chance to be heard and to make their thoughts about the proposed order and its proposed terms known to the Authority before the Authority decides to make a consumer redress order.

376. In order to help regulated persons and affected consumers understand the circumstances in which a consumer redress order may be made, the Authority is required under section 30J to prepare and publish a statement of policy in which it must set out its policy for making consumer redress orders and the requirements which it may impose. By subsection (2) of section 30J the Authority must take its statement of policy into account in deciding whether to make a consumer redress order and in determining the requirements to be imposed.

377. Section 30K sets out the time-limits for making a consumer redress order and section 30L sets out how a consumer redress order may be enforced. Both the Authority and an affected consumer may bring proceedings to enforce a consumer redress order.

378. Section 30M enables a regulated person to appeal against the making of a consumer redress order and enables a court to quash or vary the terms of a

consumer redress order and deals with other related matters such as the period for which interest on any compensation should be payable. Section 30M ensures that the making of a consumer redress order is subject to scrutiny by the courts and therefore ensures that the Authority's views on the making of a consumer redress order and its terms can be examined by an independent and impartial body when invited to do so.

379. Section 30N contains some miscellaneous provisions connected to the making of a consumer redress order. For example, subsection (2) prevents the Authority from making a consumer redress order if it feels it is more appropriate to proceed in respect of the contravention under the Competition Act 1998. A contravention may have competition law implications which the Authority feels are greater than the possible consequences caused to a consumer and therefore subsection (2) requires the Authority to proceed under the Competition Act 1998.

380. Subsection (3) of section 30N makes clear that the Authority's power to make a consumer redress order does not prevent the Authority from also exercising its existing enforcement powers to, for example, fine a regulated person for a contravention. Therefore, a regulated person could receive a fine and a consumer redress order ordering compensation in respect of the same contravention. However, in such a case, the total amount of a fine that is payable and the total cost of compensation payable must not exceed 10% of that regulated person's turnover, see section 30O(2), (3) and (4).

381. As the foregoing demonstrates, the Authority's power to make a consumer redress order is subject to several procedural safeguards. First, a consumer redress order cannot be made until notice has been given to affected parties of the intention to make an order and its proposed content. This gives affected parties an opportunity to provide the Authority with reasons why the order should or should not be made or the requirements which it should contain. This process will help the Authority satisfy itself that it is appropriate to make an order and that the requirements it is proposing are capable of being implemented to achieve the desired effect.

382. Secondly, a consumer redress order is capable of being appealed to a court. This is as much a procedural safeguard as a substantive one for it enables a regulated person who has not been able to persuade the Authority not to make an order or not on particular terms to ask a court to review the position. By ensuring that an independent and impartial court can look at a consumer redress order section 30M guards against the risk that the Authority might (inadvertently and unintentionally) stray beyond the extent of its powers.

CHAPTER 2 - Miscellaneous

Clause 133 - Offshore transmission systems

Power conferred on: *Secretary of State*
Power exercised by: *Order*
Parliamentary procedure: *Negative Resolution*

383. Paragraph (3) of this clause inserts new sections 6F and 6G into the Electricity Act 1989. Section 6F provides the circumstances in which the prohibition on unlicensed transmission in section 4 of the Electricity Act 1989 does not apply. Section 6F(3) sets out the period for which the prohibition in section 4 of the Electricity Act 1989 (prohibition against the participating in the transmission of electricity) does not apply, section 6G defines this period.

384. Section 6F relates to offshore transmission projects which are developed by persons who subsequently seek to transfer the completed assets to an offshore transmission operator selected through a competitive tender process. Section 6F(3), through the defined concept of “commissioning period”, provides for the period in which the assets must be transferred to an offshore transmission operator, i.e. a person with a licence to participate in the transmission of electricity.

385. Section 6G(1) defines the “commissioning period”. When section 6F comes into force the “commissioning period” includes a period of 18 months which commences on the day a completion notice is issued. The period of 18 months has been set as the initial period because evidence from stakeholders suggests that this is a reasonable period after the issuing of a completion notice within which to complete the transfer of the transmission assets to an offshore transmission operator.

386. Section 6G(3) provides the Secretary of State with a power by order to amend the 18 month period in subsection (1) to 12 months. The reason for providing the Secretary of State with this power is that as experience and expertise develops in the construction and transfer of transmission assets it is likely to be possible to complete the transfer sooner than 18 months post issuing of a completion notice. In order to ensure that the transfer of transmission assets is completed as soon as is practicable and feasible a power has been taken enabling the Secretary of State to reduce the period of 18 months to 12 months.

387. The Secretary of State does not have a discretion relating to the new period which should replace the 18 month period stated in section 6G(1). If he is satisfied that the practical realities relating to the transfer of transmission assets

are capable of being completed within 12 months he can reduce the 18 month period allowed by section 6G(1) to 12 months. He must do this by amending section 6G(1) by order.

388. Section 6G(4) restricts the exercise of this power by preventing a change to the period from coming into force either sooner than two years or later than 5 years after this clause comes into force.

389. Section 6G(5) further restricts the exercise of this power in respect of offshore transmission projects that have qualified for a tender process at a time when the 18 month period applies, to the effect that the 18 month period will continue to apply in respect of such projects even after an order under section 6G(3) comes into force.

390. The exercise of the power is also subject to parliamentary scrutiny. Given the limits on the discretion given to the Secretary of State (as set out above), an order made under section 6G(3) is subject to the Negative Resolution procedure[1]. Similar powers in the Electricity Act 1989 are also subject to this procedure, see, for example, sections 34(2) and 36(3) of, and paragraph 2(3) of Schedule 3 and paragraph 1(4) of Schedule 9, the Electricity Act 1989.

Clause 134: Fees for services provided for energy resilience purposes

Power conferred on:	*Secretary of State*
Power exercised by:	*Regulations/ direction of the Secretary of State*
Parliamentary procedure:	*Negative resolution if fees set by regulations; statement laid before Parliament if fees set by direction of the Secretary of State*

391. This clause confers a power on the Secretary of State to charge fees for providing energy resilience services in the event of a disruption or threatened disruption to energy supplies. The level of such fees may be set either by regulations or by a direction of the Secretary of State.

392. Recent impacts of bad weather, potential for industrial action, and flooding on the sector has shown that further action may well be needed to improve the resilience of this sector. Provision of support services from Government, such as personnel, supplies, equipment and assets, with the ability for Government to recover appropriate fees, provides an additional and potentially highly cost effective option for business, and would help safeguard the smooth functioning of the economy in general.

[1] By virtue of section 106(2) of the Electricity Act 1989.

393. The power is necessary to support development and delivery of additional options for helping to support the energy sector's resilience and planning by allowing the Secretary of State to set fees, and as such recoup some or all of the costs of providing these services to businesses.

394. It is important that any fees charged are specific to the circumstances of the particular service provided and that the level of fee is tailored to the relevant costs and market rates at the time it is provided. It would be extremely unusual for the level of fees to be set out in primary legislation, particularly as it will not be possible to predict and set out in primary legislation what energy resilience services will be provided and what level of fee will be appropriate for such services.

395. The Department will work with businesses in the energy sector in identifying the services that could be of most value to relevant businesses, and determining what charges would be appropriate and supported by the market.

396. This clause provides that the level of fee may be determined by or under either regulations or a direction of the Secretary of State. The Department considers that it would be appropriate for fees to be set by direction where it is necessary for arrangements to be put in place quickly, so that there is not sufficient time to allow for the normal timetable for statutory instruments. Further, the setting of fees by direction will provide the Secretary of State with additional flexibility to adjust the rate in order to reflect volatility in market rates, where appropriate.

397. Subsection (5) provides that any regulations made under this power will be subject to the negative resolution procedure. The Department considers that this is an appropriate level of Parliamentary scrutiny for the setting of fees. The negative resolution procedure is used in equivalent situations such as fees charged for services under section 188 Energy Act 2004.

398. Subsection (6) provides that where fees are set by direction, the Secretary of State must lay before Parliament a statement of any fees specified in that direction. The Department considers that this is an appropriate level of Parliamentary scrutiny in cases where it is not appropriate to make regulations, as it will ensure that Parliament is nevertheless properly informed of the fees directed by the Secretary of State.

Clause 135: Fees in respect of decommissioning and clean-up of nuclear sites

Power conferred on:	*Secretary of State*
Power exercised by:	*Regulations*
Parliamentary procedure:	*Negative Resolution*

399. The Energy Act 2008 currently contains powers in sections 45(8) and (9) and 49(3) and (4) enabling the Secretary of State to recover from the operator the costs incurred by him in considering a funded decommissioning programme and a proposal to modify a funded decommissioning programme. This clause expands the Secretary of State's powers in this field.

400. Subsection 2 of this clause inserts a new section 45A into the Energy Act 2008. This enables the Secretary of State to make regulations to set a fee, payable by the operator (at such time as is determined by the regulations), in respect of the costs of advice incurred by the Secretary of State in considering any proposals for a funded decommissioning programme which an operator wishes to discuss with the Secretary of State before it is formally submitted.

401. Subsection 3 of the clause adds a new subsection (3H) and (3I) to section 46. Section 46(3A) currently enables the Secretary of State to enter into an agreement which limits the extent to which he may modify a funded decommissioning programme. Subsection (3H) enables the Secretary of State through regulations to set a fee, payable by the operator (again at such time as determined through the regulations) in respect of the costs incurred by the Secretary of State in considering any agreement. Subsection (3I) defines what those costs are.

402. Section 49(3) and (4) of the Act currently enables the Secretary of State through regulations to set a fee, payable by the operator, (at such time as is determined in the regulations) to recover the costs incurred for the consideration of a proposal to modify a funded decommissioning programme. Subsection 4 of the clause extends these powers so that section 49(3) and (4) now applies where the Secretary of State considers a proposal to modify before it is formally submitted.

403. Subsection 5 of the clause adds new sections 3A and 3B to section 66 of the Act (disposal of hazardous material). Section 66 of the Act covers the scenario where the Secretary of State enters into an agreement with an operator for the disposal of hazardous material. Subsection 3A enables the Secretary of State through regulations to set a fee in respect of the costs incurred by him in considering the agreement and to determine when the fee is to be paid.

404. The regulation making powers referred to above setting out how the fee can be determined (and also when such fees are to be paid) are subject to the Negative Resolution procedure. This is the same procedure that applies to the current fee regime on which this clause builds. The actual determination of the level of the fee, and when it should be paid is a level of detail which is appropriate to place in secondary legislation. Further, the underlying policy intention is clear and the

drafting of the regulations should not involve any changes of policy. It is the Department's view that the Negative Resolution procedure provides a sufficient level of scrutiny.

PART 6 – Final

Clause 141(1) and (4): Commencement

Power conferred on: *Secretary of State*
Power exercised by: *Order*
Parliamentary procedure: *None*

405. This clause contains a standard power to bring certain provisions of the Bill into force by commencement Order. By virtue of subsection (4), an Order can make different provision for different purposes and can make transitional provision and savings.

406. Consistent with the usual practice, commencement Orders under this clause are not subject to any Parliamentary procedure. Parliament will have approved the principle of the provisions in the Bill by enacting them; commencement by Order enables the provisions to be brought into force at a convenient time.

Annex A: Delegated Powers in the Bill

CLAUSE	TITLE	POWER CONFERRED ON	POWER EXERCISEABLE BY	PARLIAMENTARY PROCEDURE
PART 1 – Decarbonisation				
1	Power to set or amend a decarbonisation order in relation to a year	Secretary of State	Order	Affirmative Resolution
3	Power to make further provision about the meaning and calculation of carbon intensity of electricity generation in GB	Secretary of State	Order	Affirmative Resolution
PART 2 – Electricity Market Reform				
Chapter 2 – Contracts for Difference				
6	Regulations to encourage low carbon electricity generation	Secretary of State	Regulations	Negative Resolution unless containing provisions under clauses 9,10 or 11, in which case Affirmative Resolution
7 *(& Schedule 1)*	Designation of a CFD counterparty Schedule 1- CFD counterparties: transfer schemes.	Secretary of State	Order	None

CLAUSE	TITLE	POWER CONFERRED ON	POWER EXERCISEABLE BY	PARLIAMENTARY PROCEDURE
10	Direction to offer a contract	Secretary of State	Direction	None
17	Order for maximum cost and targets	Secretary of State	Order	Affirmative Resolution
20	Licence modifications	Secretary of State	Licence/Code Modification Documents	Draft Negative Resolution
Chapter 3 – Capacity Market				
21	Power to make electricity capacity regulations	Secretary of State	Regulations	Affirmative Resolution in the first instance, Negative Resolution for future changes
22	Capacity agreements	Secretary of State	Regulations	Affirmative Resolution in the first instance, Negative Resolution for future changes
23	Capacity auctions	Secretary of State	Regulations	Affirmative Resolution in the first instance, Negative Resolution for future changes
24	Settlement Body	Secretary of State	Regulations	Affirmative Resolution in the first instance, Negative Resolution for future changes

CLAUSE	TITLE	POWER CONFERRED ON	POWER EXERCISEABLE BY	PARLIAMENTARY PROCEDURE
26	Other requirements	Secretary of State	Regulations	Affirmative Resolution in the first instance, Negative Resolution for future changes
27	Electricity capacity regulations: information and advice	Secretary of State	Regulations	Affirmative Resolution in the first instance, Negative Resolution for future changes
28	Capacity market rules	Secretary of State; electricity capacity regulations may also confer power on the Authority	Capacity market rules	Negative resolution in the first instance; future changes to be laid before Parliament but not subject to Parliamentary procedure
29	Provision about Electricity Demand Reduction	Secretary of State	Regulations (made under the power in clause 21)	As for the power in clause 21, Affirmative Resolution in the first instance, Negative Resolution for future changes
30	Enforcement and dispute resolution	Secretary of State	Regulations and capacity market rules	Affirmative Resolution in the first instance, Negative Resolution for future changes (for regulations); Negative resolution in the first instance, non for future changes (for capacity market rules)

CLAUSE	TITLE	POWER CONFERRED ON	POWER EXERCISEABLE BY	PARLIAMENTARY PROCEDURE
31	Licence modifications for the purposes of the capacity market	Secretary of State	Licences	Negative Resolution
32	Amendment of enactments	Secretary of State	Regulations	Affirmative Resolution
Chapter 4 and Schedule 2: Investment Contracts				
Schedule 2 – Investment Contracts				
Schedule 2, para 5	Investment contract counterparty	Secretary of State	Order	None
Schedule 2, para 6	Regulations for the purposes of investment contracts	Secretary of State	Regulations	Negative Resolution unless containing provisions under paragraph 7 or 8, in which case Affirmative Resolution
Schedule 2, para 7	Supplier Obligation	Secretary of State	Regulations	Affirmative Resolution
Schedule 2, para 8	Payments to electricity suppliers	Secretary of State	Regulations	Affirmative Resolution
Schedule 2, para 9	Application of Sums	Secretary of State	Regulations	Negative Resolution
Schedule 2, para 10	Information and advice	Secretary of State	Regulations	Negative Resolution
Schedule 2, para 11	Investment contracts: functions of the Authority	Secretary of State	Regulations	Negative Resolution

CLAUSE	TITLE	POWER CONFERRED ON	POWER EXERCISEABLE BY	PARLIAMENTARY PROCEDURE
Schedule 2, para 12	Enforcement	Secretary of State	Regulations	Negative Resolution
Schedule 2, para 14	Duties of an investment contract counterparty and a CFD counterparty	Secretary of State	Regulations	Negative Resolution
Schedule 2, paras 16-18	Transfers	Secretary of State	Scheme	None
Schedule 2, para 19	Licence modifications	Secretary of State	Licence/ Code Modification Documents	Draft Negative Resolution
Chapter 5 – Conflicts of Interest and Contingency Arrangements				
39	Modifications of transmission licences: business separation	Secretary of State	Licence/Code Modification Documents	Draft Negative Resolution
40 *(& Schedule 3)*	Power to transfer EMR functions	Secretary of State	Order	Negative Resolution
Schedule 3 *(linked to clause 35 above)*	Transfer schemes in connection with orders under section 35	Secretary of State	Transfer Scheme	None
Chapter 6 – Access to Markets etc				

CLAUSE	TITLE	POWER CONFERRED ON	POWER EXERCISEABLE BY	PARLIAMENTARY PROCEDURE
43	Power to modify licence conditions etc: market participation and liquidity	Secretary of State	Licence/Code Modification Documents	Draft Negative Resolution
44	Power to modify licence conditions etc to facilitate investment in electricity generation	Secretary of State	Licence/Code Modification Documents	Draft Negative Resolution
Chapter 7 – The Renewables Obligation: Transitional Arrangements				
46	Power to make a certificate purchase order	Secretary of State	Order	Affirmative Resolution
46	Power to revoke designation of a CFD counterparty as purchasing body	Secretary of State	Order	None
46	Power to make transitional provision in connection with a designation ceasing to have effect	Secretary of State	Order	Negative Resolution
Chapter 8 – Emissions Performance Standard				
47(6)(a)	Duty not to exceed annual carbon dioxide emissions limit	Secretary of State	Regulations	Affirmative Resolution

CLAUSE	TITLE	POWER CONFERRED ON	POWER EXERCISEABLE BY	PARLIAMENTARY PROCEDURE
47(6)(b)	Duty not to exceed annual carbon dioxide emissions limit	Secretary of State	Regulations	Affirmative Resolution
48	Suspension etc of emissions limit in exceptional circumstances	Secretary of State	Direction	Laying in Parliament of direction and statement of reasons
48(6)	Suspension etc of emissions limit in exceptional circumstances	Department of Enterprise, Trade and Investment, Northern Ireland	Direction	Laying in Parliament of direction and statement of reasons
49 *(& Schedule 5)*	Monitoring and enforcement	Secretary of State in England, the Scottish Ministers in Scotland, the Welsh Ministers in Wales, and the Department of the Environment in Northern Ireland	Regulations and Statutory Rules in Northern Ireland	Negative Resolution unless consequential amendments are being made to primary legislation in which case Affirmative Resolution applies.

CLAUSE	TITLE	POWER CONFERRED ON	POWER EXERCISEABLE BY	PARLIAMENTARY PROCEDURE
Schedule 5 *(linked to clause 49 above)*	Emissions limit duty: monitoring and enforcement	Secretary of State in England, the Scottish Ministers in Scotland, the Welsh Ministers in Wales, and the Department of the Environment in Northern Ireland	Regulations and Statutory Rules in Northern Ireland	Negative Resolution unless consequential amendments are being made to primary legislation in which case Affirmative Resolution applies
PART 3 – Nuclear Regulation				
Chapter 1 – The ONR's Purposes				
59	Nuclear security purposes	Secretary of State	Regulation	Negative Resolution
60	Notice to the Secretary of State to ONR specifying sensitive nuclear information	Secretary of State	Notice	None
62	Transport purposes	Secretary of State	Regulation	Negative Resolution
Chapter 2 – Nuclear Regulations				

CLAUSE	TITLE	POWER CONFERRED ON	POWER EXERCISEABLE BY	PARLIAMENTARY PROCEDURE
63	Nuclear regulations	Secretary of State	Regulations	Regulations under clause 54(3)(d)(ii) which amend the Safeguards Act 2000: Affirmative Resolution, otherwise Negative Resolution
Chapter 3 – Office for Nuclear Regulation				
66 *(& Schedule 7)*	The Office for Nuclear Regulation	Secretary of State	Order	Affirmative Resolution (in House of Commons only)
Schedule 7, para 26 *(linked to clause 66 above)*	The Office for Nuclear Regulation: Payments and borrowing	Secretary of State	Order	Affirmative Resolution (in House of Commons only)
66 *(& Schedule 7)*	The Office for Nuclear Regulation	Secretary of State	Direction	None
Schedule 7, para 28 *(linked to clause 66 above)*	Financial year	Secretary of State	Direction	None
Chapter 4 - Functions of the ONR				
68	Codes of Practice	ONR to issue etc. codes of Practice	Code of Practice	None

CLAUSE	TITLE	POWER CONFERRED ON	POWER EXERCISEABLE BY	PARLIAMENTARY PROCEDURE
71 *(&Schedule 8)*	Inspectors	Secretary of State	Regulations	Negative Resolution
Schedule 8 *(linked to clause 71 above)*	Appointment and powers of inspectors	Secretary of State	Regulations	Negative Resolution
73	Inquiries	Secretary of State	Regulations	Negative Resolution
77	Provision of information or advice to relevant authorities	Secretary of State	Regulations	Negative Resolution
80	Directions from Secretary of State	Secretary of State	Direction	None
81	Compliance with nuclear safeguards obligations	Secretary of State	Notice	None
87	HMRC power to seize articles etc. to facilitate ONR and inspectors	Officers of Her Majesty's Revenue and Customs	Direction	None
89	Fees	Secretary of State	Regulations	Negative Resolution
Chapter 5 - Supplementary				
99	Crown application: Part 2	Secretary of State	Order	Affirmative Resolution
102	Transitional provision etc	Secretary of State	Order	Negative Resolution
103 *(&Schedule 11)*	Transfer of staff etc	Secretary of State	Scheme	None

CLAUSE	TITLE	POWER CONFERRED ON	POWER EXERCISEABLE BY	PARLIAMENTARY PROCEDURE
Schedule 11 *(linked to clause 103 above)*	Transfers to the Office for Nuclear Regulation	Secretary of State	Scheme	None
104	Minor and consequential amendments	Secretary of State	Order	Negative Resolution
105	Application of Part 3	Her Majesty	Order in Council	Negative Resolution
PART 4 – Government Pipe-line and Storage System				
117	Power to dissolve the Oil and Pipelines Agency by order	Secretary of State	Order by Statutory Instrument	Negative Resolution
PART 5 – Strategy and Policy Statement				
119	Designation of statement	Secretary of State	Designation of statement	Affirmative Resolution
125	Reporting requirements	Secretary of State	Secretary of State Direction	None
PART 6 – Consumer Protection and Miscellaneous				
Chapter 1- Consumer Protection				
127	Power to modify energy supply licences: domestic supply contracts	Secretary of State	Order	None

CLAUSE	TITLE	POWER CONFERRED ON	POWER EXERCISEABLE BY	PARLIAMENTARY PROCEDURE
131	Powers to alter activities requiring licence: activities related to supply contracts	Secretary of State	Order	Affirmative Resolution
132	Consumer redress orders	The Authority	The Authority	None
Chapter 2 - Miscellaneous				
133	Offshore transmission systems	Secretary of State	Order	Negative Resolution
134	Fees for services provided for energy resilience purposes	Secretary of State	Regulations/direction	Negative resolution if fees set by regulations; statement laid before Parliament if fees set by direction of the Secretary of State
135	Fees in respect of decommissioning and clean-up of nuclear sites	Secretary of State	Regulations	Negative Resolution
PART 7 – Final				
141	Commencement	Secretary of State	Order	None