Self-Reporting Routine Compliance Violations

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The Federal Energy Regulatory Commission (FERC) assessed a $750,000 civil penalty against International Transmission Company and several of its public utility affiliates for failure to obtain FERC approval under Section 203 of the Federal Power Act (FPA) for 20 jurisdictional transactions, which were self-reported to FERC. The company and its affiliates were also penalized here for failing to make appropriate filings under FPA Section 205 with respect to 174 jurisdictional agreements that *were not* self-reported to FERC.[1]

Yet even FERC recognized that similar missed filings, "which are frequently self-reported," often are closed without FERC's Office of Enforcement opening a formal investigation and without any civil penalty being assessed "depending on the particular facts and circumstances of the case."[2] FERC assessed the civil penalty in *ITC Penalty* due to the significant volume and multiyear duration of the violations and because the "violations created a lack of transparency in the market."[3] FERC also found that the violations "were the direct result of [the] failure to maintain a compliance program capable of identifying and ensuring compliance with . . . FPA Section 203 and 205 obligations."[4]

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Regulated entities frequently are faced with having failed to fulfill routine regulatory requirements, such as (1) timely filing a required report, such as an Electric Quarterly Report or an Annual Report of Natural Gas Transactions;[5] (2) obtaining authorization under FPA Section 205 prior to providing a jurisdictional service, such as making a wholesale power sale;[6] (3) recertifying status as a qualifying facility when facts change;[7] or (4) timely filing a notice of change in status when the facts on which market-based rate authority is granted change.[8] Such entities often are reluctant to self-report these types of violations because the entities are concerned about entering into a long, drawn-out compliance investigation with FERC for violations that they view as minor, unintentional, and easily corrected. *ITC Penalty*'s $750,000 penalty indeed might have the unintended consequence of heightening this reluctance to self-report or even dampening the voluntary compliance efforts that might help the regulated entity identify a violation in the first place.[9]

At the same time, FERC does not view any routine compliance violation as too minor to evaluate as a potential self-report. While each situation needs to be considered on its own merits, under FERC's present compliance and enforcement policies, a company often will be in a better position if it self-reports such routine violations. Nevertheless, because self-reporting even routine compliance violations often requires substantial internal resources and potentially outside counsel, regulated entities need to understand the consequences of self-reporting and what is required to improve the likelihood that its self-report is closed without FERC assessing civil penalties.

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WHY IS A COMPANY IN A BETTER POSITION IF IT SELF-REPORTS?

Although self-reporting is voluntary, FERC views a self-report as "evidence of a company's commitment to compliance."[10] If a violation, even a minor one, known to a regulated entity is not self-reported but later discovered by FERC, it is likely to more harshly judge and potentially penalize the entity.[11]

An entity should consider self-reporting for various reasons. First, FERC may be less likely to penalize or penalize as harshly a violation that is self-reported, as long as it is self-reported prior to an imminent threat of disclosure or government investigation and within a reasonably prompt time after the entity becomes aware of the violation.[12] Second, a self-report will allow an entity to control its message to FERC, to describe the violation, the actions taken by the entity subsequent to discovery of the violation in the most favorable light, the entity's overall compliance program, and steps it will take to prevent future recurrence of the violation. Finally, it often is the case that FERC will learn of a violation through other means (e.g., referral by another office of a late filing or referral by a market monitor that a generation unit failed to report an outage). However, a self-report will support the company's position that it had no intent to violate and intended to comply.

WHEN SHOULD A SELF-REPORT BE MADE?

A self-report should be made promptly after a regulated entity has identified a situation that has caused it to be in violation of a FERC-enforced statute, regulation, rule, or order.

Each case is different and must be considered in light of its own facts. However, it often is the case that while an entity becomes aware of facts and circumstances that could give rise to a violation, self-reporting might not be appropriate upon learning these facts. A self-report is not an insignificant event. Once a matter is self-reported to FERC, it will expect that the entity prepare a written report and investigate whether other, similar violations exist. FERC also could start its own investigative process, which could include data requests and depositions. These are time-consuming, resource-taxing activities.

Therefore, a self-report generally should be made only when an entity is certain, or reasonably certain, that a violation indeed has occurred. Gaining this certainty might require further factual investigation or a review of the pertinent facts by legal counsel. These procedures should determine if an actual violation exists or, because there often are grey areas in the interpretation of applicable laws, if there is a good-faith argument that no violation exists.[13]

Once there is a reasonable certainty that a violation has occurred, the entity then should contact FERC's Office of Enforcement, typically through a telephone conference, and report the violation. Although the entity should request confirmation, the Office of Enforcement generally will note this initial telephone conference date as the self-report date.

WHAT SHOULD A WRITTEN SELF-REPORT INCLUDE

The self-reporting entity's work does not stop with the initial, oral self-report.

FERC will almost certainly require a written report. To improve a self-report's chances of being closed without action, the report should describe the following:

- The violation, including the statute or regulation that was violated, the date of the violation, identification of personnel involved in the violation, any documents relevant to or evidencing the violation, and any other information that Office of Enforcement might request in the initial self-report discussion
- How the violation was identified, e.g., through self-evaluation, internal audit, or internal compliance program
- When the violation was identified
- Actions taken to end the violation and how soon cessation occurred after discovery
- Root cause of the violation
- Corrective actions that were taken subsequent to the discovery of the violation, and how soon were such corrective actions taken
- Investigation done (or to be done) to determine the scope of the violation or similar violations, including whether senior management actively participated in such investigation and whether senior management encouraged employees to be forthcoming with facts in the investigation
- Harm caused by the violation, if any, such as harm to market transparency, economic loss to others, fraud, and market manipulation
- Steps taken (or to be taken) to prevent recurrence of the same or similar violations

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WILL THERE BE A LONG, DRAWN-OUT FERC INVESTIGATION?

While attempting to predict whether FERC will investigate a self-report of a routine compliance violation is difficult because each case is different, FERC's past practices can help a company decide when and whether to self-report.

First, although FERC has an aggressive enforcement program, its priorities are fraud and manipulation, reliability standards violations, anticompetitive conduct, and conduct that threatens the transparency of regulated markets.[14] With respect to more routine compliance matters, such as those previously discussed, FERC certainly remains concerned, but its goal appears to be to educate, assist, and encourage regulated entities to achieve compliance with voluntary compliance measures rather than with penalties.[15] Indeed, FERC has exercised prosecutorial discretion in the majority of self-reported matters and closed those cases without subjecting the entity to further investigation or civil penalty. According to FERC's 2013 Report on Enforcement, of the 594 self-reports that FERC has received, "496 have been reviewed and closed without action."[16]

Common themes among self-reported cases that FERC has closed without action—even cases in which there were multiple violations over multiyear periods—include the following:[17]

- The violation caused no harm to the market or customers, e.g., did not involve fraud, manipulation, reliability risk, or losses.
- The violation was quickly remedied.
- The entity implemented compliance procedures to prevent recurrence of the same or similar violations.
- There was no evidence of intent to violate the law (e.g., conduct was inadvertent or isolated).
- The violation was identified through an internal compliance review.

There is no guarantee that FERC will not investigate routine compliance violations (as evidenced by *ITC Penalty*). Based on past FERC practice, if a violation and the company's handling of the violation includes some or all of these common themes, and the company has a reasonably robust compliance program that has procedures to prevent, detect, and correct violations and includes the other qualities that FERC has indicated are essential to an effective compliance program,[18] it is more likely than not that FERC will close a self-report of a routine compliance violation without further action. However, facts that might trigger an investigation could include a pattern of noncompliance or a company not actually following its internal compliance program.

Routine compliance matters are not generally considered a FERC enforcement priority unless market transparency is threatened. Thus, a company self-reporting a routine compliance matter should not quickly expect word from FERC's Office of Enforcement whether its matter is closed without action. Closure depends on FERC's internal review of the matter. FERC will also wait to make a decision on the self-report until after other FERC offices issue any orders on corrective filings relative to the self-report made by the entity.

NOTES

1. *International Transmission Co.*, 146 FERC ¶ 61,172, pp. 6, 7, 14 (2014) (*ITC Penalty*).
2. Ibid., p. 15 (citing FERC Office of Enforcement, FERC Docket No. AD07-13-006, 2013 Report on Enforcement (Nov. 21, 2013), p. 19) (2013 Report on Enforcement).
3. Ibid., p. 12.
4. Ibid., p. 13.
5. 18 C.F.R. §§ 35.10b, 260.401 (2013).
6. 18 C.F.R. § 35.1.
7. 18 C.F.R. § 292.207.
8. 18 C.F.R. § 35.42.
9. See, e.g., Note 1 (Moeller dissent).
10. 2013 Report on Enforcement, p. 14; see, e.g., *Enforcement of Statutes, Regulations and Orders*, Revised Policy Statement on Enforcement, 123 FERC ¶ 61,156, pp. 61–64 (2008); *Compliance with Statutes, Regulations and Orders*, Policy Statement on Compliance, 125 FERC 61,058, p. 20 (2008) (*Policy Statement on Compliance*).
11. See, e.g., *Enforcement of Statutes, Orders, Rules, and Regulations*, FERC Docket No. PL06-1-000. Policy Statement on Enforcement," 70 Fed. Reg. 66378, p. 25 (Nov. 2, 2005) Policy Statement on Enforcement; *Policy Statement on Compliance*, p. 20.
12. See, e.g., *Enforcement of Statutes, Orders, Rules and Regulations*, "Revised Policy Statement on Penalty Guidelines," 132 FERC ¶ 61, 216, pp. 127–129, 147–148 (2010) (*Revised Penalty Guidelines*).
13. See, e.g., *Revised Penalty Guidelines*, pp. 127–129.
14. 2013 Report on Enforcement, p. 2.
15. See, e.g., *Revised Penalty Guidelines*, pp. 109–110; *Enforcement of Statutes, Orders, Rules and Regulations*, Policy Statement on Penalty Guidelines, 130 FERC ¶ 61,220, at P 11 (2010).
16. 2013 Report on Enforcement, p. 14.
17. Ibid., pp. 17–21.
18. The qualities of an effective compliance program are discussed in Carpentier, D. (2012, July). What is missing from your compliance program? *Natural Gas & Electricity*, 28(12), 19–23; Carpentier, D. (2011, September). Establishing a culture of compliance. *Natural Gas & Electricity*, 28(2), 30–32.

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