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FERC Anti-Manipulation Enforcement and the Barclays Proceeding: What Factors Should Regulated Entities Consider before Deciding to Follow Barclays' Path to Federal Court?

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FERC Anti-Manipulation Enforcement and the Barclays Proceeding: What Factors Should Regulated Entities Consider before Deciding to Follow Barclays' Path to Federal Court?

Matthew Hale*

Abstract

Energy regulation is not a new topic, but after the Enron scandal, Congress made significant changes. The changes were embodied in the Energy Policy Act of 2005. One major change was to FERC's ability to hand down penalties for market manipulation. Recently, FERC has been aggressively enforcing its power and anticipates anti-manipulation enforcement will be a point of emphasis in the future. The first entity to challenge FERC's power in federal court is Barclays. The Barclays case, other recent enforcement actions, and the regulations FERC has promulgated provide a guide to regulated entities about how and when they should challenge FERC in federal court. The outcome of the Barclays case will have an immense impact on future FERC enforcement actions.

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I. Introduction

In 2001, the Enron scandal ripped through California and the nation's economy.¹ In the wake of the scandal, questions arose about whether agencies like the Federal Energy Regulatory Commission ("FERC") had enough power to keep another Enron type manipulation from occurring.² One area of regulatory law that has changed since the Enron scandal is FERC's authority to police and penalize market manipulation.³

Congress responded to the market manipulation problem with provisions in the Energy Policy Act of 2005 ("EPAAct").⁴ The EPAAct included major additions to FERC's enforcement power.⁵ It granted FERC authority to both regulate market manipulation and impose civil penalties on regulated entities it finds participated in market manipulation.⁶ Since the beginning of 2013, FERC has aggressively enforced its new power and

1. See William W. Bratton, *Enron and the Dark Side of Shareholder Value*, 76 TUL. L. REV. 1275, 1277-78 (2002) (discussing the financial implications of Enron's collapse).

2. See *id.* at 1288 ("Enron shows that the incentive structure that motivates actors in our self-regulatory governance system generates much less powerful checks against abuse than many observers have believed.").

3. See Allan Horwich, *Warnings to the Unwary: Multi-Jurisdictional Federal Enforcement of Manipulation and Deception in the Energy Markets after the Energy Policy Act of 2005*, 27 ENERGY L.J. 363, 369 (2006) (discussing the added authority passed in the EPAAct of 2005 as a response to concerns that arose after the Enron scandal).

4. See *id.* (noting the specific law that the U.S. government used to respond to the concerns associated with the Enron scandal).

5. See *id.* ("[T]he Energy Policy Act of 2005 . . . granted additional enforcement power to the FERC and added to the array of and increased the existing civil and criminal penalties for manipulative and deceptive conduct.").

6. See 16 U.S.C. § 824v (2014) (prohibiting market manipulation).

regulated entities have consented to pay considerable fines.⁷ Although Congress created FERC's power in 2005, Barclays is the first to challenge FERC's anti-manipulation authority in a federal court.⁸

On July 16, 2013, FERC issued an order assessing a \$435 million fine against Barclays as previously proposed by FERC's Office of Enforcement on October 31, 2013.⁹ In addition, four traders associated with the market manipulation were individually fined.¹⁰ Barclays refused to pay the fine,¹¹ and FERC recently filed an action in the United States District Court for the Eastern District of California asking for an order affirming the assessment.¹²

Section II of this Note discusses the history and passage of the EAct.¹³ Section III of this Note discusses FERC's

7. See Order Approving Stipulation and Consent Agreement, 142 FERC ¶ 61,056, 1, Docket No. IN12-4, (Jan. 22, 2013) (assessing a civil penalty for market manipulation against Deutsche Bank); Order Approving Stipulation and Consent Agreement, 142 FERC ¶ 61,088, 1, Docket No. IN10-5, (Feb. 1, 2013) (assessing a civil penalty for market manipulation against Oceanside Power); Order Approving Stipulation and Consent Agreement, 142 FERC ¶ 61,218, 1, Docket No. IN12-11, (Mar. 22, 2013) (assessing a civil penalty for market manipulation against Rumford Paper); Order Approving Stipulation and Consent Agreement, 142 FERC ¶ 61,041, 1, Docket No. IN11-8 & IN13-5, [hereinafter "JP Morgan Consent Agreement"] (July 30, 2013) (assessing a civil penalty for market manipulation against JP Morgan).

8. See Kelly Fetty, *Barclays Rejects \$453 Million Fine, Takes FERC to Court*, DIGITAL JOURNAL (Aug. 7, 2013), www.digitaljournal.com/article/356023 (discussing the precedential effect of the Barclays decision) (on file with the WASHINGTON AND LEE JOURNAL OF ENERGY, CLIMATE, AND THE ENVIRONMENT).

9. See Order Assessing Civil Penalties, Docket No. IN08-8, 144 FERC ¶ 61,041, 75-76 (July 16, 2013) [hereinafter "Order Assessing Civil Penalties"] (accepting Office of Enforcement staff's recommendation for penalties).

10. See *id.* (agreeing with the penalties recommended by the Office of Enforcement against the individual traders).

11. See Petition for an Order Affirming FERC's July 16, 2013 Order Assessing Penalties, at 2, *FERC v. Barclays Bank PLC*, No. CV-02093, (E.D. Cal. Oct. 9, 2013) (stating that Barclays failed to pay the fine within 60 days).

12. See *id.* ("The Commission now files this petition for an order from this Court affirming the Order Assessing Civil Penalties.").

13. See *infra* Part II (discussing the history and passage of the EAct).

promulgation of the anti-manipulation rule.¹⁴ Section IV of this Note discusses FERC's recent history of enforcement including its considerable fine levied against JP Morgan.¹⁵ Section V addresses the Barclays enforcement action.¹⁶ Section VI analyzes issues that may be decided in the pending district court litigation.¹⁷ Section VII of the note analyzes factors regulated entities should consider when they determine whether to cooperate with FERC or force FERC to litigate in federal court.¹⁸ Section VIII concludes that when a regulated entity considers a large fine undeserved or any amount of fine entirely unwarranted, a regulated entity should take FERC to federal court, and when a large fine is warranted or a small fine could be reduced to zero, a regulated entity should settle with FERC.¹⁹

II. History of Energy Policy Act of 2005

Before the EPAct, FERC's enforcement authority was based on market behavior rules.²⁰ The market behavior rules were promulgated in 2003 to combat market-based trading activity after the Commission discovered multiple price manipulation schemes in California in 2000 and 2001.²¹ Rule 2 of the market behavior rules included a prohibition for "[a]ctions or

14. See *infra* Part III (outlining FERC's promulgation of anti-manipulation rule).

15. See *infra* Part IV (explaining FERC's recent history of enforcement in situations similar to Barclay's).

16. See *infra* Part V (discussing Barclays pending enforcement action).

17. See *infra* Part VI (noting the issues that need to be resolved in current district court litigation).

18. See *infra* Part VII (elaborating on factors regulated entities should consider when conducting business with FERC).

19. See *infra* Part VII (discussing recommended actions for regulated entities based on potential outcomes).

20. See Joseph Kelliher, *Market Manipulation, Market Power, and the Authority of the Federal Energy Regulatory Commission*, 26 ENERGY L.J. 1, 31 (2005) ("Commission issued the Market Behavior Rules, establishing a general prohibition of market manipulation and banning a number of specific manipulative practices used by Enron.").

21. See Prohibition of Energy Market Manipulation, 113 FERC ¶ 61,067, 61,243 (proposed Oct. 20, 2005) [hereinafter "NOPR"] (to be codified at 18 C.F.R. pt. 1c.2) (discussing the history and purpose of the market behavioral rules).

transactions that are without a legitimate business purpose and that are intended to or foreseeably could manipulate market prices, market conditions, or market rules for electric energy or electricity products.”²² However, by 2005, concerns began to grow that FERC did not have the necessary tools to regulate its markets.²³

A major driver behind Congressional action and a model of what FERC needed was Joseph Kelliher’s 2005 article.²⁴ At the time, Kelliher was the Chairman of FERC.²⁵ He outlined three important changes needed for FERC to police and penalize market manipulation.²⁶ First, Kelliher proposed that FERC must have an express authority to prohibit market manipulation that did not involve Congress singling out specific instances of market manipulation.²⁷ Kelliher wanted FERC to have the ability to promulgate rules that generally prohibited market manipulation.²⁸ With that power, FERC could promulgate regulations prohibiting behavior as quickly as market participants came up with more creative ways to get around the rules.²⁹

Second, Kelliher advocated that FERC have civil and criminal penalty authority when its market manipulation rule was violated.³⁰ He argued that both securities and commodities law had established penalties for their market manipulation

22. Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations, 105 FERC ¶ 61,218, 62,147 (Nov. 17, 2003).

23. See Kelliher, *supra* note 20, at 1 (discussing market changes over past 25 years impacting FERC’s ability to regulate effectively).

24. See *id.* at 33 (recommending Congressional action to enhance FERC’s abilities to regulate).

25. See *id.* at 1 n.* (stating that Kelliher was the Commissioner of FERC).

26. See *id.* at 30–31 (discussing three approaches to enhancing FERC power to regulate).

27. See *id.* at 31 (“It is unlikely that legislatively prohibiting specific manipulative practices will prove an effective way to prevent market manipulation.”).

28. See *id.* (“A better approach would be to establish a general prohibition of market manipulation and authorize the Commission to prohibit specific manipulative practices.”).

29. See *id.* (discussing that market participants normally find creative means to circumvent an express Congressional prohibition).

30. See *id.* at 30 (advocating that FERC needs the power to impose civil penalties for violations of a manipulation rule).

rules.³¹ With those examples in mind, Kelliher argued no public policy rationale existed to support the difference in enforcement powers between FERC and other market regulators.³²

Third, Kelliher advocated for FERC to have the ability to collect market information.³³ He argued that FERC needed the ability to collect information on market participants outside of an investigation or report for Congress.³⁴ Kelliher argued that without power to collect information, FERC would have more difficulty adequately regulating markets.³⁵

After Kelliher's article, Congress addressed whether or not to enhance FERC's authority to regulate energy markets. Congress included new power for FERC in EAct.³⁶ However, there is very little language in the Congressional Record to indicate whether representatives and senators were satisfied with the rule. In the House of Representatives, Samuel Farr of California stated that the EAct did not adequately address market manipulation concerns.³⁷ However, Senator Bingaman of New Mexico believed that consumers benefited from the Act and that the bill contained measures that would make markets more transparent.³⁸ Senator Bingaman stated that the Act was meant

31. *See id.* ("Securities and commodities laws include express prohibitions of market manipulation.")

32. *See id.* ("There is no valid public policy reason why the Commission should not have the same enforcement tools as other federal economic regulatory agencies.")

33. *See id.* at 32 ("There is also a need to strengthen the Commission's ability to collect market information on a routine basis from all market participants, not just public utilities.")

34. *See id.* ("Under current law, the Commission can obtain information only from market participants other than public utilities in the course of a specific enforcement investigation, or in the preparation of a report to Congress.")

35. *See id.* (arguing that under the then existing scheme FERC could not adequately maintain an understanding of developments in the market).

36. *See* 16 U.S.C. § 824v (2014) (granting FERC power to punish market manipulation).

37. *See* 151 CONG. REC. H2192-02, H2209, (daily ed. April 20, 2005) ("The bill does not give federal regulators the tools they need to prevent and punish bad actors like Enron who manipulate power markets.")

38. *See* 151 CONG. REC. S9255-01, S9258, (daily ed. July 28, 2005) ("The conference report has perhaps some of the strongest provisions in the area of protection of energy consumers.")

to prohibit market manipulation.³⁹ Senator Harkin of Iowa also stated that the Act was meant to protect consumers but added that the Act was directed at actions like those that occurred during the Enron scandal.⁴⁰

President George W. Bush signed EAct into law on August 8, 2005.⁴¹ The two statutory provisions of note for FERC address market manipulation⁴² and civil penalties.⁴³ The market manipulation statute states that:

It shall be unlawful for any entity (including an entity described in section 824(f) of this title), directly or indirectly, to use or employ, in connection with the purchase or sale of electric energy or the purchase or sale of transmission services subject to the jurisdiction of the Commission, any manipulative or deceptive device or contrivance (as those terms are used in section 78j(b) of Title 15), in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of electric ratepayers.⁴⁴

The statute granting civil penalty power to FERC states that:

Any person who violates any provision of subchapter II of this chapter or any provision of any rule or order thereunder shall be subject to a

39. See *id.* (stating that the new provisions are broad, ensure market transparency, and prohibit market manipulation).

40. See 151 CONG. REC. S9255-01, S9270, (daily ed. July 28, 2005) (“The energy bill includes vitally important measures to boost renewable energy and energy efficiency, to improve our electricity grid, and to protect consumers from bad corporate actors like Enron.”).

41. See Statement by the President on Energy Policy Act of 2005, 2005 WL 1864962 (August 8, 2005) (“Today, I have signed into law H.R. 6, the ‘Energy Policy Act of 2005.’”).

42. See 16 U.S.C. § 824v (2014) (granting the power to punish market manipulation).

43. See 16 U.S.C. § 825o-1 (2014) (granting the power to assess fines and criminal penalties for market manipulation violations).

44. 16 U.S.C. § 824v (2014).

civil penalty of not more than \$1,000,000 for each day that such violation continues. Such penalty shall be assessed by the Commission, after notice and opportunity for public hearing, in accordance with the same provisions as are applicable under, section 823b(d) of this title in the case of civil penalties assessed under section 823b of this title. In determining the amount of a proposed penalty, the Commission shall take into consideration the seriousness of the violation and the efforts of such person to remedy the violation in a timely manner.⁴⁵

FERC anti-manipulation cases use the procedure outlined in the Federal Power Act.⁴⁶ There are two procedural avenues a regulated entity can take when issued an order assessing penalties.⁴⁷ First, the company can elect to go before an Administrative Law Judge (“ALJ”) for a hearing under Section 31(d)(2).⁴⁸ If the ALJ affirms the Commission’s proposed penalty, the regulated entity has the option to appeal to the appropriate United States Court of Appeals who can affirm, modify, or set aside the Commission’s order.⁴⁹

Second, when a regulated entity is sent notice of a proposed penalty under Section 31(d)(1) of the Federal Power Act, the entity may elect in writing within 30 days that it wishes to skip the agency hearing.⁵⁰ If the entity chooses to skip the agency hearing, FERC will immediately assess civil penalties without an agency hearing.⁵¹ Under Section 31(d)(3), if the company does not

45. 16 U.S.C. § 825o-1 (2014).

46. *See* 16 U.S.C. § 823b(d) (2014) (outlining procedural options under the Federal Power Act for anti-manipulation cases).

47. *See id.* § 823b(d)(1) (providing for the election to skip the administrative proceeding by notifying the agency in writing within 30 days).

48. *See id.* § 823b(d)(2)(A) (providing agency proceedings for a regulated entity that does not elect to skip agency proceedings).

49. *See id.* § 823b(d)(2)(B) (allowing a party unsatisfied with the agency proceeding to appeal to the proper Court of Appeal).

50. *See id.* § 823b(d)(1) (allowing a regulated entity to “elect in writing within 30 days after the date of receipt of such notice to have the procedures” avoided in exchange for a Commission assessment.).

51. *See id.* § 823b(d)(3)(A) (“[T]he Commission shall promptly assess such penalty, by order, after the date of the receipt of the notice . . .”).

pay the penalty FERC orders within 60 days, FERC will file suit in a federal district court seeking an affirmance of the Commission's assessed penalty.⁵² Barclays and its traders elected to take this procedural route.⁵³

III. FERC'S Promulgation of the Anti-Manipulation Rule

After the EAct was passed, FERC promulgated rules implementing the newly enacted statutes.⁵⁴ FERC used two different methods to implement the statute. First, FERC went through the typical agency rulemaking procedure with a Notice of Proposed Rulemaking ("NOPR"),⁵⁵ public comment period⁵⁶ and a Final Rulemaking ("Final Rule") addressing the changes and comments.⁵⁷ Second, FERC issued various Policy Statements to help regulated entities understand different aspects of FERC's investigative and enforcement process.⁵⁸

52. See *id.* § 823b(d)(3)(B) ("If the civil penalty has not been paid within 60 calendar days after the assessment order has been made . . . the Commission shall institute an action in the appropriate district court of the United States for an order affirming the assessment of the civil penalty.").

53. See Order Assessing Civil Penalties, *supra* note 99, at 9 ("On November 29, 2012, Respondents each gave notice of their election under section 31(d)(3)(A) of the FPA and the Order to Show Cause, thereby electing an immediate penalty assessment if the Commission finds a violation.").

54. See NOPR, *supra* note 21, at 6 (stating that the anti-manipulation rule was meant to fulfill Congress' intent that FERC promulgate rules prohibiting market manipulation).

55. See *id.* (proposing regulations implementing EAct 2005).

56. See Prohibition of Energy Market Manipulation, 71 Fed. Reg. 4244, 4246 (January 26, 2006) [hereinafter "Final Rule"] (to be codified at 18 C.F.R. pt. 1c.2) ("Thirty parties filed comments and nine parties filed reply comments.").

57. See *id.* ("[T]his final rule serves as the implementing provision designed to prohibit manipulation and fraud in the markets the Commission is charged with regulating.").

58. See, e.g., Policy Statement on Enforcement, Docket No. PL06-01, 113 FERC ¶ 61,068, 61,243 (October 20, 2005) [hereinafter "October Policy Statement"]; Revised Policy Statement on Enforcement, Docket No. PL08-3, 123 FERC ¶ 61,156, 62,008 (May 15, 2008) [hereinafter "May Policy Statement"]; Compliance with Statutes, Regulations, and Orders, Docket No. PL09-1, 125 FERC ¶ 61,058, 1 (Oct. 16, 2008) [hereinafter "Compliance Policy Statement"]; Enforcement of Statutes, Order, Rules, and Regulations, Policy Statement on Penalty Guidelines, Docket No. PL10-4, 130 FERC ¶ 61,220, 1 (March 18, 2010) [hereinafter "March Penalty Guidelines"]; Revised Policy Statement on Penalty

First, this section discusses the FERC's rulemaking procedure through the NOPR, public comment period, and the Final Rule.⁵⁹ Second, this section discusses the Policy Statements that FERC has issued identifying its internal procedure for finding violations.⁶⁰ Third, this section discusses the FERC's Policy Statements identifying its positions on compliance and penalty guidelines.⁶¹

A. Rulemaking Proceeding

On October 20, 2005, FERC issued its NOPR. Because Section 1283 of the EAct was not self-actuating, FERC had to promulgate rules implementing the intent of Congress.⁶² The NOPR set out the proposed elements of a violation of the market manipulation rule and defined the phrase "any entity" in the statute to mean "regulated utilities but also governmental utilities and other market participants."⁶³ The rulemaking invited comment on the proposed elements.⁶⁴

The NOPR indicated that anti-manipulation issues should be considered in light of SEC Rule 10b-5 because much of the language of Section 1283 of the EAct closely mirrors the language of Rule 10b-5.⁶⁵ By adopting established Rule 10b-5 precedent from the SEC, FERC and Congress hoped regulated entities would gain guidance about how to comply with the manipulation rule.⁶⁶ The SEC has a large body of precedent

Guidelines, 132 FERC 61,216, ¶ 1 (Sep. 17, 2010) [hereinafter "September Policy Statement"].

59. See *infra* Part III.A (discussing FERC's rule promulgation).

60. See *infra* Part III.B (explaining how an investigation is started, how the Office of Enforcement makes decisions, and how the Commission adopts decisions).

61. See *infra* Part III.C (analyzing FERC's policy statements issued on penalty guidelines and compliance).

62. See NOPR, *supra* note 21, at 2 (stating that neither of the statutes Congress passed were self-actuating and the rule was promulgated to fulfill Congress' intent).

63. *Id.* at 2.

64. See *id.* at 1 ("The Commission seeks public comment on its proposals for the regulations . . .").

65. See *id.* at 3 ("The Commission proposes to pattern proposed sections 47.1 and 159.1 of its regulations on the text of Rule 10b-5.").

66. See *id.* at 3 (stating reliance on 10b-5 "should benefit the industry because it will provide greater certainty to entities subject to the new

regarding the rule, and it is a highly litigated administrative provision.⁶⁷ FERC stated in the NOPR that its anti-manipulation rule would be interpreted with the precedent of Rule 10b-5.⁶⁸

On January 19, 2006, FERC issued its Final Rule.⁶⁹ Because EAct does not prohibit any actual conduct, the Final Rule prohibited conduct in violation of the market manipulation and fraud rules within the markets that FERC regulates.⁷⁰ The rulemaking states explicitly that it is not meant to reach negligent practice or corporate mismanagement.⁷¹ It also reiterated that the rule was based on SEC Rule 10b-5.⁷²

In response to the NOPR, thirty parties filed comments and nine parties filed reply comments.⁷³ Overall, FERC believed the comments were positive toward the anti-manipulation rule.⁷⁴ The six areas that the commenters emphasized were (1) scope, (2) usefulness of SEC precedent, (3) disclosure implications, (4) elements of a violation, (5) the Final Rule's interaction with the

rules because the Commission intends to rely on the large body of case law interpreting and applying section 10(b) and Rule 10b-5 when applying its new authority.”).

67. *See id.* (describing the large amount of precedent interpreting rule 10b-5).

68. *See id.* (“[T]he Commission intends to rely on the large body of case law interpreting and applying section 10(b) and Rule 10b-5 when applying its new authority.”).

69. *See* Prohibition of Energy Market Manipulation, 71 Fed. Reg. 4244-03, 4246 (January 26, 2006) (to be codified at 18 C.F.R. pt. 1c.2) (“[T]his final rule serves as the implementing provision designed to prohibit manipulation and fraud in the markets the Commission is charged with regulating.”).

70. *See id.* (“[T]he language of EAct 2005 sections 315 and 1283 does not, by itself, make any particular act unlawful.”).

71. *See id.* (“The final rule is not intended to regulate negligent practices or corporate mismanagement, but rather to deter or punish fraud in wholesale energy markets.”).

72. *See id.* (“These anti-manipulation sections of EAct 2005 closely track the prohibited conduct language in section 10(b) of the Securities Exchange Act of 1934 . . .”).

73. *See id.* (“The 30 initial comments and nine reply comments on the NOPR are from a diverse group of industry stakeholders.”).

74. *See id.* (“Overwhelmingly, commenters are supportive of our efforts to implement well-developed, clear and fair rules aimed at eliminating the potential for fraud in wholesale energy transactions.”).

market behavior rules, and (6) procedural issues including the statute of limitations.⁷⁵

Commenters' concern about the scope of the Final Rule mainly grew from concerns over whether the language of the rule should be interpreted broadly or narrowly.⁷⁶ Each clause of the rule was raised.⁷⁷ In response, FERC stated that a reasonable interpretation of the terms required reading each of the terms of the rule as they relate to each other.⁷⁸ FERC stated that the term "any entity" should be broadly construed.⁷⁹ FERC asserted that it applies to parties outside FERC's jurisdictional reach.⁸⁰ The language that limits FERC to its expertise is the "in connection with a transaction" language.⁸¹ While any entity could violate the manipulation rule, the rule would not apply to an entity that violated the rule in a transaction outside FERC's jurisdiction.⁸²

Commenters expressed more concern about the application of SEC precedent to the market manipulation rule.⁸³ The main concern was that the SEC rules are meant to protect different parties than those protected by the FERC rule.⁸⁴ The

75. See *id.* at 4246–47 (listing the six areas).

76. See *id.* at 4247 (describing arguments by commenters about the breadth of various aspects of the rule).

77. See *id.* at 4248–49 (discussing comments that touch on each element of the proposed rule).

78. See *id.* at 4248 ("The answer to the scope of application of the final rule lies in a reasonable reading of these terms in relation to each other.").

79. See *id.* ("Any entity" is a deliberately inclusive term.).

80. See Kelliher, *supra* note 20, at 16 (2005) (noting that FERC would like the rule to apply outside of its normal jurisdiction).

81. See Prohibition of Energy Market Manipulation, 71 Fed. Reg. 4244-03, 4249 (January 26, 2006) (to be codified at 18 C.F.R. pt. 1c.2) ("[T]he Commission views the "in connection with" element in the energy context as encompassing situations in which there is a nexus between the fraudulent conduct of an entity and a jurisdictional transaction.").

82. See *id.* ("We do not intend to construe the Final Rule sobroadly as to convert every common-law fraud that happens to touch a jurisdictional transaction into a violation of the final rule.")

83. See *id.* ("Commentators are divided as to whether we should model the proposed anti-manipulation regulations after SEC rule 10b-5.")

84. See *id.* ("Many of the commentators also argue that the participants in energy markets are highly sophisticated . . . unlike less sophisticated participants in the securities markets. . . .")

SEC rules protect unknowing investors in securities.⁸⁵ Conversely, FERC's anti-manipulation rule regulates a market with more experienced investors.⁸⁶ However, other commenters argued that the sophistication of the traders in the market should not matter because EPAct's purpose was to protect the consumers of electricity and not traders.⁸⁷ The Commission took account of both sides of the argument and determined that in light of the explicit guidance of Congress, it would use SEC precedent in analogous cases.⁸⁸

Next, the Commission rejected the proposed changes regarding both the duty to disclose and additions to intent.⁸⁹ The Commission addressed concerns from regulated entities that additional duties to disclose and penalties for omissions of material fact would place a larger burden on regulated entities.⁹⁰ The Commission stated that the new rule does create an additional duty to disclose and that omissions of material fact between bilateral contracting parties will not necessarily be pursued as violations.⁹¹ Some of the commenters requested a more explicit enunciation of the intent requirement.⁹² However, the Commission relied on SEC Rule 10b-5's unchanged scienter

85. *See id.* (“[T]he securities model is one of disclosure, designed in large part to protect novice investors by eliminating disparities in access to information . . .”).

86. *See id.* (“[T]he commenters also argue that the participants in energy markets are largely sophisticated, and unlike less-sophisticated participants in the securities markets, do not need the protections of a disclosure regime.”).

87. *See id.* at 4250 (“[T]he level of sophistication of the parties to a bilateral negotiation is irrelevant because the Commission’s anti-manipulation rules are not to protect the contracting parties from each other, but to protect the consumers who rely on the market for their energy supplies.”).

88. *See id.* (“We intend to adapt analogous securities precedents as appropriate to specific facts, circumstances, and situations that arise in the energy industry.”).

89. *See id.* at 4251 (“The Commission declines to modify the proposed regulations in this final rule.”).

90. *See id.* at 4250 (identifying a possible new duty of disclosure and penalties for omissions as concerns from regulated entities).

91. *See id.* at 4251–52 (stating there is no additional duty to disclose and rejecting proposals to delete or modify the rule regarding omissions of material fact).

92. *See id.* at 4252 (stating commenters requested FERC “explicitly . . . include the element of intent . . .”).

requirement to justify not including a more explicit intent element in a violation.⁹³

The Commission accepted commenters' request to clarify the required elements for a violation of the manipulation rule.⁹⁴ As a general clarification, the Commission again stated that the elements are largely based on the requirements needed to violate Rule 10b-5 of the Exchange Act.⁹⁵ FERC briefly outlined the meaning of the elements.⁹⁶ For the scienter element, because the Courts of Appeal have allowed recklessness to satisfy Rule 10b-5's scienter requirement, recklessness also satisfies the scienter requirement for the manipulation rule.⁹⁷

The Commission declined to clarify whether it would abolish or continue to use the market behavioral rules.⁹⁸ However, it stated that it would not seek to enforce both the market behavior and manipulation rules for the same violation.⁹⁹ The Commission also rejected commenters' call for an explicit statute of limitations for the manipulation rule.¹⁰⁰ The Commission noted that none of the SEC enforcement actions, the Federal Power Act or the National Gas Act, are subject to any statute of limitations other than the general five-year statute of limitations for actions enforcing civil penalties.¹⁰¹ The

93. *See id.* ("SEC Rule 10b-5 has an analogous section that has remained unchanged since it was adopted in 1942, and there is abundant securities law precedent that highlights the ongoing relevance of that section.").

94. *See id.* at 4253 ("The Commission generally agrees that clarification of the elements of a violation under the final rule would reduce regulatory uncertainty and thereby assure greater compliance.").

95. *See id.* (stating that the elements of a Rule 10b-5 claim serve a useful purpose when analyzing a anti-manipulation claim).

96. *See id.* at 4253–54 (discussing each element briefly or incorporating previous discussion of an element).

97. *See id.* at 4254 ("[T]he Commission concludes that recklessness satisfies the scienter element of the final rule.").

98. *See id.* (stating that the market behavior rules were still in effect and notification of repeal would be sent if they were repealed).

99. *See id.* ("[T]he Commission will not seek duplicative sanctions for the same conduct in the event that conduct violates both the Market Behavior Rules and this final rule.").

100. *See id.* at 4255 ("The Commission declines to designate a statute of limitations or otherwise adopt an arbitrary time limitation on complaints or enforcement actions that may arise under NGA section 4A and FPA section 222.").

101. *See id.* at 4254–55 (declining to adopt any statute of limitation other than the general five year statute of limitation).

Commission also refused to give specific examples of market manipulation or assert that certain actions were permissible.¹⁰² The Commission stated that the procedures to be used are already established in the Commission's precedent and rejected claims that it needed to explicitly describe procedures in the text of the rule.¹⁰³

The only major change to the text of the rule from the NOPR to the Final Rule was the change from "person" to "entity."¹⁰⁴ Commenters expressed concern that under the definition of "person" in the Federal Power Act,¹⁰⁵ fraud and manipulation conducted by organizations like municipalities would be actionable while actions taken against the same organizations would not be violations.¹⁰⁶ The Commission agreed with the commenters that this oversight would be unfair and changed the wording of the Final Rule to include entities.¹⁰⁷

The Final Rule went into effect January 19, 2006.¹⁰⁸ The rule states:

It shall be unlawful for any entity, directly or indirectly, in connection with the purchase or sale of electric energy or the purchase or sale of transmission services subject to the jurisdiction of the Commission, (1) to use or employ any device, scheme, or artifice to defraud, (2) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the

102. See *id.* at 4255 (declining to give concrete examples of acceptable behavior or adopt commenters' examples as acceptable behavior).

103. See *id.* at 4256 ("[T]he Commission will process the filing under the procedures currently set forth in Rule 206 of the Rules of Practice and Procedure.").

104. See *id.* ("Accordingly, the Commission will substitute the word 'entity' for 'person' in sections 1c.1(a)(3) and 1c.2(a)(3) of the final rule.").

105. See 16 U.S.C. § 796(4) (2014) (defining person as "an individual or a corporation").

106. See Prohibition of Energy Market Manipulation, 71 Fed. Reg. 4244-03, 4256 (January 26, 2006) (to be codified at 18 C.F.R. pt. 1c.2) (describing a commenter's argument that under the proposed section would punish municipalities but not allow them to qualify as victims).

107. See *id.* ("[T]he Commission will substitute the word 'entity' for 'person' in sections 1c.1(a)(3) and 1c.2(a)(3) of the final rule.").

108. 18 C.F.R. § 1c. (2014).

statements made, in light of the circumstances under which they were made, not misleading, or (3) to engage in any act, practice, or course of business that operates or would operate as a fraud or deceit upon any entity.¹⁰⁹

B. FERC'S Anti-Manipulation Enforcement Procedure

FERC has created a complicated procedural structure to oversee potential market manipulation.¹¹⁰ FERC settles 75% of its cases before they become public through procedures outlined in Policy Statements.¹¹¹ On October 20, 2005, along with its Final Rule, FERC issued its first Policy Statement.¹¹² A Policy Statement is not a rule with force of law; it is a guidance document meant to give regulated entities an idea how FERC plans to enforce the rules it implements.¹¹³ FERC's May 15, 2008 Policy Statement also provides guidance on enforcement procedures.¹¹⁴ An investigation begins in the Office of Enforcement, where it attempts to settle the case, and if the

109. Prohibition of Energy Market Manipulation, 71 Fed. Reg. 4244-03, 4258 (January 26, 2006) (to be codified at 18 C.F.R. pt. 1c.2).

110. See May Policy Statement, Docket No. PL08-3, 123 FERC ¶ 61,156, 62,010 (May 15, 2008) (describing “the steps involved in an audit and the steps involved in an investigation”).

111. See *id.* (“[B]etween 2005 and 2007, Enforcement staff closed approximately 75 percent of its investigations without any sanctions being imposed.”).

112. See October Policy Statement, Docket No. PL06-01, 113 FERC ¶ 61,068, 61,243 (October 20, 2005) (“The Commission issues this Policy Statement to provide guidance and regulatory certainty regarding our enforcement of the statutes, orders, rules, and regulations we administer.”).

113. See *id.* (“Our purpose is to provide firm but fair enforcement of our rules and regulations and to place entities subject to our jurisdiction on notice of the consequences of violating the statutes, orders, rules, and regulations we enforce.”).

114. See May Policy Statement, Docket No. PL08-3, 123 FERC ¶ 61,156, 62,010 (May 15, 2008) (“[T]he non-public nature of much of Enforcement staff's work, coupled with the potential for the imposition of significant monetary penalties, argues for a fuller explication than we have yet provided as to how we conduct our investigations and determine the imposition of remedies, including civil penalties.”).

Office does not, it gives a recommendation to the Commission.¹¹⁵ The Commission then decides whether to issue an order to show cause while continuing to attempt to settle with the regulated entity.¹¹⁶ If an order to show cause is issued, the regulated entity must decide whether it wants to submit to a hearing in front of an ALJ.¹¹⁷ If it does not want to go through the agency proceeding, it can force FERC to issue an Order Assessing Civil Penalties and file to have the order affirmed in a federal district court.¹¹⁸

On October 20, 2005, FERC issued a statement that outlined factors FERC would use to make decisions about enforcement proceedings and assessment of penalties.¹¹⁹ The Commission believed that in light of the enhanced power it received under EAct, it should explicitly state its policies on cooperation and other mitigating factors.¹²⁰ The Commission noted that the past policies of other agencies have defied formulas and looked at cases individually.¹²¹ In the same way,

115. *See id.* at 62,012 (“By regulation, Enforcement staff is authorized to initiate and conduct investigations relating to any matter subject to our jurisdiction.”).

116. *See id.* at 62,014 (“Following issuance of the Order to Show Cause, potential settlement may proceed in accordance with the requirements of Rule 602 of the Commission's Rules of Practice and Procedure.”).

117. *See* 16 U.S.C. § 823b(d) (2014) (providing for notice to the regulated entity that they may elect to skip agency proceedings or have a hearing in front of an ALJ).

118. *See id.* § 823b(d)(3)(B) (“[T]he Commission shall institute an action in the appropriate district court of the United States for an order affirming the assessment of the civil penalty.”).

119. *See* October Policy Statement, Docket No. PL06-01, 113 FERC ¶ 61,068, 61,243 (October 20, 2005) (“The Policy Statement discusses the factors we will take into account in determining remedies for violations, including applying the enhanced civil penalty authority provided by the Energy Policy Act of 2005.”).

120. *See id.* (stating that given its new authority, FERC wanted to “assure the industry that we will temper strong enforcement measures with consideration of all relevant factors, including mitigating factors, in determining the appropriate remedies.”).

121. *See id.* at 61,245 (noting that the SEC and CFTC penalty schemes “emphasized the importance of considering a range of factors that may lead to different penalty decisions depending on the circumstances presented by each case.”).

FERC would not commit to a specific formula and would emphasize flexibility.¹²²

The October Policy Statement outlines a two-step process to determine the penalty for a violation.¹²³ Each step lists factors used to analyze the regulated entity's conduct.¹²⁴ The first step considered is the seriousness of the offense.¹²⁵ Some factors include who committed the violation, what type of harm resulted from the violation, and whether the violation was willful.¹²⁶ The second step is what the regulated entity did to remedy the problem.¹²⁷ Mitigating factors include internal compliance, self-reporting a violation, and cooperative conduct.¹²⁸ Cooperative conduct can reduce a penalty even if the entity did not self-report.¹²⁹ None of the mitigating factors in step two apply to reduce disgorgement of unjust profits because the harm has already occurred.¹³⁰

On May 15, 2008, FERC issued a revised statement on enforcement. The statement is meant to give regulated entities an idea how FERC determines if a penalty is warranted and how its investigative process works.¹³¹ The Commission felt that

122. *See id.* at 61,246 (“[W]e will not prescribe specific penalties or develop formulas for different violations.”).

123. *See id.* at 61,245 (identifying the seriousness of the offense and timely efforts to remedy the violation as the most important factors).

124. *See id.* at 61,247–49 (listing factors FERC will use to interpret different aspects of the process to determine a penalty).

125. *See id.* at 61,246 (“[T]he seriousness of the violation is the first touchstone for our determination of the level of penalty to be imposed.”).

126. *See id.* at 61,247 (listing factors used to determine the seriousness of the offense).

127. *See id.* (“The second point to be taken into account as required by section 316A of the FPA and new section 22 of the NGA is what efforts the company made to remedy the violation in a timely manner.”).

128. *See id.* at 61,247–49 (listing factors used to determine the effect of the three aspects of timely remedy).

129. *See id.* at 61,248 (“[T]he Commission will consider these factors even for entities that did not self-report violations, provided that cooperation was provided once the violation was uncovered.”).

130. *See id.* at 61,247 (“[A]t a minimum a company involved in wrongdoing must disgorge any unjust profits resulting from the wrongdoing.”).

131. *See* Stuart Caplan et al., *What Invigorated FERC and FCPA Enforcement Activity Means for US Energy Companies*, ASPATORE, 2014 WL 10387, 3 (Jan. 2014) (“The Revised Enforcement Policy Statement gives regulated entities a better understanding of how FERC’s investigative process

because only enforcement actions that ended in penalties became public, the Commission needed to issue the Policy Statement.¹³² The revised statement updates FERC's policies from the 2005 Policy Statement.¹³³

FERC's Office of Enforcement receives cases from internal and external sources.¹³⁴ Before deciding whether to open an investigation, the Office reviews the details of the potential case and may look at additional available information.¹³⁵ If the Office determines that there is a basis for an investigation, it informs the regulated entity that it will open an investigation.¹³⁶ If no basis for an investigation exists, the regulated entity is notified that there will not be an investigation.¹³⁷

If an investigation is opened, regulated entities are only allowed to communicate with specifically designated staff.¹³⁸ FERC does have and use the discovery process to gather facts and

works and provides details on the factors FERC considers in determining whether a penalty is warranted.”).

132. See May Policy Statement, Docket No. PL08-3-000, 123 FERC ¶ 61156, 62,010 (May 15, 2008) (stating that the regulated community did not have a sense for the enforcement actions that did not result in penalties and wanted to give regulated entities a better sense of enforcement procedures).

133. See *id.* at 1–2 (describing the 2005 policy statement and the reasons why it needed to be supplemented).

134. See *id.* at 6 (listing sources of investigations including the Division of Audits, Division of Energy Market Oversight, other Commission offices, and referrals from market monitors).

135. See *id.* (stating that before an investigation begins, staff look at information included the referral information and potentially information from outside sources or the regulated entity).

136. See *id.* at 7 (“If . . . staff determines that an investigation should be opened, it will notify the subject of that fact.”).

137. See *id.* (“If . . . staff determines that an investigation is not warranted, it will so notify the subject of the inquiry, assuming the subject is aware that an investigation is under consideration.”).

138. See *id.* at 9 (“[N]either the Commissioners nor their assistants will receive oral communications . . . from any person concerning an ongoing staff investigation as to which such person is the subject.”); see also Suedeem Kelly & Julia E. Sullivan, *Navigating the FERC Enforcement Process*, ASPATORE, 2014 WL 10384, 7 (2014) (“Staff members involved in the investigation are designated as ‘non-decisional,’ which means they may not have off-the-record communications concerning the investigation with ‘decisional staff.’”).

data during an investigation.¹³⁹ At any time during the investigation, Office of Enforcement staff can close an investigation.¹⁴⁰ Enforcement staff can settle cases with consent from the Commission and attempt to do so before recommending that the Commission issue an Order to Show Cause.¹⁴¹ JP Morgan settled with FERC at this stage.¹⁴² When settlement occurs at this stage, a Stipulation and Consent Agreement between the regulated entity and staff is released publicly.¹⁴³

When the Office of Enforcement and the regulated entity cannot reach a settlement, the Office of Enforcement recommends the Commission issue an Order to Show Cause.¹⁴⁴ The regulated entity is notified that it may attempt to demonstrate why the Commission should not issue an Order to Show Cause.¹⁴⁵ If the Commission decides to issue the Order to Show Cause, the settlement discussion can take place between the regulated entity and the Commission.¹⁴⁶ If the parties do not reach a settlement by that point, the statute governing the violation at issue takes

139. See May Policy Statement, Docket No. PL08-3, 123 FERC ¶ 61,156, 62,014–15 (May 15, 2008) (describing FERC’s discovery processes and mechanisms during an investigation).

140. See *id.* at 62,013 (“At any time during the course of its investigation, staff may determine to close the investigation without taking any further action.”).

141. See *id.* (stating that when staff does not close an investigation “staff requests settlement authority from the Commission and, in that request, seeks authority to negotiate within a range of potential civil penalties and/or disgorgement.”).

142. See Order Approving Stipulation and Consent Agreement, Docket No. IN 11-8 & IN 13-5, 142 FERC ¶ 61,041, 1 [hereinafter “JP Morgan Consent Agreement”] (July 30, 2013) (stating that Office of Enforcement staff reached a settlement with JP Morgan and describing the Office of Enforcement’s investigation).

143. See May Policy Statement, Docket No. PL08-3, 123 FERC ¶ 61,156, 62,014 (May 15, 2008) (“Upon approval, the Stipulation and Consent Agreement and the order approving the settlement are generally released publicly.”).

144. See *id.* (“[S]taff may recommend that the Commission initiate enforcement proceedings.”).

145. See *id.* (“[T]he subject . . . may make a submission to the Commission to present its case as to why an Order to Show Cause should not issue.”).

146. See *id.* (“Following issuance of the Order to Show Cause, potential settlement may proceed in accordance with the requirements of Rule 602 of the Commission’s Rules of Practice and Procedure.”).

over.¹⁴⁷ The statute at issue in an anti-manipulation claim is section 31(d) of the Federal Power Act.¹⁴⁸ Once Section 31(d) becomes the governing statute, the regulated entity has three options: it can pay the fine, refuse to pay the fine and go through agency proceedings, or refuse to pay the fine and force FERC to file in Federal District Court.¹⁴⁹

The Commission also addressed how it arrives at remedies in a given situation. FERC emphasized that its disgorgement of profits policies remained the same, and that the Commission did not believe that it should employ a penalty schedule to decide the amount of civil penalties to impose for a violation.¹⁵⁰ The headings for the factors FERC takes into account are the seriousness of the offense, commitment to compliance, self-reporting, cooperation, and reliance on staff guidance.¹⁵¹ Seriousness of the offense and commitment to compliance remain the most important factors.¹⁵² The Commission retained all the seriousness of offense factors it listed in the 2005 Policy Statement, added additional factors, and gave a list of questions regulated entities can ask to determine if they have a good compliance culture.¹⁵³ The factors for self-reporting and

147. *See id.* (“In the event there is no settlement, the proceeding will continue according to the process prescribed by the particular statute governing the violation at issue, as well as in accordance with any additional procedures set forth by the Commission in orders issued in the particular proceeding.”).

148. *See* Process for Assessing Civil Penalties, 117 FERC ¶ 61,317, 1–2 (Dec. 21, 2006) (describing the statutes that govern violation of the Federal Power Act).

149. *See* 16 U.S.C. § 823b(d) (2014) (providing that after the Order to Show Cause a regulated entity may pay its fine, go to a hearing with an ALJ, or elect to take FERC to federal court).

150. *See* May Policy Statement, Docket No. PL08-3, 123 FERC ¶ 61,156, 62,014–17 (May 15, 2008) (describing disgorgement in addition to civil penalties and reaffirming the approach of the 2005 statement).

151. *See id.* at 62017 (“[T]he factors we consider in determining whether a civil penalty should be imposed . . . are grouped under the following headings: seriousness of the offense, commitment to compliance, self-reporting, cooperation, and reliance on staff guidance.”).

152. *See id.* (“Of these factors, the most important in determining the amount of the penalty are the seriousness of the offense and the strength of the entity’s commitment to compliance.”).

153. *See id.* (adding factors including the efficient working of the market, earnings and market share of a company under investigation, the best

cooperation remained the same from the 2005 Policy Statement.¹⁵⁴

C. Other Information FERC Has Provided to Regulated Entities through Policy Statements

FERC has also issued guidance on topics besides procedure. It issued a Policy Statement on compliance and two Policy Statements adopting penalty guidelines.¹⁵⁵ First, on October 16, 2008, FERC issued a revised statement on compliance meant to help regulated entities maintain compliance with FERC's rules.¹⁵⁶ In the Policy Statement, the FERC outlined four main factors that it uses.¹⁵⁷ The factors are "(1) the role of senior management in fostering compliance; (2) effective preventive measures to ensure compliance; (3) prompt detection, cessation, and reporting of violations; and (4) remediation efforts."¹⁵⁸ Each factor is discussed in detail.¹⁵⁹ The policy statement also includes additional information on how compliance affects penalties.¹⁶⁰

Second, on March 18, 2010, FERC issued an order adopting penalty guidelines.¹⁶¹ The guidelines are modeled after the federal sentencing guidelines for organizations and are meant

penalty that discourages improper conduct without discouraging market participation, and the motivation of the improperly acting entity).

154. *See id.* ("We carry forward from the 2005 Policy Statement the factors we examine in determining the credit to be given for self-reporting.")

155. *See generally* Compliance Policy Statement, Docket No. PL09-1, 125 FERC ¶ 61,058, 1 (Oct. 16, 2008); *see also* March Penalty Guidelines, Docket No. PL10-4, 130 FERC ¶ 61,220, 1 (March 18, 2010); September Policy Statement, 132 FERC ¶ 61,216, 62,117 (Sep. 17, 2010).

156. *See* Caplan, *supra* note 133, at 3 ("On October 16, 2008, FERC issued a Policy Statement on Compliance to provide guidance to regulated entities with respect to FERC's governing statutes, regulations and orders.")

157. *See* Compliance Policy Statement, Docket No. PL09-1, 125 FERC ¶ 61,058, 1 (Oct. 16, 2008) (listing the four factors).

158. *Id.*

159. *See id.* at 4–6 (discussing and giving guidance on each factor).

160. *See id.* at 6–7 (explaining the effect of the factors on penalties but emphasizing that all determinations are on a case by case basis).

161. *See* March Penalty Guidelines, Docket No. PL10-4, 130 FERC ¶ 61,220, 1 (March 18, 2010) ("The Commission issues this Policy Statement on Penalty Guidelines for the purpose of adding greater fairness, consistency, and transparency to our civil penalty determinations.")

to provide more transparency and fairness when imposing penalties.¹⁶² Although FERC originally denied requests to create penalty guidelines, eventually FERC decided to adopt guidelines.¹⁶³ FERC emphasized that the sentencing guidelines are patterned after the same seriousness of violation and efforts to remedy as is required of FERC in the EPA Act.¹⁶⁴ FERC believes that the objective requirement of the penalty guidelines will help create uniformity as the Commission manages a growing number of enforcement actions.¹⁶⁵

Under the penalty guidelines for organizations, there is a two-step process to determine a fine. First, FERC comes up with a base fine depending on the organization's gain, loss created, or a statutory mandate.¹⁶⁶ Second, FERC comes up with a multiplier based on the organization's culpability.¹⁶⁷ The culpability of the organization is based on a list of factors.¹⁶⁸ After the base fine and multiplier are calculated, the two numbers are added together to get the amount of the fine.¹⁶⁹ Although one stated disadvantage is that FERC has less discretion to assess fines on a case-by-case basis, FERC asserted that it has the ability to deviate from the

162. *See id.* ("The Commission's Penalty Guidelines . . . are modeled on portions of the United States Sentencing Guidelines . . . with appropriate modifications to account for Commission-specific considerations.")

163. *See id.* at 2 ("We now believe that it is in the public interest to advance our past use of the Sentencing Guidelines' principles by implementing a guidelines approach patterned after the Sentencing Guidelines, which apply factors in a focused manner to promote fairness and consistency . . .").

164. *See id.* ("Congress instructs that we must specifically consider the seriousness of the violation and the efforts a company takes to remedy it.")

165. *See id.* at 9 ("The uniformity of the guidelines approach reduces the potential disparities in penalties that might otherwise arise for similar violations committed by similarly situated offenders, particularly because a uniform approach ensures that similar cases are considered based on more than just institutional judgment.")

166. *See id.* at 6 ("First, the Sentencing Guidelines require the calculation of a base fine.")

167. *See id.* ("Second, the Sentencing Guidelines produce a multiplier range for the base fine . . .").

168. *See id.* (listing factors like history of compliance, level of management involved in the offense, self-reporting, and whether the entity had an effective compliance program).

169. *See id.* ("The multiplier and the base fine are then combined to calculate a fine range for the conduct.")

penalty guidelines.¹⁷⁰ The penalty guidelines produce a range for a fine rather than an exact figure.¹⁷¹ In the end, FERC decided that the benefits of adopting the guidelines outweighed the disadvantages.¹⁷² The Commission pointed out that the penalty guidelines do not apply to the amount of disgorged profits a company must pay, and the penalty guidelines do not apply to natural persons who violate rules or regulations.¹⁷³

Third, on September 17, 2010, FERC issued a statement regarding penalty guidelines.¹⁷⁴ The Policy Statement was meant to respond to comments made by the industry, explain the kind of weight FERC gives to the factors in the penalty guidelines, and amend the penalty guidelines in certain places.¹⁷⁵ In response to the Commission suspending the penalty guidelines for sixty days to receive comments, the Commission received forty-one comments.¹⁷⁶ Many comments related to topics other than anti-manipulation enforcement.¹⁷⁷ However, FERC stated it departs from the penalty guidelines on a case-by-case basis, Office of Enforcement Staff still has the ability to close enforcement proceedings,¹⁷⁸ and compliance is still important for determining

170. *See id.* at 10 (“The Penalty Guidelines, however, reduce the impact of this concern by allowing us to depart from the guidelines where we deem appropriate.”).

171. *See id.* (“[T]he Penalty Guidelines produce a penalty range, rather than an absolute figure.”).

172. *See id.* at 11 (“[W]e believe that the benefits outweigh the disadvantages and that a guidelines approach to determining penalties is best for the Commission, organizations, and the public at large.”).

173. *See id.* at 18 (describing why the penalty guidelines do not affect disgorgement of profits and that the Commission does not have much experience levying fines on individuals).

174. *See* Caplan, *supra* note 131, at 3 (“On September 17, 2010, FERC issued a Revised Policy Statement on Penalty Guidelines and revised Penalty Guidelines.”).

175. *See* September Policy Statement, 132 FERC ¶ 61,216, 62,117 (Sep. 17, 2010) (stating the reasons that the FERC issued the policy statement).

176. *See id.* at 62,118 (“[T]he Commission suspended the Policy Statement on Penalty Guidelines and application of the Penalty Guidelines to allow sixty days within which comments could be submitted.”).

177. *See id.* (stating that the comments covered a broad range of subjects).

178. *See id.* at 62,121 (“Staff will continue to close all investigations where no violation is found, and to close some investigations without sanctions for certain violations that are relatively minor in nature and that result in little or no potential or actual harm.”).

a fine.¹⁷⁹ Additionally, the points system for compliance type conduct is broken into different categories.¹⁸⁰ FERC advised that settlements with FERC count as adjudications in an organization's past history.¹⁸¹ The amount of any loss determined by FERC must be determined under a substantial evidence burden.¹⁸²

IV. Recent FERC Enforcement Proceedings

FERC enforces through its Office of Enforcement. Recently, FERC has engaged in more enforcement proceedings than ever before.¹⁸³ Although FERC's stated overall goal is compliance, recent investigations of high profile financial institutions indicate that FERC is not afraid to give out large fines.¹⁸⁴ FERC stated in its fiscal report for 2013 that market manipulation will continue to be one of its priorities in 2014.¹⁸⁵ FERC noted that in the past year it has approved the largest settlement in FERC history and issued the largest order assessing penalties in its history.¹⁸⁶ FERC brought in an

179. See *id.* at 62,132 (“[U]nder the Penalty Guidelines, an effective compliance program could result in a ninety-five percent reduction in penalties when combined with other factors.”).

180. See *id.* at 62,137 (“The Commission agrees to modify the Penalty Guidelines so that the mitigation credits for self-reports, cooperation, avoidance of trial-type hearings, and acceptance of responsibility are not tied together.”).

181. See *id.* at 62,140 (“The Commission rejects the commenters’ suggestion that we not treat prior settlements as ‘adjudications’ that would trigger the prior history enhancement under the Penalty Guidelines.”).

182. See *id.* at 62,147 (“[T]he Commission is, in fact, required under the APA to base imposition of any sanction on ‘substantial evidence.’”).

183. See Caplan, *supra* note 131, at 1 (“Gas and electric utility companies are finding themselves the target of heightened scrutiny by the Federal Energy Regulatory Commission . . . Office of Enforcement . . . in connection with their activities in the US energy markets.”).

184. See *id.* at 1 (“The past few years suggest, however, that investigating high profile companies and securing increasingly large disgorgement and civil penalty remedies has become the OE's main focus.”).

185. See 2013 Report on Enforcement, Docket No. AD07-13-006, 2–3 (describing policies and overviewing the amount of penalties collected in the past year).

186. See *id.* at 4 (stating that the “Commission approved its largest settlement to date” and describing the \$450 Million fine imposed on Barclays).

unprecedented \$445 million in civil penalties and disgorgement of profits in the past year and shows no signs of slowing down.¹⁸⁷

On January 22, 2013, Deutsche Bank agreed to pay \$1.5 million in fines and over \$172,000 in disgorgement of profits.¹⁸⁸ Deutsche Bank violated the anti-manipulation rule in the California Independent System Operator Corporation (“CAISO”) by trading at a loss in one product to benefit another product.¹⁸⁹ Because the transactions were undertaken at a loss and without regard for regular market principles, the transactions committed fraud against the market by artificially moving the Congestion Revenue Rights Index (“CRR”) in a direction that took away the risk in Deutsche Bank’s trading.¹⁹⁰

On February 1, 2013, FERC entered a stipulation with Oceanside Power, LLC after it agreed to pay \$51,000 in civil penalties and disgorgement of profits.¹⁹¹ Oceanside violated the anti-manipulation rule by misusing trades to get a larger share of a payout based on the share of the amount of power bought in that hour.¹⁹² An Oceanside trader, Robert Scavo, knowingly bought an extraordinarily large share of the power even though

187. *See id.* at 8 (overviewing the amount of penalties collected through settlements in the past year).

188. *See* Order Approving Stipulation and Consent Agreement, Docket No. IN 12-4, 142 FERC ¶ 61,056, 1 (Jan. 22, 2013) (“The Commission approves the attached Stipulation and Consent Agreement (Agreement) between the Office of Enforcement (Enforcement) and DB Energy Trading LLC (Deutsche Bank).”).

189. *See id.* at 8 (“Enforcement determined that . . . Deutsche Bank violated the Commission’s Anti-Manipulation Rule by engaging in transactions in one product . . . with the intent to benefit a second product . . .”).

190. *See id.* at 8 (“Enforcement determined that by hindering the proper functioning of the CRR and physical markets, which are both jurisdictional markets, Deutsche Bank’s Export Strategy was a scheme that operated as a ‘fraud or deceit’ under the Commission’s Anti-Manipulation Rule.”).

191. *See* Order Approving Stipulation and Consent Agreement, Docket No. IN 10-5, 142 FERC ¶ 61,088, 1 (Feb. 1, 2013) (“The Commission approves the attached Stipulation and Consent Agreement . . . signed by the Office of Enforcement . . . Oceanside Power, LLC . . . and Robert Scavo.”).

192. *See id.* at 2 (“Enforcement determined that Oceanside used the UTC transaction at the South Imp/South Exp pricing nodes as a pretext to reserve a large volume of transmission and thereby earn larger share of the MLSA for the hours in which it submitted a schedule.”).

the trades themselves would lose money.¹⁹³ However, Scavo bought the power in a type of transaction in a market where he could lose money on the transactions but make a profit through the payout from his large market share.¹⁹⁴

On March 22, 2013, Rumford Paper agreed to pay \$10 million in civil penalties and \$2 million in disgorgement of unjust profits.¹⁹⁵ Rumford violated the anti-manipulation rule by taking advantage of a load reduction program in the ISO-New England.¹⁹⁶ In a plan coordinated by the CEO of another company, Rumford established a baseline rate of use of its facility much higher than its normal rate.¹⁹⁷ A load-reducing program operated on the company's promise to reduce the load when they bid at a low rate of operation.¹⁹⁸ However, Rumford caused its facility to set a baseline load capacity at its highest possible rate.¹⁹⁹ Because the baseline rate was the highest rate at which the plant could run, the promise to reduce load capacity was not a promise to reduce capacity at all.²⁰⁰ Instead, it was a promise to use the facility as Rumford always did and get paid for reducing their capacity.²⁰¹

193. See *id.* (“Enforcement determined that from July 29, 2010 through August 4, 2010, Robert Scavo submitted UTC transaction bids at the “South Imp” and “South Exp” node pair on behalf of Oceanside.”).

194. See *id.* at 2–3 (describing Oceanside's scheme to lose at a fixed rate and gain on the payout).

195. See Order Approving Stipulation and Consent Agreement, Docket No. IN 12-11, 142 FERC ¶ 61,218, 1 (Mar. 22, 2013) (“Rumford admits to the facts set forth in the Agreement, but neither admits nor denies the allegations and has agreed to a civil penalty of \$10,000,000 and disgorgement of \$2,836,419.08.”).

196. See *id.* at 1–3 (describing Rumford's participation in ISO-NE).

197. See *id.* at 9 (“[O]nce the baseline was established, Rumford would operate G4 as it typically had operated.”).

198. See *id.* at 8 (“DALRP participants offered load reductions for the next day from the hours of 7:00 AM through 6:00 PM on non-holiday weekdays and, if ISO-NE accepted the offer, the participant was obligated to reduce load the next day.”).

199. See *id.* at 11 (“Enforcement found that Rumford's scheme was based on misrepresentations to ISO-NE about Rumford's typical load . . .”).

200. See *id.* (“Rumford and CES were compensated for load response that they knew would never occur and in fact never occurred.”).

201. See *id.* (“Rumford did not intend to reduce its consumption or increase its generation once the baseline was established.”).

On July 30, 2013, FERC and JP Morgan entered a stipulation agreement.²⁰² The JP Morgan enforcement action is closest in amount to the current Barclays enforcement.²⁰³ FERC assessed \$285 million in civil penalties and \$125 million for disgorgement of profits.²⁰⁴ FERC alleged and JP Morgan stipulated that in western energy markets, JP Morgan traders intentionally manipulated the computer systems of CAISO to receive above market prices for its power generators that otherwise lost money.²⁰⁵ JP Morgan traders' conduct included concealing their scheme when asked directly by CAISO market monitors and not submitting documents that were truthful to the profitability of their plants.²⁰⁶ The JP Morgan traders knew the plants were not as valuable as the payouts from CAISO and received daily reports on the payments from CAISO.²⁰⁷

V. FERC'S Enforcement Proceeding Against Barclays

In July of 2007, FERC's Office of Enforcement notified Barclays that it was investigating Barclays' trading practices in

202. See Order Approving Stipulation and Consent Decree, Docket No. IN 11-8 & IN13-5, 144 FERC ¶ 61,068, 1 [herein after JP Morgan Consent Agreement] (July 30, 2013) ("The Commission approves the attached Stipulation and Consent Agreement . . . between the Office of Enforcement . . . and JP Morgan Ventures Energy Corporation . . .").

203. See *id.* (stating FERC assessed \$285 million in civil penalties and \$125 million in unjust profits).

204. See *id.* ("JPMVEC admits the facts set forth in Section II of the Agreement, neither admits nor denies the violations set forth in Section III, agrees to pay a civil penalty of \$285,000,000, agrees to disgorge alleged unjust profits of \$125,000,000 . . .").

205. See *id.* at 12 ("[T]o make profits from power plants that were usually out of the money, JPMVEC submitted Day Ahead bids that falsely appeared economic to CAISO and MISO's automated market software and that were intended to, and did, lead CAISO and MISO to pay it at rates far above market prices.").

206. See *id.* at 20 ("When asked by the CAISO MMU why it submitted negative Day Ahead bids rather than energy self-schedules, JPMVEC stated that self-scheduling would result in unknowable compensation and could cause JPMVEC to receive payment at a level that is too low.").

207. See *id.* at 26 ("JPMVEC knew that the ISOs received no benefit from making inflated payments to JPMVEC, and thus defrauded the ISOs by obtaining payments for benefits . . . that JPMVEC did not deliver.").

Western energy markets.²⁰⁸ The Office of Enforcement staff began privately investigating Barclays in October of 2008.²⁰⁹ On October 31, 2012, the Commission issued an Order to Show Cause, which began a public proceeding against Barclays.²¹⁰

FERC asserts that Barclays unlawfully manipulated markets from November 2006 to December 2008 through Western power traders Daniel Brin, Scott Connelly, Karen Levine, and Ryan Smith.²¹¹ FERC alleges that the traders manipulated FERC regulated physical markets for 655 days.²¹² FERC specifically alleges Barclays “traded fixed price products not in an attempt to profit from the relationship between the market fundamentals of supply and demand, but instead for the fraudulent purpose of moving the Index price at a particular point so that Barclays' financial swap positions at that same trading point would benefit.”²¹³ Essentially, Barclays traded at a loss to push the Index to a good position for financial swaps Barclays owned.²¹⁴ When Barclays was due to pay on the financial swaps, the traders would artificially deflate the index,

208. See Order Assessing Civil Penalties, Docket No. IN08-8, 144 FERC ¶ 61,041, 4 (July 16, 2013) (“On July 3, 2007, OE Staff notified Barclays that it had begun an investigation of allegations that Barclays and some of its traders manipulated the electricity markets in and around California beginning in November 2006.”).

209. See *id.* (“The Commission issued a non-public order of formal investigation on October 2, 2008.”).

210. See *id.* (“The Commission issued the Order to Show Cause to commence this public proceeding on October 31, 2012.”).

211. See *id.* at 1 (“On October 31, 2012, the Commission issued an order directing Barclays Bank . . . Daniel Brin, Scott Connelly, Karen Levine, and Ryan Smith . . . to show cause why they should not be found to have violated section 1c.2 of the Commission's regulations by manipulating the electricity markets in and around California from November 2006 to December 2008.”).

212. See *id.* at 2 (“Respondents intentionally engaged in an unlawful scheme to manipulate prices on 655 product days over 35 product months in the period between November 2006 to December 2008 in the Commission-regulated physical markets at the four most liquid trading points in the western United States.”).

213. *Id.*

214. See *id.* (describing Barclays' alleged scheme to manipulate markets to benefit future financial swaps).

and when Barclays was due to be paid, they would artificially inflate the index.²¹⁵

On November 29, 2012, both Barclays and its traders elected Federal Power Act Section 31(d)(3) that allows FERC to assess civil penalties, circumventing the entire agency process.²¹⁶ Through that procedure, FERC assesses penalties and gives the parties sixty days to pay the fines.²¹⁷ If Barclays and the traders did not pay the fines within sixty days, FERC could file suit in federal court to ask for an order forcing the parties to pay the fines.²¹⁸

On July 16, 2013, FERC issued an Order Assessing Civil Penalties based on an Office of Enforcement report recommending penalties.²¹⁹ In the order, FERC provided arguments for why Barclays violated the anti-manipulation rule and addressed some counterarguments Barclays asserted during the administrative process.²²⁰ The order addresses FERC's evidence according to three elements required by FERC's anti-manipulation rule.²²¹ FERC adopted a burden shifting analysis to determine that the Office of Enforcement report established a prima facie case.²²² To determine the penalty, FERC would follow the policies as set out in its Policy Statements.²²³

215. See *id.* (“OE Staff has shown that the intended effect of trading Dailies to flatten the Physical Positions was to influence the daily ICE Index settlement price at that trading point.”).

216. See *id.* at 5 (“On November 29, 2012, Respondents each gave notice of their election under section 31(d)(3)(A) of the FPA and the Order to Show Cause, thereby electing an immediate penalty assessment if the Commission finds a violation.”).

217. See 16 U.S.C. § 823b(d)(3)(B) (2014) (giving a regulated entity 60 days to pay a fine).

218. See *id.* (“[T]he Commission shall institute an action in the appropriate district court of the United States for an order affirming the assessment of the civil penalty.”).

219. See Order Assessing Civil Penalties, Docket No. IN08-8, 144 FERC ¶ 61,041, 75–76 (July 16, 2013) (“The Commission finds that Respondents violated the Commission's Anti-Manipulation Rule from November 2006 to December 2008 by manipulating the energy markets in and around California through the use of a coordinated, fraudulent scheme.”).

220. See *id.* at 6–48 (discussing arguments on preliminary issues, the merits, and the appropriateness of the assessed fine).

221. See *id.* at 9–36 (describing the evidence against Barclays regarding all three elements of the anti-manipulation rule).

222. See *id.* at 6 (finding “a prima facie case that Respondents effectuated a manipulative scheme” which means the “burden, therefore, falls

After dismissing Barclays' and its traders' initial arguments asserting fairness of process, statute of limitations, and waiver claims, FERC proceeded to its evidence on the merits of the case.²²⁴ The first element addressed was whether there was a fraudulent device, scheme, or artifice.²²⁵ The Commission determines fraud factually and defines it as including "any action, transaction, or conspiracy for the purpose of impairing, obstructing or defeating a well-functioning market."²²⁶ FERC argues that this element is met by a pattern of coordinated actions by which the traders completed transactions in FERC's jurisdictional markets in California to push ICE index prices into favorable positions for financial swaps.²²⁷ FERC relies on the fact that the losses taken by the traders were avoidable.²²⁸ Barclays and its traders assert multiple defenses based generally on their belief that FERC's allegations are cherry-picked and do not constitute a scheme to commit fraud.²²⁹

On the fraud element, Barclays' first counterargument is that there is no joint scheme.²³⁰ FERC asserts an email from Karen Levine, an email from Scott Connelly, and trading data as

upon Respondents to rebut the prima facie case established in the Staff Report").

223. See *id.* at 5 (stating that the seriousness of the offense and efforts to remedy the violation are factors to consider).

224. See *id.* at 6–8 (discussing burden of proof, fairness of process, the statute of limitations, and estoppel).

225. See *id.* at 9 ("The first element we address in determining whether there was a violation of the Anti-Manipulation Rule is establishing whether there was a fraudulent device, scheme, or artifice, or whether there was a course of business that operated as a fraud.").

226. *Id.* at 11.

227. See *id.* at 9 ("OE Staff avers that Respondents engaged in a coordinated scheme to assemble "substantial" Physical Positions which were generally in the opposite direction of Respondents' fixed-for-floating Financial Swaps.").

228. See *id.* at 10 ("OE Staff avers that the execution of Dailies by Respondents generally produced trading losses which were avoidable.").

229. See *id.* ("Respondents counter that the conduct 'cherry-picked' by OE Staff does not equate to a fraudulent device, scheme or artifice in violation of the Anti-Manipulation Rule nor was it a course of business that operated or would operate as a fraud in violation of that Rule.")

230. See *id.* ("Respondents, in defense, argue . . . there is no evidence of a joint scheme . . .").

evidence of the joint scheme.²³¹ As an example, FERC relies on Levine's email to the other traders asking them to ensure that while she is on vacation, the Index stays high on a position that Barclays will be paid and low on a position that Barclays must pay out.²³² In response to the email, FERC asserts that Smith and Brin moved the index and that their response to the email proves the existence of a joint scheme.²³³

Barclays also attempts to argue that no pattern exists to prove a scheme because FERC is cherry picking only certain trading.²³⁴ Barclays attempts to direct FERC to its overall trading during the alleged months, but FERC asserts that the only relevant activity is the alleged manipulative activity.²³⁵ FERC believes that Barclays' trading not in question is irrelevant.²³⁶ The key for FERC is that, in the markets at issue, Barclays acquired financial positions, which they significantly moved in a direction beneficial to Barclays.²³⁷ FERC asserts that these moves overwhelm Barclays' counterargument of any larger picture trading or daily trading.²³⁸ FERC dismisses Barclays' argument about profitability because the profitability of daily or monthly trading is not determinative on the issue of manipulation.²³⁹

231. *See id.* at 11–12 (discussing emails and communications between the traders that FERC argues together satisfy the joint scheme element).

232. *See id.* at 12 (describing a communication Levine sent before leaving for vacation asking co-workers to trade for her).

233. *See id.* (“OE Staff presented evidence that shows Brin and Smith reversed Physical Positions to support Levine's request.”).

234. *See id.* at 13 (“Respondents deny the existence of a pattern of building and flattening the Physical Positions to the benefit of the Financial Swaps.”).

235. *See id.* at 14 (describing Barclays' argument that its trading when taken as a whole does not constitute a pattern of fraudulent conduct).

236. *See id.* (“[T]he Commission declines the invitation to view the trade data in this ‘aggregated’ manner.”).

237. *See id.* (“The allegation . . . is that it was the physical markets at four nodes across 35 product months that were manipulated.”).

238. *See id.* (“[T]he record in this case reflects a sustained and deliberate effort by Respondents first to build Physical Positions in a direction opposite to their Financial Swaps and then to flatten those Physical Positions in order to benefit the Financial Swaps.”).

239. *See id.* at 15 (“The fact that Respondents' trading may have been profitable on a particular day, or in a particular month, however, does not overcome the weight of evidence . . .”).

FERC also rejects Barclays' support for the position.²⁴⁰ FERC stresses that it considers all of the circumstances of the case to determine a violation.²⁴¹

Barclays and its traders also attempt to disprove fraud through Barclays' *ex ante* theory.²⁴² Barclays and its traders assert that the individual traders could not have had the necessary confidence in the profitability of the swap positions to risk that the positions might be unprofitable.²⁴³ In essence, Barclays asserts that it is unlikely the traders would take such positions because they are too risky financially.²⁴⁴ FERC rejects this argument because the emails between the traders do not evidence concern about the profitability of their positions.²⁴⁵ Additionally, FERC argues the emails reflect a misunderstanding because the traders do not know how buying or selling in large quantities impacts the market as a whole by taking trades from other companies.²⁴⁶

Barclays also asserted they could not have violated the anti-manipulation rule because the trades themselves were legal.²⁴⁷ FERC asserts the trades can violate the anti-manipulation rule if legal trades are made with a manipulative

240. *See id.* (rejecting two Commission cases that Barclays asserted established that trades must be unprofitable to be a violation).

241. *See id.* (“[T]he determination of fraud is based on all of the circumstances in the particular case before the Commission.”).

242. *See id.* at 16–18 (describing Barclays' *ex ante* theory and rejecting it).

243. *See id.* at 16 (arguing no manipulation because “the benefit to the financial positions from manipulating the physical market could not have been anticipated . . . and thus the alleged behavior would be ‘irrational’ and the traders would lack ‘incentive’ to engage in those trades.”).

244. *See id.* (“[T]he traders could not ‘reasonably believe’ that they would trade Dailies to enhance the Financial Swaps in such a manner as to result in an overall profit.”).

245. *See id.* at 17 (“[T]he communications among the traders themselves demonstrate that the traders understood that they were moving the Index to benefit Barclays' financial position.”).

246. *See id.* (“Barclays wrongly assumes that its trading Dailies had no impact on other market participants.”).

247. *See id.* at 18 (“Specifically, Barclays states that it is not possible to defraud market participants in an open market ‘based solely on transparent bids and offers’”).

intent.²⁴⁸ FERC cites case authority stating that there is a difference between a legal transaction with and without the intent to manipulate a market.²⁴⁹ FERC asserted that the existence of the emails, unprofitable daily trading, and trading inconsistent with supply and demand of the market are enough to satisfy the fraud element of an anti-manipulation claim given an intent to manipulate the market.²⁵⁰

Having rejected Barclays' and the traders' arguments on the first element, FERC moved on to the scienter element²⁵¹. Scienter requires knowing, intentional, or reckless misconduct.²⁵² FERC argues that this element is satisfied by the trader's own emails, suspiciously timed transactions, transactions that benefitted derivative positions, and irrational economic conduct.²⁵³ FERC alleges that all the traders coordinated in a scheme to manipulate the market that they understood, expected to work, and intended to work.²⁵⁴ Barclays asserts that FERC must prove its interpretation of the emails and transactions in question, but FERC argues that because its prima facie case is met, Barclays has the burden to rebut the prima facie case and has not.²⁵⁵ FERC goes so far as to say that they do not believe

248. *See id.* at 19 (“A number of courts have recognized that transactions undertaken with manipulative intent, rather than a legitimate economic motive, send inaccurate price signals to the market . . .”).

249. *See id.* at 18–19 (describing precedent that held lawful trades could be unlawful if undertaken with manipulative intent).

250. *See id.* at 20 (listing the different pieces of evidence that FERC asserts establishes manipulation).

251. *See id.* at 22 (outlining scienter as the second element necessary to establish a violation of the Anti-Manipulation Rule).

252. *See id.* (“[S]cienter requires knowing, intentional, or reckless misconduct, as opposed to mere negligence.”).

253. *See id.* (stating scienter is satisfied because “emails and instant messages (IMs), suspicious timing or repetition of transactions, execution of transactions benefiting derivative positions, and lack of legitimate economic motive or economically irrational conduct”).

254. *See id.* (stating the traders “understood how this scheme would work; that they expected it to work; that they intended it to work”).

255. *See id.* (“[I]t is also true that Barclays bears the burden of rebutting OE Staff's allegations, including its interpretations of the emails and IMs after OE Staff establishes a prima facie case.”).

Barclays' traders' conduct was merely reckless but was intentional.²⁵⁶

To support its finding of scienter, FERC first asserts direct evidence.²⁵⁷ To combat the direct evidence, Barclays asserts that the evidence does not prove a manipulative scheme but only intent in specific instances that FERC cannot use to later claim an overall manipulative intent.²⁵⁸ Also, Barclays does not believe that FERC established a necessary connection between the documents it asserts to prove intent and manipulative transactions by traders.²⁵⁹ FERC believes it did establish a connection and that appropriate inferences will always be necessary to prove intent from direct evidence.²⁶⁰

FERC presents direct evidence with respect to each individual trader.²⁶¹ First, with respect to Brin, FERC relies on instant message communications.²⁶² In the communications, he tells a friend that his trading is to benefit the long-term positions that Conelly possesses.²⁶³ Barclays asserts that Brin did not have the knowledge to participate or design such a scheme, but FERC rejects that argument because of his explanation to his friend.²⁶⁴

Second, FERC asserts direct evidence of Smith's intent based on a November 3, 2006 instant message in which he

256. See *id.* at 23 (“We are satisfied that the scienter element is met here under even the most stringent definition of ‘recklessness’ because, as discussed elsewhere in this order, the evidence presented demonstrates that the conduct was not merely reckless, but intentional.”).

257. See *id.* at 25 (discussing whether particular communications by the traders were directly linked to specific manipulative trades).

258. See *id.* (arguing that communications from specific periods of time in October 2006 and summer 2007 cannot be used to infer Barclays' intent to go along with the entire scheme for the entire period of time).

259. See *id.* (arguing that the FERC cannot establish a “nexus” between communications by the traders and resulting manipulative trades).

260. See *id.* (stating that Supreme Court precedent assumes that inferences will be necessary to prove intent).

261. See *id.* at 26–34 (outlining communications made by each trader that FERC believes proves manipulative intent).

262. See *id.* at 26–27 (explaining that FERC submitted the instant message to establish Brin's state of mind).

263. See *id.* (describing instant messages between Brin and a friend discussing his abnormal trading).

264. See *id.* at 27 (“Brin's November 30, 2006 IM exchange and the additional evidence presented by OE Staff establishes that Brin both understood the mechanics of the manipulative scheme alleged by OE Staff, and willingly participated in that scheme.”).

bragged to another trader that he moved the index to a position more favorable to Barclays' financial swap positions.²⁶⁵ Barclays attempts to argue that Smith engaged in boastful banter, but FERC believes his communication shows his direct intent to involve himself in the scheme.²⁶⁶

Third, FERC asserts that Levine was a part of the scheme because she sent two emails to colleagues and an instant message to another trader, who are not charged with manipulating the market.²⁶⁷ Levine and Barclays argue that these communications are proof of her intent only if the manipulative scheme is assumed.²⁶⁸ In one communication, Levine states that one reason to trade a certain way is to protect a swap position.²⁶⁹ In two other communications, Levine requests that colleagues trading on her behalf attempt to trade in ways that would protect her financial swap positions.²⁷⁰ FERC rejects Levine and Barclays' arguments that the communications do not display manipulative intent because Levine fails to supply any credible alternative explanation regarding the communications.²⁷¹

Fourth, FERC asserts that Connelly, the managing director of North American power trading, had the necessary scienter, arguing that three communications and suspect trading

265. See *id.* at 28 (describing an instant message in which Smith states that he messed with the market).

266. See *id.* (“[H]is IM chatter, the evidence provides a direct window into his understanding of the manipulative scheme, even as he was in the process of implementing it.”).

267. See *id.* at 29 (“Both Levine and OE Staff focus their arguments on the same five communications, but they interpret them in irreconcilable ways.”).

268. See *id.* at 28 (arguing “that the communications cited by OE Staff contain ‘loose’ or ‘ambiguous’ language, but do not contain a straightforward admission of any of the elements of what OE Staff has called the three-part scheme.”).

269. See *id.* at 29 (“[T]he explanation that she offered . . . ‘flattening’ a Physical Position rather than ‘protecting’ a Financial Swap position lacks credibility, because the broker had already suggested flattening a Physical Position as . . . possible explanations to which Levine added a third—protecting a position.”).

270. See *id.* (“[W]e view the October 11 IM exchange as an acknowledgement that the Respondents traded Index in order to protect the value of Barclays’ Financial Swap Positions.”).

271. See *id.* at 30 (rejecting Levine’s arguments because she does not offer plausible explanations for her communications).

practices show Connelly's intent.²⁷² The communications include instant messages where Connelly spurns the possibility of his trading being reported to FERC and an email published anonymously by The Friday Burrito when the newsletter questioned trading practices in power markets that involve moving the index.²⁷³ Barclays and Connelly attempt to argue that (1) the messages show that Connelly did not believe he could move the index much and (2) he chose to be published anonymously because he was not allowed to speak to the media on Barclays' behalf.²⁷⁴ FERC claims that these arguments are inconsistent with Connelly's position and emails.²⁷⁵ FERC further asserts that the individual traders were personally hired by Connelly and would not have acted without Connelly's approval.²⁷⁶ FERC concluded its scienter argument by stating that the scienter of the individual traders should be attributed to Barclays.²⁷⁷

The final element requires that the action be taken in connection with a transaction subject to the Commission's jurisdiction.²⁷⁸ FERC's general grant of jurisdiction states that the Commission has authority over "the sale of electric energy at

272. See *id.* at 31 ("Barclays and Connelly argue that OE Staff has not established that Connelly acted with the requisite scienter in connection with the alleged manipulative scheme.").

273. See *id.* ("There are additional facts, communications, and trade data which demonstrate that Connelly understood the manipulative strategy that he both oversaw and personally implemented, and that directly contradict his current claims of ignorance of the scheme.").

274. See *id.* at 33 ("[A]ny alleged nefarious characterization of such a request was completely outweighed by the basic reason that he was not authorized to make public statements or representations to the media on behalf of Barclays.").

275. See *id.* at 34 ("We find that Connelly acted with actual intent. We also find that the evidence supports a finding that his conduct satisfies the lesser 'recklessness' standard, however stringently defined.").

276. See *id.* at 31 ("The Individual Traders—whom Connelly personally hired and had known for years—testified that they traded in Connelly's book and that they would not have done so without his knowledge and consent.").

277. See *id.* at 34 ("[W]e find that the knowing or reckless state of mind of the Individual Traders can and must be attributed to Barclays itself.").

278. See *id.* at 35 ("The third element of establishing a violation of the Anti-Manipulation Rule is determining whether the conduct in question was "in connection with" a transaction subject to the Commission's jurisdiction.").

wholesale in interstate commerce.”²⁷⁹ In addition, the statute that gives rise to the anti-manipulation rule grants authority over any entity that manipulates in connection with the purchase or sale of electric energy subject to the jurisdiction of the Commission.²⁸⁰ Thus, FERC reasons that Barclays sold electric energy at wholesale within FERC’s grant of jurisdiction, and because the grant for the manipulation rule includes FERC’s general jurisdiction, Barclays is subject to FERC’s jurisdiction.²⁸¹ Barclays argues that FERC does not have authority over financially-settled-day-ahead transactions.²⁸² Although FERC does not explicitly address Barclays’ argument, it contends that its aforementioned arguments prove FERC’s jurisdiction over the transactions.²⁸³

After considering the evidence, FERC agreed with its Office of Enforcement and analyzed the issue of whether to adopt the Office of Enforcement’s recommendation of civil penalties against Barclays of \$435 million, Connelly for \$15 million, Brin for \$1 million, Levine for \$1 million, Smith for \$1 million, and disgorgement of unjust profits against Barclays of \$34.9 million.²⁸⁴ After considering the penalty minimums and maximums per the penalty guidelines, FERC decided that the Office of Enforcement’s recommended penalties for Barclays were appropriate.²⁸⁵ All of the individual traders argued that their

279. *Id.*

280. *See* 16 U.S.C. § 824(v)(a) (2014) (“It shall be unlawful for any entity . . . to use or employ, in connection with the purchase or sale of electric energy . . . subject to the jurisdiction of the Commission, any manipulative or deceptive device or contrivance . . .”).

281. *See* Order Assessing Civil Penalties, Docket No. IN08-8, 144 FERC ¶ 61,041, 36 (July 16, 2013) (“Respondents traded ‘to affect’ an index ‘which sets the price of both non-jurisdictional and jurisdictional transactions’ and, therefore, they are subject to the Commission’s authority under section 222 of the FPA and the Anti-Manipulation Rule.”).

282. *See id.* at 35 (“Barclays claims that the Commission has no jurisdiction over what it describes as the ‘financially-settled day-ahead transactions’ at issue.”).

283. *See id.* (reasoning that (1) FERC does have jurisdiction and (2) Barclays’ argument is not persuasive).

284. *See id.* at 48–49 (listing the penalties assessed against Barclays and the traders).

285. *See id.* at 41 (“After taking into consideration the two statutory factors of FPA section 316A in light of the evidence presented to us, we find that

penalties were not appropriate due to their financial status, but FERC rejected the arguments because of the gravity and nature of the offenses.²⁸⁶ Barclays disputed the Office of Enforcement's disgorgement of profits calculation, but did not suggest a different figure.²⁸⁷ FERC decided \$34.9 million was sufficient, and that the econometric evidence could be presented to a federal district judge.²⁸⁸

On October 9, 2013, FERC filed a petition to enforce the order in the Eastern District of California.²⁸⁹ This is the first FERC enforcement action that has reached the federal courts; accordingly, this action will likely address many significant issues.²⁹⁰ The federal court will review FERC's factual and legal findings de novo.²⁹¹ The case is pending on a Motion to Dismiss or Change Venue filed by Barclays along with a supporting brief.²⁹² FERC filed its opposition to both the Motion to Dismiss and

the penalties recommended by OE Staff are authorized by statute, and appropriate to the conduct.”).

286. See *id.* at 42–46 (describing the traders' arguments that the penalties assessed were disproportionate to their financial assets, in addition to FERC's rejection of these contentions).

287. See *id.* at 46 (“Barclays responds that the recommended disgorgement is ‘wholly inconsistent with the data available to Barclays’ but does not propose a different sum.”).

288. See *id.* at 48 (“[I]n the absence of competing evidence presented to us concerning Barclays' profit from the scheme, we find that Barclays should disgorge \$34.9 million in unjust profits, plus interest, from its manipulative scheme.”).

289. See Petition for an Order Affirming FERC's July 16, 2013 Order Assessing Penalties, *FERC v. Barclays Bank PLC*, No. CV-02093, 1 (E.D. Cal. Oct. 9, 2013) (“Petitioner Federal Energy Regulatory Commission . . . petitions this Court for an Order Affirming the Commission's Order Assessing Civil Penalties against Barclays Bank PLC . . . Daniel Brin, Scott Connelly, Karen Levine, and Ryan Smith . . .”).

290. See Fetty, *supra* note 8, at 2 (stating that because FERC is still developing its enforcement policies, every decision made regarding the rule will be important).

291. See 16 U.S.C. § 823b(d)(3)(B) (2014) (“The court shall have authority to review de novo the law and the facts involved . . .”).

292. See *generally* Barclays Motion to Dismiss, *FERC v. Barclays Bank PLC*, 2013 WL 7045799 (Dec. 16, 2013) (E.D. Cal.) [hereinafter Barclays Brief] (requesting the court either dismiss the case or change venue to the Southern District of New York).

Change of Venue on February 14.²⁹³ The Motion is set for hearing on April 24, 2014.²⁹⁴

VI. Current Posture of the Barclays' Case

Barclays is the first entity to take FERC to federal court after being penalized under the market manipulation rule.²⁹⁵ This section analyzes some of the issues the Barclays case may decide. Barclays Motion to Dismiss raises several important issues that are answered in FERC's opposition motion: (1) whether FERC has jurisdiction over the transactions at issue under *Hunter v. FERC*,²⁹⁶ (2) whether the phrase "any entity" includes individuals,²⁹⁷ and (3) whether FERC has stated a claim under the SEC's 10b-5 precedent.²⁹⁸ An important issue that Barclays reserved for later in the case is whether FERC has enough evidence to prove that its traders acted with intent to manipulate the market.²⁹⁹

The first argument is that FERC does not have jurisdiction under the Federal Power Act over the types of trades made by Barclays.³⁰⁰ This is particularly important in light of the D.C. Circuit Court's recent ruling in *Hunter*, which held that the

293. See Petitioner's Opposition, *FERC v. Barclays Bank PLC*, 2014 WL 988138, at *8–9 (Feb. 14, 2014) [hereinafter FERC Brief] (requesting that Barclays' motion be denied in full).

294. See Barclays Brief, 2013 WL 7045799 at *1 (stating the case is set for hearing April 24).

295. See *id.* at *22 (arguing that the CFTC has exclusive jurisdiction over accounts, agreements, options, and transactions involving contracts to sell commodities for future delivery, traded or executed on a contract market or any other board of trade, exchange, or market) (citing 7 U.S.C. § 2(a)(1)(A) (2014)).

296. See *id.* at *21 ("As the court of appeals made clear in *Hunter*, the CFTC's anti-manipulation authority over futures contracts is exclusive."); See generally *Hunter v. FERC*, 711 F.3d 155 (D.C. Cir. 2013).

297. See *id.* at *22 ("The plain meaning of the term 'entity' does not include natural persons.").

298. See *id.* at *26 (arguing that FERC has not stated a manipulation claim).

299. See *id.* at *34 n.56 ("[A]ll other objections to the manipulation claim not raised in this Motion, including lack of intent to deceive, are reserved to be raised later if this action survives this Motion.").

300. See *id.* at *41 ("The *Hunter* case explains why FERC has no jurisdiction to pursue its claims against Defendants in this case.").

CFTC has exclusive jurisdiction over commodities futures contracts.³⁰¹ Barclays argues that the trades at issue are under the exclusive jurisdiction of the CFTC.³⁰² If the case is dismissed on this ground, it would be another significant blow to the breadth of FERC's jurisdiction.

Second, Barclays argues that "entity" in the anti-manipulation statute does not include individuals, and thus, FERC cannot penalize the individual traders.³⁰³ Barclays argues that the plain meaning of the term "entity" does not include natural persons.³⁰⁴ The resolution of this issue will set important precedent because FERC could not assess penalties against individual traders if the court determines that individuals are not covered in the statute.³⁰⁵

Third, Barclays argues that the complaint does not state a claim of market manipulation.³⁰⁶ Citing precedent from the Supreme Court and Circuit Courts of Appeal, Barclays contends that FERC has not alleged manipulative conduct.³⁰⁷ If the case is dismissed on this ground, regulated entities will have their first example of how courts will apply rule 10b-5 precedents to FERC cases.

An issue that Barclays did not explicitly raise in its brief, but reserved for the future, is the intent element of

301. See *Hunter*, 711 F.3d at 159 ("[I]f a scheme, such as manipulation, involves buying or selling commodity futures contracts, CEA section 2(a)(1)(A) vests the CFTC with jurisdiction to the exclusion of other agencies.").

302. See Barclays Brief, *supra* note 292, 2013 WL 7045799 at *21 ("[T]he CFTC has exclusive jurisdiction over the alleged manipulative scheme . . .").

303. See *id.* at *50 ("The FPA only permits FERC to regulate the manipulative acts of entities, such as businesses and organizations.").

304. See *id.* at *22 ("The plain meaning of the term "entity" does not include natural persons.").

305. See *id.* at *50 (arguing that because FERC's regulation of manipulative activities is limited to entities, the claims against Mr. Brin, Mr. Connelly, Ms. Levine, and Mr. Smith should be dismissed).

306. See *id.* at *22 ("[T]he Complaint fails to state a claim and should be dismissed as a matter of law.").

307. See *id.* at *54 ("There is a complete absence of allegations of manipulative conduct, as defined by the Supreme Court and the Ninth Circuit, against any of the Traders.").

manipulation.³⁰⁸ In the Barclays case—especially in the context of the traders’ emails—FERC infers intent from emails or instant messages.³⁰⁹ Barclays may try to persuade the court or jury that FERC’s inferences are insufficient to establish manipulative intent.³¹⁰ Given FERC’s strong reliance on the traders’ intent, Barclays may believe that a judge will not see the intent FERC relies on to prove both the intent and fraud elements. FERC has already stated that the transactions taken by the traders themselves could be legal without manipulative intent.³¹¹ Thus, if Barclays can disprove intent, the case may have to be dismissed.

For example, trader Karen Levine argues that to prove intent against her, the *prima facie* case must be assumed.³¹² The emails she sent are not overtly manipulative; she did not instruct anyone to trade uneconomically to protect her financial swaps.³¹³ In the instant message FERC relies on, Levine offers an alternate explanation to a question about trading.³¹⁴ She does not state which explanation is the correct one.³¹⁵ Accordingly, it may be difficult for FERC to convince a court or jury that an alternate explanation in an instant message and email, asking colleagues to try trade a certain way, proves intent to manipulate a market.

308. See *id.* at n.56 (“[A]ll other objections to the manipulation claim not raised in this Motion, including lack of intent to deceive, are reserved to be raised later if this action survives this Motion.”).

309. See Order Assessing Civil Penalties, Docket No. IN08-8, 144 FERC ¶ 61,041, 15 (July 16, 2013) (stating that because Levine did not include any mention of uncertainty in the profitability of financial swaps, that she was sure, and part of the scheme).

310. See Barclays Brief, *supra* note 292, 2013 WL 7045799 at n.56 (reserving the right to attack the FERC for “the lack of sufficient allegations of an intent to deceive.”).

311. See Order Assessing Civil Penalties, Docket No. IN08-8, 144 FERC ¶ 61,041, 19 (July 16, 2013) (stating that the difference between a legal trade and an illegal one is intent).

312. See *id.* at 28 (“Levine herself contends that the only way the cited communications could be construed as evincing manipulative intent is if the existence of the manipulative scheme is already presupposed . . .”).

313. See *id.* at 30–31 (arguing that although Levine did not spell out in her email why her trading instructions furthered the manipulative scheme, her emails furthered the scheme anyway).

314. See *id.* at 29 (arguing that Levine’s addition of an alternate reason to trade their shows she had manipulative intent).

315. See *id.* at 29 (arguing that Levine was not referencing Barclays at all in her instant message).

*VII. Factors for Determining Whether to Force FERC into
Federal Court*

There are many different factors a regulated entity should consider before deciding whether to take its case into federal court.³¹⁶ These factors include: (1) timing of the entity's cooperation; (2) whether the company self-reported; and (3) the size of a potential fine.³¹⁷

As an initial matter, it is useful to consider why FERC agrees to settlements. One reason FERC is willing to reduce fines is because it believes that settlements are in the interest of public policy.³¹⁸ Settlements allow FERC to sequester ongoing violations and unjust profits.³¹⁹ For example, FERC does not accept mitigating factors for unjust profits because the harm has already occurred.³²⁰ A regulated entity should consider whether there are ongoing violations, and unjust profits derived from such violations, when assessing how to approach a FERC investigation.³²¹ If the entity knows that the violations and unjust

316. See October Policy Statement, Docket No. PL06-01, 113 FERC ¶ 61,068, 61,243 (October 20, 2005) (“Our purpose is to provide firm but fair enforcement of our rules and regulations and to place entities subject to our jurisdiction on notice of the consequences of violating the statutes, orders, rules, and regulations we enforce.”).

317. See *id.* (“In discussing the factors we will take into account in determining the severity of penalties . . . for violations, we also recognize the importance of demonstrable compliance and cooperation efforts by utilities, natural gas companies, and other entities subject to the statutes, orders, rules, and regulations administered by the Commission.”).

318. See May Policy Statement, Docket No. PL08-3, 123 FERC ¶ 61,156, 62,013 (May 15, 2008) (“[T]he public interest is often better served through settlements . . .”).

319. See *id.* (“[W]e are able to ensure that compliance problems are remedied faster and that disgorged profits may be returned to customers faster . . .”).

320. See October Policy Statement, Docket No. PL06-01, 113 FERC ¶ 61,068, 61,247 (October 20, 2005) (“[A]t a minimum a company involved in wrongdoing must disgorge any unjust profits resulting from the wrongdoing.”).

321. See *id.* at 61,249 (“The manner in which a company approaches cooperation will be an important factor in determining whether, and how much, credit may be given for cooperation.”).

profits have ceased, it may predict FERC's sanctions more easily.³²²

Another initial question is whether the company self-reported.³²³ Self-reporting may show that the company has a strong commitment to compliance.³²⁴ This commitment fosters the belief that the company is trying to comply with FERC regulations in good faith, which may permit a reduction in fines.³²⁵ However, if the company did not self-report, that will affect two different factors that FERC uses to assess penalties: (1) there will be no argument that the entity self-reported, and (2) the entity will have a difficulty arguing for a strong culture of compliance if it cannot find its own mistakes.³²⁶

Once the Office of Enforcement has determined that a violation occurred, a company loses one of its incentives to settle quickly and quietly.³²⁷ Because the Commission counts settlements that occur before trial proceedings as prior adjudications, regulated entities do not have an incentive to settle quickly to benefit them in future proceedings.³²⁸ The impact of a settlement on the regulated entity is that its compliance will

322. *See id.* (“The factors discussed in this Policy Statement provide guidance to the industry on the approach we will take to future enforcement.”).

323. *See id.* at 61,247 (“We place great importance on self-reporting. Companies are in the best position to detect and correct violations of our orders, rules, and regulations . . . and should be proactive in doing so.”).

324. *See* May Policy Statement, Docket No. PL08-3, 123 FERC ¶ 61,156, 62,019 (May 15, 2008) (“We also place great value on self-reporting, particularly when it points to a strong compliance program.”).

325. *See id.* (“We . . . will maintain our practice of awarding penalty credit for parties that promptly self-report violations, assuming such conduct is not negated by a poor compliance culture.”).

326. *See id.* (“[S]elf-reporting is no substitute for a strong compliance program . . .”).

327. *See* September Policy Statement, Docket No. PL10-4, 132 FERC ¶ 61,216, 62,140 (Sept. 17, 2010) (“We generally consider that an organization's efforts to achieve or maintain compliance with our requirements should not be the basis for an offset to or reduction in the penalty amount for a violation because the organization should have been in compliance before the violation.”).

328. *See id.* at 62,141 (“The Commission considers prior settlements for purposes of considering an organization's prior history and we will continue to do so under the Penalty Guidelines.”).

not be as highly regarded in future actions.³²⁹ If the regulated entity committed any violation against FERC or any other agency in the past ten years, its compliance score will be higher than if it had no prior adjudications.³³⁰ Because of the impact on future proceedings, a regulated entity should consider settling with FERC before the proceeding counts as a prior adjudication.³³¹

In their October Policy Statement, FERC states that it will account for cooperative conduct when assessing penalties.³³² Therefore, a regulated entity should consider whether their fine reduction from cooperation makes paying the total fine cheaper than the cost of litigation.³³³ The September Policy Statement states that there could be a significant reduction in the penalty assessed or no penalty at all,³³⁴ a ninety-five percent reduction is possible.³³⁵ Cooperation is available even if the company did not self-report.³³⁶ However, uncooperative conduct is also taken into account.³³⁷ Additionally, a firm that will receive a small fine may get it reduced to zero.³³⁸

329. See *id.* (deciding that prior history will be used on a case-by-case basis and may indicate a lack of commitment to compliance).

330. See *id.* at 62,137 (“[A]n organization’s culpability score increases by one point if there was a Commission adjudication of any violation less than ten years earlier or if there was an adjudication of similar misconduct by any other enforcement agency.”).

331. See *id.* at 62,141 (“The Commission considers prior settlements for purposes of considering an organization’s prior history and we will continue to do so under the Penalty Guidelines.”).

332. See October Policy Statement, Docket No. PL06-01, 113 FERC ¶ 61,068, 61,243 (October 20, 2005) (“[W]e also recognize the importance of demonstrable compliance and cooperation efforts . . .”).

333. See Fetty, *supra* note 8 (discussing an entity that chose to litigate against FERC after receiving a \$415 million fine).

334. See September Policy Statement, Docket No. PL10-4, 132 FERC ¶ 61,216, 62,133 (Sept. 17, 2010) (discussing the benefits of compliance under the penalty guidelines).

335. See *id.* (“[A]n effective compliance program could result in a ninety-five percent reduction in penalties when combined with other factors.”).

336. See October Policy Statement, Docket No. PL06-01, 113 FERC ¶ 61,068, 61,248 (October 20, 2005) (“[T]he Commission will consider these factors even for entities that did not self-report violations, provided that cooperation was provided once the violation was uncovered.”).

337. See *id.* (“Lack of cooperation is a serious matter and will be weighed in deciding appropriate remedies.”).

338. See *id.* (“[P]rompt and full self-reporting of violations, coupled with steps to correct the adverse impact on customers or third parties from the misconduct, may result in . . . no civil penalty being assessed.”).

A final factor to consider is that FERC has authority to file in the jurisdiction of its choice depending on how broadly a court is willing to read “the appropriate court” language of Section 31(d)(3)(B).³³⁹ The energy markets that Barclays allegedly manipulated were in California, and FERC may believe that a favorable judgment is more likely in the affected state.³⁴⁰

VIII. CONCLUSION

The value of the Barclays enforcement proceeding itself is immense. When decided, it will be the only precedent for regulated entities to determine how a federal court will administer the anti-manipulation rule. With FERC rapidly increasing its number of enforcement actions and the amount of the fines levied, regulated entities will intently analyze the outcome of this case.³⁴¹

Looking at the factors, there are two types of actions that benefit from immediate cooperation with the agency and two types of actions that benefit from litigation in federal court.³⁴² A regulated entity that receives an enormous fine on evidence it believes is weak, like Barclays, and an entity receiving what it believes is an entirely unwarranted fine, might take FERC to court.³⁴³ However, regulated entities that believe they can settle

339. See 16 U.S.C. § 823b (2014) (“[T]he Commission shall institute an action in the appropriate district court of the United States for an order affirming the assessment of the civil penalty.”)

340. See Barclays Brief, *supra* note 292, 2013 WL 7045799 at *2. (“[T]his District is convenient and also has a powerful interest in this matter as it involves Respondents’ manipulation of electricity markets in and around this District.”)

341. See October Policy Statement, Docket No. PL06-01, 113 FERC ¶ 61,068, 61,246 (October 20, 2005) (explaining that FERC wants to develop a consistent approach to levying penalties in cases of analogous misconduct, “taking all relevant factors into account.”)

342. See *id.* at 61,244 (“The proposed regulations will provide . . . for imposition of civil penalties. It is therefore important that we articulate how we intend to apply our new . . . civil penalty authority . . . to assure the industry that we will temper strong enforcement measures with consideration of . . . mitigating factors, in determining the appropriate remedies.”)

343. See 16 U.S.C. § 823b(d)(3)(B) (2014) (demonstrating that because regulated entities only have 60 days to pay fines, it may be economically beneficial, in terms of legal fees, to litigate winnable cases against FERC instead of hastily paying and assuming fault).

for a small financial penalty and entities that are aware of strong evidence against them, like JP Morgan, should cooperate to significantly reduce their penalty.³⁴⁴

344. See October Policy Statement, Docket No. PL06-01, 113 FERC ¶ 61,068, 61,247 (October 20, 2005) (explaining that compliance and cooperation may drastically lower an entity's penalty).