

ELEMENTS OF AN EFFECTIVE COMPLIANCE PROGRAM

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Introduction

- In assessing civil penalties, the Federal Energy Regulatory Commission (“FERC”) will consider “the nature and extent of the company’s internal compliance measures in existence at the time of the violation.”
 - “[A]n effective compliance program could result in a ninety-five percent reduction in penalties when combined with other factors. . . . [E]ven if an organization fails to receive any reduction other than compliance credit, the compliance credit alone could still reduce a penalty by sixty percent, for example, from \$5 million to \$2 million.”

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Penalties

- The Energy Policy Act of 2005 substantially increased penalties for violating the Federal Power Act (“FPA”), Natural Gas Act (“NGA”), and FERC’s implementing regulations
 - Civil penalties of up to \$1 million *per day, per violation*
 - Criminal penalties of up to \$1 million and/or 5 years in prison
- Other potential remedies include, but are not limited to, the disgorgement of unjust profits and revocation of blanket marketing certificates/market-based rate authority

Statutory Requirements

Under Section 316A of the FPA and Section 22 of the NGA, in assessing civil penalties, FERC is required to consider the seriousness of the violation and efforts by the entity to remedy the violation.

2005 and 2008 Policy Statements

FERC has therefore adopted a policy that, in assessing penalties, it will consider “steps taken by entities to prevent, monitor, and immediately stop misconduct, to report violations to the Commission, and to cooperate with the Commission’s enforcement actions,” including:

- systems and protocols for monitoring, identifying, and correcting possible violations;
- a management culture that encourages compliance among company personnel;
- tools and training sufficient to enable employees to comply with Commission requirements; and
- actions taken by the company to correct the activity that produced the violation.

Factors Taken into Account by FERC to Assess Compliance Programs

- Does the company have an established, formal program for internal compliance?
 - Is it well documented and widely disseminated within the company?
 - Is the program supervised by an officer or other high-ranking official?
 - Does the compliance official report to or have independent access to the chief executive officer and/or the board of directors?
 - Is the program operated and managed so as to be independent?
 - Are there sufficient resources dedicated to the compliance program?

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