

FERC Issues Policy Statement on Key Elements of Compliance Programs

On October 16, 2008, the Federal Energy Regulatory Commission (FERC) issued a Policy Statement on Compliance (Policy Statement), which provides additional guidance on the key elements of internal compliance programs that FERC will consider in deciding whether to reduce or forego potential civil penalties for violations. The Policy Statement supplements the May 15, 2008, Revised Policy Statement on Enforcement: <http://www.vnf.com/news-alerts-260.html>.

While the Policy Statement identifies key factors of a compliance program, FERC acknowledged that what constitutes an effective compliance program may vary based on each company's unique circumstances, including the company's size and involvement in regulated activities. In a concurring opinion, Commissioner Moeller expressed support for the development of model compliance programs and encouraged trade associations to develop industry model programs.

KEY ELEMENTS OF COMPLIANCE PROGRAMS

The new Policy Statement identifies four key elements that FERC will consider when evaluating its response to a violation of its regulations: (1) actions of senior management; (2) effective preventive measures; (3) prompt detection, cessation, and reporting of the offense; and (4) remediation efforts.

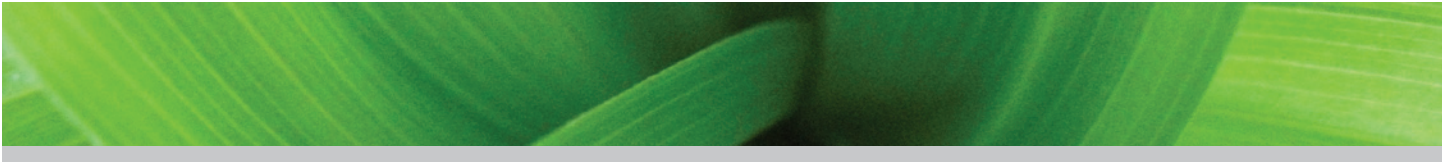
Actions of Senior Management

The Policy Statement emphasizes that "responsibility for a culture of compliance rests squarely on the shoulders of senior management." The role of senior management in developing a culture of compliance includes:

- Providing adequate funds and resources for compliance;
- Frequently communicating a commitment to compliance, both formally and informally;
- Dedicating the necessary time to vet proposed actions and address misconduct;
- Actively encouraging employees to raise questions and obtain views from supervisors on compliance matters;
- Involving compliance personnel in the development of new transaction structures or business initiatives; and
- Ensuring the independence of compliance officials, who should be able to bring compliance matters directly to the board of directors or equivalent governance structure.

Effective Preventive Measures

Preventive measures that companies can adopt in their compliance programs include careful hiring, training, and supervision of employees and the establishment of appropriate accountability and review mechanisms.



When determining the adequacy of preventive measures, FERC will take into consideration the size of the company and the nature and extent of its jurisdictional activities.

Methods for Promptly Detecting, Ceasing, and Reporting Violations

The third factor that FERC will consider is the implementation of measures to ensure that transactions are reviewed on a timely or even real-time basis for conformance to regulatory requirements. Such measures can include high quality and comprehensive internal monitoring systems or an actively-promoted company hotline. To encourage the adoption of effective controls to identify possible misconduct, FERC will normally give companies substantial credit for violations discovered as a result of systematic internal auditing and supervision programs. Companies are encouraged to report violations to FERC's Office of Enforcement promptly after discovery.

Remediation Efforts

FERC is required by statute to consider a company's efforts to remedy a violation in determining the amount of a proposed penalty. FERC will consider the steps a company has taken to end a violation and remedy misconduct including, among other things, whether disciplinary actions against employees were appropriate and whether the company has adopted or modified controls necessary to prevent a recurrence of the violation.

PENALTY CREDITS

The Policy Statement explains that FERC will eliminate or reduce civil penalties in light of a company's commitment to compliance and the effectiveness of its compliance programs. FERC may reduce a civil penalty to zero if: (1) the violation is not serious; and (2) all four key factors are present in the compliance program, i.e., senior management has made a commitment to compliance, the company adopted effective preventive measures, the violation was detected, halted, and reported promptly, and the company took appropriate remediation. If the violation is serious or the compliance program is inadequate or incomplete, FERC may rely on the aspects of the internal compliance program that meet the Policy Statement's requirements as a basis for reducing potential civil penalties.

FOR ADDITIONAL INFORMATION

Van Ness Feldman has experience in all aspects of federal energy regulatory compliance. The firm regularly conducts regulatory compliance reviews, helps clients develop compliance plans and training programs, and defends clients in FERC audits, investigations and enforcement actions. For more information, please contact Doug Smith or Paul Korman in our Washington, DC office at (202) 298-1800, or Pam Anderson in our Seattle office at (206) 623-9372, or any member of the firm's Electric, Natural Gas, or Hydro practice areas.

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