WILLKIE FARR & GALLAGHER LLP

CLIENT ALERT

Hidden Insights in the FERC 2020 Report of Enforcement

November 25, 2020

AUTHORS

Thomas R. Millar | Paul J. Pantano, Jr.

On November 19, 2020, the staff of the Federal Energy Regulatory Commission's Office of Enforcement ("OE" or "Staff") issued its 2020 Report on Enforcement (the "Report") for the Commission's fiscal year ending September 30, 2020.[1] The Commission requires OE to prepare the Report in order to inform the public of the activities of the Office of Enforcement and its three Divisions: the Division of Investigations ("DOI"); the Division of Analytics and Surveillance ("DAS"); and the Division of Audits and Accounting ("DAA").[2]

OE asserted that its priorities remained as follows in 2020:

- fraud and market manipulation;
- serious violations of the Reliability Standards;
- anticompetitive conduct; and
- conduct that threatens the transparency of regulated markets.

Although Staff professed no change in priorities, Commissioner Richard Glick, who is widely considered to be the leading candidate to be the next Chairman of the Commission, expressed doubt about the Commission's continued commitment to its enforcement responsibilities. The statistics cited in the Report can be viewed as supporting Commissioner Glick's criticism, though it is difficult to draw firm conclusions because FERC investigations are non-public. Moreover, since the

[1] *Available here*. All references to yearly totals in this document refer to the Commission's fiscal year ending September 30, 2020.

[2] Enforcement of Statutes, Regulations and Orders, 123 FERC ¶ 61,156 at P 12 (2008).

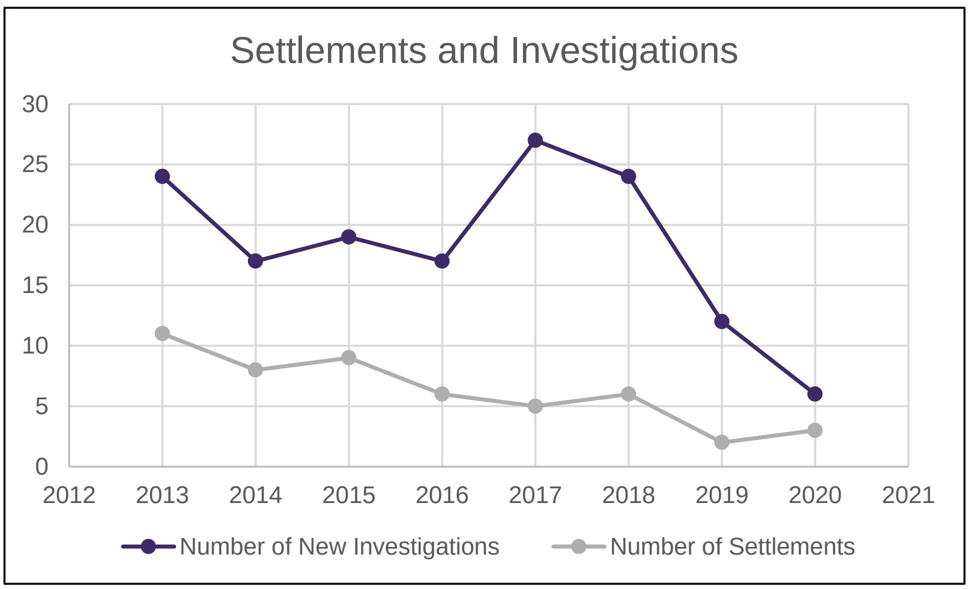
passage of the Energy Policy Act of 2005, which gave the Commission its powerful anti-manipulation authority, industry has undoubtedly become more sophisticated about compliance.

We summarize below the key insights in the Report.

Division of Investigations Activity Remained Slow

In 2020, DOI opened just six new investigations, while bringing eight pending investigations to a close without action. DOI negotiated three settlements in 2020 worth $553,376 in civil penalties and disgorgement. These are the lowest civil penalties and disgorgement amounts since OE began publishing its annual Report on Enforcement.

OE's 2020 report demonstrates a continued decline in DOI's activity. As demonstrated in the graph below, which we prepared based on past Enforcement Reports, the number of new investigations fell in 2020. DOI initiated less than one-third the number of investigations in 2020 relative to the seven-year average of new investigations for the years 2013 to 2019. There were also fewer settlements in 2020 when compared to years past—less than half the seven-year average from 2013 to 2019. For the first time since 2010, OE did not settle a single market manipulation case.[3]



This trend did not go unnoticed by Commissioner Glick. In remarks after OE presented the 2020 Report on Enforcement at the Commission's November 2020 Open Meeting, he expressed concern about the Commission's lack of attention to policing its markets. Commissioner Glick contrasted the 2020 Report with its prior enforcement activity, stating:

> In order for the Office of Enforcement to do its job, this Commission must also do its job. And I'm concerned that we have gone AWOL. For example, . . . in the last fiscal year, the Commission entered into settlements, which include civil penalties and disgorgement worth only $550,000. In prior years, settlements amounted to tens of millions and sometimes

[3] Report at 17-19; *see also* the Enforcement Reports from 2010 to 2019, reporting types of settlements.

> hundreds of millions of dollars. Now I recognized that you can't always make a finite judgment based on a single year statistic, but I think it's at least worth asking if the Commission remains committed to its enforcement responsibilities. And I've had my doubts.[4]

If Commissioner Glick becomes Chairman Glick under the Biden administration, DOI activity may increase significantly. Indeed, even if someone else is appointed Chair, the relative quiet in enforcement investigations and actions that market participants have become accustomed to in recent years may be near an end.

Manipulation Self-Report Closed with No Action

Staff described a self-report of a potential anti-manipulation rule violation that it closed without taking any action.[5] Staff explained that a privately held energy trading firm had self-reported that two of its subsidiaries took offsetting virtual trading positions at the same location in the same hour that appeared to be a wash trade. However, the firm explained that the apparent wash trade was accidental (*i.e*., not prearranged), caused by two different traders at two different subsidiaries. The firm's compliance software identified the issue, but was unable to undo the trades. The trading firm immediately self-reported the issue and subsequently implemented structural improvements to prevent the problem from reoccurring. Staff emphasized the isolated and inadvertent nature of the violation and the lack of economic harm as significant factors in its decision to close the self-report without action.

Referrals from the Division of Analytics and Surveillance

As we have explained in prior Hidden Insights alerts, the Commission created DAS in 2012 to develop surveillance tools, conduct surveillance, and analyze transactional and market data to detect potential manipulation, anticompetitive behavior, and other anomalous activities in the energy markets. It focuses on three areas: (1) natural gas surveillance; (2) electric surveillance; and (3) analytics for reviewing market participant behavior. DAS employs "screens" or algorithms in the natural gas and electric markets to identify conduct appropriate for referral to DOI.

In 2020, DAS narrowed 10,594 natural gas screen trips to 26 inquiries and no referrals to DOI. On the electric side, DAS narrowed 399,750 screen trips to 39 inquiries and five referrals.[6]

District Court and Administrative Actions

Staff represented the Commission in four federal district court cases and two administrative proceedings, each of which remains pending. The status of each case is summarized below:

- ***FERC v. Silkman, et al.,*** No. 1:13-cv-13054 (D. Me.). Since February 2020, the parties had been engaged in mediation before a magistrate judge. As reflected in the court's September 25, 2020 minute order, a tentative

---

4 Audio of the November 19, 2020 Open Meeting is available here.

5 Report at 31.

6 *Id.* at 7.

settlement was reached, pending review and approval by the Commission. Details of the settlement are not yet publicly available.

- ***FERC v. Powhatan Energy Fund LLC, et al.,*** No. 3:15-cv-00452 (E.D. Va.). This case had been before the Fourth Circuit on interlocutory appeal of the district court's denial of the defendants' motion to dismiss on statute of limitations grounds. On February 11, 2020, the Fourth Circuit issued an opinion affirming the district court and the case resumed in the Eastern District of Virginia. Discovery is ongoing.

- ***FERC v. Coaltrain Energy L.P., et al.,*** No. 2:16-cv-00732 (S.D. Ohio). The parties completed summary judgment briefing in March 2020. On November 18, 2020, the court granted the Commission's partial motion for summary judgment on the defendants' affirmative defenses of waiver, estoppel, selective prosecution, laches, unclean hands, and fault of others, and it granted the Commission's § 35.41(b) (duty of candor) claim against Coaltrain. The court denied the defendants' motions for summary judgment.

- ***FERC v. Vitol Inc. and Federico Corteggiano***, No. 2:20-CV-00040-KJM-AC (E.D. Cal.). The defendants each filed motions to dismiss the Commission's market manipulation claim and moved to stay discovery pending the court's resolution of the motions to dismiss. All motions remain pending before the court.

- ***Total Gas & Power North America, Inc., et al.,*** Docket No. IN12-17 and ***BP America Inc., et al.***, Docket No. IN13-15. Staff's 2020 summary of the two administrative proceedings pending at the Commission remained unchanged from 2019 because no progress has occurred in either proceeding.

Takeaways

The most significant feature of the 2020 Enforcement Staff Report is what is missing: an increased number of investigations and enforcement actions. Even more striking, there has been no activity in pending administrative litigation at the Commission during the past year. This trend is likely to change substantially in the Biden administration. Entities regulated by the Commission should use the next several months as an opportunity to review their compliance programs, to identify any weaknesses, and to mitigate them promptly.

If you have any questions regarding this client alert, please contact the following attorneys or the attorney with whom you regularly work.

Thomas R. Millar
202 303 1144
tmillar@willkie.com

Paul J. Pantano Jr.
202 303 1211
ppantano@willkie.com

Copyright © 2020 Willkie Farr & Gallagher LLP.

This alert is provided by Willkie Farr & Gallagher LLP and its affiliates for educational and informational purposes only and is not intended and should not be construed as legal advice. This alert may be considered advertising under applicable state laws.

Willkie Farr & Gallagher LLP is an international law firm with offices in New York, Washington, Houston, Palo Alto, San Francisco, Chicago, Paris, London, Frankfurt, Brussels, Milan and Rome. The firm is headquartered at 787 Seventh Avenue, New York, NY 10019-6099. Our telephone number is (212) 728-8000, and our fax number is (212) 728-8111. Our website is located at www.willkie.com.