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**EBA 2018 Enforcers
and Defenders Forum**



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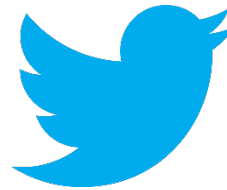
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2018 Enforcers & Defenders Forum CLE Submission

Learning Objective

The Compliance and Enforcement Committee of the Energy Bar Association presents the Enforcers and Defenders Forum at Georgetown University Law Center on April 11, 2018. The Defenders panel will address "Issues in Federal Energy Enforcement Court Practice." This panel will focus on the trends in Federal Energy Regulatory Commission (FERC) Enforcement litigation and alternative dispute resolution matters. Panelists will provide an overview of these disputes and discuss how practitioners and in-house counsel should prepare for litigation, settlement, and dispute resolution scenarios. The Forum also will present its popular Enforcers Panel with key representatives from FERC, US Commodity Futures Trading Commission (CFTC), Pipeline and Hazardous Materials Safety Administration (PHMSA) and the Northeast Power Coordinating Council (NPCC), addressing hot enforcement and compliance issues for 2018 and other timely topics.

Timed Agenda with Brief Bios for Panelists:

1:30- 2:00 p.m. Registration and Sign-In

2:00 – 3:15 p.m. **FERC Enforcement Litigation and Alternative Dispute Resolution**

Facilitator

Todd Mullins, Partner, McGuireWoods LLP

Panelists

- **Peter Brann, Partner, Brann & Isaacson**
Peter Brann is a partner at Brann & Isaacson, where he handles litigation in state and federal trial and appellate courts around the country. He is lead counsel for the defendants in *FERC v. Silkman*. Prior to joining the firm, he was an Assistant Attorney General and then State Solicitor in the Maine Attorney General's Office, handling and supervising complex litigation and civil appeals up through the Supreme Court. He is an adjunct law professor at Columbia (2010-16), Harvard (2016-18), and Yale (2019), co-teaching a class on the Role of the State Attorney General. He is a graduate of Bates College and Boston University Law School.
- **Daniel Mullen, Partner, Steptoe & Johnson LLP**
Daniel Mullen counsels clients on energy and commodities enforcement matters and government investigations and litigation, and assists clients with the development of energy regulatory compliance programs. He focuses on defending clients in investigations by the Federal Energy Regulatory Commission (FERC) and US Commodity Futures Trading Commission (CFTC). Prior to joining Steptoe, Dan served as a Division of Investigations Branch Chief within the Office of Enforcement at FERC. In this position, he helped develop FERC's existing enforcement regime and oversaw and conducted investigations and litigation against companies participating in the wholesale electricity and natural gas markets. His focus was on investigations concerning energy market manipulation, reliability and other violations of FERC-jurisdictional statutes, regulations and tariffs. Dan is a frequent speaker at industry conferences, presenting on issues related to energy and commodity enforcement defense.

- **William Scherman, Partner, Gibson Dunn**

William S. Scherman is a partner in the Washington, D.C. office of Gibson, Dunn & Crutcher and chairs the Energy, Regulation and Litigation practice group. Mr. Scherman has served as general counsel for the Federal Energy Regulatory Commission and was chief of staff and senior legal and policy advisor for the FERC beginning in 1987. He advises companies on litigation, commercial, regulatory and legislative matters relating to the U.S. and international energy markets. He has litigated high-profile energy investigation and enforcement matters before the FERC and in the federal courts and represents large electric utilities before the FERC and state regulators.

Mr. Scherman was a partner with Skadden Arps from 1993-2013. During his tenure at the FERC, he played a key role in major policy initiatives, including the Energy Policy Act of 1992 and Order No. 636, which reformed the natural gas pipeline industry. As FERC's chief legal officer, he was responsible for the agency's litigation strategy before federal appellate courts.

Mr. Scherman has litigated dozens of cases throughout his career. During the last several years, Mr. Scherman has been heavily involved in very high-profile trials before the FERC involving rate, market power and market manipulation issues. He also utilizes his experience in market power issues in advising companies on mergers and acquisitions.

Mr. Scherman is a frequent speaker on energy issues at various industry and government conferences. He is a member of the Keystone Energy Board, a prominent non-profit think tank that seeks bipartisan policy consensus on key energy and environmental issues, and regularly participates in the Harvard Electricity Policy Group. Mr. Scherman was the only private practice lawyer named to SNL Energy's 10 Most Influential People of 2014. The list features individuals who had significant impact on the electric power, natural gas and coal sectors over the past year. He is recognized as a leading practitioner in energy law in various publications including Chambers, The Best Lawyers in America®, America's Leading Lawyers for Business and was named a 2014 BTI Client Service All-Star. In 2015, Mr. Scherman was recognized in the National Law Journal's first edition of Energy & Environmental Trailblazers as one of the leading lawyers dealing with the crucial intersection of energy and environmental issues. Euromoney's Expert Guides named Mr. Scherman to its 2017 edition of the Energy and Environment Guide, which recognizes top legal practitioners in more than 90 jurisdictions. Mr. Scherman has published numerous articles, including articles for the Energy Law Journal, the Wall Street Journal, Forbes and the Energy Daily.

3:15- 3:30 BREAK

3:30 p.m. – 5:00 p.m. **Current Issues and Trends in Enforcement**

Facilitator

Robert Fleishman, Senior Of Counsel, Morrison & Foerster LLP

Panelists

- **Paul Hayeck, Deputy Director, US Commodity Futures Trading Commission**

Paul G. Hayeck is a Deputy Director for the Division of Enforcement of the U.S. Commodity Futures Trading Commission. Mr. Hayeck joined the Commission in 1999 as a Senior Trial Attorney. He is currently an Adjunct Professor at the American University Washington College of Law where he teaches Regulation of Derivatives. Prior to joining the Commission, Mr. Hayeck was a partner in a law firm in Boston, Massachusetts, where he focused on commercial litigation. He holds an LL.M. in Banking Law and a J.D. from Boston University School of Law. He is a graduate of the College of the Holy Cross, where he received a Bachelor of Arts in Economics.

- **Kristin McKeown, General Counsel, Northeast Power Coordinating Council**
Kristin McKeown is the General Counsel of the Northeast Power Coordinating Council (NPCC). Before joining NPCC, Ms. McKeown worked in energy trading compliance at BP Energy Company in Stamford, CT. She also served as an Attorney in the Office of Enforcement at the Federal Energy Regulatory Commission, an analyst in the Office of Electric Reliability at the Federal Energy Regulatory Commission and as a Presidential Management Fellow at OSHA at the U.S. Department of Labor. Ms. McKeown graduated from the University of Miami School of Law with honors and Rutgers University.
- **Larry R. Parkinson, Director, Office of Enforcement-Federal Energy Regulatory Commission**
Larry R. Parkinson is the Director of the Office of Enforcement. From March 2010 to April 2015, he served as Director of the Division of Investigations in the Office of Enforcement. Before joining FERC, Mr. Parkinson served as Deputy Assistant Secretary at the U.S. Department of the Interior, General Counsel of the Federal Bureau of Investigation, General Counsel of the U.S. Small Business Administration, Assistant United States Attorney for the District of Columbia, litigation associate at Ropes & Gray, and law clerk to the Honorable William G. Young of the U.S. District Court for Massachusetts. Mr. Parkinson is a graduate of Northern State University and Harvard Law School, where he served as an editor of the Harvard Law Review. Before law school, he worked for four years on Capitol Hill as a staff member to two congressmen and as a subcommittee minority staff director.
- **James Pates, Assistant Chief Counsel, Pipeline and Hazardous Materials Safety Administration**
James M. Pates serves as Assistant Chief Counsel for Pipeline Safety in the Office of Chief Counsel, Pipeline and Hazardous Materials Safety Administration (PHMSA), U.S. Department of Transportation, Washington, DC. In that capacity, he supervises a legal staff responsible for enforcement of the federal Pipeline Safety Laws and for providing a broad range of other legal services to the Office of Pipeline Safety, PHMSA, including rulemakings, advisory bulletins and other guidance, legislation, and litigation. Prior to assuming his current position in 2007, Mr. Pates served for 18 years as the City Attorney of Fredericksburg, Virginia, where he was responsible for all of the City's civil legal matters. Beginning in 1990, he became active in pipeline issues as a result of two accidents in which the City lost its entire public water supply due to oil pipeline accidents. He has published several papers on pipeline safety, produced a public education video for local governments, and served as a co-founder of the Pipeline Safety Trust, a non-profit organization dedicated to improving pipeline safety and environmental protection.

Prior to serving as City Attorney, he served as counsel for the Committee on Government Operations, U.S. House of Representatives, and had a private law practice in Virginia. He received his undergraduate degree from Amherst College and his J.D. degree from the University of Virginia.

5:00 p.m. – 6:00 p.m. Networking Reception

RESOURCES AND REFERENCES

CFTC

Commodity Exchange Act, 7 U.S.C. §§ 1 *et seq.* (2012):

- Section 4c(a), 7 U.S.C. § 6c(a) (prohibiting wash sales, imparting of certain non-public information, disruptive trade practices, among other things)
- Section 6(c), 7 U.S.C. § 9 (prohibiting employment or attempted employment of manipulative and deceptive devices, manipulation by false reporting, making false statements to the CFTC, among other things)
- Section 6c, 7 U.S.C. § 13a-1 (restraining orders, injunctions, other orders, civil penalties, among other things)
- Section 9(a)(2), 7 U.S.C. § 13 (prohibiting price manipulation and false reporting, among other things)

CFTC Cooperation Advisories

- <http://www.cftc.gov/PressRoom/PressReleases/pr7518-1>

CFTC Regulations, 17 C.F.R. §§ 1 *et seq.* (2014):

- Regulation 180.1, 17 C.F.R. § 180.1 (prohibition on the employment or attempted employment of manipulative and deceptive devices)
- Regulation 180.2, 17 C.F.R. § 180.2 (prohibition on price manipulation)

Total Gas & Power North America, Inc., and Therese Tran:

<http://www.cftc.gov/idc/groups/public/@lrenforcementactions/documents/legalpleading/enfnorthamerorder12715.pdf>

FERC

1) Enforcement Related Orders and Policy Statements

- a) ***Enforcement of Statutes, Regulations, and Orders (Revised Policy Statement on Penalty Guidelines)***, 132 FERC ¶ 61,216 (2010).
- b) ***Enforcement of Statutes, Regulations and Orders (Order Authorizing Secretary to issue Staff's Preliminary Notice of Violations)***, 129 FERC ¶ 61,247 (2009).
- c) ***Enforcement of Statutes, Regulations and Orders (Policy Statement on Disclosure of Exculpatory Materials)(Brady Policy Statement)***, 129 FERC ¶ 61,248 (2009).

- d) ***Enforcement of Statutes, Regulations, and Orders (Revised Policy Statement on Enforcement)***, 123 FERC ¶ 61,156 (2008), *superseding Enforcement of Statutes, Orders, Rules, and Regulations*, 113 FERC ¶ 61,068 (2005).
 - e) ***Submissions to the Commission upon Staff Intention To Seek an Order To Show Cause***, Order No. 711, FERC Stats. & Regs. ¶ 31,270 (2008) (Revision of 18 C.F.R. § 1b.19 regarding submission of written statement before staff recommends litigation).
 - f) ***Ex Parte Contacts and Separation of Functions***, 125 FERC ¶ 61,063 (2008) (Order No. 718)
 - g) ***Compliance with Statutes, Regulations, and Orders (2008 Policy Statement on Compliance)***, 125 FERC ¶ 61,058 (2008).
 - h) ***Process for Assessing Civil Penalties***, 117 FERC ¶ 61,317 (2006) (Statement of Administrative Policy Regarding the Process for Assessing Civil Penalties).
 - i) ***Obtaining Guidance on Regulatory Requirements***, 123 FERC ¶ 61,157 (2008) (Interpretative Order Modifying No-Action Letter Process and Reviewing Other Mechanisms for Obtaining Guidance); *see also Informal Staff Advice on Regulatory Requirements*, 113 FERC ¶ 61,174 (2005), *modified* 117 FERC ¶ 61,069 (2006) (Interpretive Order Regarding No-Action Letter Process).
- 2) ***Commission Orders Related to Market Manipulation***
- a) ***Prohibition of Energy Market Manipulation***, Order No. 670, FERC Stats. & Regs. ¶ 31,202, *order denying reh'g*, 114 FERC ¶ 61,300 (2006) (Anti-Manipulation Rule). ***Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations***, 114 FERC ¶ 61,165, *order denying reh'g*, 115 FERC ¶ 61,053 (2006) (Order Revising Market-Based Rate Tariffs and Authorizations, rescinding Market Behavior Rules 2 and 6 as applied to electric market-based rate sellers).
 - b) ***Amendments to Codes of Conduct for Unbundled Sales Service and for Persons Holding Blanket Marketing Certificates***, Order No. 673, FERC Stats. & Regs. ¶ 31,207 (2006) (Rescission of Market Behavior Rule 2 as applied to natural gas sales).
 - c) ***Conditions for Public Utility Market-Based Rate Authorization Holders***, Order No. 674, FERC Stats. & Regs. ¶ 31,208 (2006) (Codification of Market Behavior Rules 1, 3, 4, and 5 for electric market-based rate sellers; rules subsequently renumbered by Order No. 697).

NERC and Northeast Power Coordinating Council Enforcement

- Section 215 of the Federal Power Act [Link](#)
- 18 CFR Part 39 [Link](#)
- NERC Rules of Procedure [Link](#)
 - Sanction Guidelines of the North American Electric Reliability Corporation [Link](#)
 - Compliance Monitoring and Enforcement Program [Link](#)
 - ERO Enterprise Guide for Internal Controls [Link](#)

Select FERC Orders

- *North American Electric Reliability Corporation*, 150 FERC ¶ 61,108 (2015) ([February 2015 Risk-Based CMEP Order](#))
- *North American Electric Reliability Corporation*, 148 FERC ¶ 61,214 (2014) ([September 2014 FFT Order](#))
- *North American Electric Reliability Corporation*, 143 FERC ¶ 61,253 (2013) ([June 2013 FFT Order](#))

- *North American Electric Reliability Corporation*, 138 FERC ¶ 61,193 (2012) ([March 2012 FFT Order](#))
- *Enforcement of Statutes, Orders, Rules, and Regulations*, 132 FERC ¶ 61,216 (2010) ([Revised Policy Statement on Penalty Guidelines](#))
- *Guidance Order on Reliability Notices of Penalty*, 124 FERC ¶ 61,015 (2008) ([May 2008 Guidance Order](#))
- *Mandatory Reliability Standards for the Bulk-Power System*, Order No. 693, FERC Stats. & Regs. ¶ 31,242 (2007) ([March 2007 Order Mandatory Reliability Standards](#))
- *Rules Concerning Certification of the Electric Reliability Organization; and Procedures for the Establishment, Approval and Enforcement of Electric Reliability Standards*, Order No. 672, FERC Stats. & Regs. ¶ 31,204 (2006) ([February 2006 Order ERO Certification and Enforcement of Reliability Standards](#))

PHMSA

- PHMSA Standards & Regulations, and Latest Rulemakings <http://www.phmsa.dot.gov/pipeline/regs>
- PHMSA Pipeline Safety Enforcement Program <https://www.phmsa.dot.gov/pipeline/enforcement/enforcement-overview>
- PHMSA Guidance Documents <https://www.phmsa.dot.gov/training/pipeline/guidance-manuals>
- Pipeline Safety, Regulatory Certainty, and Job Creation Act of 2011 <https://www.phmsa.dot.gov/legislative-mandates/pipeline-safety-act/pipeline-safety-regulatory-certainty-and-job-creation-act>
- Pipeline Inspection, Protection, Enforcement, and Safety Act of 2006 (PIPES) <https://www.phmsa.dot.gov/pipes-act>
- Other Pipeline Safety Statutes and Regulations <https://www.phmsa.dot.gov/working-phmsa/state-programs/federalstate-legislative-authorities>

Relevant US Supreme Court Cases

- *Lucia v. Securities and Exchange Commission* <http://www.scotusblog.com/case-files/cases/lucia-v-securities-exchange-commission/>
- *Oil States Energy Services, LLC v. Greene's Energy Group, LLC* <http://www.scotusblog.com/case-files/cases/oil-states-energy-services-llc-v-greenes-energy-group-llc/>