REPORT OF THE COMPLIANCE & ENFORCEMENT COMMITTEE

This report of the Compliance & Enforcement Committee summarizes key federal enforcement and compliance developments in 2012 including certain decisions, orders, actions, and rules of the Federal Energy Regulatory Commission, the Commodity Futures Trading Commission, the Pipeline and Hazardous Materials Safety Administration, the Department of Energy, and the United States Department of Justice.*

* The Compliance & Enforcement Committee gratefully acknowledges the contributions to this report of Joseph Williams, Randy Rich, Nicole Aulerich, Greg Leonard, Michael Brooks, Robert Fleishman, Matthew Krauss, Alyssa Schindler, Megan Vetula, Candice Castaneda, Jim Curry, and Keith Coyle.

I. THE FEDERAL ENERGY REGULATORY COMMISSION

A. Reports and Rules

1. Annual Enforcement Report

On November 15, 2012, the Federal Energy Regulatory Commission (FERC) Office of Enforcement issued its Annual Report of enforcement staff activities in fiscal year 2012.[1] The report highlighted the creation of the new Division of Analytics and Surveillance; initiation of sixteen investigations and closure of twenty-one investigations; nine settlements, five Orders to Show Cause, and seven Notices of Alleged Violations.[2] The FERC settled cases for over $148 million in civil penalties and over $119 million disgorgement of unjust profits.[3] Enforcement processed thirty-three full Notices of Penalty and twelve Spreadsheet Notices of Penalty including a total of 904 possible or confirmed violations.[4]

2. Division of Analytics and Surveillance

In February 2012, the FERC Office of Enforcement created the Division of Analytics and Surveillance (DAS) 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."[5] "In FY2012, DAS reviewed numerous instances of potential misconduct and referred matters" to the Division of Investigations.[6] The FERC also issued Order No. 760, Enhancement of Electricity Market Surveillance and Analysis through Ongoing Electronic Delivery of Data from Regional Transmission Organizations (RTO) and Independent System Operators (ISO),[7] and Order No. 768, Electricity Market Transparency Provisions of section 220 of

1. STAFF OF THE OFFICE OF ENFORCEMENT, FERC, 2012 REPORT ON ENFORCEMENT, FERC Docket No. AD07-13-005 (Nov. 15, 2012) [hereinafter 2012 REPORT].

2. *Id.* at 2-3.

3. *Id.* at 3.

4. *Id.*

5. *Id.* at 49.

6. *Id.* at 2.

7. Order No. 760, *Enhancement of Electricity Market Surveillance and Analysis through Ongoing Electronic Delivery of Data from Regional Transmission Organizations and Independent System Operators*, 139 F.E.R.C. ¶ 61,053 (2012) (to be codified at 18 C.F.R. pt. 35) [hereinafter Order No. 760].

the Federal Power Act (FPA),[8] to "enhance DAS's ability to conduct surveillance of the electric markets and to analyze individual market participant behavior."[9] Order No. 760 requires RTOs/ISOs to deliver market data directly to the FERC, including "physical and virtual bids and offers, market awards, resource outputs, marginal cost estimates, shift factors, financial transmission rights, internal bilateral contracts, uplift, and interchange pricing."[10] Order No. 768 requires "market participants that are excluded from [FERC] jurisdiction under FPA section 205, and have more than a *de minimis* market presence to file [Electric Quarterly Reports] with the [FERC]."[11]

B. Show Cause Proceedings

1. Barclays Bank, PLC

On October 31, 2012, the FERC issued an Order to Show Cause (OSC) to Barclays Bank PLC (Barclays) and four individuals, Daniel Brin, Scott Connelly, Karen Levine, and Ryan Smith (together, the individual traders), directing them to show cause why they did not violate section 1c.2 of the FERC's regulations and section 222 of the FPA.[12] Barclays and the individual traders "are alleged to have violated section 1c.2 by manipulating the electricity markets in and around California from November 2006 to December 2008."[13]

Office of Enforcement Staff (OE Staff) initiated the investigation after the Enforcement Hotline received calls from market participants on the matter.[14] OE Staff concluded "that Barclays and the individual traders engaged in . . . loss-generating trading of next-day fixed-price physical electricity on the IntercontinentalExchange . . . to benefit Barclays' financial swap positions."[15] In its "Enforcement Staff Report and Recommendation" to the FERC, Staff "allege[d] that Barclays and the individual traders engaged in a coordinated scheme to manipulate trading at four electricity trading points in the Western United States in certain months from November 2006 to December 2008."[16] OE Staff proposed $34.9 million plus interest disgorgement and a $435 million civil penalty against Barclays, and $18 million total civil penalties against the individual traders ($15 million against Connelly, and $1 million each against Brin, Levine, and Smith).[17]

On November 29, 2012, Barclays and the individual traders elected penalty assessment under section 31(d)(3) of the FPA.[18]

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8. Order No. 768, *Electricity Market Transparency Provisions of Section 220 of the Federal Power Act*, 140 F.E.R.C. ¶ 61,232 (2012) (to be codified at 18 C.F.R. pt. 35) [hereinafter Order No. 768].

9. 2012 REPORT, *supra* note 1, at 2.

10. *Id.* at 49 (discussing Order No. 760, *supra* note 7).

11. *Id.* (discussing Order No. 768, *supra* note 8).

12. *Barclays Bank PLC*, 141 F.E.R.C. ¶ 61,084, 61,416 (2012).

13. *Id.* at 61,416-17.

14. *Id.* at 61,421.

15. *Id.* at 61,417.

16. *Id.*

17. 141 F.E.R.C. ¶ 61,084, at 61,417.

18. All five parties filed a separate Notice of Election on November 29, 2012, in FERC Docket No. IN08-8-000.

2. Deutsche Bank Energy Trading, LLC

On September 5, 2012, the FERC issued an OSC to Deutsche Bank Energy Trading LLC (Deutsche Bank), directing it to show cause as to why Deutsche Bank should not be found to have violated the Anti-Manipulation Rule and section 222 of the FPA; and why it should not be found to have violated the accuracy requirement of section 35.41(b), in connection with its physical energy trades and financial positions in the CAISO markets.[19] Enforcement Staff alleged that Deutsche Bank "falsely schedul[ed] unprofitable physical exports (purchases) at the Silver Peak intertie with the intent to benefit its financial positions in [CAISO]."[20]

OE Staff began its investigation of Deutsche Bank after CAISO's Department of Market Monitoring referred the matter.[21] Based on its investigation, OE Staff determined that, after CAISO derated the Silver Peak intertie, the value of Deutsche Bank's Congestion Revenue Rights (CRR) position at the intertie was diminished.[22] OE Staff alleged that, to avoid losses, Federico Corteggiano, head of Deutsche Bank's CAISO CRR business, and Huber Salas, an analyst assisting Corteggiano, implemented a circular wheel-through strategy (the Export Strategy) "to eliminate the import congestion at Silver Peak" that had decreased the value of the CRR position.[23] OE Staff alleged further that, when it became evident that the Export Strategy was successful, Corteggiano and Salas then increased the CRR position.[24] OE Staff noted that the physical transactions lost money each day, but that the benefit to the CRR positions outweighed the losses.[25]

OE Staff determined that Deutsche Bank violated the Anti-Manipulation Rule, section 1c.2, and the CAISO Tariff by fraudulently trading in one product to benefit a second product without regard to market fundamentals, and by submitting fraudulent wheeling-through transactions.[26] OE Staff also asserted that Deutsche Bank violated the accuracy requirements of section 35.41(b) and the CAISO Tariff because the wheeling-through transactions were not associated with a resource and a load outside CAISO, as OE Staff alleged was required by the Tariff.[27]

OE Staff was unable to reach a settlement agreement with Deutsche Bank, and accordingly recommended that the FERC issue the OSC.[28] The FERC is seeking a civil penalty of $1.5 million, and disgorgement of $123,198 plus interest.[29]

19. *Deutsche Bank Energy Trading, LLC*, 140 F.E.R.C. ¶ 61,178 at P 1 (2012).

20. *Id*. at 61,802.

21. *Id*. at 61,803.

22. *Id*.

23. *Id*.

24. *Id*.

25. 140 F.E.R.C. ¶ 61,178, at 61,803.

26. *Id*.

27. *Id*. at app A, 61,804.

28. *Id*.

29. *Id.*

On October 4, 2012, Deutsche Bank elected immediate penalty assessment under FPA section 31(d)(3).[30]

3. Rumford Paper Co., Lincoln Paper and Tissue, LLC, Competitive Energy Services, LLC, and Richard Silkman

On July 17, 2012, the FERC issued OSC's and Notices of Penalty[31] alleging that Lincoln Paper and Tissue, LLC (Lincoln) and Rumford Paper Co. (Rumford) manipulated ISO-New England's (ISO-NE) Day Ahead Load Response Program (DALRP).[32] After a four-year investigation, OE Staff alleged that in 2007 and 2008, the two paper mills inflated their energy consumption when their load baselines were being measured and then offered consumption reductions without any plan to actually decrease load, resulting in Lincoln and Rumford being paid by ISO-NE for "phantom load reductions" under the DALRP.[33] OE Staff also alleged that Competitive Energy Services, LLC (CES) and Richard Silkman (Silkman), a CES principal, developed the scheme and recommended it to Rumford.[34] Together, the mills and advisors face proposed civil penalties totaling more than $26 million.[35] The show cause orders were issued after settlement negotiations between the OE Staff and the parties were unsuccessful.[36]

Specifically, OE Staff alleged that "Rumford curtailed its internal generation by approximately 30-40 MW" and "Lincoln curtailed its internal generation by approximately 3 MW during the five-day period when [the mills']

30. Notice of Election of Deutsche Bank Energy Trading LLC, FERC Docket No. IN12-4-000 (Oct. 4, 2012).

31. *Rumford Paper Co.*, 140 F.E.R.C. ¶ 61,030 (2012); *Lincoln Paper and Tissue, LLC*, 140 F.E.R.C. ¶ 61,031 (2012); *Competitive Energy Services, LLC*, 140 F.E.R.C. ¶ 61,032 (2012); *Richard Silkman*, 140 F.E.R.C. ¶ 61,033 (2012).

32. The DALRP is a demand response program. According to the FERC:

> Demand response is a "change[] in electric usage by end-use customers from their normal consumption patterns in response to changes in the price of electricity over time, or to incentive payments designed to induce lower electricity use at times of high wholesale market prices or when system reliability is jeopardized." Demand response programs require, at the least, either reduced consumption or increased production of electricity by the responder. Demand response programs in Commission-jurisdictional markets improve competition in those markets and help fulfill the Commission's mandate under the Federal Power Act (FPA) that rates for energy are just, reasonable, and not unduly discriminatory or preferential.

See, e.g., *Rumford*, 140 F.E.R.C. ¶ 61,030, at 61,086 (internal citations omitted).

33. *See, e.g.*, *id.* at 61,082.

34. *See, e.g.*, *CES*, 140 F.E.R.C. ¶ 61,032, at 61,118.

35. The FERC proposes to assess Rumford a civil penalty of $13,250,000 and disgorgement of $2,836,419.08 plus interest, Lincoln a civil penalty of $4,400,000 and disgorgement of $379,016.03 plus interest, CES a civil penalty of $7,500,000 and disgorgement of $166,841.13 plus interest, and Silkman an individual civil penalty of $1,250,000. *Rumford*, 140 F.E.R.C. ¶ 61,030, at 61,099; *Lincoln*, 140 F.E.R.C. ¶ 61,031, at 61,117; *CES*, 140 F.E.R.C. ¶ 61,032, at 61,134; *Silkman*, 140 F.E.R.C. ¶ 61,033, at 61,151. Commissioner LeFleur issued concurring opinions in the Rumford and CES proceedings to reflect her position that the majority inflates Rumford's and CES' proposed civil penalties by counting both the duration of the alleged fraud and the and the cumulative value of the monetary loss, which the Commissioner states is directly related to the duration of the alleged scheme. *Rumford*, 140 F.E.R.C. ¶ 61,030, at 61,100-01; *CES*, 140 F.E.R.C. ¶ 61,032, at 61,134-35.

36. *Rumford*, 140 F.E.R.C. ¶ 61,030, at 61,085; *Lincoln*, 140 F.E.R.C. ¶ 61,031, at 61,105; *CES*, 140 F.E.R.C. ¶ 61,032, at 61,121; *Silkman*, 140 F.E.R.C. ¶ 61,033, at 61,138.

initial baseline load[s] [were] established for the DALRP."[37] "Instead of operating the generator to supply Rumford with virtually all of its energy needs (as was typical for the facility)," Rumford (with CES' and Silkman's advice) purchased "replacement energy during the baseline period at a $120,000 cost" and Lincoln "purchased replacement energy during the baseline period at a $10,000 cost."[38] "By purchasing energy, instead of producing it on site, [Rumford and Lincoln each] reported larger energy consumption to ISO-NE than otherwise would have been the case, thereby establishing a false and inflated baseline."[39] Rumford and Lincoln then claimed "load reductions (the difference between its baseline load and its normal operations)," but neither mill actually reduced any load.[40]

As a result, OE Staff concluded that Rumford (advised by CES and Silkman) and Lincoln violated section 1c.2 of the FERC's regulations[41] under section 222 of the FPA.[42] The curtailment of generation to establish a baseline for the DALRP constituted a fraudulent scheme or artifice in which Rumford (advised by CES and Silkman) and Lincoln knowingly misled and falsely reported to ISO-New England about both typical load, and willingness and ability to reduce load. Accordingly, OE Staff alleged that ISO-New England compensated Rumford (which in turn paid CES) and Lincoln for "load response that they knew would never occur and, in fact, never occurred."[43] Because Rumford and Lincoln understood they would neither increase generation nor decrease consumption, Rumford (with CES and Silkman) and Lincoln knowingly participated in schemes with the intent to defraud ISO-New England by getting DALRP payments for which they were not entitled.[44]

OE Staff further alleged that Rumford (and CES) and Lincoln satisfied the scienter requirement of section 1c.2 by their "recklessness."[45] OE Staff found that "Lincoln had previous experience with demand response" and knew what

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37. *Rumford*, 140 F.E.R.C. ¶ 61,030, at 61,085; *Lincoln*, 140 F.E.R.C. ¶ 61,031, at 61,105.

38. *Rumford*, 140 F.E.R.C. ¶ 61,030, at 61,085; *Lincoln*, 140 F.E.R.C. ¶ 61,031, at 61,105.

39. *Rumford*, 140 F.E.R.C. ¶ 61,030, at 61,085; *Lincoln*, 140 F.E.R.C. ¶ 61,031, at 61,105.

40. *Rumford*, 140 F.E.R.C. ¶ 61,030, at 61,085; *Lincoln*, 140 F.E.R.C. ¶ 61,031, at 61,105.

41. 18 C.F.R. § 1c.2 (2012). In response to argument by CES and Silkman that FERC does not have jurisdiction over their activities, the FERC found that

> CES and Silkman did not merely aid and abet Rumford's fraud, but rather actively developed, participated, and benefitted from the fraud in conjunction with Rumford. Silkman and CES conceived of the scheme to defraud ISO-NE and New England rate payers. They recruited Rumford to join in this scheme. They helped to implement the scheme by communicating false and misleading information to ISO-NE. Further, CES's percentage-based profit from the scheme was directly tied to the scheme's success. Under these circumstances, Silkman and CES independently violated section 1c.2 of the Commission's regulations.

CES, 140 F.E.R.C. ¶ 61,032, at 61,132-33.

42. 16 U.S.C. § 824v(a) (2012).

43. *Rumford*, 140 F.E.R.C. ¶ 61,030, at 61,091-92; *Lincoln*, 140 F.E.R.C. ¶ 61,031, at 61,110.

44. *Rumford*, 140 F.E.R.C. ¶ 61,030, at 61,092; *Lincoln*, 140 F.E.R.C. ¶ 61,031, at 61,111.

45. *Rumford*, 140 F.E.R.C. ¶ 61,030, at 61,092; *Lincoln*, 140 F.E.R.C. ¶ 61,031, at 61,111.

> Recklessness has been defined as "conduct which is highly unreasonable and which represents an extreme departure from the standards of ordinary care" or "an extreme departure from the standards of ordinary care that presents a danger that is either known to the defendant or so obvious that the actor must have been aware of it."

Rumford, 140 F.E.R.C. ¶ 61,030, at 61,092; *Lincoln*, 140 F.E.R.C. ¶ 61,031, at 61,111 (internal citations omitted).

was required while Rumford was "a large, sophisticated company" whose managers questioned CES' plan.[46] Further, OE Staff found that offers of demand response are made in connection with transactions subject to the FERC's jurisdiction under sections 201(b)(1) and 205(a) of the FPA.[47]

Lincoln,[48] Rumford,[49] and CES and Silkman[50] filed their responses to the show cause orders on September 14, 2012. OE Staff filed its replies on November 13, 2012.[51]

C. Enforcement Litigation

1. J.P. Morgan Ventures Energy Corporation

On September 20, 2012, the FERC issued an OSC to J.P. Morgan Ventures Energy Corporation (JP Morgan) alleging that JP Morgan violated section 35.41(b) of the FERC's regulations under the FPA[52] by manipulation of the California and Midwest energy markets and for violations of the duty to make truthful and non-misleading communications to the FERC and regional energy market operators.[53] The FERC further directed JP Morgan to show cause why the FERC should not suspend "JP Morgan's authorization to sell electric energy, capacity, and ancillary services at market-based rates."[54]

In response to data requests, JP Morgan argued that emails between non-attorneys, some of which were copied to attorneys, were protected by attorney-client privilege.[55] JP Morgan later produced some of the emails in redacted form, and OE staff disagreed with JP Morgan that there had been a basis to assert privilege as to those emails.[56] The FERC filed a petition for a show cause in the Federal District Court for the District of Columbia in an attempt to obtain the remaining emails as to which JP Morgan continued to assert attorney-client privilege.[57]

The court ordered JP Morgan to show cause why the court should not grant the petition and enforce the FERC's subpoenas.[58] Following briefing and oral

46. *Lincoln*, 140 F.E.R.C. ¶ 61,031, at 61,111; *Rumford*, 140 F.E.R.C. ¶ 61,030, at 61,092.

47. *Rumford*, 140 F.E.R.C. ¶ 61,030, at 61,092-93; *Lincoln*, 140 F.E.R.C. ¶ 61,031, at 61,111-12.

48. Answer of Lincoln Paper and Tissue, LLC in Opposition to Order to Show Cause and Notice of Proposed Penalty, FERC Docket No. IN12-10-000 (Sept. 14, 2012).

49. Answer of Rumford Paper Co. in Opposition to Order to Show Cause and Notice of Proposed Penalty, FERC Docket No. IN12-11-000 (Sept. 14, 2012).

50. Competitive Energy Services and Richard Silkman Response to Orders to Show Cause, FERC Docket Nos. IN12-12-000 and IN12-13-000 (Sept. 14, 2012).

51. Reply of Enforcement Staff, FERC Docket No. IN12-11-000 (Nov. 13, 2012); Reply of Enforcement Staff, FERC Docket No. IN12-10-000 (Nov. 13, 2012); Reply of Enforcement Staff, FERC Docket No. IN12-13-000 (Nov. 13, 2012).

52. 18 U.S.C. § 35.41(b) (2012).

53. *J.P. Morgan Ventures Energy Corp.*, 140 F.E.R.C. ¶ 61,227, 62,124 (2012). *See also* Memorandum in Support of Petition for an Order to Show Cause, FERC v. J.P. Morgan Ventures Energy Corp., No. 1:12-MC-00352 DAR, 2012 WL 2877630 (D.D.C. July 2, 2012) [hereinafter Memorandum in Support of Petition].

54. 140 F.E.R.C. ¶ 61,227, at 62,124.

55. Memorandum in Support of Petition, *supra* note 53, at *1.

56. *Id.*

57. *Id.*

58. FERC v. J.P. Morgan Ventures Energy Corp., No. 1:12-mc-00352 DAR, 2012 WL 5974177, at *1 (D.D.C. Nov. 29, 2012).

argument, in addition to *in camera* review of the emails at issue, the magistrate judge to which the proceeding was referred issued an order denying the FERC's request to compel production.[59] The magistrate judge found that JP Morgan had demonstrated that the contents of the documents covered by its proposed redactions were subject to a claim of attorney-client privilege.[60] In her order, the judge noted that "the redactions are of communications between [JP Morgan] and its counsel, acting as counsel, with respect to legal advice relating to facts communicated confidentially to counsel by [JP Morgan]."[61] However, prior to the court's ruling on the discovery dispute, the FERC issued an order suspending JP Morgan's market-based rate authority for a period of six months effective April 1, 2013, citing statements made in connection with certain data requests.[62] The FERC's order is pending rehearing.

D. Settlement Agreements

1. Constellation Energy Commodities Group

On March 9, 2012, the FERC approved a Stipulation and Consent Agreement (Agreement) between the Office of Enforcement and Constellation Energy Commodities Group (CCG) resolving two investigations.[63] OE Staff determined that "CCG violated the [FERC's] Anti-Manipulation Rule, [section 1c.2], by entering into virtual transactions and [day-ahead] physical schedules without regard for their profitability, but with the intent of impacting [day-ahead] prices in the [NYISO] and ISO-NE" to benefit CCG's Contract for Differences (CFD) positions.[64] OE Staff determined that the consequences of these violations were "widespread economic losses to market participants . . . in the day-ahead markets of ISO-NE and the NYISO," and distortion of "price discovery for all market participants."[65]

OE Staff also determined that CCG violated section 35.41(b) "by providing inaccurate and misleading information to NYISO," specifically that CCG's virtual transactions were unrelated to its CFD positions and were entered into based on market fundamentals.[66]

Under the Agreement, CCG neither admitted nor denied that its trading behaviors violated FERC rules, regulations, or policies.[67] CCG agreed to pay $135 million in civil penalties and $110 million in disgorgement of unjust profits.[68] $6 million of the disgorgement is to be paid directly and equally to NYISO, ISO-NE, PJM, Midwest ISO, Southwest Power Pool, and California ISO for the purpose of enhancing their surveillance capabilities, and the remaining disgorgement is to be used to set up a fund for the benefit of electric

59. *Id.* at *3.
60. *Id.*
61. *Id.*
62. *J.P. Morgan Ventures Energy Corp.*, 141 F.E.R.C. ¶ 61,131 at P 53 (2012).
63. *Constellation Energy Commodities Group, Inc.*, 138 F.E.R.C. ¶ 61,168 at P 1 (2012).
64. *Id.* at P 12.
65. *Id.* at P 17.
66. *Id.* at P 20.
67. *Id.* at P 21.
68. 138 F.E.R.C. ¶ 61,168, at P 22.

energy consumers in the states affected by CCG's improper transactions.[69] CCG also "instituted additional procedures to monitor profit and loss concentrations in virtual transactions and day-ahead physical schedules of electric energy and to document the purpose of [those] transactions."[70] Per the Agreement, CCG must retain and monitor traders' communications for five years and submit semi-annual compliance monitoring reports describing compliance program measures to OE Staff for the next two to three years.[71]

The Agreement also terminated the investigations of four individual traders involved.[72] CCG agreed that Joseph Kirkpatrick, Managing Director of East Power Trading, may not hold any position at CCG in the future, and that Michael Pavo and Jason Hughes, traders under Kirkpatrick's supervision, and Maxim Duckworth, Kirkpatrick's supervisor, may not hold any position involving physical and financial energy trading at CCG in the future.[73]

2. Gila River Power, LLC

On November 19, 2012, the FERC approved a settlement between Enforcement and Gila River Power LLC (Gila River) to resolve an investigation into manipulation of power markets in California.[74] "Following a referral by the CAISO Department of Market Monitoring, [OE Staff] opened a non-public, preliminary investigation of Gila River to determine whether it had violated the" Anti-Manipulation Rule, section 1c.2, the accuracy requirements of section 35.41(b), and the CAISO Tariff.[75] In a first for the FERC, Gila River admitted to engaging in improper wheeling-through transactions in the CAISO without the requisite resource and load outside the CAISO.[76]

As part of its "Standalone Wheel" strategy, Gila River scheduled wheeling-through transactions "inside the CAISO from an uncongested node as an import . . . to a to a node congested in the import direction as an export"; then, Gila River completed the circular schedule by scheduling energy from the export point to the import point outside the CAISO.[77] Over the eight months Gila River engaged in the Standalone Wheel strategy, it made approximately $613,801 in profits from the improper circular scheduling.[78]

As part of its "Adjustment Wheel" strategy, "Gila River used [w]heeling-[t]hrough transactions in the Day Ahead Market (DAM) to increase the amount of power it could import into the CAISO and to increase the price paid for its imports" from its Gila River plant to the Palo Verde intertie.[79] In the DAM, Gila River submitted a wheeling-through bid and an import bid to the same intertie

69. *Id.*
70. *Id.* at P 23.
71. *Id.* at PP 24-25.
72. *Id.* at P 21.
73. 138 F.E.R.C. ¶ 61,168, at P 26.
74. *Gila River Power, LLC*, 141 F.E.R.C. ¶ 61,136 (2012).
75. *Id.* at P 4.
76. *Id.* at P 5.
77. *Id.* at P 6.
78. *Id.* at P 7.
79. 141 F.E.R.C. ¶ 61,136, at P 8.

that served as the export point for the wheel-through.[80] After the DAM settled, Gila River entered its bids in the Hour Ahead Scheduling Process market, redirecting its imports so the maximum quantity flowed to its preferred import point without causing congestion, and any remaining imports flowed to the import point of the Adjustment Wheel.[81] "At the same time, Gila River bought back the import and export legs of the Adjustment Wheel" to cancel out the wheeling-through transaction.[82] Over the fourteen months Gila River engaged in the Adjustment Wheel strategy, it made approximately $296,753 in profits from the improper transactions.[83]

In the settlement agreement, Gila River admitted to violating section 35.41(b) of the FERC's regulations by submitting wheeling-through transactions that did not have a resource and a load outside the CAISO and thus did not meet the CAISO Tariff requirements.[84] Gila River also admitted that it violated the Anti-Manipulation Rule, section 1c.2, by engaging in the Adjustment Wheel strategy; its submission of inaccurate wheeling-through transactions, and its submission of these transactions to benefit the imports from the Gila River plant both constituted fraud under the rule.[85] Gila River agreed to pay a civil penalty of $2.5 million and disgorgement of $910,553 plus interest.[86] Under the agreement, Gila River must also adopt specified compliance measures, including improved compliance training, and must submit semi-annual compliance monitoring reports to Enforcement for the next year.[87]

3. EnerNOC, Inc.

On December 17, 2012, the FERC approved a Stipulation and Consent Agreement between Enforcement, EnerNOC, Inc. (EnerNOC), and Celerity Energy Partners San Diego LLC (Celerity) to resolve investigations "into whether EnerNOC submitted inaccurate metering data without exercising due diligence in [ISO-NE's] demand response markets in violation of ISO-NE's tariff, and whether Celerity violated [sections 35.7 and 35.37(a)(1) of FERC's regulations,] and its market-based rate tariff," by failing to meet FERC filing obligations.[88]

Enforcement began its "investigation of EnerNOC in 2012 following two referrals from ISO-NE's Internal Market Monitoring Unit."[89] OE Staff determined that EnerNOC had submitted overstated data for five demand response assets without first exercising due diligence, in violation of the ISO-NE Tariff.[90] In two instances, the use of an inaccurate "pulse multiplier," used to properly interpret the utility meter at a demand response site, led to projected

80. *Id.* at P 9.
81. *Id.* at P 10.
82. *Id.*
83. *Id.* at P 11.
84. 141 F.E.R.C. ¶ 61,136, at P 12.
85. *Id.* at P 13.
86. *Id.* at P 14.
87. *Id.* at P 26.
88. *EnerNOC, Inc.*, 141 F.E.R.C. ¶ 61,211 at P 1 (2012).
89. *Id.* at P 4.
90. *Id.* at P 5.

curtailment for the assets much greater than initial estimates based on historical utility bills.[91] Despite concerns raised in several instances as to the accuracy of the data, EnerNOC failed to correct the error before ISO-NE's settlement for the assets.[92] As a result, EnerNOC received excess TICAP and FCM payments for one of the assets, amounting to $556,040 in unjust profits.[93]

In two other instances, faulty equipment led to inaccurate data, which EnerNOC took insufficient steps to correct.[94] EnerNOC failed to timely determine the cause of inaccurate data, correct the problem, and notify ISO-NE.[95] As a result, EnerNOC received overpayments for one of the assets, amounting to $100,766 in unjust profits.[96]

Enforcement initiated investigation of Celerity, a wholly-owned subsidiary of EnerNOC, in 2012 following its late filings in 2011 and the consequent FERC review of those late-filed documents.[97] OE Staff determined that Celerity violated Order No. 714 and section 35.7 of the FERC's regulations by failing to timely file its baseline tariff, and Order No. 697 and section 35.37(a)(1) and its MBR tariff by failing to timely file its updated market power analysis and its Category 1 Seller classification request.[98] OE Staff "concluded that lack of a compliance program specific to Celerity was responsible for Celerity's failure to comply with [FERC] filing requirements."[99] Instead, Celerity "relied upon reminders from outside counsel" about FERC filing requirements.[100]

EnerNOC admitted that it violated the ISO-NE tariff by "submitt[ing] inaccurate data for five demand response assets without exercising due diligence, and that [it] was overpaid for two of those assets."[101] Celerity admitted to violation of Order Nos. 714 and 697, Sections 35.7 and 35.37(a)(1) of FERC's regulations, and its MBR tariff by failing to timely meet its filing deadlines.[102] "EnerNOC and Celerity agree[d] to pay a civil penalty of $820,000, disgorge $656,806 in unjust profits, plus interest, implement a compliance program, and submit to at least one year of compliance monitoring, with another year of monitoring at Enforcement's discretion."[103]

E. Updates

1. Brian Hunter

In July 2007, both the FERC and the Commodity Futures Trading Commission (CFTC) simultaneously brought separate enforcement actions against the hedge fund Amaranth Advisors, LLC and its trader Brian Hunter on

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91. *Id.* at PP 5-14.
92. *Id.* at PP 8, 12.
93. 141 F.E.R.C. ¶ 61,211, at P 10.
94. *Id.* at PP 15-19.
95. *Id.*
96. *Id.* at PP 19.
97. *Id.* at PP 24, 26.
98. 141 F.E.R.C. ¶ 61,211, at PP 31-34.
99. *Id.* at P 34.
100. *Id.*
101. *Id.* at P 9.
102. *Id.* at PP 9-10.
103. 141 F.E.R.C. ¶ 61,211, at P 10.

theories that they had engaged in, from the FERC's point of view, manipulation, or, from the CFTC's point of view, only attempted manipulation of the price of natural gas futures contracts traded on the New York Mercantile Exchange (NYMEX).[104] The FERC's administrative enforcement action charged Amaranth with a violation of FERC Rule 1c.1 for allegedly manipulating the price of natural gas futures contracts traded on the NYMEX. The FERC claimed enforcement jurisdiction based on its position that the alleged manipulation of NYMEX futures prices directly affected prices in FERC jurisdictional natural gas markets.[105] Based on the same operative facts, the CFTC sued Amaranth Advisors and Brian Hunter in a federal court injunctive action for attempted manipulation of the price of the NYMEX natural gas futures contracts.[106]

Amaranth Advisors has settled the actions against it.[107] At the outset of the FERC administrative proceeding, Hunter sued the FERC in federal district court seeking declaratory and injunctive relief to stop the FERC proceeding.[108] Hunter asserted that the FERC lacked the authority to initiate an enforcement proceeding against him because the CFTC had *exclusive* jurisdiction to enforce anti-manipulation prescriptions with respect to exchange-traded futures. The district court denied relief and dismissed the action.[109] In 2011, a FERC final order found a violation of Rule 1c.1 and imposed a civil penalty against him of $30 million.[110] The FERC's final order is on appeal before the United States Court of Appeals for the D.C. Circuit.[111] Oral argument was scheduled for February 2013.[112] The CFTC has intervened in various appeals arising out of the FERC proceedings against Hunter, arguing that the Commodity Exchange Act (CEA)'s section 2(a)(1) grant to the CFTC of exclusive jurisdiction over exchange-traded futures contracts precludes the FERC from prosecuting manipulation claims relating to such contracts.[113] The CFTC's enforcement action against Hunter is still pending in the federal district court.

II. THE COMMODITY FUTURES TRADING COMMISSION

A. Energy-Related Enforcement Cases

In 2012, the CFTC had limited public enforcement activity specifically in energy commodities; just one case, *CFTC v. Optiver*[114] was settled in 2012. The crude oil manipulation case filed in 2011, *CFTC v. Parnon Energy Inc.*

104. CFTC v. Amaranth Advisors, LLC, 523 F. Supp. 2d 328, 331-32 (S.D.N.Y. 2007).

105. *Id.* at 333.

106. *Id.*

107. Press Release, CFTC, Amaranth Entities Ordered to Pay a $7.5 Million Civil Fine in CFTC Action Alleging Attempted Manipulation of Natural Gas Futures Prices (Aug. 12, 2009), http://www.cftc.gov/PressRoom/PressReleases/pr5692-09.

108. Hunter v. FERC, 348 F. App'x 592, 593 (D.C. Cir. 2009).

109. *Id.*

110. *Brian Hunter*, 135 F.E.R.C. ¶ 61,054 at P 148 (2011), *reh'g denied*, 137 F.E.R.C. ¶ 61,146 (2011).

111. Hunter v. FERC, No. 11-1477 (D.C. Cir. Dec. 12, 2011).

112. Hunter v. FERC, No. 11-1477 (D.C. Cir. Nov. 15, 2012).

113. *See, e.g.*, Brief of Intervenor CFTC at 13, Brian Hunter v. FERC, 403 F. App'x 525 (D.C. Cir. 2010) (No. 10-1017).

114. Final Consent Order of Permanent Injunction, Civil Monetary Penalty and Other Relief, CFTC v. Optiver US, LLC, No. 08-civ-6560 (S.D.N.Y. Apr. 19, 2012).

continues to move forward with the denial of the defendant's motion to dismiss and the subsequent filing of an answer to the complaint.[115]

Outside of the energy sector, the CFTC has been active in other areas relevant for energy market participants. The CFTC filed a notable wash sale violation case against the Royal Bank of Canada.[116] Also notable was the CFTC's enforcement and issuance of penalties for violating position limits on agricultural commodities,[117] particularly since new position limit rules on energy commodities were scheduled to take effect in 2012.[118] The most widely publicized cases settled by the CFTC in 2012 involved allegations against Barclays and UBS in LIBOR, Euribor, and other interest rates for attempted manipulation and false reporting.[119]

1. Manipulation and Attempted Manipulation

On April 19, 2012, the CFTC issued a final order against Optiver and three of its traders settling allegations filed in July 2008.[120] The CFTC alleged the defendants attempted to, and in some cases successfully managed to, influence the closing price[121] to benefit related financial positions in Light Sweet Crude Oil, New York Harbor Heating Oil, and New York Harbor Gasoline on the NYMEX.[122]

The settlement agreement was reached in April 2012 with the defendants neither admitting nor denying the allegations contained in the complaint. The defendants agreed to pay a joint and separate civil monetary penalty totaling $13 million[123] and separately $1 million in disgorgement.[124] As part of the settlement, Optiver US must enhance compliance to "institute, update and strengthen policies and procedures designed to detect, deter, discipline, and

115. CFTC v. Parnon Energy Inc., 875 F. Supp. 2d 233 (S.D.N.Y. 2012) (denial of motion to dismiss); Answer and Affirmative Defenses, CFTC v. Parnon Energy Inc., No. 11-cv-3543-WHP, 2012 WL 2065029 (S.D.N.Y. May 31, 2012).

116. Complaint, CFTC v. Royal Bank of Canada, No. 12-cv-2497 (S.D.N.Y. Apr. 2, 2012).

117. For example, Citigroup was fined $525,000 for violation of wheat position limits and JP Morgan Chase was fined $600,000 for violation of cotton position limits. Order Instituting Proceedings Pursuant to Sections 6(c) and 6(d) of the Commodity Exchange Act, As Amended, Making Findings and Imposing Remedial Sanctions, *In re Citigroup Inc. & Citigroup Global Markets Ltd.*, CFTC Docket No. 12-34 (Sept. 21, 2012); Order Instituting Proceedings Pursuant to Sections 6(c) and 6(d) of the Commodity Exchange Act, As Amended, Making Findings and Imposing Remedial Sanction, *In re JP Morgan Chase Bank, N.A.*, CFTC Docket No. 12-37 (Sept. 27, 2012).

118. The energy commodity position limit rules were subsequently remanded back to the CFTC by the court. Memorandum Opinion, Int'l Swaps and Derivatives Assoc. v. CFTC, No. 1:11-cv-2146-RLW (D.D.C. Sept. 28, 2012).

119. Order Instituting Proceedings Pursuant to Sections 6(c) and 6(d) of the Commodity Exchange Act, As Amended, Making Findings and Imposing Remedial Sanctions, *In re Barclays PLC, Barclays Bank PLC & Barclays Capital Inc.*, CFTC Docket No. 12-25 (June 27, 2012); Order Instituting Proceedings Pursuant to Sections 6(c) and 6(d) of the Commodity Exchange Act Making Findings and Imposing Remedial Sanctions, *In re UBS AG & UBS Securities Japan Co.*, CFTC Docket No. 13-09 (Dec. 19, 2012).

120. Final Consent Order of Permanent Injunction, Civil Monetary Penalty and Other Relief, CFTC v. Optiver US, LLC, No. 08-civ-6560-LAP/THK, 2012 WL 1632613 (S.D.N.Y. Apr. 19, 2012).

121. Conduct commonly referred to as "banging the close" or "marking the close." Complaint, CFTC v. Optiver US, LLC, No. 08-civ-6560-LAP/THK, 2008 WL 2915421, ¶ 2 (S.D.N.Y. July 24, 2008).

122. *Id.* ¶ 4.

123. Final Consent Order, *supra* note 120, at 5.

124. *Id.*

correct potential violations."[125] The settlement also imposed trading limitations on Optiver US as well as the traders involved. Optiver US agreed not to execute futures or options contracts in the three commodities involved in the allegations from three minutes before the beginning of the closing period to the end of the closing period, for a duration of two years.[126] Similarly, traders Downson, Meijer, and van Kempen agreed not to trade in any futures or options contracts, regardless of the commodity, for a period of eight, four, and two years, respectively.[127]

B. The Dodd-Frank Wall Street Reform and Consumer Protection Act

1. Update on Implementation Progress

Although few enforcement actions in energy commodities occurred in 2012, the agency continued to expand its regulatory footprint. Implementation of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act or Act)[128] continued in 2012, reaching its second anniversary with a flurry of activity. Roughly sixty draft rules and proposals were released, and approximately forty more rules were finalized.[129] The Act was signed into law on July 21, 2010, and the CFTC has thus far finalized forty-one rules and eight final orders.[130] During 2012, the CFTC extended numerous deadlines for the effective dates of certain Dodd-Frank Act provisions; in addition, three lawsuits were filed against the CFTC challenging its rulemakings, discussed below.

2. Litigation Against the CFTC

In 2012, market participants filed three high-profile lawsuits against the CFTC involving the implementation of Dodd-Frank.

On April 17, 2012, the Investment Company Institute (ICI) filed suit against the CFTC claiming that Rule 4.5 is arbitrary and capricious; the rule requires mutual funds and exchange-traded funds with commodity investments to register with the CFTC as a commodity pool operator.[131] The ICI contends that since mutual funds are required to file with the SEC, further registration with the CFTC is redundant and unnecessary.[132] Furthermore, the ICI alleges the CFTC did not properly assess the costs and benefits of the rule.[133] On December 12, 2012, Judge Beryl Howell rejected the arguments presented by the ICI and dismissed the lawsuit stating, "The [c]ourt is satisfied that the CFTC considered

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125. *Id.* at 6.

126. *Id.* at 8.

127. *Id*. at 8-10.

128. Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111-203, 124 Stat. 1376 (codified in scattered sections of 7, 12, 15, 18, 22, 31, & 42 U.S.C.).

129. Scott D. O'Malia, Commissioner, CFTC, Address at the AICPA/SIFMA FMS Conference on the Securities Industry: The Dodd-Frank Holiday Season (Nov. 30, 2012), http://www.cftc.gov/PressRoom/SpeechesTestimony/opaomalia-20.

130. *Dodd-Frank Final Rules and Orders*, CFTC.GOV, http://www.cftc.gov/LawRegulation/DoddFrankAct/Dodd-FrankFinalRules/index.htm (last visited Mar. 11, 2013).

131. Complaint, Invest. Co. Inst. v. CFTC, No. 1:12-cv-00612-BAH, 2012 WL 1292673 (D.D.C. Apr. 17, 2012).

132. *Id.* at 39.

133. *Id.* at 39-40.

the relevant factors, acted well within its discretion, and that there was nothing arbitrary or capricious about the CFTC's actions in promulgating the [f]inal [r]ule."[134] The CFTC did provide partial relief from registration on November 30, 2012, for commodity pool operators of certain fund of funds operators who do not have access to information from the funds in which they invest; this action moved the deadline for registration from December 31, 2012, to June 30, 2013.[135] The ICI filed an appeal to the court's decision on December 27, 2012.[136]

On December 2, 2011, the International Swaps and Derivatives Association (ISDA) and Securities Industry and Financial Markets (SIFMA) brought actions against the CFTC in relation to the position limit rule set to take effect on October 12, 2012.[137] The rule would impose federal limits on speculative positions in futures contracts on twenty-eight agricultural, energy, and metal commodities.[138] Judge Robert Wilkins of the U.S. District Court for the District of Columbia granted summary judgment to ISDA and SIFMA on September 28, 2012, remanding the rule back the CFTC.[139] According to the plaintiffs, the Dodd-Frank Act requires the CFTC to find that position limits are "necessary" before imposing them.[140] Conversely, the defendants argue the Dodd-Frank Act requires the CFTC to impose position limits without regard to the necessity or appropriateness of imposing limits.[141] In Judge Wilkins' summary judgment he states: "The precise question, therefore, is whether the language of Section 6a(a)(1) clearly and unambiguously requires the Commission to make a finding of necessity prior to imposing position limits. The answer is yes."[142] Subsequently, the CFTC did not accept the court's decision and chose to file an appeal on November 15, 2012.[143] Currently, no federal position limits exist on energy commodities or swap contracts.[144]

The Chicago Mercantile Exchange (CME) Group filed suit against the CFTC on November 8, 2012, asking the U.S. District Court for the District of Columbia to issue an injunction to prevent the requirement of reporting transactions to swap data repositories (SDRs) from becoming effective

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134. Memorandum Opinion, Invest. Co. Inst. v. CFTC, No. 1:12-cv-00612-BAH at 93, 2012 WL 6185735 (D.D.C. Dec. 12, 2012).

135. Request for Delayed Compliance Date of Amended Part 4; Rescission of Former Appendix A., CFTC No-Action Letter No. 12-38 (Nov. 29, 2012), *available at* http://www.cftc.gov/ucm/groups/public/@lrlettergeneral/documents/letter/12-38.pdf.

136. Notice of Appeal, Invest. Co. Inst. v. CFTC, No. 1:12-cv-00612-BAH (D.D.C. Dec. 27, 2012).

137. Complaint, Int'l Swaps and Derivatives Ass'n v. CFTC, No. 1:11-cv-02146-RLW, 2011 WL 6005217 (D.D.C. Dec. 2, 2011); Plaintiff's Application for a Preliminary Injunction, Int'l Swaps and Derivatives Ass'n v. CFTC, No. 1:11-cv-02046-RLW, 2012 WL 385627 (D.D.C. Feb. 7, 2012).

138. Position Limits for Futures and Swaps, 76 Fed. Reg. 71,626 (CFTC Nov. 18, 2011) (to be codified at 17 C.F.R. pts. 1, 150-51).

139. Int'l Swaps and Derivatives Assoc. v. CFTC, 887 F. Supp. 2d 259, 268 (D.D.C. 2012).

140. *Id.* at 266.

141. *Id.* at 267.

142. *Id.* at 269.

143. Notice of Appeal, Int'l Swaps and Derivatives Assoc. v. CFTC, No. 1:11-cv-02146-RLW (D.D.C. Nov. 15, 2012).

144. Limits established by designated contract markets and federal limits on agricultural products remain in effect.

November 13, 2012.[145] At the time of this lawsuit the CME Group's own application to become a SDR had not yet been approved and the effective rule would require CME Group's proprietary data to be submitted to a third party SDR; subsequently, on November 20, 2012, the CFTC approved CME Group's application to become a SDR.[146] The CME Group then withdrew its lawsuit without prejudice on November 29, 2012.[147]

3. Anti-Evasion

The CFTC has substantial authority to prevent evasion of its regulation of swaps under the Dodd-Frank Act. For example, section 721(c) of the Dodd-Frank Act[148] empowers "the CFTC to further define the terms 'swap,' 'swap dealer,' 'major swap participant,' and 'eligible contract participant,' in order '[t]o include transactions and entities that have been structured to evade'" the CFTC's regulation of swaps under Title VII of the CEA.[149] Similarly, section 722(d) of the Dodd-Frank Act provides for the CFTC to prescribe or promulgate rules or regulations as necessary or appropriate to prevent the evasion of CFTC regulations through activities outside the United States.[150]

Pursuant to this authority, on August 13, 2012, the CFTC adopted new rule 1.3(xxx)(6) to further define "swap" to include any "agreement, contract, or transaction that is *willfully* structured to evade any provision of [the Dodd-Frank Act or CFTC regulations applicable to swaps]."[151] In the same order, the Commission adopted rule 1.6, which "makes it unlawful to conduct activities outside the United States, including entering into transactions and structuring entities, to willfully evade or attempt to evade any provision of the CEA."[152]

When evaluating whether a transaction has been willfully structured to evade CFTC regulation, the Commission intends to disregard "clever draftsmanship" by not considering "the form, label, or written documentation dispositive."[153] If the Commission determines that a transaction was willfully structured to evade regulation, the impact is retroactive; that is, the transaction

145. Complaint, Chicago Mercantile Exch., Inc. v. CFTC, No. 1:12-cv-1820 (D.D.C. Nov. 8, 2012). Chicago Mercantile Exchange, Inc. is a wholly-owned subsidiary of CME Group.

146. Order of Provisional Registration, *In re* Request of Chicago Mercantile Exch., Inc. (CFTC Nov. 20, 2012), *available at* http://www.cftc.gov/ucm/groups/public/@newsroom/documents/file/cmesdr-rev2.pdf.

147. Notice of Dismissal Without Prejudice, Chicago Mercantile Exch., Inc. v. CFTC, No. 1:12-cv-1820 (D.D.C. Nov. 29, 2012); *see also* Ann Saphir, *CME Group Withdraws Complaint Against Regulator*, THOMSON REUTERS (Nov. 29, 2012), http://newsandinsight.thomsonreuters.com/Securities/News/2012/11_-_November/CME_Group_withdraws_complaint_against_regulator/.

148. Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111-203, § 721(c), 124 Stat. 1376 (2010).

149. Further Definition of "Swap," "Security-Based Swap," and "Security-Based Swap Agreement"; Mixed Swaps; Security-Based Swap Agreement Recordkeeping, 77 Fed. Reg. 48,208, 48,297 (Aug. 12, 2012) (to be codified at 17 C.F.R. pt. 1; 17 C.F.R. pts. 230, 240, and 241).

150. Dodd-Frank § 722(d). Also, section 741(b) of the Dodd-Frank Act provides that any designated contract market, swap dealer, or major swap participant "that knowingly or recklessly evades or participates in or facilitates an evasion of the requirements of 2(h) [of the CEA] shall be liable for a civil monetary penalty in twice the amount otherwise available for a violation of [s]ection 2(h)." *Id.* § 741(b). Notably, section 741(b) amended section 6(e) of the CEA and does not require any rulemaking to effectuate the prohibition. *Id.*

151. 77 Fed. Reg. 48,208, at 48,298 (emphasis added).

152. *Id.* at 48,299.

153. *Id.* at 48,298.

"will be considered in determining whether a person is a swap dealer or a major swap participant."[154] In the "rare situations where there is a true 'innocent party,' it will likely be due to fraud or misrepresentation by the evading party," and the impact will be prospective only for the "innocent party."[155] The Commission clarified that "entering into transactions that qualify for the forward exclusion from the swap definition shall not be considered evasi[on]," but entering into transactions made to look like forward contracts but that in fact are not may constitute evasion.[156]

The CFTC also provided interpretive guidance regarding evasion. Although it plans to evaluate each transaction on a case-by-case basis in light of all relevant facts and circumstances, it provided examples of factors it will consider. First, the CFTC indicated that it "will consider the extent to which the person has a legitimate business purpose for structuring the instrument or entity or entering into the transaction in that particular manner."[157] The Commission states that a transaction or structure will not constitute evasion if the transaction or structure is *solely* motivated by a legitimate business purpose.[158] Relying on concepts the Internal Revenue Service (IRS) has used to distinguish between tax evasion and legitimate means for tax avoidance, the Commission also "will consider the extent to which the [activity] involves deceit, deception, or other unlawful or illegitimate activity."[159] However, "the CFTC does not [consider] these factors [to be] prerequisites to an evasion finding."[160]

4. Whistleblower Protections

Section 23 of the CEA (pursuant to section 748 of the Dodd-Frank Act) generally directs the CFTC to pay awards "to whistleblowers who voluntarily provide the [CFTC] with original information about a violation of the CEA that leads to the successful enforcement of an action . . . that results in monetary sanctions exceeding $1,000,000."[161] Section 23 also provides protection for whistleblowers against retaliation for their cooperation.[162] On August 25, 2011, the CFTC published a final rule defining terms and establishing procedures related to the new whistleblower incentives and protection.[163]

In January 2012, the CFTC opened its Whistleblower Office, which is comprised of the Director, a staff attorney, and a paralegal, along with interns.[164] The Whistleblower Office issued its first Notices of Covered Actions on

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154. *Id.*

155. *Id.* at 48,299.

156. 77 Fed. Reg. 48,208, at 48,299.

157. *Id.* at 48,301.

158. *Id.*

159. *Id.*

160. *Id.* at 48,302.

161. Final Rule, Whistleblower Incentives and Protection, 75 Fed. Reg. 53,172, 53,172 (CFTC Aug. 25, 2011) (to be codified at 17 C.F.R. pt. 165).

162. *Id.*

163. *Id.*

164. Jessica Tillipman, *Interview with Vincente Martinez of the CFTC Whistleblower Program: Part 1*, THE FCPA BLOG (Sept. 4, 2012, 3:28 AM) [hereinafter *Martinez Interview Part I*], http://www.fcpablog.com/blog/2012/9/4/interview-with-vincente-martinez-of-the-cftc-whistleblower-p.html.

February 1, 2012,[165] each posted on the Whistleblower Office website for at least ninety days.[166]

In September 2012, Vincent Martinez, Director of the Whistleblower Office, participated in an interview with The FCPA Blog.[167] There, when asked what changes he recommends companies make to their existing compliance programs to ensure they are adequately prepared to manage whistleblowers and/or CFTC inquiries in response to whistleblower complaints, Mr. Martinez answered:

> Companies should make sure that their compliance systems and cultures have certain common sense features and characteristics. First, company management, compliance and legal personnel should be well acquainted with the anti-retaliation provisions of the Dodd-Frank Act and the Sarbanes-Oxley Act. The anti-retaliation provisions of the Dodd-Frank Act are written broadly. Companies should develop careful, conscientious and consistent policies and procedures for responding to internal whistleblowers that limit the possibility of actions that could be deemed retaliatory. Second, companies should have well-publicized compliance systems that provide clear and easy-to-use reporting mechanisms. I believe it is particularly important for companies to allow employees to report anonymously. Last, it is to a company's benefit to establish and promote a culture where whistleblowers feel comfortable in reporting violations. An ethical tone at the top is essential to encourage whistleblowers to report internally.[168]

In October 2012, Mr. Martinez authored *Filing Pointers from CFTC's Whistleblower Office* in which he described characteristics of a "quality" submission.[169] Specifically, Mr. Martinez highlighted the importance that whistleblowers and their attorneys understand the limitations on types of information and employees that can qualify for awards. "Attorneys can also add value by working with their clients to demonstrate how the submitted information establishes a violation of the CEA or CFTC regulations."[170]

III. THE PIPELINE AND HAZARDOUS MATERIALS SAFETY ADMINISTRATION

A. Minimum Federal Pipeline Safety Standards

The Pipeline and Hazardous Materials Safety Administration (PHMSA), an agency within the U.S. Department of Transportation (DOT), administers and enforces compliance with pipeline safety standards for gas and hazardous liquids pipelines pursuant to the Pipeline Safety Act (PSA), as codified in title 49 of the United States Code (U.S.C.), and the implementing regulations at 49 C.F.R.

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165. CFTC, FIRST NOTICES OF COVERED ACTIONS TO BE ISSUED ON FEBRUARY 1, 2012, NOTICE NO. 2012-001 (Jan. 31, 2012), *available at* http://www.cftc.gov/ConsumerProtection/WhistleblowerProgram/WhistleblowerNotices/NOTICE-2012-001.

166. Jessica Tillipman, *Interview with Vincente Martinez of the CFTC Whistleblower Program: Part 1V*, THE FCPA BLOG (Sept. 7, 2012, 3:18 AM), http://www.fcpablog.com/blog/2012/9/7/interview-with-vincente-martinez-of-the-cftc-whistleblower-p.html.

167. *Martinez Interview Part I*, *supra* note 164.

168. Jessica Tillipman, *Interview with Vincente Martinez of the CFTC Whistleblower Program: Part III*, THE FCPA BLOG (Sept. 6, 2012, 2:28 AM), http://www.fcpablog.com/blog/2012/9/6/interview-with-vincente-martinez-of-the-cftc-whistleblower-p.html.

169. Vincente Martinez, *Filing Pointers from CFTC's Whistleblower Office*, LAW360 (Oct. 12, 2012), http://www.cftc.gov/ucm/groups/public/@whistleblowernotices/documents/file/whistleblowerprogram-law360.pdf.

170. *Id.*

parts 190-199.[171] The PSA authorizes the PHMSA to assess administrative civil penalties for violations of the PSA, the pipeline safety regulations, or orders issued under these authorities.[172] The PHMSA may issue compliance orders and other orders to address safety issues and abate hazards to life, property or the environment.[173] The PHMSA may also refer alleged civil and criminal violations of the PSA and pipeline safety regulations to the Department of Justice for judicial enforcement.[174]

B. The Pipeline Safety, Regulatory Certainty, and Job Creation Act of 2011

On January 3, 2012, the President signed into law the Pipeline Safety, Regulatory Certainty, and Job Creation Act of 2011 (2011 Act).[175] The 2011 Act added to or amended numerous provisions of the pipeline safety laws in title 49 of the U.S.C., including provisions concerning PHMSA's enforcement authorities. The 2011 Act doubles PHMSA's administrative civil penalty authority from $100,000 to $200,000 per violation per day, and from $1 million to $2 million for a related series of violations.[176] In addition, the 2011 Act provides for civil penalties for obstructions of inspections and investigations,[177] states that the civil penalty caps for administrative cases do not apply in judicial cases,[178] and places judicial review of agency orders in the United States Courts of Appeals.[179]

The 2011 Act also amends section 311 of the Clean Water Act to provide PHMSA with recordkeeping and civil penalty authority related to onshore spill response plans for oil pipelines.[180] Regarding PHMSA's administrative enforcement process, the 2011 Act requires a series of changes and provides PHMSA with two years to revise its regulations to provide for hearings before a presiding official, a separation of functions between prosecution and decisional staff, a prohibition on ex parte communications in enforcement cases, hearing transcripts, and expedited review of corrective action orders.[181] In addition to the aforementioned amendments and additions, the 2011 Act adds safety requirements and mandates that PHMSA undertake numerous studies on whether further regulation is appropriate.[182]

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171. 49 U.S.C. §§ 60101-301 (2012). The PSA vests pipeline safety authority in the Secretary of Transportation, who has delegated this power to the Administrator of the PHMSA by regulation. 49 C.F.R. § 1.97 (2012).

172. 49 U.S.C. § 60122.

173. *Id.* §§ 60112, 60117-18.

174. *Id.* §§ 60120, 60123.

175. Pipeline Safety, Regulatory Certainty, and Job Creation Act of 2011, Pub. L. No. 112-90, 125 Stat. 1904 (2012).

176. 49 U.S.C. § 60122(a).

177. *Id.* § 60118(e)(2).

178. *Id.* § 60120(a)(1).

179. *Id.* § 60119(a)(3).

180. Pub. L. No. 112-90, § 10, 125 Stat. 1904, 1912-13 (2012) (codified at 33 U.S.C. §§ 1321(m)(2), 1321(b)(6)(a) (2012)).

181. Pub. L. No. 112-90, § 20, 125 Stat. 1904, 1916-17.

182. *See generally* Pub. L. No. 112-90, 125 Stat. 1904 (providing authority throughout numerous sections for the Secretary's ability to require regulation where appropriate).

C. Administrative Enforcement

The PHMSA initiated more than sixty enforcement cases against gas and hazardous liquid pipeline operators in 2012 and issued more than seventy final orders, assessing nearly $10 million in civil penalties.[183] On September 7, 2012, the PHMSA issued a notable final order to Enbridge Energy, LP, finding violations and assessing a $3.7 million civil penalty related to a July 25, 2010, pipeline failure on Enbridge's Line 6B crude oil pipeline near Marshall, Michigan.[184] Enbridge took issue with many of the PHMSA's allegations but paid the proposed civil penalty in full.[185] The Enbridge final order made findings of violations of the regulations for integrity management, operations and maintenance procedures, emergency procedures, operator qualifications, and accident reporting.[186] The PHMSA's $3.7 million penalty is the largest civil administrative penalty issued by the agency to date.[187]

On May 11, 2012, the PHMSA entered into a consent agreement with Marathon Pipe Line, LLC, in settlement of an enforcement case related to a March 10, 2009 accident at the St. James Terminal near Garyville, Louisiana.[188] Under the terms of the agreement, Marathon agreed to pay an $842,650 civil penalty and to undertake a Supplemental Safety and Environmental Project (SSEP) in mitigation of a portion of the civil penalty proposed in the case.[189] This case is notable for two reasons. First, settlement of PHMSA enforcement cases is rare, with the PHMSA historically settling less than 1% of all enforcement cases.[190] Second, the case is one of only a handful of cases in which the PHMSA has agreed to permit a pipeline operator to undertake a SSEP in mitigation of a civil penalty.[191]

D. Rulemaking

In 2012 the PHMSA issued two significant Notices of Proposed Rulemaking (NPRM) affecting its enforcement and rulemaking procedures and its regulations concerning the prevention of damage to pipelines.

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183. *See generally Listing of Cases Initiated*, U.S. DEP'T OF TRANSP. PHMSA, http://primis.phmsa.dot.gov/comm/reports/enforce/CasesOpen_opid_0.html?nocache=5617#_TP_1_tab_2 (last visited Mar. 12, 2013).

184. Final Order, *In re Endbridge Energy, LP*, PHMSA CPF No. 3-2012-5013, at 2-3 (Sept. 7, 2012).

185. Enbridge Response to July 2012 Notice of Probable Violation and Proposed Civil Penalty, *In re Enbridge Energy, LP*, PHMSA CPF No. 3-2012-5013, at 1 (Aug. 10, 2012).

186. Final Order, *In re Endbridge Energy, LP*, PHMSA CPF No. 3-2012-5013, at 2-21 (Sept. 7, 2012).

187. Press Release, Pipeline and Hazardous Materials Safety Administration, PHMSA Announces Enforcement Action Against Enbridge for 2010 Michigan Oil Spill (July 2, 2012), http://www.phmsa.dot.gov/staticfiles/PHMSA/DownloadableFiles/Files/Press%20Release%20Files/phmsa1512.pdf.

188. Consent Agreement and Order, *In re Marathon Pipe Line, LLC*, PHMSA CPF No. 4-2010-5013 (Sept. 7, 2012).

189. *Id.* at 4-5.

190. *See generally Consent Orders Issued*, U.S. DEP'T OF TRANSP. PHMSA, http://primis.phmsa.dot.gov/comm/reports/enforce/CONOevent_opid_0.html?nocache=9398#_TP_1_tab_1 (last visited Mar. 12, 2013).

191. *See, e.g.*, Consent Agreement, *In re Navajo Nation Oil and Gas Co*., PHMSA CPF No. 4-2006-5029 (Sept. 2, 2011); Final Order, *In re Navajo Nation Oil and Gas Co.*, PHMSA CPF No. 4-2006-5029 (Sept. 2, 2011); Consent Agreement and Order, *In re Williams Gas Pipeline Company, LLC*, PHMSA CPF No. 1-2005-1007 (Jan. 16, 2009).

1. Enforcement and Rulemaking Procedures

On August 13, 2012, the PHMSA issued an NPRM proposing extensive changes to its enforcement procedures and more limited amendments to its procedures for rulemaking.[192] The PHMSA proposed the changes in order to implement the enforcement procedure changes required by the 2011 Act and to make clarifying amendments and corrections.[193] The NPRM addresses the 2011 Act requirements concerning increased civil penalty caps, presiding officials, ex parte communications, hearing transcripts, expedited review of corrective action orders, and separation of prosecution and decisional functions.[194] The PHMSA also proposes to clarify the procedures for subpoenas, requests for informal guidance by the public, agency requests for information, informal agency adjudications, petitions for reconsideration, judicial appeals, consent orders, and criminal enforcement.[195] Finally, the PHMSA would make numerous technical corrections throughout its procedural rules and remove the target times for agency action on petitions for reconsideration of rulemaking.[196]

Numerous trade associations filed comments generally supportive of the PHMSA's NPRM.[197] However, some trade associations expressed concern with the requirements related to petitions for reconsideration and other elements of the NPRM. For example, commenters expressed concern that the PHMSA had proposed to require the filing of petitions for reconsideration of final orders in enforcement cases to exhaust administrative remedies for the purposes of judicial review, but did not propose to stay the effectiveness of the final order during the pendency of a petition.[198] The PHMSA has indicated that it expects to issue a final rule in 2013.[199]

2. Damage Prevention

On April 2, 2012, the PHMSA issued an NPRM that would create additional damage prevention requirements applicable to the states and to excavators.[200] The PHMSA issued the NPRM in response to a mandate in the Pipeline Inspection, Protection, Enforcement Act of 2006 (PIPES Act).[201] By way of this rulemaking, the PHMSA seeks to reduce pipeline failure incidents

192. Notice of Proposed Rulemaking, Administrative Procedures; Updates and Technical Corrections, 77 Fed. Reg. 48,112 (PHMSA, Dep't of Transp. Aug. 13, 2012) (to be codified at 49 C.F.R. pts. 190, 192, 193, 195, and 199).

193. *Id*. at 48,112.

194. *Id.* at 48,112-13.

195. *Id*. at 48,114.

196. *Id.* at 48,114-15.

197. Vanessa Sutherland, Chief Counsel, PHMSA, Part 190 Rule Briefing 3 (Dec. 12, 2012), http://www.phmsa.dot.gov/staticfiles/PHMSA/DownloadableFiles/Files/Pipeline/Part190RuleBrief_VSunderland_JPates_121212_6.ppt.

198. *Id.* at 4-5.

199. U.S. Dep't of Transp., PHMSA, Transcript: Meetings of the Gas and Liquids Pipeline Advisory Committees 67 (Dec. 12, 2012), http://www.phmsa.dot.gov/staticfiles/PHMSA/DownloadableFiles/Files/Pipeline/Technical_Advisory_Committees/Transcript%201212PHMS.pdf.

200. Notice of Proposed Rulemaking, Pipeline Damage Prevention Programs, 77 Fed. Reg. 19,800 (Apr. 2, 2012) (to be codified at 49 C.F.R. pts. 196 and 198).

201. *Id.* at 19,800; Pipeline Inspection, Protection, and Enforcement Act of 2006, Pub. L. No. 109-468, §2, 120 Stat. 3489, 3491 (Dec. 29, 2006).

caused by excavation damage, which the agency explains are a leading cause of such incidents.[202] To accomplish this objective, the PHMSA proposes numerous changes to the pipeline safety regulations.[203] First, the PHMSA proposes to establish criteria and a process for determining the adequacy of state pipeline damage prevention enforcement.[204] Damage prevention is currently the primary responsibility of the states.[205] Second, the PHMSA proposes to create an administrative process that will allow states to contest a notice of program inadequacy from the PHMSA.[206] Third, the PHMSA proposes federal excavation requirements that the PHMSA would enforce in states deemed to have inadequate enforcement.[207] Fourth, the PHMSA proposes to create an administrative adjudication process for federal enforcement against excavators in states deemed to have inadequate enforcement.[208] Finally, the PHMSA describes the potential reductions in federal grant funding for state pipeline safety programs that could result from an enforcement inadequacy determination.[209]

The PHMSA received comments on the NPRM, some of which raised concerns regarding certain of its provisions.[210] For example, some commenters questioned whether the PHMSA's proposed process for determining the adequacy of state damage prevention enforcement would consider information beyond the scope of its authority under the PIPES Act.[211] Commenters also expressed concerns about, or support for possible exemptions from, the proposed federal excavation standards for homeowners, farming activities, and railroads, as well as concerns about potential reductions in grant funding for state pipeline safety programs.[212] The PHMSA anticipates that it will issue a final rule in 2013.[213]

E. Litigation

Pipeline safety litigation with the PHMSA is rare, with only a handful of cases filed in the last decade. In 2012, two suits were filed against the PHMSA.

On December 3, 2012, ONEOK Hydrocarbon, L.P. and other ONEOK companies (collectively, ONEOK) filed a complaint, motion for preliminary injunction (PI), and motion for temporary restraining order (TRO) against the DOT and the PHMSA in the U.S. District Court for the Northern District of

202. 77 Fed. Reg. 19,800, at 19,801.

203. *Id.* at 19,800.

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id*.

209. *Id.* at 19,805.

210. Sam Hall, Damage Prevention Program Manager, PHMSA, Pipeline Damage Prevention NPRM Briefing 9 (Dec. 12, 2012), http://www.phmsa.dot.gov/staticfiles/PHMSA/DownloadableFiles/Files/Pipeline/Excavation%20DamageRuleVote_SHall_121212_5.ppt.

211. *Id.* at 16-17.

212. *Id.* at 23, 28.

213. U.S. DEP'T OF TRANSP., REPORT ON DOT SIGNIFICANT RULEMAKINGS 90 (Dec. 28, 2012), http://www.dot.gov/sites/dot.dev/files/docs/Dec%2028%20Internet%20Report%20Final%20for%20Jan%202013%20docx.docx

Oklahoma.[214] ONEOK filed the action in response to a series of interpretations of the PSA and the Pipeline Safety Regulations that the PHMSA issued to ONEOK as well as a scheduled PHMSA inspection of a Natural Gas Liquids (NGL) fractionation plant in Kansas.[215] ONEOK asserts that the PHMSA lacks jurisdiction over the fractionation plant because it is a refinery and associated in-plant piping and storage exempt from the reach of the PSA.[216] ONEOK's motions for PI and TRO were referred to a Magistrate Judge, who recommended denial of both motions, clearing the way for PHMSA's inspection.[217] However, on December 10, 2012, District Judge Payne issued an order discontinuing the PHMSA's inspection of the NGL fractionation plant, pending his ruling on the Magistrate Judge's recommendations.[218] On December 21, 2012, the PHMSA filed a motion to dismiss, asserting that the district court lacks subject matter jurisdiction to hear the case.[219] The case remains pending in the district court.

On February 14, 2012, the City Attorney for San Francisco, California filed a lawsuit against the DOT in the U.S. District Court for the Northern District of California pursuant to the citizen suit provision of the PSA.[220] On July 25, 2012, the judge granted the DOT's motion to dismiss, finding that the PSA citizen suit provision did not authorize the City's claims, but granted the City leave to amend to plead claims under the Administrative Procedure Act.[221] The City filed an amended complaint on August 12, 2012.[222] The City alleges that the PHMSA failed to oversee the California Public Utilities Commission's (CPUC) pipeline safety program for intrastate gas transmission pipelines, failed to ensure federal standards were being enforced, and improperly delegated oversight authority to pipeline operators.[223] The suit requests declaratory and injunctive relief related to the PHMSA's oversight of state programs.[224] On September 20, 2012, the PHMSA filed a motion to dismiss and the case remains pending in the district court.[225]

214. Complaint, Motion for Preliminary Injunction and Brief In Support, and Plaintiff's Motion for Temporary Restraining Order, ONEOK Hydrocarbon, L.P. v. U.S. Dep't of Transp., No. 12-CV-660-JHP-FHM (N.D. Okla. Dec. 3, 2012).

215. Motion for Preliminary Injunction and Brief In Support, *supra* note 214, at 1-3.

216. *Id.* at 2.

217. Magistrate's Report and Recommendation, ONEOK Hydrocarbon, L.P. v. U.S. Dep't of Transp., No. 12-CV-660-JHP-FHM (N.D. Okla. Dec. 7, 2012).

218. Minute Order, ONEOK Hydrocarbon, L.P. v. U.S. Dep't of Transp., No. 12-CV-660-JHP-FHM (N.D. Okla. Dec. 10, 2012).

219. Defendants' Motion to Dismiss and Memorandum in Support, ONEOK Hydrocarbon, L.P. v. U.S. Dep't of Transp., No. 12-CV-660-JHP-FHM (N.D. Okla. Dec. 21, 2012).

220. Complaint for Injunctive and Declaratory Relief for Violations of the Natural Gas Pipeline Safety Act, 49 U.S.C. §§ 60101 et seq., San Francisco v. U.S. Dep't of Transp., No. C. 12-0711 RS (N.D. Cal. Feb. 14, 2012).

221. Order Granting Motion to Dismiss With Leave to Amend, San Francisco v. U.S. Dep't of Transp., No. C. 12-0711 RS (N.D. Cal. Jul. 25, 2012).

222. Amended Complaint for Injunctive and Declaratory Relief for Violations of the Natural Gas Pipeline Safety Act, 49 U.S.C. §§ 60101 et seq. and the Administrative Procedure Act, 5 U.S.C. §§ 701 et seq., No. C. 12-00711 RS (N.D. Cal. Aug. 13, 2012).

223. *Id.* at 1-3.

224. *Id.* at 56-58.

225. Notice of Motion and Motion to Dismiss; Memorandum of Points and Authorities, San Francisco v. U.S. Dep't of Transp., No. C. 12-0711 RS (N.D. Cal. Sept. 20, 2012).

IV. The Department of Energy

A. Minimum Energy Efficiency Standards

The Department of Energy (DOE) monitors and enforces compliance with energy and water conservation standards for covered consumer products under title 3, part A of the Energy Policy and Conservation Act of 1975 (EPCA) and its regulations set forth in 10 C.F.R. part 430, subpart C.[226] The EPCA and its regulations authorize the DOE to assess civil penalties for violations of the Act and to seek a judicial order restraining further distribution of a noncompliant product.[227]

B. New Steps

The DOE took several steps in 2012 regarding enforcement of the EPCA's conservation standards and the requirements of the ENERGY STAR program.

1. Enforcement Actions

The DOE undertook numerous enforcement actions during 2012 involving failures to comply with the EPCA or other standards and certifications, imposing civil penalties or recommending the de-listing of noncompliant products from the ENERGY STAR program. One of the most notable of these enforcement actions concluded in November 2012. The DOE reached a compromise agreement with several subsidiaries and affiliates of GD Midea Holding Co., under which the companies agreed to cease distribution of offending products and to pay more than $4.5 million in civil penalties after admitting that four freezer and refrigerator/freezer products failed to comply with applicable energy conservation standards.[228]

2. Proposed Restriction on Import of Noncompliant Products

On March 26, 2012, following extensive collaboration with the DOE, U.S. Customs and Border Protection and the U.S. Department of the Treasury issued a notice of proposed rulemaking.[229] The rule, if adopted, would prohibit imports into the United States of covered products that fail to meet applicable DOE energy conservation standards or FTC labeling requirements. Customs and Border Protection received several comments on the proposed rule before the

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226. Energy Policy and Conservation Act of 1975, 42 U.S.C. §§ 6291-309 (2012); 10 C.F.R. §§ 430.31-.35 (2012).

227. 42 U.S.C. §§ 6302-04; 10 C.F.R. §§ 430.61, 430.73.

228. U.S. Dep't of Energy, *Midea Agrees to Pay $4.5M for Four Models that Fail to Meet Federal Energy Standards*, ENERGY.GOV (Nov. 28, 2012), http://energy.gov/gc/articles/midea-agrees-pay-45m-four-models-fail-meet-federal-energy-standards.

229. Notice of Proposed Rulemaking, Inadmissibility of Consumer Products and Industrial Equipment Noncompliant With Applicable Energy Conservation or Labeling Standards, 77 Fed. Reg. 17,364 (Mar. 26, 2012) (to be codified at 19 C.F.R. pt. 12); *see also* U.S. Dep't of Energy, *Rule Proposed to Prohibit Importation of Products that Fail to Comply with DOE Energy Conservation Standards*, ENERGY.GOV (Mar. 30, 2012), http://energy.gov/gc/articles/rule-proposed-prohibit-importation-products-fail-comply-doe-energy-conservation-1.

end of the official comment period on May 25, 2012, but the agency has not yet promulgated a final rule.[230]

V. THE DEPARTMENT OF JUSTICE

A. Energy-Related Investigations and Settlements

On July 3, 2012, the U.S. Department of Justice (DOJ) announced a $4,084,000 settlement with Louis Dreyfus Energy Services in resolution of allegations that it violated the False Claims Act related to price discounts for gas obtained from federal oil and gas leases in the Gulf of Mexico.[231] Specifically, the allegations concerned Louis Dreyfus' claims for acquisition of price discounts during time periods in which they were barred.[232]

On November 15, 2012, the DOJ announced that it had settled claims related to alleged violations by Exelon Corporation of court orders related to Exelon's acquisition of Constellation Energy Group.[233] The allegations, issued by the DOJ's Antitrust Division, concerned offers for sales of electricity at above-cost prices, which were prohibited during a specified period after the closure of the merger.[234] The DOJ found that Exelon had taken appropriate remedial activities upon discovery of the above-cost offers.[235] Under the settlement agreement, Exelon agreed to pay a $400,000 civil penalty.[236]

On November 14, 2012, the DOJ Antitrust Division announced that it was closing an investigation related to Entergy Corporation's acquisitions of electric generating plants in Mississippi and Arkansas, based on a determination that the acquisitions are "unlikely to substantially lessen competition."[237] At the same time, the DOJ noted that its investigation concerning allegations of potential exclusionary conduct by Entergy in its utility service territory remained open, but that if Entergy divested its transmission assets and joined the Midwest Independent Transmission System Operator, DOJ concerns would be resolved.[238]

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230. *See generally* Docket No. USGBP-2012-0004, *Inadmissibility of Consumer Products and Industrial Equipment Noncompliant with Applicable Energy Conservation and Labeling Standards*, REGULATIONS.GOV, http://www.regulations.gov/#!docketDetail;D=USCBP-2012-0004 (last visited Mar. 15, 2012).

231. Press Release, U.S. Dep't of Justice, Louis Dreyfus Energy Services Pays $4 Million to Resolve Allegations That it Violated the False Claims Act (July 3, 2012), http://www.justice.gov/opa/pr/2012/July/12-civ-848.html.

232. *Id.*

233. Press Release, U.S. Dep't of Justice, Justice Department Settles Civil Contempt Claim Against Exelon Corporation (Nov. 15, 2012), http://www.justice.gov/opa/pr/2012/November/12-at-1362.html.

234. *Id.*

235. *Id.*

236. *Id.*

237. Press Release, U.S. Dep't of Justice, Justice Department Statement on Entergy Corp.'s Transmission System Commitments and Acquisition of KGen Power Corp.'s Plants in Arkansas and Mississippi (Nov. 14, 2012), http://www.justice.gov/opa/pr/2012/November/12-at-1360.html.

238. *Id.*

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