Self-Reporting Compliance Issues at FERC: A Practitioner’s Perspective

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- Hypothetical means hypothetical.
The easy part

- “Self-reporting” is valuable and is encouraged by FERC. Self-reporting is said to be valued in setting a civil penalty or in determining whether a civil penalty should be assessed. In other words, a company may get “credit” for self reporting.
What triggers a self-report?

- Three examples:
  - Violation of an established, settled regulation.
  - Troubling trader talk
  - Making Policy Through Litigation
    - The Hunter Case
    - Capacity Allocation Settlements and Rulemakings
While we are at it, does getting “credit” really matter?
Self-Reporting is an agency expectation; what are the related expectations of industry and practitioners?

- Clear and articulated rules.
- Rulemaking vs. adjudication; agency discretion vs. notice.
Energy Bar Association

Lessons Learned from Self-Reporting Alleged Violations to the FERC and CFTC – Practitioners’ Perspectives

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Self-Reporting in the CFTC Enforcement Process

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Increasing Civil and Criminal Prosecutions Under the Commodity Exchange Act

- In FY 2010, the Commodity Futures Trading Commission ("CFTC") filed 57 enforcement actions and opened 419 investigations, reflecting very substantial increases over 2009 and 2008.

- CFTC civil prosecutions by category included:
  - Manipulation, attempted manipulation, false reporting or concealing material facts – 6
  - Commodity pools, hedge funds, commodity pool operators and commodity trading advisors – 15
  - Fraud by futures commission merchants, introducing brokers and their associated persons – 2
  - Forex fraud – 14
  - Financial, supervision, compliance and recordkeeping – 8
  - Trade practice – 11
  - Statutory disqualification – 1

- Criminal prosecutions:
  - More than 95% of the CFTC’s major injunctive fraud cases involved related criminal investigations and more than 65% of those investigations have resulted in criminal indictments.
Self-Reporting Under the Commodity Exchange Act is Voluntary

- **No legal obligation to self-report**
  - The Commodity Exchange Act ("CEA") and the CFTC regulations do not set forth a legal obligation to self-report violations of the CEA or the CFTC’s regulations.

- **The CFTC may credit self-reporting by imposing lesser sanctions**
The CFTC’s 2007 Enforcement Advisory identifies the following factors pertaining to self-reporting in assessing sanctions:

- Did the company quickly make appropriate disclosure of the misconduct?
- Following the discovery of the misconduct, did the company promptly notify the Division?
- Did a corporate officer or company attorney promptly meet with Division staff to review and explain the known facts about the misconduct?
- Did the company outline the findings and relevant evidence regarding the misconduct and produce a full and complete report of the internal investigation to the Division?
– Did the company misrepresent the nature or extent of the company’s misconduct?

– In investigating the misconduct, did the company issue questionnaires to employees regarding the facts that suggested responses that might minimize culpability?

– Did the company turn a blind eye to warnings or indications that employees had acted in violation of the law “and failed to report such warnings to the Commission”? 
The CFTC regime is analogous to that of the Securities and Exchange Commission (“SEC”).

– Neither the federal securities laws nor the SEC’s regulations require self-reporting of violations.

– However, the SEC’s Enforcement Manual § 6.1.2 specifically identifies self-reporting as one of the four measures of a company’s “cooperation” when determining sanctions.
The Federal Energy Regulatory Commission (“FERC”) has stated that it expects companies regulated by it to self-report violations promptly.

- Revised Policy Statement On Penalties Guidelines, 132 FERC ¶ 61,216 at ¶ 127 (Sept. 17, 2010) (“The Commission has always expected prompt reporting of violations as part of an organization’s compliance program.”); Policy Statement on Compliance, 125 FERC ¶ 61058 at ¶ 19 (“Once discovered, we expect that companies will act expeditiously to report the wrongful conduct and will report it promptly.” (emphasis added)); see also Revised Policy Statement on Enforcement, 123 FERC ¶ 61,656 at ¶¶ 61-64 (2008).
The CFTC has not published quantitative guidelines for assessing monetary penalties.

No CFTC precedent has quantified the amount of reduction in sanctions attributable to self-reporting or other types of cooperation.

Many CFTC settlements, however, expressly acknowledge the respondent’s cooperation in the investigation as a basis for reduced sanctions.
The CFTC’s Order in *In the Matter of Enserco Energy, Inc.*, CFTC Doc. No. 03-22 (2003), specifically addressed the credit accorded self-reporting:

“Upon the recommendation of the Division of Enforcement (‘DOE’), the Commission afforded substantial weight to Enserco’s extraordinary level of cooperation in its decision to accept the Respondent’s offer. In less than three months, Enserco swiftly and aggressively investigated its trade reporting activities and provided DOE with detailed reports of its analyses and findings, as well as transcriptions of over 100 relevant telephone recordings, and all other details related to its internal investigation, without asserting claims of attorney-client privilege or attorney-work product or requiring a limited waiver agreement.”
The CFTC’s Enserco Order expressly stated that the CFTC’s “determination to impose sanctions lower than it would have otherwise” was based on considerations, among others, that:

- In response to the Enforcement Division’s inquiry, the company promptly uncovered the nature and extent of the misconduct and brought it to the attention of the Enforcement Division;

- Promptly disclosed the existence of the misconduct to the public; and

- Promptly produced a thorough and probing written report detailing the findings of its review; and

- On his own volition, the president of the corporate parent promptly and personally met with Enforcement Division staff to discuss and thoroughly review the company’s misconduct.
Factors Bearing on a Decision to Self-Report

- Is there a violation?
  - Are the facts disputed?
  - What is the quality of proof of misconduct?
    - Documentary proof? Recorded conversations?
    - How much reliance is placed on supposition without proof?
    - Are there witness credibility issues?
  - Is it clear that the law proscribes the conduct?
    - Are there clear precedents?
    - Is the CFTC’s view of the law subject of reasonable debate? Has it been rejected in particular cases?
Factors Bearing on a Decision to Self-Report (cont’d.)

- The scope of the internal investigation
  - Does the information of potential wrongdoing indicate a need to investigate beyond the immediate conduct under review (e.g., conduct of other persons, operations of the company, or affiliates)?

- Are disciplinary measures against employees necessary?

- Potential collateral consequences
  - Will the putative violators have potential claims for libel or slander?
  - Will self-reporting trigger public disclosure obligations?
  - Will self-reporting trigger inquiries from other regulators?
  - Will self-reporting or public disclosure likely spawn Congressional inquiries?
Factors Bearing on a Decision to Self-Report (cont’d.)

- **Timing**
  - – Is the internal investigation complete?
  - – Should regulators be initially advised of a potential “concern” and that an internal investigation is ongoing?

- **Who should make the decision to self-report?**
  - – The Board of Directors? Senior management?
  - – The General Counsel’s Office?

- **Who should be consulted in deciding self-reporting issues?**
  - Have non-privileged communications about self-reporting occurred?
Factors Bearing on a Decision to Self-Report (cont’d.)

- Any self-reporting obligations under other laws?
  - E.g., public disclosure obligations under the federal securities laws, the Sarbanes-Oxley Act; fiduciary duties; the federal criminal sentencing guidelines and the Department of Justice’s December 12, 2006 McNulty Memo; the FERC’s self-reporting expectations; any requirements of foreign regulators.

- The form of a self-report
  - If in writing, how detailed?
  - How to prevent potential for later accusations of misleading or incomplete disclosure?
  - If the report is made orally, who should make the report?
Factors Bearing on a Decision to Self-Report (cont’d.)

- **Waiver of privilege / protection of confidentiality**
  - Should attorney-client privilege and/or attorney work product protections be waived?
  - Is there a means to provide the government the information it needs without waiving privilege?
  - Is there a means to protect confidentiality and preserve privileges?
  - What protections exist from government disclosure under the Freedom of Information Act?

- **To whom should the report be made?**
  - CFTC only? Other U.S. / International regulators?
  - Self-regulatory organizations (e.g., National Futures Association, futures exchanges)?
Bob Fleishman, Of Counsel at Covington & Burling LLP in Washington DC, focuses on energy, white collar defense, and ADR matters for a range of clients.

Before joining Covington in 2003, he served as General Counsel and Vice-President of Corporate Affairs and Legislative and Regulatory Policy for Constellation Energy Group. From 1979-1985, Bob worked at FERC in various capacities, including in the Division of Enforcement where he investigated and litigated various matters.

Bob is Chairman of the Committee on Compliance and Enforcement for the Energy Bar Association. The committee is EBA’s focal point for developments in civil and criminal enforcement and compliance activities in the energy industry at FERC, CFTC, FTC, DOJ, and DOE, in the courts, and in Congress.

He represented Energy Transfer Partners in the FERC show cause proceeding and settlement, negotiated the settlement in the Oasis show cause proceeding, prepared a White Paper for seven major energy trade associations in connection with the FERC Conference on Enforcement in 2007-2008, and represents and advises clients in connection with FERC and CFTC non-public enforcement investigations and related issues.

Bob is Editor-in-Chief of the Energy Law Journal and was President of the EBA in 1999-2000.

In the ADR arena, he was the Project Manager of the Energy ADR Forum and its report, “Dispute Resolution in the Energy Industry: The Better Way,” is a member of the Energy Panel of the International Center for Dispute Resolution, and served as Chairman of EBA’s ADR Committee.

Bob graduated from Boston University School of Law in 1978 and received his undergraduate degree, *cum laude*, from Georgetown University in 1974.
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Mark R. Haskell is a partner in Morgan Lewis's Energy Practice. Mr. Haskell's practice focuses on Federal Energy Regulatory Commission (FERC) matters, including FERC investigations, litigation and related court appeals, as well as Commodity Futures Trading Commission (CFTC) investigations affecting the energy industry.

A seasoned energy lawyer, Mr. Haskell has represented natural gas and power marketers, local distribution companies, end users, producers, industrial consumers, and LNG and shale gas developers in energy regulatory matters.

In the natural gas area, Mr. Haskell has participated in litigation addressing interstate natural gas pipeline rates, terms and conditions of service, involving Florida Gas Transmission Company; Panhandle Eastern Pipe Line Company; Texas Eastern Transmission Corporation; Southern Star Central Pipeline Company; Maritimes and Northeast Pipeline; Kinder Morgan Interstate Gas Transmission Co.; Northwest Pipeline Company; and others. Mr. Haskell has assisted clients in a variety of rulemaking proceedings, including the development of FERC's anti-manipulation rules and pipeline restructuring under Order No. 637. He also has worked with LNG and shale gas developers to address commercial and regulatory issues in the U.S.

Mr. Haskell represents parties in litigation arising under the Interstate Commerce Act concerning rates, terms and conditions of service for regulated common carrier transportation of oil and natural gas liquids. He also has worked on petitions for declaratory orders to facilitate greenfield common carrier pipeline development projects.

Mr. Haskell is actively involved in the firm's energy compliance and enforcement practice, including:

- Managing FERC and CFTC investigations of physical and financial energy commodity trading;
- Assisting in investigations of electric reliability related incidents;
- Developing compliance plans;
- Pursuing internal investigations;
- Developing energy compliance training;
- Conducting compliance related regulatory due diligence in connection with acquisitions, and
- Counseling clients regarding the mandates of the Dodd-Frank Act.

Mr. Haskell has litigation experience in defense of gas and power refund claims associated with regulatory changes, market dislocations, and allegations of market manipulation.

Mr. Haskell possesses over 25 years of industry experience in matters relating to federal regulation of oil and natural gas, electric energy and ancillary services, and interstate pipeline safety and infrastructure.


Mr. Haskell is admitted to practice in the District of Columbia.

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Member, American Bar Association, Section of Energy, Environment and Resources (Vice Chair, Committee on Electric and Natural Gas Marketing 2000–2001; 2001–2002)

Energy Bar Association (Member, Board of Directors, 2001–2004)

1980 Harry S Truman Scholar, State of Maine

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Member, Phi Beta Kappa

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**education**

Harvard Law School, 1985, J.D.

University of Maine, 1982, B.A., With Highest Honors and Highest Distinction
Charles R. Mills

Charles R. Mills is a partner in the Washington, DC office of K&L Gates LLP. He counsels clients with respect to derivatives and securities law compliance and represents them in CFTC, SEC, FERC, DOJ and SRO enforcement investigations and actions, civil litigation and arbitration. As lead counsel for the lead defendant, he recently obtained a complete dismissal of all charges in the Department of Justice’s criminal prosecution for alleged propane price manipulation. U.S. v. Radley, 632 F.3d 177 (5th Cir. 2011), aff’g 659 F. Supp. 2d 803 (S.D. Tex. 2009). In 2005, the Compliance Reporter honored him as its “Lawyer of the Year” for his precedent-setting victory in an SEC enforcement action, WHX Corp. v. SEC, 362 F.3d 854 (D.C. Cir. 2004).

Charley currently is the Chair of the Derivatives and Futures Law Committee of the ABA’s Business Law Section. He is an adjunct professor at the Georgetown University Law Center. Since 1994, he has taught graduate courses in The Regulation of Commodity Futures Transactions and Fraud and Fiduciary Duties under the Federal Securities Laws. He is on the Board of Editors of the Futures and Derivatives Law Reporter. He entered private practice in 1983, after serving 5 ½ years with the CFTC. He received his J.D. from the Georgetown University Law Center in 1977 and his B.A. from Occidental College in Los Angeles in 1974.