

REPORT OF THE COMPLIANCE AND ENFORCEMENT COMMITTEE

This report of the Compliance and Enforcement Committee summarizes key federal enforcement and compliance developments in 2017, including certain decisions, orders, actions, and rules of the Federal Energy Regulatory Commission (FERC or Commission), the United States (U.S.) Commodity Futures Trading Commission (CFTC), the Pipeline and Hazardous Materials Safety Administration (PHMSA), the U.S. Department of Energy (DOE), and the U.S. Department of Justice (DOJ).*

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I. THE FEDERAL ENERGY REGULATORY COMMISSION

A. Reports and Rules

1. Annual Enforcement Report

On November 16, 2017, the FERC Office of Enforcement (Enforcement) issued its Annual Report of Enforcement Staff activities during the fiscal year 2017 (2017 Report) that, as in past years, identified its priorities as focusing on (1) “fraud and market manipulation;” (2) “serious violations of the Reliability

Standards;” (3) “anticompetitive conduct;” and (4) “conduct that threatens the transparency of regulated markets.”¹

In pursuit of these priorities, Enforcement opened twenty-seven new investigations in fiscal year 2017, up from seventeen investigations in 2016, while bringing sixteen to closure.² Enforcement obtained more than \$51 million in civil penalties and disgorgement of over \$42 million in unjust profits.³ Enforcement’s penalty amount was higher than the \$12.25 million it assessed in 2016.⁴ The 2017 Report reaffirmed that Enforcement does not intend to change its priorities in the upcoming year.⁵

2. Final Rule on Civil Monetary Penalty Inflation Adjustments

On January 9, 2017, FERC issued Order No. 834, its Final Rule on Civil Monetary Penalty Inflation Adjustments.⁶ The FERC indicated that the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended by the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (2015 Act), requires each federal agency to issue a rule by July 2016 adjusting for inflation each civil monetary penalty within the agency’s jurisdiction.⁷ The 2015 Act requires the FERC to make an initial inflation adjustment to its civil monetary penalties, and adjust each such penalty on an annual basis every January 15 thereafter.⁸ The FERC indicated that Order No. 834 is intended to implement the initial adjustment.⁹

The Federal Power Act (FPA), the Natural Gas Act (NGA), and the Natural Gas Policy Act (NGPA), permit civil monetary penalties of up to \$1,000,000 per violation.¹⁰ The FERC stated that applying the requisite inflation adjustments resulted in a maximum civil penalty of \$1,213,503.¹¹ The FERC also adjusted other civil monetary penalties it is authorized to assess under these and other statutes.¹² Order No. 834 became effective January 24, 2017, the date it was published in the Federal Register.¹³

1. FERC OFFICE OF ENFORCEMENT, 2017 REPORT ON ENFORCEMENT 4 (2017) [hereinafter 2017 Report].

2. *Id.* at 5. These statistics do not include Barclays Bank, PLC, 161 F.E.R.C. ¶ 61,147 (2017), which was settled after the close of FERC’s fiscal year.

3. *Id.*

4. FERC OFFICE OF ENFORCEMENT, 2016 REPORT ON ENFORCEMENT 5 (2016).

5. 2017 Report, *supra* note 1, at 4.

6. Order No. 834, *Civil Monetary Penalty Inflation Adjustments*, 158 F.E.R.C. ¶ 61,017 (2017).

7. Fed. Civil Penalties Inflation Adjustment Act of 1990, Pub. L. No. 101-410, 104 Stat. 890 (codified as amended at 28 U.S.C. § 2461); Fed. Civil Penalties Inflation Act Improvements Act of 2015, Pub. L. No. 114-74, 701, 129 Stat. 584, 599; Order No. 834, *supra* note 6, at P 2.

8. Order No. 834, *supra* note 6, at PP 2, 4.

9. *Id.* at P 1.

10. See FPA § 316A(b) (2015), 16 U.S.C. § 825o-1(b); Natural Gas Act (NGA) § 22, 15 U.S.C. § 717t-1 (2014); Natural Gas Policy Act (NGPA) § 504(b)(6)(A)(i), 15 U.S.C. § 3414(b)(6)(A)(i) (1978).

11. Order No. 826, *Civil Monetary Penalty Inflation Adjustments*, 155 F.E.R.C. ¶ 61,320 at P 17 (2017).

12. *Id.*

13. Order No. 834, *supra* note 6.

B. Notices of Alleged Violations

1. Rover Pipeline, LLC and Energy Transfer Partners, L.P.

On July 13, 2017, FERC issued a notice stating that Enforcement Staff preliminarily determined that Rover Pipeline, LLC and Energy Transfer Partners, L.P. (collectively, Rover) violated NGA section 7, and 18 C.F.R. section 157.5, by failing to disclose all relevant information in its Application for a Certificate of Public Convenience and Necessity and attendant filings in Docket No. CP15-93.¹⁴ Specifically, Enforcement Staff alleged that Rover falsely promised it would avoid adverse effects to a historic resource that it was simultaneously working to purchase and destroy.¹⁵ In a separate matter, Enforcement initiated an investigation into the presence of petroleum hydrocarbons in drilling fluid spilled by Rover in horizontal drilling under the Tuscarawas River in Ohio.¹⁶

2. American Transmission Company, LLC

On July 7, 2017, FERC issued a notice stating that Enforcement Staff preliminarily determined that American Transmission Company, LLC (ATC) violated FPA sections 203 and 205 between 2006 and 2014 by failing to seek approval from FERC before acquiring twenty-two jurisdictional facilities as required by FPA section 203 and failing to timely file with FERC forty-two jurisdictional agreements as required by FPA section 205.¹⁷

3. Westar Energy, Inc.

On March 30, 2017, FERC issued a notice stating that Enforcement Staff preliminarily determined that Westar Energy, Inc. (Westar) violated various provisions of the Southwest Power Pool, Inc. (SPP) Open Access Transmission Tariff by including incorrect cost inputs in its mitigated energy offer curves and failing to timely update other cost inputs.¹⁸

4. Covanta Haverhill Associates, L.P.

On January 23, 2017, FERC issued a notice stating that Enforcement Staff preliminarily determined that Covanta Haverhill Associates, L.P. (Covanta Haverhill) violated 18 C.F.R. section 35.41(a) and various provisions of the ISO-New England (ISO-NE) Tariff by failing to provide instantaneous metered output data to ISO-NE.¹⁹

14. FERC, STAFF NOTICE OF ALLEGED VIOLATIONS (July 13, 2017), <https://www.ferc.gov/enforcement/alleged-violation/notices/2017/20170713-Rover-NAV.pdf>.

15. *Id.*

16. Letter from FERC Sec'y Kimberly Bose to Joey Mahmoud, Senior Vice President, Rover Pipeline LLC (June 1, 2017).

17. FERC, STAFF NOTICE OF ALLEGED VIOLATIONS (July 7, 2017), <https://www.ferc.gov/enforcement/alleged-violation/notices/2017/20170707-ATC-NAV.pdf>.

18. FERC, STAFF NOTICE OF ALLEGED VIOLATIONS (Mar. 30, 2017), <https://www.ferc.gov/enforcement/alleged-violation/notices/2017/20170330-Westar-NAV.pdf>.

19. FERC, STAFF NOTICE OF ALLEGED VIOLATIONS (Jan. 23, 2017), <https://www.ferc.gov/enforcement/alleged-violation/notices/2017/20170123-Covanta-NAV.pdf>.

C. Enforcement Litigation and Adjudication

1. FERC v. Powhatan Energy Fund, LLC, Houlian Alan Chen, HEEP Fund, Inc., and CU Fund, Inc.

On December 28, 2017, the U.S. District Court for the Eastern District of Virginia held that its review of FERC-assessed civil penalties and disgorgements in the amount of \$29.8 million and \$4.7 million, respectively, against respondents Powhatan Energy Fund, LLC, Houlian “Alan” Chen, HEEP Fund, Inc., and CU Fund, Inc. (together, the Powhatan Respondents) for alleged violations of FPA section 222 and FERC’s Anti-Manipulation Rule will be a “*de novo* trial governed by the Federal Rules of Civil Procedure and federal Rules of Evidence.”²⁰ The opinion follows the Court’s denial of the Powhatan Respondents’ motions to dismiss without prejudice, pending additional briefing by the parties on the scope of FPA section 31, which requires a federal district court to “review *de novo* [] the law and the facts involved” in FERC’s assessment of a civil penalty for alleged violations of the FPA.²¹ The Court rejected FERC’s position that a federal district court has “discretion to craft the procedure[s] that will best facilitate its review” in reviewing an assessed civil penalty for alleged violations of the FPA.²² Instead, consistent with other federal district courts reviewing the same issue, the Court found that it was obliged to conduct a trial *de novo*, and permit the Powhatan Respondents to fully develop factual defenses consistent with federal procedural and evidentiary rules.²³ By separate order, the Court established a procedural schedule whereby FERC will either re-file its complaint or file an amended complaint by late January 2018.

2. FERC v. ETRACOM LLC

On March 8, 2017, the U.S. District Court for the Eastern District of California issued an order finding that ETRACOM LLC and its owner were entitled to a full trial on the merits and discovery in an action brought by FERC seeking to enforce an order assessing civil penalties against the respondents for alleged manipulation of the market operated by the California Independent System Operator Corp.²⁴ The primary issue was the scope of a district court’s “authority to review *de novo* the law and the facts involved” in an action seeking enforcement of a FERC penalty assessment.²⁵

The Court explained that FPA section 31(d) sets out two procedural pathways to assess a civil penalty. Specifically, the subject of a FERC enforcement action

20. 16 U.S.C. § 824v(a); 18 C.F.R. § 1c.2; FERC v. Powhatan Energy Fund, LLC., slip op. at 2 (E.D. Va. Dec. 28, 2017).

21. *Powhatan Energy Fund, LLC.*, slip op. at B.

22. *Id.* at II.

23. See, e.g., FERC v. Barclays Bank PLC, 247 F. Supp. 3d 1118 (E.D. Cal. 2017); FERC v. Etracom LLC, No. 2:16cv01945, 2017 U.S. Dist. LEXIS 33430 (E.D. Cal. Mar. 7, 2017); FERC v. Silkman, 233 F. Supp. 3d 201 (D. Me. 2017); FERC v. City Power Mktg., LLC, 199 F. Supp. 3d 218 (D.D.C. 2016); FERC v. Maxim Power Corp., 196 F. Supp. 3d 181 (D. Mass. 2016).

24. FERC v. Etracom LLC, No. 2:16-cv-01945-SB, 2017 U.S. Dist. LEXIS 33430, 1 (E.D. Cal., Mar. 7, 2017).

25. *Id.* at 5-6 (quoting 16 U.S.C. § 823b(d)(3)).

can elect to either: (1) litigate FERC's claims before a FERC Administrative Law Judge, followed by an assessment of civil penalties by FERC and review by the U.S. Court of Appeals; or (2) have FERC promptly assess a civil penalty and, if the penalty is not paid within sixty calendar days, FERC may institute an action in U.S. district court to enforce its order, with the Court having the "authority to review *de novo* the law and the facts involved."²⁶ While the respondents argued that the reference to *de novo* review entitled them to application of the Federal Rules of Civil Procedure (FRCP) that normally apply in civil actions, FERC argued that a court reviewing a FERC penalty assessment was only required to review the administrative record developed before the FERC.²⁷

The Court, agreeing with the respondents, found that the FRCP apply to a FERC action seeking to enforce a civil penalty assessment.²⁸ The Court stated that the FRCP generally apply to civil actions before district courts unless there is a clear expression of congressional intent to the contrary.²⁹ In the case of the FPA, the Court explained that there had been no clear expression of congressional intent to exempt actions brought by FERC from the application of the FRCP, and noted that the legislative history of other statutes providing for *de novo* review of agency actions supported the conclusion that Congress intended the FRCP to apply to actions brought by FERC.³⁰ The court also noted that other federal district courts had found that the FRCP apply to such actions.³¹

3. Total Gas & Power North America, Inc., Aaron Trent Hall and Therese Nguyen Tran v. FERC

On June 8, 2017, the United States Court of Appeals for the Fifth Circuit denied an appeal of an order of the United States District Court and affirmed the district court's ruling that Total's Petition for Declaratory Judgment is not ripe for review.³² After FERC issued an Order to Show Cause and Notice of Proposed Penalty and Enforcement, FERC staff informed Total of its intention to recommend that FERC initiate enforcement proceedings.³³ Total sought a declaration that FERC lacked statutory authority to adjudicate violations of the NGA and assess civil penalties.³⁴ Total argued that the NGA vested exclusive adjudicatory authority in the federal district court.³⁵ Total further argued that adjudication of an NGA violation and imposition of a civil penalty through an internal FERC administrative proceeding violated the Appointments Clause, the Fifth Amendment's Due Process Clause, and the Seventh Amendment's guarantee of a jury trial.³⁶ In considering ripeness, the court of appeals applied four factors:

26. *Id.* at 4-6.

27. *Id.* at 4.

28. *Id.* at 1.

29. FERC v. Etracom LLC, No. 2:16-cv-01945-SB, 2017 U.S. Dist. LEXIS, 6-7 (E.D. Cal. Mar. 7, 2017).

30. *Id.* at 6-8.

31. *Id.* at 9-10.

32. Total Gas & Power N. Am., Inc., v. FERC, 859 F.3d 325, 339 (5th Cir. 2017).

33. Total Gas & Power N. Am., Inc., et al., 155 F.E.R.C. ¶ 61,105 (2016).

34. Total Gas & Power N. Am., 859 F.3d at 327.

35. *Id.* at 331.

36. *Id.* at 331-32.

(1) whether the issues presented are purely legal; (2) whether the challenged [FERC] action constitutes “final agency action,” within the meaning of [s]ection 10 of the Administrative Procedure Act; (3) whether the challenged [FERC] action has or will have a direct and immediate impact upon the petitioners; and (4) whether resolution of the issues will foster, rather than impede, effective enforcement and administration by [FERC].³⁷

Based on these factors and finding that Total’s argument was identical to that made in *Energy Transfer Partners*, the Court upheld the district court’s findings, dismissed Total’s petition for lack of ripeness, and declined to address the merits of Total’s arguments.³⁸ The Court found that Total was not challenging FERC’s actions, but was preemptively challenging a FERC order that may never be issued.³⁹ The Court further rejected Total’s constitutional arguments.⁴⁰

D. Settlements

1. American Transmission Company, LLC

On August 28, 2017, FERC approved a Stipulation and Consent Agreement between Enforcement and ATC resolving Enforcement’s investigation into whether ATC failed to file FERC-jurisdictional agreements as required by FPA section 205 and failed to obtain prior approval for the disposition of facilities as required by FPA section 203.⁴¹ Specifically, it was alleged that, between October 17, 2000 and May 26, 2011, ATC failed to timely file forty-two FERC-jurisdictional agreements and six notices of cancellation.⁴² It further was alleged that ATC failed to obtain prior approval for twenty-one transactions falling within the scope of FPA section 203 between August 8, 2006 and February 13, 2014.⁴³ Under the agreement, ATC agreed to pay a civil penalty of \$205,000 and submit semi-annual compliance monitoring reports for one year following the effective date of the agreement.⁴⁴

2. Westar Energy, Inc.

On August 24, 2017, FERC approved a Stipulation and Consent Agreement between Enforcement and Westar, resolving a violation of part 1(b) of FERC’s regulations and the provisions of the SPP Tariff by submitting inaccurate cost inputs for its mitigated energy offer curves or by intentionally targeting outsized make-whole payments at various times in 2014 and 2015.⁴⁵ Westar admitted to the violations and agreed to pay a civil penalty of \$180,000, to implement

37. *Id.* at 337 n.6 (citing *Energy Transfer Partners, L.P.*, 567 F.3d 134, 139-40 (5th Cir. 2009) (quoting *Pennzoil Co. v. FERC*, 645 F.2d 360, 398 (5th Cir. 1981))).

38. *Id.* at 335-39.

39. *Total Gas & Power N. Am.*, 859 F.3d at 339.

40. *Id.* at 336.

41. On July 7, 2017, FERC issued a notice of alleged violations that Enforcement had preliminarily determined that ATC violated FPA sections 203 and 205 between 2006 and 2014. FERC, STAFF NOTICE OF ALLEGED VIOLATIONS (July 7, 2017); *Am. Transmission Co., LLC*, 160 F.E.R.C. ¶ 61,030 (2017).

42. 160 F.E.R.C. ¶ 61,030 at P 6.

43. *Id.* at P 5.

44. *Id.* at P 1.

45. *Westar Energy, Inc.*, 160 F.E.R.C. ¶ 61,025 at PP 13-14 (2017); 18 C.F.R. pt. 1b (2017).

compliance procedures, and to file annual compliance monitoring reports with OE for up to three years at Enforcement's option.⁴⁶

3. City Power Marketing, LLC and K. Stephen Tsingas

On August 22, 2017, FERC approved a Stipulation and Consent Agreement between Enforcement and City Power Marketing, LLC (City Power), and its owner, K. Stephen Tsingas (together, the City Power Respondents).⁴⁷ The agreement resolved allegations that the City Power Respondents violated FPA section 222 and FERC's electricity market Anti-Manipulation Rule, 18 C.F.R. section 1c.2, by placing Up-To-Congestion (UTC) transactions in the market operated by PJM Interconnection, L.L.C. (PJM) in a manner designed to artificially inflate City Power's eligibility for Marginal Loss Surplus Allocation (MLSA) payments.⁴⁸ More specifically, Enforcement alleged that the City Power Respondents had placed UTC transactions in a manner designed to minimize the risk of the transaction while increasing City Power's trading volume and eligibility for MLSA payments.⁴⁹

The FERC previously had issued an order finding that the City Power Respondents' conduct violated the Anti-Manipulation Rule and assessing a \$14 million civil penalty against City Power and a \$1 million civil penalty against Mr. Tsingas, and directing the City Power Respondents to disgorge approximately \$1.3 million.⁵⁰ After the City Power Respondents did not pay these amounts, FERC brought an action in the U.S. District Court for the District of Columbia seeking to enforce its assessment of civil penalties against the City Power Respondents.⁵¹

The City Power Respondents stipulated to the facts set forth in the agreement, but neither admitted nor denied the alleged violations.⁵² In order to resolve the allegations set forth in FERC's earlier order and the pending district court litigation, City Power agreed to pay a civil penalty of \$9 million, and Mr. Tsingas agreed to pay a civil penalty of approximately \$1.4 million and disgorge \$1.3 million to PJM.⁵³ Mr. Tsingas also agreed to a three-year ban on participating directly or indirectly in any FERC-jurisdictional market.⁵⁴

4. Covanta Haverhill Associates, L.P.

On February 1, 2017, FERC approved a Stipulation and Consent Agreement between Enforcement and Covanta Haverhill, resolving a violation of section 35.41(a) of FERC's regulations and the ISO-NE Tariff, by failing to provide instantaneous metered output data to ISO-NE from September 1, 2007 through

46. 160 F.E.R.C. ¶ 61,025 at PP 13-14.

47. *City Power Mktg., LLC*, 160 F.E.R.C. ¶ 61,013 (2017).

48. *Id.* at P 1.

49. *City Power Mktg., LLC*, 160 F.E.R.C. ¶ 61,012 (2017).

50. *City Power Mktg., LLC*, 152 F.E.R.C. ¶ 61,012 (2015).

51. *FERC v. City Power Mktg.*, No. 15-1428 (mem.) (D.C. Cir. Aug. 10, 2016).

52. 160 F.E.R.C. ¶ 61,013 at P 10.

53. *Id.* at P 11.

54. *Id.* at P 12.

June 29, 2016.⁵⁵ Covanta Haverhill neither admitted nor denied the alleged violations, but agreed to pay a civil penalty of \$36,000, to implement compliance procedures, and to file semi-annual reports with Enforcement for at least two years.⁵⁶

5. GDF Suez Energy Marketing NA, Inc.

On February 1, 2017, FERC approved a Stipulation and Consent Agreement between Enforcement and GDF SUEZ Energy Marketing NA, Inc. (GDF Suez) settling allegations that GDF Suez had manipulated the PJM market by offering its combustion turbine units into the PJM day-ahead market in a manner designed to increase its receipt of lost opportunity cost (LOC) payments.⁵⁷

At the time of the alleged violations, the PJM Tariff provided that owners of combustion turbine units that received a day-ahead award, but were not dispatched in the real-time market, would be paid LOCs equal to the higher of: (1) the difference between day-ahead and real-time prices; or (2) the difference between real-time prices and the higher of the unit's price-based or cost-based energy offer.⁵⁸ However, since the formula for calculating LOCs did not take into account the fact that the unit would not incur start-up and no-load costs if the unit was not called upon to run in real-time, the LOC payment received by a generator owner was greater than the profit that the generator would have received if it were dispatched in real-time.⁵⁹

According to FERC staff, in March 2011, GDF Suez implemented a strategy to increase its receipt of LOC payments by submitting a price-based offer for its units that was below the units' calculated cost in order to ensure that GDF Suez would receive a day-ahead award and collect LOC payment when the units were not called upon to operate in real-time.⁶⁰ After PJM modified the LOC calculation to base the payment on the higher of the price-based or cost-based offer, GDF Suez allegedly also began discounting its cost-based offers below its actual costs.⁶¹

Under the agreement, GDF Suez stipulated to the facts alleged by Enforcement, but neither admitted nor denied that it had violated FERC's Anti-Manipulation Rule.⁶² In addition, GDF Suez agreed to pay a civil penalty of \$41 million and disgorge \$40.8 million to PJM.⁶³

6. Barclays Bank PLC

On November 7, 2017, FERC approved a Stipulation and Consent Agreement between Enforcement and Barclays Bank PLC, Daniel Brin, Scott Connelly, and Karen Levine (together, the Barclays Respondents) resolving all claims for alleged

55. *Covanta Haverhill Assocs.*, 158 F.E.R.C. ¶ 61,105 (2017).

56. *Id.* at P 12.

57. *GDF Suez Energy Mktg. NA*, 158 F.E.R.C. ¶ 61,102 at P 1 (2017).

58. *Id.* at P 5.

59. *Id.*

60. *Id.* at P 6.

61. *Id.* at P 7.

62. *GDF Suez Energy Mktg. NA*, 158 F.E.R.C. ¶ 61,102 at P 15 (2017).

63. *Id.* at P 16.

violations of FPA section 222 and FERC's Anti-Manipulation Rule, as well as FERC's federal district court action to enforce such alleged violations.⁶⁴ Pursuant to the approved Stipulation and Consent Agreement, the Barclays Respondents neither admitted nor denied the allegations, agreed to pay a \$70 million civil penalty and to disgorge \$35 million.⁶⁵ Earlier in 2017, the federal district court granted defendant Ryan Smith's motion for judgment on the pleadings, and dismissed him from the case, holding that FERC's claims against Smith were time-barred by the applicable federal statute of limitations, 28 U.S.C. section 2462.⁶⁶

II. THE COMMODITY FUTURES TRADING COMMISSION

A. *Energy-Related Enforcement Cases*

1. In the Matter of Statoil ASA

On November 14, 2017, the CFTC issued an order filing and settling charges against Statoil ASA (Statoil) for attempted manipulation of the Argus Far East Index (Argus FEI), a published index of propane prices in the Far East region, in violation of Commodity Exchange Act (CEA) section 9(a)(2).⁶⁷ The order alleges that "from at least October through November 2011," Statoil attempted to manipulate the Argus FEI by executing physical propane purchases in the Far East with the intent to increase the Argus FEI and thereby benefit its physical and financial positions, including Statoil's New York Mercantile Exchange (NYMEX)-cleared "over-the-counter swaps that settled to the Argus FEI."⁶⁸ "[W]ithout admitting or denying [any of] the findings [or] conclusions" of the order, Statoil agreed to pay a \$4 million civil monetary penalty and to "cease and desist from violating" CEA section 9(a)(2).⁶⁹

According to the order, Statoil suffered major losses in its gas liquids throughout 2011 and subsequently changed its strategy for the winter to be more profitable.⁷⁰ Specifically, Statoil established physical and financial positions in the Far East that would benefit from an increase in the Argus FEI.⁷¹ That did not occur because of unanticipated propane market conditions.⁷² The order alleged that, hoping to avoid the additional losses and meet December customer demand, Statoil attempted to increase the Argus FEI by purchasing propane cargoes during

64. 16 U.S.C. § 824v; 18 C.F.R. § 1.c.2; FERC v. Barclays Bank, 2-13-cv-02093-TLN-DC (E.D. Cal. filed Oct. 19, 2013) [hereinafter the Federal Court Lawsuit]; *Barclays Bank PLC, Daniel Brin, Scott Connelly, Karen Levine*, 161 F.E.R.C. ¶ 61,147 (2017).

65. 161 F.E.R.C. ¶ 61,147 at P 10.

66. FERC v. Barclays Bank, 2-13-cv-02093-TLN-DC (E.D. Cal. Sept. 29, 2017).

67. See generally *In the Matter of Statoil ASA*, CFTC Docket No. 18-04 (Nov. 14, 2017). See also 7 U.S.C. § 13(a)(2) (2012).

68. *Statoil*, *supra* note 67, at 1-2.

69. *Id.* at 1, 6.

70. *Id.* at 2.

71. *Id.* at 2-3.

72. *Id.* at 3.

the November Argus FEI propane price-setting window.⁷³ The order asserts that Statoil's traders described their intent in contemporaneous communications.⁷⁴

The order acknowledges that Statoil never "purchase[d] more cargoes than [it] needed to meet its physical delivery obligations," but nonetheless it purchased propane cargo in so-called "bullets" to try to cause a price movement.⁷⁵ The order explains that "it was clear that these 'bullets' were being used to benefit Statoil's financial and physical propane positions in the Far East tied to the Argus FEI, which included its NYMEX-cleared swaps."⁷⁶ However, because there was a large volume of propane available in November 2011, Statoil's purchases did not move the market.⁷⁷

The CFTC found Statoil liable for attempted manipulation, which, under section 9(a)(2) of the CEA, "requires: (1) an intent to affect market price and (2) some overt act in furtherance of that intent."⁷⁸ The order concluded that Statoil met both requirements because of its traders' contemporaneous communications and Statoil's actual trading conduct in the Far East attempting to increase the "November Argus FEI and, consequently, the value of [Statoil's] NYMEX-cleared swaps."⁷⁹

2. In the Matter of Logista Advisors LLC

In this settlement order, which was entered into without the respondent admitting or denying the factual findings or conclusions of law, the CFTC imposed a fine of \$250,000 against Logista Advisors LLC (Logista), a crude oil trading firm that is a registered commodity trading advisor and commodity pool operator, for violating supervisory obligations under CFTC Regulation 166.3, 17 C.F.R. section 166.3, arising from alleged spoofing on a foreign futures exchange by one of its traders.⁸⁰ The order's non-adjudicated findings state that Logista: (1) lacked any procedures for the detection and deterrence of disruptive trading by its traders and agents; (2) "failed to perform its supervisory duties diligently to detect" spoofing by one of its traders, "even after Logista was informed of" spoofing by a foreign futures exchange; and (3) "lacked an adequate supervisory system sufficient to ensure that [its] personnel provided an appropriate response to inquiries from the exchange."⁸¹

The order found that "Logista lacked any written policies or procedures providing direction for its traders in implementing the firm's trading strategies" as well as no "policies or procedures to avoid disruptive trading."⁸² The order concludes that the trader who was primarily responsible for the firm's crude oil

73. *Statoil*, *supra* note 67, at 3.

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. *Statoil*, *supra* note 67, at 4 (citing *CFTC v. Paron Energy, Inc.*, 875 F. Supp. 2d 233, 250 (S.D.N.Y. 2012); *In re Hohenberg Bros. Co.*, CFTC No. 75-4, 1977 WL 13562, at *7 (Feb. 18, 1977)).

79. *Id.* at 4-5.

80. In the Matter of Logista Advisors, LLC, CFTC Docket No. 17-29 (Sept. 29, 2017).

81. *Id.*

82. *Id.* at 3.

futures trading was given inadequate training, direction, and supervision, which resulted in the employee, in his trading on a foreign futures exchange, repeatedly engaging in “spoofing.”⁸³ The order also finds that Logista provided inaccurate responses to the exchange’s inquiries, which rose to the level of a failure to supervise because the executive who provided the responses to the exchange did not examine the trading in question “for the date in question, even after the exchange provided specific examples of the spoofing conduct.”⁸⁴ Moreover, the order explains that no one at Logista ever asked the trader in question about his conduct or informed him that his conduct was under investigation by the exchange.⁸⁵

3. W Resources, LLC

In an order dated September 5, 2017, the CFTC required Dallas, Texas-based W Resources, LLC (W Resources) to pay a \$150,000 civil monetary penalty for acting as a Commodity Pool Operator (CPO) without registering with the CFTC, as required by CEA section 6m(1), and to cease and desist from further violating the CEA.⁸⁶ “W Resources solicited, accepted and/or received funds from investors on behalf of the W North Funds to purchase oil and gas assets, including non-operated working interests in oil drilling wells, and to trade commodity options to hedge its resulting financial exposure.”⁸⁷ “In order to hedge the W North Funds’ financial exposure related to anticipated future oil production volumes realized from the drilling wells . . . W Resources traded crude oil options on futures contracts on [NYMEX.]”⁸⁸ “W Resources ha[d] never been registered as a CPO, ha[d] never notified the National Futures Association that it is exempt from registration, and never sought no-action relief from the [CFTC.]”⁸⁹ In deciding the case, the CFTC reiterated that “[t]he registration requirement [under the CEA] does not contain a ‘state of mind’ limitation to liability,” and that “[w]hile fraud or misconduct may also be violations of the [CEA] . . . violations of [section] 6m alone are sufficient’ to warrant relief.”⁹⁰

4. In the Matter of Simon Posen

On June 2, 2017, the CFTC issued an order filing and settling charges against Simon Posen for engaging in spoofing transactions “with respect to [c]rude [o]il futures on the [NYMEX] and [g]old, [s]ilver, and [c]opper [f]utures [] traded on the Commodity Exchange, Inc. (‘COMEX’) market,” in violation of section 4c(a)(5)(C) of the CEA.⁹¹ While neither admitting nor denying the factual

83. *Id.*

84. *Id.*

85. *Logista Advisors*, *supra* note 80, at 3.

86. 7 U.S.C. § 6m(1) (2012); *In the matter of W Resources, LLC*, CFTC Docket No. 17-24 at 2 (Sept. 5, 2017).

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.* at 3 (quoting *CFTC v. Wilson*, 19 F. Supp. 3d 352, 360 (D. Mass. 2014), *aff’d*, 812 F.3d 98 (1st Cir. 2016)). *See also id.* (quoting *British Am. Commodity Options Corp.*, 560 F.2d 135, 142 (2d Cir. 1977)).

91. *In re Simon Posen*, CFTC Docket No. 17-20 at 2 (July 26, 2017); 7 U.S.C. § 6c(a)(5)(C) (2017).

allegations and findings of violations set forth in the order, Posen submitted a settlement offer which the CFTC accepted.⁹² The settlement includes a civil monetary penalty of \$635,000, plus post-judgment interest, and permanently bans Posen from engaging in trading activity on or subject to the rules of a registered entity.⁹³

“Posen [was] a manual ‘point and click’ trader who traded” in futures markets for crude oil, gold, silver and copper for his own account.⁹⁴ The order alleges that “during the period December 2011 through March 2015,” Posen would typically “enter hundreds of buy and sell orders” in any given day, with a focus on the futures products noted above.⁹⁵ The order alleges that Posen followed a pattern of placing one or more large “layered” orders, gradually increasing or decreasing prices “with the intent to cancel these orders before execution.”⁹⁶ Within seconds of placing these orders, Posen would also place smaller, “iceberg” orders (in which other market participants cannot see the size of the order) “on the opposite side of the market.”⁹⁷ Once the corresponding “‘iceberg order’ was filled,” Posen would then “cancel the . . . large[r] . . . layered order on the opposite side of the market before [that order was] filled.”⁹⁸

The order alleged that Posen engaged in this strategy on thousands of occasions between December 2011 and March 2015.⁹⁹ The order also alleged that Posen frequently made these trades “during off-peak hours, when the markets were less liquid, and [that he] would typically exit the market [each day] without holding onto any positions.”¹⁰⁰ Similarly, the order alleged that after engaging in the pattern of trading behavior described above, Posen would often carry out the same series of transactions in reverse, thus exiting the position he had created.¹⁰¹

The order found that Posen’s conduct, which included his entry of thousands of bids or offers with the intent to cancel those orders before execution, violated CEA section 4c(a)(5)(C).¹⁰² The order cited several district court cases in support of its finding, including *CFTC v. Oystacher*, which rejected a vagueness challenge to the CEA’s anti-spoofing provision and held that substantially identical allegations to those against Posen fell “within the Spoofing Statute’s defined prohibition,” and thus the statute provided reasonable notice to the defendant that his trading conduct was prohibited.¹⁰³

92. *Simon Posen*, *supra* note 91, at 3-4.

93. *Id.* at 5.

94. *Id.* at 2.

95. *Id.*

96. *Id.*

97. *Simon Posen*, *supra* note 91, at 2.

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. *Simon Posen*, *supra* note 91, at 3.

103. *Id.*; *CFTC v. Oystacher*, 203 F. Supp. 3d 934, 942-43 (N.D. Ill. 2016).

B. *Enforcement Advisories*

1. January 2017 Advisories

On January 19, 2017, the CFTC issued two Enforcement Advisories—one for individuals and one for companies—outlining factors that the CFTC’s Enforcement Division will consider in evaluating cooperation in a CFTC investigation or enforcement action.¹⁰⁴ Both advisories note that:

[t]he Division considers three broad policy issues in its assessment of whether cooperation was provided and the quality of that cooperation: (1) the value of the company’s cooperation to the Division’s investigation(s) and enforcement actions; (2) the value of the company’s cooperation to the Commission’s broader law enforcement interests; and (3) the balancing of the level of the company’s culpability and history of prior misconduct with the acceptance of responsibility, mitigation [and remediation].¹⁰⁵

Under the first category—the value of the cooperation to the investigation—four factors will be evaluated for both companies and individuals: whether the assistance was material, whether it was timely, the nature of the cooperation, and the quality of the cooperation.¹⁰⁶ With respect to the second category—the value of the cooperation to the CFTC’s broader law enforcement interests—for both individuals and companies, the Enforcement Division evaluates the importance of the investigations and actions, the resources the CFTC was able to conserve, and enhancement of the CFTC’s ability to detect and pursue other violations.¹⁰⁷ For companies only, the CFTC also considers “[t]he degree to which appropriate cooperation credit in the company’s particular instance encourages high-quality cooperation from other entities.”¹⁰⁸ Finally, with respect to the third broad category—the balancing of culpability and acceptance of responsibility—for both individuals and companies, the CFTC will evaluate the circumstances of the misconduct, prior misconduct, mitigation, and acceptance of responsibility.¹⁰⁹ For companies only, the CFTC will also consider the level of remediation.¹¹⁰ For individuals, the CFTC evaluates whether the individual would have the opportunity to commit future violations.¹¹¹

104. *Enforcement Advisory: Cooperation Factors in Enforcement Division Sanction Recommendations for Companies*, COMMODITY FUTURES TRADING COMM’N (Jan. 19, 2017), <http://www.cftc.gov/idc/groups/public/@Irenforcementactions/documents/legalpleading/enfadvisorycompanies011917.pdf> [hereinafter *Company Advisory*]; *Enforcement Advisory: Cooperation Factors in Enforcement Division Sanction Recommendations for Individuals*, COMMODITY FUTURES TRADING COMM’N (Jan. 19, 2017), <http://www.cftc.gov/idc/groups/public/@Irenforcementactions/documents/legalpleading/enfadvisoryindividuals011917.pdf> [hereinafter *Individual Advisory*].

105. *Company Advisory*, *supra* note 104, at 1; *Individual Advisory*, *supra* note 104, at 1.

106. *Company Advisory*, *supra* note 104, at 2-4; *Individual Advisory*, *supra* note 104, at 2-3.

107. *Company Advisory*, *supra* note 104, at 4; *Individual Advisory*, *supra* note 104, at 3.

108. *Company Advisory*, *supra* note 104, at 4.

109. *Id.* at 4-6; *Individual Advisory*, *supra* note 104, at 3-4.

110. *Company Advisory*, *supra* note 104, at 5-6.

111. *Individual Advisory*, *supra* note 104, at 4.

Both advisories also note that even when the entity under investigation satisfies some of the factors that would “warrant credit for cooperation, certain actions [] may limit or offset the credit a company might otherwise receive.”¹¹² Both advisories give examples of such “uncooperative conduct,” including, for example, “providing specious explanations for instances of misconduct that are uncovered.”¹¹³

2. September 2017 Enforcement Advisory

On September 25, 2017, the CFTC issued an additional advisory to provide further guidance and clarity regarding the earlier January advisories.¹¹⁴ The goal of the September 2017 Advisory is to “encourage companies and individuals to detect, report, and remediate wrongdoing, thus increasing voluntary compliance with the law.”¹¹⁵ Under the additional guidance provided in the September 2017 Advisory, the CFTC notes that any disclosure must have been made

prior to an imminent threat of exposure of the misconduct . . . within a reasonably prompt time after the company or individual becomes aware of the misconduct . . . [and] must include all relevant facts known to the company or individual at the time of the disclosure, including all relevant facts about the individuals involved in the misconduct.¹¹⁶

“To receive full credit under this self-reporting program, the company/individual must adhere to the terms of the Division’s January 2017 Advisories,” and the CFTC’s evaluation of whether a company timely and appropriately remediated flaws in compliance and control programs “[w]ill be fact and circumstance dependent.”¹¹⁷

With respect to the credit given to a company or individual, the advisory states that “[i]n all instances, the company or individual will be required to disgorge profits (and, where applicable, pay restitution) resulting from any violations.”¹¹⁸ Given satisfaction of this requirement, “[i]f a company or individual self-reports, fully cooperates, and remediates, the [Enforcement] Division will recommend . . . [the most] substantial reduction from the otherwise applicable civil monetary penalty.”¹¹⁹

112. Company Advisory, *supra* note 104, at 6.

113. *Id.* at 6-7; Individual Advisory, *supra* note 104, at 4-5.

114. See generally *Enforcement Advisory: Updated Advisory on Self Reporting and Full Cooperation*, COMMODITY FUTURES TRADING COMM’N (Sept. 25, 2017), <http://www.cftc.gov/idc/groups/public/@lrenforcementactions/documents/legalpleading/enfadvisoryselfreporting0917.pdf>.

115. *Id.* at 2.

116. *Id.* at 2-3.

117. *Id.* at 3.

118. *Updated Advisory*, *supra* note 114, at 3.

119. *Id.* at 2.

3. CFTC's Enforcement Director's Speech on Enforcement Advisories

In a September 25, 2017 speech at the NYU Institute for Corporate Governance & Finance, the Director of CFTC's Enforcement Division, James McDonald, discussed the three advisories and how the CFTC's Enforcement Division might rely on them going forward.¹²⁰ McDonald explained that the CFTC was hopeful that by “spelling out the substantial benefit, in the form of a significantly reduced penalty,” companies and individuals would be more motivated to self-report misconduct in a timely manner.¹²¹ He further emphasized that “disclosure must be truly voluntary,” that “the company must fully cooperate with the Division throughout the investigation,” and “the company must timely and appropriately remediate to ensure the misconduct doesn't happen again.”¹²² If those factors were satisfied, McDonald noted that the Enforcement Division would “clearly communicate with the company—at the outset—our expectations regarding self-reporting, cooperation, and remediation,” would “work with [a company or individual] on remediation,” and that a company or individual “can expect concrete benefits in return for your self-reporting, cooperation, and remediation.”¹²³

C. Energy-Related Private Action

1. Alan Harry, et al. v. Total Gas & Power North America, Inc., et al.

In a decision issued March 25, 2017, the United States District Court for the Southern District of New York granted the motion of Total Gas & Power North America, Inc., its affiliates, and other defendants to dismiss a putative class action filed by Alan Harry, Levante Capital, LLC, Public Utility District No. 1 of Clark County, Washington, and C&C Trading, LLC.¹²⁴ The class action alleged that the defendant violated the CEA, CFTC regulations, the Sherman Act, by manipulating prices for physical and financial natural gas contracts at four regional hubs through contracts tied to natural gas prices at the Henry Hub in Louisiana.¹²⁵

The plaintiffs brought four claims under the CEA and CFTC regulations and a fifth claim of manipulation under section 2 of the Sherman Act.¹²⁶ “The

120. See generally *Speech of James McDonald, Director of the Division of Enforcement Commodity Futures Trading Commission Regarding Perspectives on Enforcement: Self-Reporting and Cooperation at the CFTC*, COMMODITY FUTURES TRADING COMM'N (Sept. 25, 2017), <http://www.cftc.gov/PressRoom/Speeches/Testimony/opamcdonald092517>.

121. *Id.*

122. *Id.*

123. *Id.*

124. See generally *Harry v. Total Gas & Power N. Am.*, 244 F. Supp. 3d 402 (S.D.N.Y. 2017).

125. *Id.*

126. *Id.* at 406 (Count One alleged manipulation in violation of §§ 6(c)(3), 9(a), and 22(a) of the CEA, 7 U.S.C. §§ 9(3), 13(a), and 25(a), and CFTC Rule 180.2, 17 C.F.R. § 180.2. Count Two alleged manipulation by false reporting and fraud and deceit in violation of sections 6(c)(1) and 22 of the CEA, 7 U.S.C. §§ 9(1) and 25, and CFTC Rule 180.1(a), 17 C.F.R. § 180.1(a). Count Three alleged principal-agent liability under § 2(a)(1)(B) of the CEA, 7 U.S.C. § 2(a)(1)(B). Count Four alleged aiding and abetting by each defendant as to each other defendant in violation of § 22(a)(1) of the CEA, 7 U.S.C. § 25(a)(1); 15 U.S.C. § 2 (2004).

plaintiffs [sought] treble damages under under [section] 4 of the Clayton Act, 15 U.S.C. [section] 15, as well as punitive and actual damages, costs, and fees.”¹²⁷ The claims were based on findings by the CFTC and FERC that the defendants manipulated the natural gas monthly index at four regional delivery hubs from 2009 through 2012.¹²⁸ The plaintiffs sought to represent a class of individuals that either purchased or sold natural gas contracts at Henry Hub at prices impacted by the defendants’ alleged manipulation during the weeks the defendants allegedly attempted to manipulate natural gas prices at one or more of the four regional hubs.¹²⁹

The CEA requires plaintiffs to demonstrate “actual damages” and also to demonstrate a specific intent to cause artificial prices.¹³⁰ The Court found that the plaintiffs failed to plausibly allege actual damages or a specific intent to manipulate, and therefore dismissed counts one through four.¹³¹

To satisfy the antitrust standing requirements under the Sherman Act, the plaintiffs needed to plausibly allege that they both suffered an antitrust injury and were efficient enforcers of the antitrust laws.¹³² The Court found that the plaintiffs failed to plausibly allege an antitrust injury as the conduct took place at the four regional hubs, and any impact on the market at the Henry Hub was incidental and not intentional.¹³³ The Court explained that allowing plaintiffs at markets other than those directly manipulated by the defendants to sue would undermine the objectives of antitrust injury limits and duplicative recovery and vastly expand the pool of potential plaintiffs—the problems that the efficient enforcer concept addresses.¹³⁴ Furthermore, the Court found that the plaintiffs were not the most efficient enforcers in this case as there existed more direct victims who purchased natural gas at the regional hubs or purchased derivative instruments tied to the manipulated index prices.¹³⁵ The Court dismissed count five for both reasons.¹³⁶

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

1. Strengthening Anti-Retaliation Protections for Whistleblowers and Enhancing the Award Claims Review Process

On May 22, 2017, the CFTC adopted amendments to its regulations intended to strengthen anti-retaliation protections for whistleblowers and enhance the

127. *Id.* at 412.

128. *See generally* *In the Matter of Total Gas & Power N. Am.*, CFTC Docket No. 16-03 (Dec. 7, 2015); *see also Total Gas & Power N. Am.*, 155 F.E.R.C. ¶ 61,105 (2016).

129. *See generally Harry*, 244 F.Supp. 402.

130. *Id.* at 412-13 (quoting *In re LIBOR-based Fin. Instruments Antitrust Litig.*, 962 F. Supp. 2d 606, 620 (S.D.N.Y. 2013); 7 U.S.C. § 25(a)(1); *In re Amaranth Nat. Gas Commodities Litig.*, 730 F.3d 170, 173 (2d Cir. 2013)).

131. *See generally id.* at 417-19.

132. *Id.* at 419, 423 (citing *Gelboim v. Bank of Am.*, 823 F.3d 759, 778 (2d Cir. 2016)).

133. *Id.* at 419-22.

134. *Harry*, 244 F. Supp. 3d at 423.

135. *Id.* at 423.

136. *Id.*

award claims review process.¹³⁷ The amendments purport to “strengthen anti-retaliation protections for whistleblowers and add transparency to the [CFTC’s] process of deciding whistleblower award claims.”¹³⁸ The amendments make certain key changes or clarifications including, among other things, that the CFTC or the whistleblower may now bring an action against an employer for retaliation against a whistleblower.¹³⁹ The amendments also prohibit employers from impeding a would-be whistleblower “from communicating directly with [CFTC] staff about a possible violation of the [CEA], including by enforcing, or threatening to enforce, a confidentiality agreement or pre-dispute arbitration or similar agreement.”¹⁴⁰ The amended rules establish a claims review process which will utilize a Claims Review Staff, in place of the Whistleblower Award Determination Panel, to consider and issue a Preliminary Determination as to whether an award claim should be granted or denied.¹⁴¹ A whistleblower would then have an opportunity to request to view the record and may contest the Preliminary Determination before the CFTC issues a Final Determination.¹⁴² The amendments also make changes to other key areas, such as whistleblower eligibility requirements, and make clear that, with limited exceptions, a whistleblower may receive an award in a Covered Action, a Related Action, or both.¹⁴³ Finally, the amendments authorize the Whistleblower Office to handle facially ineligible award claims “that do not relate to a Notice of Covered Action, a final judgment in a Related Action, or a previously filed Form TCR [(Tip, Complaint or Referral)].”¹⁴⁴

E. The Department of Justice

1. Michael Coscia

The U.S. Court of Appeals for the Seventh Circuit in August 2017 affirmed the conviction of Michael Coscia for “spoofing” in the commodity futures markets in violation of CEA sections 4c(a)(5)(C) and 9(a)(2), and for criminal commodities fraud in violation of 18 U.S.C. [section] 1348(1).¹⁴⁵

137. Press Release, Commodity Futures Trading Comm’n, CFTC Strengthens Anti-Retaliation Protections for Whistleblowers (May 22, 2017), Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) section 748 amended the CEA by adding a new Section 23, titled “Commodity Whistleblower Incentives and Protection” and codified at 7 U.S.C. § 26 (“On August 25, 2011, the [CFTC] adopted Part 165 of its Regulations [(Whistleblower Rules)] to implement [se]ction 23 of the CEA”). *Fact Sheet: Strengthening Anti-Retaliation Protections for Whistleblowers and Enhancing the Award Claims Review Process*, COMMODITY FUTURES TRADING COMM’N (May 22, 2017), http://www.cftc.gov/idc/groups/public/@newsroom/documents/file/wbruleamend_factsheet052217.pdf [hereinafter *CTFC Fact Sheet*].

138. *CTFC Fact Sheet*, *supra* note 137, at 1.

139. 17 C.F.R. pt. 165, app. A (2017).

140. 17 C.F.R. § 165.19.

141. *Id.* §§ 165.7(f)(1), (g)(1).

142. *Id.* §§ 165.7(g)(2)–(h).

143. *Id.* § 165.5(a)(3).

144. *Id.* § 165.7(e)(1).

145. *United States v. Coscia*, 866 F.3d 782 (7th Cir. 2017), *reh’g and suggestion for reh’g en banc denied* (Sept. 5, 2017).

The Court held that the anti-spoofing statute satisfies constitutional standards of fair notice as applied to the defendant's conduct, the evidence was sufficient to support conviction, the district court's jury instruction on the standard for materiality for the criminal fraud statute was not erroneous, and that, in determining the sentence, the district court did not err in applying Coscia's gains as a reasonable measure of the market's loss from the alleged violations.¹⁴⁶

The Court found that establishing a claim of spoofing requires proof that a trader intended at the time an order was entered into the market to cancel the order before it could be executed.¹⁴⁷ The Court rejected Coscia's argument that the prohibition of spoofing is unconstitutionally vague because CEA section 6c(a)(5)(C) requires its definition to be established from sources outside the statute's text and there are no such sources.¹⁴⁸ The Court found that the statute's parenthetical "bidding or offering with the intent to cancel the bid or offer before execution" immediately following the term "spoofing" describes what spoofing is and provides adequate notice of the proscribed conduct as applied in this case because Coscia's conduct fell clearly within its ambit.¹⁴⁹

The Court held that the cumulative evidence of the trading pattern, its aberrant nature relative to regular market orders and executions, and Coscia's commissioning of a computer program designed to pump or deflate the market through the use of large orders that were specifically designed to be cancelled if they ever risked actually being filled allowed a rational trier of fact to conclude that Coscia had the requisite "intent to cancel before execution" to establish spoofing.¹⁵⁰ With respect to the trading pattern, the decision describes an example in which the defendant placed a small sell order at a price above the current market price and then placed large orders on the buy side at steadily increasing prices that also were above the market.¹⁵¹ The Court stated that the "buy orders created the illusion of market movement, swelling the perceived value" of the futures contract "by fostering the illusion of [increased] demand" at the higher prices.¹⁵² Coscia's resting sell order was executed when prices reached that level, which the Court described as a "price equilibrium that he created."¹⁵³ The Court found, however, that the defendant's trading algorithm cancelled his large buy orders before the market reached them.¹⁵⁴

The Court rejected Coscia's argument that his orders were not fraudulent as a matter of law under 18 U.S.C. [section] 1348(1), because they "were fully executable and subject to legitimate market risk."¹⁵⁵ The Court held that Coscia's trading was "a scheme to pump and deflate the market" by using large orders to inflate or deflate prices, while intending to cancel the orders before they were

146. *Id.* at 791, 796-97, 799.

147. *Id.* at 794-95.

148. *Id.* at 791, 794.

149. *Id.* at 791.

150. *Coscia*, 866 F.3d at 796.

151. *Id.* at 788.

152. *Id.*

153. *Id.*

154. *Id.* at 788-89.

155. *Coscia*, 866 F.3d at 797.

filled.¹⁵⁶ The Court explained that “[h]is scheme was deceitful because, at the time he placed the large orders, he intended to cancel the orders” and create “the *illusion* of market movement.”¹⁵⁷

The appellate court did not find the district court’s jury instruction relating to materiality under the fraud statute to be reversible error.¹⁵⁸ The instruction provided that the alleged wrongdoing had to be “capable of influencing the decision of the person to whom it is addressed.”¹⁵⁹ Coscia argued that the proper standard for materiality is whether the alleged scheme was “‘reasonably calculated to deceive persons of ordinary prudence’ and that ‘there is a substantial likelihood that a reasonable investor [or trader] would consider [the deceptive conduct] important in making a decision.’”¹⁶⁰ The appellate court found that Coscia’s conduct clearly “was material even under his own formulation of materiality.”¹⁶¹ The Court also dismissed an argument that the cancellation of orders is not fraudulent because other market participants cannot reasonably expect any given order to remain in the market for a particular period of time.¹⁶² The Court opined that fraud may be inferred from spoofing because market participants do not reasonably expect “a complex, concerted effort not only to pump the market but also to create a totally non-existent market.”¹⁶³ The Court held that Coscia’s design to evade execution differentiated his orders from legitimate “fill-or-kill orders” and “iceberg orders,” which are intended to be executed under certain conditions.¹⁶⁴

Lastly, the Court found it permissible for the district court to use Coscia’s gain of \$1.4 million as the measure of market harm in determining the sentence, because the complexity and nature of the crime made it almost impossible to ascertain the exact losses of other market participants caused by his trading.¹⁶⁵

III. THE PIPELINE & HAZARDOUS MATERIALS SAFETY ADMINISTRATION

The PHMSA initiated 229 pipeline safety enforcement actions in 2017, an increase over the 164 cases the agency initiated in 2016.¹⁶⁶ The PHMSA also proposed \$2,893,700 in total civil penalties in 2017, substantially less than the \$8,460,900 million proposed in 2016 and the lowest total since 2005.¹⁶⁷ The

156. *Id.*

157. *Id.* (emphasis in original).

158. *Id.* at 799.

159. *Id.* at 798.

160. *Coscia*, 866 F.3d at 799.

161. *Id.* at 799-800.

162. *Id.* at 800.

163. *Id.*

164. *Id.*

165. *Coscia*, 866 F.3d at 801.

166. PIPELINE & HAZARDOUS MATERIALS SAFETY ADMIN., SUMMARY OF ENFORCEMENT ACTIVITY - NATIONWIDE (2018), <https://primis.phmsa.dot.gov/comm/reports/enforce/EnfHome.html?nocache=7890>.

167. PIPELINE & HAZARDOUS MATERIALS SAFETY ADMIN., SUMMARY OF CASES INVOLVING CIVIL PENALTIES (2018), https://primis.phmsa.dot.gov/comm/reports/enforce/CivilPenalty_opid_0.html?nocache=519.

PHMSA issued fifty-two enforcement orders and decisions in 2017, down from the seventy-five such orders issued in 2016 and the lowest number since 2009.¹⁶⁸

A. Pipeline Safety: Operator Qualification, Cost Recovery, Accident and Incident Notification, and Other Pipeline Safety Changes Final Rule

On January 23, 2017, the PHMSA issued a final rule adopting a number of amendments to the federal pipeline safety regulations and addressing sections 9 and 13 of the Pipeline Safety, Regulatory Certainty, and Job Creation Act of 2011 (2011 Act).¹⁶⁹ The final rule responds to issues raised by recent pipeline accidents, addresses recommendations of the National Transportation Safety Board, and responds to comments submitted on PHMSA's 2015 notice of proposed rulemaking.¹⁷⁰ The rule includes the following new or modified provisions:

- Immediate notice of an accident or incident to the National Response Center must be made no later than one hour after “confirmed discovery,” defined as the time “when it can be reasonably determined, based on information available to the operator at the time[] that a reportable event has occurred, even if only based on a preliminary evaluation.” An operator must revise or confirm the initial notification within forty-eight hours, and provide “an estimate of the amount of product released, an estimate of the number of fatalities and injuries, if any,” and provide all other significant facts known by the operator that are relevant to the cause of the incident or accident or the extent of the damage.¹⁷¹
- Operators must provide the PHMSA with sixty days’ advance notice of certain flow reversals in a mainline pipeline, unless the system is designed for bi-directional flow or the reversal would last for no more than thirty days, as well as of product changes.¹⁷²
- An operator proposing a qualifying project must provide PHMSA with the design specifications, construction plans and procedures, project schedule, and related materials at least 120 days before commencing route surveys, material manufacturing, offsite facility fabrications, construction equipment move-in activities, onsite or offsite fabrications, personnel support facility construction, and any offsite or onsite facility construction.¹⁷³

168. PIPELINE & HAZARDOUS MATERIALS SAFETY ADMIN., SUMMARY OF ENFORCEMENT ACTIONS (2018), https://primis.phmsa.dot.gov/comm/reports/enforce/Actions_opid_0.html?nocache=3981#_TP_1_tab_2.

169. Final Rule, *Pipeline Safety: Operator Qualification, Cost Recovery, Accident and Incident Notification, and Other Pipeline Safety Changes*, 82 Fed. Reg. 7,972 (2017) (to be codified at 49 C.F.R. pts. 190-92, 195, 199) [hereinafter *Final Rule*].

170. See generally *Pipeline Safety: Operator Qualification, Cost Recovery, Accident and Incident Notification, and Other Pipeline Safety Proposed Changes*, 80 Fed. Reg. 39,916 (2017) (to be codified at 49 C.F.R. pts 190-92, 195, 199).

171. *Final Rule*, supra note 169, at 7,976, 7,978.

172. *Id.* at 7,973.

173. *Id.* at 7,996.

- An operator must submit a renewal application for expiring special permits at least 180 days before the permit expires. The existing special permit remains in effect until final administrative action occurs on the renewal application.¹⁷⁴
- Operators using “direct assessment . . . to evaluate . . . stress corrosion cracking . . . must develop . . . a Stress Corrosion Cracking Direct Assessment plan that meets all requirements and recommendations of NACE SP 0204-2008 . . . and that implements . . . [steps for] pre-assessment, indirect inspection, detailed examination and post-assessment.”¹⁷⁵
- The final rule establishes procedures for requesting protection of confidential commercial information submitted to the PHMSA.¹⁷⁶
- The rule incorporates by reference Appendix B of the American Petroleum Institute’s Standard 1104, *Welding of Pipelines and Related Facilities*, which addresses in-service welding procedures and welder qualifications.¹⁷⁷
- Farm taps are exempt from Gas Distribution Integrity Management requirements, inspection of pressure regulating/limiting devices, relief devices, and automatic shutoff devices is required every three years. Rupture disks are exempt from the inspection requirement. This provision of the final rule applies to any service line directly connected to a production, gathering, or transmission pipeline that is not operated as part of a distribution system.¹⁷⁸

B. Legal Challenges to and Partial Stay of Pipeline Safety: Underground Storage Facilities for Natural Gas Interim Final Rule

In 2016, the PHMSA issued an Interim Final Rule adopting safety standards for underground natural gas storage facilities, which became effective on January 18, 2017.¹⁷⁹ The State of Texas, American Gas Association (AGA) and Interstate Natural Gas Association of America (INGAA) filed separate petitions for review of the interim final rule.¹⁸⁰ The petition of the State of Texas (No. 17-60189) is pending at the U.S. Court of Appeals for the Fifth Circuit.¹⁸¹ The petitions of AGA and INGAA (Nos. 17-1095 and 17-1096) were consolidated and subsequently dismissed by the D.C. Circuit Court of Appeals on June 27, 2017.¹⁸²

174. *Id.* at 7,984, 7,995.

175. *Id.* at 8,000.

176. *Final Rule*, *supra* note 169, at 7,990.

177. *Id.* at 7,990-91.

178. *Id.* at 7,984-85.

179. Interim Final Rule, *Pipeline Safety: Safety of Underground Natural Gas Storage Facilities*, 81 Fed. Reg. 91,860, 91,861 (2016) (to be codified at 18 C.F.R. pts 191-92).

180. *Texas v. Tran*, 81 Fed. Reg. 91,860 (2017), *appeal docketed*, No. 17-60189 (5th Cir. Mar. 17, 2017); *Am. Gas Ass’n v. Dep’t of Transp.*, TRAN-81FR91680 (2017), *appeal docketed*, No. 17-1095 (D.C. Cir. Mar. 3, 2017); *Interstate Nat. Gas Ass’n v. Dep’t of Transp.*, TRAN-81FR91860, *appeal docketed*, No. 17-1095 (D.C. Cir. Mar. 3, 2017).

181. *See generally Tran*, 81 Fed. Reg. 91,860.

182. *Am. Gas Ass’n*, TRAN-81FR91680; *Interstate Nat. Gas Ass’n*, TRAN-81FR91860.

The PHMSA issued a notice announcing a partial stay of enforcement of the interim final rule on June 20, 2017.¹⁸³ The notice announced that the PHMSA intended to address the petition in a final rule by January 2018.¹⁸⁴ The notice states that until the final rule is issued and for one year after its publication, the PHMSA would not initiate enforcement for failure to comply with certain non-mandatory provisions, but would enforce other compliance deadlines, including the requirement that operators develop policies and procedures implementing other mandatory provisions by January 18, 2018.¹⁸⁵ The notice states that the PHMSA reserves the authority to issue an emergency order or corrective action order if an underground gas storage facility is found to be an imminent hazard or if facility operations would be hazardous to life, property or the environment.¹⁸⁶

C. ExxonMobil Pipeline Co. v. U.S. Department of Transportation

On August 14, 2017, the U.S. Court of Appeals for the Fifth Circuit vacated most of a PHMSA enforcement decision regarding ExxonMobil Pipeline Company's Pegasus crude oil pipeline which ruptured in March 2013 near Mayflower, Arkansas.¹⁸⁷ The PHMSA had found that "ExxonMobil violated several pipeline safety [and integrity] regulations" leading to the rupture, and assessed \$2.6 million in civil penalties and imposed a compliance order requiring specific corrective actions.¹⁸⁸ The Court found that ExxonMobil appropriately "considered" risk factors as required by the unambiguous language of section 195.452(e)(1) of PHMSA's regulations.¹⁸⁹ The Court rejected the PHMSA's position that ExxonMobil's construction of low-frequency electric resistance welded pipe precluded a conclusion that the line was not susceptible to seam failure, stating that the law is not clear how operators should determine if pipelines are likely to suffer seam failure in the first place.¹⁹⁰ The Court also refused to defer to PHMSA because the agency failed to provide ExxonMobil "fair notice" of how the agency interpreted the regulation.¹⁹¹

The Court vacated all but one of the counts against ExxonMobil, along with the associated civil penalties and compliance order.¹⁹² On the remaining count, the Court remanded the civil penalty for reconsideration because PHMSA had determined that a regulatory violation was a causal factor in the pipeline release when it was not related to the pipeline spill.¹⁹³

183. Pipeline Safety: Safety of Underground Natural Gas Storage Facilities; Petition for Reconsideration, 82 Fed. Reg. 28,224 (2017).

184. *Id.*

185. *Id.* at 28,225.

186. *Id.*

187. *ExxonMobil Pipeline Co. v. Dep't of Transp.*, 867 F.3d 564 (5th Cir. 2017).

188. *Id.* at 568.

189. *Id.* at 574.

190. *Id.* at 574-78.

191. *Id.* at 578-80.

192. *ExxonMobil*, 867 F.3d at 584.

193. *Id.*

IV. THE DEPARTMENT OF ENERGY

A. *Enforcement Actions*

The DOE's Office of Enterprise Assessments (EA) assesses and "report[s] on whether national security material and information assets are appropriately protected," and has authority to institute enforcement actions to address noncompliance.¹⁹⁴ In 2017, the DOE EA's Office of Enforcement entered into one settlement agreement under 10 C.F.R. part 824, *Procedural Rules for the Assessment of Civil Penalties for Classified Information Security Violations*.¹⁹⁵

In August 2017, DOE entered into a settlement agreement with UT-Battelle, LLC (UTB), the entity responsible for the management and operation of the DOE's Oak Ridge National Laboratory, to resolve an incident covering a five-year period of time in which presentations containing classified information were processed on unapproved information systems, stored on unapproved servers and media, transmitted by unauthorized means, and visually presented to uncleared individuals.¹⁹⁶ UTB discovered the issue on March 28, 2016 and reported it in the Safeguards and Security Information Management System, but subsequently engaged in an "ineffective initial inquiry process and cyber sanitization activities."¹⁹⁷

During its investigation, the Office of Enforcement found several deficiencies in UTB's processes regarding the appropriate review and marking of classified information.¹⁹⁸ Rather than issuing an enforcement action, the Office of Enforcement agreed to allow UTB to fully implement a host of corrective actions and pay a monetary remedy of \$120,000.¹⁹⁹

The DOE also monitors and enforces compliance with the Worker Safety and Health Program regulations at 10 C.F.R. part 851.²⁰⁰ The regulations contain directives and technical standards to provide safe and healthful workplaces for DOE contractors and their employees at DOE sites.²⁰¹ The regulations also provide procedures for investigating violations.²⁰² The DOE engaged in a series of investigations in 2017, and resolved one matter through a consent order.²⁰³

194. Office of Enterprise Assessments, *Mission*, DEP'T OF ENERGY, <https://energy.gov/ea/mission>.

195. Letter from Steven C. Simonson, Director, Office of Enterprise Assessments, to Dr. Thomas Zacharia, Laboratory Director, UT-Battelle, LLC (Aug. 2, 2017).

196. *In re UT-Battelle, LLC*, Settlement Agreement SSA-2017-01 (Dep't of Energy Aug. 2, 2017), <https://energy.gov/sites/prod/files/2017/08/f35/UT-Battelle%20Signed%20Settlement%20Agreement.pdf>.

197. *Id.* at 2.

198. *Id.*

199. *Id.* at 4.

200. 10 C.F.R. pt. 851.

201. *Chronic Beryllium Disease Prevention Program; Worker Safety and Health Program*, 71 Fed. Reg. 6,858, 6,865 (Feb. 9, 2006), *corrected*, 71 Fed. Reg. 36,661 (June 28, 2006) (implementing 10 C.F.R. §§ 851.1 – 851.45), *amended*, 80 Fed. Reg. 69,564 (Nov. 10, 2015).

202. 10 C.F.R. § 851.1 (2017).

203. *In re Consolidated Nuclear Security, LLC*, Consent Order, Docket No. WCO-2017-01 (Dep't of Energy Apr. 28, 2017), <https://energy.gov/sites/prod/files/2017/05/>.

In April 2017, the DOE and the National Nuclear Security Administration (NNSA) executed a consent order with Consolidated Nuclear Security, LLC (CNS), resolving an investigation of potential noncompliance with the worker safety and health requirements of 10 C.F.R. part 851.391.²⁰⁴ The DOE initiated the investigation after CNS, using the DOE's Noncompliance Tracking System, documented an employee fall incident at NNSA's Y-12 National Security Complex and Pantex Plant.²⁰⁵ DOE Office of Enforcement and NNSA elected to resolve any potential noncompliance by CNS through execution of the consent order.²⁰⁶ In lieu of an enforcement action with the proposed imposition of a civil penalty, DOE, NNSA, and CNS agreed that CNS would pay a \$45,000 monetary remedy and undertake several corrective actions, including developing and finalizing a site-wide corrective actions plan and providing training.²⁰⁷ The DOE cited CNS's investigation of the event and subsequent corrective actions as support for the settlement.²⁰⁸

In accordance with the Energy Policy and Conservation Act of 1975 (EPCA) and its implementing regulations, the DOE monitors and enforces compliance with energy and water conservation standards for certain covered consumer products.²⁰⁹ Under this authority, the DOE is authorized to assess civil penalties for violations of the EPCA and to seek judicial action to prohibit further distribution of noncompliant products.²¹⁰

The DOE engaged in a series of EPCA enforcement actions in 2017, including the following matters which resulted in compromise agreements:

1. Guangdong Chigo Air-Conditioning Co., Ltd.

In June 2017, the DOE accepted a compromise agreement with Guangdong Chigo Air-Conditioning Co., Ltd. that resolved a civil penalty case for the sale of central air conditioning heat pumps that did not meet the applicable energy conservation standard.²¹¹ The compromise agreement reflected a civil penalty of \$735,400.²¹²

2. ABB, Inc.

In February 2017, the DOE adopted a compromise agreement with ABB, Inc. that resolved a civil penalty case for the sale of liquid-immersed distribution

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.*

208. *See generally* Consolidated Nuclear Security, *supra* note 203.

209. *See generally* Energy Policy and Conservation Act of 1975, 42 U.S.C. §§ 6291-6309; 10 C.F.R. pts. 430-31 (2017).

210. 42 U.S.C. §§ 6302-04 (2014).

211. *In the Matter of Guangdong Chigo Air-Conditioning Co., Ltd.*, No. 2016-SE-16002 (Dep't of Energy June 7, 2017), https://energy.gov/sites/prod/files/2017/07/f35/2016-SE-16002_Guangdong_Order.pdf.

212. *Id.* at 1.

transformers that failed to meet the applicable energy conservation standard.²¹³ The compromise agreement reflected a civil penalty of \$86,300.²¹⁴

V. THE DEPARTMENT OF JUSTICE

A. *Energy-Related Investigations*

1. Peabody Energy Corp.

In September 2017, the U.S. Bankruptcy Court for the Eastern District of Missouri (Schermer, J.) approved a settlement resolving claims filed by the federal government on behalf of five states and seven Native American tribes against Peabody Energy Corp. and affiliated Chapter 11 debtor Gold Fields Mining, LLC.²¹⁵ The claims involve environmental liabilities at thirteen Superfund sites contaminated by heavy metal mining and production.²¹⁶ The pollution became Peabody's responsibility when it acquired ownership of Gold Fields Mining in the 1990s.²¹⁷ Under the \$43 million settlement, Peabody will pay \$20 million and its insurers will contribute another \$12 million to be shared among the governments.²¹⁸ Additionally, a tax payment setoff of \$11.2 million will be retained by the federal government, while \$2 million will be placed in a liquidating trust to be used exclusively for one of the sites in Kansas.²¹⁹

2. Richard Paul Underwood and Colin P. Purcell

In August 2017, Richard Paul Underwood of Fort Lauderdale, Florida, and Colin P. Purcell of Simpsonville, Kentucky, were charged with conspiracy to commit wire fraud and mail fraud for their alleged roles in a \$15 million oil investment Ponzi scheme.²²⁰ According to the indictment, from 2012 to 2016, Underwood, Purcell, and others claimed to investors that they operated companies selling investments in oil and natural gas projects in Texas, Oklahoma, and Kansas.²²¹ They used fake identities when communicating with investors, provided false information about their investment experience and the companies, and concealed the fact that the companies were actually managed by convicted

213. *In the Matters of ABB, Inc.*, Nos. 2016-SE-47001 (Dep't of Energy Feb. 15, 2017), https://energy.gov/sites/prod/files/2017/04/f34/2016-SE-47001_2016-SE-47002_ABB_Order.pdf.

214. *Id.* at 1.

215. Order Granting Motion to Request the Court's Approval of Environmental Settlement Agreement, Docket No. 4:16-BK-4259 (Bankr. E.D. Mo. Sept. 5, 2017); Alex Wolf, *\$43M Peabody Pollution Cleanup Deal with US Gets Court OK*, LAW360 (Sept. 5, 2017), <https://www.law360.com/articles/960590>.

216. Wolf, *supra* note 215.

217. *Id.*

218. *Id.*; *see also* United States' Motion for Approval of Environmental Settlement Agreement, Docket No. 4:16-BK-4259 (Bankr. E.D. Mo. Sept. 5, 2017).

219. Wolf, *supra* note 215.

220. Indictment, Docket No. 4:17-cr-00197-LGW-GRS-1 (S.D. Ga. Jul. 5, 2017); Press Release, Dep't of Justice, 2 Defendants Plead Guilty, 2 More Arrested in \$15 Million Oil Investment Fraud Scheme (Aug. 11, 2017).

221. Indictment, *supra* note 220; Press Release, Dep't of Justice, *supra* note 220.

felons who had previously been involved in other investment scams.²²² The defendants obtained over \$15 million from investors, which they used for their own personal benefit.²²³ The indictment and subsequent arrests of Underwood and Purcell followed the guilty pleas of David R. Greenlee of Seguin, Texas, and David A. Stewart of Portland, Kentucky, who pled guilty in federal court for their roles in the same scheme.²²⁴

3. Kolawole Akanni Aluko and Olajide Omokore

In July 2017, the Department of Justice announced the filing of a civil complaint seeking the forfeiture and recovery of approximately \$144 million in proceeds of foreign corruption offenses laundered in and through the United States.²²⁵ According to the complaint, Nigerian businessmen Kolawole Akanni Aluko and Olajide Omokore paid bribes to Diezani Alison-Madueke, Nigeria's former Minister for Petroleum Resources.²²⁶ This included the purchase of real estate in London for Alison-Madueke, as well as renovating and furnishing the homes with millions of dollars' worth of furniture, artwork, and other luxury items from two Houston-area furniture stores.²²⁷ Alison-Madueke, who oversaw the state-owned oil company, directed lucrative oil contracts to two shell companies created by Aluko and Omokore.²²⁸ The complaint also alleges that despite failing to meet their obligations under the contracts, the companies were permitted to lift and sell over \$1.5 billion worth of Nigerian crude oil, which they then laundered into and through the U.S. via various shell companies and intermediaries.²²⁹

4. Rolls-Royce PLC

In November 2017, charges were unsealed against two former Rolls-Royce executives, a former Rolls-Royce employee, a former intermediary for Rolls-Royce, Kazakhstan, and an executive of an international engineering consulting firm for their alleged participation in a scheme to bribe foreign government officials for the benefit of Rolls Royce—namely, to secure a contract to supply equipment and services to a gas pipeline running from Central Asia to China.²³⁰ Petros Contoguris was charged by an indictment filed in the Southern District of Ohio with one count of conspiracy to violate the Foreign Corrupt Practices Act (FCPA), one count of conspiracy to launder money, seven counts of violating the

222. Press Release, Dep't of Justice, *supra* note 220.

223. *Id.*

224. *Id.*; *see also* Docket No. 4:17-cr-00203-LGW-GRS-1 (S.D. Ga. Nov. 11, 2017); Docket No. 4:17-cr-00213-LGW-GRS-1 (S.D. Ga. Dec. 19, 2017).

225. Press Release, Dep't of Justice, Department of Justice Seeks to Recover Over \$100 Million Obtained from Corruption in the Nigerian Oil Industry (July 14, 2017).

226. *Id.*; *see also* Complaint, Docket No. 4:17-cv-02166 (S.D. Tex. July 14, 2017).

227. Press Release, Dep't of Justice, *supra* note 225.

228. *Id.*

229. *Id.*; *see also* Complaint, *supra* note 226.

230. Indictment, Docket No. 2:17-cr-002233-EAS (S.D. Ohio Oct. 12, 2017); Press Release, Dep't of Justice, Five Individuals Charged in Foreign Bribery Scheme Involving Rolls-Royce Plc and its U.S. Subsidiary (Nov. 7, 2017).

FCPA, and ten counts of money laundering.²³¹ James Finley pleaded guilty in the Southern District of Ohio (Sargus, J.) to one count of conspiracy to violate the FCPA and one count of violating the FCPA.²³² Aloysius Johannes Jozef Zuurhout, Andreas Kohler, and Keith Barnett each pled guilty to one count of conspiracy to violate the FCPA.²³³ According to the indictment, the individuals involved allegedly conspired to bribe foreign officials in exchange for steering business to Rolls-Royce Energy Systems, Inc., a U.S.-based subsidiary of Rolls-Royce PLC, which is a United Kingdom-based manufacturer and distributor of power systems within the aerospace, defense, marine, and energy sectors.²³⁴ The individuals allegedly paid kickbacks to international engineering consulting firm Technical Advisor, which claimed to provide independent advice to Asia Gas Pipeline LLP (AGP).²³⁵ AGP ultimately awarded Rolls-Royce a contract worth \$145 million, and the commission was then passed on to Technical Advisor employees with the knowledge that it would be shared with a foreign official.²³⁶ According to three of the individuals who have already pled guilty, the conspiracy involving the use of Rolls-Royce commission payments as bribes to foreign officials goes as far back as 1999.²³⁷

5. Chi Ping Patrick Ho and Cheikh Gadio

In November 2017, Chi Ping Patrick Ho and Cheikh Gadio were charged with violations of the FCPA, international money laundering, and conspiracy.²³⁸ The complaint was filed in the Southern District of New York.²³⁹ Ho and Gadio allegedly conspired to bribe African government officials in Chad and Uganda on behalf of a Chinese energy conglomerate.²⁴⁰ Ho and Gadio are alleged to have wired almost a million dollars in bribes to the President of Chad and the Uganda Foreign Minister in an attempt to generate business.²⁴¹ Ho and Gadio attempted to disguise these bribes as donations.²⁴²

6. Raheem J. Brennerman

In July 2017, a federal grand jury indicted Raheem J. Brennerman for conspiracy to commit bank and wire fraud, bank fraud, wire fraud, and visa

231. Indictment, *supra* note 230; Press Release, Dep't of Justice, *supra* note 230.

232. Docket No. 2:17-cr-00160-EAS-1 (S.D. Ohio Dec. 22 2017); Press Release, Dep't of Justice, *supra* note 230.

233. Press Release, Dep't of Justice, *supra* note 230.

234. Indictment, *supra* note 230.

235. Press Release, Dep't of Justice, *supra* note 230.

236. *Id.*

237. *Id.*

238. Press Release, Dep't of Justice, Head of Organization Backed by Chinese Energy Conglomerate, and Former Foreign Minister of Senegal, Charged with Bribing High-Level African Officials (Nov. 2017).

239. *Id.*

240. *Id.*

241. *Id.*

242. *Id.*

fraud.²⁴³ The indictment was filed in the Southern District of New York.²⁴⁴ The indictment alleges that since 2011, Brennerman orchestrated a scheme to defraud financial institutions through his operation of an oil and gas company called the Blacksands Pacific Group, Inc. (Blacksands).²⁴⁵ Brennerman allegedly sought financing for his business deals by falsely representing that Blacksands had significant worldwide involvement in the exploration and development of oil and gas reserves, had \$1 billion in long-term assets, and employed approximately 100 employees.²⁴⁶ The indictment alleges that Brennerman knew that Blacksands lacked any long-term assets, had few employees, and minimal involvement in the oil and gas industry.²⁴⁷ Brennerman used significant amounts of the money to pay his own personal expenses, including trips, fine jewelry, and high-end designer clothing.²⁴⁸ In total, Brennerman is alleged to have attempted to defraud financial institutions of more than \$300 million.²⁴⁹

7. James VanBlaricum

In September 2017, the U.S. District Court for the Northern District of Texas (Means, J.) sentenced James VanBlaricum to eighty-four months in federal prison for participating in a Ponzi oil and gas fraud scheme.²⁵⁰ The court also ordered VanBlaricum to pay \$32,222,291 in restitution.²⁵¹ VanBlaricum, who operated Signal Oil and Gas Company (SOG) and Texas Energy Management (TEM), pleaded guilty to one count of mail fraud for his role in the fraud scheme that took place from January 2007 to August 2016.²⁵² Using sales agents, VanBlaricum raised millions of dollars from investors by selling securities in the form of joint ventures in programs offered by SOG and TEM.²⁵³ VanBlaricum deceived these investors and potential investors by telling investors that they would earn an “assured” rate of return on their initial investment.²⁵⁴ VanBlaricum then deposited investors’ funds into accounts he controlled and spent the money on vacations, international travel, and automobiles.²⁵⁵

243. Press Release, Dep’t of Justice, Chairman and CEO of Purported Oil and Gas Company Charged in Manhattan Federal Court with \$300 Million International Fraud Scheme (June 2017).

244. *Id.*

245. *Id.*

246. *Id.*

247. *Id.*

248. Press Release, Dep’t of Justice, *supra* note 243.

249. *Id.*

250. Press Release, Dep’t of Justice, Colleyville Businessman Sentenced to 84 Months in Federal Prison for Role in a Ponzi Oil and Gas Fraud Scheme (Sept. 5, 2017).

251. *Id.*

252. *Id.*

253. *Id.*

254. *Id.*

255. Press Release, Dep’t of Justice, *supra* note 250.

8. Kristopher Brian Anderson

In September 2017, Kristopher Brian Anderson pleaded guilty to one count of mail fraud in the U.S. District Court for the Northern District of Texas.²⁵⁶ Anderson faces a maximum sentence of up to twenty years in federal prison, a \$250,000 fine, and a possible order of restitution.²⁵⁷ Anderson was the corporate controller for Pivotal Petroleum Services (“Pivotal”), a privately held Texas corporation that provided administrative services to oil and gas companies.²⁵⁸ It was alleged that Anderson created Empery Resources Consultants, LLC (Empery) for the purpose of submitting fictitious claims for “landmen” services provided to Pivotal.²⁵⁹ Anderson then created false and fraudulent invoices in the name of Empery and submitted these invoices to Pivotal to pay.²⁶⁰ It was alleged that Anderson submitted 142 fake invoices and received \$1,389,991 in fraudulent payments.²⁶¹

256. Press Release, Dep’t of Justice, Dallas Man Admits to Over \$1.3 Million Oil and Gas Embezzlement Scheme (Sept. 29, 2017).

257. *Id.*

258. *Id.*

259. *Id.*

260. *Id.*

261. Press Release, Dep’t of Justice, *supra* note 256.

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