

SHOULD AFFILIATED MARKETERS BE TREATED AS INSIDERS?

Kim G. Bruno*

I. INTRODUCTION

The Securities and Exchange Commission (SEC) and the Federal Energy Regulatory Commission (FERC or Commission) prohibit transmission of "inside" information,¹ but in very different ways.² The SEC prohibits "insiders" from acting on non-public information that will affect the price of a security. In contrast, the FERC requires that pipelines adopt standards of conduct which prohibit persons with access to certain information from transmitting it to those that can act on it. In the latter instance, the information is received from a pipeline. Whereas in the SEC context, "insiders" receive the inside information either as a fiduciary or through a fiduciary.

The FERC prohibits the use of inside information. However, the FERC narrowly focuses its prohibition on natural gas company marketing affiliates gaining and profiting from inside information. The FERC requires that if the natural gas company provides such inside information to its marketing affiliate, it must disclose the information contemporaneously to other market participants.³

In contrast to the SEC's active monitoring to detect the use of inside information, the FERC has, for the most part, adopted a reactive enforcement policy. Complainants may either informally request that the Enforcement Hotline investigate allegations of trading natural gas capacity on inside information or complainants may file a complaint with the FERC.⁴

This article reviews the basis for the SEC's and the FERC's divergent

* Mr. Bruno is a trial attorney at the Federal Energy Regulatory Commission. The views expressed herein are those of the author and do not necessarily reflect the views of the Federal Energy Regulatory Commission. The author thanks Barry S. Clark, Professor of Economics, University of Wisconsin - La Crosse, for his comments.

1. Although the focus of this paper is inside information regarding gas markets, the principles appear to apply to the electric transmission market.

2. "Inside information" means the possession of material, non-public information. See *In re Cady, Roberts & Co.*, 1961 WL 3743 (S.E.C. Nov. 8, 1961).

3. Standard E states that a pipeline "may not disclose to its marketing affiliate any information the pipeline receives from a nonaffiliated shipper or potential nonaffiliated shipper." Standard E, 18 C.F.R. § 161.3(e) (2000).

4. On March 31, 1999, the FERC revised its complaint procedures so that complainants are encouraged to seek consensual resolutions, and so that complaints may be handled in a timely and fair manner. Final Rule, Order No. 602, *Complaint Procedures*, [Regs. Preambles] III F.E.R.C. STATS. & REGS. ¶ 31,071, 64 Fed. Reg. 17,087 (1999); *order on Reh'g and Clarification*, Order No. 602-A, *Complaint Procedures*, [Regs. Preambles] III F.E.R.C. STATS. & REGS. ¶ 31,076 (1999), 64 Fed. Reg. 43,600 (1999).

approaches to remedying the unfair use of inside information, and concludes that the FERC consider adopting the SEC's regulatory approach. The SEC's proactive methods of detecting and addressing market abuses may be more effective and should be considered by the FERC in adopting a more proactive market monitoring role.

II. MARKETS IN GENERAL

As Senator Phil Gramm once quipped, "[w]hat the SEC needs is the equivalent to the Hippocratic Oath: First, do no harm. . . . Let technology lead, and regulation will follow."⁵

Although Senator Gramm's quip appears to be self-evident, it misses at least two salient points: who is harmed and what is the harm? Because markets generate winners and losers, some participants may be harmed. Market forces alone will not always prevent or correct conduct that is harmful to competitors and the public. For example, if a market participant garners sufficient market power to collect monopoly profits, the market alone may not be able to restore competition because governmental action is required. Indeed, because markets cannot operate without legally enforceable property rights, the exercise of governmental power is essential to ensure a properly functioning market.⁶

III. CAPITAL MARKETS

As is well known, the SEC's oversight of the capital markets focuses on making accurate information readily and widely available. The SEC requires that companies disclose extensive information, contemporaneously and periodically, including when special events occur, such as an initial stock offering to the public.⁷ The SEC also requires that major shareholders, participants in proxy contests, and directors and officers disclose certain information.⁸ The SEC prohibits manipulation of stock prices by requiring that persons with "inside information" either "disclose or abstain" from trading on their knowledge.⁹ A person is considered an "in-

5. Scot J. Paltrow, *Beat Cop: As Huge Changes Roil the Market, Some Ask: Where Is the SEC?*, WALL ST. J., Oct. 11, 1999, at A1.

6. "Our popular mythology makes the state the enemy of the free market. But without the state the free market would not exist. . . . The state, far from being an enemy of the market system, is both the market's product and its perpetrator." GARRY WILLS, *A NECESSARY EVIL: A HISTORY OF AMERICAN DISTRUST OF GOVERNMENT* 303 (1999). Some might argue that markets have existed even when governmental power sought to suppress them. Although small markets may exist despite unfavorable governmental action, national and regional markets cannot effectively operate without the market participants having access to legal remedies.

7. 17 C.F.R. §§ 210.1-210.12. (2000).

8. 17 C.F.R. §§ 229.10-229.1016, 240-240.36. (2000).

9. Securities and Exchange Act of 1934 § 9, 15 U.S.C. § 78i (1994); Rule 10b-5, 17 C.F.R. § 240.10b-5 (2000). The SEC also bans other practices that manipulate stock prices, e.g., prohibiting persons from creating fictitious trades, Securities and Exchange Act of 1934 § 9(a)(2), 15 U.S.C. § 78i(a)(2) (1994), and trading practices that are designed to assure that a stock trades at a certain price such as prearranged trades with others, Rule 10b-7, 17 C.F.R. § 240.10b-7 (2000).

sider" if he or she is under a duty to refrain from making use of non-public material¹⁰ to gain trading profits.¹¹ For example, directors, officers, other employees, controlling shareholders, accountants, lawyers, and other professionals who are expected by the company to keep information confidential are "insiders."¹² Moreover, sources (tippees) who knew or should have known that divulging or acting on the information would breach his or her duty are also "insiders."¹³ If persons breach their duty to "disclose or abstain," the SEC may require disgorgement of profits gained from the breach,¹⁴ impose a civil penalty,¹⁵ or may refer the matter to the Department of Justice for criminal prosecution.¹⁶

Although some commentators argue that the securities laws are intended to make "stock prices accurate,"¹⁷ the SEC articulated its concern "to restore and maintain investor confidence in the capital markets."¹⁸ In other words, the investing public must have trust that the capital markets are "fair" and equitable or the public may not invest.

IV. ECONOMIC PRINCIPLES

There appears to be at least two principles supporting the SEC's rules. The first is grounded in traditional economic theory and the second is grounded in the ethical principle of fairness.¹⁹ Economic theories hold that for competition to occur all agents in a market must possess "perfect" information (other assumptions include perfect mobility of resources, a large number of small buyers and sellers, and a homogeneous product). Thus, all the conclusions that economists derive about the market's ability

10. Materiality means that the reasonable investor would, with substantial likelihood, view the information as significantly altering the total mix of available information. See *Basic, Inc. v. Levinson*, 485 U.S. 224, 231-32 (1988) (citing *TSC Indus. v. Northway, Inc.*, 426 U.S. 438 (1976)).

11. See also *Dirks v. SEC*, 463 U.S. 646, 653-54 (1983).

12. But compare the role of financial analysts that also act as merchant bankers. A financial analyst researches the financial capabilities of a company and provides impartial advice concerning whether to "buy," "hold," or "sell" a company's securities. A merchant banker is consulted, concerning the viability or prudence of the deal, during a major financial event such as a merger. These individuals may or may not be "insiders" because they may not owe a fiduciary duty. However, when these roles are combined, there may be many potential conflicts between the analyst's impartiality and the merchant banker's desire to complete the transaction. See generally Anita Raghavan, *A Role That's Hard to Police*, WALL ST. J., March 25, 1997, at A1.

13. See also *Chiarella v. United States*, 445 U.S. 222 (1980). The possession of nonpublic, confidential market information does not result in a corresponding duty to publicly disclose that information or to abstain from trading on the basis of such select knowledge. But rather, the duty to "disclose or abstain" arises only from a relationship of trust and confidence either between the parties to a market transaction or between the trading party and the source of that information.

14. *SEC v. MacDonald*, 699 F.2d 47, 52-55 (1983).

15. Securities Act of 1933 §§ 12-13, 15 U.S.C. §§ 77k-78r (1994).

16. Securities Act of 1933 § 32, 15 U.S.C. § 78ff (1994).

17. See also Marcel Kahan, *Securities Laws and the Social Costs of "Inaccurate" Stock Prices*, 41 DUKE L.J. 977, 985 (1992).

18. See also *In the matter of Certain Trading in the Common Stock of Faberge, Inc.*, 1973 WL 12512 at *4 (S.E.C. May 25, 1973).

19. See also *The Supreme Court, 1982 Term, Insider Trading*, 97 HARV. L. REV. 286, 289 (1983).

to produce an efficient allocation of resources hinge on perfect information. If such information is lacking, the market can be criticized for being both inefficient and unfair.²⁰

Another problem created by "asymmetric" information is "moral hazard." In the "insider trading" context, some economists argue that the government should not prevent insider trades, because the trade sends information to the market about the value of a specific commodity. However, the more transparent the information and the more available the information at *de minimis* cost, the more likely that the market will operate efficiently.

A. *The SEC's Reactive Sources*

According to a recent study, approximately 64% of the SEC's investigations begin with a complaint, referral, or inquiry to the SEC.²¹ These complaints or referrals may come from insiders, investors, the securities community (securities professionals, attorneys, accountants, trade associations, and anonymous complainants), or other federal and state agencies. According to the study, reactive sources tend to over report small acts and miss acts that are less vulnerable to disclosure. In addition, Shapiro argues that such disclosures usually "must await the disaffection of a loyal conspirator," and thus are untimely.²²

B. *The SEC's Proactive Approach*

According to the study, approximately 50% of the SEC's investigations are initiated by the SEC's staff.²³ Such investigations may begin with surveillance of public information, or with routine inspections or audits. Staff surveillance includes monitoring market price information, public disclosures, and news reports. It was calculated that 40% of the SEC's surveillance cases come from monitoring price data, trading volumes, financial news, and reports of broker-dealer behavior.²⁴ In contrast, 57% of the SEC's investigations that begin from inspections are generated from registrant filings and 22% from on-site inspections. Although few filers would confess to misdeeds, analysis of filings by the SEC's staff may disclose concerns that warrant additional review or information. For example, recomputing filed financial information may disclose financial difficulties that may not be apparent from the filings.

20. See also John B. McArthur, *Anti-trust in the New [De]regulated Natural Gas Industry*, 18 ENERGY L.J. 1, 86-93 (1997). McArthur argues that the FERC should focus on ensuring that complete and accurate information is provided by natural gas transmission companies.

21. SUSAN P. SHAPIRO, *WAYWARD CAPITALISTS: TARGET OF THE SECURITIES AND EXCHANGE COMMISSION* 47 (1984).

22. *Id.* at 56.

23. SHAPIRO, *supra* note 21, at 57. Shapiro explains the sum of the proactive and reactive sources exceed 100% because some investigations are mobilized by both sources.

24. *Id.* at 59.

V. NATURAL GAS MARKETS

The FERC regulates natural gas companies and electric transmission companies under the Natural Gas Act (NGA) and the Federal Power Act (FPA), respectively.²⁵ Section 4 of the NGA prohibits natural gas companies from charging unjust and unreasonable rates²⁶ and from making or granting "any undue preference or advantage to any person."²⁷ In 1988, in response to complaints from unaffiliated marketers that natural gas transportation companies were giving affiliated marketers "inside" information, the FERC promulgated rules designed to prohibit companies from giving their marketing affiliates preferential access to information or pipeline services.²⁸ If a transmission company provides such information to an affiliate, the FERC requires that the pipeline must contemporaneously disclose such information to all market participants.²⁹

In Order No. 497³⁰ and Order No. 566,³¹ the FERC found that although natural gas markets have become more competitive, natural gas pipeline companies (pipelines) continue to have an incentive to offer their affiliated natural gas marketers preferences in matters related to transportation of natural gas.³² Thus, the FERC has required that pipelines adopt and comply with standards of conduct.

25. Natural Gas Act, 15 U.S.C. §§ 717-717z (1994); Natural Gas Policy Act of 1978, 15 U.S.C. §§ 3301-3432 (1994); and Federal Power Act, 16 U.S.C. §§ 824-828 (1994).

26. Section 4(a) of the Natural Gas Act, 15 U.S.C. § 717c(a).

27. Section 4(b)(1) of the Natural Gas Act, 15 U.S.C. § 717c(b)(1).

28. Order No. 497, *Inquiry into Alleged Anticompetitive Practices Related to Marketing Affiliates of Interstate Pipelines*, [Regs. Preambles 1986-1990] III F.E.R.C. STATS. & REGS. ¶ 30,820, 53 Fed. Reg. 22,139 (1988); *order on reh'g*, Order No. 497-A, [Regs. Preambles 1986-1990] III F.E.R.C. STATS. & REGS. ¶ 30,868, 54 Fed. Reg. 52,781 (1989); *order extending sunset date*, Order No. 497-B, [Regs. Preambles 1986-1990] III F.E.R.C. STATS. & REGS. ¶ 30,908, 55 Fed. Reg. 53,291 (1990); *order extending sunset date and amending final rule*, Order No. 497-C, [Regs. Preambles 1991-1996] III F.E.R.C. STATS. & REGS. ¶ 30,934, 57 Fed. Reg. 9 (1992), *reh'g denied*, 58 F.E.R.C. ¶ 61,139 (1992), 57 Fed. Reg. 5815 (1992); *Tenneco Gas v. FERC*, 969 F.2d 1187 (D.C. Cir. 1992) (affirmed in part and remanded in part); *order on remand and extending sunset date*, Order No. 497-D, [Regs. Preambles 1991-1996] III F.E.R.C. STATS. & REGS. ¶ 30,958 (1992), 57 Fed. Reg. 58,978 (1992); *order on reh'g and extending sunset date*, Order No. 497-E, [Regs. Preambles 1991-1996] III F.E.R.C. STATS. & REGS. ¶ 30,987, 59 Fed. Reg. 243 (1994); *order denying reh'g and granting clarification*, Order No. 497-F, 66 F.E.R.C. ¶ 61,347, 59 Fed. Reg. 15,336 (1994); and *order extending sunset date*, Order No. 497-G, [Regs. Preambles 1991-1996] III F.E.R.C. STATS. & REGS. ¶ 30,996, 59 Fed. Reg. 32,884 (1994).

29. The FERC issued similar rules and regulations concerning electric transmission companies. Order 889, *Open Access Same-Time Information System (Formerly Real-Time Information Networks) and Standards of Conduct*, [Regs. Preambles 1991-1996] III F.E.R.C. ¶ 31,035, 61 Fed. Reg. 21,737 (1996), *order on reh'g*, Order No. 889-A, III F.E.R.C. STATS. & REGS. ¶ 31,049, 62 Fed. Reg. 12,484 (1997); *reh'g denied*, Order No. 889-B, 81 F.E.R.C. ¶ 61,253, 62 Fed. Reg. 64,715 (1997).

30. *Tenneco Gas v. FERC*, 969 F.2d 1187, 1194 (D.C. Cir. 1992).

31. Order No. 566, *Standards of Conduct and Reporting Requirements for Transportation and Affiliate Transactions*, [Regs. Preambles 1991-1996] III F.E.R.C. STATS. & REGS. ¶ 30,997, 59 Fed. Reg. 32,885 (1994); *order on reh'g*, Order No. 566-A, [Regs. Preambles 1991-1996] III F.E.R.C. STATS. & REGS. ¶ 31,002, 59 Fed. Reg. 52,896 (1994); Order No. 566-B, *order on reh'g*, 69 F.E.R.C. ¶ 61,334, 59 Fed. Reg. 65,707 (1994).

32. *Tenneco*, 969 F.2d at 1194. See also COMMENTS OF THE UNITED STATES DEPARTMENT OF JUSTICE IN RESPONSE TO THE NOTICE OF INQUIRY, Docket No. RM87-5, (Dec. 29, 1986) at 6-7.

The standards of conduct incorporate "structural" and "behavioral" means to prevent natural gas pipeline companies from preferring their affiliates. First, the standards of conduct require structural separation "to the maximum extent practicable" between a pipeline's "operating employees"³³ and its marketing affiliate's operating employees.³⁴ As the D.C. Circuit recognized in *Tenneco Gas v. FERC*:

a shared employee who "receive[s]" information from a nonaffiliated shipper will, by definition, divulge that information to the marketing affiliate since the employee is herself working for the affiliate. The relevant question is thus not whether a shared employee who receives critical information will disclose it to the affiliate, but whether that shared employee will in fact "receive[]" such information in the first place, or, alternatively, how the pipeline intends to keep information supplied by nonaffiliated shippers from reaching a shared employee.³⁵

For example, the FERC prohibits a pipeline company from "cycling" operating employees with its marketing affiliates, thus effectively sharing operating employees and the information they possess with the pipeline company's marketing affiliates.³⁶

Although urged to do so,³⁷ the FERC has rejected "the more radical '[s]tructural' remedies of divorcement and divestiture" and stated that "structural remedies that could impede the ability of affiliated marketers to compete may reduce the choices available to buyers and sellers of gas for moving gas in the marketplace."³⁸ The FERC warned that "[s]uch structural remedies should be adopted only where they are shown to be necessary to prevent more seriously anticompetitive practices. . . . However, the Commission reserves the right to consider and impose such remedies as divorcement and divestiture in specific cases where the circumstances demonstrate they are required."³⁹

Second, the FERC requires that pipelines adhere to certain behavioral standards. For example, a gas pipeline "may not disclose to its marketing affiliate any information the pipeline receives from a non-affiliated

33. The FERC defined an "operating employee" as an individual who has day-to-day duties and responsibilities for planning, directing, organizing, or carrying out gas-related operations, including gas transportation, gas sales or gas marketing activities. Examples of operating employees include any member of the board of directors, officers, managers, supervisors, regulatory and technical personnel with duties involving day-to-day gas purchasing, marketing, sales, transportation, operations, dispatching, storage, or related activities. See also *order on reh'g and extending sunset date*, Order No. 497-E, [Regs Preambles 1991-1996] III F.E.R.C. STATS. & REGS. ¶ 30,987, 30,996, 59 Fed. Reg. 243 (1994).

34. Standard G, 18 C.F.R. § 161.3(g) (2000).

35. *Tenneco*, 969 F.2d at 1208.

36. *KN Interstate Gas Transmission Co.*, 77 F.E.R.C. ¶ 61,309, 62,413 (1996), *aff'd*, 80 F.E.R.C. ¶ 61,212 (1997).

37. See also COMMENTS OF THE U.S. DEPARTMENT OF JUSTICE, Docket No. RM95-8-000, (August 7, 1995) and COMMENTS OF THE BUREAU OF ECONOMICS OF THE FEDERAL TRADE COMMISSION, Docket No. RM95-8-000 (Aug. 7, 1995).

38. Order No. 497, *Inquiry into Alleged Anticompetitive Practices Related to Marketing Affiliates of Interstate Pipelines*, [Regs. Preambles 1986-1990] III F.E.R.C. STATS. & REGS. ¶ 30,820, 31,129, 53 Fed. Reg. 22,139 (1988).

39. *Id.*

shipper or potential non-affiliated shipper,”⁴⁰ and “[t]o the extent it [the pipeline] provides to a marketing affiliate information related to transportation of natural gas, it must provide that information contemporaneously to all potential shippers, affiliated and nonaffiliated, on its system.”⁴¹ The FERC also prohibits pipelines from granting preferences in the application of their tariffs or other services,⁴² including providing transportation discounts.⁴³ The FERC regulations require that a pipeline disclose information concerning available capacity on its electronic bulletin board⁴⁴ and at its Internet website,⁴⁵ and file with the FERC information concerning capacity⁴⁶ and discounted transportation transactions on their pipeline.⁴⁷ Finally, the FERC requires that gas pipelines identify their marketing affiliates at the pipeline’s Internet sites.⁴⁸

A. *The FERC’s Reactive Enforcement*

The FERC generally relies on a reactive approach to enforce its inside information standards of conduct. Complainants may either “formally” file a complaint under Rule 206 of the Commission’s Rules of Practice and Procedure or “informally” complain to the Enforcement Hotline.⁴⁹ For example, the FERC acted swiftly in response to a complaint filed by Amoco Production Company concerning allegations of violations of a pipeline’s standards of conduct.⁵⁰

In *Amoco*,⁵¹ on March 25, 1997, the FERC ordered an audit team comprised of attorneys, accountants, and technical staff to explore the factual bases of the complaint and the pipeline’s response. The FERC

40. However, disclosure of information to a marketing affiliate is acceptable upon the voluntary and written consent of the non-affiliated shipper or potential non-affiliated shipper. *See generally Southern Natural Gas Co.*, 71 F.E.R.C. ¶ 61,295 (1995); *Ozark Gas Transmission System*, 67 F.E.R.C. ¶ 61,381 (1994) and *Algonquin Gas Transmission Co.*, 58 F.E.R.C. ¶ 61,140 (1992).

41. 18 C.F.R. § 161.3(f) (2000). In Order 497-A, the FERC stated that a pipeline should limit communications with affiliates to information regarding specific transportation requests. However, general information provided by the pipeline in response to an affiliate’s routine request must be contemporaneously disclosed to all potential shippers. Order No. 497-A, *Inquiry into Alleged Anticompetitive Practices Related to Marketing Affiliates of Interstate Pipelines*, [Regs. Preambles 1986-1990] III F.E.R.C. STATS. & REGS. ¶ 30,868, 31,597, 54 Fed. Reg. 10,684 (1988). *See also Southern Natural Gas Company*, 70 F.E.R.C. ¶ 61,129, 61,348 (1995) and *Algonquin Gas Transmission Company*, 58 F.E.R.C. ¶ 61,140, 61,442 (1992).

42. 18 C.F.R. § 161.3(a)-(d) (2000).

43. 18 C.F.R. § 161.3(h) (2000).

44. Sections 284.13(b)(1) (available “firm” capacity) and 284.13(b)(2) (available “interruptible” capacity), 18 C.F.R. §§ 284.12(a)(1)-(4) (2000).

45. Order No. 587-C, *Standards for Business Practices of Interstate Natural Gas Pipelines*, [Regs. Preambles] III F.E.R.C. STATS. & REGS. ¶ 31,050, 62 Fed. Reg. 10,684 (1997).

46. 18 C.F.R. § 284.12 (2000).

47. 18 C.F.R. § 284.13(e)(5) (2000).

48. Order No. 599, *Reporting Interstate Natural Gas Pipeline Marketing Affiliates on the Internet*, III F.E.R.C. STATS. & REGS. ¶ 31,064, 63 Fed. Reg. 43,075 (1998).

49. 18 C.F.R. § 385.206 (2000).

50. *Amoco Production Co. v. Natural Gas Pipeline Co. of America*, 78 F.E.R.C. ¶ 61,313 (1997).

51. *Id.*

adopted eleven of the audit team's seventeen proposed findings of violations. They concluded, among other things, that the pipeline had violated the Commission's marketing affiliate rules. Specifically, the FERC found that: (1) the pipeline had failed to separate its marketing affiliate employees from its pipeline employees (Standard G), (2) the pipeline provided non-affiliated shipper and potential shipper information to its marketing affiliates (Standard E), (3) the pipeline failed to contemporaneously disclose information provided to its marketing affiliates to all shippers and potential shippers (Standard F), (4) the pipeline failed to give equal access to information regarding the pipeline's transportation capacity and the availability of transportation services,⁵² and (5) it violated its tariff by not evaluating bids for transportation capacity as provided in its tariff.⁵³ Under section 504(b)(6)(E) of the Natural Gas Policy Act of 1978 (NGPA), the Commission, in addition to other remedial action, assessed civil penalties for the violations of the marketing affiliate rules.⁵⁴

VI. INJURY OR HARM

The FERC's efforts to enforce the behavioral standards in the marketing affiliate rules may be more difficult than necessary. Some administrative efforts to enforce the standards have been thwarted by a perceived requirement that an element of a standards violation first requires a finding that the violation harmed competitors. For example, in 1992, the Commission set for hearing, among other issues, whether a gas pipeline company's 1988 assignment of gas purchase contracts to its marketing affiliate, which in turn sold the gas to another marketing affiliate, violated Standard of Conduct F.⁵⁵ Standard F, at the time of the assignment, stated that "to the extent [the pipeline] provides information related to transportation of natural gas and gas sales and marketing to a marketing affiliate, it must do so contemporaneously to all potential shippers, affiliated and nonaffiliated, on its system."⁵⁶

The FERC Enforcement argued that the assignment to the pipeline company's marketing affiliates provided the company's marketing affiliates with information related to transportation because the assignment included: (1) information on the gas supply contracts; (2) information that the gas pipeline company used in gathering the assigned gas; and (3) information relating to the timing of the assignment and the notification to the producers of the assignment.

The gas pipeline company countered that the assignment did not contain "transportation" information, because the gas pipeline company provided "transaction specific" information which is exempt from Standard

52. 18 C.F.R. § 284.8(b) (2000).

53. *Amoco Production Co. v. Natural Gas Pipeline Co.*, 82 F.E.R.C. ¶ 61,038, 61,156 (1998).

54. *Id.* at 61,172.

55. *Northwest Pipeline Corp.*, 63 F.E.R.C. ¶ 63,010 (1992).

56. 18 C.F.R. §161.3(f) (1989).

F.⁵⁷ Moreover, the gas pipeline company argued that in order for it to violate the NGA, the FERC Enforcement must prove that the gas pipeline company's actions resulted in competitive harm.

The Administrative Law Judge (ALJ) agreed with the gas pipeline company. The ALJ noted that the NGA only prohibited gas pipeline companies from granting "undue preferences" and that not all preferences are "undue."⁵⁸ The ALJ found that if the assignments granted a preference to the gas pipeline's affiliates, such a preference was not undue because assignments had dubious value and did not result in a competitive harm.⁵⁹

The FERC affirmed the ALJ's decision.⁶⁰ The FERC did not accept the FERC Enforcement's argument that the pipeline company "gave [an] unfair advantage to its marketing affiliates in providing information about available gas supplies only to those affiliates. . . ." ⁶¹ However, in addressing the violation, the FERC concluded that the pipeline had not provided its marketing affiliates an undue preference, because the assignments failed to harm any market participants. Thus, the FERC may have added an additional requirement to a finding that an inside information violation occurred, i.e., did the gas pipeline provide its marketing affiliate information that resulted in a "competitive harm?"⁶²

The FERC may have used an alternative analysis to determine whether a violation occurred. Assuming that the gas pipeline company transferred confidential information (Standard E information) to its mar-

57. The ALJ quoted Order No. 497-A's definition of "transaction-specific information:"
[I]nformation regarding the affiliate's transportation request . . . necessary to process the affiliate's request or to provide the requested transportation service. . . . [P]ipeline X would not have to disclose the information transmitted to the marketing affiliate to perfect the transportation request or complete the transportation transaction.

Order No. 497-A, *Inquiry into Alleged Anticompetitive Practices Related to Marketing Affiliates of Interstate Pipelines*, [Regs. Preambles 1986-1990] III F.E.R.C. STATS. & REGS. ¶ 30,868, 31,596-97, 63 F.E.R.C. ¶ 63,010, 65,047-48.

58. 63 F.E.R.C. ¶ 63,010, at 65,043-45.

59. In *Tenneco*, the court stated:

The Commission appears to believe that any advantage a pipeline gives its marketing affiliate is improper. . . . But advantages a pipeline gives its affiliate are improper only to the extent that they flow from the pipeline's anti-competitive market power. Otherwise vertical integration produces permissible efficiencies that 'cannot by themselves be considered uses of monopoly power'. [citations omitted] As it stands, therefore, because standard (f) covers sales and marketing information, it may well reflect a remedy improperly disproportionate to the identified ailment, pipeline's market power over transportation. [citations omitted].

Tenneco Gas v. FERC, 969 F.2d 1187, 1201 (D.C. Cir. 1992). Thus, the court questioned whether Standard F should apply to marketing and sales information. The *Tenneco* court, however, did not question whether a gas pipeline company providing non-public transportation information to its marketing affiliate constitutes an undue preference.

60. *Northwest Pipeline Corp.*, 67 F.E.R.C. ¶ 61,025 (1994).

61. *Id.* at 61,082.

62. Indeed, the Fifth Circuit agreed with the ALJ and the Commission that, "[o]nce the Commission shows that discrimination exists, the pipeline has the burden of showing that the discrimination was not undue." [citation omitted] *Transcontinental Gas Pipe Line Corp., v. FERC*, 998 F.2d 1313, 1321-22 (5th Cir. 1993).

keting affiliate without its customers' approval, the FERC could have concluded that such a transfer violated the pipeline's duty to its customers to keep confidential information confidential. Accordingly, because the pipeline company has misappropriated confidential customer information, it has granted an undue preference. The burden should then shift to the pipeline company to show that such a transfer did not competitively harm its customers.

A. Misappropriation of confidential information as an undue preference

As discussed above, in securities law possession of nonpublic, confidential information does not give rise to a duty to disclose or abstain. Such a duty is only created in a specific relationship of trust and confidence between the parties.⁶³ Moreover, whether a particular disclosure violates the duty depends on the purpose of the disclosure. However, if a person misappropriates non-public information in breach of a fiduciary duty and trades on that information to his or her own advantage, such a person has violated the securities laws.⁶⁴

The FERC's Standard E may be viewed as creating a fiduciary obligation on behalf of gas pipeline companies to keep non-public, non-affiliated shipper information confidential. Persons providing contractual information to pipeline companies expect that their information will remain non-public unless the parties agree to make it public or if after providing adequate due process, the FERC orders that such information be made public.⁶⁵ In any event, gas market participants trust that non-public information should remain confidential. Thus, if a gas pipeline releases non-public information to its marketing affiliate in violation of Standard E, it has also violated its fiduciary obligation to its customer. Conversely, if the marketing affiliate obtains a commercial advantage by the receipt of such information, the gas pipeline has violated Standard E.

Standard F may be argued as Standard E's twin sibling. If the transportation information is released, it must be done contemporaneously. If the gas pipeline violates Standard F and receives a commercial advantage, it has also violated its fiduciary obligation to its customer. Accordingly, it is not necessary to identify any specific "competitive harm" in order to establish a violation. That is, a pipeline unduly discriminates against the non-affiliated shipper or potential shipper if the pipeline violates its fiduci-

63. A fiduciary duty may exist not simply because a person "acquired nonpublic corporate information, but rather that they have entered into a special confidential relationship in the conduct of the business of the enterprise and are given access to information solely for corporate purposes." *United States v. Reed*, 601 F. Supp. 685, 698 (S.D.N.Y. 1985), *rev'd on other grounds*, 773 F.2d 477 (2d Cir. 1985), *quoted in Dirks v. SEC*, 463 U.S. 646, 655 n.14 (1983).

64. *SEC v. Materia*, 745 F.2d 197, 203 (2d Cir. 1984). *See also SEC v. Texas Gulf Sulphur Co.*, 401 F.2d 833 (2d Cir. 1968).

65. A fiduciary obligation would not apply where a non-affiliated shipper or potential non-affiliated shipper voluntarily consents to the disclosure in writing. *See also Garden Banks Gas Pipeline, L.L.C.*, 89 F.E.R.C. ¶ 61,066 (1999); and *Mississippi Canyon Pipeline, L.L.C.*, 88 F.E.R.C. ¶ 61,089 (1999).

ary obligation to its customer. If the pipeline's violation also created a quantifiable competitive harm, then the harm may be taken into account in designing a remedy.

VII. REMEDIES

There are at least two remedies for violations of the FERC's "inside information" rules: (1) the FERC may assess a civil penalty under the NGPA of \$5,000 per day until the violation ceases,⁶⁶ or (2) the FERC may order a refund of the unjust enrichment from the illegal activity.⁶⁷

With regard to these remedies, each is problematic in redressing a pipeline's breach of the FERC's standards of conduct regarding inside information. Because the FERC possesses civil penalty authority only for violations of the NGPA and not for violations of the NGA,⁶⁸ and the *Tenneco* court declined to rule on the issue on ripeness grounds,⁶⁹ it is uncertain whether a civil penalty for a violation of the standards of conduct would survive judicial review.⁷⁰

With regard to requiring insiders to divulge inside information as required by Standard F, this remedy has a host of practical problems. Would the pipeline only disclose time sensitive information, e.g., recent contractual arrangements, or would the pipeline be required to divulge less time sensitive but commercially valuable information, e.g., concerning operational bottlenecks on the pipeline's system? Finally, requiring that the pipeline disgorge profits gained by sharing inside information may also have practical problems. For example, shared inside information may have ripple effects where the employee may share his or her inside information with other marketers that then capitalize on the information to the detriment of other non-affiliated marketers, making it difficult to accurately determine the extent of the unjust enrichment. Moreover, if the insider only shares commercially valuable "general" system information, will there be a causation problem linking the inside information to the profits gained?

A. Proactive Enforcement

One effective means of enforcement may be developing more effective proactive enforcement tools.⁷¹ The FERC's surveillance of the gas and

66. 18 C.F.R. § 250.16(e) (2000).

67. *Coastal Oil & Gas Corp. v. FERC*, 782 F.2d 1249, 1253 (5th Cir. 1986).

68. *Southern Union Gas Co. v. FERC*, 725 F.2d 99, 102 (10th Cir. 1984).

69. *Tenneco Gas v. FERC*, 969 F.2d 1187, 1210-11 (D.C. Cir. 1992).

70. In *Amoco*, the Commission ordered Natural to pay \$4,420,000 of the proposed civil penalty and have the remaining \$4,420,000 civil penalty be suspended for two years or file any factual or legal arguments that it believes may justify reduction or remission by the Commission of the civil penalty imposed by the Commission. Natural did not contest the validity of the civil penalty and instead timely paid \$4,420,000. *Amoco Production Co. v. Natural Gas Pipeline Co. of America*, 82 F.E.R.C. ¶ 61,038, 61,172 (1998).

71. On November 25, 1997, the FERC's Office of the Chief Accountant (OCA) announced that the OCA was commencing audits of interstate gas pipeline companies. OCA stated that its "overall

electric markets would be enhanced by a requirement that pipelines and public utilities report more detailed information concerning transactions. For example, in a recent rulemaking the Commission recognized that it needed to change its regulations to disseminate better information about discounted gas transactions, so that there is better price transparency.⁷²

However, collecting better information about the operation of markets is much simpler than gaining better knowledge about the operation of markets and detecting any market power abuses. For example, the FERC may institute inter-office teams, as created in response to Amoco Production Company's complaint, that inspect gas and electric utilities' compliance with the FERC's standards of conduct. The FERC Enforcement could enhance its visibility by attending selective industry panels and describing the FERC Enforcement's efforts to ensure the integrity of gas and electric market transactions. In order to collect information faster from industry participants, the FERC could delegate its subpoena power to the General Counsel. Thus, the General Counsel could issue a subpoena in a preliminary investigation, rather than require the staff to seek such authority from the FERC in a formal investigation.⁷³ Finally, the FERC may consider requesting civil penalty authority from Congress to address violations of the standards of conduct by gas and electric utilities.⁷⁴

Clearly, the FERC has fewer tools than the SEC to monitor markets. For example, Congress has directed the SEC to work with self-regulatory organizations (SROs), such as the New York Stock Exchange and the National Association of Securities Dealers, to monitor markets more effec-

audit objective is to determine the extent of natural gas industry compliance with Commission regulations governing marketing affiliates." Specifically, the OCA stated that it "will determine the extent of companies' compliance with the standards of conduct . . . [and] the extent of compliance with the [FERC's] reporting and record maintenance requirements. . . ." Although the OCA may refer any violations detected during its audit to the FERC Enforcement Section (FERC Enforcement), a division within the FERC's Office of the General Counsel, OCA did not state whether it would make such referrals. 81 F.E.R.C. ¶ 62,224, at 64,486 (1997).

72. Some of these reporting anomalies were identified in a recent Commission rulemaking. See also Final Rule, Order No. 637, *Regulation of Short-Term Natural Gas Transportation Services and Regulation of Interstate Natural Gas Transportation Services*, III F.E.R.C. STATS. & REGS. ¶ 31,091 (2000), 63 Fed. Reg. 42,982 (1998); Notice of Proposed Rulemaking, *Regulation of Short-Term Natural Gas Transportation Services*, [Regs. Preambles 1988-1998] IV F.E.R.C. STATS. & REGS. ¶ 32,533, 63 Fed. Reg. 42,982, 18 C.F.R. pts. 161, 250, 289 (1998); Notice of Inquiry, IV F.E.R.C. STATS. & REGS. ¶ 35,533, 63 Fed. Reg. 42,973 (1998).

73. Compare sections 1(b)(5) (formal investigations), 1(b)(6) (preliminary investigations), and 1(b)(13) (powers of persons conducting formal investigations). 18 C.F.R. §1(b)(5), (6), (13) (2000).

74. Recently, the FERC announced efforts to adopt more proactive enforcement policies. *Inside FERC* reported that the FERC's Office of the General Counsel was reorganizing in order to implement the goal of Chairman James Hoecker "to re-engineer the commission internally . . . to make [the] FERC more customer-attentive, efficient and focused on facilitating competitive markets." As part of that effort, *Inside FERC* reported that the Office of the General Counsel would reshape its enforcement division to take on the additional responsibility of examining whether markets as a whole are doing what the commission expects them to do. The FERC's General Counsel, Douglas Smith, stated that this division will help "evaluate how energy markets are doing and how effective the commission's policies are in promoting competition." Mark Dantos, *FERC Lawyers Retool for Energy, Convergence Market-Monitoring Role*, *INSIDE FERC*, May 8, 2000, at 1.

tively. Specifically, Congress has granted the SEC authority to oversee the SROs,⁷⁵ which includes the authority to amend, add to, abrogate, and delete the SROs governing rules,⁷⁶ even regarding the discipline of the SROs' members.⁷⁷

Although Congress has not granted the FERC any similar authority with regard to either the Gas Industry Standards Board, the North American Electric Reliability Council, or Independent System Operators (ISO), the FERC has broad authority to address discrimination in the interstate gas transportation and electric transmission markets.⁷⁸ For example, the FERC has approved market monitoring programs that are operated by the ISOs.⁷⁹ These programs are apparently working. However, their legal status may be in doubt.⁸⁰

In addition, in its final rule concerning Regional Transmission Organizations (RTO), the FERC required that market monitoring be part of any proposed RTO. The FERC stated:

The Commission, however, is engaged in finding ways to understand market operations in real-time, so that it can identify and react to any problems that are preventing the most efficient operations. It also has a responsibility to protect against anticompetitive effects in electricity markets. [footnote omitted]. If we are to satisfy this goal, we must systematically assess whether our policies and decisions are consistent with this responsibility. Market monitoring is an important tool for ensuring that markets within the region covered by an RTO do not result in wholesale transactions or operations that are unduly discriminatory or preferential or provide opportunity for the exercise of market power. In addition, market monitoring will provide information regarding opportunities for efficiency improvements.⁸¹

VIII. POLICY CONCERNS

Disclosure of information does not come without a cost. For example, economists warn that forcing companies to reveal information may have anti-competitive effects. In 1987, the United States Department of Justice (DOJ) made this argument in its filed comments in the Commission's Or-

75. 15 U.S.C. § 78s (1994).

76. *Id.* at § 78s(c).

77. 15 U.S.C. § 78s(d).

78. See *Associated Gas Distributors v. FERC*, 824 F.2d 981 (D.C. Cir. 1987) and *Transmission Access Policy Study Group v. FERC*, U.S. App. LEXIS 15362, Nos. 97-1715 *et al.*, 2000 WL 762706, (D.C. Cir. June 30, 2000).

79. *New England Power Pool*, 79 F.E.R.C. ¶ 61,374 (1997), *order on reh'g*, 85 F.E.R.C. ¶ 61,242 (1998) (order conditionally authorizing ISO by the New England Power Pool (NEPOOL)); *New England Power Pool*, 83 F.E.R.C. ¶ 61,045 (1998), *reh'g pending* (order on NEPOOL tariff and restructuring); *Automated Power Exchange, Inc.*, 82 F.E.R.C. ¶ 61,287, *reh'g denied*, *Automated Power Exchange, Inc.* 84 F.E.R.C. ¶ 61,020 (1998), *appeals docketed*, *Automated Power Exchange, Inc. v. FERC*, 204 F.3d 1144 (2000).

80. For example, such market monitoring units may not be entitled to governmental immunity. Thus, a finding by a market-monitoring unit may be subject to a civil suit for libel or slander.

81. Final Rule, Order No. 2000, *Regional Transmission Organizations*, [Regs. Preambles] III F.E.R.C. STATS. & REGS. ¶ 31,089, 31,155 (2000).

der No. 497 rulemaking proceeding.⁸²

The DOJ argued that collecting and disclosing too much information regarding transportation of natural gas may have anticompetitive impacts. The DOJ stated that disclosure of information that the pipeline does not need in order to transport gas may be anticompetitive. For example, the DOJ stated that because market information regarding the source and ultimate destination of gas is closely held by market participants, disclosure of such information would greatly reduce incentives for marketers to compete vigorously. If the disclosure of detailed information "would make it easier for competing shippers, including pipeline affiliates, to determine the approximate price and terms offered to customers, [competitors would] tailor their competing offers accordingly."⁸³ The DOJ was apparently worried that disclosure of such information would "deter" shippers from "expending resources to develop innovative and possibly efficient transactions," because competing shippers would need only to consult the public record to "free-ride" on the efforts of other shippers.⁸⁴

Economic theory, however, suggests that the DOJ's concerns may be misplaced because the greater the price transparency, the more efficient a market will be. Indeed, with regard to the capital markets, the SEC has determined that the benefit of restoring and maintaining investor confidence exceeds the cost borne by companies in releasing such information.

IX. CONCLUSION

With regard to the natural gas markets, the FERC has determined that because "a pipeline has an obvious incentive to favor its own marketing affiliate; profits to the affiliate are profits to the pipeline."⁸⁵ The FERC should swiftly detect and remedy violations of a pipeline's standards of conduct so as to maintain trust and confidence in the natural gas markets. Only through maintaining trust in the market can the benefits of an efficient market accrue to the public. Ensuring that trust in market mechanisms is maintained may be the ultimate regulatory challenge.

82. DEPARTMENT OF JUSTICE, COMMENTS ON RULEMAKING ON ANTICOMPETITIVE PRACTICES OF MARKETING AFFILIATES OF INTERSTATE PIPELINES, Docket No. RM87-5-000, (July 24, 1987).

83. *Id.* at 7.

84. COMMENTS OF THE UNITED STATES DEPARTMENT OF JUSTICE at 7. This point of view may have reached its apogee in Order No. 566-A, where the Commission stated:

Pipeline marketing affiliates should be able to compete in the market on the same terms as non-affiliates to the maximum extent possible. The Commission is concerned that if information about affiliate discounts is provided during the negotiating process, such information could provide non-affiliates with a competitive advantage over affiliates. As the pipelines contend, non-affiliates could use the posted affiliate information to try to interfere with an affiliate's negotiations with a customer. Non-affiliates are not subject to a similar risk, because they are not required to disclose information about the deals they negotiate.

Final Rule, Order No. 566-A, *Standards of Conduct and Reporting Requirements for Transportation and Affiliate Transactions*, [Regs. Preambles 1991-1996] III F.E.R.C. STATS. & REGS. ¶ 31,002, 31,125 (1994).

85. *Tenneco Gas v. FERC*, 969 F.2d 1187, 1202 (D.C. Cir. 1992).