

REPORT OF THE COMPLIANCE AND ENFORCEMENT COMMITTEE

This report summarizes key federal enforcement and compliance developments in 2018, including certain decisions, orders, actions, and rules of the Federal Energy Regulatory Commission (FERC or Commission), the Commodity Futures Trading Commission (CFTC), the Pipeline and Hazardous Materials Safety Administration, 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 15, 2018, the Federal Energy Regulatory Commission (FERC) Office of Enforcement (Enforcement) issued its Annual Report of Enforcement Staff activities during the fiscal year 2018 (FY 2018). Enforcement continues to identify its priorities for FY2018 as: (1) fraud and market manipulation; (2) serious violations of the Reliability Standards; (3) anticompetitive conduct; and (4) conduct that threatened the transparency of regulated markets.¹

In pursuit of these priorities, Enforcement opened twenty-four new investigations in fiscal year 2018, a reduction from twenty-seven investigations in 2017, while bringing twenty-three to closure with no action.² In addition, Enforcement resolved six cases through settlement, obtaining \$83 million in civil penalties and disgorgement of over \$66 million in unjust profits.³ Enforcement's penalty and disgorgement amounts were higher than the \$51 million and \$42 million, respectively, that it assessed in 2017.⁴

1. FERC Office of Enforcement, 2018 Report on Enforcement 4 (Nov. 15, 2018) [hereinafter 2018 Report].

2. *Id.* at 5.

3. *Id.*

4. FERC OFFICE OF ENFORCEMENT, 2017 REPORT ON ENFORCEMENT 5 (Nov. 16, 2017).

2. Final Rule on Civil Monetary Penalty Inflation Adjustments

On January 8, 2018, FERC issued Order No. 839, its Final Rule on Civil Monetary Penalty Inflation Adjustments.⁵ FERC indicated that the Federal Civil Penalties Inflation Adjustment Act of 1990,⁶ as amended by the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (2015 Act),⁷ required each federal agency to issue a rule by July 2016 adjusting for inflation each civil monetary penalty within the agency's jurisdiction.⁸ FERC stated that the 2015 Act requires it to make an initial inflation adjustment to its civil monetary penalties, and adjust each such penalty on annual basis every January 15 thereafter.⁹ FERC indicated that Order No. 839 is intended to implement the annual adjustment.¹⁰

The Federal Power Act (FPA), the Natural Gas Act (NGA), and the Natural Gas Policy Act (NGPA), initially provided FERC with the authority to assess civil monetary penalties in amounts up to \$1,000,000.¹¹ FERC stated that applying the requisite inflation adjustments resulted in a maximum civil penalty of \$1,238,271.¹² FERC also adjusted other civil monetary penalties it is authorized to assess under these and other statutes.¹³ Order No. 839 became effective January 12, 2018, the date it was published in the Federal Register.¹⁴

B. Notices of Alleged Violations and Request for Investigation

1. PSEG Energy Resources & Trade, LLC

On April 5, 2018, FERC issued a Notice of Alleged Violation to PSEG Energy Resources & Trade, LLC (PSEG) with respect to the submission of inaccurate cost-based bids into the PJM Interconnection, L.L.C. (PJM) energy market in violation of the PJM Operating Agreement, PJM Open Access Transmission Tariff, and FERC regulations.¹⁵

5. Order No. 839, *Civil Monetary Penalty Inflation Adjustment*, 162 F.E.R.C. ¶ 61,010 (2018).

6. Federal Civil Penalties Inflation Adjustment Act of 1990, Pub. L. No. 101-410, 104 Stat. 890 (codified as amended at 28 U.S.C. § 2461).

7. Federal Civil Penalties Inflation Act Improvement Act of 2015, Pub. L. No. 114-74, 129 Stat. 584, 599.

8. Order No. 839, *supra* note 5, at P 2.

9. *Id.* at P 2.

10. *Id.* at P 1.

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

12. Order No. 826, *Civil Monetary Penalties Inflation Adjustment*, 155 F.E.R.C. ¶ 61,320 at P 17 (2017).

13. *Id.*

14. Order No. 839, *supra* note 5.

15. Staff Notice of Alleged Violations (FERC issued Apr. 5, 2018), <https://www.ferc.gov/enforcement/alleged-violation/notices/2018/20180405-PSEG-NAV.pdf?csrt=12373244978439824854>.

2. Algonquin Gas Transmission

In an August 2017 white paper,¹⁶ the Environmental Defense Fund asserted that “local distribution companies located in New England had engaged in practices to withhold pipeline capacity on the Algonquin system in order to drive up gas and/or power prices.”¹⁷ FERC initiated an inquiry into the matter.

On February 27, 2018, FERC issued a press release stating that its “staff inquiry had revealed no evidence of anticompetitive withholding of natural gas pipeline capacity on Algonquin Gas Transmission by New England shippers.”¹⁸ FERC declined to take further action on this matter.

C. Enforcement Litigation and Adjudication

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

On September 24, 2018, the United States District Court for the Eastern District of Virginia (Lauck, J.) (Court) denied Respondents’¹⁹ motion to dismiss in *FERC v. Powhatan Energy Fund, LLC*, a case involving an allegedly fraudulent trading scheme to manipulate the electricity market.²⁰ The Respondents had moved to dismiss, claiming that FERC began this lawsuit outside the applicable statute of limitations, FERC lacks the authority to pursue disgorgement as a civil penalty, and if disgorgement is available, it is also time-barred.²¹

In the two-month period between June 1, 2010 and August 3, 2010, Respondent Houlian “Alan” Chen, via the other Respondent entities, allegedly conducted wash trades through the wholesale energy market that led to Respondents’ receipt of substantial “Marginal Loss Surplus Allocation” payments.²² According to the FERC, the scheme entailed manipulating day-ahead and real-time energy trades that ultimately canceled each other out, so that the wash trades created no economic risk.²³ Based on complaints from another market participant, Enforcement began investigating Respondents in August 2010, and issued a formal Order of Investigation on August 25, 2010.²⁴ Ultimately, on December 17, 2014—four years and four months after the alleged manipulation period—FERC issued an Order to Show Cause (OSC).²⁵ The OSC alleged that Respondents had violated

16. *Disconnected Energy Markets Cost Public Billions*, ENV’L DEFENSE FUND, <https://www.edf.org/disconnected-energy-markets-cost-public-billions>.

17. News Release, FERC, *FERC Staff Inquiry Finds No Withholding of Pipeline Capacity in New England Markets* (Feb. 27, 2018), <https://www.ferc.gov/media/news-releases/2018/2018-1/02-27-18.pdf?csrt=12373244978439824854>.

18. *Id.*

19. *FERC v. Powhatan Energy Fund, LLC*, 345 F. Supp. 3d 682 (E.D. Va. Sept. 24, 2018) (The Respondents are Powhatan Energy Fund, LLC, Houlian “Alan” Chen, HEEP Fund, Inc., and CU Fund, Inc. (collectively, the Respondents)).

20. *Id.*

21. *Id.* at 685.

22. *Id.* at 686.

23. *Id.*

24. *FERC v. Powhatan*, 345 F. Supp. 3d at 686-87.

25. *Id.* at 687.

the applicable statute²⁶ and FERC regulation²⁷ forbidding manipulative behavior in connection with the purchase or sale of electric energy, and recommending that the Commission assess penalties and profit disgorgement against each Respondent.²⁸

If Respondents chose to challenge FERC's determination, the OSC also required that Respondents elect to proceed through either the "Default Option" or "Alternate Option."²⁹ Under the Default Option, an administrative law judge conducts a formal hearing before the assessment of a civil penalty.³⁰ While under the Alternate Option, FERC promptly assesses penalties upon finding a violation and a U.S. district court reviews the facts and law of the case *de novo*.³¹ Respondents chose the Alternate Option.³² Accordingly, FERC issued an Order Assessing Civil Penalties that ordered payment of all penalties and profits within sixty days.³³ Respondents elected not to pay the penalties in the proscribed sixty days, and thus under the procedure set forth in 16 U.S.C. § 823b(d)(3)(B), FERC filed an action in federal court on July 31, 2015—over five years after most of the alleged manipulative trading.³⁴

a. The Statute of Limitations Issue

In their motion to dismiss, Respondents argued that FERC's lawsuit was barred by the statute of limitations because the claim accrued at the time of the alleged market manipulation.³⁵ The Court noted that because the statutory scheme for assessing a civil penalty under section 823b does not contain an independent statute of limitations, the catch-all statute of limitations for civil fines, 28 U.S.C. § 2462, applies.³⁶ Thus, the issue before the Court was the point at which FERC's claim had "accrued" for the purpose of the statute of limitations.³⁷ FERC argued that its claim accrued when Respondents failed to pay the assessed penalty.³⁸ Respondents argued that because the court reviews the propriety of the Commission's penalty assessment *de novo*, and because the assessment "flows directly from the alleged violations," it is "commonsensical" that the claim would accrue at the time of the violation.³⁹ The Court ultimately found that FERC's position conformed more closely to the plain meaning of "accrue," because under the Alternate Option, FERC may not bring an action in federal court until two events have occurred: (1) the Commission has assessed a civil penalty by order, and (2) sixty days have

26. 16 U.S.C. § 824v(a) (2005).

27. 18 C.F.R. § 1c.2 (2006).

28. *FERC v. Powhatan*, 345 F. Supp. 3d at 688.

29. *Id.* at 688.

30. *Id.*

31. *Id.*; 16 U.S.C. § 823b(d)(3)(A).

32. *FERC v. Powhatan*, 345 F. Supp. 3d at 689.

33. *Id.* at 690.

34. *Id.*

35. *Id.* at 691.

36. *Id.* at 691-92.

37. *FERC v. Powhatan*, 345 F. Supp. 3d at 694.

38. *Id.* at 691.

39. *Id.* at 695-96.

elapsed without payment of the penalty.⁴⁰ As a result, FERC's ability to bring suit for an order of the Court affirming its assessment of the penalty had accrued when Respondents failed to pay the penalty—not at the time of the allegedly manipulative trading.⁴¹ The lawsuit thus was not time-barred.⁴²

b. The Disgorgement Issue

Respondents also challenged the Court's authority to order disgorgement of profits.⁴³ The Court found that the plain statutory language of the Alternate Option supported the Court's authority to do so because the statute gives the Court the power to enforce, modify, enforce as modified, or set aside in whole or in part, FERC's order assessing penalties.⁴⁴ The Court also noted that absent congressional intent to the contrary, "a court will not presume that its equitable power has been limited."⁴⁵ Thus, the Court found that because disgorgement is a "restitutionary and equitable remedy," it retains the power to order equitable relief in the form of disgorgement.⁴⁶ Despite this holding, however, the Court declined to resolve at the motion to dismiss stage whether the disgorgement the Commission seeks here constitutes a civil penalty (bringing it under section 2462), or was assessed purely as a remedial measure and not for penal purposes.⁴⁷ The Court held that "[g]iven the complicated nature of the energy trading scheme, the potentially convoluted relationship among all Respondents, and the fact-intensive nature of the Court's inquiry into whether disgorgement could constitute a penalty, the Court cannot determine at this stage whether the ordered disgorgement amounted to a penalty."⁴⁸

2. FERC v. Coaltrain Energy, L.P., et al.

On March 30, 2018, the United States District Court for the Southern District of Ohio (Court) denied Coaltrain Energy, L.P. (Coaltrain) and the individual defendants' motion to dismiss FERC's action to enforce civil penalties of \$42 million for alleged market manipulation.⁴⁹ FERC alleged that the defendants' trades of Up-To Congestion (UTC) financial contracts in the PJM day-ahead market violated the FPA's anti-manipulation provision, 16 U.S.C. § 824v(a), and FERC's anti-manipulation rule, 18 C.F.R. § 1c.2, because they were designed solely or primarily to generate Marginal Loss Surplus Allocation (MLSA) payments while incurring no market risk of loss.⁵⁰ The Court upheld FERC's legal position that

40. *Id.*

41. *Id.* at 696.

42. *FERC v. Powhatan*, 345 F. Supp. 3d at 711.

43. *Id.* at 697.

44. *Id.* at 698.

45. *Id.*

46. *Id.* at 698-99.

47. *FERC v. Powhatan*, 345 F. Supp. 3d at 699.

48. *Id.* at 700.

49. *FERC v. Coaltrain Energy, L.P., et al.*, No. 2:16-cv-732-MHW, ECF No. 45 (S.D. Ohio Mar. 30, 2018).

50. *Id.* at 21.

such trades could be a deceptive practice sufficient to support a market manipulation claim, even though FERC did not allege that the defendants made any material misrepresentations or omissions.⁵¹

FERC alleged that the defendants placed large UTC trades on paths where there was “little or no price spread between the day-ahead and real-time markets.”⁵² FERC alleged that the defendants knew these trades would not yield any profits from price arbitrage, but would nevertheless be profitable from generating entitlement to MLSA payments.⁵³ FERC argued that the trades diverted MLSA payments from other market participants and tied up transmission that other market participants could have used for legitimate trading.⁵⁴

The Court ruled that FERC’s allegations that defendants engaged in a scheme of riskless trading for an improper purpose (*i.e.*, to collect MLSA payments) satisfied the required element of deception for a *prima facie* claim of manipulation, notwithstanding the fact that FERC did not allege that defendants made any material misrepresentation.⁵⁵ The Court’s holding relied on a securities fraud case law holding that “trades made without ‘any legitimate economic reason[] . . . can constitute market manipulation.’”⁵⁶ For the same reason, the Court rejected Coaltrain’s argument that its trades could not be manipulative because FERC had expressly authorized traders to collect MLSA payments on UTC trades that utilized paid transmission reservations.⁵⁷ On the element of scienter, the Court concluded that FERC was not required to allege that the defendants knew when they made the trades that FERC would consider them manipulative.⁵⁸

The Court also allowed FERC to proceed on its claim that defendants violated 18 C.F.R. § 35.41(b), FERC’s rule prohibiting false and misleading statements to the agency, based on Coaltrain’s alleged omissions and inaccurate statements in responding to data requests.⁵⁹ In addition and consistent with prior rulings of other district courts, the Court held that the FPA’s provision for *de novo* review of FERC’s administrative assessment of sanctions entitles a defendant to full discovery rights under the Federal Rules of Civil Procedure.

D. Settlements and Show Cause Orders

1. Entergy Nuclear Power Marketing, L.L.C.

On July 25, 2018, FERC issued an order approving a Stipulation and Consent Agreement between Enforcement and Entergy Nuclear Power Marketing, L.L.C.

51. *Id.* at 33-35.

52. *Id.* at 32.

53. *Id.* at 31.

54. *FERC v. Coaltrain*, *supra* note 49, at 32.

55. *Id.* at 33.

56. *Id.* at 35 (citing *SEC v. Masri*, 523 F. Supp. 2d 361, 372 (S.D.N.Y. 2007)); *see also* *In re Amaranth Nat. Gas Commodities Litig.*, 587 F. Supp. 2d 513, 534 (S.D.N.Y. 2008); *see also* *FERC v. City Power Mktg., LLC*, 199 F. Supp. 3d 218, 235 (D.C. Cir. 2016).

57. *FERC v. Coaltrain*, *supra* note 49.

58. *Id.* at 53-54.

59. *Id.* at 60-61.

(ENPM),⁶⁰ finding that ENPM violated several sections of the ISO New England Inc. (ISO-NE) tariff and section 35.41(b) of FERC's regulations.⁶¹ As a capacity resource in ISO-NE, ENPM was required to bid in its full 575 MW.⁶² ENPM submitted an offer in ISO-NE's Day-Ahead market to provide electricity without securing fuel sufficient to meet its dispatch obligation.⁶³ ENPM also failed to timely update ISO-NE of its potential inability to meet dispatch.⁶⁴ ENPM agreed to pay a civil penalty of \$115,000 and to disgorge \$47,084, plus interest.⁶⁵

2. Footprint Power LLC

On June 18, 2018, FERC issued an Order to Show Cause and Notice of Proposed Penalty to Footprint Power LLC (Footprint)⁶⁶ for submitting false or misleading supply offers and failing to report the fuel status and related operational status of its capacity resource, in violation of several provisions of ISO-NE's tariff (Tariff) and section 35.41(b) of FERC's regulations.⁶⁷ FERC proposed a civil penalty of \$4,200,000 and disgorgement of \$2,049,571.⁶⁸

On August 2, 2018, Footprint filed a response to the Show Cause Order, arguing that due to cold start-up requirements, it actually had sufficient fuel to meet its capacity obligation.⁶⁹

On September 19, 2018, FERC's Office of Enforcement replied to Footprint's answer.⁷⁰ Although Enforcement Staff disagreed with many of the arguments that Footprint raised, Enforcement Staff found "merit in Footprint's new defense relating to the start-up requirements."⁷¹ Staff agreed with Footprint that its conduct from June 27 through July 17, 2013 did not violate the Tariff provisions and regulations at issue; however, Enforcement Staff still contended that Footprint violated the Tariff and FERC regulations from July 18 to July 25, when Footprint submitted Day-Ahead Limited Energy Generator Offers, because Footprint's new start-up requirements' defense did not apply then.⁷² Staff reevaluated its position

60. *Entergy Nuclear Power Mktg., LLC*, 164 F.E.R.C. ¶ 61,051 (2018).

61. Section 35.41(b) provides that: [a] "seller must provide accurate and factual information and not submit false or misleading information, or omit material information, in any communication with the Commission, Commission-approved market monitors, Commission-approved regional transmission organizations, Commission-approved independent system operators, or jurisdictional transmission providers." 18 C.F.R. § 35.41(b) (2012).

62. 164 F.E.R.C. ¶ 61,051 at P 3.

63. *Id.* at P 4.

64. *Id.* at P 5.

65. *Id.* at P 8.

66. *Footprint Power LLC*, 163 F.E.R.C. ¶ 61,198 (2018).

67. 18 C.F.R. §35.41(b), *supra* note 61.

68. 163 F.E.R.C. ¶ 61,198 at P 2.

69. Footprint Power LLC, Reply of Enforcement Litigation Staff to the Answer of Footprint Power LLC and Footprint Salem Harbor Operations LLC and Recommendation to Vacate Order to Show Cause, Docket No. IN18-7-000 (FERC issued Sept. 19, 2018).

70. *Id.*

71. *Id.*

72. *Id.* at 1-2.

“in light of the now more limited scope and nature of the violations,” and is now recommending that FERC vacate the Order to Show Cause.⁷³

3. Duke Energy Corporation

On June 8, 2018, FERC approved a Stipulation and Consent Agreement with Duke Energy Corporation (Duke).⁷⁴ The settlement resolved the investigation into whether Duke failed to fully and accurately communicate information to FERC related to transmission studies submitted in support of the Duke and Progress Energy merger application.⁷⁵ Specifically, a Progress Energy staff engineer made a programming error affecting an Available Transfer Capacity calculation.⁷⁶ Following approval of the merger, an anonymous letter was submitted to FERC claiming the merger filing contained erroneous and intentionally misleading data.⁷⁷ Duke and Progress Energy offered additional mitigation remedies for this error, which FERC accepted.⁷⁸ The matter was referred to Enforcement, who concluded that Duke/Progress Energy violated section 35.41(b) of FERC’s regulations.⁷⁹ Duke agreed to pay a civil penalty of \$3,500,000.⁸⁰

4. PSEG Energy Resources & Trade, LLC

On April 25, 2018, FERC approved a Stipulation and Consent Agreement between Enforcement and PSEG Energy Resources & Trade, LLC (PSEG).⁸¹ This settlement resolved issues related to the submission of incorrect cost-based offers between 2005 and 2014 by PSEG in violation of the PJM Operating Agreement, the PJM Open Access Transmission Tariff and section 35.41(b) of FERC’s regulations.⁸²

Following an April 2014 self-report of inaccuracies in its cost-based offers, PSEG submitted a comprehensive self-report providing the results of its internal investigation.⁸³ This internal investigation identified multiple errors in cost-based offer components as far back as 2005 that PSEG’s compliance program and procedures failed to detect.⁸⁴ Among these were:

- inclusion of environmental adders and allowances after termination of the state program, outside the season and after the installation of new technology;
- errors in variable operations and maintenance and other fuel-related quantities and cost components, resulting in over-statements and

73. *Id.*

74. *Duke Energy Corp.*, 163 F.E.R.C. ¶ 61,189 (2018).

75. *Id.* at P 1.

76. *Id.* at P 18.

77. *Id.* at P 14.

78. *Id.* at P 16.

79. 18 C.F.R. § 35.41(b), *supra* note 61.

80. 163 F.E.R.C. ¶ 61,189 at P 23.

81. *PSEG Energy Resources & Trade, LLC*, 163 F.E.R.C. ¶ 61,056 (2018).

82. *Id.* at P 1; 18 C.F.R. § 35.41(b), *supra* note 61.

83. 163 F.E.R.C. ¶ 61,056 at P 5.

84. *Id.*

under-statements of the costs included in PSEG's cost-based offers;
and

- inaccurate performance factor data, which affected the heat rate or fuel burned per unit of output.⁸⁵

PSEG agreed to pay a civil penalty of \$8 million, to pay PJM disgorgement of \$26,905,736, plus \$4,494,264 interest, and to submit annual reports.⁸⁶

5. ETRACOM LLC and Michael Rosenberg

On April 10, 2018, FERC approved a Stipulation and Consent Agreement between Enforcement and ETRACOM LLC (ETRACOM) and Michael Rosenberg resolving all claims for violations of FPA section 222 and FERC's Anti-Manipulation Rule, as well as the lawsuit in the eastern district of California filed by FERC to enforce such alleged violations.⁸⁷ FERC found that ETRACOM and Michael Rosenberg had violated its Anti-Manipulation Rule by engaging in virtual transactions at the California Independent System Operator (CAISO)/New Melones intertie to affect power prices and benefit ETRACOM's Congestion Revenue Rights.⁸⁸ ETRACOM agreed to pay \$1,900,000, consisting of a civil penalty of \$1,500,508.28, disgorgement of \$315,072, plus \$84,419.72 of interest, with the disgorgement and interest to be paid to CAISO to distribute to impacted market participants.⁸⁹ No sanctions were assessed against Michael Rosenberg personally.

6. Wheelabrator Claremont Company, L.P.

On September 28, 2018, FERC approved a Stipulation and Consent Agreement between Enforcement and Wheelabrator Claremont Company, L.P. (Wheelabrator).⁹⁰ The settlement resolved violations of the ISO-NE Tariff and Market Rule by Wheelabrator continuing to collect Forward Capacity Payments for a resource that had been closed permanently. Wheelabrator agreed to pay a \$250,000 civil penalty and to disgorge \$107,231.34, plus interest, to ISO-NE.⁹¹

II. THE COMMODITY FUTURES TRADING COMMISSION

A. *Energy-Related Enforcement Cases*

1. In the Matter of Kamaldeep Gandhi

On October 11, 2018, the Commodity Futures Futures Trading Commission (CFTC) issued an order filing and settling charges against Kamaldeep Gandhi for manipulative and deceptive schemes, which involved thousands of acts of spoofing with respect to a variety of futures products, including natural gas futures

85. *Id.* at P 6.

86. *Id.* at P 12.

87. 16 U.S.C. § 824v; 18 C.F.R. § 1.c.2; *FERC v. ETRACOM, LLC*, No. 2:16 cv-1945-SB (E.D. Cal. filed Aug. 17, 2016); *ETRACOM LLC & Michael Rosenberg*, 163 F.E.R.C. ¶ 61,022 (2018).

88. 163 F.E.R.C. ¶ 61,022 at P 4.

89. *Id.* at P 10.

90. *Wheelabrator Claremont Co.*, 164 F.E.R.C. ¶ 61,237 (2018).

91. *Id.* at P 11.

contracts traded on the Chicago Mercantile Exchange (CME), Chicago Board of Trade (CBOT), New York Mercantile Exchange (NYMEX), and the Commodity Exchange, Inc (COMEX).⁹² Gandhi admitted that he engaged in this unlawful activity while placing orders for, and trading futures contracts through, accounts owned by his former employers, two proprietary trading firms not named in the order.⁹³ The order stated that “Gandhi placed orders to buy or sell futures contracts that he intended to cancel before execution at the time the orders were placed. In doing so, Gandhi intentionally sent false signals of increased supply or demand designed to trick market participants into executing against the orders he wanted filled.”⁹⁴ The CFTC concluded that the alleged schemes violated sections 4c(a)(5)(C) and 6(c)(1) of the Commodity Exchange Act (CEA), 7 U.S.C. §§ 6c(a)(5)(C), 9(1) (2012), and CFTC Regulation 180.1(a)(1) and (3), 17 C.F.R. § 180.1(a)(1), (3) (2018).⁹⁵ The order permanently banned Gandhi from trading on or subject to the rules of any registered entity but deferred a potential assessment of monetary sanctions based on Gandhi’s cooperation in a CFTC investigation and related proceedings.⁹⁶

2. In the Matter of Geneva Trading USA, LLC

On September 20, 2018, the CFTC issued an order filing and settling charges against Geneva Trading USA, LLC (Geneva), a Chicago trading firm, for engaging in spoofing with respect to several futures contracts on the CME, including heating oil, reformulated blendstock for oxygenate blending gasoline, and light sweet crude oil.⁹⁷ The order alleges that Geneva, through three of its traders, manually placed a smaller order on one side of the market at or near the best price while placing a larger order or series of orders on the opposite side of the market.⁹⁸ The order finds that Geneva’s large orders were often modified to avoid being filled before they were ultimately cancelled, allegedly “to create — or sometimes exacerbate — an imbalance in the order book and to induce other market participants to transact on the [smaller order].”⁹⁹ The order concludes that Geneva violated section 4c(a)(5)(C) of the CEA, 7 U.S.C. § 6c(a)(5)(C) (2012), and requires Geneva to pay a \$1.5 million civil monetary penalty and to cease and desist from violating the CEA’s prohibition against spoofing.¹⁰⁰

3. In the Matter of Victory Asset, Inc.; In the Matter of Michael D. Franko

On September 19, 2018, in another spoofing case, the CFTC issued two orders filing and settling charges against Victory Asset, Inc. (Victory) and Michael

92. *In re Kamaldeep Gandhi*, CFTC Docket No. 19-01 (Oct. 11, 2018).

93. *Id.* at 3.

94. *Id.* at 2.

95. *Id.* at 1.

96. *Id.* at 8.

97. *In re Geneva Trading USA, LLC*, CFTC Docket No. 18-37 (Sept. 20, 2018).

98. *Id.* at 2.

99. *Id.*

100. *Id.* at 5.

D. Franko.¹⁰¹ The alleged scheme involved COMEX and London Metal Exchange (LME) copper, COMEX gold, and NYMEX crude oil contract markets. The order alleges that Franko placed bids for future contracts in these markets with the intent to cancel them before execution.¹⁰² One aspect of the alleged scheme involved cross-market spoofing—*i.e.*, spoofing in one market to benefit a position in another market, where the price of the two markets is generally correlated, particularly in the short term (here COMEX copper and LME copper futures).¹⁰³ The two CFTC orders require Victory and Franko to pay civil monetary penalties of \$1.8 million and \$500,000, respectively, and to cease and desist from violating the CEA's prohibition against spoofing and the CEA's and CFTC Regulation's prohibition against the use of a manipulative scheme.¹⁰⁴ In addition, the CFTC order against Franko bans Franko from trading in U.S. futures markets for six months.¹⁰⁵

B. Energy-Related Private Action

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

In a decision issued on May 4, 2018, the United States Court of Appeals for the Second Circuit affirmed, with modifications, a March 25, 2017 Order by the United States District Court for the Southern District of New York granting 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.¹⁰⁶ The class action alleged that the defendant violated the CEA, CFTC regulations, and the Sherman Antitrust Act (Sherman Act), by manipulating prices for natural gas futures and options contracts traded on NYMEX and Intercontinental Exchange and natural gas swaps, by manipulating physical and financial natural gas contracts at four regional hubs.¹⁰⁷ The plaintiffs contended that the alleged manipulation of the hub prices sent shockwaves that reverberated through to Henry Hub prices, and which in turn caused manipulation of the derivatives that were based on Henry Hub price indices.¹⁰⁸

The Second Circuit upheld the dismissal based on its conclusion that the complaint failed to plausibly plead any “actual injury” under CEA section 22, 7 U.S.C. § 25, from the defendant's gas transactions at the regional hubs.¹⁰⁹ *First*, the court held that plaintiffs had “not plausibly asserted that the relatively small number of transactions it takes to manipulate regional hubs would have any but a negligible impact on Henry Hub's pricing, let alone a noticeable impact on the

101. *In re Victory Asset, Inc.*, CFTC Docket No. 18-36 (Sept. 19, 2018); *In re Michael D. Franko*, CFTC Docket No. 18-35 (Sept. 19, 2018).

102. *In re Victory Asset, Inc.*, *supra* note 101, at 2.

103. *Id.* at 3.

104. *Id.* at 7.

105. *Id.* at 6.

106. *Harry v. Total Gas & Power N. Am., Inc.*, 889 F.3d 104 (2d Cir. 2018), *cert. denied*, 138 S. Ct. 2648 (2018).

107. *Id.* at 108.

108. *Id.* at 109.

109. *Id.* at 104.

pricing of derivatives based on the price index calculated from a specific thirty-minute window of Henry Hub prices.”¹¹⁰ *Second*, the court, noting that the plaintiffs included both long and short futures traders, concluded that the complaint provides just as much support for the proposition that plaintiffs were *benefited* by defendant’s trading as for the proposition that they were *harmed* by it.¹¹¹ The court concluded that “[w]e do not require that a plaintiff calculate damages at the pleading stage, but we certainly need some reason to believe that any damage has occurred at all. Only speculation could lead us to that belief here.”¹¹² The court similarly upheld dismissal of the antitrust claims for failure to allege facts supporting antitrust standing: “Plaintiffs do not even present evidence that they traded at ‘artificial prices.’ There is no actual injury the Plaintiffs allege, let alone a connection between defendants’ unlawful conduct and that non-injury.”¹¹³

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

1. Chief Compliance Officer Duties and Annual Report Requirements for Futures Commission Merchants, Swap Dealers, and Major Swap Participants

On August 27, 2018, the CFTC amended its regulations regarding certain duties of chief compliance officers (CCO) of swap dealers (SDs), major swap participants, and futures commission merchants (FCMs) (the CCO Rule).¹¹⁴ The amendments seek to streamline and clarify the CCO Rule, including by modifying the CCO annual report content and submission requirements to reduce report preparation burdens while also making the reports more effective. The amendments also more closely harmonize certain provisions of the CCO Rule with corresponding Securities and Exchange Commission (SEC) rules. However, the CFTC declined to fully harmonize the CCO’s duties with parallel provisions of the SEC’s rule. The CFTC emphasized that the role of the CCO required under the CEA, as amended by Dodd-Frank, goes beyond the advisory role more traditionally associated with CCOs in the securities industry.¹¹⁵ The CFTC justified the departures from the SEC CCO Rule in respect of these duties by referring to the differences between CFTC and SEC-regulated entities.¹¹⁶ For

110. *Id.* at 115.

111. *Harry*, 889 F.3d at 115.

112. *Id.* The court, however, found that while plaintiffs had not plausibly alleged actual injury, they had met the lower standard for constitutional standing to file a claim, which requires only that interconnectedness between the wrongful acts and the alleged injury be within the “realm of possibility.” *Id.* at 111.

113. *Id.* at 116.

114. Final Rulemaking, *Chief Compliance Officer Duties and Annual Report Requirements for Futures Commission Merchants, Swap Dealers, and Major Swap Participants*, 83 Fed. Reg. 43,510 (Aug. 27, 2018) (to be codified at 17 C.F.R. pt. 3). In May 2017, the CFTC published a Notice of Proposed Rulemaking to amend the CCO Rule. Notice of Proposed Rulemaking, *Chief Compliance Officer Duties and Annual Report Requirements for Futures Commission Merchants, Swap Dealers, and Major Swap Participants; Amendments*, 82 Fed. Reg. 21,330 (May 8, 2017).

115. 83 Fed. Reg. at 43,512.

116. *Id.* at 43,517.

example, with regards to the requirements for the CCO annual report, the CFTC explained:

The SEC's CCO rules apply to security-based swap dealers and major security-based swap participants, which are likely to consist of a smaller number of large financial entities or affiliates thereof, most of which are likely required by regulation to have audit committees. By contrast, the CFTC's CCO Rules apply to SDs that range from large financial enterprises to regional banks to commodity dealers to limited purpose affiliates, as well as FCMs. In light of this greater variety of firms subject to the CFTC CCO Rules, the Commission believes a more flexible approach is appropriate.¹¹⁷

The CFTC did not, however, take these differences into account by adopting more flexible reporting lines, as commenters had requested.¹¹⁸

III. THE PIPELINE & HAZARDOUS MATERIALS SAFETY ADMINISTRATION

The Pipeline and Hazardous Materials Safety Administration (PHMSA) initiated 173 pipeline safety enforcement cases in 2018, a decrease from the 229 cases initiated in 2017.¹¹⁹ The PHMSA also proposed \$6,971,100 in total civil penalties in 2018, an increase over the \$2,893,700 proposed in 2017.¹²⁰ In addition, the PHMSA issued seventy-two enforcement orders in 2018, an increase over the fifty-two orders issued in 2017.¹²¹

A. *Memorandum of Understanding with FERC Regarding Regulation of Liquefied Natural Gas Facilities*

On August 31, 2018, the PHMSA and FERC entered into a memorandum of understanding (MOU) for the purpose of improving coordination between the agencies throughout the application process for Liquefied Natural Gas (LNG) facilities.¹²²

Under NGA section 3, 15 U.S.C. §§ 717b, b-1, FERC is responsible for authorizing the siting, construction, expansion, and operation of LNG facilities on shore and in state waters.¹²³ FERC issues certificates of public convenience and necessity for such facilities under NGA section 7, 15 U.S.C. § 717(f), and serves as the lead federal agency for complying with the National Environmental Policy Act, 42 U.S.C. §§ 4321-4347.¹²⁴ Under the Pipeline Safety Act, 49 U.S.C. §§

117. *Id.*

118. *Id.* at 43,512.

119. PIPELINE & HAZARDOUS MATERIALS SAFETY ADMIN., SUMMARY OF ENFORCEMENT ACTIVITY - NATIONWIDE (2018).

120. PIPELINE & HAZARDOUS MATERIALS SAFETY ADMIN., SUMMARY OF CASES INVOLVING CIVIL PENALTIES (2018).

121. PIPELINE & HAZARDOUS MATERIALS SAFETY ADMIN., SUMMARY OF ENFORCEMENT ACTIONS (2018).

122. Memorandum of Understanding Between the Department of Transportation and the Federal Energy Regulatory Commission Regarding Liquefied Natural Gas Transportation Facilities (FERC issued August 31, 2018) [hereinafter FERC Memo of Understanding].

123. *Id.* at 1.

124. *Id.*

60101-60301, the PHMSA prescribes minimum safety standards governing the location, design, construction, operation, and maintenance of LNG facilities.¹²⁵

The MOU reads that “the Agencies will work together to ensure that safety and security issues are addressed in a coordinated and comprehensive manner.”¹²⁶ In particular, the PHMSA will issue a Letter of Determination to FERC no later than thirty days before FERC issues its final National Environmental Policy Act document that includes the PHMSA’s determination whether the proposed facility complies with the safety standards contained in Part 193, Subpart B, of Title 49.¹²⁷ FERC will accept that letter as authoritative with regard to assessing compliance with these standards.¹²⁸

In addition, the agencies “agree to assist one another by sharing information and inspection findings pertaining to the review of LNG operations to enable each Agency to discharge its respective responsibilities.”¹²⁹ To that end, “[e]ach Agency will seek to keep the other informed of newly discovered or emerging safety issues or concerns, including information relating to any incident investigations or enforcement actions that an Agency may undertake, to the extent permitted by law.”¹³⁰

B. Decision to Provide Public Notice of Enforcement Hearings

On June 28, 2018, the PHMSA announced through a letter from Chief Counsel Paul Roberti that it would begin providing public notice of enforcement hearings held under 40 C.F.R. § 190.211.¹³¹ Specifically, the PHMSA indicated that it would add letters scheduling enforcement hearings to the electronic case files that are accessible on the agency’s enforcement website.¹³²

The PHMSA’s announcement states that a member of the press interested in observing a hearing may submit a request to do so, and the agency will evaluate and act on that request.¹³³ The announcement does not address how the agency will determine whether to grant a request to observe a hearing or whether non-members of the press are also allowed to submit a request.¹³⁴ The PHMSA’s decision to provide this notice of enforcement hearings came in response to a request from the Reporters Committee for Freedom of the Press and E&E News.¹³⁵

125. *Id.* at 2.

126. *Id.* at 1.

127. FERC Memo of Understanding, *supra* note 122, at 1.

128. *Id.* at 2.

129. *Id.* at 3.

130. *Id.*

131. Letter from Paul Roberti, Chief Counsel, Pipeline & Hazardous Material Safety Admin. to Katie Townsend, The Reporters Committee for Freedom of the Press (June 28, 2018).

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

C. Pipeline Safety: Plastic Pipe Rule Final Rule

On November 20, 2018, the PHMSA issued a final rule amending the Federal Pipeline Safety Regulations in 49 C.F.R. Part 192 that govern the use of plastic piping systems in the transportation of natural and other gas.¹³⁶ Effective on January 22, 2019, the rule “accommodate[s] innovations in plastic pipe materials and designs” and includes a number of technical changes that allow for the expanded use of plastic pipe products.¹³⁷ The rule responds to four petitions for rulemaking that the agency received from the regulated community and to comments received on the 2015 notice of proposed rulemaking.¹³⁸

D. Hazardous Materials: Response to Petitions From Industry to Modify, Clarify, or Eliminate Regulations Final Rule

On November 7, 2018, the PHMSA issued a final rule adopting amendments to the Hazardous Materials Regulations in 49 C.F.R. Parts 171, 172, 173, 176, 178, and 180.¹³⁹ Effective on December 7, 2018, the rule adopts a number of technical and administrative amendments designed “to update, clarify, streamline, or provide relief from miscellaneous regulatory requirements.”¹⁴⁰ The rule responds to nineteen petitions for rulemaking submitted by the regulated community and to comments received on the 2016 notice of proposed rulemaking.¹⁴¹

IV. THE DEPARTMENT OF ENERGY

The Office of Enterprise Assessments (EA) supports the DOE’s mission priorities and strategic plan for the secure and safe operation of the nuclear weapons complex, science and energy research, and environmental cleanup activities, by conducting independent assessments of security and safety performance throughout the DOE, holding contractors accountable for violations of security and safety regulations, and providing training programs that institutionalize enterprise security and safety lessons learned.¹⁴² In addition, EA has been designated to implement congressionally authorized contractor enforcement programs pertaining to classified information security, nuclear safety, and worker safety and health.¹⁴³ During 2018, the EA’s Office of Enforcement settled four separate enforcement proceedings initiated under 10 C.F.R. Parts 820, 824 and 851.

136. Final Rulemaking, *Pipeline Safety: Plastic Pipe Rule*, 83 Fed. Reg. 58,694 (2018) (to be codified at 49 C.F.R. pt. 192).

137. *Id.* at 58,694.

138. *Id.* at 58,694–95.

139. Final Rulemaking, *Hazardous Materials: Response to Petitions from Industry to Modify, Clarify, or Eliminate Regulations*, 83 Fed. Reg. 55,792 (2018) (to be codified at 49 C.F.R. pts. 171, 172, 173, 176, 178, and 180).

140. *Id.* at 55,792.

141. *Id.*

142. OFFICE OF ENTERPRISE ASSESSMENTS, DEP’T OF ENERGY MISSION, <https://www.energy.gov/ea/mission> (last visited Feb. 26, 2019).

143. *Id.*

A. *Nuclear Safety Enforcement (10 C.F.R. Pt. 820)*

The Office of Nuclear Safety Enforcement implements the Department's nuclear safety enforcement program in accordance with 10 C.F.R. Pt. 820, *Procedural Rules for DOE Nuclear Activities*, as authorized by the Atomic Energy Act.¹⁴⁴ On March 21, 2018, the DOE Office of Enterprise Assessments' Office of Enforcement issued a Consent Order (NCO-2018-01) to URS | CH2M Oak Ridge, LLC (UCOR) for nuclear safety deficiencies involving operations and work processes that occurred at the Molten Salt Reactor Experiment.¹⁴⁵ The Consent Order was issued pursuant to DOE's authority under section 234A of the Atomic Energy Act of 1954, as amended (42 U.S.C. § 2282a), and the implementing provisions of 10 C.F.R. Part 820 governing enforcement of DOE nuclear safety requirements.¹⁴⁶

UCOR is responsible for the management and operation of the DOE's Molten Salt Reactor Experiment (MSRE) in Oak Ridge, TN and is a prime contractor with the DOE Oak Ridge Office of Environmental Management (OREM).¹⁴⁷

On February 16, 2017, UCOR Reactive Gas Removal System (RGRS) operators manipulated cross connect valves to confirm the location of the boundary valves without proper work authorization or procedure.¹⁴⁸ Although the February 16, 2017 occurrence did not result in any injury to personnel, damage to equipment, or release to the environment, DOE views this event as significant because of the importance of the safe operation of the RGRS as part of the overall safety of the MSRE, a hazard category 2 nuclear facility.¹⁴⁹

UCOR agreed to fully complete and implement certain specified corrective actions applicable to the Nuclear and High Hazard Operations' nuclear facilities¹⁵⁰ and to pay the amount of \$120,000, reflecting an agreed upon monetary remedy in lieu of the issuance of an enforcement action with the proposed imposition of a civil penalty pursuant to 10 C.F.R. § 820.24.¹⁵¹

B. *Security Enforcement (10 C.F.R. Part 824)*

The Office of Security Enforcement implements the Department's classified information security enforcement program in accordance with 10 C.F.R. Part 824, *Procedural Rules for the Assessment of Civil Penalties for Classified Information*

144. OFFICE OF ENTERPRISE ASSESSMENTS, DEP'T OF ENERGY ENFORCEMENT, <https://www.energy.gov/ea/services/enforcement> (last visited Feb. 26, 2019).

145. *In re URS | CH2M Oak Ridge, LLC.*, Consent Order NCO-2018-01 (U.S. Dep't Energy Mar. 21, 2018), <https://www.energy.gov/sites/prod/files/2018/04/f50/Signed%20NCO-2018-01%20UCOR%20Consent%20Order.pdf>.

146. *In re URS | CH2M Oak Ridge, LLC.*, Consent Order Incorporating Agreement Between the U.S. Department of Energy and URS | CH2M Oak Ridge, LLC, NCO-2018-01, 4 (U.S. Dep't Energy Mar. 21, 2018), <https://www.energy.gov/sites/prod/files/2018/04/f50/Signed%20NCO-2018-01%20UCOR%20Consent%20Order.pdf>.

147. *Id.* at 1.

148. *Id.*

149. *Id.*

150. *In re URS | CH2M Oak Ridge, LLC.*, *supra* note 145, at 3.

151. *Id.* at 2.

Security Violations, as authorized by the Atomic Energy Act.¹⁵² The DOE and the National Nuclear Security Administration issued a Settlement Agreement related to the improper shipment and storage of classified archived records.¹⁵³ On July 23, 2018, the DOE Office of Enterprise Assessments' Office of Enforcement and the National Nuclear Security Administration (NNSA) entered into a Settlement Agreement (SSA-2018-01) with Consolidated Nuclear Security, LLC (CNS) to resolve the issues arising from the improper shipment and storage of classified archived records at the Y-12 National Security Complex (Y-12).¹⁵⁴ The Settlement Agreement was issued pursuant to DOE's authority under section 234B of the Atomic Energy Act of 1954, as amended (42 U.S.C. § 2282b), and the implementing provisions of Part 824 governing enforcement of DOE classified information security requirements.¹⁵⁵

CNS is responsible for the management and operation of the NNSA Y-12 and the Pantex Plant and is a prime contractor with the NNSA, pursuant to which CNS was responsible for the proper handling, protection, and control of Y-12 archived records and other classified information at both sites.¹⁵⁶

CNS reported an incident of security concern (IOSC) in the Safeguards and Security Information Management System (SSIMS) in March 2017 involving the improper shipment and storage of classified inactive archived records, which were accessed by uncleared individuals (hereafter the "security event").¹⁵⁷ In 2016, CNS had sent boxes of inactive archived records, dating back to 1943—including both unclassified and classified records—to three different Federal Records Centers (FRCs).¹⁵⁸ In March 2017, after four months of record transfers, CNS discovered it had transferred classified information to an FRC that was not authorized to store classified information.¹⁵⁹ CNS had determined that the relocation of over 30,000 boxes of unclassified and classified archived records to FRCs did not meet its criteria for a "formal project" and consequently did not develop a formal project plan for this activity.¹⁶⁰

To resolve potential noncompliance with DOE classified information security requirements identified in the investigation report and in consideration of CNS's final inquiry, causal analyses, and associated corrective actions for the se-

152. OFFICE OF ENTERPRISE ASSESSMENTS, DEP'T OF ENERGY ENFORCEMENT, <https://www.energy.gov/ea/services/enforcement> (last visited Feb. 26, 2019).

153. *In re Consolidated Nuclear Security, LLC*, Settlement Agreement Among the U.S. Department of Energy, the National Nuclear Security Administration, and Consolidated Nuclear Security, LLC, SSA-2018-01 1 (U.S. Dep't Energy Jul. 23, 2018), https://www.energy.gov/sites/prod/files/2018/07/f54/SSA-2018-01%20_transmittal%20Letter.pdf.

154. *Id.* at 5.

155. *Id.*

156. *Id.* at 1.

157. *Id.*

158. *In re Consolidated Nuclear Security, LLC*, *supra* note 153, at 2.

159. *Id.*

160. *Id.*

curity event, which the Office of Enforcement and NNSA found to be comprehensive and appropriate, the Office of Enforcement, NNSA, and CNS reached agreement to resolve the matter through the execution of the Settlement Agreement.¹⁶¹

In addition to fully implementing certain corrective actions, including the retrieval of archived records potentially containing classified information,¹⁶² in lieu of the issuance of an enforcement action with the proposed imposition of a civil penalty pursuant to 10 C.F.R. § 824.6, CNS agreed to pay an agreed-upon monetary remedy of \$73,000.¹⁶³

C. Worker Safety and Health Enforcement (10 C.F.R. Part 851)

The Office of Worker Safety and Health Enforcement implements the Department's worker safety and health enforcement program in accordance with 10 C.F.R. Part 851, *Worker Safety and Health Program*, as authorized by the Atomic Energy Act.¹⁶⁴

On February 7, 2018, the DOE Office of Enterprise Assessment's Office of Enforcement issued a Consent Order (WCO-2018-01) to Nuclear Waste Partnership, LLC (NWP) related to NWP's implementation of safety requirements for power transmission and distributions systems as revealed by an electrical shock event that occurred while an electrical worker was installing a ground cluster to the ground bus of a 13.8 kilovolt (kV) transformer at the Waste Isolation Pilot Plant.¹⁶⁵ The Consent Order was issued pursuant to DOE's authority under section 234C of the Atomic Energy Act of 1954, as amended (42 U.S.C. § 2282c), and the implementing provisions of Part 851 governing the enforcement of worker safety and health requirements at DOE sites.¹⁶⁶

NWP is responsible for management and operation of the DOE's Waste Isolation Pilot Plant (WIPP) and is a prime contractor with the DOE's Carlsbad Field Office (CBFO).¹⁶⁷ On February 12, 2017, an NWP employee received an electrical shock during the de-energization of a 13.8 kV transformer and the event revealed deficiencies in NWP's implementation of 10 C.F.R. Part 851, Appendix A requirements for electrical safety, and Occupational Safety and Health Administration power transmission and distribution standard (29 C.F.R. § 1910.269) that is invoked by Part 851.¹⁶⁸

In addition to fully implementing certain corrective measures described in a document entitled 13.8kV Transformer Electric Shock Corrective Action Plan, improving its electrical safety manual and training program for electrical workers,

161. *Id.* at 3.

162. *Id.* at 4.

163. *In re Consolidated Nuclear Security, LLC*, *supra* note 153, at 4.

164. OFFICE OF ENTERPRISE ASSESSMENTS, DEP'T OF ENERGY ENFORCEMENT, <https://www.energy.gov/ea/services/enforcement> (last visited Feb. 26, 2019).

165. *In re Nuclear Waste Partnership, LLC*, Consent Order Incorporating Agreement Between the U.S. Department of Energy and Nuclear Waste Partnership, LLC, WCO-2018-01 (U.S. Dep't of Energy Feb. 7, 2018), <https://www.energy.gov/ea/downloads/consent-order-nuclear-waste-partnership-llc>.

166. *Id.* at 4.

167. *Id.* at 1.

168. *Id.*

and improving its work planning and control program to ensure adequate review and authorization of electrical work, NWP agreed to pay \$100,000 as an agreed-upon monetary remedy in lieu of the issuance of an enforcement action with the proposed imposition of a civil penalty pursuant to 10 C.F.R. § 851.42.¹⁶⁹

On April 6, 2018, the DOE Office of Enterprise Assessment's Office of Enforcement issued a Consent Order (WCO-2018-02) to UChicago Argonne, LLC (UChicago) related to UChicago's implementation of DOE's 10 C.F.R. Part 851 electrical safety program requirements and two events involving workers contacting hazardous electrical energy at Argonne National Laboratory.¹⁷⁰ The Consent Order was issued pursuant to DOE's authority under section 234C of the Atomic Energy Act of 1954, as amended (42 U.S.C. § 2282c), and the implementing provisions of Part 851 governing the enforcement of worker safety and health requirements at DOE sites.¹⁷¹

UChicago is responsible for management and operation of the DOE's Argonne National Laboratory. UChicago is a prime contractor with the DOE Office of Science (SC).¹⁷² In less than three months, UChicago experienced two separate events involving work with electrical energy storage devices.¹⁷³

On May 10, 2017, a technician received thermal contact second-degree burns on two fingers while troubleshooting instrumentation installed on a plug-in hybrid electric vehicle's high voltage battery pack.¹⁷⁴ Then, on July 18, 2017, an employee not wearing appropriate personal protective equipment received second-degree burns to his left hand from a capacitor arc flash.¹⁷⁵ DOE conducted an onsite investigation in December 2017.¹⁷⁶

To resolve potential noncompliance with worker safety and health requirements and in consideration of UChicago's initiation of a common cause analysis of their electrical safety program prior to the first event, investigations and cause analyses of the two events, and associated corrective actions, DOE has elected to enter into settlement. DOE and UChicago have reached agreement to resolve this matter through execution of the Consent Order.¹⁷⁷ UChicago agreed to fully implement certain enumerated corrective measures described in the Consent Order, including updating its electrical safety program procedures and requirements documents, restructuring resources to support the electrical safety program, enhancing electrical safety training for workers and supervisors, evaluating potential gaps in the inspection process for lab-constructed electrical devices, improving communi-

169. *Id.* at 2-3.

170. *In re UChicago Argonne, LLC*, Consent Order Incorporating Agreement Between the U.S. Department of Energy and UChicago Argonne, LLC, WCO-2018-02 (U.S. Dep't Energy Apr. 6, 2018), <https://www.energy.gov/sites/prod/files/2018/04/f50/Consent%20Order%2C%20UChicago%20Argonne%2C%20LLC.pdf>.

171. *Id.* at 5.

172. *Id.* at 1.

173. *Id.*

174. *Id.*

175. *In re UChicago Argonne, LLC*, *supra* note 170, at 1-2.

176. *Id.* at 2.

177. *Id.* at 3.

cations and employee concern management, evaluating surplus property management procedures to identify opportunities for improvement, and benchmarking and establishing metrics to evaluate electrical safety program performance.¹⁷⁸

In lieu of the issuance of an enforcement action pursuant to 10 C.F.R. §§ 851.42-851.43, DOE entered into the Consent Order with UChicago and, in consideration of the \$683,854.58 contract fee reduction that DOE imposed for the circumstances leading the two separate electrical events, and consistent with 10 C.F.R. § 851.5(c), no monetary remedy was included in the Consent Order.¹⁷⁹

V. THE DEPARTMENT OF JUSTICE

A. *United States v. RaPower-3, LLC*

On October 4, 2018, the U.S. District Court for the District of Utah (Nuffer, J.) (Court) issued an injunction and order prohibiting two Utah men and their businesses from continuing to engage in and promote a scheme involving solar energy-related income tax benefits and requiring them to disgorge over \$50 million in gross receipts.¹⁸⁰ Defendant Neldon Johnson developed a complex business model whereby he manufactured and sold purported solar lenses to consumers through a multi-level marketing system, claiming that the purchase of such lenses made customers eligible for certain income tax benefits—namely, a depreciation deduction and a solar energy credit.¹⁸¹ The Court found that defendants knew or had reason to know that their statements about consumers' eligibility were false, because they knew or had reason to know that their customers were not engaged in "trade or business"—a requirement for both the deduction and the credit.¹⁸² The Court also held, in relevant part, that defendants had grossly overstated the value of the lenses by charging customers \$3,500 per lens, which the court noted was over 200% of the correct price of a single lens.¹⁸³ The Court also found that the lenses were incapable of actually producing energy: "Defendants' technology does not work, and is not likely to work to produce commercially viable electricity or solar process heat. Therefore, each 'lens' is just one component of an inoperable system. It is not a piece of sophisticated technology such that premium pricing is appropriate for it."¹⁸⁴ On these grounds, the Court ruled that an injunction was appropriate to "prevent recurrence of penalty conduct" in light of the extensive marketing employed by defendant RaPower-3, and that disgorgement was warranted.¹⁸⁵

178. *Id.*

179. *Id.* at 4.

180. *United States v. RaPower-3, LLC*, No. 2:15-cv-828-DN, 2018 WL 5292548, at *65-68 (D. Utah 2018); *see also* Press Release, U.S. Dep't of Justice, Federal Court Orders Tax Scheme Promoters to Disgorge \$50 Million in Gains From Fraudulent Solar Energy Tax Scheme (Oct. 5, 2018), <https://www.justice.gov/opa/pr/federal-court-orders-tax-scheme-promoters-disgorge-50-million-gains-fraudulent-solar-energy>.

181. Press Release, *supra* note 189.

182. *RaPower-3*, 2018 WL 5292548, at *45.

183. *Id.* at *59.

184. *Id.*

185. *Id.* at *60.

B. North American Power Group Ltd. and Michael Ruffatto

In July 2018, North American Power Group, Ltd. (NAPG) and its owner and president Michael Ruffatto reached an out-of-court settlement with the United States to resolve claims that they violated the False Claims Act by submitting fraudulent reimbursements to the DOE pursuant to a cooperative agreement.¹⁸⁶ NAPG and Ruffatto have agreed to pay \$14.4 million.¹⁸⁷ On December 8, 2009, DOE National Energy and Technology Laboratory (NATL) (located in Pittsburgh, Pennsylvania) awarded NAPG a \$14 million cooperative agreement for a project to collect and analyze data related to carbon sequestration, and to design and implement carbon sequestration wells at Two Elk Energy Park located in Campbell County, Wyoming.¹⁸⁸ Between 2009 and 2012, NAPG submitted invoices to the NATL for payment totaling approximately \$5.7 million, purportedly for expenses related to the project.¹⁸⁹ In fact, the claimed costs were unrelated to the project and instead used by Ruffatto to pay legal fees and car payments, and to purchase international travel, jewelry, and other personal items.¹⁹⁰ Ruffatto allegedly funneled the money awarded to NAPG under the agreement into his personal account through a subsidiary of NAPG that was falsely listed as a subcontractor on the project.¹⁹¹ The settlement came after Ruffatto had been sentenced on June 28, 2018 to eighteen months in prison, three years supervised release, a \$50,000 fine, and an additional \$2 million in restitution.¹⁹²

C. NGL Crude Logistics, LLC

In September 2018, the DOJ and the Environmental Protection Agency (EPA) reached a settlement with NGL Crude Logistics, LLC (NGL), requiring the company to pay a \$25 million civil penalty, and retire 36 million Renewable Identification Numbers (RINs) at an additional cost of approximately \$10 million.¹⁹³ Under the Clean Air Act's renewable fuel program, a percentage of all fuel produced or imported by an obligated party must be renewable.¹⁹⁴ RINs are assigned

186. Press Release, U.S. Dep't of Justice, North American Power Group Ltd And Michael Ruffatto Agree to Pay \$14.4 Million to Resolve Alleged False Claims for Department of Energy Cooperative Agreement Funds (July 2, 2018), <https://www.uspress.news/north-american-power-group-ltd-and-michael-ruffatto-agree-to-pay-14-4-million-to-resolve-alleged-false-claims-for-department-of-energy-cooperative-agreement-funds/>; see also Emma Cueto, *Colo. Energy Co., Owner To Pay \$14.4M To End Fraud Claims*, LAW 360 (July 3, 2018), <https://www.law360.com/articles/1059927/colo-energy-co-owner-to-pay-14-4m-to-end-fraud-claims>.

187. Press Release, *supra* note 195.

188. *Id.*

189. *Id.*

190. *Id.*

191. Cueto, *supra* note 195.

192. *Id.*

193. Press Release, Env'tl. Prot. Agency, NGL Crude Logistics LLC Agrees to Pay \$25 Million Civil Penalty and to Retire \$10 Million in Renewable Fuel Production Credits Under Settlement With United States (Sept. 27, 2018), <https://www.epa.gov/newsreleases/ngl-crude-logistics-llc-agrees-pay-civil-penalty-25-million-and-retire-10-million>.

194. *United States v. NGL Crude Logistics, LLC*, No. 16-cv-1038-LRR, 2018 WL 4762901, *3 (N.D. Iowa 2018).

to all renewable fuel that is produced in or imported to the United States, by volume.¹⁹⁵ Obligated parties satisfy their obligations under the renewable fuel program by “retiring” a sufficient number of RINs, which reflects the fact that they have either produced or traded in the requisite amount of renewable fuel.¹⁹⁶ In 2011, NGL purchased millions of gallons of biodiesel, which generated 36 million RINs assigned to that fuel.¹⁹⁷ NGL sold the fuel to Western Dubuque, designating it as “feedstock,” and sold the RINs to other entities.¹⁹⁸ Western Dubuque reprocessed the fuel and sold it back to NGL, along with a second set of RINs generated for the reprocessed fuel.¹⁹⁹ NGL then sold those RINs to other entities.²⁰⁰

The settlement came after the U.S. District Court for the Northern District of Iowa (Reade, J.) granted, in part, the government’s motion for summary judgment, finding that: (1) NGL was required to retire nearly 36 million RINs when it designated the biodiesel it sold to Western Dubuque as feedstock; (2) NGL caused Western Dubuque to violate the Clean Air Act by impermissibly generating invalid RINs, and (3) NGL unlawfully transferred the invalid RINs by selling them to third parties.²⁰¹ The EPA initially discovered the violations of the program through a tip provided by other renewable fuel program participants.²⁰²

D. Transport Logistics International, Inc.

In March 2018, Maryland-based company Transport Logistics International, Inc. (TLI) agreed to resolve criminal charges against it in connection with the long-term bribery of a Russian official at a subsidiary of Russia’s State Atomic Energy Corporation.²⁰³ TLI provides services for the transportation of nuclear materials, both domestically and abroad.²⁰⁴ According to certain admissions and documents, from 2004 until at least 2014, TLI was involved in a conspiracy to wire more than \$1.7 million to offshore bank accounts associated with shell companies in Latvia, Cyprus, and Switzerland at the direction of Russian official Vadim Mikerin.²⁰⁵ Mikerin, who was employed at JSC Techsnabexport, accepted the bribe payments in exchange for his involvement in helping TLI secure business advantages with

195. *Id.*

196. *Id.*

197. *Id.* at *5.

198. *Id.*

199. *NGL Crude Logistics*, 2018 WL 4762901 at *5 (Western Dubuque resolved its alleged violations stemming from the same series of transactions in a settlement with the United States in 2016).

200. *Id.*

201. *Id.* at *5-17.

202. *Id.* at 16.

203. Press Release, U.S. Dep’t of Justice, Transport Logistics International Inc. Agrees to Pay \$2 Million Penalty to Resolve Foreign Bribery Case (Mar. 13, 2018), <https://www.justice.gov/opa/pr/transport-logistics-international-inc-agrees-pay-2-million-penalty-resolve-foreign-bribery>; *see also* Press Release, U.S. Dep’t of Justice, Former President of Maryland-Based Transportation Company Indicted on 11 Counts Related to Foreign Bribery, Fraud and Money Laundering Scheme (Jan. 12, 2018), <https://www.justice.gov/opa/pr/former-president-maryland-based-transportation-company-indicted-11-counts-related-foreign>.

204. Transport Logistics International Press Release, *supra* note 212.

205. *Id.*

the State Atomic Energy Corporation subsidiary.²⁰⁶ TLI has entered into a deferred prosecution agreement with the DOJ, under which it will pay a \$2 million criminal penalty, cooperate fully with the ongoing investigation, and implement a compliance and ethics program.²⁰⁷

E. *Jin Chul Cha*

On January 11, 2018, Jin Chul “Jacob” Cha, 41, of Tustin, California, pleaded guilty to conspiracy to defraud the government and conspiracy to commit wire fraud.²⁰⁸ According to court proceedings, Cha was part of a conspiracy involving a Washington renewable energy company called Gen-X Energy Group, Inc. (Gen-X).²⁰⁹ From October 2012 to March 2015, Cha and his co-conspirators fraudulently claimed production of over 9.4 million renewable energy credits, which Gen-X then sold for more than \$6 million.²¹⁰ The co-conspirators also filed false claims with the Internal Revenue Service for over \$2.5 million in excise credit refunds.²¹¹ In reality, a significant portion of the fuel Gen-X claimed to have produced during this time was either never produced at all, or was re-processed multiple times.²¹² On April 20, 2018, Cha was sentenced to 51 months in prison, followed by three years of court supervision following his release.²¹³

F. *Gregory Schnabel*

In August 2018, Gregory Schnabel was sentenced to serve 63 months in prison, followed by a term of three years of supervised release, and ordered to pay \$26,244,437 in restitution for his involvement in a conspiracy in which he fraudulently claimed RINs and tax credits on fuel that did not qualify, on fuel that had already generated credits, and on fuel that was exported or used contrary to EPA and IRS regulations.²¹⁴ The scheme generated over \$47 million in EPA renewable fuel credits and over \$12 million in fraudulent tax credits.²¹⁵ Schnabel, the owner of GRC Fuels located in Oneonta, New York, purchased and sold fuel and RINs

206. *Id.*

207. *Id.*

208. Press Release, U.S. Dep’t of Justice, California Man Sentenced to 51 Months in Prison for Renewable Fuel Fraud (Apr. 20, 2018), <https://www.justice.gov/opa/pr/california-man-sentenced-51-months-prison-renewable-fuel-fraud>.

209. *Id.* (Andre Bernard, who was found guilty for his role in the Gen-X conspiracy last year on August 2, 2017, was sentenced on February 6, 2018 to 87 months in federal prison); *see also* Press Release, U.S. Dep’t of Justice, New York Man Sentenced to 87 Months for Multi-State Biodiesel Fraud Scheme (Feb. 6, 2018), <https://www.justice.gov/opa/pr/new-york-man-sentenced-87-months-multi-state-biodiesel-fraud-scheme>.

210. Press Release, *supra* note 217.

211. *Id.*

212. *Id.*

213. *Id.*

214. Press Release, U.S. Dep’t of Justice, Ohio Man Sentenced to 63 Months in Prison for Renewable Fuel Fraud (Aug. 27, 2018), <https://www.justice.gov/opa/pr/ohio-man-sentenced-63-months-prison-renewable-fuel-fraud>.

215. *Id.*

from several other individuals who have also pleaded guilty for their roles in the conspiracy.²¹⁶

VI. OTHER

On June 19, 2018, the U.S. District Court for the Southern District of California (Lorenz, J.) (Court) denied defendant refineries' motion to dismiss for failure to state a claim.²¹⁷ In its amended complaint, plaintiff Persian Gulf, Inc., a California gas station, brought claims against the refineries alleging violations of the Sherman Antitrust Act, the Cartwright Act, and the Unfair Competition Law.²¹⁸ Specifically, plaintiff alleged defendants "conspired to manipulate the wholesale gasoline market," resulting in historically high wholesale gas prices in California in 2012 and 2015.²¹⁹ According to plaintiff, defendants conspired to mislead wholesalers and the general public by creating a "false impression of reduced supply," when in fact, the refineries possessed sufficient inventory and production capacity to supply the market in California.²²⁰ Plaintiff contended that defendants did so by agreeing to employ tactics such as withholding certain information while publicly spreading misleading information about supply, planning simultaneous refinery maintenance shutdowns, staging a "run on the market," coordinating exports, and failing to repair a damaged refinery.²²¹ The Court rejected defendants' argument that each alleged activity had an independent explanation.²²² Instead, the Court found that the "big picture" that emerged when viewing defendants' activities in the aggregate supported an inference of conspiracy.²²³ The Court noted that the defendants' actions were against self-interest and closely coordinated in timing, both of which suggested intent to manipulate the market.²²⁴ Accordingly, the Court ultimately concluded that plaintiff's "extensive and detailed" factual allegations supported a plausible inference of conspiracy under the Sherman Antitrust Act, and therefore, denied defendants' motion to dismiss.²²⁵

216. *Id.* (The other individuals are: Fred Witmer and Gary Jury, formerly of Triton Energy; Malek Jalal, formerly of Unity Fuels; and Dean Daniels, William Bradley, Ricky Smith, and Brenda Daniels, of New Energy Fuels and Chieftain Biofuels).

217. *Persian Gulf, Inc. v. BP W. Coast Prod., LLC*, 324 F. Supp. 3d 1142 (S.D. Cal. 2018). The named defendants in this case are BP West Coast Products LLC, Chevron U.S.A. Inc., Tesoro Refining & Manufacturing Company LLC, Equilon Enterprises LLC d/b/a Shell Oil Products US, ExxonMobil Refining & Supply Co., Valero Marketing and Supply Co., ConocoPhillips, and Alon USA Energy, Inc.

218. *Id.* at 1146. (Defendants were previously successful in dismissing the initial complaint for failure to allege conspiracy. Plaintiff was granted leave to amend. In the amended complaint, plaintiff included more detailed factual statements regarding the conspiracy allegation. *Id.*).

219. *See generally id.*

220. *Id.* at 1149.

221. *Persian*, 324 F. Supp. 3d. at 1149–541142.

222. *Id.* at 1154.

223. *Id.*

224. *Id.* at 1155–561154–55.

225. *Id.* at 1156-57 (Because defendants made no arguments specific to the Cartwright Act claim, and because the Unfair Competition Law Claim derives entirely from the Cartwright Act claim, the court denied defendants' motion to dismiss as to those claims as well).

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