

FERC Compliance and FERC Compliance Programs Who Needs Them!?

Thank you for joining us today
The webinar will begin promptly at 12 pm

Please note, your phone lines will be
automatically muted upon entering the webinar

© 2010 Steptoe & Johnson PLLC All Rights Reserved



West Virginia Ohio Kentucky WWW.STEPTOE-JOHNSON.COM



Today's Presenter

Kurt L. Krieger



Kurt L. Krieger

Steptoe & Johnson PLLC

Chase Tower, 8th Floor

707 Virginia Street East

Charleston, WV 25326

Office: 304.353.8124

kurt.krieger@steptoe-johnson.com





FERC Compliance and FERC Compliance Programs Who Needs Them!?

■ ■ *Today's Presentation*



1. Scope of FERC regulation
2. Why FERC compliance matters
3. FERC's view on compliance programs
4. How to get started
5. Determining compliance requirements
6. Practical observations on compliance programs
7. Compliance program role in penalty mitigation

■ ■ *Does this apply to me?*



- Yes, for FERC-regulated companies
- Yes, if your company is not entirely regulated by FERC, but engages in FERC-regulated transactions



Scope of FERC Regulation

(Part 1 of 7)

■ ■ *Who is FERC? What does it do?*



- Independent agency in Washington, DC
- Regulates the interstate transmission of electricity, natural gas, and oil
- Reviews proposals to build interstate natural gas pipeline and storage facilities
- Hydroelectric licensing
- Enforcement arm enforces compliance with FERC regulations through imposition of civil penalties and other means

■ ■ *What does FERC do? - Electric*



- Transmission and wholesale sales of electricity in interstate commerce
- Disposition of certain generation facilities
- Terms of interconnections
- Reliability of the interstate transmission system through mandatory reliability standards (NERC)
- QFs and EWGs
- Reviews certain mergers, acquisitions, reorganizations
- Issuance of securities and assumption of liabilities
- Interlocking directorates
- Siting of electric transmission (limited circumstances)
- Standards and Codes of Conduct

■ ■ *What does FERC do? - Gas*



- Transmission and sale of natural gas for resale in interstate commerce
- Approves siting and abandonment of interstate natural gas pipelines and storage facilities (oversees related environmental aspects)
- Transparency and posting requirements
- LDC and intrastate pipelines interstate transactions
- Standards of Conduct
- Form 552 gas purchase and sales reporting

■ ■ *What does FERC do? - Other*



- Oil : Transportation of oil by pipeline in interstate commerce
- LNG: Approves siting and abandonment of liquefied natural gas (LNG) terminals (oversees related environmental aspects), and ensures their safe operation and reliability
- Hydro: Licenses and inspects certain hydroelectric projects
- Energy Markets: Monitors and investigates energy markets; market manipulation rules
- Conduct and Accounting: Administers accounting and financial reporting regulations and conduct of regulated companies
- New PUHCA 2005

■ ■ *What does FERC NOT do? - Generally*



- Retail electricity and natural gas sales
- Construction of electric generation facilities or oil pipelines
- Mergers and acquisitions related to oil or interstate natural gas pipelines
- Activities of municipal power systems, rural electric cooperatives
- Pipeline safety



Why FERC Compliance Matters

(Part 2 of 7)

■ ■ *Why does FERC compliance matter?*



- The price for non-compliance is high
- Civil and criminal penalties
 - \$1 million per day/per violation
 - \$1 million and 5 years imprisonment for knowing and willful violations of the law
- Disgorgement of unjust profits
- Revocation of certificates or authorizations
- Variety of enforcement tools

■ ■ *Why does FERC compliance matter?*



- Compliance with the law
- Integrity and good business practice
- Company reputation, time, and resources
- FERC's Hotline
- FERC diligently enforces compliance with its rules and regulations
- Avoid civil litigation



FERC's View on Compliance Programs

(Part 3 of 7)

■ ■ *Who needs a compliance program?*



FERC encourages all companies subject to FERC regulatory requirements -

“to develop rigorous compliance programs,”
and “to invest appropriate time and effort in the creation, monitoring, and growth of strong internal compliance programs.”

“The needs of each company are unique. . . .”

■ ■ *FERC Policy Statements*

- 2005 Policy Statement on Enforcement
- 2008 Revised Policy Statement
- 2008 Policy Statement on Compliance
- 2010 Policy Statement on Penalty Guidelines

■ ■ 2005 & 2008 Policy Statements on Enforcement



- Encouraged companies to:
 - Have comprehensive compliance programs
 - Develop a culture of compliance
 - Self-report and cooperate with FERC in the event violations occur
- FERC emphasized: enforcement and remedies applicable to jurisdictional companies, individuals and all other market participants.
- Penalties determined by seriousness of the violation and company's actions

■ ■ 2005 Policy Statement on Enforcement



- Key internal compliance program factors:
 - Established, formal program
 - Documented and widely disseminated
 - Chief FERC compliance officer rank, reporting, and independence
 - Adequate resources
 - Active senior management involvement
 - Review of program itself and audits for compliance
 - Training of the right detail and scope
 - Company response to wrongdoing

2008 Revised Policy Statement on Enforcement

- Additional factors indicating a strong compliance culture:
 - Inventory compliance risks and practices
 - Independent compliance officer
 - Adequate resources and funding for compliance efforts
 - Use measurable performance targets
 - Tie regulatory compliance to personnel assessments and compensation, including compensation of management
 - Disciplinary consequences
 - Frequent mandatory training programs with examples and a list of prohibited activities
 - Implement an internal Hotline with anonymous reporting
 - Implement a comprehensive compliance audit program, including the tracking and review of any incidents of noncompliance, with submission of the results to senior management and the Board

■ ■ 2008 Policy Statement on Compliance



FERC “cannot spell out what constitutes an effective compliance program in all circumstances, but we can identify the compliance-related credit factors we will consider. . . . it is possible to identify four key compliance factors. . . .”

■ ■ *Factors for Vigorous Compliance Programs*



2008 Policy Statement on Compliance

1. Actions by senior management
2. Effective preventive measures
3. Prompt detection, cessation, and reporting
4. Remediation

■ ■ *Factors for Vigorous Compliance Programs*



1. Actions of senior management

- Embrace compliance effort
- Foster culture
- Fund and devote resources to compliance
- Communicate frequently, formally and informally
- Get involved in non-compliance as it arises
- Encourage questioning
- Involve compliance in new business structures/ventures
- Designate senior-level, independent compliance officer

■ ■ *Factors for Vigorous Compliance Programs*



2. Effective preventive measures

- Not just paper tiger – systems and implementation matters
- Training
- Accountability
- Supervision
- “determine the optimum investment. . . in light of its resources and risks.”

■ ■ *Factors for Vigorous Compliance Programs*



3. Prompt detection, cessation, and reporting of violations

- Method of detection and behavior after detection
- Audit, internal hotline, investigation
- Self-reporting from increased compliance measures
- Terminate wrongful conduct
- Promptly report

■ ■ *Factors for Vigorous Compliance Programs*



4. Remediation

- Always fact specific
- Disciplinary action depends on circumstances
- Involve supervisory personnel and senior management
- Prevent recurrence with new and improved controls

■ ■ *Factors for Vigorous Compliance Programs*



2010 Policy Statement on Penalty Guidelines

The Penalty Guidelines detail “what is required for an organization to have an effective compliance and ethics program. . . . [and are] consistent with the four hallmarks of effective compliance programs that we enumerated in our [2008] Policy Statement on Compliance. . .



How to Get Started

(Part 4 of 7)

■ ■ *How do I get started?*



Perform an Initial Compliance Audit?

Or

Set up Compliance Organization?

■ ■ *The Basic Approach to Compliance*



- Identify all companies and company activities
- Conduct interviews
- Comprehensively list compliance requirements
- Create a compliance plan
 - Self-report
- Create a compliance organization
- Implement the plan, monitor, audit and report



Determining Compliance Requirements

(Part 5 of 7)

■ ■ *What are my compliance obligations?*



FERC-regulated companies

- Interstate natural gas pipelines
- Electric public utilities
- Hydroelectric facilities
- Oil pipelines

■ ■ *What are my compliance obligations?*



- Depends upon company and company activities
- Analyze company operations under applicable FERC requirements under:
 - Start with Federal statutes (to name a few):
 - Natural Gas Act (NGA)
 - Natural Gas Policy Act of 1978 (NGPA)
 - Federal Power Act (FPA)
 - EAct 2005
 - FERC regulations and orders
 - Gas and electric tariffs and hydro licenses
- Law and regulation is extensive, broad and complex

■ ■ *What are my compliance obligations?*



- Interstate natural gas pipelines and public utilities
 - Cash management (money-pool) program documentation
 - Market manipulation rules
 - Standards of conduct
 - NGA and FPA undue discrimination standards
 - Regular reports and record retention
 - New PUHCA 2005 holding and service company requirements and filings
 - Document retention
 - Price reporting
 - Gas purchases and sales

■ ■ *What are my compliance obligations?*



- Interstate natural gas pipelines
 - Facility construction and abandonment approval and review practices
 - Awarding of available firm capacity
 - Tariff terms and practices
 - All service features and customer arrangements in the tariff
 - Negotiated rate arrangements
 - Non-conforming service agreements

■ ■ *What are my compliance obligations?*



- Public utilities
 - Power sales, market-based-rates and code of conduct
 - Interlocking director requirements
 - NERC and reliability standards compliance
 - Issuance of securities and assumption of liabilities
 - Cross-subsidization rules
 - QF and EWG certifications and maintaining one's status
 - Document retention

■ ■ *What are my compliance obligations?*



- Local gas distribution companies (LDCs), intrastate (or gathering) pipelines, others (producers, gas marketers):
 - Facilities crossing state lines?
 - Engaging in any interstate transactions?
 - Facilities interconnected with whom?
 - Asset management agreements?
 - Capacity release transactions?
 - Bidding practices in pipeline open seasons?
 - Reporting commodity transaction prices to index makers?
 - Buying or selling natural gas?
 - Document retention requirements?
 - Order No. 720 posting requirements?
 - Market manipulation rules?

■ ■ *What are my compliance obligations?*



- Other items:
 - Cogeneration facilities and small power production facilities (self-certified as a QF or EWG? State citing approval?)
 - Ownership or control over power generation
 - Hydro license compliance obligations and reporting
 - Oil pipelines

■ ■ *What are my compliance obligations?*



- Common types of violations
 - Failure to file reports
 - Capacity release rules
 - Shipper must have title
 - Standards of conduct
 - OATT and tariff violations
 - Market manipulation rules

■ ■ *What are my compliance obligations?*



- Not sure? Need to find out.
- Prepare an initial compliance audit
- Involve counsel
- Seek FERC assistance
- Begin with statutes, regulations and tariffs
- Review FERC audits and settlements
- It does not end



Practical Observations on Compliance Programs

(Part 6 of 7)

■ ■ *Practical Observations on Compliance Programs*



- Plan addresses companies compliance risks
- No one-size-fits-all approach
- FERC does not approve plans
- Satisfy FERC's four factors for vigorous plans and in the 2010 penalty guidelines
- Not just about paper
- Starts with compliance culture
- Devote meaningful resources in proportion to risks

■ ■ *What does my compliance program look like?*



- Compliance organization
 - Chief FERC Compliance Officer
 - Determine supporting resource needs
- List reporting requirements and assign names
- Create policies and procedures for compliance
 - Scope depends on company activities
- Training an integral component
- Periodic compliance alerts
- Implement, monitor, audit and report

■ ■ *I have a compliance program, am I done?*



- Ongoing senior management communications
- Review and creation of policies and procedures
- Send out compliance alerts
- Changing business activities
- Repeating violations
- Employee questions or reporting of issues
- Changing law and regulation
- Changing technology (in-house and external)
- Set up an intranet website
- Platform for other compliance

■ ■ *What should policies and procedures address?*

- Plan policies and procedures must address:
 - Training on what topics?
 - Who is responsible for FERC filings?
 - What if our business changes? Grows?
 - What if the law or regulations change?
 - Do we need to report on compliance to management?
 - How do we encourage employees to report events of non-compliance?
 - If we find a problem, what do we do?

■ ■ *What makes for effective training?*



- At hire and regular ongoing basis
- Make it easy
- Mandatory
- Real examples
- Short list of 'don'ts'
- Keep training records
- Always look for training topic opportunities

■ ■ *IT system compliance concerns*



- IT Systems and Information Sharing Prohibitions
 - Inventory of applications
 - Type of information
 - Who has access
 - Frequency of inventory and access checks
 - New and changing applications
 - Granting new or terminating exiting employee's access
 - (and employee intra-company transfers)
 - Adding companies, facilities, or new lines of business
 - Who's the gatekeeper



Compliance Program Role In Penalty Mitigation

(Part 7 of 7)

■ ■ *What if I find non-compliance?*



- Before, during or after a compliance program
- Involve senior management
- Immediately stop non-compliance
- Promptly self-report to FERC enforcement
- Cooperate and be forthcoming
 - Waiver of privilege is not required
- FERC expects and gives credit for self-reporting
- Implement corrective procedures

■ ■ *What factors determine a FERC penalty?*



2008 Revised Policy Statement on Enforcement

Seriousness of the offense

Commitment to compliance

2008 Policy Statement on Compliance

Four Factors or Hallmarks of an Effective
Compliance Program

■ ■ *What factors determine a FERC penalty?*

2010 Policy Statement on Penalty Guidelines

- Penalty ranged based on a five-step process
- Step four – culpability score
- One adjustment to the culpability score:
 - Reemphasizes FERC’s previous policy statements on the importance of compliance programs
 - Reduce[s] an organization’s “culpability score” by if the violation occurred despite the existence of an effective compliance program



Step toe & Johnson PLLC can assist in surveying your company and company activities for FERC compliance risks, identify those risks, and develop a right-sized compliance program



Thank You!

www.step toe-johnson.com



Kurt Krieger

Step toe & Johnson PLLC

Chase Tower, 8th Floor

707 Virginia Street East

Charleston, WV 25326

Office: 304.353.8124

kurt.krieger@step toe-johnson.com





The meeting host will now open phone and chat lines for questions

Please ask questions by typing your question into the chat box on the lower right-hand portion of the screen and submitting it to the host

Thank you for participating!

*Please join us for the next
Energy Webinar , August 18*

Details will be emailed to you soon!





Material Disclaimer



These materials are public information and have been prepared solely for educational purposes to contribute to the understanding of energy and oil and gas law. These materials reflect only the personal views of the author and are not individualized legal advice. It is understood that each case is fact-specific, and that the appropriate solution in any case will vary. Therefore, these materials may or may not be relevant to any particular situation. Thus, the author and Steptoe & Johnson PLLC cannot be bound either philosophically or as representatives of their various present and future clients to the comments expressed in these materials. The presentation of these materials does not establish any form of attorney-client relationship with the author or Steptoe & Johnson PLLC. While every attempt was made to insure that these materials are accurate, errors or omissions may be contained therein, for which any liability is disclaimed.