

Alerts and Updates

FERC MAKES ENFORCEMENT PROCESS MORE TRANSPARENT--MAY IMPACT TIMING OF SEC DISCLOSURE

December 23, 2009

On December 17, 2009, the Federal Energy Regulatory Commission ("FERC") made its energy-market enforcement process involving nonpublic investigations more transparent for market participants and consumers by authorizing the Office of Enforcement to make public the details of an investigation. The FERC order in Docket No. [PL10-2](#) authorizes the secretary of the FERC, upon authorization of the Director of the Office of Enforcement, to issue a "Staff's Preliminary Notice of Violations" ("Notice") after the subject of the investigation has had an opportunity to respond to the FERC staff's preliminary findings letter.

This order modifies the current procedures by permitting the Office of Enforcement to provide the public with details of the investigation earlier in the process. Previously, public disclosure usually did not occur until a settlement agreement was reached between the subject and the Office of Enforcement or the FERC issued an order to show cause.

The FERC acknowledged that one result of accelerated public disclosure may be that the entity being investigated would face adverse consequences to its reputation once the details of the investigation are released. However, the FERC stated that in its experience, once staff provides its preliminary conclusions, the existence of an investigation is likely to become public via a negotiated settlement, an order to show cause or, in the case of a publicly traded company, a securities filing. Although third parties do not have a right to intervene or participate directly in FERC investigations, the possibility exists that a third party may be prompted to file a formal complaint against a target company based upon the information available in the Notice.

Public companies experiencing nonpublic investigations may have to decide whether a filing with the U.S. Securities and Exchange Commission is warranted, which would detail the facts of the investigation and any potential liability or sanctions that could have a material adverse impact on the entity's financial condition or operations. With the issuance of the Notice, some public companies faced with the possibility of FERC's Notice may feel compelled to make a contemporaneous disclosure. In the past, they may have considered delaying disclosure until later in the investigation process or until issuance of an order to show cause.

Under the new procedures, as the Office of Enforcement completes its fact-finding process, it may make a preliminary determination that the subject has violated one or more FERC requirements. Upon making such a determination, the Office of Enforcement will send the subject a letter outlining the basis for the preliminary determination. Once the subject has had an opportunity to respond to staff's preliminary findings letter, the Director of the Office of Enforcement is authorized to direct the Secretary of the FERC to issue a Notice. The Commission order requires such Notice to disclose the following:

- the identity of the entity or entities under investigation;
- the time and place of the alleged conduct;
- the rules, regulations, statutes or orders that staff alleges were violated; and
- a concise description of the alleged wrongful conduct.

The FERC stated that the order would benefit the public interest by increasing transparency and informing the regulated community about the views of the Office of Enforcement with respect to the matter, which may contribute to a better understanding of compliance obligations.

In a related action, the FERC also formalized a process by which the Office of Enforcement would provide exculpatory evidence to subjects of its investigations and respondents in administrative enforcement proceedings.

For Further Information

If you have questions about this Alert, please contact [David DeSalle](#), [Laurence Lese](#) or [Sharli Silva](#) in our [Washington, D.C. office](#), any [member](#) of the [Energy, Environment and Resources Practice Group](#) or the attorney in the firm with whom you are regularly in contact.