

130 FERC ¶ 61,220  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinohoff, Chairman;  
Marc Spitzer, Philip D. Moeller,  
and John R. Norris.

Enforcement of Statutes, Orders, Rules,  
and Regulations

Docket No. PL10-4-000

POLICY STATEMENT ON PENALTY GUIDELINES

(Issued March 18, 2010)

1. The Commission issues this Policy Statement on Penalty Guidelines for the purpose of adding greater fairness, consistency, and transparency to our civil penalty determinations. The Commission's Penalty Guidelines (Penalty Guidelines) are modeled on portions of the United States Sentencing Guidelines (Sentencing Guidelines), with appropriate modifications to account for Commission-specific considerations. The Penalty Guidelines are contained at the end of this Policy Statement.

**I. Introduction**

2. The Commission's present adoption of a guidelines approach as a significant factor to be considered in determining civil penalties is the latest in a line of policy statements and initiatives we have implemented since passage of the Energy Policy Act of 2005 (EPAAct 2005) to add greater fairness, consistency, and transparency to our enforcement program.<sup>1</sup> The Penalty Guidelines accomplish this by using a set of objective characteristics to determine penalties that are transparent. The Penalty Guidelines will promote greater consistency by basing penalties on a set of uniform factors that are

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<sup>1</sup> A guidelines approach allows for the discretion to depart from the indicated penalty where necessary.

assigned transparent values and weighted similarly for similar types of violations and similar types of violators. Organizations will be provided more notice and certainty as to how we will determine appropriate civil penalties.<sup>2</sup> Application of the Penalty Guidelines, however, is discretionary, not mandatory. As such, deviations in penalties may be necessary to account for the specific facts and circumstances of a violation.

3. The Commission's approach to determine penalties has evolved during the almost four-and-a-half years since EPCRA 2005 first went into effect in August 2005. We have given the question careful consideration at many junctures, weighing the benefits and costs and considering how other federal agencies determine civil penalties. We have paid close attention to the Sentencing Guidelines because they rely on many of the same factors that are at the core of our enforcement program.<sup>3</sup> We now believe that it is in the public interest to advance our past use of the Sentencing Guidelines' principles by implementing a guidelines approach patterned after the Sentencing Guidelines, which apply factors in a focused manner to promote fairness and consistency, while still allowing for the discretion to depart from the indicated penalty where necessary.

4. The purpose of this Policy Statement is to explain how we have come to the decision to adopt the Penalty Guidelines, to explain the benefits of a guidelines approach, and to set forth how our Penalty Guidelines will work in practice.

## **II. Background**

### **A. Energy Policy Act of 2005**

5. The Commission has various enforcement tools in policing the areas of the electric, natural gas, hydroelectric, and oil pipeline industries within our jurisdiction. Specifically, we can require compliance plans and disgorgement of unjust profits, we have the ability to condition, suspend, or revoke market-based rate authority, certificate authority, or blanket certificate authority, we have the ability to refer matters to the Department of Justice for criminal prosecution, and we have civil penalty authority. With respect to civil penalties, the Commission received a significant enhancement to its

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<sup>2</sup> "Organization" is defined in the Penalty Guidelines as "any entity other than a natural person." Penalty Guidelines § 1A1.1 (Commentary note 1).

<sup>3</sup> See, e.g., *Compliance with Statutes, Regulations, and Orders*, 125 FERC ¶ 61,058, PP 23-25 (2008) (Policy Statement on Compliance).

enforcement program with the passage of EAct 2005.<sup>4</sup> Prior to EAct 2005, the Commission's authority to assess civil penalties was limited to: (1) \$11,000 per day under Part I of the Federal Power Act (FPA); (2) \$11,000 per day under sections 211 through 214 of Part II of the FPA; and (3) \$5,500 per day under the Natural Gas Policy Act of 1978 (NGPA).<sup>5</sup> The Commission lacked civil penalty authority entirely under the Natural Gas Act (NGA). Congress significantly expanded this authority in EAct 2005 through three primary enhancements. First, Congress expanded the Commission's FPA civil penalty authority to cover all provisions of FPA Part II and any rule or order issued thereunder.<sup>6</sup> Second, Congress extended our civil penalty authority to cover the NGA and any rule, regulation, restriction, condition, or order made or imposed by the Commission under the NGA.<sup>7</sup> Third, Congress increased the maximum civil penalty the Commission can assess to \$1,000,000 per day, per violation for any violation of the NGA, NGPA, and Part II of the FPA.<sup>8</sup> With this expansion came the responsibility to carefully implement our new authority and to seek to improve our application of it in light of experience. This Policy Statement represents such an improvement.

6. While granting the Commission this greater civil penalty authority, EAct 2005 also mandated that we consider certain factors in determining the amount of a particular penalty. Specifically, EAct 2005 amended the NGA to provide that "[i]n determining the amount of a proposed penalty, the Commission shall take into consideration the nature and seriousness of the violation and the efforts to remedy the violation."<sup>9</sup> Thus, in

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<sup>4</sup> See Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594 (2005) (EAct 2005).

<sup>5</sup> 16 U.S.C. § 823b(c) (2000) (FPA Part I); 16 U.S.C. § 825o-1(b) (2000) (FPA Part II); 15 U.S.C. § 3414(b)(6) (2000) (NGPA); 18 C.F.R. § 385.1602 (2009).

<sup>6</sup> EAct 2005 § 1284(e)(1) (amending FPA § 316A(a)).

<sup>7</sup> EAct 2005 § 314(b)(1) (inserting new NGA § 22).

<sup>8</sup> EAct 2005 § 314(b)(1) (inserting new NGA § 22(a)); EAct 2005 § 314(b)(2) (amending NGPA § 504(b)(6)(A)); EAct 2005 § 1284(e)(2) (amending FPA § 316A(b)). EAct did not change the Commission's existing \$11,000 per day authority under Part I of the FPA. See section 385.1602(b) of the Commission's regulations, 18 C.F.R. § 385.1602(b) (2009).

<sup>9</sup> 15 U.S.C. § 717t-1 (added by EAct 2005 § 314(b)). A similar directive already had existed in the FPA.

determining an appropriate penalty, Congress instructs that we must specifically consider the seriousness of the violation and the efforts a company takes to remedy it. As we will discuss more fully below, these two factors have been at the forefront of our penalty determinations since EAct 2005 and will continue to be significant factors under the Penalty Guidelines that we announce here.

### **B. The Commission's First Policy Statement on Enforcement**

7. Following the passage of enhanced civil penalty authority in EAct 2005, the Commission issued the first Policy Statement on Enforcement on October 20, 2005 (2005 Policy Statement), for the purpose of providing guidance and regulatory certainty regarding our statutes, orders, rules, and regulations.<sup>10</sup> We made clear that our purpose was to provide “firm but fair enforcement” of our laws and to provide notice to jurisdictional organizations of the consequences of violating our laws.<sup>11</sup> The Commission described factors that we would consider in determining appropriate penalties under our enhanced penalty authority.<sup>12</sup>

8. In deciding what criteria would guide our penalty determinations, we considered our statutory mandates from EAct 2005 as well as the enforcement policies of other federal agencies, including the Securities and Exchange Commission (SEC), the Commodity Futures Trading Commission (CFTC), and the Department of Justice (DOJ). We explained that the “first touchstone for our determination” would be the seriousness of the violation, given that this was a statutorily mandated consideration.<sup>13</sup> We listed some factors we would consider in judging the seriousness of the violation, including the harm caused by the violation and whether the violation resulted from manipulation, deceit, or artifice.<sup>14</sup> We also looked to the second statutory criterion, specifically, the efforts made by the company to remedy the violation in a timely manner.<sup>15</sup> This criterion

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<sup>10</sup> *Enforcement of Statutes, Orders, Rules, and Regulations*, 113 FERC ¶ 61,068 (2005) (2005 Policy Statement).

<sup>11</sup> *Id.* P 1.

<sup>12</sup> *Id.* PP 17-27.

<sup>13</sup> *Id.* P 11.

<sup>14</sup> *Id.* P 20.

<sup>15</sup> *Id.* P 21.

also includes several factors, including efforts relating to internal compliance, self-reporting, and cooperation.<sup>16</sup> We encouraged organizations to create comprehensive compliance programs, develop a culture of compliance, and to self-report and cooperate with the Commission if violations were to occur.<sup>17</sup>

9. At the time, the Commission also considered the most effective way to apply the various factors to determine a penalty. It did this, in part, by considering the enforcement programs at other federal agencies. In 2001, the SEC issued a decision in which it listed thirteen factors it considers in determining whether, and how much, credit it gives for self-policing, self-reporting, remediation, and cooperation.<sup>18</sup> While listing these factors, the SEC declined to adopt a guidelines approach, emphasizing that it was not limiting its broad discretion to evaluate each case individually.<sup>19</sup> The CFTC also has listed relevant factors it considers to determine penalties, but like the SEC, has declined to adopt a guidelines approach. Other agencies, however, have adopted guidelines approaches. For example, the Environmental Protection Agency uses various matrices to calculate civil penalty amounts.<sup>20</sup> Similarly, the Nuclear Regulatory Commission uses a guidelines model to determine penalties.<sup>21</sup> The Federal Communications Commission employs guidelines to assess forfeiture penalties.<sup>22</sup> In addition, the Occupational Safety and Health Administration uses a guidelines approach to determine penalties.<sup>23</sup> We also

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<sup>16</sup> *Id.* PP 21-27.

<sup>17</sup> *See, e.g., id.* P 2.

<sup>18</sup> *Accounting and Auditing Enforcement*, SEC Release No. 1470 (October 23, 2001).

<sup>19</sup> *Id.*

<sup>20</sup> *See generally* Calculation of the Economic Benefit of Noncompliance in EPA's Civil Penalty Enforcement Cases, 64 Fed. Reg. 32,948 (Env'tl. Prot. Agency June 18, 1999); Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations, 65 Fed. Reg. 19,618 (Env'tl. Prot. Agency April 11, 2000).

<sup>21</sup> *See* NRC Enforcement Policy at 18-21, available at <http://www.nrc.gov/about-nrc/regulatory/enforcement/enforc-pol.pdf>.

<sup>22</sup> *See* 47 C.F.R. § 1.80 (2009).

<sup>23</sup> *See* OSHA's Field Operations Manual, Chapter 6 (Nov. 9, 2009).

considered the practice of the DOJ, which, pursuant to the Sentencing Reform Act of 1984, uses the Sentencing Guidelines to determine penalties.<sup>24</sup> After weighing our options, we chose, like the SEC and CFTC, to determine penalties based on a case-by-case approach, hoping to retain more discretion and flexibility to address each case on its individual set of facts.<sup>25</sup>

10. Although we declined at the time to adopt a guidelines approach like that used by the DOJ, we were heavily influenced by the Sentencing Guidelines and the practices of the DOJ in deciding which factors would guide our penalty analyses. For example, as with our approach, the Sentencing Guidelines consider the seriousness of an offense, in part, by calculating the gain to the organization or the loss caused by the conduct,<sup>26</sup> and the number of victims.<sup>27</sup> Also, the Sentencing Guidelines consider the organization's culpability, including whether the organization has a prior history, whether the organization has self-reported the offense, whether high-level personnel were involved in the offense, and whether the organization cooperated with governmental authorities.<sup>28</sup> Moreover, the Sentencing Guidelines provide credit for organizations with effective compliance programs.<sup>29</sup> The Commission incorporated all of these factors into its 2005 Policy Statement and it has continued to weigh these factors in its penalty determinations, albeit in a less structured manner than is found in the Sentencing Guidelines.

C. **Early Experience with Civil Penalties and Feedback from Regulated Community**

11. The Commission's early experience with our enhanced civil penalty authority reflected the "firm but fair enforcement" policy that we articulated in our 2005 Policy Statement. We imposed civil penalties in the context of negotiated settlements where

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<sup>24</sup> 2005 Policy Statement at P 8.

<sup>25</sup> *Id.* P 13.

<sup>26</sup> United States Sentencing Commission, Guidelines Manual (U.S.S.G.), § 8C2.4(a).

<sup>27</sup> *Id.* § 2B1.1(b)(1-2).

<sup>28</sup> *Id.* § 8C2.5.

<sup>29</sup> *Id.* §§ 8C2.5(f); 8B2.1.

appropriate, but we also closed many investigations with no sanctions and required compliance measures instead of penalties in others. Between 2005 and 2007, the Commission's Office of Enforcement staff (Enforcement staff) closed forty-seven out of sixty-four investigations without any sanctions being imposed, even though Enforcement staff found a violation in twenty-two of those closed investigations.<sup>30</sup> Only the remaining one-quarter of the total investigations completed during this period resulted in civil penalties.<sup>31</sup> In addition, Enforcement staff closed with no action more than half of the seventy-four self-reports submitted to Enforcement staff during this period.<sup>32</sup> Enforcement staff frequently exercised prosecutorial discretion to resolve minor infractions with agreed-upon compliance measures rather than with penalties.

12. Between 2005 and the end of 2007, all of the post-EPA 2005 investigations resulting in civil penalties were resolved by settlement between Enforcement staff and the subject companies. The Commission issued 12 orders approving these settlements.<sup>33</sup> The civil penalties ranged from \$300,000 to \$10 million, and reflected a wide variety in the type and seriousness of the violations at issue. In some of these cases, disgorgement or other monetary remedies were imposed as well, and all but three of the settlements also required compliance plans designed to prevent reoccurrence of the violations. We also issued two Orders to Show Cause, based on Enforcement staff's allegations of

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<sup>30</sup> *Report on Enforcement*, Docket No. AD07-13-000, at 21 (Nov. 14, 2007). No sanctions were imposed in the twenty-two investigations because the violations were relatively minor in nature and resulted in little or no actual harm. In addition, in some of those investigations, the violations predated the effective date of the Commission's expanded penalty authority under EPA 2005.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 15.

<sup>33</sup> See *In re BP Energy Co.*, 121 FERC ¶ 61,088 (2007); *In re MGTC, Inc.*, 121 FERC ¶ 61,087 (2007); *In re Gexa Energy L.L.C.*, 120 FERC ¶ 61,175 (2007); *In re Cleco Power, LLC*, 119 FERC ¶ 61,271 (2007); *In re Columbia Gulf Transmission Co.*, 119 FERC ¶ 61,174 (2007); *In re Calpine Energy Services, L.P.*, 119 FERC ¶ 61,125 (2007); *In re Bangor Gas Co.*, 118 FERC ¶ 61,186 (2007); *In re NRG Energy, Inc.*, 118 FERC ¶ 61,025 (2007); *In re NorthWestern Corp.*, 118 FERC ¶ 61,029 (2007); *In re Entergy Services, Inc.*, 118 FERC ¶ 61,027 (2007); *In re SCANA Corp.*, 118 FERC ¶ 61,028 (2007); *In re PacifiCorp*, 118 FERC ¶ 61,026 (2007).

possible violations of a former Market Behavior Rule<sup>34</sup> and the current Anti-Manipulation Rule.<sup>35</sup> Reflecting the seriousness of the allegations in those cases, those orders portended the possibility of near maximum statutory penalties.

13. Given the importance and nascence of this new enforcement regime, Enforcement staff prepared a report summarizing the enforcement actions it took in the first two years after issuance of EAct 2005,<sup>36</sup> and the Commission held a widely-attended Conference on Enforcement Policy (Enforcement Conference) on November 16, 2007, to entertain questions and suggestions regarding our enforcement program.<sup>37</sup>

14. The Enforcement Conference generated many thoughtful comments, questions, and suggestions, including requests for additional information on how we apply the factors set out in our 2005 Policy Statement and suggestions that the Commission adopt a guidelines approach to determine penalties. These requests and suggestions led the Commission to issue a Revised Policy Statement on Enforcement (Revised Policy Statement).

**D. Revised Policy Statement on Enforcement and Policy Statement on Compliance**

15. In 2008, we issued two additional policy statements to provide further guidance on our enforcement program. First, on May 15, 2008, the Commission issued the Revised Policy Statement to supersede the 2005 Policy Statement and provide industry with a

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<sup>34</sup> 18 C.F.R. § 284.403(a)(2005) (at the time of the alleged violations, this regulation included the now rescinded Market Behavior Rule 2); *Energy Transfer Partners, L.P.*, 120 FERC ¶ 61,086 (2007).

<sup>35</sup> 18 C.F.R. § 1c.1-1c.2 (2007); *Amaranth Advisors LLC*, 120 FERC ¶ 61,085 (2007).

<sup>36</sup> *Report on Enforcement*, Docket No. AD07-13-000 (Nov. 14, 2007). This report was well-received by the regulated community, and Enforcement staff has continued to issue this report on an annual basis.

<sup>37</sup> *Conference on Enforcement Policy*, Docket No. AD07-13-000 (Nov. 16, 2007).

fuller picture of Enforcement staff's investigative process and the factors we consider to determine whether a penalty is warranted and, if so, the amount of such penalty.<sup>38</sup> Second, on October 16, 2008, we issued the Policy Statement on Compliance to discuss factors related to effective compliance that the Commission will consider in determining whether to reduce or, where appropriate, even eliminate civil penalties for violations.<sup>39</sup>

16. In the Revised Policy Statement, the Commission re-emphasized that the two most important factors are seriousness of the offense and the strength of an organization's commitment to compliance.<sup>40</sup> As to the compliance factor, the Commission provided additional guidance not included in the 2005 Policy Statement as to what specifically constitutes an effective compliance program.<sup>41</sup> The Policy Statement on Compliance further supplemented our discussion as to the specific factors underpinning effective compliance programs. There, we enumerated four hallmarks of effective compliance programs: active engagement and leadership by senior management; effective preventive measures; prompt detection and cessation of violations and voluntary reporting of violations; and remediation of the misconduct.<sup>42</sup> Thus, with both the Revised Policy Statement and Policy Statement on Compliance, the Commission placed a renewed and heavy emphasis on promoting industry-wide compliance and the creation of effective compliance programs.

17. As was the case with the 2005 Policy Statement, the Commission once again was heavily influenced by the factors enumerated in the Sentencing Guidelines. For example, the hallmarks of an effective compliance program that we listed in the Policy Statement on Compliance are all included in the Sentencing Guidelines.<sup>43</sup> Nevertheless, the Commission continued to decline various commenters' suggestions that we adopt a penalty guidelines approach like that used by the DOJ. We explained in the Revised

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<sup>38</sup> *Enforcement of Statutes, Regulations and Orders*, 123 FERC ¶ 61,156 (2008) (Revised Policy Statement).

<sup>39</sup> Policy Statement on Compliance, 125 FERC ¶ 61,058 (2008).

<sup>40</sup> Revised Policy Statement at P 54.

<sup>41</sup> *Id.* P 59.

<sup>42</sup> Policy Statement on Compliance at PP 13-21.

<sup>43</sup> *See* U.S.S.G. § 8B2.1.

Policy Statement that “[o]ur two years of experience in administering the enhanced penalty authority granted under EPAct 2005 has not yet convinced us to revise our decision [from the 2005 Policy Statement] at this time.”<sup>44</sup> We left open the possibility of moving to a guidelines approach in the future, indicating that a guidelines approach might be more feasible when “the Commission develops more experience in reviewing matters involving its enforcement authority.”<sup>45</sup>

### **E. United States Sentencing Guidelines**

18. The section of the Sentencing Guidelines that applies to organizations involves a two-step process to determine the ultimate fine range that an organization will be required to pay after being sentenced for a crime. First, the Sentencing Guidelines require the calculation of a base fine.<sup>46</sup> The base fine is the greater of the gain to the organization, the loss caused by the conduct, or a pre-determined amount that is generated by the offense level and is enumerated in the guidelines.<sup>47</sup> Second, the Sentencing Guidelines produce a multiplier range for the base fine, which requires an analysis of the organization’s culpability, considering factors similar to those the Commission considers, such as whether the organization has a prior history of violations, whether high-level management was involved in the offense, whether the organization has self-reported and accepted responsibility for its conduct, whether the organization had an effective compliance program at the time it committed its offense, and whether the organization cooperated with government authorities.<sup>48</sup> The multiplier and the base fine are then combined to calculate a fine range for the conduct.<sup>49</sup>

19. Imposing a sentence or fine generated by the Sentencing Guidelines is not mandatory. The Sentencing Guidelines themselves provide for a departure process where

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<sup>44</sup> Revised Policy Statement at P 52.

<sup>45</sup> *Id.* P 53. *See also* Policy Statement on Compliance at P 22 (explaining that the “appropriate result must be determined on a case-by-case basis”).

<sup>46</sup> *See* U.S.S.G. § 8C2.4.

<sup>47</sup> *Id.*

<sup>48</sup> *See id.* § 8C2.5.

<sup>49</sup> *See id.* § 8C2.6.

a judge may impose a sentence higher or lower than the relevant guidelines range.<sup>50</sup> In addition, the Supreme Court in *United States v. Booker* held that under the Sixth Amendment the Sentencing Guidelines are advisory, not mandatory, in nature and that federal judges are required only to consider the guidelines.<sup>51</sup> As a practical matter, though, a majority of federal criminal sentences fall within the designated Sentencing Guidelines range.<sup>52</sup>

20. For over two decades, federal courts have used the Sentencing Guidelines to determine sentences and fines in federal criminal cases. Although the Sentencing Guidelines have not existed without controversy in the criminal law community, they are designed to promote many of the same policy goals that we promote at the Commission. Specifically, the Sentencing Guidelines are designed to provide certainty and fairness by avoiding unjustified disparity among offenders with similar characteristics, while permitting enough flexibility to account for applicable aggravating and mitigating factors.<sup>53</sup> Moreover, by providing a predictable sentence, the Sentencing Guidelines operate as a deterrent to misconduct. Since nationwide implementation of the Sentencing Guidelines in January 1989, federal judges have sentenced more than one million defendants under the Sentencing Guidelines.<sup>54</sup>

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<sup>50</sup> *See, e.g., id.* §§ 1B1.4; 5K2.0 (“A departure may be warranted in the exceptional case in which there is present a circumstance that the Commission has not identified in the guidelines but that nevertheless is relevant to determining the appropriate sentence.”).

<sup>51</sup> 543 U.S. 220, 264 (2005).

<sup>52</sup> Since *Booker*, the United States Sentencing Commission has conducted national comparisons of sentences imposed by judges relative to the Sentencing Guidelines range. Since 2006, approximately sixty percent of sentences have fallen within the guidelines range annually. *See* United States Sentencing Commission, Final Quarterly Data Report, Fiscal Year 2006, at 1 (61.7 percent); Fiscal Year 2007, at 1 (60.8 percent); Fiscal Year 2008, at 1 (59.4 percent); Preliminary Report, Fiscal Year 2009, at 1 (57.1 percent through September 30, 2009).

<sup>53</sup> *See An Overview of the United States Sentencing Commission* at 1, June 2009, available at [http://www.ussc.gov/general/USSC\\_Overview\\_200906.pdf](http://www.ussc.gov/general/USSC_Overview_200906.pdf).

<sup>54</sup> *Id.* at 2.

21. In 1991, the United States Sentencing Commission (Sentencing Commission) created a new chapter of the Sentencing Guidelines related to sentencing of organizations. The purpose of this chapter, much like the Commission's purpose in assessing penalties against organizations, is to provide "just punishment, adequate deterrence, and incentives for organizations to maintain internal mechanisms for preventing, detecting, and reporting criminal conduct."<sup>55</sup> After implementing this chapter related to organizations in 1991, the number of indicted organizations increased rapidly, then declined, and has now continued to increase in recent years.<sup>56</sup> The increase in indictments has led corporations to operate more cautiously and to devote significant attention and resources to self-policing programs.<sup>57</sup>

22. Since the Sentencing Guidelines went into effect nationwide in 1989, the Supreme Court has upheld their constitutionality, even while rejecting the mandatory nature of them in *Booker*. In 1989, defendants began challenging the constitutionality of the Sentencing Guidelines, arguing that they represented improper legislative delegation and a violation of the separation of powers doctrine. The Court rejected these arguments in *Mistretta v. United States*.<sup>58</sup> In *Booker*, the Court held that the Sixth Amendment right to a jury trial applies to the Sentencing Guidelines.<sup>59</sup> As a result, the Court held that district courts are not bound by the Sentencing Guidelines, but they must at least consult them when sentencing.<sup>60</sup> Even while making the Sentencing Guidelines advisory, the Court in *Booker* recognized that the guidelines still would serve the purpose of "provid[ing] certainty and fairness in meeting the purposes of sentencing, [while] avoiding unwarranted sentencing disparities . . . [and] maintaining sufficient flexibility to permit individualized sentences when warranted."<sup>61</sup>

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<sup>55</sup> U.S.S.G. § 8A1.1 (Introductory Commentary).

<sup>56</sup> Melissa Ku & Lee Pepper, *Corporate Criminal Liability*, 45 Am. Crim. L. Rev. 275, 289 (2008).

<sup>57</sup> *Id.*

<sup>58</sup> 488 U.S. 361 (1989).

<sup>59</sup> 543 U.S. 220, 226-27 (2005).

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* (citation and internal quotations omitted).

23. Thus, the Sentencing Guidelines have been tested for more than twenty years and used to promote fairness, consistency, and efficiency in sentencing for federal criminal cases. More than one million defendants, including many organizations, have been sentenced and fined under the Sentencing Guidelines.

### **III. Discussion**

24. As demonstrated above, since the passage of EAct 2005 we have continuously sought and implemented methods to bring more fairness, consistency, and transparency to our enforcement program. Most recently, we: (1) formalized a process by which Enforcement staff will provide exculpatory evidence to subjects of its investigations and respondents in administrative enforcement proceedings;<sup>62</sup> and (2) authorized the Director of the Office of Enforcement to direct the Secretary of the Commission to issue Enforcement staff's preliminary notice of violations after the subject of an investigation has had an opportunity to respond to Enforcement staff's preliminary findings letter.<sup>63</sup>

25. Until now, however, we have chosen not to use the Sentencing Guidelines, or any other guidelines approach, to apply various penalty factors. Instead, we have chosen to apply the factors more generally. For the reasons discussed below, we now believe that the advantages of a penalty guidelines approach outweigh the disadvantages and that we have gained sufficient experience to employ a guidelines approach as a significant factor to be considered in determining civil penalties.

#### **A. The Penalty Guidelines Approach**

26. On balance, the Commission believes that it is in the public's interest to use a guidelines approach to determine civil penalties patterned after the Sentencing Guidelines related to organizations. The multiple advantages of a guidelines approach outweigh the disadvantages, and we believe that we now have enough experience with various types of enforcement actions to implement such an approach. We believe further that the Sentencing Guidelines provide the best model to adapt to Commission purposes because they focus on factors—such as the seriousness and remediation of a violation—that reflect the requirements of EAct 2005 and that we believe are the centerpiece of our penalty regime. Moreover, the Sentencing Guidelines allow for the consideration of a

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<sup>62</sup> *Enforcement of Statutes, Regulations, and Orders*, 129 FERC ¶ 61,248 (2009), *reh'g pending*.

<sup>63</sup> *Enforcement of Statutes, Regulations, and Orders*, 129 FERC ¶ 61,247 (2009).

wide range of additional factors that are also important, while still providing sufficient flexibility to allow for departures where necessary.

27. The advantages of the penalty guidelines approach we adopt today reflect our continual efforts to promote greater fairness, consistency, and transparency in our enforcement program. The adoption of the Penalty Guidelines promotes greater fairness and ensures greater proportionality in violations by more rigorously imposing appropriately different penalties for conduct of differing severity. At the same time, the Commission retains the discretion to depart from the Penalty Guidelines as necessary.

28. Determining penalties based on a guidelines approach also promotes consistency by basing the penalty calculations on a set of uniform factors that are weighted similarly for similar types of violations and similar types of violators. To date, we have attempted to treat cases consistently. As an analytical exercise, however, it is simply more difficult to compare outcomes in particular cases and determine if they are “consistent” as opposed to consistently applying the same factors to all cases to reach results. This problem of “back end” consistency review becomes even greater as the “database” of cases grows and the cases become ever more varied from one another. The uniformity of the guidelines approach reduces the potential disparities in penalties that might otherwise arise for similar violations committed by similarly situated offenders, particularly because a uniform approach ensures that similar cases are considered based on more than just institutional judgment.

29. The guidelines approach promotes greater transparency by providing notice to organizations as to how we will determine civil penalties for violations of the statutes, rules, regulations, restrictions, conditions, or orders overseen by the Commission. This will add to organizations’ confidence in the fairness and consistency of our enforcement program. Determining penalties based on the Penalty Guidelines avoids potential confusion in the industry regarding the bases behind particular penalties. Further, organizations will gain a greater understanding of which types of violations the Commission views as most important. This, in turn, will help organizations best allocate resources to the most important compliance objectives, leading to more robust and effective compliance.

30. Another benefit of using a guidelines approach is the relative ease of administration in determining civil penalties. Determining appropriate civil penalties has been a complex process, made more difficult and time consuming by the present and inevitable lack of uniformity of the analyses in cases. Modeled on the Sentencing Guidelines, the Penalty Guidelines allow for a more straightforward process, while still allowing us the discretion to depart from the guidelines where appropriate.

31. We have confidence in the fairness of the Penalty Guidelines because they are modeled on the Sentencing Guidelines. We base our new approach on the Sentencing Guidelines because they are largely driven by the same factors in our policy statements on enforcement and that we believe should be the focus of our penalty regime. The Sentencing Guidelines consider similar factors to those present in our policy statements on enforcement, but do so in a more focused manner. For instance, while the current enforcement statements consider generally the harm caused by the violation, the Sentencing Guidelines explicitly incorporate a dollar value estimate of the harm into the base penalty determination.<sup>64</sup> Similarly, the current enforcement policy statement considers whether the organization had a robust internal compliance program generally. In contrast, the Sentencing Guidelines provide a specified and substantial reduction in the culpability score if the violation occurred while the organization had such a program in place.<sup>65</sup>

32. We recognize that a guidelines approach is not without some disadvantages. A guidelines approach provides less flexibility and discretion than a more generalized approach. Similarly, a guidelines approach always creates the possibility of outcomes not adequately accounting for all of the specifics of a case. This is inevitable with any guidelines-based system, including the Sentencing Guidelines. Indeed, a system tailored to fit every conceivable circumstance of a case would likely prove unworkable. The Penalty Guidelines, however, reduce the impact of this concern by allowing us to depart from the guidelines where we deem appropriate. This departure mechanism allows us to account for unique or exceptional factors that might arise in a case. In addition, we have made certain modifications and changes to the Sentencing Guidelines in our Penalty Guidelines to account for recurring Commission-specific considerations that have arisen in our experience since EAct 2005. Also, the Commission will continue to determine penalties based on the individual facts and circumstances for certain violations, such as for natural persons as opposed to organizations,<sup>66</sup> and for cases involving multiple types of violations.<sup>67</sup> Finally, we also retain some discretion because the Penalty Guidelines produce a penalty *range*, rather than an absolute figure. Specific facts of each case will determine where in the range the ultimate penalty might fall. Overall, we retain sufficient

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<sup>64</sup> Compare Revised Policy Statement at P 55, with U.S.S.G § 8C2.4.

<sup>65</sup> Compare Revised Policy Statement at PP 57-60, with U.S.S.G § 8B2.1.

<sup>66</sup> Penalty Guidelines § 1A1.1 (Commentary note 1).

<sup>67</sup> *Id.* § 1C2.1(b).

discretion and flexibility in those cases where the Penalty Guidelines produce a penalty that does not “fit” the violation for one reason or another. We do not intend to depart from the Penalty Guidelines regularly, but neither will we always adhere to a rigid application of them.

33. With the Penalty Guidelines, organizations may be able to estimate their civil penalty exposure with various violations. As such, some would argue that the guidelines approach creates the potential that organizations will engage in cost-benefit analyses and decide that the benefits of committing a violation outweigh the cost of a potential civil penalty. On the other hand, it would be difficult for an organization to adequately predict all of the effects of its misconduct before committing the violations. This uncertainty in how an organization’s violation would actually “play out” would likely hinder the organization’s ability to accurately estimate, in advance of the misconduct, its civil penalty. Also, such gaming by organizations would likely trigger penalty enhancements intended to deter willful misconduct.<sup>68</sup>

34. Another consideration weighing against adopting a guidelines approach is the continuing need to keep the model current with statutory, regulatory, and policy changes. The Commission’s priorities change over time, and we have a history of re-examining and refining our approach to determining civil penalties. This is a cost that is embedded in all approaches to determining penalties. Indeed, when Congress created the Sentencing Guidelines regime, it directed the Sentencing Commission to continually monitor the Sentencing Guidelines, to submit to Congress appropriate modifications to the Sentencing Guidelines, and to establish education and research programs related to the guidelines. In so directing the Sentencing Commission, Congress recognized that “sentencing is a dynamic field that requires continuing review by an expert body to revise sentencing policies, in light of application experience, as new criminal statutes are enacted, and as more is learned about what motivates and controls criminal behavior.”<sup>69</sup> Enforcement staff, working with the Commission, will have to attend to this task, but it is not an unreasonably difficult one. We anticipate that the Penalty Guidelines will be adjusted and amended as necessary and appropriate in light of reason and experience, as well as to reflect changes in the law and enforcement practice and policy. In addition, Enforcement staff will hold a technical conference one year from the implementation of the Penalty Guidelines to discuss how the Penalty Guidelines have worked and to permit comments and questions from the industry.

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<sup>68</sup> See, e.g., *id.* § 1C2.3(b)(1)-(5).

<sup>69</sup> U.S.S.G., Chapter 1, Part A, Introductory Commentary.

35. After balancing the foregoing factors, we believe that the benefits outweigh the disadvantages and that a guidelines approach to determining penalties is best for the Commission, organizations, and the public at large. Most of the potential downsides are minimal, more perceived than likely, and more administrative than substantive. We have several years of experience in determining penalties and, at this juncture, determine it appropriate to use the Penalty Guidelines.

36. Courts have acknowledged the benefits of an agency issuing a policy statement designed to inform the public as to the approach the agency plans to take in future cases.<sup>70</sup> Courts have also recognized the limitations of policy statements. Consistent with this precedent, we recognize that, as a policy statement, the Penalty Guidelines are neither a rule nor a precedent but instead are an announcement to the public of the course the Commission intends to follow in future penalty determinations. In addition, when the Commission applies the Penalty Guidelines, we must be prepared to support the application of the Guidelines.

#### **IV. Description of the Commission's Penalty Guidelines**

##### **A. Calculation of Civil Penalties Under Penalty Guidelines**

37. The attached Penalty Guidelines provide the details of our new approach and need to be carefully applied in each case. The purpose of this section, however, is to describe in summary fashion how our new Penalty Guidelines work in practice. Like the Sentencing Guidelines, our model generates a penalty range based on the combination of: (1) a violation level, consisting of a base level that is adjusted for various seriousness factors; and (2) a culpability score, which considers an organization's past and current conduct and efforts to remedy the violation. Generating a final penalty range can be broken down into five discrete steps.

##### **i. Step One: Base Violation Level**

38. Step one involves identifying the "base violation level" from an applicable Chapter Two guideline.<sup>71</sup> Specifically, Chapter Two consists of three separate guidelines for various types of violations, each containing a unique "base violation level:"

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<sup>70</sup> *Pacific Gas and Electric v. FPC*, 506 F.2d 33, 38 (D.C. Cir. 1974) (*PGE*); *Panhandle Eastern Pipe Line Co. v. FERC*, 198 F.3d 266, 269-70 (D.C. Cir. 1999).

<sup>71</sup> Penalty Guidelines § 1C2.1(a).

(1) violations of the Reliability Standards for the Bulk Electric System of North America carry a “base violation level” of sixteen;<sup>72</sup> (2) violations involving fraud, manipulation, or anti-competitive conduct and violations of rules, tariffs, and orders carry a “base violation level” of six;<sup>73</sup> and (3) violations involving misrepresentations and false statements to the Commission carry a “base violation level” of eighteen.<sup>74</sup>

**ii. Step Two: Adjustments**

39. Step two involves applying, in the order listed, any appropriate adjustments contained in the applicable Chapter Two guideline.<sup>75</sup> Specifically, each Chapter Two guideline contains specific adjustments that account for circumstances that are specific to the type of violation at issue. For example, the guideline for violations of the Reliability Standards has adjustments based on the risk of loss caused by the particular violation.<sup>76</sup> Many violations of the Reliability Standards pose a risk of serious harm, but did not, on their facts, result in actual harm. These adjustments account for this reality and consider two primary factors: the amount of potential injury and the likelihood of that injury actually occurring. As an example, if we find that the violation created either a high risk of substantial harm or a low risk of major harm, seven points will be added to the “base violation level.”<sup>77</sup>

40. The guideline for violations involving fraud, manipulation, or anti-competitive conduct and violations of rules, tariffs, and orders contains adjustments for the monetary gain or loss caused by the violation and the scope of the violation.<sup>78</sup> The adjustment for gain or loss has the potential to significantly increase an organization’s civil penalty. For example, if an organization causes a loss of more than \$1 million, sixteen points would be added to the “base violation level” and, as a result, the ultimate penalty would increase

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<sup>72</sup> *Id.* § 2A1.1(a).

<sup>73</sup> *Id.* § 2B1.1(a).

<sup>74</sup> *Id.* § 2C1.1(a).

<sup>75</sup> *Id.* § 1C2.1(a).

<sup>76</sup> *See id.* § 2A1.1(b)(1).

<sup>77</sup> *Id.* § 2A1.1(b)(1)(D).

<sup>78</sup> *Id.* § 2B1.1(b)(1)-(2).

accordingly. The adjustments for scope consider the volume of energy involved in the violation as well as the violation's duration.<sup>79</sup> Further, this guideline contains an adjustment that creates a floor violation level of sixteen for violations that present a serious threat to market transparency.<sup>80</sup> The guideline for misrepresentations and false statements contains upward adjustments for violations resulting in substantial interference with the administration of justice and violations involving spoliation of records or that are otherwise extensive in scope, planning, or preparation.<sup>81</sup>

41. Applying the foregoing adjustments to the "base violation level" from step one generates a final "violation level." Each "violation level" then corresponds to a specific dollar amount listed in a table in Chapter One, section 1C2.2(b), which plays a role in determining the "base penalty," discussed below.

**iii. Step Three: Base Penalty**

42. Step three involves calculating a "base penalty," which is the greater of: (1) the dollar amount from the table in section 1C2.2(b) that corresponds to the applicable violation level, described above; (2) the pecuniary gain to the organization from the violation; or (3) the pecuniary loss from the violation caused by the organization.<sup>82</sup> As

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<sup>79</sup> *Id.* § 2B1.1(b)(2).

<sup>80</sup> *Id.* § 2B1.1(b)(3). "Flipping" transactions, for example, present a serious threat to market transparency. These transactions disguise what is in effect a long-term discounted release of firm capacity as a series of short-term releases, circumventing the Commission's capacity release rules that require competitive bidding for long-term discounted releases and, thereby, denying access to the capacity to interested market participants. *See, e.g., In re BP Energy Co.*, 121 FERC ¶ 61,088 (2007). Violations of an organization's Open Access Same-time Information System (OASIS) posting requirements provide another example. An organization's failure to post information on OASIS, for example, results in a lack of transparency because transmission customers are not able to view information regarding the transmission system, including information about available products and desired services. *See, e.g., Entergy Servs., Inc.*, 118 FERC ¶ 61,027 (2007).

<sup>81</sup> *Id.* § 2C1.1(b)(1)-(2). "Substantial interference with the administration of justice" includes the unnecessary expenditure of substantial Commission resources.

<sup>82</sup> *Id.* § 1C2.2(a)(1)-(3).

described in step five, this “base penalty” will be combined with “minimum and maximum multipliers,” stemming from an organization’s “culpability score,” to generate penalty ranges.

iv. **Step Four: Culpability Score**

43. Step four involves calculating an organization’s “culpability score.” Each organization’s “culpability score” starts with a base score of five and is then adjusted upward or downward depending on six separate considerations.<sup>83</sup>

44. First, we will adjust the “culpability score” upwards in pre-determined amounts where high-level personnel of the organization or unit of the organization within which the violation occurred participated in, condoned, or were willfully ignorant of the violation.<sup>84</sup> We also consider whether tolerance of the violation by substantial authority personnel was pervasive throughout the organization or unit of the organization within which the violation occurred.<sup>85</sup> Following the Sentencing Guidelines, this factor is tied to the size of the organization and the unit of the organization within which the violation occurred. For example, we will increase the “culpability score” by five points where this factor applies to an organization with 5,000 or more employees, four points if 1,000 or more employees, three points if 200 or more employees, two points if fifty or more employees, and one point if ten or more employees.<sup>86</sup>

45. Second, we will increase the “culpability score” where the organization has a prior history of committing violations. We will increase the “culpability score” by one point where the organization committed any part of the instant violation less than ten years after a prior Commission adjudication of any violation or less than ten years after an adjudication of similar misconduct by other enforcement agencies.<sup>87</sup> We will increase

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<sup>83</sup> *Id.* § 1C2.3(a).

<sup>84</sup> *Id.* § 1C2.3(b).

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* § 1C2.3(b)(1)-(5).

<sup>87</sup> *Id.* § 1C2.3(c)(1). The other enforcement agencies would include those Federal and state enforcement agencies that adjudicate similar types of matters as the Commission.

the score by two points where the organization committed any part of the instant violation less than five years after a prior Commission adjudication of any violation or less than five years after an adjudication of similar misconduct by other enforcement agencies.<sup>88</sup>

46. Third, following the Sentencing Guidelines, we will increase the “culpability score” by two points if the violation violated a judicial or Commission order or injunction directed at the organization by the Commission or other Federal and state enforcement agencies that adjudicate similar types of matters as the Commission.<sup>89</sup>

47. Fourth, also following the Sentencing Guidelines, we will increase the “culpability score” by three points where the organization obstructed justice, or encouraged obstruction of justice, during the investigation or resolution of the violation.<sup>90</sup> Three points will also be added if the organization knew of such obstruction, but failed to take reasonable steps to prevent it.<sup>91</sup>

48. The fifth adjustment to the “culpability score” deals with an organization’s compliance and ethics program and reemphasizes from our previous policy statements the importance we place on compliance. Specifically, we will reduce an organization’s “culpability score” by three points if the violation occurred despite the existence of an effective compliance and ethics program at the time of the violation.<sup>92</sup> Moreover, Chapter One, Part B of our Penalty Guidelines details what is required for an organization to have an effective compliance and ethics program.<sup>93</sup> Part B is modeled after section 8B2.1 of the Sentencing Guidelines, but is consistent with the four hallmarks of effective compliance programs that we enumerated in our Policy Statement on Compliance: active engagement and leadership by senior management; effective

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<sup>88</sup> *Id.* § 1C2.3(c)(2). “Prior adjudication” is defined in the Penalty Guidelines as “any resolution, whether by trial or settlement, regardless whether the settlement included an admission of the violation.” Penalty Guidelines § 1A1.1 (Commentary note 3(e)).

<sup>89</sup> *Id.* § 1C2.3(d).

<sup>90</sup> *Id.* § 1C2.3(e).

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* § 1C2.3(f)(1).

<sup>93</sup> *See id.* § 1B2.1.

preventive measures; prompt detection and cessation of violations and voluntary reporting of violations; and remediation of the misconduct.<sup>94</sup>

49. Finally, we will decrease the “culpability score” for self-reporting, cooperation, and acceptance of responsibility.<sup>95</sup> We have always considered self-reporting and cooperation, but we now also will give specific, transparent, and measurable credit if the organization clearly demonstrates recognition and affirmative acceptance of responsibility for its violation. Moreover, we will also reduce the “culpability score” where the organization resolves the matter without the need for a trial-type hearing. Organizations can substantially reduce their scores if they satisfy each of these elements. Specifically, if an organization self-reports, exhibits full cooperation during the investigation, admits the violation, and resolves the matter without the need for a trial-type hearing, we will reduce the “culpability score” by five points.<sup>96</sup>

50. Thus, the base “culpability score” of five is adjusted based on the six culpability factors to produce a final “culpability score.” The final “culpability score” corresponds to a set of “minimum and maximum multipliers” that are listed in a table in section 1C2.4 of our Penalty Guidelines. For example, any “culpability score” of ten or higher corresponds to “minimum and maximum multipliers” of 2.00 and 4.00.<sup>97</sup> A “culpability score” of zero or less corresponds to “minimum and maximum multipliers” of 0.05 and 0.20.<sup>98</sup> “Culpability scores” one through nine also have corresponding “minimum and maximum multipliers.”

v. **Step Five: Multiplication of Base Penalty by Minimum and Maximum Multipliers**

51. The fifth and final step involves multiplying the “base penalty” amount (from step three) by the “minimum and maximum multipliers” (from step four) to produce the

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<sup>94</sup> Policy Statement on Compliance at PP 13-21.

<sup>95</sup> Penalty Guidelines § 1C2.3(g).

<sup>96</sup> *Id.* § 1C2.3(g)(1).

<sup>97</sup> *Id.* § 1C2.4.

<sup>98</sup> *Id.*

applicable penalty range.<sup>99</sup> For example, a case involving a base penalty of \$1 million and “minimum and maximum multipliers” of 0.80 and 1.60 would generate a penalty range of \$800,000 to \$1,600,000.

**B. Specific Examples Calculating Civil Penalties Under the Penalty Guidelines**

52. In addition to our general description above setting forth the steps involved in calculating civil penalties under the Penalty Guidelines, we add further guidance below by applying the guidelines using specific hypothetical examples.<sup>100</sup>

**i. Example One: Market Manipulation in Violation of 18 C.F.R. § 1c**

53. Our first example involves Organization A, a 450-employee organization that has violated the Commission’s anti-manipulation regulation, 18 C.F.R. § 1c. Enforcement staff learned, through a call to the Enforcement Hotline and through subsequent data responses, that Organization A manipulated a specific market for a period of three weeks and caused a loss of \$75 million to other market participants. Organization A committed multiple violations on each day during the three-week period. Organization A’s senior management knew about and condoned the manipulative conduct, Organization A does not have a prior history before the Commission, it did not violate an order specifically directed at Organization A, and did not engage in obstruction of justice. At the time of its violation, Organization A lacked an effective compliance program. Organization A fully cooperated with Enforcement staff throughout Enforcement staff’s investigation. Although it settled the case, Organization A refused to demonstrate an affirmative acceptance of responsibility for its violations. To calculate a civil penalty for Organization A, we would take the following steps:

- **Step One: Base Violation Level**
  - Base violation for market manipulation = 6 (§ 2B1.1(a))

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<sup>99</sup> *Id.* § 1C2.5.

<sup>100</sup> These examples are entirely hypothetical and the facts are not taken from any of Enforcement staff’s prior or pending investigations.

- **Step Two: Adjustments**
  - Applicable Adjustments:
    - Manipulation caused a loss of \$75 million = add 24 (§ 2B1.1(b)(1)(M)) Manipulation lasted more than ten, but less than fifty days = add 2 (§ 2B1.1(b)(2))
  - Final violation level (adding the base and the adjustments) = 32, which corresponds to \$17,500,000 from the “Violation Level Penalty Table” (§ 1C2.2(b))
- **Step Three: Base Penalty**
  - Base penalty is the greater of: (a) the dollar amount from the “Violation Level Penalty Table,” which in this case would be \$17,500,000 (see step two, above); (b) the pecuniary gain; or (c) the pecuniary loss, which in this case was \$75 million (§ 1C2.2)
  - Because the pecuniary loss in this case (\$75 million) was greater than \$17,500,000, the base penalty equals \$75 million (§ 1C2.2)
- **Step Four: Culpability Score**
  - Base culpability score = 5 (§ 1C2.3(a))
  - There was senior management involvement and Organization A has more than 200, but less than 1,000 employees = add 3 (§ 1C2.3(b)(3))
  - No prior history (§ 1C2.3(c))
  - No violation of an order directed specifically at Organization A (§ 1C2.3(d))
  - No obstruction of justice (§ 1C2.3(e))
  - No effective compliance program (§ 1C2.3(f))
  - No self-report
  - Organization A fully cooperated and avoided a trial-type hearing = subtract 2 (§ 1C2.3(g))

- Organization A did not accept responsibility (§ 1C2.3(g))
- Total culpability score =  $5+3-2 = 6$
- A culpability score of 6 corresponds to minimum and maximum multipliers of 1.20 and 2.40 (§ 1C2.4)
- **Step Five:** multiply base penalty amount by minimum and maximum multipliers to determine penalty range (§ 1C2.5)
  - Minimum penalty:  $\$75,000,000 \times 1.20 = \mathbf{\$90,000,000}$
  - Maximum penalty:  $\$75,000,000 \times 2.40 = \mathbf{\$180,000,000}$

ii. **Example Two: Tariff Violation**

54. In our second example, Organization B, a 200-employee corporation that provides electric transmission services, violated its Open Access Transmission Tariff (OATT) by denying access to unrelated organizations without a valid reason and favoring its affiliate instead. As a result, Organization B's affiliate was able to make favorable sales in a market in which it would have been unable to participate without Organization B's transmission. These favorable sales by Organization B's affiliate totaled \$1,700,000 in that market. Organization's B's violation lasted for almost a full year. Organization B self-reported these violations. Organization B's senior management was not involved in the violations, but Organization B committed the same type of violations less than two years earlier. Organization B did not violate an order specifically directed at Organization B, and it did not commit obstruction of justice. Organization B lacked an effective compliance program at the time it committed its violations. It fully cooperated with Enforcement staff, settled the matter, and demonstrated an affirmative acceptance of responsibility for its misconduct. To calculate a civil penalty for Organization B, we would take the following steps:

- **Step One:** Base Violation Level
  - Base violation for a tariff violation = 6 (§ 2B1.1(a))
- **Step Two:** Adjustments
  - Applicable Adjustments:
    - Organization B gained \$1,700,000 = add 16 (§ 2B1.1(b)(1)(I))

- OATT violations lasted more than 250 days = add 6 (§ 2B1.1(b)(2))
  - Final violation level (adding the base and the adjustments) = 28, which corresponds to \$6,300,000 from the “Violation Level Penalty Table” (§ 1C2.2(b))
- **Step Three: Base Penalty**
  - Base penalty is the greater of: (a) the dollar amount from the “Violation Level Penalty Table,” which in this case would be \$6,300,000 (see step two, above); (b) the pecuniary gain, which in this case was \$1,700,000; or (c) the pecuniary loss (§ 1C2.2)
  - Thus, the base penalty equals \$6,300,000 (§ 1C2.2)
- **Step Four: Culpability Score**
  - Base culpability score = 5 (§ 1C2.3(a))
  - No senior management involvement
  - Prior history less than 5 years after prior Commission adjudication = add 2 (§ 1C2.3(c))
  - No violation of an order directed specifically at Organization B (§ 1C2.3(d))
  - No obstruction of justice (§ 1C2.3(e))
  - Organization B lacked an effective compliance program (§ 1C2.3(f))
  - Organization B self-reported, fully cooperated, accepted responsibility, and avoided a trial-type hearing = subtract 5 (§ 1C2.3(g))
  - Total culpability score =  $5+2-5 = 2$
  - A culpability score of 2 corresponds to minimum and maximum multipliers of 0.40 and 0.80 (§ 1C2.4)
- **Step Five:** multiply base penalty amount by minimum and maximum multipliers to determine penalty range (§ 1C2.5)

- Minimum penalty:  $\$6,300,000 \times 0.40 = \mathbf{\$2,520,000}$
- Maximum penalty:  $\$6,300,000 \times 0.80 = \mathbf{\$5,040,000}$

**iii. Example Three: Capacity Release Violation**

55. Example three involves Organization C, a local distribution company that self-reported shipper-must-have-title violations involving the transportation of natural gas on three interstate pipelines during a two-year period. Organization C's violations affected the transparency of the applicable markets, but it did not earn any profits from its transactions and did not cause any identifiable harm to other market participants. Organization C's senior management was not involved in the violations, and Organization C did not have any history of violations before the Commission. Organization C did not violate an order specifically directed at Organization C, and it did not commit obstruction of justice. Organization C lacked an effective compliance program at the time it committed its violations. It fully cooperated with Enforcement staff, settled the matter, and demonstrated an affirmative acceptance of responsibility for its misconduct. To calculate a civil penalty for Organization C, we would take the following steps:

- **Step One: Base Violation Level**
  - Base violation level for capacity release violation = 6 (§ 2B1.1(a))
- **Step Two: Adjustments**
  - Applicable Adjustments:
    - Violations lasted more than 250 days = add 6 (§ 2B1.1(b)(2))
  - Final violation level (adding the base and the adjustments) = 12, but because the violations presented a serious threat to market transparency, the violation level becomes 16. (§ 2B1.1(b)(3)). A 16 violation level corresponds to \$175,000 from the "Violation Level Penalty Table" (§ 1C2.2(b))
- **Step Three: Base Penalty**
  - Base penalty is the greater of: (a) the dollar amount from the "Violation Level Penalty Table," which in this case would be \$175,000 (see step two, above); (b) the pecuniary gain, which in this case was \$0; or (c) the pecuniary loss, which in this case was \$0 (§ 1C2.2)

- Thus, the base penalty equals \$175,000 (§ 1C2.2)
- **Step Four: Culpability Score**
  - Base culpability score = 5 (§ 1C2.3(a))
  - No senior management involvement
  - No prior history (§ 1C2.3(c))
  - No violation of an order directed specifically at Organization C (§ 1C2.3(d))
  - No obstruction of justice (§ 1C2.3(e))
  - Organization C lacked an effective compliance program (§ 1C2.3(f))
  - Organization C self-reported, fully cooperated, accepted responsibility, and avoided a trial-type hearing = subtract 5 (§ 1C2.3(g))
  - Total culpability score =  $5 - 5 = 0$
  - A culpability score of 0 corresponds to minimum and maximum multipliers of 0.05 and 0.20 (§ 1C2.4)
- **Step Five: multiply base penalty amount by minimum and maximum multipliers to determine penalty range (§ 1C2.5)**
  - Minimum penalty:  $\$175,000 \times 0.05 = \mathbf{\$8,750}$
  - Maximum penalty:  $\$175,000 \times 0.20 = \mathbf{\$35,000}$

iv. **Example Four: Violation of Reliability Standards**

56. Example four involves Organization D, a transmission owner which violated Reliability Standard FAC-003-1, Requirement 2, for failing to implement its annual plan for vegetation management work to ensure the reliability of the system. Organization D's vegetation management plan required it to perform, or contract with a third party vendor to perform, annual aerial patrols of all of its transmission lines. The plan also required it to verify that its vendors promptly and satisfactorily completed the patrols. One of Organization D's vendors failed to perform an aerial patrol, as required, and Organization D never verified whether the work had been completed. As a result, no patrol had been performed over a 500 kV line, which ultimately came into contact with an overgrown

tree. The contact caused a loss of load to 20,000 customers for seven hours during the middle of a work day. No one was injured as a result of the loss of load. The value of the loss of load was \$15 million. Organization D's senior management was not involved in the violations, and Organization D did not have any history of Reliability Standard violations before the Commission. Organization D did not violate an order specifically directed at Organization D, and it did not commit obstruction of justice. Organization D lacked an effective compliance program at the time it committed its violations. It did not self-report its violation, was not fully cooperative with Enforcement staff, and did not demonstrate an affirmative acceptance of responsibility for its violation. Organization D, however, did settle the matter, thus avoiding the need for a trial-type hearing. To calculate a civil penalty for Organization D, we would take the following steps:

- **Step One: Base Violation Level**
  - Base violation level = 16 (§ 2A1.1(a))
- **Step Two: Adjustments**
  - Applicable Adjustments:
    - Organization D's violations created a moderate risk of extreme harm = add 14 (§ 2A1.1(b)(1)(G))
  - Final violation level (adding the base and the adjustments) = 30, which corresponds to \$10,500,000 from the "Violation Level Penalty Table" (§ 1C2.2(b))
- **Step Three: Base Penalty**
  - Base penalty is the greater of: (a) the dollar amount from the "Violation Level Penalty Table," which in this case would be \$10,500,000 (see step two, above); (b) the pecuniary gain; or (c) the pecuniary loss, which in this case was \$15,000,000 (§ 1C2.2)
  - Thus, the base penalty equals \$15,000,000 (§ 1C2.2)
- **Step Four: Culpability Score**
  - Base culpability score = 5 (§ 1C2.3(a))
  - No senior management involvement
  - No prior history (§ 1C2.3(c))

- No violation of an order directed specifically at Organization D (§ 1C2.3(d))
- No obstruction of justice (§ 1C2.3(e))
- Organization D lacked an effective compliance program (§ 1C2.3(f))
- Organization D did not self-report, fully cooperate, or accept responsibility (§ 1C2.3(g))
- Organization D avoided a trial-type hearing = subtract 1
- Total culpability score =  $5 - 1 = 4$
- A culpability score of 4 corresponds to minimum and maximum multipliers of 0.80 and 1.60 (§ 1C2.4)
- **Step Five:** multiply base penalty amount by minimum and maximum multipliers to determine penalty range (§ 1C2.5)
  - Minimum penalty:  $\$15,000,000 \times 0.80 = \mathbf{\$12,000,000}$
  - Maximum penalty:  $\$15,000,000 \times 1.60 = \mathbf{\$24,000,000}$

### C. General Principles of Applicability

57. The Penalty Guidelines do not affect the Commission's practice of requiring disgorgement of unjust profits.<sup>101</sup> In cases of identifiable pecuniary gain that results from a violation, the Commission will continue to enter disgorgement orders for the full amount of the gain, plus interest.<sup>102</sup> The disgorgement amount is also relevant to determining the base penalty, which, as described above, is the greater of (1) the dollar amount from the table in section 1C2.2(b) that corresponds to the applicable violation

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<sup>101</sup> See Revised Policy Statement at P 42 ("It is important to note that the Commission has discretion to order disgorgement not in lieu of, but in addition to, civil penalties . . .").

<sup>102</sup> Penalty Guidelines § 1B1.1(a).

level; (2) *the pecuniary gain to the organization from the violation*; or (3) the pecuniary loss from the violation caused by the organization.<sup>103</sup>

58. The Penalty Guidelines will generally be applicable to Commission cases, but, as we have stated, we reserve the discretion to depart from them where we deem appropriate. We believe that retaining this level of flexibility is necessary to account for unique circumstances not considered by the Penalty Guidelines.

59. In addition, we will continue to determine civil penalties based on the individual facts and circumstances for natural person violators.<sup>104</sup> As a Commission, we have less experience in determining penalties to be applied when the case involves an individual as opposed to an organization. Moreover, since we have patterned the Penalty Guidelines after the organizational Sentencing Guidelines, the structure is not designed to apply to natural persons. As a result, the Commission will determine the appropriate penalty for natural persons based on the facts and the circumstances of the violation but will look to the Penalty Guidelines for guidance in setting the penalties. Thus, the Penalty Guidelines apply to organizations which violate the statutes, rules, and tariffs overseen by the Commission.<sup>105</sup> As noted above, under the Penalty Guidelines, an “organization” is “any entity other than a natural person.”<sup>106</sup>

60. The Commission also has discretion to determine penalties in cases involving multiple types of violations.<sup>107</sup> For example, the Commission will set penalties for a case involving both anti-competitive conduct and violations of the Reliability Standards.

61. Moreover, the Penalty Guidelines contain certain caveats where the penalty range will not be followed. First, where the minimum guideline penalty is greater than the maximum penalty authorized by our \$1 million per day, per violation statutory authority, then the guideline penalty will be reduced to the maximum penalty authorized by

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<sup>103</sup> *Id.* § 1C2.2(a)(1)-(3) (emphasis added).

<sup>104</sup> *Id.* § 1A1.1 (Commentary note 1).

<sup>105</sup> *Id.* § 1A1.1.

<sup>106</sup> *Id.* § 1A1.1 (Commentary note 1).

<sup>107</sup> *Id.* § 1C2.1(b).

statute.<sup>108</sup> Second, we will reduce the penalty to the extent that it would impair the organization's ability to disgorge profits,<sup>109</sup> and can reduce penalties where the organization is not able to pay the minimum penalty.<sup>110</sup>

62. The Penalty Guidelines apply to all future violations of any statute, rule, regulation, restriction, condition, or order of the Commission. The Penalty Guidelines will apply to any pending investigation where Enforcement staff and the organization have not yet entered into settlement negotiations.

63. The Commission's prior policy statements on enforcement as well as its Policy Statement on Compliance still provide useful guidance and will continue to inform our enforcement program. The Penalty Guidelines supplement those previous documents, but any perceived conflicts will be resolved in favor of the Penalty Guidelines.

64. The North American Electric Reliability Corporation (NERC), acting as the Electric Reliability Organization, and Regional Entities (RE) impose penalties for violations of Commission-approved, mandatory Reliability Standards using penalty guidelines that employ a Base Penalty Amount Table. FPA section 215(e)(2) provides that a penalty imposed by NERC or an RE may take effect no earlier than 31 days after NERC files with the Commission a notice of penalty and the record of the proceeding.<sup>111</sup> In the Notice of Penalty Policy Order, we established the general criteria the Commission will use to determine whether it will review a particular notice of penalty.<sup>112</sup> The Commission stated that the more serious the violation described in the notice of penalty, the more likely it would be subject to Commission review.<sup>113</sup> To date, the Commission has decided to further review only one of the 153 Notices NERC has filed. We are not modifying the approach set forth in the Notice of Penalty Policy Order. In our previous

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<sup>108</sup> *Id.* § 1C3.1(b).

<sup>109</sup> *Id.* § 1C3.2(a).

<sup>110</sup> *Id.* § 1C3.2(b).

<sup>111</sup> 16 U.S.C. §284o(e)(2) (Supp V (2005)). *See also* 18 C.F.R. §39.7(e).

<sup>112</sup> *See Statement of Administrative Policy on Processing Notices of Penalty and Order Revising Statement in Order No. 672*, 123 FERC ¶ 61,046 (2008) at PP 10-11.

<sup>113</sup> *Id.* P 11.

determinations on notices of penalty, our prior Policy Statements on Enforcement and the Policy Statement on Compliance were resources that informed our judgment whether to review the notices of penalty. We intend to use the Penalty Guidelines in a similar manner. That is, while we do not anticipate applying the Penalty Guidelines when we look at most notices of penalty that we receive, for an out-of-ordinary notice of penalty describing a serious violation we may consider the results of applying the Penalty Guidelines—but these results would not be determinative of our decision to proceed with a further review.

65. The Commission's principal objective in enforcement is to ensure compliance with our rules, regulations and orders. That goal is best achieved if the orders we issue and the regulations we adopt clearly inform the public as to what the Commission expects of them and how the Commission will implement its rules and programs. To that end, we expect that all orders imposing penalties shall describe the facts that support the penalty amount.

#### **V. Conclusion**

66. The Commission's use of the Penalty Guidelines further improves our enforcement program and our approach to making civil penalty determinations. Although the Penalty Guidelines represent a change in the way we determine civil penalties, they incorporate many of our prior considerations and further our enforcement program goals by serving as a deterrent, encouraging compliance, and adding greater fairness, consistency, and transparency.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,  
Deputy Secretary.

## FERC Penalty Guidelines

### CHAPTER 1

#### PART A - GENERAL APPLICATION PRINCIPLES

##### §1A1.1. Applicability of these Guidelines

This chapter applies to the penalties to be imposed on all organizations for violations of the statutes, rules, regulations, restrictions, conditions or orders overseen by the Federal Energy Regulatory Commission. The Commission reserves the right to depart from these Guidelines where it deems appropriate.

##### Commentary

##### Application Notes:

1. *"Organization" means any entity other than a natural person. The Commission will determine the appropriate penalty for natural persons based on the facts and circumstances of the violation but will look to these Guidelines for guidance in setting those penalties.*
2. *The definitions in the United States Sentencing Guidelines are persuasive authority in interpreting these Guidelines unless otherwise specified.*
3. *The following are definitions of terms used frequently in this chapter:*
  - (a) *"High-level personnel of the organization" means individuals who have substantial control over the organization or who have a substantial role in the making of policy within the organization. The term includes: a director; an executive officer; an individual in charge of a major business or functional unit of the organization, such as sales, administration, or finance; and an individual with a substantial ownership interest. "High-level personnel of a unit of the organization" is defined in the Commentary to §1C2.3 (Culpability Score).*
  - (b) *"Substantial authority personnel" means individuals who within the scope of their authority exercise a substantial measure of discretion in acting on behalf of an organization. The term includes high-level personnel of the organization, individuals who exercise substantial supervisory authority (e.g., a plant manager, a sales manager), and any other individuals who, although not a part of an organization's management, nevertheless exercise substantial discretion when acting within the scope of their authority (e.g., an individual with authority in an organization to negotiate or set price levels or an individual authorized to negotiate or approve significant contracts). Whether an individual falls within this category must be determined on a case-by-case basis.*
  - (c) *"Agent" means any individual, including a director, an officer, an employee, or an independent contractor, authorized to act on behalf of the organization.*
  - (d) *An individual "condoned" a violation if the individual knew of the violation and did not take reasonable steps to prevent or terminate the violation.*
  - (e) *"Prior adjudication" means any resolution, whether by trial or settlement, regardless*

*whether the settlement included an admission of the violation.*

- (f) *"Similar violations" means prior conduct that is similar in nature to the conduct underlying the instant violation, without regard to whether or not such conduct violated the same provision.*
- (g) *"Pecuniary gain" is derived from 18 U.S.C. § 3571(d) and means the additional before tax profit to the entity resulting from the relevant conduct of the violation. Gain can result from either additional revenue or cost savings. For example, a violation involving an unreported outage by an organization receiving capacity payments can produce additional revenue. In such a case, the pecuniary gain is the additional revenue received because the outage was not reported. A violation involving a failure to comply with the reliability standards requiring vegetation management can produce pecuniary gain resulting from cost savings. In such a case, the pecuniary gain is the amount saved over time as a result of the failure to implement an appropriate vegetation management program.*
- (h) *"Pecuniary loss" is equivalent to the term "loss" as used in Chapter Two (Violation Conduct). In a case involving a violation of the Reliability Standards, the loss will be enhanced to the extent necessary to reflect any loss that the organization should have caused to prevent greater risk to the bulk power system. An example of such an enhancement to pecuniary loss would be the value of firm load that a balancing authority should have shed to resolve an emergency condition, but did not do so.*
- (i) *An individual was "willfully ignorant of the violation" if the individual did not investigate the possible occurrence of violative conduct despite knowledge of circumstances that would lead a reasonable person to investigate whether violative conduct had occurred.*
- (j) *"Violation" means a violation of any statute, rule, regulation, restriction, condition or order overseen by the Commission. "Compliance with the law" means compliance with a statute, rule, regulation, restriction, condition or order overseen by the Commission.*

## **PART B - DISGORING GAIN FROM VIOLATIONS AND EFFECTIVE COMPLIANCE AND ETHICS PROGRAM**

### **1. DISGORING GAIN FROM VIOLATIONS**

#### **§1B1.1. Disgorgement**

- (a) In the case of pecuniary gain as a result of the violation, the Commission enters a disgorgement order for the full amount of the gain plus interest.

### **2. EFFECTIVE COMPLIANCE AND ETHICS PROGRAM**

#### **§1B2.1. Effective Compliance and Ethics Program**

- (a) To have an effective compliance and ethics program, for purposes of subsection (f) of §1C2.3 (Culpability Score), an organization shall—

- (1) exercise due diligence to prevent and detect violations; and
- (2) otherwise promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law.

Such compliance and ethics program shall be reasonably designed, implemented, and enforced so that the program is generally effective in preventing and detecting violations. The failure to prevent or detect the instant violation does not necessarily mean that the program is not generally effective in preventing and detecting violations.

- (b) Due diligence and the promotion of an organizational culture that encourages ethical conduct and a commitment to compliance with the law within the meaning of subsection (a) minimally require the following:
  - (1) The organization shall establish standards and procedures to prevent and detect violations.
  - (2)
    - (A) The organization's governing authority shall be knowledgeable about the content and operation of the compliance and ethics program and shall exercise reasonable oversight with respect to the implementation and effectiveness of the compliance and ethics program.
    - (B) High-level personnel of the organization shall ensure that the organization has an effective compliance and ethics program, as described in this guideline. Specific individual(s) within high-level personnel shall be assigned overall responsibility for the compliance and ethics program.
    - (C) Specific individual(s) within the organization shall be delegated day-to-day operational responsibility for the compliance and ethics program. Individual(s) with operational responsibility shall report periodically to high-level personnel and, as appropriate, to the governing authority, or an appropriate subgroup of the governing authority, on the effectiveness of the compliance and ethics program. To carry out such operational responsibility, such individual(s) shall be given adequate resources, appropriate authority, and direct access to the governing authority or an appropriate subgroup of the governing authority.
  - (3) The organization shall use reasonable efforts not to include within the substantial authority personnel of the organization any individual whom the organization knew, or should have known through the exercise of due diligence, has engaged in violations or other conduct inconsistent with an effective compliance and ethics program.
  - (4)
    - (A) The organization shall take reasonable steps to communicate

periodically and in a practical manner its standards and procedures, and other aspects of the compliance and ethics program, to the individuals referred to in subdivision (B) by conducting effective training programs and otherwise disseminating information appropriate to such individuals' respective roles and responsibilities.

- (B) The individuals referred to in subdivision (A) are the members of the governing authority, high-level personnel, substantial authority personnel, the organization's employees, and, as appropriate, the organization's agents.
- (5) The organization shall take reasonable steps—
- (A) to ensure that the organization's compliance and ethics program is followed, including monitoring and auditing to detect violations;
  - (B) to evaluate periodically the effectiveness of the organization's compliance and ethics program; and
  - (C) to have and publicize a system, which may include mechanisms that allow for anonymity or confidentiality, whereby the organization's employees and agents may report or seek guidance regarding potential or actual violations without fear of retaliation.
- (6) The organization's compliance and ethics program shall be promoted and enforced consistently throughout the organization through (A) appropriate incentives to perform in accordance with the compliance and ethics program; and (B) appropriate disciplinary measures for engaging in violations and for failing to take reasonable steps to prevent or detect violations.
- (7) After a violation has been detected, the organization shall take reasonable steps to respond appropriately to the violation and to prevent further similar violations, including making any necessary modifications to the organization's compliance and ethics program.
- (c) In implementing subsection (b), the organization shall periodically assess the risk of violations and shall take appropriate steps to design, implement, or modify each requirement set forth in subsection (b) to reduce the risk of violations identified through this process.

Commentary

Application Notes:

1. *Definitions.—For purposes of this guideline:*

*"Compliance and ethics program" means a program designed to prevent and detect violations.*

*"Governing authority" means the (A) the Board of Directors; or (B) if the organization does not have a Board of Directors, the highest-level governing body of the organization. "High-level personnel of the organization" and "substantial authority personnel" have the meaning given those terms in the Commentary to §1A1.1 (Application Instructions-Organizations).*

*"Standards and procedures" means standards of behavior and internal controls that are reasonably capable of reducing the likelihood of violations.*

2. *Factors to Consider in Meeting Requirements of this Guideline.*—

- (A) *In General.*—*Each of the requirements set forth in this guideline shall be met by an organization; however, in determining what specific actions are necessary to meet those requirements, factors that should be considered include: (i) applicable industry practice; (ii) the size of the organization; and (iii) similar violations.*
- (B) *Applicable Industry Practice.*—*An organization's failure to incorporate and follow applicable industry practice weighs against a finding of an effective compliance and ethics program.*
- (C) *The Size of the Organization.*—
- (i) *In General.*—*The formality and scope of actions that an organization shall take to meet the requirements of this guideline, including the necessary features of the organization's standards and procedures, depend on the size of the organization.*
- (ii) *Large Organizations.*—*A large organization generally shall devote more formal operations and greater resources in meeting the requirements of this guideline than shall a small organization.*
- (iii) *Small Organizations.*—*In meeting the requirements of this guideline, small organizations shall demonstrate the same degree of commitment to ethical conduct and compliance with the law as large organizations. However, a small organization may meet the requirements of this guideline with less formality and fewer resources than would be expected of large organizations. In appropriate circumstances, reliance on existing resources and simple systems can demonstrate a degree of commitment that, for a large organization, would only be demonstrated through more formally planned and implemented systems.*

*Examples of the informality and use of fewer resources with which a small organization may meet the requirements of this guideline include the following: (I) the governing authority's discharge of its responsibility for oversight of the compliance and ethics program by directly managing the organization's compliance and ethics efforts; (II) training employees through informal staff meetings, and monitoring through regular "walk-arounds" or continuous observation while managing the organization; (III) using available personnel, rather than employing separate staff, to carry out the compliance and*

*ethics program; and (IV) modeling its own compliance and ethics program on existing, effective compliance and ethics programs and best practices of other similar organizations.*

(D) Recurrence of Similar Violations.—*Recurrence of similar violations creates doubt regarding whether the organization took reasonable steps to meet the requirements of this guideline. For purposes of this subdivision, "similar violations" has the meaning given that term in the Commentary to §1A1.1 (Application Instructions - Organizations).*

3. Application of Subsection (b)(2).—*High-level personnel and substantial authority personnel of the organization shall be knowledgeable about the content and operation of the compliance and ethics program, shall perform their assigned duties consistent with the exercise of due diligence, and shall promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law.*

*If the specific individual(s) assigned overall responsibility for the compliance and ethics program does not have day-to-day operational responsibility for the program, then the individual(s) with day-to-day operational responsibility for the program typically should, no less than annually, give the organization's governing authority or an appropriate subgroup thereof information on the implementation and effectiveness of the compliance and ethics program.*

4. Application of Subsection (b)(3).—

(A) Consistency with Other Law.—*Nothing in subsection (b)(3) is intended to require conduct inconsistent with any Federal, State, or local law, including any law governing employment or hiring practices.*

(B) Implementation.—*In implementing subsection (b)(3), the organization shall hire and promote individuals so as to ensure that all individuals within the high-level personnel and substantial authority personnel of the organization will perform their assigned duties in a manner consistent with the exercise of due diligence and the promotion of an organizational culture that encourages ethical conduct and a commitment to compliance with the law under subsection (a). With respect to the hiring or promotion of such individuals, an organization shall consider the relatedness of the individual's violations (including other conduct inconsistent with an effective compliance and ethics program) to the specific responsibilities the individual is anticipated to be assigned and other factors such as: (i) the recency of the individual's violations; and (ii) whether the individual has engaged in other such violations.*

5. Application of Subsection (b)(6).—*Adequate discipline of individuals responsible for a violation is a necessary component of enforcement; however, the form of discipline that will be appropriate will be case specific.*

6. Application of Subsection (c).—*To meet the requirements of subsection (c), an organization shall:*

(A) *Assess periodically the risk that violations will occur, including assessing the following:*

(i) *The nature and seriousness of such violations.*

- (ii) *The likelihood that certain violations may occur because of the nature of the organization's business. If, because of the nature of an organization's business, there is a substantial risk that certain types of violations may occur, the organization shall take reasonable steps to prevent and detect that type of violation. For example, an organization that, due to the nature of its business, has employees whose compensation is dependent on the final settlement price of a certain product shall establish standards and procedures designed to prevent market manipulation of that final settlement price.*
- (iii) *The prior history of the organization. The prior history of an organization may indicate types of violations that it shall take actions to prevent and detect.*
- (B) *Prioritize periodically, as appropriate, the actions taken pursuant to any requirement set forth in subsection (b), in order to focus on preventing and detecting the violations identified under subdivision (A) of this note as most serious, and most likely, to occur.*
- (C) *Modify, as appropriate, the actions taken pursuant to any requirement set forth in subsection (b) to reduce the risk of violations identified under subdivision (A) of this note as most serious, and most likely, to occur.*

## **PART C – CIVIL PENALTIES**

### **1. GENERAL**

#### **§1C1.1**

This Part governs the determination and implementation of civil penalties.

### **2. DETERMINING THE PENALTY**

#### **§1C2.1. Violation Level**

- (a) Use the applicable Chapter Two guideline to determine the base violation level and apply, in the order listed, any appropriate adjustments contained in that guideline.
- (b) Where there are multiple violations falling under different Chapter Two guidelines, e.g., a case involving both anticompetitive conduct and reliability violations, the Commission will determine the appropriate penalty on a case-by-case basis.

#### **§1C2.2. Base Penalty**

- (a) The base penalty is the greatest of:
  - (1) the amount from the table in subsection (b) below corresponding to the violation level determined under §1C2.1 (Violation Level); or
  - (2) the pecuniary gain to the organization from the violation; or

(3) the pecuniary loss from the violation caused by the organization.

(b) Violation Level Penalty Table

<u>Violation Level</u>	<u>Amount</u>
6 or less	\$5,000
7	\$7,500
8	\$10,000
9	\$15,000
10	\$20,000
11	\$30,000
12	\$40,000
13	\$60,000
14	\$85,000
15	\$125,000
16	\$175,000
17	\$250,000
18	\$350,000
19	\$500,000
20	\$650,000
21	\$910,000
22	\$1,200,000
23	\$1,600,000
24	\$2,100,000
25	\$2,800,000
26	\$3,700,000
27	\$4,800,000
28	\$6,300,000
29	\$8,100,000
30	\$10,500,000
31	\$13,500,000
32	\$17,500,000
33	\$22,000,000
34	\$28,500,000
35	\$36,000,000
36	\$45,500,000
37	\$57,500,000
38 or more	\$72,500,000

**§1C2.3. Culpability Score**

(a) Start with **5** points and apply subsections (b) through (g) below.

(b) Involvement in or Tolerance of Violations

If more than one applies, use the greatest:

(1) If --

- (A) the organization had 5,000 or more employees and
  - (i) an individual within high-level personnel of the organization participated in, condoned, or was willfully ignorant of the violation; or
  - (ii) tolerance of the violation by substantial authority personnel was pervasive throughout the organization; or
- (B) the unit of the organization within which the violation was committed had 5,000 or more employees and
  - (i) an individual within high-level personnel of the unit participated in, condoned, or was willfully ignorant of the violation; or
  - (ii) tolerance of the violation by substantial authority personnel was pervasive throughout such unit,

add **5** points; or

(2) If --

- (A) the organization had 1,000 or more employees and
  - (i) an individual within high-level personnel of the organization participated in, condoned, or was willfully ignorant of the violation; or
  - (ii) tolerance of the violation by substantial authority personnel was pervasive throughout the organization; or
- (B) the unit of the organization within which the violation was committed had 1,000 or more employees and
  - (i) an individual within high-level personnel of the unit participated in, condoned, or was willfully ignorant of the violation; or
  - (ii) tolerance of the violation by substantial authority personnel was pervasive throughout such unit,

add **4** points; or

(3) If --

- (A) the organization had 200 or more employees and

- (i) an individual within high-level personnel of the organization participated in, condoned, or was willfully ignorant of the violation; or
- (ii) tolerance of the violation by substantial authority personnel was pervasive throughout the organization; or

(B) the unit of the organization within which the violation was committed had 200 or more employees and

- (i) an individual within high-level personnel of the unit participated in, condoned, or was willfully ignorant of the violation; or
- (ii) tolerance of the violation by substantial authority personnel was pervasive throughout such unit,

add **3** points; or

- (4) If the organization had 50 or more employees and an individual within substantial authority personnel participated in, condoned, or was willfully ignorant of the violation, add **2** points; or
- (5) If the organization had 10 or more employees and an individual within substantial authority personnel participated in, condoned, or was willfully ignorant of the violation, add **1** point.

(c) Prior History

If more than one applies, use the greater:

- (1) If the organization committed any part of the instant violation less than 10 years after a prior Commission adjudication of any violation or less than 10 years after an adjudication of similar misconduct by any other enforcement agency, add **1** point; or
- (2) If the organization committed any part of the instant violation less than 5 years after a prior Commission adjudication of any violation or less than 5 years after an adjudication of similar misconduct by any other enforcement agency, add **2** points.

(d) Violation of an Order

If the commission of the instant violation violated a judicial or Commission order or injunction directed at the specific organization by the Commission or other Federal and state enforcement agencies that adjudicate similar types of matters as the Commission, add **2** points.

(e) Obstruction of Justice

If the organization willfully obstructed or impeded, attempted to obstruct or impede, or aided, abetted, or encouraged obstruction of justice during the investigation or resolution of the instant violation, or, with knowledge thereof, failed to take reasonable steps to prevent such obstruction or impedance or attempted obstruction or impedance, add **3** points.

(f) Effective Compliance and Ethics Program

- (1) If the violation occurred even though the organization had in place at the time of the violation an effective compliance and ethics program, as provided in §1B2.1 (Effective Compliance and Ethics Program), subtract **3** points.
- (2) Subsection (f)(1) does not apply if, after becoming aware of a violation, the organization unreasonably delayed reporting the violation to appropriate governmental authorities.
- (3) (A) Except as provided in subdivision (B), subsection (f)(1) does not apply if an individual within high-level personnel of the organization, a person within high-level personnel of the unit of the organization within which the violation was committed where the unit had 200 or more employees, or an individual described in §1B2.1(b)(2)(B) or (C), participated in, condoned, or was willfully ignorant of the violation.  
  
(B) There is a rebuttable presumption, for purposes of subsection (f)(1), that the organization did not have an effective compliance and ethics program if an individual—
  - (i) within high-level personnel of a small organization; or
  - (ii) within substantial authority personnel, but not within high-level personnel, of any organization,  
  
participated in, condoned, or was willfully ignorant of, the violation.

(g) Self-Reporting, Cooperation, and Acceptance of Responsibility

If more than one applies, use the greatest:

- (1) If the organization (A) prior to an imminent threat of disclosure or government investigation; and (B) within a reasonably prompt time after becoming aware of the violation, reported the violation to the Commission, exhibited full cooperation in the investigation, and resolved the matter without need for a trial-type hearing, subtract **4** points. If the organization also clearly demonstrated recognition and affirmative acceptance of responsibility for its violation, subtract an additional **1** point.

- (2) If the organization exhibited full cooperation in the investigation and resolved the matter without need for a trial-type hearing, subtract **2** points. If the organization also clearly demonstrated recognition and affirmative acceptance of responsibility for its violation, subtract an additional **1** point.
- (3) If the organization resolved the matter without need for a trial-type hearing, subtract **1** point. If the organization also clearly demonstrated recognition and affirmative acceptance of responsibility for its violation, subtract an additional **1** point.

Commentary

Application Notes:

1. Definitions.—For purposes of this guideline, "condoned," "prior adjudication," "similar violations," "substantial authority personnel," and "willfully ignorant of the violation" have the meaning given those terms in the Commentary to §1A1.1 (Applicability of these Guidelines).  
  
*"Small Organization", for purposes of subsection (f)(3), means an organization that, at the time of the instant violation, had fewer than 200 employees.*
2. *For purposes of subsection (b), "unit of the organization" means any reasonably distinct operational component of the organization. For example, a large organization may have several large units such as divisions or subsidiaries, as well as many smaller units such as specialized manufacturing, marketing, or accounting operations within these larger units. For purposes of this definition, all of these types of units are encompassed within the term "unit of the organization."*
3. *"High-level personnel of the organization" is defined in the Commentary to §1A1.1 (Application Instructions - Organizations). With respect to a unit with 200 or more employees, "high-level personnel of a unit of the organization" means agents within the unit who set the policy for or control that unit. For example, if the managing agent of a unit with 200 employees participated in a violation, three points would be added under subsection (b)(3); if that organization had 1,000 employees and the managing agent of the unit with 200 employees were also within high-level personnel of the organization in its entirety, four points (rather than three) would be added under subsection (b)(2).*
4. *Pervasiveness under subsection (b) will be case specific and depend on the number, and degree of responsibility, of individuals within substantial authority personnel who participated in, condoned, or were willfully ignorant of the violation. Fewer individuals need to be involved for a finding of pervasiveness if those individuals exercised a relatively high degree of authority. Pervasiveness can occur either within an organization as a whole or within a unit of an organization. For example, if a violation were committed in an organization with 1,000 employees but the tolerance of the violation was pervasive only within a unit of the organization with 200 employees (and no high-level personnel of the organization participated in, condoned, or was willfully ignorant of the violation), three points would be added under subsection (b)(3). If, in the same organization, tolerance of the violation was pervasive throughout the organization as a whole, or an individual within high-level personnel of the organization participated in the violation, four points (rather than three) would be added under subsection (b)(2).*

5. *Under subsection (c), in determining the prior history of an organization with separately managed lines of business, only the prior conduct or record of the separately managed line of business involved in the instant violation is to be used. A "separately managed line of business" is a subpart of a for-profit organization that has its own management, has a high degree of autonomy from higher managerial authority, and maintains its own separate books of account. Corporate subsidiaries and divisions frequently are separately managed lines of business.*
6. *Under subsection (c), in determining the prior history of an organization, the conduct of the underlying economic entity will be considered without regard to its legal structure or ownership. For example, if two companies merged and became separate divisions and separately managed lines of business within the merged company, each division would retain the prior history of its predecessor company. If a company reorganized and became a new legal entity, the new company would retain the prior history of the predecessor company. In contrast, if one company purchased the physical assets but not the ongoing business of another company, the prior history of the company selling the physical assets would not be transferred to the company purchasing the assets. However, if an organization is acquired by another organization in response to solicitations by appropriate federal government officials, the prior history of the acquired organization will not be attributed to the acquiring organization.*
7. *Under subsection (c)(1), the adjudication(s) must have occurred within the specified period (ten or five years) of the instant violation.*
8. *Adjust the culpability score for the factors listed in subsection (e) whether or not the violation guideline incorporates that factor, or that factor is inherent in the violation.*
9. *Subsection (f)(2) contemplates that the organization will be allowed a reasonable period of time to conduct an internal investigation. In addition, no reporting is required by subsection (f)(2) if the organization reasonably concluded, based on the information then available, that no violation had been committed.*
10. *To qualify for a reduction under subsection (g)(1) or (g)(2), cooperation must be both timely and thorough. To be timely, the cooperation must begin essentially at the same time as the organization is notified by the Commission or Commission staff of an investigation. To be thorough, the cooperation should include the disclosure of all pertinent information known by the organization. A prime test of whether the organization has disclosed all pertinent information is whether the information is sufficient for the Commission to identify the nature and extent of the violation and the individual(s) responsible for the violation. However, the cooperation to be measured is the cooperation of the organization itself, not the cooperation of individuals within the organization. If, because of the lack of cooperation of particular individual(s), neither the organization nor the Commission are able to identify the culpable individual(s) within the organization despite the organization's efforts to cooperate fully, the organization may still be given credit for full cooperation. The Commission will not require organizations to waive attorney-client privilege or work-product protections in order to qualify for a reduction under these subsections.*
11. *The Commission has not always required organizations to admit responsibility in settlement agreements. This Guideline is designed to provide a reduction in the culpability score to organizations willing to resolve cases without the need for a trial-type hearing that is comparable to the reduction in the Sentencing Guidelines for acceptance of responsibility with an additional*

*incentive for companies willing to affirmatively recognize their violations.*

***Background:** The increased culpability scores under subsection (b) are based on three interrelated principles. First, an organization is more culpable when individuals who manage the organization or who have substantial discretion in acting for the organization participate in, condone, or are willfully ignorant of violations. Second, as organizations become larger and their managements become more professional, participation in, condonation of, or willful ignorance of violations by such management is increasingly a breach of trust or abuse of position. Third, as organizations increase in size, the risk of violations beyond that reflected in the instant violation also increases whenever management’s tolerance of that violation is pervasive. Because of the continuum of sizes of organizations and professionalization of management, subsection (b) gradually increases the culpability score based upon the size of the organization and the level and extent of the substantial authority personnel involvement.*

**§1C2.4. Minimum and Maximum Multipliers**

Using the culpability score from §1C2.3 (Culpability Score) and applying any applicable special instruction for penalties in Chapter Two, determine the applicable minimum and maximum penalty multipliers from the table below.

<u>Culpability Score</u>	<u>Minimum Multiplier</u>	<u>Maximum Multiplier</u>
10 or more	2.00	4.00
9	1.80	3.60
8	1.60	3.20
7	1.40	2.80
6	1.20	2.40
5	1.00	2.00
4	0.80	1.60
3	0.60	1.20
2	0.40	0.80
1	0.20	0.40
0 or less	0.05	0.20.

**§1C2.5. Guideline Penalty Range – Organizations**

- (a) The minimum of the guideline penalty range is determined by multiplying the base penalty determined under §1C2.2 (Base Penalty) by the applicable minimum multiplier determined under §1C2.3 (Minimum and Maximum Multipliers).
- (b) The maximum of the guideline penalty range is determined by multiplying the base penalty determined under §1C2.2 (Base Penalty) by the applicable maximum multiplier determined under §1C2.3 (Minimum and Maximum Multipliers).

**3. IMPLEMENTING THE PENALTY**

**§1C3.1. Imposing a Penalty**

- (a) Except to the extent restricted by the maximum penalty authorized by statute or any minimum penalty required by statute, the penalty range will be that determined under §1C2.5 (Guideline Penalty Range - Organizations).
- (b) Where the minimum guideline penalty is greater than the maximum penalty authorized by statute, the maximum penalty authorized by statute will be the guideline penalty.

**§1C3.2. Reduction of Penalty Based on Inability to Pay**

- (a) The Commission will reduce the penalty below that otherwise required to the extent that imposition of such penalty would impair its ability to disgorge profits.
- (b) The Commission may impose a penalty below that otherwise required if the Commission finds that the organization is not able and, even with the use of a reasonable installment schedule, is not likely to become able to pay the minimum required by §1C2.5 (Guideline Penalty Range-Organizations) and §1B1.1 (Disgorgement).

*Provided*, that the reduction under this subsection will not be more than necessary to avoid substantially jeopardizing the continued viability of the organization.

Commentary

Application Notes:

1. *For purposes of this section, an organization is not able to pay the minimum penalty if, even with an installment schedule, the payment of that penalty would substantially jeopardize the continued existence of the organization.*

**CHAPTER 2: VIOLATION CONDUCT**

**Guideline for Violations of Commission-Approved Reliability Standards**

**§2A1.1**

- (a) Base Violation Level: **16**
- (b) Specific Violation Characteristics
  - (1) Risk of Loss. Apply the greatest of the following:
    - (A) If the violation created a low risk of minor harm, **no increase.**
    - (B) If the violation created either a moderate risk of minor harm OR a low risk of substantial harm, **add 3.**
    - (C) If the violation created either a high risk of minor harm OR a moderate risk of substantial harm, **add 5.**
    - (D) If the violation created either a high risk of substantial harm OR a low risk of major harm, **add 7.**
    - (E) If the violation created a moderate risk of major harm, **add 9.**
    - (F) If the violation created a high risk of major harm OR a low risk of extreme harm, **add 12.**
    - (G) If the violation created a moderate risk of extreme harm, **add 14.**
    - (H) If the violation created a high risk of extreme harm, **add 16.**

Commentary

*The following chart reflects the enhancements for risk of harm described in this Guideline:*

	Minor harm	Substantial Harm	Major Harm	Extreme Harm
Low Risk	+0	+3	+7	+12
Moderate Risk	+3	+5	+9	+14
High Risk	+5	+7	+12	+16

Illustrative Examples:

(1) *Risk of harm.*

(A) **Low risk of minor harm**

*Example: A Transmission Owner fails to produce evidence of maintenance and testing for 37 days after requested by its Regional Entity, i.e., 7 days after the 30-day deadline for production, creating a risk that no documentation exists to show the entity’s adherence to its maintenance and testing program for protection systems.*

(B.1) **Moderate risk of minor harm**

*Example: A medium-sized utility registered as a Balancing Authority has a documented*

*and adequate training program, but the training plan does not address all the knowledge and competencies required for reliable system operations and the entity has provided 90% of its operators with sufficient training time, creating a risk that a small percentage of operators have not received sufficient time for training to maintain all competencies needed for reliable system operations.*

**(B.2) Low risk of substantial harm**

*Example: A Generator Operator fails to, without any intentional time delay, notify its Balancing Authority and Transmission Operator of equipment failure that would limit the output of its 300 MW generator, which may make it difficult for the Generator Operator's Balancing Authority to replace the power in a time period of high demand or low supply availability.*

**(C.1) High risk of minor harm**

*Example: A small utility registered as a Transmission Owner is three months behind on testing and maintaining 1% of its relays, all on its 115 kV radial transmission lines, meaning the entity faces a high risk of losing a small amount of radial load through an inability to isolate a fault in response to a contingency.*

**(C.2) Moderate risk of substantial harm**

*Example: Over a weekend when the system is lightly loaded, operating personnel for a small utility registered as a Transmission Operator fail to use three-part communication of directives, which leads to the wrong breaker being opened. Because there was sufficient capacity on a looped line, there was moderate risk that a substantial, otherwise unnecessary loss of load could occur because the breaker opened.*

**(D.1) High risk of substantial harm**

*Example: A medium to large utility registered as a Transmission Operator fails to have on duty NERC-certified operators for 50 hours per month for the last 2 years, placing the utility at an elevated risk of an operator error during any emergency while the non-certified operator is on duty that could lead to a substantial, otherwise unnecessary loss of load.*

**(D.2) Low risk of major harm**

*Example: A Reliability Coordinator's modeling tool does not include several recent changes to the transmission system. Should an emergency occur, the Reliability Coordinator would lack situational awareness of its Reliability Coordinator Area and, as a result, issue improper directives that exacerbate the emergency.*

**(E) Moderate risk of major harm**

*Example: A medium to large utility registered as a Balancing Authority has an event occur on its system and fails to take actions necessary to return its area control error (ACE) to zero for more than 15 minutes, and while it has the necessary amount of*

*reserves through a reserve sharing group, the full amount of reserves cannot be delivered to the BA due to transmission constraints resulting from the event. This violation threatens unnecessary losses of load within the Balancing Authority and in neighboring Balancing Authorities should another contingency occur.*

**(F.1) High risk of major harm**

*Example: A large Transmission Owner has a transmission vegetation management program that requires foot, vehicle and aerial patrols annually along rights-of-way for transmission lines having a capacity of 138 kV and above. The Transmission Owner decides to save \$2 million by deferring the annual aerial patrols for two years. During that time period, a tree located within the right-of-way of a 500 kV line grew sufficiently to contact the line. An aerial patrol timely would have identified the tree as a potential threat of a vegetation contact or flashover that would cause an outage of the line. Such an outage likely would result in major harm through significant, unnecessary losses of load, as well as severe transmission constraints between neighboring Transmission Operators and Balancing Authorities.*

**(F.2) Low risk of extreme harm**

*Example: A utility registered as a Balancing Authority does not have any required procedures for the recognition of and for making its operating personnel aware of sabotage events on its facilities and multi-site sabotage affecting larger portions of the Interconnection, and its operating personnel have received no training on recognizing sabotage events. Because of the Balancing Authority's configuration and facilities, its lack of these procedures and training make it more likely that a large-scale sabotage attempt focused on the Balancing Authority's facilities would be successful, causing widespread, unnecessary losses of load on the systems of the Balancing Authority and its neighboring Balancing Authorities.*

**(G) Moderate risk of extreme harm**

*Example: A medium-sized utility that serves native load and is registered as a Balancing Authority and Transmission Operator does not have sufficient manually-operated load shedding capability to shed load within fifteen minutes in the amount of the Balancing Authority's most severe single contingency. The failure to shed sufficient load as a last resort in an emergency could cause the utility to lean on the Interconnection for too long and, were an Adjacent Balancing Authority to have a contingency, it could lead to widespread blackouts in either or both Balancing Authority Areas.*

**(H) High risk of extreme harm**

*This situation could occur as a result of multiple violations (vegetation contact, frequency oscillations, poor operator training and situational awareness, etc.) that are similar to the causes of the 2003 Northeast blackout.*

Application Notes:

1. *The Guideline increases the violation level as the expected harm from the reliability violation increases. As a result, the violation level goes up as both the risk of harm and the severity of the potential harm increases. Many cases may involve multiple risks of multiple levels of harm. For instance, a case might involve a moderate risk of major harm and a high risk of substantial harm. The Guideline takes the greater of the two violation levels. In this case, the increase to the base violation level would be 9.*
2. *In this context, “low risk” is not meant to include cases where there was virtually no risk of harm. It is meant to apply to cases where there was a significant, albeit small, chance of the relevant level of harm.*
3. *The risk of the relevant harm is to be determined based on all of the facts and circumstances surrounding the violation(s). As an initial starting point, the violation risk factors will be considered in determining the relevant risk. However, the VRF might understate or overstate the actual risk resulting from the violation. For instance, a violation or combination of violations of Low VRF standards might, under certain circumstances, pose a high risk of harm. Alternatively, a violation of a standard with a High VRF might present little or no real risk of harm. Under such circumstances, the actual risk from the violation should be used to determine the offense level. The fact that little or no loss of load occurred is not, by itself, evidence that the violation involved a low or moderate risk.*

**Guideline for Fraud, Anti-Competitive Conduct and  
Other Rule, Tariff and Order Violations**

**§2B1.1**

- (a) Base Violation Level: **6**
- (b) Specific Violation Characteristics
- (1) If the loss exceeded \$5,000, increase the violation level as follows:

<u>Loss (Apply the Greatest)</u>	<u>Increase in Level</u>
(A) \$5,000 or less	no increase
(B) More than \$5,000	add <b>2</b>
(C) More than \$10,000	add <b>4</b>
(D) More than \$30,000	add <b>6</b>
(E) More than \$70,000	add <b>8</b>
(F) More than \$120,000	add <b>10</b>
(G) More than \$200,000	add <b>12</b>
(H) More than \$400,000	add <b>14</b>
(I) More than \$1,000,000	add <b>16</b>
(J) More than \$2,500,000	add <b>18</b>
(K) More than \$7,000,000	add <b>20</b>
(L) More than \$20,000,000	add <b>22</b>
(M) More than \$50,000,000	add <b>24</b>
(N) More than \$100,000,000	add <b>26</b>
(O) More than \$200,000,000	add <b>28</b>
(P) More than \$400,000,000	add <b>30</b>

- (2) If more than one of the following enhancements applies, use only the greatest.

If the violation--

- (A) involved more than 70,000 MMBtus of natural gas or more than 10,000 MWh of electricity, or equivalent volumes of natural gas related or electricity related transactions, increase by **2** levels
- (B) involved more than 140,000 MMBtus of natural gas or more than 20,000 MWh of electricity, or equivalent volumes of natural gas related or electricity related transactions, increase by **4** levels
- (C) involved more than 700,000 MMBtus of natural gas or more than 100,000 MWh of electricity, or equivalent volumes of natural gas related or electricity related transactions, increase by **6** levels

If the violation--

- (D) continued for more than 10 days, increase by **2** levels

- (E) continued for more than 50 days, increase by **4** levels
  - (F) continued for more than 250 days, increase by **6** levels
- (3) If the violation involved conduct that presented a serious threat to market transparency and the total violation level is less than level **16**, increase to level **16**.

Commentary

Application Notes:

1. *This Guideline is based on United States Sentencing Guidelines Section 2B1.1 and terms used in this Guideline are intended to have the same meaning as they do in Section 2B1.1. Section (b)(2) provides various enhancements for the scope and extent of the violation. If more than one of the enhancements is applicable, only the greatest enhancement should be used.*
2. Loss Under Subsection (b)(1).—*This application note applies to the determination of loss under subsection (b)(1).*
  - (A) General Rule.—*Subject to the exclusions in subdivision (D), loss is the greater of actual loss or intended loss.*
    - (i) *Actual Loss.*—*"Actual loss" means the reasonably foreseeable pecuniary harm that resulted from the violation.*
    - (ii) *Intended Loss.*—*"Intended loss" (I) means the pecuniary harm that was intended to result from the violation; and (II) includes intended pecuniary harm that would have been impossible or unlikely to occur.*
    - (iii) *Pecuniary Harm.*—*"Pecuniary harm" means harm that is monetary or that otherwise is readily measurable in money. Accordingly, pecuniary harm does not include emotional distress, harm to reputation, or other non-economic harm.*
    - (iv) *Reasonably Foreseeable Pecuniary Harm.*—*For purposes of this guideline, "reasonably foreseeable pecuniary harm" means pecuniary harm that the entity knew or, under the circumstances, reasonably should have known, was a potential result of the violation.*
  - (B) *Gain.*—*The Commission will use the gain that resulted from the violation as an alternative measure of loss only if there is a loss but it reasonably cannot be determined.*
  - (C) *Estimation of Loss.*—*The Commission need only make a reasonable estimate of the loss.*
  - (D) *Exclusions from Loss.*—*Loss does not include the following:*
    - (i) *Interest of any kind, finance charges, late fees, penalties, amounts based on an agreed-upon return or rate of return, or other similar costs.*
    - (ii) *Costs to the government of, and costs incurred by victims primarily to aid the government in, the prosecution and investigation of a violation.*

- (E) *Credits Against Loss.—Loss will be reduced by the following:*
- (i) *The money returned, and the fair market value of the property returned and the services rendered, by the entity or other persons acting jointly with the entity, to the victim before the violation was detected. The time of detection of the violation is the earlier of (I) the time the violation was discovered by a victim or the Commission; or (II) the time the entity knew or reasonably should have known that the violation was detected or about to be detected by a victim or the Commission.*
  - (ii) *In a case involving collateral pledged or otherwise provided by the entity, the amount the victim has recovered at the time of penalty from disposition of the collateral, or if the collateral has not been disposed of by that time, the fair market value of the collateral at the time of penalty.*

**Guideline for Misrepresentation and False Statements  
To the Commission or Commission Staff**

**§2C1.1**

- (a) Base Violation Level: **18**
- (b) Specific Violation Characteristics
  - (1) If the violation resulted in substantial interference with the administration of justice, increase by **3** levels.
  - (2) If the violation (A) involved the destruction, alteration, or fabrication of a substantial number of records, documents, or tangible objects; (B) involved the selection of any essential or especially probative record, document, or tangible object, to destroy or alter; or (C) was otherwise extensive in scope, planning, or preparation, increase by **2** levels.

Commentary

Application Notes:

1. *This Guideline is based on United States Sentencing Guidelines Section 2J1.2 and terms used in this Guideline are intended to have the same meaning as they do in Section 2J1.2.*
2. *Definitions.—For purposes of this guideline:*

*"Records, documents, or tangible objects" includes (A) records, documents, or tangible objects that are stored on, or that are, magnetic, optical, digital, other electronic, or other storage mediums or devices; and (B) wire or electronic communications.*

*"Substantial interference with the administration of justice" includes a premature or improper termination of a Commission investigation; any official action based upon perjury, false testimony, or other false evidence; or the unnecessary expenditure of substantial governmental or Commission resources.*