

FERC Should Rescind Its Notice of Alleged Violations Policy

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In December 2009, the Federal Energy Regulatory Commission (“FERC” or “Commission”) introduced a new policy providing for early public disclosure of its enforcement investigations—including the identities of investigation subjects—by authorizing the Director of the Office of Enforcement (“Enforcement”) to issue a Staff Notice of Alleged Violations (“NAV”).¹ Under the NAV Policy, the NAV would issue once “the subject of the investigation has had the opportunity to respond to staff’s preliminary findings” but prior to both the staff finalizing its findings and conclusions and the Commission itself issuing an order addressing the matter.² The NAV Policy was controversial, as it upset a long-established policy that Commission investigations—especially the identities of investigation subjects—were kept non-public unless and until the Commission either issued an order approving a settlement between Enforcement and the investigation subject or initiated an enforcement action by issuing an Order to Show Cause (“OSC”).³ In either

case, prior to the NAV Policy, it was only through a Commission order that the subject matter of an investigation—or the identity of its subject(s)—would be made public.

The Commission recognized that the NAV Policy came at a significant cost to investigation subjects, as “[o]ne cost of accelerated public disclosure is that the entity under investigation is placed in the public eye, with possible adverse consequences to its reputation.”⁴ However, the Commission found that the NAV Policy was justified by the benefits of public transparency—mainly the ability of third-party market participants to bring relevant information to staff’s attention in response to the NAV, and the NAV’s educational value to third-party market participants about the nature of violations under investigation.⁵ When implementing the NAV Policy, the Commission said it would “continue to monitor the [NAV] procedure and [was] open to considering it again after staff has acquired some experience in its application.”⁶ The Commission also directed Enforcement staff to publicly report on its experience with the NAV Policy to the Commission a year later when it issued its Annual Report on Enforcement.⁷

In this Article, we argue that the NAV Policy has not worked, and that it is time for the Commission to revisit—and rescind—the Policy. We recognize that the Commission instituted the NAV Policy as a part of its efforts to bring transparency to the enforcement program—efforts that we find laudable. But now, with more than six years’ experience with the NAV Policy, it is possible to reach some conclusions about the NAV Policy’s effectiveness. And we think, based on publicly-available data, that the Policy has not produced the benefits that the Commission intended. This alone is cause for the Commission to revisit and rescind the NAV Policy, as there is no justification for continuing a policy that admittedly causes harm when its anticipated countervailing benefits have not materialized. But there are additional reasons for rescinding the NAV Policy. One is that advancements in

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1. *Enforcement of Statutes, Regulations, and Orders*, 129 FERC ¶ 61,247 (2009) (2009 NAV Order), *order on reh’g*, 134 FERC ¶ 61,054 (2011) (2011 NAV Order) (collectively, “NAV Policy”). While these orders characterize the disclosure as a Preliminary Notice of Violations, in practice, the disclosure is called a Notice of Alleged Violations, or “NAV.” See *Notices*, FED. ENERGY REG. COMMISSION (Dec. 2, 2016), <http://www.ferc.gov/enforcement/alleged-violation/notices.asp>. For simplicity, we refer to the disclosure as a NAV throughout this Article.
2. 2009 NAV Order, *supra* note 1, at P 6.
3. See *id.* P 5 (noting that prior to the NAV Policy, public disclosure does not “generally occur until a settlement is reached or the Commission issues an [OSC]”). Section 1b.4 of the Commission’s regulations provides for both public and non-public investigations. 18 C.F.R. § 1b.4 (2016). However, since the Commission received substantial enforcement authority through the Energy Policy Act of 2005, Pub. L. No. 109-58, §§ 1261 *et. seq.*, 119 Stat. 594 (2005), we are not aware of any instance in which Enforcement has conducted a public investigation. Moreover, the default rule under Section 1b.19 is that Commis-

sion investigations are treated as non-public until the Commission authorizes disclosure, the investigation is made public through an adjudicatory proceeding, or information relating to the investigation is required to be disclosed by the Freedom of Information Act. 18 C.F.R. § 1b.19 (2016).

4. 2009 NAV Order, *supra* note 1, at P 6.
5. See 2011 NAV Order, *supra* note 1, at PP 15–16 (noting that the NAV policy is “part of [the Commission’s] ongoing efforts to promote transparency and good government”).
6. *Order on Requests for Rehearing and Clarification*, 134 FERC ¶ 61,054, at P 22 (2011).
7. *Id.*

the Commission's enforcement tools and sophistication since 2009 have diminished the need for the NAV or anything like it to assist Enforcement staff in conducting investigations. Another is that the "possible adverse consequences to [an investigation subject's] reputation"⁸ are, if anything, even more significant and damaging than they were in 2009, as the Commission's enforcement activities garner a greater amount of public attention and increasingly target individuals rather than only companies. And finally, although a key premise of the NAV Policy was that NAVs would issue only after staff's investigation concluded, we now know that this premise is not always true and that staff may continue to investigate and refine its conclusions after a NAV issues. This means that the NAV may not accurately reflect who will ultimately be named and what violations will ultimately be pursued—a reality that further detracts from the NAV's intended transparency benefits.

For these reasons, we argue that the Commission should revisit—and rescind—the NAV Policy.

I. The NAV Policy Has Not Resulted in the Benefits the Commission Expected

The Commission found that the NAV Policy would promote transparency concerning Commission investigations in two distinct, concrete ways.⁹ First, the Commission found that the NAV would "provide[] a vehicle whereby market participants can bring to staff's attention additional information relevant to the investigation"—whether inculpatory or exculpatory.¹⁰ Second, the Commission found that the NAV would "better educate the public as to the nature of the violations under investigation by the Commission" and "allow other market participants to evaluate themselves and their own activities against what they know about the subject and the conduct alleged in the [NAV]."¹¹ As explained below, with now more than six years' experience with the NAV Policy, we conclude that the policy has not led to the benefits the Commission anticipated.¹²

A. There Is No Evidence the NAV Policy Has Prompted Market Participants to Bring Relevant Information to Staff's Attention

There is no evidence in the public record of any NAV prompting market participants to bring relevant information about

an investigation to staff's attention. To date, the Commission has issued 50 NAVs.¹³ Based on a review of public filings and Commission orders in connection with the investigations for which NAVs have been issued, there is no record of a NAV aiding the Commission's enforcement efforts. In fact, there is not a single reference to any relevant evidence being provided in response to the issuance of a NAV in (1) any OSC or appended Enforcement Staff Report, (2) any filing by Enforcement staff or an investigation subject in an OSC proceeding, or (3) any Commission order in an OSC proceeding, including orders assessing civil penalties and orders issued by administrative law judges ("ALJs"). Likewise, in the eight enforcement cases that have been or are being litigated in federal district court pursuant to the *de novo* review procedures of section 31(d)(3) of the Federal Power Act, there is no reference in any filing indicating Commission staff has received relevant information from a market participant as a result of the NAV.¹⁴ A review of other relevant sources of information on the Commission's enforcement program—including annual reports produced by Enforcement, and Commissioner statements and press releases¹⁵—similarly does not reveal any instance in which a party provided Enforcement staff with relevant information about an investigation as a result of the NAV.

Recognizing that the Commission's investigative activities remain non-public even after the Commission issues a NAV or initiates enforcement proceedings through an OSC, it is possible, of course, that the Commission or Enforcement staff are aware of instances in which the NAV Policy has prompted third parties to voluntarily bring relevant information to staff's attention, even if such instances are not reflected in the public record. If that has occurred, the Commission could provide information on such instances, with confidential information protected as necessary, so that the public has the benefit of understanding the extent to which the NAV Policy has had its intended effects. Publicly reporting the extent to which there have been any instances of third-party submissions in response to NAVs that are not reflected in public records is particularly appropriate due to the Commission's commitment to reviewing the effectiveness of the NAV Policy. Further, in the 2011 NAV Order, the Commission directed Enforcement staff to publicly report on its "experience with the [NAV] procedure in the Annual Report on Enforcement for fiscal year 2011."¹⁶ We note that, to date,

13. *Notices*, *supra* note 1.

14. *FERC v. Barclays Bank PLC*, Case No. 2:13-cv-2093 (E.D. Cal.); *FERC v. ETRACOM LLC*, Case No. 2:16-cv-01945 (E.D. Cal.); *FERC v. City Power Marketing LLC*, Case No. 1:15-cv-01428 (D.D.C.); *FERC v. Maxim Power Corporation*, Case No. 15-cv-30113 (D. Mass.); *FERC v. Silkman*, Case No. 1:13-cv-13054 (D. Mass.), *transferred*, Case No. 1:16-cv-205 (D. Me.); *FERC v. Coaltrain Energy L.P.*, Case No. 2:16-cv-00732 (S.D. Ohio); *FERC v. Powhatan Energy Fund LLC*, Case No. 3:15-cv-00452 (E.D. Va.); *FERC v. Lincoln Paper & Tissue, LLC*, Case No. 1:13-cv-13056-DPW (D. Mass.); see generally *Orders to Show Cause Proceedings*, FED. ENERGY REG. COMMISSION, <https://www.ferc.gov/enforcement/civil-penalties/show-cause-orders.asp#B> (last updated Jan. 24, 2017).

15. OFFICE OF ENF'T, FED. ENERGY REGULATORY COMMISSION, No. AD07-13-010, 2016 REPORT ON ENF'T (2016) [hereinafter 2016 REPORT ON ENF'T]; see also *Headlines*, FED. ENERGY REG. COMMISSION, <https://www.ferc.gov/media/headlines.asp> (last updated Jan. 12, 2017).

16. *2011 NAV Order*, *supra* note 1, at P 22.

8. *2009 NAV Order*, *supra* note 1, at P 6.

9. *2011 NAV Order*, *supra* note 1, at P 10.

10. *Id.* P 15.

11. *Id.* P 16.

12. The Commission also identified a third transparency benefit of the NAV Policy, in that "disclosure [in the NAV] of the subject's identity prevents unwarranted suspicion from being cast on companies that are not under investigation, which might otherwise occur if the [NAV] is issued without identifying the subject." *Id.* P 16. This consideration goes to whether a NAV should or should not identify the investigation subject—not whether there should be a NAV in the first instance. While the Commission could consider revising this particular aspect of the NAV so that it no longer identifies the investigation subject (as the greatest harm is caused by the public identification), because the NAV Policy has not led to the core benefits the Commission expected to occur, the better approach is simply to rescind it altogether.

Enforcement staff has not publicly reported any instances in which a NAV caused a third party to bring relevant information to staff's attention.

B. *The NAV Provides Little to No Meaningful Transparency or Educational Value to Other Market Participants*

Contrary to the Commission's expectations, the NAV Policy has not provided meaningful transparency about investigations, nor has it enabled "other market participants to evaluate themselves and their own activities against what they know about the subject and the conduct alleged in the [NAV]."¹⁷ As explained below, this is the case for two key reasons. First, the NAV provides very little information concerning the underlying conduct at issue—a description of the conduct that pales in comparison to that provided in Commission orders approving settlements or instituting OSC proceedings, both of which often follow the NAV within a relatively short time period. Second, there are several other means for the Commission and its staff to provide guidance to market participants on conduct that may be unlawful—guidance that is without question more detailed and informative than what the NAV provides.

I. *The Sparse Detail Provided in the NAV Pales in Comparison to the Information Provided in Commission Orders, Provides Little to No Value to Market Participants, and Compromises Transparency More Than Promotes It*

The educational and transparency value of the NAV is necessarily limited by its lack of information about the alleged wrongdoing. Once one strips away the boilerplate language common to all NAVs, the substantive description of the underlying conduct is generally two or three sentences. Such brevity is understandable in the context of an issuance in the midst of an ongoing investigation in which Enforcement staff has not yet finalized its views. However, that does not change the fact that the NAV remains unhelpful to market participants and, as explained below, risks compromising transparency more than promoting it.

The cases involving the three largest civil penalties assessed or approved by the Commission to date, i.e., Constellation, Barclays, and JP Morgan, illustrate the brevity with which the NAV describes the conduct at issue:

Constellation—The Commission resolved this matter by approving a settlement between Enforcement and Constellation prior to issuing an OSC. The settlement provided for Constellation to pay a civil penalty of \$135 million and to disgorge \$110 million in unjust profits¹⁸ to resolve allegations that it (1) engaged in market manipulation through

virtual trading activities in the New York Independent System Operator ("NYISO") market and (2) provided inaccurate and misleading information to NYISO.¹⁹ The order and attached settlement agreement totaled twenty pages and included detailed descriptions of the alleged unlawful conduct.²⁰ The NAV, on the other hand, contained only a single sentence describing each of the alleged violations.²¹

Barclays—Following an OSC proceeding, the Commission assessed its largest civil penalty ever of \$435 million for Barclays (plus \$34.9 million in disgorgement), and \$18 million collectively for four of its traders.²² The Commission's Order Assessing Civil Penalties contained eighty-five pages of factual description of the alleged misconduct and legal analysis explaining the Commission's view of why such conduct was unlawful.²³ In the Order, the Commission repeatedly characterized the conduct as "complex."²⁴ The Order followed extensive briefing by the parties addressing the conduct at issue in response to the OSC. And the OSC itself included an attached sixty-seven-page Enforcement Staff Report that explained in detail staff's views of the underlying conduct and why it was unlawful.²⁵ The NAV, on the other hand, contained just two sentences describing the alleged misconduct.²⁶

JP Morgan—The Commission resolved the JP Morgan investigation by approving a settlement between Enforcement and JP Morgan prior to issuing an OSC. The settlement provided for JP Morgan to pay a civil penalty of \$285 million and to disgorge \$125 million in unjust profits to resolve allegations that it engaged in twelve different manipulative trading strategies.²⁷ The order and attached settlement agreement totaled thirty-seven pages and included detailed descriptions of each of the twelve trading strategies alleged to be unlawful, along with relevant background and context necessary to understand the facts and circumstances of the alleged misconduct.²⁸ The NAV, on the other hand, generally contained a one-sentence bullet on each trading strategy.²⁹

As is seen from these examples, the NAV provides little transparency and is not a meaningful source of guidance to market participants. With respect to transparency, the brevity of the NAV can compromise transparency more than promote it. Attempting to boil complex matters down to a

17. *Id.* P 16.

18. *Constellation Energy Commodities Grp., Inc.*, 138 FERC ¶ 61,168, at PP 36, 38 (2012).

19. *Id.* PP 16, 17.

20. *See generally id.*

21. *Constellation Energy Commodities Group, Inc. Staff Notice of Alleged Violations*, FED. ENERGY REG. COMMISSION (Jan. 30, 2012), <https://www.ferc.gov/enforcement/alleged-violation/notices/2012/constellation.pdf>.

22. *Barclays Bank PLC*, 144 FERC ¶ 61,041, at P 8 (2013).

23. *See generally id.*

24. *Id.* PP 129–30.

25. *See generally Barclays Bank PLC*, 141 FERC ¶ 61,084 (2012).

26. *Barclays Bank PLC Staff Notice of Alleged Violations*, FED. ENERGY REG. COMMISSION (Apr. 5, 2012), <https://www.ferc.gov/enforcement/alleged-violation/notices/2012/barclays.pdf>.

27. *Make-Whole Payments and Related Bidding Strategies*, 144 FERC ¶ 61,068, at P 3 (2013).

28. *Id.* P 4.

29. *See JP Morgan Ventures Energy Corp. Staff Notice of Alleged Violations*, FED. ENERGY REG. COMMISSION 1–2 (July 29, 2013), <http://www.ferc.gov/enforcement/alleged-violation/notices/2013/jpmorgan-07-29-2013.pdf>. The NAV in the JP Morgan investigation only referenced 8 of the 12 trading strategies described in the settlement. *See id.*

sentence or two often generates more questions than answers, and potentially leaves significant misimpressions in the minds of the public about what kind of misconduct allegedly occurred. For example, a NAV issued in a case that the Commission ultimately determined warranted a \$20,000 civil penalty describes conduct similarly to NAVs issued in cases the Commission ultimately determined warranted penalties in the tens and hundreds of millions of dollars.³⁰ Regarding educational value, the substantive orders the Commission issues in enforcement cases provide substantially more detail and useful information to market participants. And, importantly, those orders (unlike the NAV) reflect the considered view of the Commission itself. As the Commission explains on its website in a section devoted to “Staff Guidance” to market participants on compliance, “[m]ost guidance is provided through Commission orders, issued in response to pleadings subject to public review and comment.”³¹ The “Staff Guidance” section of FERC’s website does not list NAVs as a source of guidance for market participants.

2. There Are Several Other Means for the Commission and Its Staff to Provide Guidance to Market Participants on Conduct That May Be Unlawful—Guidance That Is More Detailed and Informative Than the NAV

Not only does the NAV fail to provide meaningful guidance to market participants, but there is no need for the NAV to serve that function. Rather, the Commission has ample tools at its disposal outside of Commission orders to provide guidance to market participants on conduct that the Commission or its staff believes to be unlawful. Two of the most significant resources for guidance on compliance and enforcement matters are the Commission’s Enforcement Hotline and annual Enforcement Reports.³²

The Enforcement Hotline, which staff maintains pursuant to the Commission’s regulations, serves as a resource for market participants to both provide information to, and obtain information from, Commission staff. The regulations make clear that one function of the Hotline is for staff to “provide

information to the public and give informal staff opinions.”³³ In Fiscal Year 2016 alone, staff received 198 calls to the Enforcement Hotline, 95% of which were resolved promptly through staff guidance.³⁴

Another key mechanism for staff to provide guidance is the Annual Report on Enforcement. These reports provide market participants with extensive information concerning the Commission’s enforcement program during the past year. The reports include descriptions of investigations and self-reports that were closed during the past year (including descriptions of the underlying conduct and potential violations), as well as detailed information on other enforcement activities such as OSCs, settlements, and litigated proceedings. Commissioners have repeatedly noted the value of the compliance guidance the annual report provides to market participants.³⁵ Former Chairman Norman C. Bay recently noted that the report “allows the Commission to provide valuable transparency into [the Commission’s] enforcement efforts,” “provides the public important insight into the work the Commission performs to ensure the integrity of the markets,” “is an equally-useful tool for market participants,” and “can assist regulated entities in developing a culture of compliance.”³⁶ Acting Chairman Cheryl A. LaFleur has characterized the report as “required reading” for market participants.³⁷

These annual reports provide much more guidance to market participants on compliance issues than NAVs. Moreover, Enforcement staff always has the option of including in the reports additional information on its enforcement efforts and views with respect to compliance issues. Such additional information could include, for example, more detailed information regarding the types of investigations Enforcement staff opened during the prior year. This information would likely be more comprehensive and in some instances timelier than that provided by the NAV, and provide better transparency into the Commission’s enforcement program.³⁸

Finally, the Commission’s website notes several other mechanisms available for market participants to obtain

30. Compare *Direct Energy LLC Staff Notice of Alleged Violations*, FED. ENERGY REG. COMMISSION (July 9, 2014), <http://www.ferc.gov/enforcement/alleged-violation/notices/2014/direct-energy-07-01-2014.pdf> (alleging that Direct Energy “manipulat[ed] natural gas prices during May 2012 at Algonquin and Transco Zone 6 in order to benefit its related financial positions.”), with *BP America Inc. Staff Notice of Alleged Violations*, FED. ENERGY REG. COMMISSION (July 28, 2011), <https://www.ferc.gov/enforcement/alleged-violation/notices/2011/bp-america.pdf> (alleging that from mid-September 2008 through November 2008, BP “fraudulently trad[ed] physical natural gas in the Houston Ship Channel and Katy markets and trading points to increase the value of its financial swing spread positions.”). The Direct Energy investigation ultimately resulted in a \$20,000 civil penalty, *Direct Energy Services, LLC*, 148 FERC ¶ 61,114 (2014), whereas the BP investigation resulted in the Commission assessing a civil penalty of over \$20 million, *BP America Inc.*, 156 FERC ¶ 61,031 (2016). NAVs issued in other cases describe conduct very similarly. See, e.g., *Barclays Bank PLC Staff Notice of Alleged Violations*, *supra* note 26.

31. *Staff Guidance*, FED. ENERGY REG. COMMISSION, <http://www.ferc.gov/enforcement/staff-guid.asp> (last updated Dec. 3, 2015).

32. *Enforcement Hotline*, FED. ENERGY REG. COMMISSION, <https://www.ferc.gov/enforcement/staff-guid/enforce-hot.asp>; see, e.g., 2016 REPORT ON ENF’T, *supra* note 15.

33. 18 C.F.R. § 1b.21 (2016).

34. 2016 REPORT ON ENF’T, *supra* note 15, at 32.

35. Transcript of 1021st FERC Commission Meeting at 30–31 (2015), <http://www.ferc.gov/CalendarFiles/20151209102929-transcript.pdf>.

36. *Id.* at 30.

37. *Id.* at 31.

38. Annual Enforcement Reports describe the number of investigations opened during the past year and their general subject matter. See, e.g., 2016 REPORT ON ENF’T, *supra* note 15, at 26 (“Of the 17 investigations staff opened this fiscal year (some of which involve more than one type of potential violation or multiple subjects), 12 involve potential market manipulation, 11 involve potential tariff violations, one involves potential violations of a Commission certificate order, one involves potential violations of the Standards of Conduct, and one involves potential violation of a Commission filing requirement.”). Staff could include a brief discussion of the types of conduct at issue in the investigations (e.g., “the manipulation investigations concern potential uncoordinated trading of physical energy products to benefit related positions, ISO/RTO bidding behavior that may have been intended to improperly collect uplift payments, and potential manipulation of baselines by demand response participants”). Including this information in the annual report would provide market participants with at least the same (and likely far greater) guidance and transparency provided by the NAV. This information could be more timely as well because NAVs often issue years into an investigation, whereas there will always be an annual report issued within a year of staff discovering potentially unlawful conduct.

guidance from the Commission or its staff on compliance issues.³⁹ These mechanisms include the Commission's Compliance Help Desk, meetings with staff, No Action Letters, legal opinions issued by the General Counsel, and interpretive letters issued by the Commission's Chief Accountant.⁴⁰

II. The Commission's Bases for Instituting Its NAV Policy in 2009 Are Less Valid Now Due to Advances in the Commission's Enforcement Tools

While the NAV Policy's failure to produce the benefits the Commission intended is reason enough for reconsideration, it is also important to understand how the Commission's enforcement tools have evolved since 2009, and how that affects the need for the NAV Policy. As discussed above, one of the Commission's core bases for instituting the NAV Policy was that it would "provide[] a vehicle whereby market participants can bring to staff's attention additional information relevant to the investigation."⁴¹ However, as the previous FERC Chairman (and former Director of Enforcement) has observed, "[o]ver the past few years, [Enforcement] has substantially expanded its investigative and analytical capabilities and has developed extensive new surveillance tools."⁴² These developments, which occurred after the Commission instituted the NAV Policy, render the Commission's need to rely on third parties to voluntarily bring information to Enforcement staff's attention much less important.

At the time the Commission instituted the NAV Policy in 2009, the Commission's modern enforcement program was still in its early stages, having been launched in response to new enforcement authority granted by Congress through the Energy Policy Act of 2005, which was signed into law in 2006.⁴³ Given the Commission's limited experience

with complex investigations such as those involving market manipulation, it is understandable that the Commission at the time thought that staff providing public notice of investigations might assist the Commission in obtaining information from third parties to support its enforcement efforts. But much has changed since 2009. The tools now available to Commission staff allow the Commission to proactively identify conduct that might warrant investigation (and potential sources of relevant information, including third parties). While cataloging all the changes that have occurred with respect to the Commission's enforcement resources and tools over the past several years is beyond the scope of this Article, a few developments illustrate that the Commission's investigative and surveillance capabilities are significantly more advanced than they were in 2009, particularly with respect to third-party data.

A. Creation of the Division of Analytics and Surveillance and Access to Near-Real Time Market Data Reduce Enforcement's Need to Rely on Voluntary Third-Party Submissions

In February 2012, the Commission created a new division within Enforcement, called the Division of Analytics and Surveillance ("DAS"). As its name suggests, one of DAS's core functions is the development of surveillance tools to review market participant activity and identify anomalous activities.⁴⁴ In April 2012, the Commission issued Order No. 760, a rule that requires each FERC-jurisdictional independent system operator or regional transmission organization ("ISO/RTO") wholesale electric market operator to electronically deliver to the Commission, on an ongoing basis, a wide range of data.⁴⁵ This data includes physical and virtual bids and offers, market awards, resource outputs, marginal cost estimates, shift factors, financial transmission rights, internal bilateral contracts, uplift, and interchange pricing.⁴⁶ Order No. 760, for the first time, gave Commission staff a near-real time window into the activities of all participants in jurisdictional organized electric markets. In addition, in 2014, the Commission began receiving a daily feed of data from the Commodity Futures Trading Commission's ("CFTC") Large Trader Report.⁴⁷ The Large Trader Report includes the open financial positions for natural gas and electric products that are traded on exchanges for each large trader.⁴⁸ Order No. 760 data

39. *Staff Guidance*, *supra* note 31.

40. *Id.* These compliance guidance resources are discussed in *Obtaining Guidance on Regulatory Requirements*, 123 FERC ¶ 61,157 (2008). The Compliance Help Desk serves to connect individuals with compliance questions to specific Commission staff members with expertise in the relevant subject matter. The No-Action Letter process allows market participants to seek written advice from Commission staff (Enforcement and the Office of the General Counsel) regarding whether or not staff would recommend that the Commission take enforcement action with respect to specific proposed conduct. A request for a legal opinion from the General Counsel allows market participants to obtain a legal interpretation of any statute or implementing regulation under the jurisdiction of the Commission. Interpretive letters issued by the Commission's Chief Accountant provide guidance to all market participants on the implementation of standards issued by the Financial Accounting Standards Board and existing or emerging industry-wide or entity-specific accounting issues.

41. *2011 NAV Order*, *supra* note 1, at P 15.

42. *See Regulating Financial Holding Companies and Physical Commodities: Hearing Before Subcomm. on Financial Institutions & Consumer Protection Subcomm. of the H. Comm. on Banking*, 113th Cong. 3 (2014) (statement of Norman C. Bay, Dir., FERC Office of Enforcement) [hereinafter Statement of Norman C. Bay]; *see also Wall Street Bank Involvement With Physical Commodities: Hearing Before the Subcomm. on Investigations of the S. Comm. on Homeland Security & Governmental Affairs*, 113th Cong. 9 (2014) (statement of Larry D. Gasteiger, Acting Dir., FERC Office of Enforcement) [hereinafter Statement of Larry D. Gasteiger] ("In the last few years, FERC has enhanced its abilities in this area by adding surveillance tools, expert staff, and new analytical capabilities.")

43. *See* Statement of Norman C. Bay, *supra* note 42, at 14 (noting that "now that . . . Enforcement has had several years to implement a robust enforcement regime following EPA Act 2005, the Commission is in a better position to

promptly detect, investigate, and seek sanctions against fraudulent and manipulative conduct.").

44. *Division of Analytics and Surveillance*, FED. ENERGY REG. COMMISSION, <http://www.ferc.gov/about/offices/oe/oe-das.asp> (last updated Aug. 22, 2016).

45. *Enhancements of Electricity Market Surveillance and Analysis Through Ongoing Elec. Delivery of Data From Regional Transmission Orgs. and Indep. Sys. Operators*, 18 C.F.R. pt. 35 (2012), <https://www.ferc.gov/whats-new/comm-meet/2012/041912/E-4.pdf>.

46. *Id.* P 1.

47. Statement of Larry D. Gasteiger, *supra* note 42, at 10.

48. OFFICE OF ENF'T, FED. ENERGY REGULATORY COMMISSION, No. AD07-13-008, 2014 REPORT ON ENF'T 49 (2014), <https://www.ferc.gov/legal/staff-reports/2014/11-20-14-enforcement.pdf>. Many market manipulation cases FERC has brought or settled have involved trading activities in the FERC-regulated physical markets that were allegedly intended to benefit related fi-

and the CFTC's Large Trader Report together give DAS near real-time access to energy market participants' activities in both the physical and financial energy markets.

Since 2012, DAS has grown in both size and sophistication, currently deploying a staff of more than fifty, with surveillance capabilities that include complex economic analysis and algorithmic screening.⁴⁹ DAS teams not only conduct proactive market surveillance, but also work hand in hand with Enforcement attorneys in Enforcement's Division of Investigations ("DOI") during the course of investigations.⁵⁰ The creation and evolution of DAS has allowed Commission staff to analyze market data and market participant conduct, including identifying third parties that might be relevant to investigations, in a way that the Commission simply could not do in 2009 when it implemented the NAV Policy. While the full range of investigative activities DAS has allowed the Commission to undertake is not publicly known due to the non-public nature of investigations, numerous public Enforcement proceedings make clear that the Commission's analytical and surveillance tools, along with its increasing experience conducting complex investigations in general, have allowed staff to approach market analytics in investigations proactively.⁵¹

Finally, it is important to note that Enforcement staff's increased surveillance and analytics capabilities are not just the product of having direct access to more data—but having direct access to *third-party* data (i.e., data regarding the transactions and activities of a wide range of market participants). At the time the Commission adopted the NAV Policy, the Commission could have reasonably concluded that a NAV might induce a third party to bring forth evidence that a trading scheme was, for example, broader than

realized, or that a trader subject to an investigation engaged in similar conduct at a prior company. Now, the data relevant to such analysis comes to the Commission through regular feeds, without the need for Enforcement to rely on third parties to voluntarily provide such information late in the investigation process. And when Enforcement does have reason to think that third parties might have relevant information, staff's practice is to seek information directly from those third parties during the investigation. This third-party investigative discovery is now a routine part of Enforcement investigations and is not dependent on issuance of a NAV.⁵² Indeed, it usually occurs well before issuance of a NAV.

B. Increased Sophistication of Market Monitors and Staff Collaboration With Market Monitors Have Further Enhanced Enforcement's Ability to Identify Relevant Conduct and Actors

In the years since the NAV Policy was introduced, Enforcement staff has also benefitted from substantially increased collaboration with the ISO and RTO wholesale market operators and their market monitoring units ("MMUs") on enforcement issues.⁵³ In October 2011, FERC issued an order in *Southwest Power Pool, Inc.* ("SPP") clarifying the authority of Enforcement staff to communicate freely with ISOs and RTOs, and their MMUs, regarding investigations, including the ability of Enforcement staff to "share investigative information," including "referral information and information obtained from third parties."⁵⁴ Prior to SPP, there was uncertainty as to whether FERC and market operators could openly communicate with respect to investigations due to the non-public nature of Commission investigations. FERC not only found that such open communications were authorized so long as "appropriate measures" are taken to protect confidential information, but actively encouraged Enforcement staff and market operators to collaborate on investigative activities.⁵⁵ FERC also authorized and encouraged market operators and their MMUs to collaborate with each other.⁵⁶

financial positions. Thus, as noted in the 2014 Report on Enforcement, the Large Trader Report data allows FERC staff to determine whether a market participant holds a financial position "that would benefit from the market participant's conduct in Commission jurisdictional markets." *Id.*

49. See 2017 EMPLOYEE PHONE DIRECTORY, FED. ENERGY REG. COMMISSION (2017), <http://www.ferc.gov/contact-us/tel-num/phone.pdf>; 2016 REPORT ON ENF'T, *supra* note 15, at 58.

50. See *Division of Analytics and Surveillance*, *supra* note 44; see also 2016 REPORT ON ENF'T, *supra* note 15, at 58 ("The analysts and economists in DAS participate in investigations with attorneys from [the Division of Investigations], providing detailed transactional analysis, market event analysis, and subject matter expertise.").

51. From a surveillance and analytics standpoint, the most complex market manipulation cases are often those that involve open market trading, where buyers and sellers transact directly through a variety of means such as brokers and trading platforms (unlike ISO and RTO markets, where most transactions take place within the ISO or RTO trading platform). Recent open market trading cases reflect Enforcement's ability to identify relevant third-party market participants and make an assessment of market harm. See, e.g., *Total Gas & Power N. Am., Inc.*, 155 FERC ¶ 61,105, at app. A (2016) (calculating harm to other market participants through process that included collecting and analyzing data from a major trading platform and 45 individual market participants determined to represent a subset of market participants affected by the trading at issue); *Barclays Bank PLC*, 141 FERC ¶ 61,084, at app. A (2012) (describing processes by which staff calculated harm to other market participants by collecting and analyzing data from a major trading platform and 25 companies believed by staff to be significant market participants). Staff's methodologies for analyzing data and assessing market impacts have been, and will continue to be, subject to debate (often through expert testimony) in enforcement proceedings at the Commission and in federal court. The point here is simply that staff now has the relevant third-party data and the tools to conduct such analysis.

52. We note that the Commission continues to seek to expand its information gathering efforts for purposes of enhancing its surveillance and enforcement capabilities. See *Data Collection for Analytics and Surveillance and Market-Based Rate Purposes*, 156 FERC ¶ 61,045, at PP 2, 4, 5, 63–68 (2016) (proposing to collect a wide range of data from market participants on an ongoing basis).

53. Each FERC-jurisdictional ISO and RTO market is required by the Commission to have an independent MMU. The MMU is required to, among other things, "[i]dentify and notify the Commission's Office of Enforcement staff of instances in which a market participant's or the Commission-approved [ISO's or RTO's] behavior may require investigation, including, but not limited to, suspected Market Violations." 18 C.F.R. § 35.28(g)(3)(ii)(C) (2016).

54. *Order on Clarification, Rehearing, and Compliance*, 137 FERC ¶ 61,046, at P 20 (2011) ("We clarify that the Office of Enforcement may elect to share investigative information with [MMUs], RTOs, and ISOs, including referral information and information obtained from third parties, as long as appropriate measures are taken to ensure that such information is not disclosed and remains confidential.").

55. *Id.* ("This collaboration is important not only during the referral process but also during investigations initiated by the Office of Enforcement.").

56. *Id.* P 19 ("Collaboration between regional entities enhances overall market oversight by allowing those entities to focus attention on problematic interregional behavior and could lead to useful additional lines of inquiry by [MMUs].").

The *SPP* order enhanced the sophistication of the Commission's surveillance and investigative capabilities by allowing the market operators and monitors to share information with each other and conduct inquiries on a regional or inter-regional basis. The *SPP* order has facilitated a robust sharing of information, ideas, and conclusions among the ISOs and RTOs, their market monitors, and Enforcement staff. This collaborative approach, which is reflected in several recent settlements and OSCs, makes it much less likely that Enforcement will need to rely on third parties voluntarily providing relevant information in response to a NAV. Rather, the *SPP* order allows Enforcement to work directly with the ISOs and RTOs to understand market participant conduct, including identifying what conduct might warrant investigation, and those who participated or assisted in the conduct or may have been affected by the conduct.⁵⁷

III. FERC's Increasing Focus on Pursuing Individual Liability Heightens the Potential Consequences of Early Disclosure

When it implemented the NAV Policy, the Commission rightly noted that a consequence of the policy was potential reputational harm caused by "accelerated public disclosure," but found such harm was justified by the transparency benefits.⁵⁸ While the fact that the transparency benefits have not materialized is alone cause to revisit—and rescind—the NAV Policy, it is also worth noting that the prospect of harm caused by the NAV is greater than it was in 2009 due to FERC's increasing focus on pursuing individual liability. At the time the Commission issued the 2009 NAV Order, the Commission had only pursued individual liability in one enforcement case.⁵⁹ Every other enforcement case named only companies as respondents.⁶⁰ It is understandable, therefore, that the 2009 and 2011 NAV orders focused principally on the potential harm to companies (e.g., the impact on stock prices) caused by accelerated and potentially premature disclosure.⁶¹ Since instituting the NAV Policy, however,

the Commission has aggressively pursued individuals, particularly in market manipulation cases. Indeed, following the NAV Policy, the Commission has settled or brought cases against twenty-two individuals.⁶² The Commission's current policy, which is reflected in a recent penalty assessment order, is that "[c]ompanies can manipulate markets only through the conduct of individuals, making it imperative that individuals be held accountable."⁶³

With individual liability now a central component of the Commission's enforcement program, the risk of reputational harm is more significant. In the *Barclays* case, for example, an individual was fired from her employment immediately upon being publicly identified in the NAV, even though Enforcement staff at the time had not yet completed its investigation, and the Commission had not decided whether there was a basis for issuing an OSC.⁶⁴ That this individual was ultimately found by the Commission to have committed a violation does not change the fact that the NAV itself led to these consequences at a time when Enforcement staff was still investigating and evaluating whether to recommend that the Commission initiate an enforcement action, and the Commission itself had yet to address the matter. And in one recent investigation, FERC publicly named an individual in a NAV, yet never brought an enforcement action against him, and ultimately terminated the matter when it approved a settlement between Enforcement and the company nearly two years later.⁶⁵ For almost two years, this individual stood publicly accused of committing market manipulation without the Commission ever finding that there was cause to bring a case against him.⁶⁶

Unlike companies, individuals publicly accused of serious wrongdoing can be damaged in ways that go beyond monetary harm. This can include emotional harm and harm to family and personal relationships, among other things. The potential magnitude of such harm has become even more significant as the Commission's enforcement activities garner more public attention and are increasingly associated with criminal investigations and prosecutions.⁶⁷

57. The degree to which Enforcement staff now partners with ISO and RTO market monitors during investigations is reflected in both FERC orders and public statements. See, e.g., *J.P. Morgan Ventures Energy Corp.*, 141 FERC ¶ 61,131, at P 39 (2012) (referencing Enforcement's authorization for the California Independent System Operator MMU to jointly conduct investigative activities during an Enforcement investigation); see also *Order Granting Clarification*, 142 FERC ¶ 61,085, at P 2 (2013); OFFICE OF ENF'T, FED. ENERGY REGULATORY COMMISSION, No. AD07-13-009, 2015 REPORT ON ENF'T 56 (2015), <https://www.ferc.gov/legal/staff-reports/2015/11-19-15-enforcement.pdf> (noting that a proposed data collection rule should assist the MMUs "in their individual and joint investigations of cross-market manipulation").

58. *2009 NAV Order*, *supra* note 1, at P 6.

59. *Amaranth Advisors L.L.C.*, 120 FERC ¶ 61,085, at PP 6, 135–138 (2007) (proposing penalties for, among others, Brian Hunter and Matthew Donohoe).

60. See generally *All Civil Penalty Actions*, FED. ENERGY REG. COMMISSION, <https://www.ferc.gov/enforcement/civil-penalties/civil-penalty-action.asp> (last updated Feb. 2, 2017).

61. See *2009 NAV Order*, *supra* note 1, at P 6 & n.6 (noting that harm of accelerated public disclosure was mitigated in part by publicly traded companies already having to disclose potential liabilities in securities filings); see also *2011 NAV Order*, *supra* note 1, at P 18 (addressing potential harm caused to a publicly-traded company's stock price by public disclosure).

62. See generally *All Civil Penalty Actions*, *supra* note 60; *Notices*, FED. ENERGY REG. COMMISSION, <https://www.ferc.gov/enforcement/alleged-violation/notices.asp> (last visited Jan. 17, 2017).

63. *ETRACOM LLC*, 155 FERC ¶ 61,284, at P 186 (2016).

64. Answer of Karen Levine to Order to Show Cause and Notice of Proposed Penalty, at 36, *FERC v. Barclays Bank PLC*, Case No. 2:13-cv-2093 (E.D. Cal.), No. IN08-8-000 ("After the NAV was issued, Ms. Levine immediately lost her contract with another company due to the resulting publicity and was unemployed for several months.").

65. See *Maxim Staff Notice of Alleged Violations*, FED. ENERGY REG. COMMISSION (Nov. 3, 2014), <https://www.ferc.gov/enforcement/alleged-violation/notices/2014/maxim-nav-11-03-2014.pdf> (alleging Maxim, Kyle Mitton, and one other executive engaged in market manipulation); see also *Maxim Power Corp.*, 156 FERC ¶ 61,223, at PP 23, 25 (2016) (reaching a settlement with the Maxim corporate entities and releasing all other Maxim affiliates and employees, including Mitton and the other executive named in the NAV, from liability).

66. See *Maxim Staff Notice of Alleged Violations*, *supra* note 65, at PP 23, 25; *Maxim Power Corp.*, 156 FERC ¶ 61,223 at P 5 (2016); *Maxim Power Corp.*, 150 FERC ¶ 61,068, at PP 12 (2015) (initiating an enforcement action against Maxim, certain related corporate entities, and Mitton, but not the other executive named in the NAV).

67. See *BARCLAYS PLC*, 2014 ANNUAL REPORT 307 (2014) (discussing FERC's market manipulation investigation and noting that "[t]he US Attorney's Office in [the Southern District of New York] has informed [Barclays Bank PLC] that it is looking into the same conduct at issue in the FERC matter"); U.S.

In sum, FERC's increasing pursuit of individual liability heightens the consequences of early disclosure and further cautions in favor of rescinding the NAV Policy.

IV. Contrary to Statements in the NAV Policy, the NAV Does Not Always Reflect the End of an Investigation

One reason the Commission found that it was appropriate to publicly identify an investigation subject through the NAV was that the NAV would issue only after Enforcement "completed" its investigation, and that under the NAV Policy, "the subject's identity, and indeed the very existence of an investigation, will continue to remain confidential throughout the investigative process."⁶⁸ The NAV Policy reflected the view that the investigation process was linear, where the preliminary findings process and settlement negotiations occurred only once the investigative phase was over. The Commission's enforcement process has developed and matured over the past several years such that neither the issuance of preliminary findings (the stage at which the NAV Policy contemplated the NAV would issue) or the Commission's authorization of settlement negotiations (the point at which the NAV now issues in practice)⁶⁹ reflect the end of staff's investigation or an appropriate time for public disclosure. Rather, we now know—as the Commission itself has recognized—that Enforcement staff may issue preliminary findings and obtain settlement authority while it continues to actively investigate conduct, and that its findings are often subject to robust debate and reconsideration as the investigation proceeds (and after the NAV has issued).⁷⁰

A. The Preliminary Findings Process Is, In Fact, Preliminary, and Not an Appropriate Time for Public Disclosure

The NAV Policy contemplated that the NAV would issue after Enforcement staff had issued preliminary findings and the subject had an opportunity to respond.⁷¹ An implicit premise underlying the Commission's NAV Policy is that Enforcement staff's preliminary findings are likely more than just preliminary because they are issued after staff had completed most, if not all, of the investigation. The Com-

mission recognized in the NAV orders that Enforcement staff's views could change after issuing preliminary findings.⁷² But the Commission also observed—in justifying the accelerated public disclosure of the NAV—that after staff provides its preliminary findings, "the existence of the investigation is likely to become public in any event," and that the NAV will not issue until "staff has completed its fact-finding process" and the investigation is "completed."⁷³ The underlying premise reflected in these statements is that the NAV would not issue until the investigation was all but over, at which point public disclosure—likely through a settlement or enforcement action—was a near certainty. As the Commission's enforcement program has evolved over the past several years, however, it has become clear that not only are Enforcement staff's preliminary findings provided as part of a robust and ongoing back-and-forth dialogue and process between Enforcement staff and investigation subjects, but that Enforcement staff can issue them (and, as discussed below, obtain settlement authority) much earlier in the investigation process than what the NAV orders reflect.

The Commission's investigation process has evolved significantly in the past several years so that, now, staff's preliminary findings are much more likely to be preliminary in fact—and can be delivered relatively early in an investigation, and long before staff has "completed" the investigation. In 2013, in the *Barclays* matter, the Commission clarified its views with respect to the preliminary findings process and issuance of the NAV, and where those events fall within the investigation process.⁷⁴ Barclays filed a motion to quash an investigative subpoena issued by Enforcement staff in part on the basis that issuance of the NAV—which predated the subpoena by almost three months—constituted the end of Enforcement staff's investigation (and that Enforcement staff was, therefore, without authority to issue or enforce the subpoena).⁷⁵ Barclays relied on the Commission's statements in the 2011 NAV Order to support this argument (i.e., that the NAV would issue only after "the investigation is completed").⁷⁶ The Commission denied Barclays' motion and held that issuance of the NAV does not reflect the end of an investigation, and that Enforcement staff's investigative authority is in no way limited after the NAV has issued.⁷⁷ Implicit in the Commission's decision in the *Barclays* discovery dispute is a recognition that at the time a NAV issues, Enforcement staff is continuing to investigate and that its views with respect to the investigation may change and evolve even though Enforcement staff has already issued prelimi-

SEC. & EXCH. COMM'N, JPMORGAN CHASE & CO., FORM 10-K, at 331 (2014) ("The United States Attorney's Office for the Southern District of New York is investigating matters relating to the bidding activities that were the subject of the July 2013 settlement between J.P. Morgan Ventures Energy Corp. and the [FERC]."); see also Plea Agreement With Power Plant Management Services LLC, United States v. Berkshire Power Co., LLC, Criminal No. 16-30021 (D. Mass. Feb. 22, 2016) (resolving criminal charges for allegedly conspiring to violate FERC's Anti-Manipulation Rule).

68. 2011 NAV Order, *supra* note 1, at P 17.

69. Enforcement's practice has been to issue the NAV once it obtains the Commission's authorization to enter into settlement negotiations, which typically follows the preliminary findings process in short order. See Allison Murphy et al., *The FERC Enforcement Process*, 35 ENERGY L.J. 283, 294 n.64 (2014).

70. See, e.g., *Barclays Bank PLC*, 143 FERC ¶ 61,024, at P 27 (2013).

71. 2009 NAV Order, *supra* note 1, at 2; 2011 NAV Order, *supra* note 1, at 2.

72. See 2009 NAV Order, *supra* note 1, at P 7 ("In the event enforcement staff decides to terminate an investigation after a Notice has been issued, the Commission authorizes the Secretary, upon direction of the Director of the Office of Enforcement, to issue a public notice of termination of investigation."); 2011 NAV Order, *supra* note 1, at P 19 ("[I]f staff decides to terminate an investigation after a Notice has been issued, the Secretary will issue a public notice of such termination").

73. 2009 NAV Order, *supra* note 1, at P 6; 2011 NAV Order, *supra* note 1, at P 17.

74. See generally *Barclays Bank*, 143 FERC ¶ 61,024 (2013).

75. *Id.* P 3.

76. *Id.* P 5.

77. *Id.* P 27.

nary findings and obtained settlement authority. If Enforcement staff's preliminary views were not subject to change, there would be no need for staff to continue to investigate following the NAV.

The Commission's order in *Barclays* reflects how the preliminary findings process—and Enforcement's investigative process in general—has matured and evolved over the past several years. In recent years, the preliminary findings process routinely leads to a robust dialogue between Enforcement staff and investigation subjects. While it was once viewed principally as an exchange of paper (i.e., Enforcement staff delivering a preliminary findings letter to the subject, and the subject providing a written response), it is now truly a process. As a result, preliminary findings are now often delivered in-person at meetings between Enforcement staff and investigation subjects, and subject to ongoing discussion and debate as the investigation proceeds. And when staff delivers preliminary findings by letter, it is likewise often followed by robust, ongoing discussions between the parties as the investigation continues. The timing of the process has evolved as well. In some cases, preliminary findings are in fact delivered at or near the end of an investigation. But in others, preliminary findings may be presented much earlier in an investigation, when staff is continuing to actively investigate and develop its views. Staff sharing of preliminary findings earlier in the process can serve to narrow the issues in dispute and potentially help facilitate a resolution to the matter, even when staff knows there are areas of investigation it has not yet covered. While there is only limited public information on how the preliminary findings process has played out in specific cases, we know that staff does indeed continue to investigate and reassess its views after issuing preliminary findings.⁷⁸

B. *The Commission Can Authorize Staff to Have Settlement Discussions While the Investigation Is Ongoing—Before Staff Has Finalized Its Conclusions and Before the Commission Has Determined Whether There Is Cause to Initiate an Enforcement Action*

As noted above, Enforcement's timing for issuing the NAV has, in practice, differed from that provided in the NAV orders. Enforcement's practice has been to issue the NAV after the Commission authorizes Enforcement to enter into settlement negotiations—which occurs after staff issues its preliminary findings.⁷⁹ This timing difference is not meaningful for purposes of this discussion and does not change our analysis for two reasons. First, although Enforcement staff generally seeks the Commission's authorization to have settlement discussions after the preliminary findings process, this does not mean Enforcement staff has completed

its investigation or finalized its conclusions.⁸⁰ As discussed above, the *Barclays* discovery order is clear on this point, as the Commission recognized that Enforcement staff's investigation was ongoing at the time the Commission authorized staff to have settlement discussions and to issue the NAV.⁸¹ Therefore, while authority to have settlement discussions comes after staff issues its preliminary findings, neither event reflects the end of Enforcement's investigation or the finality of its conclusions.

Second, the Commission's authorization for Enforcement staff to have settlement discussions (which is provided informally rather than by order) is not a finding by the Commission that there is a sufficient basis to approve a final settlement or bring a public enforcement action (both of which require a Commission order). The Commission's standard for authorizing settlement discussions is more liberal than it is for bringing a public enforcement action—and rightfully so, in our view.⁸² Enforcement and investigation subjects may seek to enter into settlement discussions during the course of an investigation—even well before the investigation is completed—in case there is an opportunity to reach an early and efficient resolution of the matter. Such an approach is consistent with the Commission's preference to resolve investigations through settlements to, among other things, expedite disgorgement of unjust profits and free up Enforcement resources.⁸³ Enforcement staff has stated that the ability to have settlement discussions earlier in the investigation process can be particularly important for smaller entities with more limited financial resources.⁸⁴ We believe the Commission is right to employ this informal, pragmatic approach to authorizing settlement discussions, but we also think that such an approach underscores that preliminary findings and settlement authority are not the appropriate times for publicly identifying the investigation subject. That should await a more formal, considered moment in the life of an investigation, namely, when the Commission votes on approving a settlement or initiating an enforcement action.

80. *Id.* at 294–95.

81. *Barclays Bank*, 143 FERC ¶ 61,024 at P 31 n.65 & P 15 (2013).

82. In authorizing settlement discussions, the Commission is not granting Enforcement any legal authority to resolve the matter. Rather, any settlement Enforcement staff reaches with an investigation subject is subject to Commission review and is not effective unless approved by the Commission through an order. See *Enforcement of Statutes, Regulations, and Orders*, 123 FERC ¶ 61,156, at P 34 (2008) (explaining that after the Commission authorizes settlement discussions, Enforcement staff and the subject can negotiate and execute a stipulation and consent agreement, which then must be “submitted to the Commission for its consideration”).

83. *Id.* P 33 (“Settlement is our preferred resolution to investigations that result in a recommendation of remedial action.”).

84. *Barclays Bank*, 143 FERC ¶ 61,024 at P 16 (Enforcement staff states that “prohibiting Enforcement Staff from enforcing subpoenas after a [NAV] has been issued would discourage Enforcement Staff from conducting settlement discussions until every aspect of investigative discovery is exhausted,” which “would have a particularly adverse effect on smaller entities with more limited financial resources”).

78. See *infra* at Section III (noting that staff resolved a recent investigation without initiating an enforcement action against an individual alleged in the NAV to have engaged in market manipulation).

79. Murphy et al., *supra* note 69, at 294 n.64.

V. Conclusion

The Commission instituted the NAV Policy with the best of intentions, expecting that the transparency into investigations provided by the NAV would both help Enforcement staff in its investigative activities by leading third parties to provide relevant information and help market participants by serving as a resource for compliance guidance. But the Commission also had the foresight to recognize that the NAV

Policy might not produce the expected results, and it committed itself to reconsidering the policy once Enforcement staff developed experience with it. Now, with more than six years' experience, our conclusion is that the NAV Policy has not provided the benefits the Commission intended. Additionally, the risk of harm from the NAV Policy that the Commission recognized in the NAV orders still exists and is even more significant than it was in 2009. Therefore, we believe the Commission should now rescind the NAV Policy.