

Stakeholder Feedback and IESO Response

IESO Market Rules - Chapter 3 Amendments: February 2, 2024

Following the November 21, 2023, Chapter 3 Market Rule Amendments engagement the IESO invited stakeholders to provide comments and feedback on the materials presented by December 6, 2023.

The presentation materials and stakeholder feedback submissions have been posted on the IESO Chapter 3 Amendments [engagement webpage](#). Please reference the material for specific feedback as the below information provides excerpts and/or a summary only.

Feedback Received:

Chapter 3, Section 2.5.1A.4AA - Proposed Amendment:

Market Participants have 20 business days to dispute a Chapter 3 enforcement determination and/or order, (a "determination"), delegated to the Market Assessment and Compliance Division (MACD) of the Independent Electricity System Operator (IESO).

Stakeholder Feedback	IESO Response
A comment received is that the 20 business days' period to dispute a determination is too short (too much of a change from two years).	<p>MACD is aligning it to existing timelines for the initiation of a dispute of an IESO decision.</p> <p>The rules related to giving notice of a dispute are generally applicable to all types of disputes. In the case of a MACD determination, the Market Participant(s) have had multiple opportunities to participate in the investigation process, including meeting(s) with MACD, as well as multiple opportunities to make representations, and in the case of significant investigations, an opportunity to review the draft determination and provide additional representations before it is finalized. Accordingly, Market Participants are well aware of the outcome of the investigation by the determination and/or order. This situation is unlike a dispute at first instance, where a Market</p>

	<p>Participant may not have yet had the opportunity to engage with the IESO.</p> <p>The time period used elsewhere in the Market Rules to initiate disputes of IESO decisions is 20 business days (for example, Chapter 3, sections 2.5.1A.1, 2.5.1A.2, 2.5.1A.3, 2.5.1A.4A, 2.5.1A.4B, 2.5.1A.4F, 2.5.1A.4G and 6.2B.3). A 20-business day period also aligns the dispute process with other common appeal processes. For example, in Ontario civil litigation it is 30 calendar days in most cases, according to Rule 61.04 of the <i>Rules of Civil Procedure</i>, and an appeal to the Ontario Energy Board (OEB) is 15 calendar days under s. 15.02 of the OEB <i>Rules of Practice and Procedure</i>.</p> <p>This time period is unrelated to publication of the name and other information related to a breach. More information related to publication can be found below.</p>
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Chapter 3, Section 2.5.3C - Proposed Amendment:

In the dispute resolution process, where good faith negotiations have failed, either party may terminate upon notice to the other party.

Stakeholder Feedback	IESO Response
There was a request to recognize the 30 day period in Chapter 3, section 2.5.3A.	The 30-day minimum period for good faith negotiations still stands, per that section.

Chapter 3, Section 5.3.1.5B - Proposed Amendment:

An exception to the general requirement to keep Confidential Information confidential has been added for enforcement purposes.

Stakeholder Feedback	IESO Response
<p>Questions were raised about the breadth of disclosure of Confidential Information (including the sufficiency of existing exceptions to confidentiality). Suggestions were raised with respect to possible safeguards to put in</p>	<p>MACD recognizes the importance of Confidential Information and the need to protect it. MACD is especially attuned to this importance given that MACD investigates alleged breaches of the Market Rules, including breaches of confidentiality. Market Participants and the IESO are required to protect Confidential Information and are restricted on the use and sharing of Confidential Information according to Chapter 3, section 5.2. When there is a breach of Confidential Information, Chapter 3, section 5.2.4 requires the Market Participant to take certain steps, including notifying the IESO.</p> <p>Effective enforcement of Market Rules is also critical to the IESO's mandate and ensures efficient and reliable IESO-Administered Markets</p>

place when exercising this exception.

and the IESO-Controlled Grid. Claims of confidentiality should not prevent a full and fair investigation into alleged breaches of the Market Rules and their impacts.

The proposed change to allow an exemption to confidentiality for enforcement purposes is not without limitations. First, the language chosen often appears in other laws with the exception applying for “administrative and enforcement” purposes. We drafted this narrowly to limit it to enforcement purposes.

Secondly, this limit of enforcement purposes is understood in the context of the Market Rules. The IESO cannot share Confidential Information under this exception unless it is exercising an enforcement authority under the Market Rules. The current exceptions in section 5.3.1.1. to 5.3.1.13 do not apply in all the ways contemplated in this Market Rule amendment and accordingly, are not sufficient.

MACD appreciates that Market Participants have concerns about their Confidential Information and we have been open to your feedback on our proposed safeguards. We will address this feedback through a Compliance and Enforcement Guidance document (CEG), which MACD issues to detail its enforcement posture. This CEG has not yet been prepared, but it will contain the following:

- MACD will apply the principle of limited disclosure. We will limit the disclosure of Confidential Information under the proposed exemption to those situations where it is not reasonably possible to obtain the information without the disclosure of Confidential Information. Care will be taken to minimize the communication of Confidential Information.
- When disclosing Confidential Information to another Market Participant, we will mark all confidential materials as Confidential Information, and all confidentiality obligations set out under the Market Rules will apply to that information. MACD will remind the Market Participant of its confidentiality obligations under the Market Rules.
- When disclosing to a non-Market Participant, we will enter into a confidentiality agreement. MACD will follow a similar approach to confidentiality agreements as set out in Chapter 3, sections 5.3.10.1 to 5.3.10.3. This includes a legally enforceable obligation on the receiving party to treat the information as confidential; use it only for the purposes for which it was provided; and return or destroy the information upon the IESO’s request.

MACD will not provide prior notice of the disclosure of Confidential Information to the Market Participant who is the subject of the

	enforcement action. This could introduce unreasonable delay and compromise the integrity of the investigative process.
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Chapter 3, Section 6.2.4.3 - Proposed Amendment:

Additional clarity has been added around the IESO’s broad right to gather information in its enforcement actions.

Stakeholder Feedback	IESO Response
A question was received around interviews and whether this change would include third party interviews.	This provision speaks to the way in which MACD may request further information of a Market Participant. This is part of existing practices. The rationale for the rule change is to provide clarity. This provision does not apply to third parties, but MACD can speak with third parties in the course of investigating Market Rule breaches.

Chapter 3, Section 6.6.6. - Proposed Amendment:

The penalty table (lower penalty table) has been updated to go from a maximum of \$10,000 to a maximum of \$100,000.

Stakeholder Feedback	IESO Response
Participants have commented that the increase is too high, and several have asked for an explanation as to how MACD arrived at the proposed changes to the lower penalty table (i.e. benchmarking of other jurisdictions and regulators).	<p>The proposal to increase penalties is intended to deter instances of non-compliance and to ensure efficient and reliable IESO-Administered Markets and the IESO-Controlled Grid. On a notional basis, we understand that the penalty increases represent significant increases. The changes being proposed are to hold Market Participants accountable for non-compliance and ensures that Market Rules are evolving along with the significant sector changes that have occurred over time.</p> <p>MACD conducted substantial analysis of penalty frameworks in comparator jurisdictions. In addition to the electricity sector frameworks referenced below, consideration was also given to analogous regulatory frameworks, such as the Ontario Energy Board, the Ontario Security Commission and the Competition Bureau.</p> <p>The original penalty table amounts were put in place on February 18, 2000, in the first baseline version of Chapter 3 of the Market Rules, before market opening. This was at a time when civil penalties at the Federal Energy Regulatory Commission (FERC) were up to USD 10,000 and reliability standards were voluntary (the National Electric Reliability Council (as it then was, now Corporation) (NERC) did not have the authority to issue monetary penalties). Since that time, with the <i>Energy Policy Act of 2005 (US)</i>, FERC’s civil penalties authority increased up to USD 1 million per day per violation, and adjusted for inflation, are</p>

today USD 1.544 million per day per violation. They will adjust every year for inflation, unlike the IESO's penalty tables. Reliability standards also became mandatory and enforceable across North America, with NERC penalties added of up to USD 1 million per day per violation (adjusted for inflation, now up to USD 1.544 million per day per violation).

Since 2000, the electricity sector in Ontario has undergone significant changes, the enforcement regime has developed and the IESO has gained experience with enforcement matters. Absent extraordinary circumstances, when the higher penalty table is appropriate, Ontario's lower penalty table is significantly lower than all of the comparator jurisdictions reviewed, including NERC and its regional entities, FERC, Alberta, British Columbia (BC), Quebec, and Australia - see Appendix A on page 12.

MACD has achieved significant enforcement outcomes in the past two decades, particularly with respect to high impact matters, that have ensured efficient and reliable IESO Administered Markets and the IESO-Controlled Grid for all Ontarians. However, the lower penalty table has hindered the IESO's ability to enforce non-compliance in cases that do not meet the threshold for the higher penalty table, as seen in the examples below. Currently, where MACD encounters a breach of the Market Rules that does not meet the conditions under Chapter 3, section 6.6.6A, but nevertheless has a moderate to high actual or potential impact on reliability or the market, MACD is limited to issuing a maximum \$10,000 penalty. This is significantly lower than our comparator jurisdictions.

For example, for a medium violation risk factor (VRF) reliability standard violation that does not meet any of the conditions under Chapter 3, section 6.6.6A, where the responsible entity failed to meet the performance of the requirement in whole, NERC and its Regional Entities can issue up to USD 335,000 per violation, BC can issue up to \$335,000 per violation, and the Quebec Regie d'Énergie (Ministry of Energy) can issue up to \$150,000 per violation. By comparison, MACD could only issue a maximum \$10,000 penalty for the same violation, and only then where the Market Participant fails to self-report it. If the Market Participant self-reported the violation, then the maximum penalty would be \$4,000.

As another example, if a Market Participant engaged in anti-competitive behaviour that does not meet the conditions in Chapter 3, section 6.6.6A, and resulted in a pecuniary gain to the organization of between USD 120,000 and USD 200,000, FERC's guidelines provide that the base penalty would be the greater of USD 175,000 and the pecuniary gain to the organization. By comparison, MACD could only issue a

	<p>maximum of \$10,000 per breach for the same conduct, and only then where the Market Participant fails to self-report it. If the Market Participant self-reported the conduct, then the maximum penalty would be \$4,000 per breach.</p> <p>These comparisons show that the lower penalty table is far out of step with comparator regulators. This hinders MACD’s ability to effectively deter conduct that would harm reliability and the efficiency of our grid and markets.</p> <p>For all of the foregoing reasons, MACD’s judgement is that an increase to \$100,000 is a reasonable evolution.</p>
<p>The issue of deterrence seems to be one of the main drivers of the proposed changes. How will the IESO consider extenuating circumstances which prevent or delay a market participant from implementing corrective actions and what impact or effect are these higher sanctions expected to have on deterrence where a market participant is demonstrating and exercising due diligence to avoid or correct a potential breach?</p>	<p>Yes, deterrence is a driver of the proposed changes. Deterrence is a recognized foundational principle for regulatory enforcement models guiding regulatory sanctions. Currently the maximum penalty (which is not to be confused with the penalty actually applied in the specific circumstances of a given matter) is \$10,000. Even assuming the maximum penalty is ordered for a given breach, it is not likely to be material for most, if not all, Market Participants. Consequently, we may not see the investments in corrective action.</p> <p>This is separate and apart from a Market Participant’s exercise of due diligence, which is always considered before MACD issues a penalty (see Chapter 3, section 6.2.7).</p> <p>Finally, MACD will always take into account the circumstances in which the breach occurred – including extenuating circumstances which may mitigate the overall penalty amount. Please see Chapter 3, section 6.6.7 for the full list of factors MACD will consider in arriving at a sanction amount.</p>
<p>One Market Participant asks what variables will be used to assess the penalty amounts in the lower penalty table.</p>	<p>For those non-formula-based penalties*, in determining the amount of a penalty MACD will have regard to the factors set out in Chapter 3, section 6.6.7. There are no proposed amendments to this section at this time.</p> <p>*Formula-based penalties can be found in Chapter 3, Appendix 3.1 of the Market Rules.</p>
<p>There were questions around timing and one Market Participant asked when the proposed</p>	<p>If approved, these changes will apply to events that take place after the effective date of the proposed Market Rules amendments. They will not apply to existing open self-reports or other non-compliance events</p>

amounts would be applied to any non-compliance events that are discovered or self-reported.	that occurred before that date. Before that date, the original amounts in the lower penalty table will apply.
One Market Participant asked how the proposed penalty amounts will work with the IESO's Expedited Resolution Program (ERP) that is being piloted.	These changes are independent of ERP. ERP will seek multiple forms of resolution, including penalties. In the near future, MACD will be providing more information about ERP on the IESO's website; however, such information will not speak to these proposed Market Rule amendments, if implemented.

Chapter 3, Section 6.6.6A.3 - Proposed Amendment:

The one instance in which the IESO's Board of Directors was involved in determining the applicable penalty table has been changed to remove that specific role (overall Board oversight has increased).

Stakeholder Feedback	IESO Response
A couple of questions were posed as to the Board's role in assessing a breach and assessing a penalty.	Under the current rules, the IESO Board of Directors (the Board) does not have a role in (1) assessing a breach of the Market Rules; or (2) determining the amount of the penalty for such breaches. The IESO, acting through its delegated authority, the VP of MACD, determines whether there is a breach of the Market Rules in all cases. The IESO determines all of those conditions, except one. In instances when the requisite condition at issue is whether there has been a particularly severe impact on either the IESO-Administered Markets or the reliability of the integrated power system, the Board makes the determination. The proposed amendment would remove the Board's role from this specific provision and instead, MACD will make that determination. Since this Market Rule was put in place, on September 10, 2008, in baseline 20 of Chapter 3, MACD's reporting structure has changed. MACD now reports directly to the Board through the Markets Committee. (See proposed amendment to MM 2.6, section 1.3.1.) This provides necessary governance oversight, while preserving the appropriate independence of the enforcement arm of the IESO per the Delegation of Enforcement Authorities letter .

Timing of Initiative

Stakeholder Feedback	IESO Response
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<p>There was request to delay these Market Rule amendments until a second generator representative on the Technical Panel has been selected and on-boarded.</p>	<p>Any concerns with the composition of the Technical Panel (TP) are best addressed through that forum.</p>
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Changes to Market Manual 2.6 to Align with Changes to the Market Rules

Stakeholder Feedback	IESO Response
<p>There were concerns expressed with the removal of the ring-fencing language in Market Manual 2.6, one comment expressed the concern that it would allow for the free flow of information between the IESO and MACD.</p>	<p>The IESO is not changing its structure (including the segregation of its files) nor allowing for the “free flow” of information from MACD to the broader IESO. The amendments remove the term “ring-fenced” as it is ambiguous in this context, and secondly, the intent is to better capture the independence and enhanced governance oversight that has been put in place in recent years.</p> <p>The IESO is one legal entity, of which MACD is a part, and MACD shares several common services with other business units, such as Information Technology, Communications and Human Resources. The IESO has existing safeguards in place to keep MACD information separate from the rest of the IESO, including keeping its investigative files separate. We are not proposing any changes to this practice.</p> <p>Secondly, we have changed the language to conform with our governance structure. To address the proposed changes to Chapter 3, section 6.6.6A of the Market Rules, we wanted to provide clarity on the role of the Board in providing oversight of MACD. MACD also wanted to reflect the language set out in the Delegation of Enforcement Authorities letter, which acknowledges the independence of MACD and its relationship with the IESO. This is similar to language reflecting independence in the Memorandum of Understanding between the IESO, NERC and NPCC cited by one of the Market Participants in its comments.</p>

General Comments

Stakeholder Feedback	IESO Response
<p>One Market Participant raised concerns about the exception to the</p>	<p>Questions about Confidential Information, increases to the lower penalty table, and Board oversight are addressed above.</p>

<p>sharing of Confidential Information, the increase in the penalties amounts and the Board oversight. The Market Participant feels that all the proposed changes could significantly increase the stake of disputes for market participants. As a result, the IESO could be discouraging market participants from resolving issues and incidents within the IESO's dispute resolution process, and instead choosing to elevate matters to the courts.</p>	<p>MACD has had the extensive involvement of Market Participants in its investigative process and we want to continue that engagement. From time to time, there may be Market Participants which dispute the outcomes of compliance investigations. There is a dispute process for such cases. The IESO's dispute resolution process is an efficient and cost-effective way of resolving disputes that arise under the Market Rules.</p> <p>Enforcing compliance with any rules-based system takes a multi-layered approach. Informing Market Participants of the rules they must adhere to and providing guidance to support Market Participants' creation of robust internal compliance programs are part of this layered approach. Deterrence, including appropriately sized-penalties and enforcement action are also part of an effective regulator's tool kit.</p> <p>As a modern, effective regulator, we need to ensure we continue to evolve to assist Market Participants in making the choices needed to support reliability and market efficiency.</p>
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Non-Market Rule Amendment Related Comments

Removal of a provision in Market Manual 2.6 that provided that in the event of a dispute of the MACD breach finding within 10 business days of that finding, MACD would not publish information relating to the breach until after the conclusion of the dispute resolution process. (MM 2.6, section 1.3.10).

Stakeholder Feedback	IESO Response
<p>There were questions about a prior change to Market Manual 2.6, including a request to have that change retracted. Procedural questions around this change were also raised.</p>	<p>This amendment to the Market Manual followed the usual manual baseline process. It was not conducted through the expedited process. The provision was not linked to an amendment of a Market Rule; it was a standalone provision. The amendment did not fall within the criteria of the November 2018 Governance and Rule Making Report and Recommendations, as it was not made in support of a Market Rule amendment.</p> <p>The process followed included a ten-day period for public consultation. Comments were received and all were responded to within that period.</p> <p>This matter was also raised at the Technical Panel (TP), although TP members do not vote on changes to Market Manuals. Please see the draft TP minutes for September 12, 2023. The change to Market Manual 2.6 has been in effect since September 11, 2023.</p>

	<p>The rationale for removing the publication delay was to increase transparency and deterrence by publishing conduct MACD has sanctioned, providing guidance to other Market Participants. It also removed inconsistencies with the Market Rules requiring publication of certain materials during the dispute resolution process. The ability to disclose these findings is consistent with other comparator jurisdictions.</p> <p>If there are concerns about publication in a specific case, the Market Participant can discuss other publication options with MACD.</p>
<p>There was a question asking about the timing of any publishing of a market participants name and other information during the dispute resolution process.</p>	<p>A Market Participant's name and other information could be published prior to the completion of the dispute resolution process. The arbitration process is generally a public process. Chapter 3, section 2.7 sets out the arbitration process. Chapter 3, section 2.9.2.1 of the Market Rules, states that once the arbitrator is appointed, the summaries for publication are published by the IESO (see sections 2.5.3C, 2.5.6, 2.5.6C). This is also set out on page 4 of the Notice of Dispute Form (available on the IESO's website).</p>
<p>There was a question about the timing of the publication of the name of a Market Participant, who is the subject of a MACD determination or order.</p>	<p>In the example given, the determination may be published at MACD's discretion. The IESO will consider submissions from affected Market Participants regarding publication of the determination in the particular compliance investigation.</p>
<p>There was a suggestion that a new procedure should be added to section 3.2 in Market Manual 2.6 to cover this scenario.</p>	<p>We have taken your comments into account. Upon consideration, we believe that the existing reference in Market Manual 2.6, section 1.3.10 is sufficient to outline the steps that MACD may take when deciding to publish information relating to a breach.</p>

<p>A Market Participant asked what the definition of the word “determination” was as used in sections 3.1 and 3.2 of Market Manual 2.6.</p>	<p>The word “determination” is not a defined term in the Market Rules. This response will not amend the Market Rules. As used in Chapter 3, section 6.2.7, “determine” means a finding by MACD that there has been a breach of the Market Rules. Upon a finding that a Market Participant has breached the Market Rules, MACD may sanction the Market Participant in an “order”. Where it is used in Market Manual 2.6, section 3.2, it means a decision (that term is not used in section 3.1, but its root word, “determine” is used). It applies to a number of difference circumstances – from interim procedural steps to final decisions (for example, a decision that a notice under Chapter 3, section 6.2.3 is warranted, decision that there has been a breach as to whether a notice should be issued, a decision as to sanctions, etc.)</p>
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Appendix A

JURISDICTION (Regulator)	PENALTY
Alberta (Alberta Utilities Commission)	Up to \$1,000,000 per incident per day.
British Columbia (British Columbia Utilities Commission)	Up to \$1,000,000 per day for reliability standards violations, \$500,000 for breaches of various requirements respecting complying with request for information and other processes, \$200,000 for breaches of orders to cease work, \$100,000 for breaches related to energy supply contract or gas market requirements, and \$25,000 for any other contravention of the <i>Utilities Commissions Act</i> .
Quebec (Regie D'Energie, Ministry of Energy)	Up to \$500,000 per day for reliability standards violations.
U.S.A (NERC and the NERC Regional Entities)	Up to USD 1,544,521 per day per reliability standards violation.
U.S.A. (FERC)	FERC uses a points system to assess penalties based on categories of (1) reliability standards, (2) fraud and anti-competitive conduct, and other rule, tariff and order violations and (3) intentional or reckless misrepresentations and false statements made to FERC or FERC staff. FERC has maximum penalties of up to USD 1,544,521 per day per violation.
Australia (Australian Energy Regulator)	The Australian Energy Regulator uses a three-tier system that reflects three levels of severity respecting breaches of its National Electricity Rules. The lowest tier of breaches provides a maximum AUD 170,000 penalty (plus AUD 17,000 per day for continuing breaches), the medium tier has a maximum penalty of AUD 1,435,000 (plus AUD 71,800 per day for continuing breaches), and the highest tier has a maximum penalty of AUD 10 million, or if greater, three times the benefit obtained from the breach if this can be determined, or if not, 10% of annual turnover.