

Stakeholder Feedback and IESO Response

IESO Market Rules - Chapter 3 Amendments: May 13, 2024

Following the February 6, 2024 Chapter 3 Market Rule Amendments engagement, the IESO invited stakeholders to provide comments and feedback on the materials presented by February 20, 2024.

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:

General Comments

| Stakeholder Feedback | IESO Response |
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| <p>Some Market Participants raised some of the following more general thoughts:</p> <ul style="list-style-type: none">• Questions around the policy context and process• Concerns about perceived fragmentation of the changes• Proposals to add in topics for consideration | <p>MACD has been pleased with the level of engagement in this initiative, although we understand Market Participants have had differing views with respect to some of these changes. Some Market Participants have asked for additional changes, other than those contemplated as part of this limited number of rule changes.</p> <p>Given the engagement and the requests in some of the comments to take a step back before proceeding with these Chapter 3 amendments, MACD will pause these amendments to consider a full review of the enforcement provisions in Chapter 3. We will be seeking input from market participants on the types of amendments they would like to see included. MACD will also be putting forward broader proposed changes that align with other large jurisdictions with competitive markets. We would like to the opportunity to hear the perspectives of different constituencies that can benefit from a more evolved and effective</p> |

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| <ul style="list-style-type: none"> • Requests for withdrawals of amendment(s) • Requests for additional amendments, such as a limitation period | <p>enforcement framework. Therefore, granting the process more time is seen to be a productive outcome.</p> <p>Nevertheless, MACD has prepared specific responses to stakeholder feedback below. These responses will be considered when developing the expanded review.</p> |
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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 |
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| <p>Concerns were reiterated that the 20 business day period to dispute a determination is too short, in one instance 90 days was recommended to allow time to prepare for a dispute.</p> | <p>As noted in our prior response, we believe the 20 business day time period is appropriate as it is the existing time period for Market Participants to dispute other IESO decisions. It also aligns with other appeal processes in Ontario.</p> <p>In addition, in the case of a MACD determination, the Market Participant(s) will have already had multiple opportunities to participate in the investigation and fact-gathering process, including meeting(s) with MACD, as well as multiple opportunities to make representations prior to the determination.</p> <p>Finally, it is also noted that this time period is for the commencement of the dispute. There are other procedural steps along the way before any dispute is adjudicated, allowing substantial additional time to prepare for adjudication of the dispute.</p> |

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 |
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| <p>Comments were reiterated regarding the breadth of the proposed exemption regarding</p> | <p>Regulators have had to grapple with the competing concerns of protection of confidentiality and ensuring it does not prevent effective investigations of possible significant rule violations.</p> |

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| <p>Confidential Information. There was a request for benchmarking data with respect to the confidentiality exception.</p> <p>While some appreciated the safeguards MACD will put in place, there were questions around the timing for the compliance enforcement guidance.</p> <p>There was a comment comparing disclosure in the market monitoring context to disclosure in an IESO investigation.</p> | <p>MACD acknowledges the substantial concerns in respect of the former consideration and has considered how best to respond to those concerns. The approach proposed is to balance these concerns through benchmarked language used in other statutes, coupled with guidance explaining how this use will be limited, as more fully described in our prior response, just as MACD has provided with many other aspects of its enforcement processes, such as requests for information during investigations and self-reporting practices of market participants.</p> <p>To review a list of other relevant Canadian regulators with broad statutory exemptions for administrative and enforcement purposes, please see Appendix A, Table 1. In addition, all of the peer jurisdictions reviewed except one had exceptions to confidentiality that would apply to enforcement purposes; although, some of these entities provide for much broader exceptions to confidentiality – applying to other purposes, not only enforcement purposes. Please see Appendix A, Table 2 for further details. Examples illustrating the need for this exception were also already provided in both engagement sessions.</p> <p>In response to stakeholder feedback regarding this proposed change, we advised that we would prepare a Compliance and Enforcement Guidance document (“CEG”). Given that timing, the CEG itself was not finalized, but the principles were shared in writing to enable stakeholder feedback. Given the changes to this engagement, we will not be preparing a CEG for this engagement, but will revisit confidentiality and associated safeguards in our expanded Market Rule amendment process.</p> <p>Finally, market monitoring unit (“MMU”) investigations are different from MACD investigations, including that they do not lead to enforceable determinations, such as orders. MMUs operate in other jurisdictions in addition to Ontario, and other jurisdictions are not governed by the confidentiality provisions in the Market Rules. This MMU exception was introduced in 2011 to allow the IESO to share confidential information with MMUs in other jurisdictions (in response to a FERC recommendation). Accordingly, the MMU exception gives the market participant affected by the request the opportunity to challenge the MMU’s request for the information, or to seek terms and conditions for such disclosure as part of the MMU’s investigation. Nevertheless, the exception allows for confidential information to be disclosed to a MMU without notice to the affected market participant if such notice could jeopardize the investigation.</p> <p>In contrast, MACD always notifies Market Participants when they are under investigation of a potential breach of the Market Rules</p> |
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| | <p>warranting sanction, and MACD is governed by the confidentiality provisions in the Market Rules. Those Market Participants being investigated by MACD are aware and will expect MACD to take steps to gather evidence. They also have an opportunity to engage directly with MACD.</p> <p>In addition, MMUs and MACD also have fundamentally different mandates. MMUs monitor and investigate activities in the wholesale electricity market of their respective jurisdictions, and report and make recommendations based on their monitoring and investigations. Unlike MACD, MMUs do not have an enforcement role and cannot issue sanctions. MACD has modeled this exception after similar exceptions found with other enforcement agencies.</p> |
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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 |
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| <p>A couple of Market Participants have asked for additional clarification as to how the IESO arrived at its proposed increase in the penalty table, reiterating concerns with the increase, noting overlap with the penalty table in Chapter 3, Section 6.6.6B.</p> | <p>MACD’s benchmarking and comparative examples, provided in the prior response to feedback, are the supporting material to demonstrate how these proposed penalty increases to its lower penalty table are modest, reasonable and remain significantly lower than comparator jurisdictions in relation to comparable issues.</p> <p>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 Québec Régie de l’énergie can issue up to \$150,000 per violation. MACD’s proposed amendment would be lower than the above examples, with a maximum of \$100,000 per violation.</p> <p>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. MACD’s proposed amendment would be lower than the above examples, with a maximum of \$100,000 per breach.</p> <p>While the IESO has acknowledged that the percentage increases are high, as MACD’s examples demonstrated, even after these proposed</p> |

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| | <p>increases, these amounts would still be lower than comparator jurisdictions for the same violations. This underscores both the inadequacy of the current lower penalty table and the reasonableness of the proposed increases.</p> <p>As always, MACD is guided by sanctioning principles that govern the exact quantum of penalty orders and has a longstanding practice of elucidating those in reasons for its determinations.</p> |
| <p>One Market Participant noted that Alberta’s specified penalty regime was the only appropriate comparator to Ontario’s two penalty system.</p> | <p>The specified penalties regime in Alberta (the “SP Regime”) is not analogous to the IESO’s penalty table in Chapter 3, section 6.6.6 for a number of reasons:</p> <ul style="list-style-type: none"> • In Alberta, the regulator (either the Alberta Utilities Commission (“AUC”) or the Market Surveillance Administrator (“MSA”)) determines whether to issue specified penalties or seek an administrative monetary penalty of up to \$1M per incident per day. The SP Regime was developed to streamline enforcement outcomes without a formal AUC proceeding. Where a specified penalty is not commensurate with the seriousness of the conduct at issue, the MSA or AUC may elect to proceed with an application for an administrative penalty instead. In contrast, MACD’s penalty table is used unless one of the circumstances in Chapter 3, section 6.6.6A are present. • The SP Regime has very different procedural elements. The regulator may issue penalties without any prior notice of a potential investigation; it does not provide an opportunity to request a meeting, make representations or provide evidence prior to the issuance of a penalty. If a penalty is not paid or disputed, then it will proceed to a formal AUC hearing, where a penalty may be issued of up to \$1M per incident per day. By contrast, MACD’s process provides much more procedural fairness and participatory rights of the market participant prior to the issuance of a penalty. • The penalties and the factors to consider are vastly different. For breaches of ISO rules, the SP Regime only considers two factors: the number of contraventions in a rolling 12-month period, and whether a self-report discount is warranted. For breaches of reliability standards, reliability standards are sorted into nine different categories, and penalties are assessed based on: the category of standard; an assessment of severity level (for some categories); whether a self-report has been filed; and |

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| | <p>whether a mitigation plan has been filed. By contrast, MACD must consider all of the factors in Chapter 3, section 6.6.7 for every penalty in the lower penalty table. This allows MACD greater flexibility in tailoring appropriate penalties commensurate with the conduct, such as whether there was intentional vs. inadvertent conduct, or whether the market participant’s conduct resulted in a financial benefit, such that the penalty cannot incentivize the wrongdoing by being lower than the benefit.</p> <p>Accordingly, the SP Regime is not an analogous comparator to the Chapter 3, section 6.6.6 penalty table.</p> |
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Changes to Market Manual 2.6 to Align with Changes to the Market Rules

| Stakeholder Feedback | IESO Response |
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| <p>Market Participants expressed some understanding of the removal of the ring-fencing language in Market Manual 2.6. There was a request to add back in language providing for a separation of files and investigative information.</p> | <p>MACD proposed this clarification to remove potential ambiguity with the term “ring-fenced” and appreciated Market Participant’s understanding with respect to this change.</p> <p>As clarified in prior stakeholdering, the intent was not to change the approach to keeping files separate from the rest of the IESO. Currently, only MACD staff members and IESO support staff have access to MACD’s files and investigative information.</p> <p>Accordingly, in the broader review of Chapter 3, MACD will consider including language indicating that it will keep its files and investigative information accessible only to MACD staff members (and other IESO support staff).</p> |

Non-Market Rule Amendment Related Comments

This prior change to Market Manual 2.6 does not form part of this suite of changes.

Removal of a provision in Market Manual 2.6 that provided that in the event of the initiation 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 |
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| <p>Comments were received reiterating concerns about this prior change to Market Manual 2.6.</p> | <p>As noted, this change was to increase transparency and deterrence by publishing conduct MACD has sanctioned, thereby providing guidance to other Market Participants. It also removed</p> |

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| | <p>inconsistencies with the Market Rules requiring publication of certain materials during the dispute resolution process.</p> <p>The ability to disclose these findings is consistent with other comparator jurisdictions. This fundamental transparency is a basic norm of any regulatory framework and respects essential public interest imperatives.</p> <p>If there are concerns about publication in a specific case, MACD will consider special circumstances and be open to discussing options when they arise, as has been its longstanding practice.</p> |
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Appendix A

Table 1 – Canadian Regulatory Agencies with a Similar Exception

| JURISDICTION (Regulator) | CONFIDENTIALITY EXCEPTION |
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| Competition Bureau | S. 29(1) of the <i>Competition Act</i> provides an exception to confidentiality “for the purposes of the administration and enforcement of the Act”. |
| Ontario Securities Commission | S. 17(6)(b) of the <i>Securities Act</i> permits investigators to disclose confidential information in connection with “a proceeding commenced or proposed to be commenced under this Act”. |
| Ontario Energy Board | Section 112.0.6(1)(a) of the <i>Ontario Energy Board Act, 1998</i> provides that information obtained by an investigator are confidential except “as may be required in connection with the administration of this Act or any other Act that gives powers or duties to the Board or in any proceeding under this or any other Act that gives powers or duties to the Board”. |
| Canada Energy Regulator | Section 111 of the <i>Canadian Energy Regulator Act</i> provides that an inspection officer must not disclose any information regarding any secret process or trade secret obtained while performing duties or functions, “except for the purposes of this Part [Part 2 - “Safety, Security and Protection of Persons, Property and Environment”, which includes “Administration and Enforcement”, sections 102-112], or as required by law”. |
| Canada Revenue Agency | Section 241(4)(a) of the <i>Income Tax Act</i> provides that an official may “provide to any person taxpayer information that can be reasonably regarded as necessary for the purposes of the administration or enforcement of this Act, the Canada Pension Plan, the Unemployment Insurance Act or the Employment Insurance Act, solely for that purpose”. |
| Canada Revenue Agency | Section 295(5) of the <i>Excise Tax Act</i> provides that an official may provide confidential information “to any person as may reasonably be regarded as necessary for the purposes of the administration or enforcement of this Act, solely for that purposes”. |
| Environment and Climate Change Canada | Section 316(1)(b) of the <i>Environmental Protection Act, 1999</i> allows confidential information to be disclosed “as may be necessary for the purposes of the administration or enforcement of this Act”. |

Table 2 – Comparator Jurisdictions

| JURISDICTION (Regulator) | CONFIDENTIALITY EXCEPTION |
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| Alberta (Market Surveillance Administrator) | <p>We understand the MSA exception to be similar to the IESO’s proposed amendments. It enables the MSA to use the information for the purposes set out in its mandate, but it must keep the information confidential, unless, among other things, disclosure is permitted or required by legislation, the court or the Alberta Utilities Commission (See MSA Investigation Procedures, section 4.6 Use of Information Obtained During Investigation.) Public disclosure of summary information provided as part of an investigation is permitted to be made public under Market Surveillance Regulation, Alta Reg. 266/2007.</p> <p>Similarly, the IESO will use the confidential information in furtherance of its enforcement mandate, but will keep the information confidential, requiring the receiving party to either keep it confidential pursuant to existing confidentiality obligations under the Market Rules or enter into a new confidentiality agreement.</p> |
| British Columbia (British Columbia Utilities Commission) | <p>The BCUC has a broader exception than that proposed by the IESO. Its exception is not solely for enforcement purposes, but it applies to all employees engaged in the administration of the <i>Utilities Commission Act</i>.</p> <p>Section 12(1) of the <i>Utilities Commission Act</i> provides that every commissioner and officer and employee of the commission must keep all information coming to the person's knowledge during the course of the administration of this Act, “except insofar as disclosure is necessary for the administration of this Act or insofar as the commission authorizes the person to release the information.”</p> |
| Québec (Régie de l’énergie) | <p>The Régie provides for various exceptions to confidentiality but does not provide a specific exception for enforcement. It is noted that its investigation function is generally led by NPCC and not its staff members.</p> |

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| <p>U.S.A (NERC and the NERC Regional Entities)</p> | <p>NERC and the Regional Entities’ compliance investigations are subject to a broad exception to confidentiality – namely if directed to disclose by FERC.</p> <p>Under section 4.4 of NERC’s Compliance Monitoring and Enforcement Program, Appendix 4C to the NERC Rules of Procedure, compliance investigations are confidential, unless FERC directs that a Compliance Investigation should be public or that certain information obtained in the Compliance Investigation should be publicly disclosed.</p> |
| <p>U.S.A. (FERC)</p> | <p>FERC has a broad exception to direct the disclosure of confidential information for law enforcement purposes or when disclosure is otherwise found in the public interest and permitted by law.</p> <p>Under 18 CFR (Code of Federal Regulations) Part 1b.9 – Rules Relating to Investigations, FERC treats all information and documents obtained during the course of an investigation as non-public (i.e. it will not divulge it)¹ except to the extent that FERC directs or authorizes the public disclosure of the investigation, or the information or documents are made a matter of public record during the course of an adjudicatory proceeding, or disclosure is required by the Freedom of Information Act. Persons may seek confidential treatment of information for the purposes of the Freedom of Information Act² to exempt such information from public disclosure requirements, but such a request shall not prevent disclosure for law enforcement purposes or when disclosure is otherwise found in the public interest and permitted by law.</p> <p>In other words, disclosure of nonpublic information is only permitted at the Commissioners' direction or authorization, during the course of an adjudicatory proceeding, or when required by the <i>Freedom of Information Act</i>. It is not “confidential information”. Persons may seek a designation of “confidential information” to exempt it from mandatory public disclosure requirements. However, even if it is designated as “confidential information” there is a law enforcement exception: such confidential information may be disclosed at</p> |

¹ Under 18 CFR Part 3.c.2 – Nonpublic information, FERC staff must not divulge any fact or information obtained during an investigation “in the absence of Commission or court direction”. Similarly, under section 301(b) of the Federal Power Act, no member, officer, or employee of the Commission shall divulge any fact or information which may come to his knowledge as a result of a FERC investigation, “except insofar as he may be directed by the Commission or by a court”.

² Under 18 CFR Part 1b.20 – Request for confidential treatment, persons compelled by FERC to produce documents in an investigation are allowed to claim that some or all of the information contained in a particular document are confidential and exempt from mandatory public disclosure requirements.

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| | FERC’s direction for law enforcement purposes or when disclosure is otherwise found in the public interest and permitted by law. |
| Australia (Australian Energy Regulator or AER) | <p>The AER provides for various exceptions to confidentiality. There is no specific exception for enforcement; however, the existing exceptions are broad and encompass enforcement purposes.</p> <p>Under section 28ZB of the National Electricity Law, Schedule to the <i>National Electricity (South Australia) Act 1996</i>, the AER can disclose for any reason if it is of the opinion that the disclosure will not cause harm, or if it will cause harm, the harm will be outweighed by public benefit. While this exception could apply to enforcement activities, it is very broad and is not recommended by the IESO.</p> |