Compliance Exception Overview

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Compliance Exception

Introduction
The “end state” for the enforcement program involves reserving the enforcement process for those issues that pose a serious or substantial risk to the reliability of the bulk power system (BPS) and, as to other issues, allowing NERC and the Regional Entities to exercise appropriate discretion whether to initiate a formal enforcement action.

Beginning in November 2013, the ERO Enterprise expanded the exercise of enforcement discretion by identifying minimal risk noncompliance that does not warrant a penalty and which would be recorded and mitigated without triggering an enforcement action. Noncompliance that is not pursued through an enforcement action by the ERO Enterprise is referred to as a “compliance exception.”

The compliance exception track builds on the success of the Find, Fix, Track and Report (FFT) program, which was the first step in implementing a risk-based strategy that recognizes that not all instances of noncompliance require the same type of enforcement process. The exercise of discretion is informed by the facts and circumstances of the noncompliance, the risk posed by the noncompliance to the reliability of the bulk power system, and the deterrent effect of an enforcement action or penalty, among other things. These considerations are very similar to the considerations that have been used since 2011 to determine whether noncompliance should be processed as an FFT.

This document describes all aspects of the compliance exception track, including eligibility requirements, mitigation requirements, finality, and how visibility and accountability will be maintained as the program is implemented and expanded across the ERO Enterprise.

Eligibility for Compliance Exception Treatment
Only noncompliance posing a minimal risk to the reliability of the BPS is eligible for compliance exception treatment. The inclusion of moderate risk issues will be considered in the future as part of NERC’s annual review of the program.

Minimal risk noncompliance is eligible for processing as a compliance exception regardless of the discovery method. In determining that a minimal risk issue is eligible, a Regional Entity will consider whether the mitigation activity performed or to be performed is appropriate to resolve the noncompliance and prevent recurrence. The next section contains more detail regarding mitigation.

Beginning in November 2013, Regional Entities selected compliance exception candidates from minimal risk noncompliance found at or by specific registered entities. This was done to allow the ERO Enterprise to implement the program gradually and refine the program requirements and processes. In May 2014, Regional Entities expanded the number of registered entities from which compliance exception candidates could be selected. Beginning in 2015, the ERO Enterprise will further expand eligibility for compliance exception treatment to all registered entities.

In determining whether noncompliance is eligible for compliance exception treatment, Regional Entities focus on the underlying facts and circumstances of the noncompliance, including what happened, why, where, and when. Another factor Regional Entities use to determine whether a noncompliance should be eligible for compliance exception treatment is the potential and actual level of risk to reliability, including mitigating factors during the pendency of the noncompliance. Regional Entities consider the registered entity’s internal compliance program (ICP), including preventative and corrective processes and procedures, management practices, and culture of compliance as factors to help determine whether a noncompliance should receive compliance exception treatment. A robust ICP and management practices that led to timely discovery and timely mitigation of noncompliance would create a strong argument in favor of compliance exception treatment.
Noncompliance that is self-logged is presumed to be appropriate for disposition as a compliance exception, as described in the Self-logging of Minimal Issues Program Document (available at http://www.nerc.com/pa/comp/Pages/Reliability-Assurance-Initiative.aspx). This approach is limited to registered entities that have been designated as eligible for self-logging by the appropriate Regional Entity. To qualify for self-logging a registered entity must demonstrate it has effective management practices that contribute to the reliability of the BPS, in particular, the ability to identify, assess, and correct instances of noncompliance with Reliability Standards. The properly mitigated minimal risk issues that the registered entity tracks on its log are presumed to be resolved as compliance exceptions.

An issue may be eligible for compliance exception treatment even if there are past violations of the same standard and requirement. This ensures that NERC and the Regional Entities do not discourage the registered entities from robustly identifying and reporting noncompliance. However, repeat noncompliance should lead to a deeper look into root causes, including the possible failure of prior mitigation, and an examination of the connection between the registered entity’s ICP and its day-to-day adherence to Reliability Standards in operations.

Mitigation
Compliance exceptions must be mitigated within twelve months of the time of the notification to the registered entity of compliance exception treatment. Registered entities will notify the Regional Entity of completion of mitigation through an authorized representative of the registered entity (including through electronic means). Mitigation completion will be tracked by the Regional Entity. The Regional Entity will notify NERC of completion of mitigation. Failure to complete mitigation in the established timeframe, or any material misrepresentation of information provided in connection with this program, will result in rescission of the eligibility for compliance exception treatment for the noncompliance in question.

Finality
A compliance exception notice indicates to a registered entity that the Regional Entity has completed its review of the matter. As noted above, closure is subject to timely mitigation, and a material misrepresentation also would rescind eligibility for compliance exception treatment.

Any related data retention directives associated with the compliance exception are released upon verification of mitigation completion by the Regional Entity or 12 months from completion of the mitigating activities, whichever is earlier.

A registered entity may object to resolution of any issue as a compliance exception by providing written notification to the Regional Entity within seven days of the communication by the Regional Entity. If the registered entity opts out of compliance exception treatment, the matter will be pursued through the enforcement process set forth in Section 5.0 of the NERC Compliance Monitoring and Enforcement Program (CMEP).

Visibility and Accountability
The compliance exception program is not meant to eliminate or reduce oversight or visibility regarding minimal risk issues. Oversight of the program will be performed by NERC as follows:

- All noncompliance, including that which is eligible for compliance exception processing, is entered into the Regional Entity system, given a tracking ID, and undergoes the triage process.
- Upon determination that an item will be disposed of as a compliance exception, information regarding such item is provided to NERC in a tracking spreadsheet. The record includes the relevant Reliability
Standard and Requirement, a description of the issue, an assessment of the risk to the BPS posed by the issue, and the actions taken (or to be taken) to mitigate the issue and prevent recurrence.

- Each month, NERC provides a spreadsheet of compliance exceptions to FERC through non-public means.
- NERC will not post compliance exceptions on its website. Differentiating between Notice of Penalty violations, which generally present higher risks to reliability and have always been posted, and lower-risk compliance exceptions, which will not be posted, is fundamental to a risk-based approach to enforcement.
- In 2014, NERC will continue to review all compliance exceptions in order to inform a filing to FERC regarding the overall program. Once the program is fully implemented in 2015, NERC will review a sample of compliance exceptions on a regular basis and provide guidance or adjustments to the program on a prospective basis.
- NERC analyzes all compliance exceptions for trending purposes. NERC will make an annual informational filing to FERC reviewing the progress of the program and considering any enhancements that may be necessary. The annual report would include representative examples of matters handled as compliance exceptions. In addition, NERC will continue to include metrics associated with compliance exceptions in presentations to the Board of Trustees Compliance Committee, along with representative examples.
- A compliance exception is part of an entity’s compliance history only to the extent that it serves to inform the ERO Enterprise of potential risk. Compliance exceptions are not, however, part of an entity’s violation history for purposes of aggravation of penalties.
- The Regional Entity has the ability to decide to pursue a matter that otherwise would qualify for compliance exception treatment if recurrence of prior compliance exceptions indicates an increased risk or other concern.