



FERC – CFTC Memoranda of Understanding, Finalized Three Years Late, Fail to Resolve

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FERC has jurisdiction over physical energy markets² and the CFTC has exclusive jurisdiction over transactions that involve futures contracts,³ but it is not always clear which agency has jurisdiction over alleged schemes that involve both physical and financial markets. The agencies remain at odds over FERC's authority to police financial markets when manipulation in those markets affects physical energy prices.

Issues relating to FERC's jurisdiction over financial markets were highlighted in the D.C. Circuit's March 15, 2013, decision in *Hunter v. FERC*. In 2011, FERC assessed a \$30 million civil penalty against Brian Hunter, formerly a natural gas trader for Amaranth Advisors, LLC, for allegedly manipulating natural gas futures prices. Hunter appealed to the D.C. Circuit, and the CFTC intervened to brief the jurisdictional issue. The court agreed with the CFTC that FERC lacked jurisdiction to fine Hunter for his actions in the natural gas futures markets, even if those actions affected physical natural gas prices.⁴

Hunter v. FERC is a narrow decision that left many questions about FERC's jurisdiction unanswered. Hunter did not trade in the physical markets, confining his activities to financial instruments on organized exchanges, and his trades only involved natural gas. Therefore, the case actually does little to address the extent of FERC's jurisdiction over financial products generally, including derivatives that are bought and sold in organized electricity markets created and regulated by FERC. Although the CFTC has exempted certain transactions in those markets from most regulation under the Commodities Exchange Act, it has retained its anti-fraud and anti-manipulation enforcement authority in those markets.⁵ The CFTC also has

not disclaimed jurisdiction over transactions in those markets that are not on its exempted list. Therefore, significant questions remain regarding whether FERC, the CFTC, or both have the authority to pursue particular forms of alleged market manipulation.

In the eight-page MOU on information sharing, the Commissions agree to “coordinate to the extent practicable oversight (including market surveillance), investigative, and enforcement activities of mutual interest.” To facilitate this coordination, the respective oversight and enforcement staffs are authorized to share information concerning ongoing oversight (including market surveillance), investigative and enforcement activities. The MOU requires the agency receiving information to comply with the public disclosure provisions of the implementing statutes of the agency providing the information. The MOU also prohibits the disclosure to third parties of proprietary or privileged information by the receiving Commission without the written consent of the providing Commission, unless such disclosure is required by law.

The MOUs state that they are not legally binding and create no legal obligations (other than with respect to the confidential treatment of information).

¹ 15 U.S.C. § 8308.

² 16 U.S.C. § 824; 15 U.S.C. § 3431.

³ 7 U.S.C. § 2; *Hunter v. FERC*, 711 F.3d 155 (D.C. Cir. 2013).

⁴ *Hunter v. FERC*, 711 F.3d 155 (D.C. Cir. 2013).

⁵ *Final Order in Response to a Petition From Certain Indep. Sys. Operators & Reg'l Transmission Orgs. to Exempt Specified Transactions*, 78 Fed. Reg. 19,880, 19,884 (Apr. 2, 2013).

Categories

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