

2021 at the CFTC and FERC

Takeaways

- The Biden administration nominated CFTC and FERC commissioners to fill vacant seats.
- The CFTC and FERC are both investigating possible misconduct during Winter Storm Uri.
- The CFTC and FERC have both created new units and offices in their agencies.

The independent federal agencies overseeing commodities and energy services markets have had a rather interesting year in the face of political transition. Reed Smith partners Jonathan Marcus and Colette Honorable discussed U.S. Commodity Futures Trading Commission (CFTC) and Federal Energy Regulatory Commission (FERC) action and regulatory developments affecting the commodities and energy markets.

Notable CFTC developments include: (1) the CFTC transition; (2) CFTC action on position limits; (3) investigations into the WTI negative price episode and gas markets during Winter Storm Uri; (4) the creation of the Climate Risk Unit (CRU); and (5) a quieter year for CFTC enforcement. Notable FERC developments include: (1) the FERC transition; (2) creation of new FERC offices and positions; (3) important appellate decisions; and (4) an active FERC enforcement year.

Johnson and Goldsmith Romero may not receive a confirmation hearing until the Biden administration nominates a Republican for the remaining vacancy. The CFTC currently has two commissioners, Acting Chairman Behnam and Commissioner Dawn Stump, a 1-1 split.

CFTC action on position limits

The CFTC implemented position limits on certain physical commodity futures and options contracts and economically equivalent swaps in an October 2020 final rule with a general compliance date of Jan. 1, 2022. However, limits on economically equivalent swaps and elimination of the risk management exemption will not take effect until Jan. 1, 2023. While there is speculation as to whether the anticipated Democratic-majority Commission would revisit the final rule to make it more restrictive, we view that as unlikely.

What is information blocking?

The Biden administration has nominated Acting Chairman Rostin Behnam to serve as chairman of the CFTC. A confirmation hearing was held before the Senate Agriculture Committee on October 27, 2021. The Biden administration has also nominated Democrats Kristen Johnson and Christy Goldsmith Romero to serve as CFTC commissioners, and the nominees are awaiting confirmation by the U.S. Senate.

Watch the webcast



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Investigations into WTI negative price episode and gas markets during Winter Storm Uri

In November 2020, the CFTC’s Division of Market Oversight (DMO) and Office of the Chief Economist reported on the negative prices experienced in the WTI Crude Oil May 2020 Futures Contract. They identified a number of factors that contributed to the unusual episode but did not reach a conclusion as to the cause of the event.

With respect to Winter Storm Uri, DMO and the CFTC’s Division of Clearing and Risk cited a variety of factors – including the isolation of the Texas energy market and the severity of the storm – that contributed to the extreme volatility in the natural gas spot market, in a June 2021 presentation to a CFTC advisory committee.

CFTC creates the Climate Risk Unit

Acting Chairman Behnam announced the establishment of a Climate Risk Unit (CRU) in March 2021. The CRU will focus on the role of derivatives in pricing and addressing climate-related risk and in transitioning to a low-carbon economy. Its goal is to ensure that new climate-related derivatives products and markets properly facilitate hedging, price discovery, and market transparency.

Quiet CFTC enforcement year

As to be expected in light of the transition year, 2021 has been a relatively quiet year for the CFTC Division of Enforcement. Significant cases involved price manipulation and misappropriation of confidential information in the energy markets. Based on resolutions of pending matters and new charges, the Enforcement Division will likely focus in the coming year on crypto operators and markets, defi platforms, swap data reporting, and swap dealer compliance and registration.

The FERC transition

FERC currently has four commissioners: Richard Glick (chair), James Danly, Allison Clements, and Mark Christie. The Biden administration nominated DC Public Service Chairman Willie Phillips to fill the vacant seat, and on Nov. 16, the U.S. Senate unanimously confirmed Phillips. The current 2-2 vote split should be eliminated once Phillips is sworn in.

Creation of new FERC offices

FERC has established the Office of Public Participation (OPP) to assist the public in participating in Commission proceedings. Elin Katz will serve as director of OPP, effective late November. Chairman Glick has appointed Montina Cole to the newly created position of senior counsel for environmental justice. In this role, Cole will work to ensure that environmental justice considerations are integrated into FERC decisions and actions.

Important appellate decisions

Several noteworthy appeals court decisions were issued this year. In *PennEast Pipeline Co., LLC v. New Jersey*, the U.S. Supreme Court held that the Natural Gas Act’s condemnation provisions permit interstate pipelines to condemn land owned by public and private landowners. In *Vecinos Para el Bienestar de la Comunidad Costera v. FERC*, the D.C. Circuit reversed and remanded FERC orders granting certificates to construct and operate LNG facilities in Cameron County, Texas, for failure to adequately address greenhouse gas and environmental justice concerns. In *Environmental Defense Fund v. FERC*, the D.C. Circuit reversed and vacated FERC orders granting a certificate to Spire STL Pipeline for failure to adequately address issues regarding need for the project and possible self-dealing among affiliates.

Active FERC enforcement

The FERC Office of Enforcement (OE) has had a rather active year. FERC issued a May 20 Order to Show Cause directing GreenHat Energy, LLC and others to show cause as to why they should not be found to have engaged in market manipulation and be assessed \$229 million in civil penalties. FERC has opened a Winter Storm investigation and is assessing potential market manipulation in the electric and natural gas markets. On Sept. 13, Janel Burdick ascended to OE director after serving as OE deputy director, and director for energy market oversight before that.



“The information subject to the information blocking rule will change over time as the industry prepares for full compliance.”

About the authors

Colette D. Honorable

Colette leads the firm’s energy regulatory group and is highly regarded in domestic and international energy sectors. She is a trusted advisor and counselor to several Fortune 500 energy companies, investor- owned utilities, and renewable energy, innovation and technology companies. Following a nomination by President Barack Obama and unanimous confirmation by the U.S. Senate, Colette served as a FERC Commissioner from 2015 to 2017.

Jonathan L. Marcus

Jonathan advises clients on commodity, derivatives and digital asset regulation, and he litigates private suits involving the derivatives and energy markets in federal district and appellate courts. He also represents clients in government enforcement matters before the CFTC, the Securities and Exchange Commission and the FERC. Jonathan previously served as General Counsel of the CFTC and as an Assistant to the Solicitor General.

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