

# Regulatory and enforcement trends at the CFTC and FERC: Spring 2022

## Takeaways

- FERC now has a full quorum; imposes big enforcement fines
- Appeals court reverses FERC orders restricting gas pipelines
- FERC seeks tougher reliability standards for critical infrastructure
- CFTC pursues greater control over digital asset trading platforms
- Full quorum of CFTC commissioners expected soon

The Federal Energy Regulatory Commission (FERC) is increasing its scrutiny of climate-related oversight and ramping up its emphasis on reducing greenhouse gas emissions (GHG) investigations in light of an unprecedented number of appeals-court rulings highlighting this regulatory mandate. The Commodity Futures Trading Commission (CFTC) also continues to be tough on rule-breakers, enforcing its rules for derivatives markets and trying to expand rules it can use to regulate the use of digital assets.

## FERC first quarter highlights

FERC now has a full commission: Rich Glick (chair), James Danly, Allison Clements, Mark Christie, and Willie Phillips. Phillips is the most recent addition and was unanimously confirmed by the U.S. Senate on November 16, 2021. He was sworn in as a commissioner on December 3, 2021, ending the two-two split. Chairman Glick's term will expire on June 30, 2022.

In 2021, FERC established the Office of Public Participation (OPP) to assist the public in participating in commission proceedings, and Elin Katz was appointed director. In February 2022, Nicole Sitaraman was named deputy director of OPP. According to FERC, OPP should be fully staffed by 2024.

## Policy pronouncements tied up

On February 18, 2022, FERC issued two policy statements regarding its review and certification of interstate natural gas facilities: the Updated Policy Statement on Certification of New Interstate Natural Gas Facilities and the Interim Greenhouse Gas Emissions Policy Statement.

On March 3, the U.S. Senate Committee on Energy and Natural Resources held a hearing about the two policy statements. Senators Joe Manchin (D-W.Va.) and John Barrasso (R-Wyo.) expressed strong concerns that the policy statements could harm energy independence and security and impose additional costs on consumers. Additionally, dozens of parties (including 18 states) filed requests for rehearing and/or reconsideration of the policy statements. On March 24, at its monthly open meeting, FERC unanimously voted to designate the two as draft policy statements that will no longer apply to pending project applications. FERC also requested initial comments on the draft policy statements by April 25.





### **Appeals court decisions focus heavily on FERC's evaluation of pipeline applications**

In *Food & Water Watch v. FERC*, the U.S. Court of Appeals for the District of Columbia Circuit held that FERC failed to adequately consider the effects that a new natural gas pipeline and compressor station would have on downstream GHG emissions. The circuit court remanded the case, ordering FERC to conduct a supplemental environmental assessment. Notably, the D.C. Circuit did not vacate the decision or revoke the certificate, because doing so would have been “quite disruptive” to the relevant pipeline construction, which was, at the time, “either mid-construction or already operational.”

In *Environmental Defense Fund v. FERC*, the D.C. Circuit vacated and remanded FERC orders approving the Spire STL pipeline, stating that FERC inappropriately based a finding of project need on a single precedent agreement with an affiliated shipper in a region with flat demand for natural gas. The circuit court also held that FERC failed to analyze whether the project would result in cost savings or other economic benefits.

Following the D.C. Circuit's decision to vacate FERC's orders, Spire STL filed an application for a temporary certificate. Spire STL stated that its affiliate would be unable to provide adequate retail service and ensure reliability to the St. Louis region, particularly during the winter months, if Spire STL was removed from service.

Acting *sua sponte*, FERC granted Spire STL a 90-day temporary certificate to ensure continuity of service but noted that the temporary certificate does not indicate how FERC will address Spire STL's request for a temporary certificate or the D.C. Circuit's remand. Spire STL's case is unprecedented insofar as the pipeline's certificate was vacated after the pipeline was already built.

FERC recently terminated a proceeding over whether Algonquin Gas Transmission should be permitted to put the Weymouth compressor station in service. FERC previously issued final orders granting a certificate to Algonquin to construct and operate the compressor station but, after problems with the compressor led to emergency shutdowns, FERC requested briefs to address whether the compressor should remain in service. Here, FERC was forced to assess whether the agency could revoke a certificate that was already granted. After briefs were submitted, FERC found that it has no authority to revisit the original certificate orders.

### **Continuing oversight results in significant fines for GreenHat and Rover**

Since January 2021, FERC has demonstrated its commitment to oversee markets and impose significant penalties for infractions. In *GreenHat Energy LLC*, GreenHat was ordered to show cause as to why it and its owners should not pay \$229 million in fines and disgorge \$13.1 million in unjust profits for an alleged financial transmission rights market scheme.

In January 2022, FERC ordered an administrative law judge to address whether Rover Pipeline violated FERC's regulations that require Rover to provide full and forthright information in its pipeline certificate application under the Natural Gas Act. FERC's Office of Enforcement alleges Rover made misrepresentations and omitted material information concerning the status and intended treatment of a historic property in Dennison, Ohio.

### **Reliability standards for critical infrastructure being strengthened**

In January 2022, FERC issued a notice of proposed rulemaking directing the North American Electricity Reliability Corp. to develop new or improved reliability standards that require internal network security monitoring for high and medium impact bulk electric system cyber systems. The notice is in response to the SolarWinds attack.





## CFTC first quarter highlights

On March 28, the U.S. Senate unanimously confirmed President Joseph Biden's four CFTC commissioner nominees. The CFTC will soon have a full commission consisting of Rostin Behnam (chair), Kristin Johnson, Christy Goldsmith Romero, Summer Kristine Mersinger, and Caroline D. Pham.

### Seeking public comment on disintermediation

In mid-March 2022, the CFTC requested public comment on an amended order of registration as a derivatives clearing organization by an entity (FTX US) seeking to offer non-intermediated clearing of margined products to retail participants. Chairman Behnam says the CFTC will be "careful, patient, and deliberative" in considering this groundbreaking proposal.

### Regulation of digital assets

On February 9, Behnam stated in Congressional testimony that the CFTC would like to provide greater oversight of platforms where digital assets are traded and indicated support for a broadening of the scope of the CFTC's regulatory authority to encompass the digital assets spot market.

### Addressing climate change

The CFTC has been focused on the role of derivatives in understanding, pricing, and mitigating climate-related risk, including through creating a climate risk unit and participating in the climate-related risk work of various international bodies. The CFTC has also shown support for having the derivatives markets play an important role in the orderly transition to a low-carbon economy through market- and product-based initiatives.

### Global energy markets

The agency continues its work to monitor, identify, and address derivatives trading misconduct and market disruption around major events and catastrophes that create market volatility including disruptive events, such as Winter Storm Uri and COVID-19; and geopolitical events, such as Russia's war on Ukraine.

### Enforcement priorities

The CFTC has been working with the U.S. Department of Justice in enforcing the Foreign Corrupt Practices Act, particularly when the underlying foreign corruption relates to physical commodity and derivatives trading in the United States. The CFTC has also prioritized the misappropriation of material non-public information, spoofing and manipulation, and supervisory violations.





### About the authors

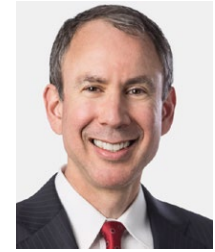
**Colette D. Honorable** leads the firm's energy regulatory practice and is highly regarded in domestic and international energy sectors. A member of the firm's Executive Committee and ESG group, she is a trusted advisor and counselor to several Fortune 500 energy companies, investor-owned utilities, 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** advises clients on commodity, derivatives, and digital asset regulation and represents them in government investigations and enforcement matters before the CFTC, the SEC, and FERC. He also litigates private suits involving the derivatives and energy markets in federal district and appellate courts. Jonathan previously served as general counsel of the CFTC and as an assistant to the solicitor general.

**Christian I. Blair** counsels clients from various industries on the intersection of law, data, and technology. He focuses on regulatory compliance, data, and technology transactions. He is a Certified Information Privacy Professional (CIPP/US) and regularly advises companies on how to proactively manage ever-growing privacy and data security risks and requirements (both U.S. and international), without sacrificing operational goals.



**Colette D. Honorable**  
Partner



**Jonathan L. Marcus**  
Partner



**Christian I. Blair**  
Associate

