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Pending Bill Could Lead FERC To Issue More Trader Bans

By **Levi McAllister and Pamela Wu** (August 26, 2022, 5:44 PM EDT)

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Targets of investigations or enforcement actions undertaken by the Federal Energy Regulatory Commission's Office of Enforcement know all too well that FERC wields significant authority to impose penalties against unlawful acts that violate the Federal Power Act, Natural Gas Act or FERC's regulations.

Indeed, FERC's imposition of penalties since the enactment of the Energy Policy Act in 2005 is eye-opening. FERC has assessed civil penalties exceeding $800 million and directed the disgorgement of monies in excess of $550 million, exclusive of penalties and disgorgement at issue in various pending matters.

Nevertheless, congressional action may provide the Office of Enforcement with yet another significant tool in its toolbox that could aid it in its mission to investigate and penalize instances of wrongdoing and misconduct.

At the end of July, Sens. Maria Cantwell, D-Wash., and Catherine Cortez Masto, D-Nev., introduced legislation to provide FERC with the authority to temporarily or permanently ban any person from trading or transacting in certain energy markets if that person is found to have manipulated the natural gas or electricity market, or willfully or knowingly provided false information regarding those markets.

Known as the Energy Consumer Protection Act, the legislation was also introduced in the House of Representatives by Rep. Jan Schakowsky, D-Ill., and was cosponsored by Reps. Don Beyer, D-Va., and Sean Casten, D-Ill.

Cantwell stated that the legislation adds a "key consumer protection arrow to FERC's quiver by blocking market manipulators from repeating their crimes and harming energy consumers." Similarly, Cortez Masto stated that the legislation would "create new tools to prevent bad actors from manipulating energy markets" and from increasing energy prices for consumers and businesses.

Schakowsky noted the importance of the legislation and the additional authority it affords to FERC, given historic heat waves, rising energy prices, and American families facing blackouts and struggling with energy costs. Casten and Beyer echoed the importance of cutting energy costs to protect consumers.

The senators and representatives who introduced the legislation explained that the current law prohibits market manipulation and false or misleading representations, but that FERC's current enforcement mechanisms are not sufficient to deter traders from violating the law. The ability to impose a trading ban would give FERC additional tools to enforce the existing law.

Amendments to the Federal Power Act and Natural Gas Act

The Energy Consumer Protection Act amends the Federal Power Act, or FPA, and the Natural Gas Act, or NGA, to explicitly provide that FERC may temporarily or permanently prohibit — conditionally or unconditionally — any person (i.e., individual or corporation) that manipulated the natural gas or electricity market, or willfully or knowingly provided false information regarding those markets, from engaging, directly or indirectly, in transactions in those markets.

Specifically, the trader or corporation that is subject to the ban would be prohibited from engaging, directly or indirectly, in purchases or sales of electric energy and natural gas, electric energy products including financial transmission rights, or FERC-jurisdictional transmission services.

In addition, the Energy Consumer Protection Act provides that FERC would be able to exercise this authority if it determines that an individual willfully or knowingly reported any false information related to (1) the price of electricity sold at wholesale or the availability of transmission capacity that is being compiled by the federal agency; or (2) the transportation or sale of natural gas that is subject to FERC's jurisdiction — including information relating to the availability and price of natural gas sold at wholesale and in interstate commerce, and information relating to the operation of facilities for the transportation and sale of natural gas at wholesale and in interstate commerce — to a federal agency, or to a private-sector price-reporting agency.

Impact of the Energy Consumer Protection Act

The Energy Consumer Protection Act would enhance FERC's enforcement authority, and add to the measures FERC could impose on traders and their companies that are found to have engaged in manipulation or willfully or knowingly submitted false information.

Although FERC currently does not have explicit authority to ban traders from FERC-jurisdictional markets, FERC has approved settlements under which an individual was banned from participating in FERC-jurisdictional markets. Those bans were temporary in nature, and lasted between one and three years.

For example, in 2017, a trader agreed to be banned from engaging or participating, directly or indirectly, in any trading transaction within FERC's jurisdiction for three years. This trading ban was agreed to as part of a settlement that resolved an investigation into whether the financial trading activities of the company and its trader in the PJM Interconnection LLC's energy markets were fraudulent and violated the FPA and FERC's anti-manipulation rule.

Specifically, FERC's Office of Enforcement alleged that the company and the trader placed high volumes of trades that canceled each other out, while creating the illusion of bona fide trading, to qualify for and collect large amounts of market payments.

More recently, in 2021, a trader agreed to a two-year ban from FERC-jurisdictional markets as part of a settlement that resolved an investigation into similar trading activities and allegations of implementing a manipulative scheme in the PJM energy markets in violation of the FPA and anti-manipulation rule.

FERC, however, has not sought to impose a ban on a trader or corporation outside of the context of a settlement. As FERC's current chairman, then a commissioner, Richard Glick noted in a letter to Cantwell in November 2019, "it is not clear that the Commission has the authority to impose such a measure without the trader's consent, even in the face of multiple instances of manipulation."

If the Energy Consumer Protection Act is passed and signed into law, that authority would be clearly and explicitly made available to FERC, to exercise in both power and natural gas cases under the FPA and the NGA.

Individuals that trade and transact in power and natural gas markets regulated by FERC would potentially be exposed to not only civil penalties and the disgorgement of unjust profits, but would also be potentially exposed to the imposition of a temporary or permanent trader ban outside of the context of a settlement.

In other words, FERC's Office of Enforcement may indicate that it will recommend that FERC impose a trader ban when it issues its preliminary findings — and FERC may seek to impose a trader ban when it issues a show cause order.

The Energy Consumer Protection Act allows FERC, through its Office of Enforcement, to put on the table a potential trading ban before it engages in any settlement discussions with a company or trader that is under investigation. Trader bans may become a more common tool that is utilized by FERC and its Office of Enforcement as they continue to identify, investigate, and deter manipulative and fraudulent conduct.

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