

Client Alert

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CFTC and FERC Issue Long-Awaited Memoranda of Understanding on Jurisdiction and Information Sharing

By Robert Fleishman, Julian Hammar and Michael Sorrell

On January 2, 2014, the Commodity Futures Trading Commission (“CFTC”) and the Federal Energy Regulatory Commission (“FERC,” collectively, the “agencies”) signed “Memoranda of Understanding” regarding certain matters of overlapping jurisdiction (“jurisdiction MOU”) and sharing information in connection with market surveillance and enforcement activities (“information sharing MOU,” collectively, the “MOUs”). The MOUs come nearly three years after a statutory deadline, imposed by Section 720 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, for the agencies to negotiate such memoranda. The agencies had been operating under a 2005 Memorandum of Understanding generally providing for cooperation in enforcement matters but not explicitly recognizing the prospect of overlapping jurisdiction. Then-CFTC Chairman Gary Gensler, whose term expired the day after the MOUs’ issuance, and FERC Acting Chairman Cheryl LaFleur signed the MOUs on behalf of their respective agencies.¹

JURISDICTION MOU

It establishes a high-level process whereby the agencies are to notify each other of certain activities that may involve overlapping jurisdiction and coordinate to address such regulatory issues. Among other things, the agencies committed to:

1. Notify and consult with the other agency’s staff when considering an authorization or exemption for a market participant that may fall under such other agency’s jurisdiction;
2. Advise the notifying agency whether it has any interest in the matter; and
3. Coordinate on matters of mutual interest to develop an approach that meets both agencies’ regulatory interests.

The agencies also committed to certain dispute resolution procedures.

The CFTC and FERC have sparred on jurisdiction in recent years as both agencies’ enforcement activities expanded. In a federal appeals court, for example, the CFTC sided with the subject of a FERC enforcement investigation in challenging FERC’s authority to impose a \$30 million civil penalty for alleged manipulation of the natural gas futures market. The court held in March 2013 against FERC, reasoning that the CFTC has exclusive authority to police futures markets under the Commodity Exchange Act.² Some thought the *Hunter* decision would encourage the agencies to

¹ Commissioner Mark Wetjen is currently serving as CFTC Acting Chairman. Timothy Assad, Assistant Secretary for Financial Stability at the Department of the Treasury, has been nominated by President Obama to chair the CFTC but has not yet been confirmed.

² See *Hunter v. FERC*, No. 11-1477 (D.C. Cir. Mar. 15, 2013), available at [http://www.cadc.uscourts.gov/internet/opinions.nsf/99CC9904B30AC2CB85257B2F004DEA04/\\$file/11-1477-1425550.pdf](http://www.cadc.uscourts.gov/internet/opinions.nsf/99CC9904B30AC2CB85257B2F004DEA04/$file/11-1477-1425550.pdf); see also

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issue the jurisdiction MOU soon after the court ruled, but the agencies did not reach agreement on an MOU until recently, and ultimately avoided committing to any substantive positions on jurisdiction in the jurisdiction MOU.

The jurisdiction MOU is available [here](#).

INFORMATION SHARING MOU

This MOU establishes procedures through which the agencies are to share information of mutual interest related to their respective market surveillance and investigation of potential manipulation, fraud or market power abuse. FERC is to direct to the CFTC requests for information from CFTC-jurisdictional entities, including designated contract markets (*i.e.*, futures exchanges); swap execution facilities (*i.e.*, swaps markets); derivatives clearing organizations; or any other board of trade, exchange, derivatives market or swap data repository. Reciprocally, the CFTC is to direct to FERC requests for information from FERC-jurisdictional entities, including Regional Transmission Organizations, Independent System Operators, market monitors, the North American Electric Reliability Corporation, or interstate pipelines or storage facilities. Both agencies agreed to take steps necessary to obtain and furnish promptly responsive information to the other agency. They further agreed to keep such information confidential and non-public pursuant to applicable rules.

More generally, the information sharing MOU provides that the agencies, to the extent possible, will coordinate market oversight, investigative and enforcement activities of mutual interest. Of further interest to energy market participants, Gensler wrote in a separate “side letter” to LaFleur that the agencies will work together to share appropriate data relating to financial natural gas and electricity markets to further the mutual interest of the agencies in protecting the Nation’s energy markets.³

The information sharing MOU is available [here](#).

The MOUs say they are not legally binding and create no legally enforceable obligations, except with respect to the confidential treatment of information.

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Complaint, *CFTC v. Amaranth Advisors, L.L.C. et al.* (S.D.N.Y. 07-cv-6682), available at <http://www.cftc.gov/ucm/groups/public/@lrenforcementactions/documents/legalpleading/enfamaranthcomplaint072507.pdf>.

³ Letter from CFTC Chairman Gensler to FERC Acting Chairman LaFleur (Jan. 2, 2014), available at <http://www.cftc.gov/ucm/groups/public/@newsroom/documents/file/cftcfercsideltr2014.pdf>.

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