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FERC Trader Licensing Could Be Enforcement Hammer

By **Keith Goldberg**

Law360, New York (January 08, 2014, 6:19 PM ET) -- Two Federal Energy Regulatory commissioners are developing plans to license traders and other participants in energy markets the commission regulates, a move experts say could give the agency powerful leverage to get individuals to cooperate with market manipulation investigations and flip on their employers.

While federal agencies such as the U.S. Commodity Futures Trading Commission and the U.S. Securities and Exchange Commission have licensing requirements for traders, FERC does not. Commissioners Philip Moeller and John Norris want to change that, and they're hoping to get Congress' blessing to do so.

Moeller told Law360 that a licensing process, which could apply to both people and corporate entities, would allow the agency to clamp down on bad apples who attempt to distort energy markets for their own gain.

"No. 1, it has the possibility of promoting best practices and, hopefully, a scheme where there's more certainty and there’s better behavior," Moeller said. "Two, it would give us the ability to kick some people out of this area, an ability that we lack right now."

Currently, FERC has few tools in its arsenal to restrict people or entities from participating in the markets it oversees, but one of its options is to suspend or revoke an entity's authorization to sell electricity at market-based rates. One high-profile example came in 2012, when FERC suspended a JPMorgan Chase & Co. energy unit's market-based rate authority for six months starting in April 2013 amid a manipulation probe. FERC can also bar an person from trading on its markets through a voluntary settlement agreement.

With a new licensing scheme, however, not only would FERC be better able to weed out bad or incompetent market participants, but experts say it could also see a boost in enforcement authority, which it's already used to impose attention-grabbing, multimillion-dollar penalties on financial heavyweights such as JPMorgan and Barclays PLCfor alleged market manipulation.

"If an enforcement agency can drive a wedge between an individual and a company, it will do that, in order to get the individual to cooperate," said Julia E. Sullivan, who co-chairs Akin Gump Strauss Hauer & Feld LLP's energy regulation, markets and enforcement practice. "FERC hasn't been particularly successful in getting individuals to cooperate and give them information on their employers. If FERC can take away an individual's livelihood by taking away their ability to do what they can do for any company, that's a pretty big hammer."

Daniel Mullen, a former FERC investigations chief who now heads Fried Frank Harris Shriver & Jacobson LLP's energy enforcement group, agreed that a licensing system could give the commission additional leverage in market manipulation cases. But how much leverage it gains will depend on what the system ultimately looks like, he said.

"We've heard a lot of concerns in the industry about what are the goals of the program," Mullen said. "Is it aimed at training, is it aimed at prevention of misconduct, is it an additional penalty mechanism, or all three?"

Serious questions also remain about the scope of FERC's energy market jurisdiction. Last week, the commission and the Commodity Futures Trading Commission finally inked memorandums of understanding mandated by the Dodd-Frank Act in which each agency will notify the other of activities that may involve overlapping jurisdiction, as well as coordinate and address regulatory concerns and allow for sharing data of mutual interest. But experts say the memos don't do much to define the jurisdictional boundaries between the agencies, and a new licensing system could spark another turf battle.

"This fits squarely into what the MOU punted on, which is resolving the jurisidictional overlap," said Michael Yuffee, who heads Fried Frank's energy group. "Does this registration cover just physical power sales? If not, does it tread on CFTC jurisdiction? They may not so quietly hand over jurisdiction to FERC."

That jurisdictional overlap might be an impetus for FERC to implement licensing requirements that are similar to what's required by the CFTC, according to Sullivan.

"If you have two agencies with concurrent jurisdiction and you're trying to decide which one to move forward with, one factor you would consider is what agency has more power to go after the violator," Sullivan said. "I think institutionally, FERC would want to achieve parity with the CFTC within that area of concurrent jurisdiction."

Moeller said he would welcome input from the CFTC and other agencies about how to make a licensing system work.

"I think that benefits both agencies, especially when something happens and we allege harm that goes unpunished because of the blurred jurisdictional lines," Moeller said.

Even if turf battles can be averted, experts say it's still unclear whether FERC has statutory authority to implement licensing rules, which would impose a huge administrative burden on both industry and the commission.

"It would most certainly be challenged and the courts would certainly have to decide that issue," Sullivan said.

Moeller is working under the assumption that FERC doesn't have the authority to implement a licensing system under existing law. He and Norris have reached out to members of Congress individually to gauge their interest in granting FERC additional authority to implement licensing requirements for traders, but plan to jointly shop the idea on Capitol Hill as they flesh out more details of a potential framework over the next several weeks.

"We don’t know how much interest there is on the Hill in this," Moeller said. "I certainly hope that Congress will at least consider it."

There's at least one lawmaker who is interested in learning more about the proposal: Sen. Ron Wyden, D-Ore., who chairs the Senate Committee on Energy and Natural Resources.

"Any idea that can enhance FERC’s ability to protect consumers deserves serious consideration," Wyden spokesman Keith Chu told Law360 in an email.

--Additional reporting by David McAfee. Editing by Elizabeth Bowen and Chris Yates.