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Barclays Market Manipulation Case Settles for $105 Million, What We Learned and What's Next?

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After more than four years of litigation in federal district court, the Federal Energy Regulatory Commission ("FERC" or the "Commission") yesterday issued an order approving a $105 million settlement resolving allegations that Barclays Bank PLC and certain of its traders ("Barclays") participated in a scheme to manipulate western energy markets. The settlement, which reflects a significant reduction from the penalty sought by FERC, comes on the heels of the federal court granting one of the four individual defendant's Motion for Judgment on the Pleadings based on the action being ***time-barred*** as to that individual.

The Settlement

FERC originally sought payment of a $435 million civil penalty plus $34.9 million in disgorgement. Pursuant to the settlement, Barclays agrees to pay a civil penalty of $70 million plus $35 million in disgorgement. $20 million of the disgorgement is to be placed in escrow and made available for "remediation for natural persons or other entities claimed to have been harmed as a result of the [alleged] conduct." Any unused funds from escrow, along with the remaining $15 million disgorgement payment, will go to the Low Income Home Energy Assistance Program ("LIHEAP") of Arizona, California, Oregon, and Washington. The defendants to the settlement all represented that they have ceased participating in FERC-jurisdictional markets, and Barclays has surrendered its market-based rate authority, although there was no commitment to refrain from future participation in FERC markets.

Barclays neither admitted nor denied FERC's conclusions regarding the conduct at issue, and the Commission's order provides little detail regarding the facts of the case. This is not uncommon when FERC approves a settlement with a party *after* the commencement of public litigation and proceedings against the respondent. This reflects that, in contrast to an agreement settling a non-public investigation, FERC has already provided a detailed description of the facts of the case as it perceives them through the show cause and penalty assessment process.

What We Learned From Barclays

While the settlement resolves a protracted dispute between FERC and Barclays, the settlement provides no new guidance to the market as to the reach of FERC's Anti-Manipulation Rule. However, the case has established precedent regarding certain procedural questions:

- Most recently, the court rejected FERC's arguments that its Order of Show Cause ("OSC") tolled the statute of limitations, concluding that the OSC is tantamount to a decision to prosecute, rather than a prosecution, and, therefore, does not toll the statute of limitations.

- Like every other federal court that has opined on the issue of whether defendants are entitled to conduct discovery under the Federal Rules of Civil Procedure, the Barclays court concluded that to deny defendants the opportunity to provide evidence that they assert could refute the charges against them would "def[y] notions of fairness and common sense."

- The court also rejected FERC's arguments that the proceeding should be restricted to the "administrative record," noting that a record that does not purport to include the entire investigative record compiled by staff "cannot be the basis for a neutral 'adjudication' by FERC or by [the] Court."

- Finally, the court also rejected FERC's argument that "issue exhaustion" should bar defendants from introducing new arguments or evidence as the civil action proceeds. The court concluded that, because FERC's penalty assessment is not a final agency decision, the doctrine of issue-exhaustion is inapplicable.

What's Next?

We may be closer than ever to seeing FERC reform its investigative and enforcement processes. As recently acknowledged by Chairman Neil Chatterjee:

[T]he courts have rejected FERC's interpretation of de novo review five times under the Federal Power Act. The courts have spoken, and I, for one, am listening. I believe that the proper scope of de novo review is a matter my colleagues and I need to examine so we can chart a new course that is fair and legally defensible.[1]

FERC's enforcement processes and policies thus appear ripe for reconsideration.

Separately, we note that this is the first time FERC has ordered payment of disgorged funds to LIHEAP since the U.S. Supreme Court announced in June 2017 that the five-year statute of limitations established in 28 U.S.C. §2462 applies to disgorgement in Securities and Exchange Commission ("SEC") enforcement proceedings. As we discussed in our June 7, 2017 ***blog post*** on the subject, the factors considered by the Court in *Kokesh v. SEC* likely will guide courts' analyzing FERC's use of disgorgement in the future, and one of the factors to be considered is whether the disgorged funds are compensatory (as opposed to punitive). In *Kokesh*, the SEC's disgorgement practices were considered not compensatory because the funds routinely were paid to a district court which then had discretion in distributing the funds and/or funds were paid directly to the U.S. Treasury. FERC routinely disperses disgorged funds to LIHEAP in instances where the funds are not substantial enough to warrant distributing them directly to those harmed and in instances as here where identifying victims and/or proving actual harm poses a challenge. However, by continuing to direct funds to LIHEAP, FERC may be increasing the likelihood that its practices support application of the five-year statute of limitations to disgorgement actions.

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[1] Chairman Neil Chatterjee Statement, Energy Bar Association 2017 Mid-Year Energy Forum (October 17, 2017) (available at ***https://www.ferc.gov/media/statements-speeches/chatterjee/2017/10-17-17-chatterjee.asp#.WfkBrGhSyUk***).