

# ClientAlert

## Energy, Infrastructure and Project Finance

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### Enforcement Director Norman Bay Nominated to Chair FERC

In a press release issued last Thursday, January 30, 2014, the White House announced that the President intends to nominate the current Director of the Office of Enforcement of the Federal Energy Regulatory Commission (FERC), Norman Bay, to become the next FERC Chairman. This is the President's second attempt to fill the seat that former Chairman Jon Wellinohoff vacated last November. As many will recall, nominee Ron Binz withdrew his candidacy in October following what he described as partisan "blood sport" over his confirmation.<sup>1</sup> After Mr. Binz withdrew his nomination and Cheryl LaFleur was subsequently named Acting Chairwoman, there was much speculation about who would be the next nominee and what direction FERC would take under a new Chairperson. Not only is the suspense as to the identity of the nominee over, but Mr. Bay's nomination also appears to confirm the direction that FERC will take with respect to investigations and enforcement. Assuming Mr. Bay is confirmed, the energy markets are likely to see an increase in enforcement actions and greater coordination between FERC and the Commodity Futures Trading Commission (CFTC).

Mr. Bay's background heavily features prosecution, enforcement and advocacy experience, and, as a result, FERC's increasing focus on oversight and enforcement would likely be redoubled under his watch. Mr. Bay's impressive resume includes such positions as: Assistant US Attorney in the Criminal Division at the US Attorney's Office in Washington, DC; Attorney for the Justice Department; Supervisor of the Violent Crimes division of the US Attorney's Office in Albuquerque, followed by US Attorney for the District of New Mexico (appointed by President Clinton); and most recently, a Professor of Law at the University of New Mexico School of Law, where he taught subjects such as Criminal Law, International Criminal Law, Evidence and National Security Law.

The Office of Enforcement, of which Mr. Bay is currently the Director, constitutes FERC's "enforcement arm." Among other duties, the Office of Enforcement is responsible for initiating and executing investigations into possible violations of FERC's rules and regulations, as well as serving as the principal advisor to the Commission on matters pertaining to the compliance of market participants. Given Mr. Bay's prosecutorial past, it is not surprising that the Office of Enforcement has grown substantially under his direction. In the last few years FERC has assessed hundreds of millions of dollars in civil penalties. In the



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<sup>1</sup> Statement of Ronald J. Binz, Public Policy Consulting (issued Oct. 1, 2013) (announcing his request to be withdrawn as FERC nominee) (available at <http://assets.nationaljournal.com/pdf/Binzpressstatementfinal100113.pdf>).

last FERC fiscal year alone, FERC collected settlements of US\$304 million in civil penalties and nearly US\$141 million in alleged unjust profits.<sup>2</sup> Those penalties were assessed on numerous utilities and market participants, including a handful of individuals.

The Office of Enforcement has also steadily expanded in both size and scope in the past few years under Mr. Bay's direction. For example, in February 2012, a new Division of Analytics and Surveillance (DAS) was created within the Office of Enforcement. DAS employs approximately 45 professionals with backgrounds including economists, industry analysts, former traders and former risk managers. The division is devoted to developing market surveillance tools and analyzing market activity to detect potential manipulation, anticompetitive or other anomalous behavior. Mr. Bay recently touted DAS as "among the most important achievements" of the Office of Enforcement in the past few years.<sup>3</sup>

Based on Mr. Bay's background and accomplishments at the Office of Enforcement, it is likely that enforcement would continue to be a key priority of a Commission led by Mr. Bay. In recent testimony before the Senate Committee on Banking, Financial Institutions and Consumer Protection Subcommittee on January 15, 2014, Mr. Bay hinted at potential related priorities. One such priority is obtaining further clarification regarding FERC's jurisdiction over energy market activities following the *Hunter* case to ensure FERC has access to the information necessary to perform its duties. For example, Mr. Bay stated:

In *Hunter*, the court ruled that the CFTC's exclusive jurisdiction over futures contracts deprives FERC of authority to bring an action based on manipulation in the futures market, even if the activity affected prices in the physical markets for which FERC has exclusive jurisdiction. Although the Commission reads the *Hunter* decision as narrow in scope, some market participants interpret the decision more broadly to cover not only manipulation in the futures market, but also many additional transactions and products, including those squarely within FERC's jurisdictional markets. Accordingly, a legislative fix to eliminate uncertainty on this matter could ensure that FERC has the full authority needed to police manipulation of wholesale physical natural gas and electric markets.<sup>4</sup>

In that same testimony, Mr. Bay called the recent Memorandum of Understanding (MOU) signed by FERC and the CFTC regarding information sharing among the agencies "a first step toward sharing appropriate data in a timely manner," and that it "will be essential for the agencies to work together and to make an institutional commitment to, as well as the resources necessary for, the day-to-day, nuts-and-bolts implementation of the concepts established in this [MOU]."<sup>5</sup>

Under Mr. Bay, the Office of Enforcement has also focused on the reliability arena. For example, the Office of Enforcement has launched investigations, at times contemporaneous with investigations led by the North American Electric Reliability Corporation (NERC) and other regulators, into various weather-related blackouts, including the October 2011 snowstorm in the Northeast and, earlier that year, outages in the Southwest. In testimony before the Senate Committee on Energy and Natural Resources regarding the October 2011 outages, Mr. Bay stated, "there is room for improvement" in utilities' "vegetation management and other practices to reduce transmission outages during snowstorms and similar weather events."<sup>6</sup> Thus, the physical security of the grid may well be another top priority if Mr. Bay is confirmed. A natural corollary to physical security of the grid is cybersecurity of the grid, which would likely be another area of focus for Mr. Bay—especially since the Obama Administration has made it an executive priority in recent years.<sup>7</sup>

Mr. Bay's confirmation rests largely in the hands of the Senate Energy and Natural Resources Committee, which is currently composed of 12 Democrats and ten Republicans hailing largely from Western and Midwestern states. A spokesman for the Committees' Ranking Member, Alaska Sen. Lisa Murkowski (R), issued the following statement: "Sen. Murkowski has not yet had a chance to fully review the nomination, but it's noteworthy that the president has chosen to elevate to the post of chairman—over clearly qualified commissioners—a FERC employee who has not served on the commission. It's also curious that the president, has for the second time this Congress, identified someone he believes should jump over the sitting commissioners."<sup>8</sup> While it is impossible to know whether Mr. Bay will be confirmed, it is rather easy to envision a FERC led by Mr. Bay.

<sup>2</sup> A list of all EP Act 2005 civil penalty orders is available at <http://www.ferc.gov/enforcement/civil-penalties/civilpenalty-action.asp>. This sum does not include penalties that FERC assessed but are currently being challenged in federal court.

<sup>3</sup> Testimony of Norman C. Bay, Before the Committee on Banking, Financial Institutions and Consumer Protection Subcommittee, U.S. Senate, at p. 3 (Jan. 15, 2014).

<sup>4</sup> *Id.*, pp. 10–11.

<sup>5</sup> *Id.*, at p. 10.

<sup>6</sup> Testimony of Norman C. Bay, Before the Committee on Energy and Natural Resources, US Senate, at p. 2 (Apr. 26, 2012).

<sup>7</sup> See, e.g., *Executive Order – Improving Critical Infrastructure Cybersecurity*, The White House Press Release (issued Feb. 12, 2013).

<sup>8</sup> Dixon, Darius, *White House Taps Norman Bay to Head FERC*, Politico.com (Jan. 30, 2014) (available at <http://www.politico.com/story/2014/01/norman-bay-ferc-nominee-102897.html#ixzz2s5GzeJsA>).

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