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FERC Investigations: Uncertainty Continues as Two Federal Courts Differ on When FERC Must Bring Enforcement Actions in Federal Court

*On September 29, 2017, a federal judge in California dismissed FERC's claims against Ryan Smith, a defendant in the **FERC v. Barclays** matter, because the 5-year statute of limitations had expired and a tolling agreement between the parties had ended. **FERC v. Barclays**, No. 2:13-cv-02093-TLN-DB (E.D. Ca. Sept. 29, 2017).*

Q: HOW DOES THE DECISION DIFFER FROM OTHER FERC CASES?

MATTHEW J. CONNOLLY: The statute of limitations decision creates a district court split over the limitations period for enforcement actions brought in federal court. In 2016, a judge in the District of Massachusetts found that there were effectively two 5-year limitations periods: FERC has five years to institute its “administrative proceeding,” which begins with a Notice of Proposed Penalty and Order to Show Cause; if FERC decides to issue a penalty after this “adjudication,” and the defendant refuses to pay after 60 days, FERC has an additional five years to bring an action in federal court. *FERC v. Silkman*, 177 F.Supp.3d 683 (D. Mass. 2016).

The *Barclays* court disagreed. Instead of two limitations periods, the judge found that FERC had five years from the date of the alleged conduct to bring an action in federal court. FERC's Order to Show Cause process is not a “proceeding” or “adjudication” for statute of limitations purposes, because it is not required under the Federal Power Act and is a “decision to prosecute” rather than a “prosecution,” which is what ends the limitations period.

The *Barclays* decision is yet another example of uncertainty in FERC enforcement actions brought in federal court. For example, FERC had previously held that defendants were not entitled to full discovery rights in federal court actions. Four courts have disagreed, but FERC has not yet announced that it will abandon its view. And there is uncertainty around FERC's view of market manipulation, as no case has reached a verdict in federal court under the current manipulation statute, nor has a court confirmed it.

Q: HOW DOES THE RESULTING UNCERTAINTY IMPACT FUTURE FERC ENFORCEMENT ACTIONS?

MC: We expect FERC to take a conservative view and ensure that it complies with the *Barclays* order, meaning that it brings suit in federal court within five years from the date of the original conduct. This means completing the investigative process and Order to Show Cause proceedings within five years. At least in the short term, however, we don't expect major changes to the show cause proceedings, which some have criticized as needlessly burdensome and one-sided. But FERC views the proceedings as an important part of the penalty process, even if courts—like in *Barclays*—determine that they aren't required under the Federal Power Act and don't toll the statute of limitations.



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