



# Jurisdiction over an FEAM Transacting Unbundled Attribute Products

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# FERC v. CFTC: Who has Jurisdiction?

- Under FERC's current precedent, FERC has no jurisdiction over unbundled RECs and similar products, and thus has no jurisdiction to regulate an FEAM.
- The Commodity Exchange Act ("CEA") unambiguously gives CFTC jurisdiction over contracts for the future delivery of any commodity, including RECs and similar products, and thus CFTC jurisdiction over an FEAM is unavoidable.
- Under current federal law, CFTC would be the sole federal regulator of an FEAM, as CFTC *must* regulate an FEAM whereas FERC *cannot* regulate an FEAM.

# FERC's Ruling in *WSPP*

- In *WSPP, Inc.* FERC held that “when an unbundled REC transaction is independent of a wholesale electric energy transaction . . . the unbundled REC transaction does not [directly] affect wholesale electricity rates, and the charge for the unbundled RECs is not a charge in connection with a wholesale sale of electricity.”
- Consequently, “an unbundled REC transaction that is independent of a wholesale electric energy transaction does not fall within the Commission's jurisdiction under sections 201, 205 and 206 of the FPA.”
- Creating an FEAM that only transacts forward contracts for unbundled RECs does NOT require FERC's permission or conforming changes to PJM's governing documents.

# Why CFTC Jurisdiction is Unavoidable

- “Unless exempted by the [CFTC] . . . it shall be unlawful for any person to offer to enter into . . . a contract for the purchase or sale of a commodity for future delivery . . . unless . . . such transaction is conducted on or subject to the rules of a board of trade which has been designated or registered by the [CFTC] as a contract market . . . .” 7 U.S.C. 6(a)(1)
- The CEA broadly defines “commodity” to include any “goods and articles, except onions” as well as any “right” or “interest” except for “motion picture box office receipts.” 7 U.S.C. 1a
- The CFTC has ruled that RECs constitute commodities, and therefore forward contracts for RECs and similar products are subject to CFTC jurisdiction.
- However, the CFTC considers RECs to be non-financial commodities, and as such RECs are not subject to Dodd-Frank requirements.

# How CFTC Regulates Futures Markets for Non-Financial Commodities

- This kind of market is known as a “Designated Contract Market” or DCM.
- CFTC mainly regulates DCMs by ensuring they have compliance staff, market rules, market monitoring systems and procedures, disciplinary processes to regulate market rules, and the capability to regulate themselves and their participants.
- DCMs must meet a lengthy set of prescriptive requirements, but there is not much constraint on their overall governance or administrative structure provided the required elements are present.

# A DCM is to CFTC as an RTO is to FERC

- CFTC leaves day-to-day regulation of the market to the DCM, though CFTC has the authority to investigate and take enforcement action against market manipulation and abusive trading practices at its discretion.
- Process for rule changes and new product listings shares similarities with Federal Power Act Section 205 filings:
  - CFTC has to approve rules and new products unless they violate the CEA or its implementing regulations;
  - CFTC has to act within a defined time period or changes take effect automatically.

# Setting Up A DCM

- The entity seeking to run the prospective DCM files an application with CFTC.
- Within 180 days, CFTC approves the application if it is consistent, or denies the application if it is inconsistent, with the CEA and its implementing regulations.
- CFTC can also find an application deficient and request more information; the clock is stayed until the application corrects the deficiency, at which point CFTC has 60 days to issue its final decision.

# Changing Rules/Listing New Products

- A DCM can generally change its rules or product list at anytime by filing a certification with CFTC; changes automatically take effect after 10 days without CFTC action.
- CFTC can stay rule changes or product listings for up to 90 days if the proposed changes or listings raise “novel or complex issues,” the DCM’s certification contained an inadequate explanation, or the proposed rule or product is potentially inconsistent with the CEA or its implementing regulations.
- A DCM can also seek prior approval for rule changes or new product listings; this is required for rule changes that materially change the terms and conditions of products currently listed for trading. CFTC must issue a ruling on a request for prior approval within 90 days.



# DCM Governance Requirements

- A DCM's governance structure must incorporate fitness standards for directors and protections against conflicts of interest.
- Governance arrangements must permit consideration of market participant views.
- States regulators could play a significant, formalized role in the governance and decision-making process of an FEAM without running afoul of the CEA or CFTC regulations.

# Partial Exemptions From CFTC Regulation

- CFTC can exempt markets from most—but not all—aspects of its regulation if it finds doing so is in the public interest and consistent with the CEA’s purposes.
- Based on the CFTC Order exempting RTO markets, CFTC appears to require a market to have sophisticated market monitoring capabilities and oversight from another regulator to qualify for an exemption.
- The exempted market also appears to need to have capabilities and processes that largely replicate what is required of a DCM, even if the exempted market is not held to quite the same standard.
- States are currently considering the pros and cons of seeking an exemption.