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Investing Your Way Into FERC Jurisdiction: A Warning to Compliance Officers and Company Counsel




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With the repeal of the Public Utility Holding Company Act of 1935 (PUHCA 1935) in 2005, many investors in the energy sector relaxed, knowing that the heavy-handed regulatory scheme of PUHCA 1935 had lifted. The new Public Utility Holding Company Act of 2005 (PUHCA 2005), however, introduced challenges of its own. Under PUHCA 2005, investors can unintentionally fall under the jurisdiction of the Federal Energy Regulatory Commission (FERC) based on direct or indirect investments in utility companies. The FERC can then subject such investors and their affiliates to filing and reporting requirements, restrictions on investments and transactions, books and records requirements, and penalties under PUHCA 2005 and the Federal Power Act (FPA).

Financial institutions' increasing appetite for investment in the energy sector,[1] combined with the FERC's expanded attention to utility companies and their investors under PUHCA 2005 and the FPA, makes a clear understanding of the law more essential than ever. Counsel and compliance officers for institutional investors should review the relevant legal requirements, conduct a thorough review of their investment portfolios and adopt appropriate policies and procedures.

I. *Who Is Affected?*

It is well known that the FERC reigns over public utilities and public utility holding companies. What is less known is that financial institutions can also become subject to FERC jurisdiction, if they invest directly or indirectly in public utilities or public utility holding companies.

Companies that Qualify as Holding Companies

The path to FERC jurisdiction starts with the definition of a *holding company*. For purposes of PUHCA 2005, a *holding company* is ''any company[2] that directly or indirectly owns, controls, or holds, with power to vote, 10 percent or more of the outstanding voting securities of a public-utility company or of a holding company of any public-utility company. . . .''[3] The FERC also has authority, after notice and opportunity for hearing, to declare a company a *holding company* if it determines that the company may:

[E]xercise directly or indirectly (either alone or pursuant to an arrangement or understanding with one or more persons) such a controlling influence over the

[1] Hugh MacArthur, et al., *Private Equity Drills For Growth In The Energy Sector*, Forbes, (Apr. 25 2013, 10:09 AM), http://www.forbes.com/sites/baininsights/2013/04/25/private-equity-drills-for-growth-in-the-energy-sector/.

[2] The term ''company'' excludes individuals, but includes most entities, including business trusts, as well as an ''organized group of persons, whether incorporated or not, or a receiver, trustee or other liquidating agent of any of the foregoing.'' 42 U.S.C. § 16451(4)(2006).

[3] *Id.* at § 16451(8)(A)(i).

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management or policies of any public-utility company[4] or holding company as to make it necessary or appropriate for the rate protection of utility customers with respect to rates that such person be subject to the obligations, duties, and liabilities imposed upon holding companies.[5]

The broad definition of *holding company* ensnares a wide variety of companies investing in the energy sector.

Because the concept of holding company in PUHCA 2005 focuses on voting power, an investment advisor that has been delegated the power to vote securities of a public utility can be a holding company because it ''controls'' or ''holds'' the power to vote. This is true even if it does not have a pecuniary interest in the securities.

The case of Horizon Asset Management (Horizon) is illustrative. In 2008, Horizon, an investment advisor under the Investment Advisers Act of 1940, was classified as a holding company even though it never purchased or owned the securities of public utility companies.[6] Instead, Horizon managed and directed accounts owned by individual and institutional investors; these accounts owned the voting securities of public utility holding companies.[7] Under the management agreements between Horizon and the account holders, the account holders delegated to Horizon the rights to vote the shares in the accounts.[8] Citing that delegation of voting power, the FERC found that Horizon was a holding company because Horizon held ''10 percent or more of a holding company's voting securities with power to vote.''[9] Horizon argued that it could not exercise control over the public utility because, as an investment advisor, it generally deferred to the voting recommendations of Institutional Shareholder Services, Inc. (ISS).[10] The FERC Commissioners rejected this argument on the ground that Horizon had retained the right to override the recommendations of ISS and, even if it could not, it retained the right to revoke the delegation.[11] The FERC also rejected Horizon's argument that it was not a holding company since it did not exert any controlling influence over management. While a company may be a holding company by virtue of its controlling influence over management or policies of a public utility, it can qualify as a holding company even without such control.[12]

An investment advisor may be deemed to hold power to vote more than 10 percent of a public utility through the aggregation of separate investment funds controlled by the advisor unless it can demonstrate that investment decisions are made separately by each fund. For example, in *Legg Mason*, the FERC found that the company adequately separated the funds and subsidiaries' investment activities and decisions such that securities held in each individual fund and subsidiary would not be attributed to other funds and subsidiaries or the parent company.[13] The FERC specifically pointed to the company's maintenance of ''separate trading desks, separate proxy voting procedures, separate investment committees, [and] separate investment decisions.''[14] Legg Mason, Inc. (Legg Mason) prevailed because it effectively demonstrated that, not only were the shares held by separate legal entities, but the entities were functionally separate.

Exclusions from the Definition of Holding Company

Certain entities may be excluded from the definition of public utility holding company. Banks, savings associations and trust companies, and their operating subsidiaries, are excluded if the public utility securities are held as collateral for a loan, held in the ordinary course of business as a fiduciary, or acquired for liquidation purposes in connection with loan contracted for and held for a period of not more than two years.[15] Brokers or dealers are also excluded so long as the securities are not beneficially owned by the broker/dealer and are subject to voting instructions by customers or their assigns, or are acquired in the ordinary course of business as a broker, dealer or underwriter with the intent of effecting a distribution within 12 months of the acquisition date.[16]

II. *Consequences of Being a Holding Company*

Notification Requirement

FERC jurisdiction, and oversight under PUHCA 2005 and the FPA, is triggered when an investor assumes the status of a public utility holding company.[17] An investor classified as a public utility holding company must file notice of its public utility holding company status with the FERC within thirty days of becoming a public utility holding company.[18] The notification Form FERC-65, provides the FERC with information on the identities and corporate interrelationships of the holding company, associated public utilities, natural gas companies, service companies (including special-purpose subsidiaries providing non-power goods and services), and all affiliates and subsidiaries.[19] Information in these filings is made available to the public on the FERC web site, although it will not be published in the *Federal Register*.[20] (A holding company need not file a notification form, however, if it is so classified based solely on

[4] Under the statute, a public utility company includes an electric utility company, which is a ''company that owns or operates facilities used for the generation, transmission, or distribution of electric energy for sale,'' and a gas utility company, which is a ''company that owns or operates facilities used for distribution at retail (other than the distribution only in enclosed portable containers or distribution to tenants or employees of the company operating such facilities for their own use and not for resale) of natural or manufactured gas for heat, light, or power.'' *Id.* § 16451(7).

[5] *Id.* at § 16451(8)(A)(ii).

[6] *Horizon Asset Mgmt., Inc.*, 125 F.E.R.C. ¶ 61,209 (2008) [hereinafter *Horizon*].

[7] *Id.* at P 5.

[8] *Id.* at P 7.

[9] *Id.* at P 29.

[10] *Id.* at P 9.

[11] *Id.* at P 30, P 32 n.34.

[12] *Id.* at P 30.

[13] *Legg Mason, Inc.*,121 F.E.R.C. ¶ 61,061 at P 28 (2007) [hereinafter *Legg Mason*] (''With regard to attribution between Groups, Funds, Accounts, Subsidiaries and Legg Mason, the functional information barriers between Groups or Subsidiaries in this particular case allow us to treat such Groups and Subsidiaries' activities separately for purposes of section 203(a)(2)'').

[14] *Id.* at P 29.

[15] 42 U.S.C. § 16451(8)(B)(i)).

[16] *Id.* § 16451(8)(B)(ii).

[17] *See* discussion *infra* pp. 4-6.

[18] 18 C.F.R. § 366.4(a)(1) (2012).

[19] *Id.* § 366.4(a)(2).

[20] *Id.*

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investment in Qualifying Facilities, exempt wholesale generators or foreign utility companies.[21])

If a company fails to file a Form FERC-65 within thirty days of becoming a public utility holding company, it may be subject to civil penalties of up to $1 million per violation for each day beyond the thirty-day filing window.[22] In addition to potential civil penalties, any person who knowingly and willfully violates the FPA or PUHCA 2005 may face criminal penalties including a fine of up to $1 million, up to five years' imprisonment and an additional fine of $25,000 for each day in which the violation occurred.[23]

Jurisdictional Requirements

Under PUHCA 2005, holding companies, their associate companies,[24] affiliates and subsidiaries must maintain and make available to the FERC all books, accounts, memoranda, and other records that the FERC determines are relevant to costs incurred by a public utility or natural gas company and are necessary or appropriate for the protection of utility consumers.[25] These accounting, record-retention and reporting requirements (the ''books and records requirements'') apply not only to the holding companies themselves, but to each ''affiliate'' of a holding company or of any subsidiary company of a holding company. PUHCA 2005 defines an ''affiliate'' of a company as any other company in which five percent or more of the outstanding voting securities are owned, held, controlled or held with power to vote, directly or indirectly by the company.[26]

The required length of retention for records varies based upon the type of record. For example, companies must retain reports to stockholders and minute books for five years, general ledgers for ten years, and relevant income tax returns for two years after a determination of final tax liability.[27]

Fortunately, as discussed below, a number of grounds for exemptions may relieve a public utility holding company from the FERC's books and records and records retention requirements.

Exemptions from the Jurisdictional Requirements

In certain situations, investors may be exempted from PUHCA 2005's books and records requirements.[28] Under the passive investor exemption, mutual funds, certain collective investment vehicles, and investment managers can apply to the FERC to avoid the PUHCA jurisdictional requirements.[29] To be eligible for the exemption, investors must buy and sell securities of public utilities in the ordinary course of business, hold securities as fiduciaries for clients and be barred from exercising operational control over the utilities.[30]

The passive investor exemption is available only upon application to the FERC, which is made publicly available, allowing members of the public to protest the filing.[31] An institution must file a form FERC-65A notifying the FERC that it meets the passive investor requirements.[32]

An entity granted the passive investor exemption is still classified as a public utility holding company and is not exempt from the transactional requirements under Section 203 of the FPA discussed below.[33]

Investors in certain types of facilities may also qualify for an exemption from the books and records requirements. Public utility holding companies that hold investments in only qualifying facilities (QFs), as defined in the Public Utility Regulatory Policies Act of 1978,[34] exempt wholesale generators (EWGs) or foreign utility companies (FUCOs)[35] are exempt from PUHCA 2005's requirements and are not required to file with the FERC. To qualify as a QF, which can include certain small power production facilities and cogeneration facilities,[36] the facility must file with the FERC a self-certification of Qualifying Facility status or apply for an express order of the FERC declaring its status as a QF.[37] Although many investors rely on the self-certification filing by the QF, other investors require the target to obtain an express FERC order establishing the status of the facility.

Companies that do not otherwise qualify for a specified exemption may file a petition to the FERC and obtain a declaratory order, if they can establish that the exemption is warranted.[38]

A company's obligations do not end once it obtains an exemption or waiver. If a material change of facts

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[21] *See id.* § 366.4(a)(3) (referencing § 366.3(a)).

[22] 16 U.S.C. § 825o-1 (2012).

[23] *Id.* § 825o.

[24] Meaning any company in the same holding company system. 42 U.S.C. § 16451(2) (2006). ''Holding company system'' means a holding company and all of its subsidiary companies. *Id.* § 16451(9). ''Subsidiary companies'' means ''any company, 10 percent or more of the outstanding voting securities of which are directly or indirectly owned, controlled, or held with power to vote, by such holding company,'' and ''any person, the management or policies of which the Commission, after notice and opportunity for hearing, determines to be subject to a controlling influence, directly or indirectly, by such holding company (either alone or pursuant to an arrangement or understanding with one or more other persons) so as to make it necessary for the rate protection of utility customers with respect to rates that such person be subject to the obligations, duties, and liabilities imposed by this part upon subsidiary companies of holding companies.'' *Id.* § 16451(16).

[25] 42 U.S.C. § 16452(a) (2005). *See* 18 C.F.R. §§ 366.2 (2013).

[26] 42 U.S.C. § 16451(1).

[27] 18 C.F.R. § 368.3 (2007).

[28] *See* 18 C.F.R. § 366.3(b)(2).

[29] *Id.* § 366.3(b)(2)(i).

[30] *See*, *e.g.*, *Legg Mason II,* at P 14; *CRMC*, *supra* note 29. *See also* GAMCO Investors, Inc.'s Letter and FERC-65A, Exemption Notification, FERC Docket PH07-6-000 (November 14, 2006).

[31] *See Legg Mason*, *supra* note 14, at P 14. *See Legg Mason*, *supra* note 13, at P 14. In 2006, Legg Mason filed a FERC-65A notifying the FERC of its public utility holding company status due to its beneficial ownership of more than 10% of AES Corporation and claiming passive investor status, but the notice was protested by a local group opposing AES Corporation's application to develop a liquefied natural gas import facility. The protest dragged Legg Mason into a public fight over the siting of the LNG facility. The FERC Commissioners ultimately ruled against the protest, granting Legg Mason passive investor status and an exemption from the books and records requirements, and the LNG facility was separately approved by the FERC in 2009.

[32] *See* 18 C.F.R. § 366.4(b).

[33] *Legg Mason, Inc.*, 116 F.E.R.C. ¶ 61,268 at P 15 n.11 (2006) [hereinafter *Legg Mason II*] (citing *Capital Research and Mgmt. Co.*, 116 F.E.R.C. ¶ 61,267 (2006) [hereinafter *CRMC*]).

[34] 18 C.F.R. § 292.101(b)(1) (2009).

[35] *See* 18 C.F.R. § 366.3(a).

[36] 18 C.F.R. § 292.203(a)-(b) (2009).

[37] *Id.* § 292.203(a)(3), (b)(2).

[38] *See* 18 C.F.R. § 366.3(d).

occurs after either a waiver or an exemption (including an automatic exemption), the company has only 30 days from the date of such material change in facts to report to the FERC.[39] The company may submit a new notification of exemption or waiver, as applicable, or file a written report explaining why the material change in facts does not affect the granted exemption or waiver.[40] The company must submit this filing regardless of whether the change in facts impacts the basis on which the holding company filed for or received its waiver or exemption.[41]

III. *Authorization Requirements under the FPA*

Prior Authorizations

Holding companies that are exempt from PUHCA 2005's books and records requirements are not free from all FERC oversight and control; exemptions under PUHCA do not automatically translate into exemptions from the separate requirements under Section 203 of the FPA, which limit the transactions and investments of holding companies under PUHCA 2005.[42]

Under the FPA, a public utility holding company needs prior approval from the FERC to make certain additional investments in public utilities and holding companies. Section 203(a)(2) of the FPA requires prior FERC authorization for a holding company to acquire securities with a value in excess of $10 million, if the securities are of either (1) another transmitting utility under PUHCA 2005, (2) an electric utility company, or (3) a holding company of a holding company system containing such entities.[43] This is sometimes known as the ''two-bite rule'': An entity's first investment in more than 10% of the outstanding voting securities of a public utility or holding company requires only a notice filing under PUHCA 2005 informing the FERC that the entity has become a public utility holding company; the ''second bite,'' investment of over $10 million in another public utility or holding company, requires prior approval by the FERC under the FPA.

Transaction-Specific and Blanket Authorizations

In some situations, investors may be exempt from the approval requirements, either through an automatic blanket authorization or through individual blanket authorizations. A blanket authorization allows a holding company to react to changing market conditions, take advantage of opportunities in the energy industry, and avoid alerting the market of its specific plans.[44]

Under FERC regulations, some circumstances warrant automatic blanket authorizations that require no applications. For example, the acquisition of voting interests comprising less than 10% of the outstanding securities of a utility,[45] and the acquisition of non-voting interests that do not convey control over the second utility[46] are allowed under certain conditions,[47] as are certain investments in foreign utility companies,[48] internal corporate reorganizations,[49] and acquisitions by bank holding companies that hold the securities under specific conditions.[50] A holding company proceeding under the automatic blanket authorization must file copies of any Schedule 13G, 13D and Form 13F with the FERC. Many institutional investors and investment advisors will be able to rely on the automatic blanket authorizations.

In the absence of an automatic blanket authorization, a holding company may apply to the FERC for its own blanket authorization from the approval requirements under Section 203 of the FPA. The FERC must either grant or deny an application within 180 days after the application is filed, unless the FERC finds that further consideration is required and issues an order regarding the extension of time.[51] In the absence of FERC action within 180 days, the application is deemed granted.

Applications for blanket authorizations are generally granted prospectively,[52] for a limited term, usually three years, allowing the acquisition of up to 10% of the outstanding voting securities of another public utility by a single entity and up to 20% of the outstanding voting securities of another public utility by all the affiliated entities of the holding company,[53] provided that the holding company may not exercise operational control over the public utility.[54]

Generally, blanket authorizations for investment managers and advisors are granted where the applicant agrees that:

- None of the individual investment funds will own, control, or hold 10% or more of the voting power of the

[39] *See id.* § 366.4(d).

[40] *Id.*

[41] *Material Changes in Facts that Require Notifications Under Commission Regulations Under the Public Utility Holding Company Act of 2005*, 130 F.E.R.C. ¶ 61,071 (2010).

[42] *Legg Mason II*, *supra* note 33, at P 15 n.11 (citing *CRMC*, *supra* note 29).

[43] *Ecofin Holdings Ltd.*, 120 F.E.R.C. ¶ 61,189, at P 25 (2007) [hereinafter *Ecofin*]. .

[44] *Seeid.* at P 15. *See generally*, *Lord, Abbett & Co.*, 129 F.E.R.C. ¶ 62,239 (2009) [hereinafter *Lord Abbett*]; *CRMC*, *supra* note 29.

[45] 18 C.F.R. § 33.1(c)(2)(ii) (2012).

[46] *Id.* § 33.1(c)(2)(i).

[47] The PUHCA 2005 holding company may not borrow funds from, or pledge or encumber the assets of, an electric utility company subsidiary in connection with such acquisition. *Id.* § 33.1(c)(3)(i)-(ii).

[48] *Id.* § 33.1(c)(5). *See Ecofin*, *supra* note 43, at P 59 (noting that Section 33.1(c)(5) allows certain public utility holding companies to acquire securities of foreign utility companies subject to certain restrictions).

[49] 18 C.F.R. § 33.1(c)(6).

[50] *See id.* § 33.1(c)(9). *SeealsoMorgan Stanley*, 134 F.E.R.C. ¶ 61,234 at P 13 (2011) [hereinafter *Morgan Stanley*] (noting that Morgan Stanley had become a bank holding company and was therefore able to acquire securities under the blanket authorization set forth in Section 33.1(c)(9)).

[51] 16 U.S.C. § 824b(a)(5) (2006).

[52] *See*, *e.g.*, *BlackRock, Inc.*, 131 F.E.R.C. ¶ 61,063 at P 29 (2010) [hereinafter *BlackRock*] (approving proposed blanket authorizations on a prospective basis).

[53] *See*, *e.g.*, *Morgan Stanley*, *supra* note 50, at P 14 (noting that investment managers acting as fiduciaries may acquire less than 20 percent of a public utility per reporting group and less than 10 percent of the outstanding voting securities per individual investment fund); *CRMC*, *supra* note 29, at PP 45- 46 (granting prospective blanket authorizations where Applicants would not collectively own more than 20 percent of the voting securities of any one utility and no single Applicant would own 10 percent or more of the voting securities of any one utility).

[54] *See*, *e.g.*, *Morgan Stanley*, *supra* note 50, at P 16 (recognizing the condition that Applicants must not acquire control over issuers whose securities they acquire as a result of a blanket authorization); *Horizon*, *supra* note 6, at P 10 n.8 (noting that a Schedule 13D must be filed when the owner of the securities holds the securities ''with the purpose or effect of changing or influencing the control of the issuer'' (quoting 17 C.F.R. § 240.13d-1(c)); *Ecofin*, *supra* note 43, at P 19 (''Applicants state that they meet the conditions to demonstrate an inability to exercise control of the utilities in which they invest.'').

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outstanding equity securities of any one publicly traded utility or utility holding company.[55] To the extent the applicant manager or advisor invests in the voting securities of any individual utility for its own account, it will not own, control or hold more than a de minimis amount (1%) of the voting securities of such Utility.[56]

■ The applicant manager/advisor and its funds collectively will not own, control, or hold more than 20%[57] of the total voting power of the outstanding equity securities of any one utility.[58]

■ The applicant manager/advisor and its funds will maintain procedures that have the effect of prohibiting the applicants from exercising any control over utilities whose securities they own or hold.[59]

■ The applicant manager/advisor and its funds will collectively acquire the securities of only publicly traded utilities and, except for the de minimis holdings described above, only on behalf of one or more of the applicant's funds and other clients for which it exercises investment discretion pursuant to the blanket authorization.[60]

■ Each applicant manager/advisor and its funds will maintain their status as beneficial owners eligible to file a Schedule 13G,[61] and the manager/advisor will file a Schedule 13G regarding the acquisition and holding of more than five percent (5%) of any class of equity securities of a utility and will file with the Commission a copy of any Schedule 13G, with respect to utilities, that it files with the SEC.[62]

As described above, blanket authorizations come with continuing requirements and conditions that are intended to effectively prevent the public utility holding company and its affiliates from controlling the public utilities or causing cross-subsidization.[63] In addition to the conditions the FERC imposes on the actions of the public utility holding companies, the list of reporting requirements, can include filing SEC Schedules 13G or 13D with the FERC to show that the holding company cannot exercise control over the utilities; filing reports with the FERC on the securities acquired as a percentage of the outstanding securities; reporting requirements for new subsidiaries of investment management holding companies; filing reports regarding changes to any material facts (regardless of whether the facts were the basis for the blanket authorization); amendments to holding company applications; and applications for renewal of the blanket authorizations.[64]

Next Steps

Institutional investors and investment advisors involved in the energy industry should review their current and planned investment portfolios in order to avoid becoming subject to FERC jurisdiction, PUHCA and the FPA without contemplating and planning for the related requirements, applications, filings and reports.

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[55] *See, e.g.*, *Morgan Stanley*, *supra* note 50, at P 15; *Blackrock*, *supra* note 52, at P 33; *Horizon*, *supra* note 6, at P 47; *Ecofin*, *supra* note 43, at P 41.

[56] *See T. Rowe Price Grp., Inc.*, 119 F.E.R.C. ¶ 62,048, at p. 5 (2007).

[57] *See, e.g., Franklin Res., Inc.*, 126 F.E.R.C. ¶ 61,250 (2009) [hereinafter *Franklin*] (denying Applicants' request for unlimited blanket authorization under Section 203(a)(2), but granting the blanket authorization subject to subject to a 20 percent limit on the ownership of voting securities of any one U.S. traded utility by each reporting group); *Morgan Stanley*, *supra* note 50, at P 15; *Blackrock*, *supra* note 52, at P 33; *Horizon*, *supra* note 6, at P 47; *Ecofin*, *supra* note 43, at P 41.

[58] The applicant must represent that although it may periodically control up to a total of 19% of the voting power of any one utility, it will not control the operations or management of any utility.

[59] *See, e.g.*, *Horizon*, *supra* note 6, at P 46; *Morgan Stanley*, 121 F.E.R.C. 61,060, at P 49 (2007); *Blackrock*, *supra* note 52, at P 33.

[60] *See, e.g.*, *Franklin*, *supra* note 57, at P 39; *Blackrock*, *supra* note 52, at P 15.

[61] 17 C.F.R. § 240.13d-1 (2012).

[62] *See, e.g.*, *Blackrock*, *supra* note 52, at PP 15, 34; *Horizon*, *supra* note 6, at P 49.

[63] *See Ecofin*, *supra* note 43, at P 14.

[64] *See, e.g.*, *Morgan Stanley*, *supra* note 50; *Blackrock*, *supra* note 52; *Horizon*, *supra* note 6; *Ecofin*, *supra* note 43.