

127 FERC ¶ 61,224
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Sudeen G. Kelly, Marc Spitzer,
and Philip D. Moeller.

Franklin Resources, Inc. and its
Investment Management Subsidiaries
and Applicant Funds

Docket No. EC08-111-001

ORDER ON REHEARING

(Issued June 4, 2009)

1. On April 20, 2009, Franklin Resources, Inc. (Franklin), on behalf of itself and its Investment Management Subsidiaries¹ and its Applicant Funds² (collectively, Applicants), filed a request for clarification or, in the alternative, rehearing of the Commission's order issued in this docket.³ Applicants request rehearing of the March 19 Order concerning: (1) the restriction of a Reporting Group's shareholder advocacy activities to those that were listed in their application in cases in which the Reporting Group has filed a Schedule 13D with the Securities and Exchange Commission (SEC)⁴;

¹ Investment Management Subsidiaries are the 11 entities listed in Appendix 1 to the March 19 Order.

² Applicant Funds are the 15 U.S. Applicant Funds and 9 Foreign Applicant Funds listed in Appendix 1 to the March 19 Order.

³ *Franklin Resources, Inc.*, 126 FERC ¶ 61,250 (2009) (March 19 Order).

⁴ Section 13(d) of the Securities Exchange Act of 1934 (1934 Act) and the rules and regulations of the SEC generally require any person to make an informational filing with the SEC on Schedule 13D within 10 days after such person acquires beneficial ownership of more than 5 percent of any class of voting equity securities of a company that is registered under section 12 of the 1934 Act. Securities Exchange Act of 1934, 15 U.S.C. § 78a, *et seq.* (2000); 17 C.F.R. § 240.13d-1, *et seq.* (2008). As explained in the March 19 Order (n. 5), however, in certain cases a person who would otherwise be obligated to file a statement on Schedule 13D with respect to shareholdings in a particular company may instead file an abbreviated informational filing on Schedule 13G. The filing of a Schedule 13D indicates that the filing person may wish to take a more activist role in the management or affairs of the issuer. A Reporting Group includes all of the

and (2) the reporting requirement for changes made to Schedule 13D and Schedule 13G⁵ filings with the SEC. For the reasons discussed below, we will grant the request for rehearing.

I. Background

2. The March 19 Order granted blanket authorizations to Applicants under Federal Power Act (FPA) section 203(a)(2),⁶ for a period of three years, to acquire: (1) less than 10 percent of the outstanding voting securities of any U.S. Traded Utility⁷ for each Reporting Group that has filed a Schedule 13D (Schedule 13D Reporting Group), without such holdings being aggregated with holdings of other Reporting Groups in the same U.S. Traded Utility; and (2) up to 20 percent of the outstanding voting securities of any U.S. Traded Utility for each Reporting Group that maintains eligibility to file a Schedule 13G, subject to a limit of less than 10 percent of any one U.S. Traded Utility acquired by any Applicant Fund or Investment Account within such Reporting Group. Applicants stated in their Response to Staff's Deficiency Letter that a Reporting Group may choose to file a Schedule 13D with respect to the securities of a U.S. Traded Utility in order to be able to advocate (typically by communicating to the company's board or management, or through public communications such as press releases or interviews) positions on various matters,⁸ listing several examples of such matters. The examples included:

- (1) A spin-off, sale or purchase of an asset, or a buy-back of shares;
- (2) Rejection of a "poison pill," change in management personnel, change of a staggered board;⁹ and
- (3) Sale of the company; purchase of a company; change in tax status.

Separate Investment Management Subsidiaries that are permitted to share information under Franklin's information barrier policy.

⁵ SEC regulations require that in order to file a Schedule 13G, an institutional investor such as Franklin must certify that the securities were acquired in the ordinary course of business and not for the purpose or with the effect of changing or influencing control over the issuer.

⁶ 16 U.S.C. § 824b(a)(2) (2006).

⁷ A U.S. Traded Utility is a Utility whose voting securities (including American Depository Receipts) are traded on U.S. public exchanges, including the New York Stock Exchange, the American Stock Exchange and the NASDAQ.

⁸ Applicants' Response to Staff's Deficiency Letter at 5 (Jan. 16, 2009).

⁹ We understand that this includes circumstances where personnel changes are advocated as part of a strategic change in the direction of the company.

Applicants also committed not to engage in any of the following specified activities:

- (1) Seeking board representation or the power to name a board member;
- (2) Seeking to nominate or designate managerial, operational, or other personnel of the company in question;
- (3) Seeking to set or influence the price at which power, fuel or any other product is sold or purchased in the marketplace;
- (4) Seeking to determine or influence whether generation, transmission, distribution, or other physical assets are made available or withheld from the marketplace;
- (5) Seeking to determine or influence ratemaking or rates for the sale of power or the provision of transmission or distribution service;
- (6) Seeking to determine or influence wages to be paid to labor or participate in or influence labor negotiations; or
- (7) Seeking to influence any other operational decision of the company in question.¹⁰

3. The Commission granted Applicants' request for blanket authorization with respect to the Schedule 13D Reporting Groups conditioned on, among other things, Applicants' representation that they would refrain from engaging in the activities listed above, and compliance with certain reporting requirements. The Commission also limited the matters in which a Schedule 13D Reporting Group may advocate a position to those that were listed in the Applicants' Response to the Staff's Deficiency Letter. The Commission denied Applicants' request for unlimited blanket authorization to acquire voting securities of any U.S. Traded Utility in respect of which a Schedule 13G may be filed, and granted instead blanket authorization under section 203(a)(2) to acquire voting securities of any U.S. Traded Utility, subject to a limit of 20 percent on the outstanding voting securities of such U.S. Traded Utility that may be acquired by any Reporting Group that maintains its eligibility to file a Schedule 13G and a limit of less than 10 percent on the outstanding voting securities of such U.S. Traded Utility that may be acquired by any Applicant Fund or Investment Account within that Reporting Group.

¹⁰ Applicant's Response to Staff's Deficiency Letter at 5-6.

II. Request for Rehearing

4. Applicants seek rehearing of the March 19 Order with respect to the limitation imposed on the matters on which a Schedule 13D Reporting Group may advocate a position. Applicants state that the Commission erred in restricting permissible Schedule 13D advocacy activities to those that were specifically listed in Applicants' Response to Staff's Deficiency Letter. Applicants argue that the Commission's action was contrary to the relief requested by Applicants, and that the Commission incorrectly stated the relief requested without giving a reason for the divergence. Applicants reiterate that these advocacy activities were only provided to illustrate the types of corporate actions in respect of which Applicants may wish to advocate a position (through public or private communications).

5. Applicants state that it would be impossible for them to compile an exhaustive list of all matters on which a Schedule 13D Reporting Group might wish to advocate because it would require Applicants to be able to anticipate all future situations. Applicants assert that the Commission should recognize that the examples given were not comprehensive. Applicants also contend that, if their advocacy activities are limited to those described in the March 19 Order, there will be a direct impact on Applicants' business by negatively affecting shareholders and owners of the Applicant Funds or Investment Accounts.

6. Applicants also assert that treating the list of advocacy matters as illustrative rather than exclusive would not allow the Schedule 13D Reporting Groups to exercise control over any U.S. Traded Utility or be contrary to the public interest because there are multiple protective mechanisms and enforcement safeguards in place to prevent such a result. Applicants point out that they are restricted to owning less than 10 percent of any U.S. Traded Utility with respect to which a Schedule 13D has been filed. Additionally, Applicants maintain that each separate Reporting Group will be treated as a separate unaffiliated entity with informational barrier policies in place to prevent coordination among the Reporting Groups to exercise control. Applicants further state that, under the terms of the March 19 Order, a Schedule 13D Reporting Group cannot plausibly assert control or influence the management of a U.S. Traded Utility through the exercise of certain specific actions.

7. Moreover, Applicants state that there will not be any enforcement challenges because Reporting Groups are required by the SEC when filing a Schedule 13D to state the purpose of the acquisition of the securities in question and to identify any proposals or plans the Schedule 13D Reporting Group has that would result in a "material change" to the business of the issuer. Additionally, Applicants point out that Ordering Paragraph (G) of the March 19 Order states that any changes in the information provided on the initial Schedule 13D or 13G must be reflected in an annual amended filing within 45 days of the end of each calendar year. Applicants state that to the extent the Commission is concerned with a lag in the currency of the information disclosed in a Schedule 13D, a Reporting Group that has filed a Schedule 13D is obligated to "promptly file or cause to

be filed” with the SEC an amendment that discloses any material change to the facts previously disclosed in its Schedule 13D.¹¹ Therefore, Applicants state that it would be appropriate for the Commission to amend the March 19 Order to state in Ordering Paragraph (G) that any Reporting Group filing a Schedule 13D is required to file with the Commission all amendments to such Schedule contemporaneously with the filing of such amendments with the SEC.

III. Discussion

8. We will grant Applicants’ request for rehearing. As described above, there are several conditions and restrictions in place to prevent Schedule 13D Reporting Groups from exercising control over a U.S. Traded Utility whose securities are acquired under the blanket authorization granted in the March 19 Order, including Applicants’ commitment not to engage in certain specified activities that could lead to the exercise of control over the management or affairs of a U.S. Traded Utility. Upon further consideration, therefore, we have determined that it is not necessary to limit Applicants’ ability to advocate positions on corporate matters, such as those in the three examples provided by Applicants and described in the first portion of Paragraph 2 above, so long as such advocacy does not involve any of the specific actions that the Applicants have committed not to engage in.

9. We will also revise Ordering Paragraph (G) to read as follows:

(G) Franklin shall file with the Commission, for informational purposes, ~~contemporaneous with filing at~~ at the same time and on the same basis as filed with the SEC, the Schedule 13D and 13G filings, and any amendments thereto, that are relevant to the authorizations granted in this order. ~~Any changes in the information provided on the initial Schedule 13D or 13G must be reflected in an annual amended filing due within 45 days of the end of each calendar year.~~ Franklin shall also file with the Commission any comment or deficiency letters received from the SEC that concern Schedule 13D- or 13G-related compliance audits that are related to investments in U.S. Traded Utilities~~public utilities~~. Such filings shall be made in this docket or in appropriate sub-dockets of this docket.

The Commission orders:

(A) Applicants’ request for rehearing is hereby granted, as discussed in the body of this order.

¹¹ 17 C.F.R. § 240.13d-101 (Item 4) (2008).

(B) Ordering Paragraph (G) of the March 19 Order is modified, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.