



February 2016

## Private Rights of Action for Exempt Energy Transactions: the CFTC EEMAC Committee Meeting

On May 19, 2015, the United States Commodity Futures Trading Commission (CFTC) issued a proposed order exempting certain categories of Southwest Power Pool, Inc. (SPP) electric energy transactions from all but the antifraud and anti-manipulation provisions of the Commodity Exchange Act (CEA) (the Proposed Exemption). In the preamble to the Proposed Exemption, CFTC articulates for the first time its belief that such exemptions do *not* eviscerate private rights of action available to third parties under the CEA, stating that it “did not intend to create such a limitation,” and believes that such exemptions do not prevent private claims for fraud or manipulation under the CEA. 80 Fed. Reg. 29490 (May 19, 2015).<sup>1</sup> CFTC’s statement followed on the heels of a decision of the United States District Court for the Southern District of Texas, in *Aspire Commodities, LP, et al. v. GDF SUEZ Energy North America, Inc., et al.*, Case No. 4:14-cv-01111 (S.D. Tex. April 22, 2014).

On Feb. 3, 2015, the *Aspire* Court had found that CFTC had exempted “energy transactions” (including financial transmission rights, forward capacity transactions, reserve or regulation transactions) conducted in certain Independent System Operators (ISOs) and Regional Transmission Organizations (RTOs)<sup>2</sup> from all provisions of the CEA, except CFTC’s general antifraud and anti-manipulation authority, as well as scienter-based prohibitions. See Order Granting Motion to Dismiss, *Aspire* Dkt. No. 28 at 13 (citing CFTC Final Order regarding energy transactions, 78 Fed. Reg. 19880). The transactions at issue in *Aspire* were conducted in ERCOT, one of the covered RTO/ISOs. Thus, while such transactions remained subject to the previously-specified CFTC authority, the Court found that they were *not* subject to the CEA provision that permitted private rights of action for violations of the CEA. Thus, the Court granted the Defendants’ motion

<sup>1</sup> The text of the Proposed Exemption may be found [here](#).

<sup>2</sup> The covered ISOs and RTOs are the California Independent System Operator Corporation, the Electric Reliability Council of Texas, Inc., ISO New England, Inc., Midwest Independent Transmission System Operator, New York Independent System Operator, and PJM Interconnection, LLC.

to dismiss, and dismissed the claims under Rule 12(b)(6). Aspire has appealed the dismissal to the Fifth Circuit Court of Appeals, and oral argument was held Jan. 8, 2016. The appeal is under consideration.

On Feb. 25, 2016, CFTC’s Energy and Environmental Markets Advisory Committee (EEMAC) held a public meeting to address the SPP Proposed Exemption and, specifically, CFTC’s preamble language regarding private rights of action (among other topics).<sup>3</sup> The EEMAC heard remarks from several industry participants and advisors, all of whom testified to significant concerns related to the “Private Right of Action” language in the preamble. Such issues included the possibility of inconsistent or duplicative treatment of established FERC, CFTC, and industry policy among the 400 judges in nearly 100 judicial districts; the ability of private plaintiffs to do an “end-around” such policy, all while the relevant regulatory bodies were not party to the proceedings; the fact that sound, business-based industry judgment regarding operations and capacity could be second-guessed by aggrieved market participants; the fact that the power industry already has in place robust and efficient dispute resolution and enforcement forums; the fact that the position in the preamble was a “new” position that CFTC had not previously taken, and an attempt to do so without proper notice to the public; and the significant costs of defending third-party lawsuits, all of which would be borne by the end users and consumers, in the form of higher power costs. In closing, CFTC Chairman Timothy G. Massad thanked the participants for their comments, noting that CFTC would strive to balance all possible interests. He noted further that many of the issues raised – primarily, the possibility that federal courts would apply inconsistent analyses to agency and industry rules, and that the affected agencies would have no opportunity to participate in such private actions – are issues with which CFTC (and other agencies) must and do always deal.

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<sup>3</sup> Links to the various statements and presentations during the meeting may be found [here](#).

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