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Rejecting the *Aspire* Court Decision, the CFTC Proposes a ‘Private Right of Action’ Amendment to RTO-ISO Order

The RTO-ISO Order

On March 28, 2013, the Commodity Futures Trading Commission (CFTC) issued an Order (the RTO-ISO Order), which exempted certain electric energy transactions conducted in particular regional transmission organizations (RTOs) and independent system operators (ISOs) from the Commodity Exchange Act (CEA) and CFTC Regulations, with the exception of certain enumerated provisions – specifically, CFTC’s general anti-fraud and anti-manipulation authority, and intent-based prohibitions. The exempted transactions specifically enumerated in and defined by the RTO-ISO Order included “Financial Transmission Rights,” “Energy Transactions,” “Forward Capacity Transactions,” and “Reserve or Regulation Transactions” (collectively, Covered Transactions). To qualify, Covered Transactions, among other conditions, had to be offered under the authority of a tariff approved by the Federal Energy Regulatory Commission (FERC) or the Public Utility Commission of Texas. While the RTO-ISO Order set forth the above-referenced surviving CEA authority, it did not address the availability of CEA Section 22, which provides for private rights of action by plaintiffs injured by alleged violations of the CEA.

Because Section 22 was not within the specifically-enumerated sections of the CEA that survived the blanket exemption, many believed that private rights of action for alleged violations of the CEA by the entities covered by the RTO-ISO Order were thereby extinguished. Federal courts agreed. In February 2015, the United States District Court for the Southern District of Texas held in *Aspire Commodities, L.P. v. GDF Suez Energy N. Amer., Inc.* that the RTO-ISO Order rendered the private right of action in Section 22 of the CEA unavailable to plaintiffs who sought to pursue claims of manipulation regarding Covered Transactions, finding that Section 22 was not within the specifically-enumerated sections that survived the exemptions.¹ The effect of this ruling was to leave the FERC and CFTC to police manipulation claims, not private parties. In February 2016, the United States Court of Appeals for the Fifth Circuit affirmed the Southern District’s dismissal

¹ *Aspire Commodities, L.P. v. GDF Suez Energy N. Amer., Inc.*, Case No. H-14-1111 (S.D. Tex. Feb 3, 2015).

and its conclusion that there is no manipulation private right of action related to Covered Transactions, and the matter appeared to be settled. CFTC, apparently, did not see it that way.

CFTC Responds

On May 18, 2015, the CFTC issued a proposed order similar to the RTO-ISO Order, providing a similar exemption to certain categories of electric energy transactions offered by Southwest Power Pool, Inc. (SPP) (the SPP Proposed Exemption). In the preamble to the SPP Proposed Exemption, CFTC stated that such exemptions do *not* eviscerate private rights of action for fraud and manipulation available to third parties under Section 22 of the CEA. A CFTC Committee heard testimony on the SPP Proposed Exemption on Feb. 25, 2016, but CFTC has not yet issued a final order. To read about the committee meeting in more detail, please see our previous *GT Alert*, "[Private Rights of Action for Exempt Energy Transactions: the CFTC EEMAC Committee Meeting.](#)"

In the interim, the CFTC has doubled-back to the RTO-ISO Order. On May 10, 2016, CFTC filed a [Notice of Proposed Amendment](#) to the RTO-ISO Order, purportedly clarifying its position on Section 22 actions (the Proposed Amendment). In CFTC's view, the RTO-ISO Order does not prevent private claims for fraud or manipulation under the CEA. The Proposed Amendment seeks to clarify that the relevant entities are not exempt from being subject to private rights of action for violations of the CEA that survived the RTO-ISO exemption – *i.e.*, causes of action for fraud and manipulation. In the Proposed Amendment, CFTC disagrees with the view of the industry that preserving Section 22 actions would cause regulatory uncertainty and/or duplicative or inconsistent regulation. Indeed, CFTC takes the position that it may not even have the authority to exempt an entity from the private right of action found in CEA Section 22.

CFTC Chairman, Timothy Massad, released a statement in support of the Proposed Amendment.² In it, he explains that private rights of action have been instrumental in helping to protect market participants. Chairman Massad also explains that allowing private rights of action helps to augment the resources of the CFTC, which serves the public interest. Finally, Chairman Massad states that it was never CFTC's intent to exclude private rights of action, explaining that, if it had intended to do so, CFTC would have specifically addressed it.

CFTC Commissioner J. Christopher Giancarlo "emphatically" dissented.³ He believes that the "plain language" of the RTO-ISO Order, under which U.S. power market participants "have been operating in reliance" for over three years, is unambiguous – that private rights of action did not survive the exemption. He believes that CFTC's position – that "silence" is "intent to preserve" – is "disingenuous," and will "toss legal certainty to the wind and threaten the household budgets" of U.S. power consumers. He further believes that CFTC's action in retroactively applying a previously-unarticulated position, without following rulemaking procedures, creates significant legal uncertainty. Finally, he notes that CFTC is empowered to seek restitution on behalf of aggrieved individuals, and that allowing private rights of action on top of them will cause unnecessary rate increases as companies reserve for, defend, and settle expensive litigation matters.

The CFTC invites comments from the public regarding the Proposed Amendment. All comments must be received by the CFTC on or before June 9, 2016.

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² <http://www.cftc.gov/PressRoom/SpeechesTestimony/massadstatement051016>

³ <http://www.cftc.gov/PressRoom/SpeechesTestimony/giancarlostatement051016>

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