

## INSIGHTS

## CFTC Proposal Creates Jurisdictional Controversy and Uncertainty in the RTO and ISO Markets

May 19, 2016

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On May 10, 2016, the Commodity Futures Trading Commission (“CFTC” or “Commission”) issued a proposed amendment (“May 10 Proposed Amendment”)<sup>[1]</sup> to a final order issued on March 28, 2013 (the “RTO-ISO Order”) that exempted certain specified transactions of six Regional Transmission Organizations (“RTOs”) and Independent System Operators (“ISOs”) from certain provisions of the Commodity Exchange Act (“CEA”) and other CFTC regulations.<sup>[2]</sup> The May 10 Proposed Amendment would modify the RTO-ISO Order to state that the exemption provided therein does not prohibit private causes of action pursuant to CEA section 22 with respect to the specific provisions (anti-fraud and anti-manipulation).<sup>[3]</sup> In February 2015, a federal court dismissed a private lawsuit after finding that CEA section 22 private rights of action were not available to the plaintiff based on the RTO-ISO Order.<sup>[4]</sup> This decision was later affirmed by the Fifth Circuit.<sup>[5]</sup>

Since the publication of the May 10 Proposed Amendment, the Chairman of the CFTC, Timothy Massad, has come out in support of the proposal.<sup>[6]</sup> Chairman Massad stressed the importance of private rights of action in protecting market participants and deterring bad actors.<sup>[7]</sup> He explained that allowing private rights of action “augment[s] the limited enforcement resources of the CFTC, and serve[s] the public interest by allowing harmed parties to seek damages in instances where the Commission lacks the resources to do so on their behalf.”<sup>[8]</sup> Chairman Massad explained that Congress has already determined that “the benefits to the public good” from private rights of action under the CEA “outweigh any potential costs that may be incurred” and that it is important to implement and enforce the CEA as Congress intended.<sup>[9]</sup>

Commissioner J. Christopher Giancarlo has dissented from the proposal and voiced his opinion that the Amendment will cause legal uncertainty and will negatively affect “household budgets of low and middle-income ratepayers by permitting private lawsuits in heavily regulated markets that are at the heart of the U.S. economy.”<sup>[10]</sup> Commissioner Giancarlo contends that the Amendment belies a plain language reading of the RTO-ISO Order and “flies in the face of well-accepted legal precedent established by the U.S. Supreme Court” and the recent decisions of the courts in the *Aspire* litigation.<sup>[11]</sup> Commissioner Giancarlo warns that accepting the Amendment, without a change in facts or circumstances or a change in the law, breeds uncertainty and calls into question other decisions of the Commission.<sup>[12]</sup> Further, Commissioner Giancarlo explains that a private right of action is unnecessary because the RTOs and ISOs are extensively regulated and monitored by the Federal Energy Regulatory Commission (“FERC”) and the Public Utility Commission of Texas (“PUCT”) and are additionally

overseen by independent market monitors—allowing private suits to interfere with this extensive oversight will only lead to “conflicting outcomes depriving market participants of regulatory certainty and coherence.” [\[13\]](#)

Other commentators agree with Commissioner Giancarlo’s fears. At a February 2016 meeting of the Energy & Environmental Markets Advisory Committee, similar concerns to Commissioner Giancarlo’s were voiced. [\[14\]](#) Commissioner Kenneth W. Anderson, Jr. of the PUCT stressed numerous “troubling issues” with the CFTC’s intent to preserve private claims, including: (1) “FERC and PUCT allow for greater efficiency in resolving disputes than private legal citizens,” (2) “Private causes of action will allow collateral attacking on FERC and PUCT authorized valid market rules, undermining the efficient operation and regulation of electricity markets,” and (3) “ISO’s-RTO’s are essentially non-profit entities whose expenses are borne by electricity consumers.” [\[15\]](#) Similar to the comments of Commissioner Giancarlo, PUCT Commissioner Anderson stressed that the RTOs and ISOs are heavily regulated and subject to numerous robust oversight measures. [\[16\]](#) PUCT Commissioner Anderson explained that it is inappropriate for federal courts to be interpreting PUCT and FERC regulations and RTO-ISO market rules, instead of the regulatory authority and that inconsistent determinations are likely to result, which will weaken the regulatory structure and cause uncertainty in the markets as to what conduct is permitted under the rules. [\[17\]](#) Jeff Walker, Senior VP & Chief Risk Office with ACES, similarly voiced serious concern that the CFTC’s proposal will have unintended consequences on the regulation of RTO and ISO market—private causes of action in various district courts could lead to contrary results, causing legal uncertainty, or could even serve to divest FERC or the PUCT of jurisdiction over certain ISO and RTO transactions. It will also open other FERC and PUCT rules up for collateral attack.

According to the RTOs and ISOs, the exemptions contained in the RTO-ISO Order are essential for avoiding “jurisdictional disputes between the CFTC, the [FERC], and the [PUCT] over the regulation of ISO and RTO transactions,” which helps foster legal certainty for the ISOs and RTOs on how their markets will be regulated, and as such is in the public interest. [\[18\]](#) The RTO and ISO markets are complex and should be regulated by the “expert agencies” specifically tasked with monitoring them, not the public at large. [\[19\]](#) Even with private actions prohibited, agency enforcement actions will still be available to go after wrongdoers and restitution can be sought to compensate customers for any damage caused by illegal conduct. [\[20\]](#)

As can be seen by the foregoing, this proposal raises the issue of whether FERC and PUCT regulation of conduct in RTO and ISO markets going forward will be subject to collateral attack in U.S. district courts. At the end of the day, the proposal would seem to create a structure where FERC and the PUCT are effectively co-regulators of markets (with the courts), rather than agencies with exclusive, expert authority to determine, in consideration of all the relevant facts, circumstances, and regulatory policies, what conduct is proper in the RTO and ISO markets. Importantly, the mission of plaintiffs is not to protect the public interest, nor do they value inter-agency comity.

[\[1\]](#) Notice of Proposed Amendment to and Request for Comment on the Final Order in Response to a Petition from Certain Independent System Operators and Regional Transmission Organizations to Exempt Specified Transactions Authorized by a Tariff or Protocol Approved by the Federal Energy Regulatory Commission or the Public Utility Commission of Texas From

Certain Provisions of the Commodity Exchange Act Pursuant to the Authority Provided in the Act, 6351-01-P at 3 (May 10, 2016) (“Proposed Amendment”), *available at* <http://www.cftc.gov/idc/groups/public/@newsroom/documents/file/federalregister051016.pdf>.

**[2]** Final Order in Response to a Petition From Certain Independent System Operators and Regional Transmission Organizations to Exempt Specified Transactions Authorized by a Tariff or Protocol Approved by the Federal Energy Regulatory Commission or the Public Utility Commission of Texas From Certain Provisions of the Commodity Exchange Act Pursuant to the Authority Provided in the Act, 78 FR 19880 (April 2, 2013) (“RTO-ISO Order”). The RTO-ISO Order did not exempt the specified transactions from the Commission’s general anti-fraud and anti-manipulation authority or from other scienter-based prohibitions. *See* 78 FR 19880 at 19880.

**[3]** Proposed Amendment at 3-4; *see also* Release PR7367-16, Commodity Futures Trading Commission (May 10, 2016), *available at* <http://www.cftc.gov/PressRoom/PressReleases/pr7367-16>. The proposed amendment arose in response to an application for exemption by the Southwest Power Pool, Inc. (“SPP”), an RTO subject to FERC regulation, requesting exemptive relief similar to the relief the CFTC granted in the RTO-ISO Order. *See* In the Matter of the Application for an Exemptive Order Under Section 4(c) of the Commodity Exchange Act by Southwest Power Pool, Inc., Oct. 17, 2013, as amended Aug. 1, 2014.

**[4]** *See Aspire Commodities, L.P. v. GDF Suez Energy N. Am., Inc.*, No. H-14-1111, 2015 WL 500482 (S.D. Tex. Feb. 3, 2015).

**[5]** *See Aspire Commodities, L.P. v. GDF Suez Energy N. Am., Inc.*, No. 15-20125, 2016 WL 758689 (5th

Cir. Feb. 25, 2016).

**[6]** *See* Statement of Chairman Timothy Massad in Support of the Proposed Amendment to the RTO-ISO Order (May 10, 2016) *available at* <http://www.cftc.gov/PressRoom/SpeechesTestimony/massadstatement051016>.

**[7]** *Id.*

**[8]** *Id.*

**[9]** *Id.*

**[10]** Statement of Dissent by CFTC Commissioner J. Christopher Giancarlo on the Proposed Amendment to the RTO-ISO Order (May 10, 2016), *available at* <http://www.cftc.gov/PressRoom/SpeechesTestimony/giancarlostatement051016>.

**[11]** *Id.*

**[12]** *Id.*

**[13]** *Id.*

**[14]** See Agenda, Statements, and PowerPoints from the February 25, 2016 Energy & Environmental Markets Advisory Committee Meeting, *available at* [http://www.cftc.gov/About/CFTCCommittees/EnergyEnvironmentalMarketsAdvisory/emac\\_meetings](http://www.cftc.gov/About/CFTCCommittees/EnergyEnvironmentalMarketsAdvisory/emac_meetings).

**[15]** CFTC's *Exemption Orders and Private Rights of Action in Energy Markets*, Presentation for Commodity Futures Trading Commission Energy & Environmental Markets Advisory Committee (Feb. 25, 2016), *available at* [http://www.cftc.gov/idc/groups/public/@aboutcftc/documents/file/eemac022516\\_anderson.pdf](http://www.cftc.gov/idc/groups/public/@aboutcftc/documents/file/eemac022516_anderson.pdf).

**[16]** *Id.*

**[17]** *Id.*

**[18]** Letter from Paul J. Pantano, Jr. on Behalf of the RTO and ISO Commenters to the Commodity Futures Trading Commission (Feb. 24, 2016), *available at* [http://www.cftc.gov/idc/groups/public/@aboutcftc/documents/file/eemac022516\\_pantano.pdf](http://www.cftc.gov/idc/groups/public/@aboutcftc/documents/file/eemac022516_pantano.pdf).

**[19]** *Id.*

**[20]** *Id.*