

LEGAL UPDATES

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CFTC Proposed Amendment to the RTO-ISO Order Allows Private Rights of Action

On May 10, 2016, the Commodity Futures Trading Commission (CFTC) proposed an amendment (Proposed Amendment) to its 2013 order (RTO-ISO Order) exempting specified electric energy-related transactions administered by named regional transmission organizations (RTOs) and independent system operators (ISOs) from certain provisions of the Commodity Exchange Act (CEA) and CFTC regulations. If adopted, the Proposed Amendment would allow private rights of action, including claims of fraud or market manipulation, against RTOs and ISOs for violations of the CEA with respect to the specified electric energy-related transactions. This is significant, given that the Proposed Amendment would undercut the basis supporting the U.S. Fifth Circuit Court of Appeals' recent holding in *Aspire Commodities v. GDF Suez Energy North America* that the original RTO-ISO Order precludes private rights of action for violation of the CEA.

The Background

The RTO-ISO Order, issued March 28, 2013, exempted financial transmission rights and other electricity transactions offered or sold in a market administered by the covered RTOs and ISOs from the majority of the CEA's provisions. The RTO-ISO Order, however, did not exempt transactions from the CEA's anti-fraud and anti-manipulation provisions. The RTO-ISO Order did not specifically address whether it exempted these transactions from private enforcement actions pursuant to CEA Section 22 (private rights of action).

The Southwest Power Pool (SPP), which was not included in the RTO-ISO Order because it did not implement its day-ahead market until March 2014, filed an application with the CFTC seeking the same exemptions given to the

RTOs and ISOs. The CFTC's proposed order, issued on May 18, 2015, included a statement in the preamble that the RTO-ISO Order did not exempt market participants in other organized markets from private causes of action for alleged fraud and manipulation under CEA Section 22, signaling the CFTC's position on the treatment of private rights of action.

Thereafter, the U.S. Court of Appeals for the Fifth Circuit upheld a lower court dismissal of Aspire's private market-manipulation lawsuit against GDF Suez Energy. In Aspire, the Fifth Circuit court held that the CFTC's RTO-ISO Order precludes private rights of action under CEA Section 22 because the Order did not list CEA Section 22 among those provisions the RTO-ISO Order did not grant an exemption.

Proposed Amendment to the RTO-ISO Order

In a direct response to the Aspire ruling, and to harmonize the RTO-ISO Order with the SPP proposed order, the Proposed Amendment explicitly states that its CEA exemptions do not preclude private actions under Section 22 of the CEA. If the CFTC adopts this, private parties would have the right to sue for fraud, manipulation or other scienter-based prohibitions that the RTO-ISO Order did not exempt from CEA liability, occurring in the power markets administered by the named ISOs and RTOs. The Proposed Amendment would not allow private rights of action for violations of the other provisions of the CEA since the ISO-RTO Order excuses market participants from compliance with such provisions.

The CFTC commissioners were split on the Proposed Amendment, 2-1. Chairman Timothy Massad, in support, contends the amendment will ensure clarity while preserving the "instrumental" role that a private right of action plays in "protecting the American public, deterring bad actors, and maintaining the credibility of the markets subject to [CFTC's] jurisdiction." In contrast, Commissioner J. Christopher Giancarlo offered his dissent, stating the Proposed Amendment "manages to simultaneously toss legal certainty to the wind and threaten the 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." Giancarlo also argued that, if approved, the Proposed Amendment would introduce legal uncertainty not just for the RTO-ISO Order but for all other orders the CFTC adopts, as well as increase cost to ratepayers due to an almost certain increase in litigation, court costs and settlement damages.

Texas Public Utility Commission Response

At the May 19, 2016, open meeting of the Public Utility Commission of Texas (PUCT), the commissioners discussed the Proposed Amendment as well as the memo PUCT Commissioner Kenneth Anderson wrote on the topic, asking the other commissioners for approval to file comments on the Proposed Amendment. During the meeting, Chairman Donna Nelson expressed her fear

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regarding the Proposed Amendment and the reach of the CFTC. Anderson agreed and stated that the dissent of CFTC Commissioner Giancarlo was persuasive. After a brief discussion, the PUCT commissioners agreed that Anderson (or his staff) would draft comments to the Proposed Amendment, which will be discussed and finalized at the June 9, 2016, open meeting.

What This Means to You

If the CFTC's Proposed Amendment to explicitly allow a private right of action for fraud and manipulation is adopted, general regulatory and legal uncertainty will likely continue, as well as heightened litigation and compliance risk. Those entities that participate in ISO and RTO markets should consider commenting on the Proposed Amendment. The deadline is June 16, 2016.

Contact Us

For more information on how the CFTC's proposed amendment might impact your business or your clients, please contact Chris Reeder with Husch Blackwell's Energy & Natural Resources team at 512.479.1154 or Katie Murphy at 402.964.5097.