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## C F T C

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### CLIENT ALERT: CFTC PROPOSED AMENDMENT TO RTO/ISO EXEMPTION

On March 28, 2013, the Commodity Futures Trading Commission (“CFTC”) issued an order exempting specified electric energy transactions from certain provisions of the Commodity Exchange Act (“CEA”) and Commission regulations (“2013 Order”).<sup>1</sup> On May 9, 2016, the CFTC issued a Proposed Amendment<sup>2</sup> to the 2013 Order that would “explicitly provide that the [2013] Order does not exempt ... entities ... from the private right of action found in section 22 of the CEA” with respect to the substantive provisions of the CEA that are not covered by the 2013 Order (primarily fraud and manipulation).<sup>3</sup> Comments on the Proposed Amendment are due 30 days after publication in the *Federal Register* (June 15).

#### Background

The 2013 Order applies to the purchase or sale of specifically defined “financial transmission rights,” “energy transactions,” “forward capacity transactions,” and “reserve or regulation transactions” that are offered or sold in a market administered by CAISO, MISO, ISO-NE, PJM, NYISO, and ERCOT pursuant to a tariff or protocol approved or permitted to take effect by FERC or PUCT.<sup>4</sup> The 2013 Order also exempts persons offering, entering into, rendering advice, or rendering other services with respect to those transactions.

SPP later requested a similar exemption separately, which the CFTC has proposed to grant (“SPP Proposed Order”),<sup>5</sup> explicitly stating that the SPP Proposed Order would not exempt entities from the CEA’s private right of action with respect to substantive provisions of the CEA that still apply, and stated that “in [its] view, the [2013] Order does not prevent private claims for fraud or manipulation

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<sup>1</sup> Final Order in Response to a Petition From Certain ISOs and RTOs To Exempt Specified Transactions From Certain Provisions of the Commodity Exchange Act, 78 Fed. Reg. 19,880 (Apr. 2, 2013), <https://www.gpo.gov/fdsys/pkg/FR-2013-04-02/pdf/2013-07634.pdf>.

<sup>2</sup> Commodity Futures Trading Comm’n, Notice of Proposed Amendment to and Request for Comment on the 2013 Order, No. 6351-01-P (May 10, 2016), <http://www.cftc.gov/idc/groups/public/@newsroom/documents/file/federalregister051016.pdf> (“Proposed Amendment”).

<sup>3</sup> Proposed Amendment, slip at 4.

<sup>4</sup> 2013 Order, 78 Fed. Reg. at 19,822.

<sup>5</sup> Notice of Proposed Order and Request for Comment on an Application for an Exemptive Order From Southwest Power Pool, Inc. From Certain Provisions of the Commodity Exchange Act Pursuant to the Authority Provided in Section 4(c)(6) of the Act, 80 Fed. Reg. 29,490 (May 21, 2015), <https://www.gpo.gov/fdsys/pkg/FR-2015-05-21/pdf/2015-12346.pdf>.

under the CEA.”<sup>6</sup> However, a federal district court has found, and been upheld on appeal, that the 2013 Order precludes all private causes of action under the CEA with respect to the specified transactions.<sup>7</sup>

## The Proposed Amendment

In response to *Aspire*, the CFTC is proposing to amend the 2013 Order to state that the CEA’s private right of action is available where an entity has violated a CEA provision from which the 2013 Order does not exempt it. The Proposed Amendment characterizes the amendment as a “clarif[ication],”<sup>8</sup> and states that it would not undermine any “reasonable reliance interests” because “[t]he affected parties should have been aware of, and complying with, the CEA provisions on fraud and manipulation whether or not a private plaintiff could sue for violating them, because they knew or should have known that the Commission could bring an action to redress violations of those provisions.”<sup>9</sup> On the other hand, in a strongly worded dissent, Commissioner Giancarlo argues that the 2013 Order clearly did not reserve the CEA’s private right of action for any covered transactions; that market participants have been relying on the 2013 Order for three years; and that permitting private litigation, in addition to the CFTC’s own regulation and FERC’s extensive regulation of RTOs and ISOs, “would result in too many cooks in the proverbial oversight kitchen.”<sup>10</sup> He characterizes the Proposed Amendment as “manag[ing] to simultaneously toss legal certainty to the wind and threaten the household budgets of low and middle-income ratepayers.”<sup>11</sup> The order, if amended as proposed, means that market participants (and possibly RTOs or ISOs themselves) could face third party lawsuits under the CEA for fraud or market manipulation, not just enforcement actions by FERC or the CFTC or suits from counterparties.

As noted above, comments on the Proposed Amendment are due on June 15. Please contact us if you have specific concerns or would like to submit comments.

We note that the information contained in this memorandum is highly simplified for general reading and is not intended as legal advice for any specific situation. Please do not hesitate to contact one of the attorneys listed below if you would like advice or additional information.

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<sup>6</sup> Proposed Amendment, slip at 10-11.

<sup>7</sup> *Id.* at 8-9, citing *Aspire Commodities, L.P. v. GDF Suez Energy N. Am., Inc.*, No. H-14-1111, 2015 WL 500482 (S.D. Tex. Feb. 3, 2015), *aff’d*, No. 15-20125, 2016 WL 758689 (5th Cir. Feb. 25, 2016) (“*Aspire*”).

<sup>8</sup> Proposed Amendment, slip at 12.

<sup>9</sup> *Id.*, slip at 14 n.50.

<sup>10</sup> *Id.*, App. 3 – Statement of dissent by Comm’r J. Christopher Giancarlo, slip at 39.

<sup>11</sup> *Id.*, slip at 37.