6351-01-P

COMMODITY FUTURES TRADING COMMISSION

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

AGENCY: Commodity Futures Trading Commission.

ACTION: Notice of proposed order and request for comment.

SUMMARY: The Commodity Futures Trading Commission ("CFTC" or "Commission") is proposing an amendment to an order issued on March 28, 2013 exempting specified transactions from certain provisions of the Commodity Exchange Act ("CEA" or "Act") and Commission regulations.

DATES: Comments for the Notice of Proposed Order must be received on or before **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER PUBLICATION]**.

ADDRESSES: You may submit comments by any of the following methods:

- CFTC website: http://comments.cftc.gov. Follow the instructions for submitting comments through the Comments Online process on the website.

- Mail: Christopher Kirkpatrick, Secretary of the Commission, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street NW., Washington, DC 20581.

- Hand Delivery/Courier: Same as Mail, above.
- Federal eRulemaking Portal: http://www.regulations.gov. Follow the instructions for submitting comments.

Please submit your comments using only one of these methods.

All comments must be submitted in English, or if not, accompanied by an English translation. Comments will be posted as received to http://www.cftc.gov. You should submit only information that you wish to make available publicly. If you wish the Commission to consider information that you believe is exempt from disclosure under the Freedom of Information Act, a petition for confidential treatment of the exempt information may be submitted according to the established procedures in § 145.9 of the Commission's regulations, 17 CFR 145.9.

The Commission reserves the right, but shall have no obligation, to review, pre-screen, filter, redact, refuse or remove any or all of your submission from http://www.cftc.gov that it may deem to be inappropriate for publication, such as obscene language. All submissions that have been redacted or removed that contain comments on the merits of this action will be retained in the public comment file and will be considered as required under the Administrative Procedure Act and other applicable laws, and may be accessible under the Freedom of Information Act.

FOR FURTHER INFORMATION CONTACT: Robert B. Wasserman, Chief Counsel, 202-418-5092, rwasserman@cftc.gov, Alicia L. Lewis, Special Counsel, 202-418-5862, alewis@cftc.gov, or Andrée Goldsmith, Special Counsel, 202-418-6624, agoldsmith@cftc.gov, Division of Clearing and Risk; David P. Van Wagner, Chief Counsel, 202-418-5481, dvanwagner@cftc.gov, or Riva Spear Adriance, Senior Special

Counsel, 202-418-5494, radriance@cftc.gov, Division of Market Oversight, in each case at the Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street NW., Washington, DC 20581.

SUPPLEMENTARY INFORMATION:

Overview

The Commission is proposing to amend an order issued on March 28, 2013 pursuant to the authority in section 4(c)(6) of the Act[1] exempting specified electric energy transactions from certain provisions of the CEA and Commission regulations ("RTO-ISO Order").[2] The RTO-ISO Order was issued in response to a consolidated petition from certain regional transmission organizations ("RTOs") and independent system operators ("ISOs"). The RTO-ISO Order exempted contracts, agreements, and transactions for the purchase or sale of the limited electric energy-related products that are specifically described within the RTO-ISO Order from the provisions of the CEA and Commission regulations, with the exception of the Commission's general anti-fraud and anti-manipulation authority, and scienter-based prohibitions, under CEA sections 2(a)(1)(B), 4(d), 4b, 4c(b), 4o, 4s(h)(1)(A), 4s(h)(4)(A), 6(c), 6(d), 6(e), 6c, 6d, 8, 9, and 13 of the Act, and any implementing regulations promulgated under these sections including, but not limited to, Commission regulations 23.410(a) and (b), 32.4, and part 180.[3] The RTO-ISO Order did not specifically note that the exemption contained therein does not apply to actions pursuant to CEA section 22 with respect to those substantive

[1] 7 U.S.C. 1 et seq.
[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, Apr. 2, 2013. The RTO-ISO Order was published in the Federal Register on April 2, 2013.
[3] The foregoing provisions are referred to as the "Excepted Provisions."

provisions that are excepted from the exemption (i.e. the Excepted Provisions). Although the Commission did not intend to provide an exemption from the private right of action in CEA section 22, the Fifth Circuit held that this was the effect of the RTO-ISO Order. The Commission is thus proposing to amend the text of the RTO-ISO Order to explicitly provide that the RTO-ISO Order does not exempt the entities covered under the RTO-ISO Order from the private right of action found in section 22 of the CEA[4] with respect to the Excepted Provisions ("Proposed Amendment"). A copy of the RTO-ISO Order is available at 78 FR 19880, and on the Commission's website at http://www.cftc.gov/idc/groups/public/@lrfederalregister/documents/file/2013-07634a.pdf.

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I. Relevant Dodd-Frank Provisions[5]

[4] 7 U.S.C. 25.
[5] For a fuller discussion, see RTO-ISO Order at 19881-82.

On July 21, 2010, President Obama signed the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act").[6] Title VII of the Dodd-Frank Act amended the CEA and altered the scope of the Commission's exclusive jurisdiction.[7] In particular, it expanded the Commission's exclusive jurisdiction, which had included futures traded, executed, and cleared on CFTC-regulated exchanges and clearinghouses, to also cover swaps traded, executed, or cleared on CFTC-regulated exchanges or clearinghouses.[8] As a result, the Commission's exclusive jurisdiction now includes swaps as well as futures.

The Dodd-Frank Act also added a savings clause that addresses the roles of the Commission, the Federal Energy Regulatory Commission ("FERC"), and state regulatory authorities as they relate to certain agreements, contracts, or transactions traded pursuant to the tariff or rate schedule of an RTO or ISO that has been approved by FERC or the state regulatory authority.[9] That savings clause, paragraph (I)(i) of CEA section 2(a)(1), preserves the statutory authority of FERC and state regulatory authorities over agreements, contracts, or transactions entered into pursuant to a tariff or rate schedule approved by FERC or a State regulatory authority, that are (1) not executed, traded, or cleared on an entity or trading facility subject to registration, or (2) executed, traded, or cleared on a registered entity or trading facility owned or operated by an RTO or

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[6] See Dodd-Frank Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010). The text of the Dodd-Frank Act may be accessed at http://www.cftc.gov/ucm/groups/public/@swaps/documents/file/hr4173_enrolledbill.pdf.
[7] Section 722(e) of the Dodd-Frank Act.
[8] See 7 U.S.C. 2(a)(1)(A). The Dodd-Frank Act also added section 2(h)(1)(A), which requires swaps to be cleared if required to be cleared and not subject to a clearing exception or exemption. See 7 U.S.C. 2(h)(1)(A).
[9] See 7 U.S.C. 2(a)(1)(I).

ISO.[10] However, paragraph (I)(ii) of CEA section 2(a)(1) also preserves the Commission's statutory authority over such agreements, contracts, or transactions.[11]

The Dodd-Frank Act granted the Commission specific powers to exempt certain contracts, agreements, or transactions from duties otherwise required by statute or Commission regulation by adding, as relevant here, new section 4(c)(6) to the CEA. Section 4(c)(6) provides that the Commission shall, if certain conditions are met, issue exemptions from the "requirements" of the CEA for certain transactions entered into pursuant to a tariff or rate schedule approved or permitted to take effect by FERC or a state regulatory authority.[12]

The Commission must act "in accordance with" sections 4(c)(1) and (2) of the CEA when issuing an exemption under section 4(c)(6).[13] Section 4(c)(1) grants the Commission the authority to exempt any agreement, contract, or transaction or class of transactions, including swaps, from certain provisions of the CEA, in order to promote responsible economic or financial innovation and fair competition.[14] Section 4(c)(2)[15] of the Act further provides that the Commission may not grant exemptive relief unless it determines that: (1) the exemption would be consistent with the public interest and the purposes of the CEA; (2) the transaction will be entered into solely between "appropriate

[10] 7 U.S.C. 2(a)(1)(I)(i).
[11] See 7 U.S.C. 2(a)(1)(I)(ii).
[12] See 7 U.S.C. 6(c)(6). CEA section 4(c)(6) provides that the Commission shall issue an exemption only if the Commission determines that the exemption would be consistent with the public interest and the purposes of the Act. Moreover, the Commission must act in accordance with 4(c)(1) and 4(c)(2) when issuing an exemption under section 4(c)(6).
[13] 7 U.S.C. 6(c)(6).
[14] 7 U.S.C. 6(c)(1).
[15] 7 U.S.C. 6(c)(2).

persons" as that term is defined in section 4(c);[16] and (3) the exemption will not have a material adverse effect on the ability of the Commission or any contract market to discharge its regulatory or self-regulatory responsibilities under the CEA.[17] In enacting section 4(c), Congress noted that the purpose of the provision is to give the Commission a means of providing certainty and stability to existing and emerging markets so that financial innovation and market development can proceed in an effective and competitive manner.[18]

II. Background

A. RTO-ISO Order

On March 28, 2013, the Commission issued the RTO-ISO Order, which exempts specified transactions of particular RTOs and ISOs[19] from certain provisions of the CEA and Commission regulations. The scope of the RTO-ISO Order includes transactions that fall within the definitions of "Financial Transmission Rights," "Energy Transactions," "Forward Capacity Transactions," or "Reserve or Regulation Transactions"[20] (collectively, the "Covered Transactions") and that are offered or sold in a market administered by one of the petitioning RTOs or ISOs pursuant to a tariff, rate schedule, or

[16] Section 4(c)(3) of the CEA further outlines who may constitute an appropriate person for the purpose of a particular 4(c) exemption and includes, as relevant to the RTO-ISO Order: (a) any person that qualifies for one of ten defined categories of appropriate persons; or (b) such other persons that the Commission determines to be appropriate in light of their financial or other qualifications, or the applicability of appropriate regulatory protections.
[17] 7 U.S.C. 6(c)(2).
[18] H.R. Rep. No. 102-978, 102d Cong. 2d Sess., 1992 U.S.C.C.A.N. 3179, 3213 (1992).
[19] Six entities (the "Requesting Parties") jointly filed a petition requesting the exemption provided in the RTO-ISO Order: Midwest Independent Transmission System Operator, Inc. ("MISO"), ISO New England, Inc. ("ISO NE"), and PJM Interconnection, L.L.C. ("PJM") are RTOs subject to regulation by FERC; California Independent System Operator Corporation ("CAISO") and New York Independent System Operator, Inc. ("NYISO") are ISOs subject to regulation by FERC; and the Electric Reliability Council of Texas, Inc. ("ERCOT") performs the role of an ISO and is subject to regulation by the Public Utility Commission of Texas ("PUCT"). See RTO-ISO Order at 19882.
[20] See id. at 19912-13.

protocol that has been approved or permitted to take effect by FERC or PUCT.[21] In addition, to be eligible for the exemption in the RTO-ISO Order, all parties to the agreements, contracts, or transactions that are covered by the RTO-ISO Order must be: (1) "appropriate persons," as defined in section 4(c)(3)(A) through (J) of the CEA; (2) "eligible contract participants," as defined in section 1a(18)(A) of the CEA and in Commission regulation 1.3(m); or (3) in the business of (i) generating, transmitting, or distributing electric energy, or (ii) providing electric energy services that are necessary to support the reliable operation of the transmission system.[22] To be eligible for the exemption in the RTO-ISO Order, the transactions must comply with all other enumerated terms and conditions in the RTO-ISO Order.[23]

In the RTO-ISO Order, the Commission excepted from the exemption the Commission's general anti-fraud and anti-manipulation authority, and scienter-based prohibitions, under CEA sections 2(a)(1)(B), 4(d), 4b, 4c(b), 4o, 4s(h)(1)(A), 4s(h)(4)(A), 6(c), 6(d), 6(e), 6c, 6d, 8, 9, and 13 of the Act, and any implementing regulations promulgated under these sections including, but not limited to, Commission regulations 23.410(a) and (b), 32.4, and part 180.[24] The RTO-ISO Order did not discuss the application of CEA section 22 with respect to those substantive provisions that are excepted from the exemption (i.e. the Excepted Provisions).[25]

B. Aspire v. GDF Suez

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[21] See id. at 19913. The exemption in the RTO-ISO Order also applies to "any person or class of persons offering, entering into, rendering advice, or rendering other services with respect" to any of the Covered Transactions. See id. at 19912. These entities, including the six Requesting Parties (see supra note 19) are hereinafter referred to collectively as the "Covered Entities."
[22] See id. at 19913-14.
[23] See id. at 19912-15.
[24] See id. at 19912.
[25] See id.

In February 2015, the United States District Court for the Southern District of Texas dismissed a private lawsuit on the ground that the CEA section 22 private right of action was not available to the plaintiffs under the RTO-ISO Order.[26] The lawsuit alleged that certain electricity generators in ERCOT's market manipulated the market price of electricity by, among other things, intentionally withholding electricity generation during times of tight supply.[27] The suit further alleged that this conduct created artificial and unpredictable prices in the secondary futures markets.[28] The claim thus alleged that defendants were manipulating contract prices in the derivatives commodities market in violation of the Act.[29] The District Court dismissed the claim, finding that under the RTO-ISO Order, the private right of action in CEA section 22 was "unavailable to [p]laintiffs."[30] In February 2016, the United States Court of Appeals for the Fifth Circuit affirmed the District Court's ruling.[31]

C. Southwest Power Pool Proposed Order

Southwest Power Pool ("SPP") is an RTO subject to regulation by FERC. On October 17, 2013, SPP filed an Exemption Application[32] with the Commission requesting that the Commission exercise its authority under section 4(c)(6) of the CEA[33] and section 712(f) of the Dodd-Frank Act[34] to exempt certain contracts, agreements, and transactions

[26] Aspire Commodities, L.P. v. GDF Suez Energy N. Am., Inc., No. H-14-1111, 2015 WL 500482 (S.D. Tex. Feb. 3, 2015).
[27] Id. at *1-*2.
[28] Id. at *2.
[29] See id.
[30] Id. at *5.
[31] See Aspire Commodities, L.P. v. GDF Suez Energy N. Am., Inc., No. 15-20125, 2016 WL 758689 (5th Cir. Feb. 25, 2016).
[32] SPP filed an amended Exemption Application on August 1, 2014. Citations herein to "Exemption Application" are to the amended Exemption Application.
[33] 7 U.S.C. 6(c)(6).
[34] See section 712(f) of the Dodd-Frank Act.

for the purchase or sale of specified electric energy products, that are offered pursuant to a FERC-approved tariff, from most provisions of the Act.[35] The relief that SPP requested was substantially similar to the relief the Commission granted in the RTO-ISO Order.[36]

On May 18, 2015, the Commission issued a proposed order with respect to SPP's Exemption Application ("SPP Proposed Order").[37] The exemptive relief proposed in the SPP Proposed Order was substantially similar to the exemptive relief granted by the Commission in the RTO-ISO Order. Like the RTO-ISO Order, the SPP Proposed Order excepted from the exemption the Commission's general anti-fraud and anti-manipulation authority, and scienter-based prohibitions, under CEA sections 2(a)(1)(B), 4(d), 4b, 4c(b), 4o, 4s(h)(1)(A), 4s(h)(4)(A), 6(c), 6(d), 6(e), 6c, 6d, 8, 9, and 13, and any implementing regulations promulgated thereunder including, but not limited to, Commission regulations 23.410(a) and (b), 32.4, and part 180.[38]

As proposed, the SPP Proposed Order would not exempt SPP from the private right of action under CEA section 22 for violations of the manipulation, fraud, and scienter-based provisions from which SPP will not be exempted. The Commission explained in the SPP Proposed Order that neither the proposed nor the final RTO-ISO Order discussed, referred to, or mentioned CEA section 22, which provides for private rights of action for damages against persons who violate the CEA, or persons who

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[35] See Exemption Application at 1. SPP was not one of the entities that petitioned for the RTO-ISO Order because SPP did not at that time offer the types of transactions covered by that order. See id. at 7.
[36] See id. at 2.
[37] 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 FR 29490, May 21, 2015. The SPP Proposed Order was published in the Federal Register on May 21, 2015.
[38] SPP Proposed Order at 29516.

willfully aid, abet, counsel, induce, or procure the commission of a violation of the Act.[39] The Commission explained that by enacting CEA section 22, Congress provided private rights of action as a means for addressing violations of the Act as an alternative or supplement to Commission enforcement action.[40] The Commission observed that it would be highly unusual for the Commission to reserve to itself the power to pursue claims for fraud and manipulation—a power that includes the option of seeking restitution for persons who have sustained losses from such violations or a disgorgement of gains received in connection with such violations—while at the same time, without explanation, denying private rights of action and damages remedies for the same violations.[41] The Commission stated that if it intended to take such a differentiated approach (i.e., to limit the rights of private persons to bring such claims while reserving to itself the right to bring the same claims), the RTO-ISO Order would have included a discussion or analysis of the reasons therefore.[42] The Commission therefore stated that it did not intend to create such a limitation, and that, in the Commission's view, the RTO-ISO Order does not prevent private claims for fraud or manipulation under the CEA.[43] The Commission further stated that this view would apply equally to the SPP Proposed Order.[44]

The public comment period on the SPP Proposed Order ended on June 22, 2015. The Commission received thirteen (13) comment letters on the SPP Proposed Order,[45] the

[39] Id. at 29493.
[40] Id.
[41] Id.
[42] Id.
[43] Id.
[44] Id.
[45] All comment letters received in response to the SPP Proposed Order are available through the Commission's website at: http://comments.cftc.gov/PublicComments/CommentList.aspx?id=1586.

majority of which argued that the exemptions contained in the RTO-ISO Order extended to include private claims for fraud and manipulation under section 22 of the CEA, and that the exemption in the final SPP exemptive order should also include those private claims.

III. Proposed Amendment

A. Private Right of Action Under CEA Section 22

Currently, Paragraph 1 of the RTO-ISO Order states that the Commission:

> Exempts, subject to the conditions and limitations specified herein, the execution of the electric energy-related agreements, contracts, and transactions that are specified in paragraph 2 of this Order and any person or class of persons offering, entering into, rendering advice, or rendering other services with respect thereto, from all provisions of the CEA, except, in each case, the Commission's general anti-fraud and anti-manipulation authority, and scienter-based prohibitions, under CEA sections 2(a)(1)(B), 4(d), 4b, 4c(b), 4o, 4s(h)(1)(A), 4s(h)(4)(A), 6(c), 6(d), 6(e), 6c, 6d, 8, 9, and 13, and any implementing regulations promulgated under these sections including, but not limited to, Commission regulations 23.410(a) and (b), 32.4, and part 180. [46]

Under the RTO-ISO Order, for those CEA requirements from which the RTOs and ISOs are exempt, it follows that there can be no claim under CEA section 22 with respect to those requirements. The RTO-ISO Order did not specifically note that the exemption contained therein does not apply to actions pursuant to CEA section 22 with respect to the Excepted Provisions.

In light of the Aspire court ruling discussed above,[47] the Commission is proposing to amend the text of the RTO-ISO Order to clarify that the Covered Entities are not exempt from the private right of action in CEA section 22 with respect to the Excepted

[46] See RTO-ISO Order at 19912.
[47] See supra section II.B.

Provisions. Specifically, the Commission proposes to amend Paragraph 1 of the RTO-ISO Order to read as follows (the additional language is italicized):

> Exempts, subject to the conditions and limitations specified herein, the execution of the electric energy-related agreements, contracts, and transactions that are specified in paragraph 2 of this Order and any person or class of persons offering, entering into, rendering advice, or rendering other services with respect thereto, from all provisions of the CEA, except, in each case, the Commission's general anti-fraud and anti-manipulation authority, and scienter-based prohibitions, under CEA sections 2(a)(1)(B), 4(d), 4b, 4c(b), 4o, 4s(h)(1)(A), 4s(h)(4)(A), 6(c), 6(d), 6(e), 6c, 6d, 8, 9, and 13, and any implementing regulations promulgated under these sections including, but not limited to, Commission regulations 23.410(a) and (b), 32.4, and part 180. This exemption also does not apply to actions pursuant to CEA section 22 with respect to the foregoing enumerated provisions.[48]

The Commission believes that the treatment of the section 22 private right of action should be consistent across all RTOs and ISOs.[49] The Commission therefore proposes the foregoing amendment to the RTO-ISO Order in order to ensure clarity, and for the additional reasons stated below.

It has been suggested that preserving the private right of action in CEA section 22 would cause regulatory uncertainty or inconsistent or duplicative regulation. However, the Covered Entities will be subject to the same substantive CEA provisions, including judicial interpretations of those provisions, regardless of whether the plaintiff who brings an action alleging a violation of one of those provisions is the Commission or a private

[48] The Commission's Proposed Amendment to the RTO-ISO Order does not alter any of the other terms or conditions of the RTO-ISO Order.

[49] One commenter on the SPP Proposed Order expressed the concern that if the final SPP exemptive order contained preamble language to the effect that SPP would not be exempt from the CEA section 22 private right of action, it would be inconsistent with the RTO-ISO Order. In amending the RTO-ISO Order and finalizing the SPP exemptive order, the Commission will ensure that the language of both orders and both preambles is consistent.

party acting under CEA section 22.[50] When such interpretations are necessary in a civil action, the identity of the plaintiff is of little significance. Thus, any potential for conflict among regulators and others or for conflicting judicial interpretations does not depend on whether the plaintiff is a private litigant or the Commission. The Commission also notes that the CFTC frequently participates as amicus curiae in cases where significant interpretive issues arise under the CEA. The existence of a private right of action also is not inconsistent with or detrimental to cooperation between the CFTC and FERC. Therefore, amending the RTO-ISO Order to explicitly preserve the private right of action with respect to fraud and manipulation will not cause regulatory uncertainty or duplicative or inconsistent regulation. Moreover, conflicting judicial interpretations regarding the nature of the Covered Transactions would not affect the jurisdiction of FERC or any relevant state regulatory authority.[51]

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[50] For this reason, the Commission does not believe that the Proposed Amendment to the RTO-ISO Order undermines any reasonable reliance interests on the part of the Covered Entities. The 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.

[51] To the extent that a court, during a civil proceeding alleging fraud or manipulation under CEA section 22, deems one of the Covered Transactions to be a swap, such a finding would not affect FERC's or PUCT's authority over the Covered Transactions. Section 2(a)(1)(I)(i) of the CEA provides that nothing in the Act shall limit or affect any statutory authority of FERC or a State regulatory authority with respect to an agreement, contract, or transaction that is entered into pursuant to a tariff or rate schedule approved by FERC or a State regulatory authority and is—(1) not executed, traded, or cleared on a registered entity or trading facility; or (2) executed, traded, or cleared on a registered entity or trading facility owned or operated by an RTO] or ISO.

By the terms of the RTO-ISO Order, all of the Covered Transactions must be offered or sold pursuant to a Requesting Party's tariff that has been approved or permitted to take effect by FERC or PUCT (which is a state regulatory authority). See RTO-ISO Order at 19913. In addition, the RTO-ISO Order exempts the Covered Entities from registration requirements under the CEA, and the Proposed Amendment does not change that. As a result, none of the Covered Entities is a "registered entity" as defined in CEA section 1a(40). Thus, the Covered Transactions, to the extent they are cleared, would fall within CEA section 2(a)(1)(I)(i)(I). Moreover, to the extent the Covered Transactions are executed or traded on a "trading facility," any such trading facility would be owned or operated by an RTO or ISO, since the Covered Transactions are offered or sold in a market administered (i.e., owned or operated by) one of the Requesting Parties. As such, the Covered Transactions would fall within CEA section 2(a)(1)(I)(i)(II). Therefore, given the savings clause in CEA section 2(a)(1)(I)(i), nothing in the CEA could

Second, the private right of action in the CEA is instrumental in protecting the American public, deterring bad actors, and maintaining the credibility of the markets subject to the Commission's jurisdiction. Private claims serve the public interest by empowering injured parties to seek compensation for damages where the Commission lacks the resources to do so on their behalf. Moreover, the prospect of private rights of action serves the public interest by deterring misconduct in and maintaining the integrity of the markets subject to the Commission's jurisdiction.

Third, the private right of action under CEA section 22 was established by Congress as an integral part of the CEA's enforcement and remedial scheme. The Act grants the Commission various administrative tools to enforce the statute,[52] and it also authorizes the Commission to seek redress in court in the form of injunctions, penalties, and restitution for injured parties.[53] But Congress deemed those tools insufficient, and, in the Futures Trading Act of 1982, codified an express private right of action because it found that private damages actions are "critical to protecting the public and fundamental to maintaining the creditability of the futures market."[54] The Federal Power Act ("FPA"), on the other hand, expressly prohibits private rights of action for fraud and manipulation with respect to the purchase or sale of electric energy subject to FERC's jurisdiction.[55] The fact that Congress made different judgments with respect to a private

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limit or otherwise affect FERC's or PUCT's authority over the Covered Transactions, regardless of any judicial finding regarding the nature of the Covered Transactions.

[52] E.g., 7 U.S.C. 9(4).

[53] See 7 U.S.C. 13a-1.

[54] H.R. Rep. No. 97-565, at 57 (1982).

[55] See FPA section 222(a), 16 U.S.C. 824v(a) (prohibiting the use of any manipulative or deceptive device or contrivance in connection with the purchase or sale of electric energy or transmission services subject to the jurisdiction of FERC) and FPA section 222(b), 16 U.S.C. 824v(b) (stating that nothing in that section shall be construed to create a private right of action.).

right of action in the CEA and the FPA does not persuade the Commission to strip injured parties of their remedy under the CEA, nor does it amount to a conflict between the two statutes. The difference between the two statutes in this respect is by Congress's design, subject to the proviso that the Commission is to issue exemptions where it determines exemptions would be in the public interest.[56]

Finally, the Commission's preservation of section 22 liability with respect to the Excepted Provisions is consistent with the Commission's actions in prior 4(c) orders. Section 22 establishes liability for any person "who violates" the Act or "who willfully aids, abets, counsels, induces, or procures the commission of a violation" of the Act.[57] The beneficiary of an order under section 4(c) does not violate the Act by noncompliance with CEA requirements from which it is exempt. For instance, in a 4(c) order issued in 2011, the Commission granted temporary exemptive relief from certain provisions of the CEA added or amended by Title VII of the Dodd-Frank Act that referenced certain terms that the Commission had not yet defined.[58] That order expressly stated that exemption from section 22 liability was "not necessary" because, "[t]o the extent that the Final Order provides exemptive relief under CEA section 4(c) [from certain provisions of the CEA], such exemptive relief would, in effect, preclude a person from succeeding in a private right of action under CEA section 22(a) for a violation of such provisions."[59] In other words, no private right of action exists for noncompliance with exempted CEA

Under section 306 of the FPA, however, a person or entity may initiate an administrative proceeding with FERC for a violation of the FPA, see 16 U.S.C. 825e, and FERC has ruled that a person or entity may initiate an administrative proceeding alleging market manipulation in violation of 16 U.S.C. 824v. See Blumenthal v. ISO New England Inc., 128 FERC ¶ 61,182, at para. 56 (Aug. 24, 2009).

[56] See 7 U.S.C. 6(c)(6).

[57] 7 U.S.C. 25(a)(1).

[58] Effective Date for Swap Regulation, 76 FR 42508, Jul. 19, 2011.

[59] Id. at 42517.

provisions, as such conduct would not "violate[]" the Act within the meaning of section 22. On the other hand, exempting the Covered Entities from private liability for violations of CEA requirements with which they must comply—the prohibitions on fraud and manipulation—would not be consistent with the Commission's actions in prior 4(c) exemptive orders.

Moreover, in prior 4(c) exemptive orders issued by the Commission that reserved anti-fraud and anti-manipulation provisions, the Commission has never reserved its own ability to sue for such behavior while at the same time denying private rights of action for the same conduct.[60] In certain instances, the Commission specifically reserved certain substantive CEA provisions prohibiting fraud and manipulation, but did not include section 22 in that list.[61] In such cases, however, the orders did not explicitly preserve any

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[60] See, e.g., Exemptive Order for SPDR Gold Futures Contracts, 73 FR 31979, 31979-80, June 5, 2008 (exempting transactions in SPDR gold futures contracts "from those provisions of the Act and the Commission's regulations thereunder that, if the underlying were considered to be a commodity that is not a security, would be inconsistent with the trading and clearing of SPDR gold futures contracts as security futures"); Order: (1) Pursuant to Section 4(c) of the Commodity Exchange Act (a) Permitting Eligible Swap Participants To Submit for Clearing and ICE Clear U.S., Inc. and Futures Commission Merchants To Clear Certain Over-The-Counter Agricultural Swaps and (b) Determining Certain Floor Brokers and Traders To Be Eligible Swap Participants; and (2) Pursuant to Section 4d of the Commodity Exchange Act, Permitting Certain Customer Positions in the Foregoing Swaps and Associated Property To Be Commingled With Other Property Held in Segregated Accounts, 73 FR 77015, 77016 n.4, Dec. 18, 2008 (noting that jurisdiction over the subject transactions was retained for the "provisions of the CEA proscribing fraud and manipulation"); Order Exempting the Trading and Clearing of Certain Products Related to the CBOE Gold ETF Volatility Index and Similar Products, 75 FR 81977, 81979, Dec. 29, 2010 (exempting the trading and clearing of certain products "from the provisions of the CEA and the regulations thereunder, to the extent necessary to permit such products to be so traded and cleared" on SEC-regulated entities).

With respect to the last 4(c) order listed above, the Commission exempted the trading and clearing of the subject transactions from the CEA only "to the extent necessary" to permit them to be traded and cleared on SEC-regulated entities. The Commission notes that this exemption does not extend to the fraud and manipulation provisions of the CEA because it is not "necessary" to act fraudulently or manipulatively in order to trade and clear such contracts on SEC-regulated entities, nor is exemption from the private right of action for acting fraudulently or manipulatively "necessary" to permit the trading and clearing of such contracts on SEC-regulated entities. Moreover, in all of the orders listed above, specific mention of CEA section 22 was not needed because, to the extent the orders did not provide an exemption from the anti-fraud and anti-manipulation provisions of the CEA, any violation of such provisions would be subject to a private right of action.

[61] See, e.g., Exemption for Certain Swap Agreements, 58 FR 5587, 5594, Jan. 22, 1993; Exemption for Certain Contracts Involving Energy Products, 58 FR 21286, 21294, Apr. 20, 1993.

means of enforcing those prohibitions, including Commission enforcement actions or private lawsuits. The Commission does not believe that these exemptions were intended to preserve the prohibitions on fraud and manipulation but to eliminate any means of enforcing them. Therefore, the Proposed Amendment, which explicitly clarifies that section 22 is reserved with respect to claims for fraud and manipulation, is consistent with the Commission's treatment of such claims in prior 4(c) exemptive orders.[62]

B. Section 4(c) Analysis

1. Overview of CEA Section 4(c)

a. Sections 4(c)(6)(A) and (B)

As discussed above in section I., the Dodd-Frank Act amended CEA section 4(c) to add sections 4(c)(6)(A) and (B), which provide authority to exempt certain transactions "from the requirements" of the CEA entered into: (a) pursuant to a tariff or rate schedule approved or permitted to take effect by FERC, or (b) pursuant to a tariff or rate schedule establishing rates or charges for, or protocols governing, the sale of electric energy approved or permitted to take effect by the regulatory authority of the State or municipality having jurisdiction to regulate rates and charges for the sale of electric energy within the State or municipality.[63] Indeed, section 4(c)(6) provides that if the

[62] The Commission notes that it has, in two prior 4(c) orders, specifically enumerated section 22 as one of the reserved provisions. See A new Regulatory Framework for Clearing Organizations, 65 FR 78020, 78027, Dec. 13, 2000; A New Regulatory Framework for Multilateral Transaction Execution Facilities, Intermediaries and Clearing Organizations, 65 FR 77962, 77986, Dec. 13, 2000. However, the fact that section 22 was explicitly preserved in two orders but not in others does not provide a counterexample for the proposition that the Commission has never reserved its own ability to sue for fraud and manipulation while at the same time denying private rights of action for the same conduct.

[63] The exemption language in section 4(c)(6) states that if the Commission determines that the exemption would be consistent with the public interest and the purposes of the Act, the Commission shall, in accordance with paragraphs (1) and (2), exempt from the requirements of this Act an agreement, contract, or transaction that is entered into (A) pursuant to a tariff or rate schedule approved or permitted to take effect by the Federal Energy Regulatory Commission; (B) pursuant to a tariff or rate schedule establishing rates or charges for, or protocols governing, the sale of electric energy approved or permitted to take effect

Commission determines that the exemption would be consistent with the public interest and the purposes of the Act, the Commission shall issue such an exemption.[64] However, any exemption considered under section 4(c)(6)(A) and/or (B) must be done "in accordance with [CEA section 4(c)(1) and (2)]."[65]

Based on the difference in language between section 4(c)(6), under which the RTO-ISO Order was issued, and section 4(c)(1), the Commission notes that it is not clear that section 4(c)(6) provides the Commission with the authority to exempt the Covered Entities from the private right of action found in section 22. Section 4(c)(1) authorizes the Commission to grant exemptions from the Act's "requirements" or "from any other provision of this Act," with certain exceptions.[66] Section 4(c)(6), by contrast, empowers the Commission to exempt agreements, contracts, or transactions from "requirements" of the Act only. It is not clear that the section 22 private right of action itself is a "requirement" and, therefore, it is not clear that the power to provide an exemption from section 22 is within the scope of the power granted to the Commission by section 4(c)(6).

b. Section 4(c)(1)

As described above,[67] CEA section 4(c)(1) requires that the Commission act by rule, regulation, or order, after notice and opportunity for hearing. It also provides that the Commission may act either unconditionally or on stated terms or conditions or for stated periods and either retroactively or prospectively, or both and that the Commission

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by the regulatory authority of the State or municipality having jurisdiction to regulate rates and charges for the sale of electric energy within the State or municipality; or (C) between entities described in section 201(f) of the Federal Power Act (16 U.S.C. 824(f)).

[64] 7 U.S.C. 6(c)(6).

[65] 7 U.S.C. 6(c)(6).

[66] 7 U.S.C. 6(c)(1).

[67] See supra section I.

may provide an exemption from any provisions of the CEA except subparagraphs (C)(ii) and (D) of section 2(a)(1).

c. Section 4(c)(2)

As set forth above in section I., CEA section 4(c)(2) requires the Commission to determine that: to the extent an exemption provides relief from any of the requirements of CEA section 4(a), the requirement should not be applied to the agreement, contract or transaction; the exempted agreement, contract, or transaction will be entered into solely between appropriate persons;[68] and the exemption will not have a material adverse effect on the ability of the Commission or any contract market to discharge its regulatory or self-regulatory duties under the CEA.[69]

d. Section 4(c)(3)

As explained in section I. above, CEA section 4(c)(3) outlines who may constitute an appropriate person for the purpose of a 4(c) exemption, including as relevant to the RTO-ISO Order: (a) any person that fits in one of ten defined categories of appropriate persons; or (b) such other persons that the Commission determines to be appropriate in light of their financial or other qualifications, or the applicability of appropriate regulatory protections.[70]

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[68] See 7 U.S.C. 6(c)(2)(B)(i). See also the discussion of CEA section 4(c)(3) below.

[69] See 7 U.S.C. 6(c)(2)(B)(ii). CEA section 4(c)(2)(A) also requires that the exemption would be consistent with the public interest and the purposes of the CEA, but that requirement duplicates the requirement of section 4(c)(6).

[70] See 7 U.S.C. 6(c)(3). CEA section 4(c)(3) provides that the term "appropriate person" shall be limited to the following persons or classes thereof: (A) A bank or trust company (acting in an individual or fiduciary capacity); (B) A savings association; (C) An insurance company; (D) An investment company subject to regulation under the Investment Company Act of 1940 (15 U.S.C. 80a-1 et seq.); (E) A commodity pool formed or operated by a person subject to regulation under this Act; (F) A corporation, partnership, proprietorship, organization, trust, or other business entity with a net worth exceeding $1,000,000 or total assets exceeding $5,000,000, or the obligations of which under the agreement, contract or transaction are guaranteed or otherwise supported by a letter of credit or keepwell, support, or other agreement by any such entity or by an entity referred to in subparagraph (A), (B), (C), (H), (I), or (K) of this paragraph; (G) An

2. Section 4(c) Determinations

a. Consistent With the Public Interest and the Purposes of the CEA

As required by CEA section 4(c)(2)(A), as well as section 4(c)(6), the Commission previously determined that the exemption set forth in the RTO-ISO Order is consistent with the public interest and the purposes of the CEA.[71] The Proposed Amendment does not alter the Commission's prior determinations with respect to the

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employee benefit plan with assets exceeding $1,000,000, or whose investment decisions are made by a bank, trust company, insurance company, investment adviser registered under the Investment Advisers Act of 1940 (15 U.S.C. 80a-1 et seq.), or a commodity trading advisor subject to regulation under this Act; (H) Any governmental entity (including the United States, any state, or any foreign government) or political subdivision thereof, or any multinational or supranational entity or any instrumentality, agency, or department of any of the foregoing; (I) A broker-dealer subject to regulation under the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.) acting on its own behalf or on behalf of another appropriate person; (J) A futures commission merchant, floor broker, or floor trader subject to regulation under this Act acting on its own behalf or on behalf of another appropriate person; (K) Such other persons that the Commission determines to be appropriate in light of their financial or other qualifications, or the applicability of appropriate regulatory protections.

[71] See RTO-ISO Order at 19894-95, 19900-02. The Commission's prior determination was based on a number of findings, including that (a) the Covered Transactions have been, and are, subject to a long-standing, regulatory framework for the offer and sale of the Transactions established by FERC or PUCT; (b) the Covered Transactions administered by the RTOs, ISOs, or ERCOT are part of, and inextricably linked to, the organized wholesale electric energy markets that are subject to FERC and PUCT regulation and oversight; (c) the Covered Transactions are entered into primarily by commercial participants that are in the business of generating, transmitting, and distributing electric energy; (d) the Requesting Parties were established for the purpose of providing affordable, reliable electric energy to consumers within their geographic region; (e) the Covered Transactions that take place on the Requesting Parties' markets are overseen by Market Monitoring Units, required by FERC and PUCT to identify manipulation of electric energy on the Covered Entities' markets; (f) the Covered Transactions are inextricably tied to the Requesting Parties' physical delivery of electric energy; (g) the RTO-ISO Order is explicitly limited to Covered Transactions taking place on markets that are monitored by either an independent Market Monitoring Unit, a market administrator (the RTO, ISO, or ERCOT), or both, and a government regulator (FERC or PUCT); (h) the standards set forth in FERC regulation 35.47 appear to achieve goals similar to the regulatory objectives of the Commission's DCO Core Principles, and substantial compliance with such requirements was key to the Commission's determination that the tariffs and activities of the Requesting Parties and supervision by FERC or PUCT are congruent with, and—in the context of the Covered Transactions—sufficiently accomplish, the regulatory objectives of each DCO Core Principle; (i) the Requesting Parties' policies and procedures appear to be consistent with, and to accomplish sufficiently for purposes of the RTO-ISO Order, the regulatory objectives of the DCO Core Principles in the context of the Covered Transactions; and (j) the Requesting Parties' policies and procedures appear to be consistent with, and to accomplish sufficiently for purposes of the RTO-ISO Order, the regulatory objectives of the SEF Core Principles in the context of the Covered Transactions. Id.

public interest and purposes of the CEA, and the Commission proposes to incorporate such prior determinations herein.[72]

In addition, the Commission proposes to determine that the Proposed Amendment to the RTO-ISO Order, which would explicitly preserve the section 22 private right of action with respect to the Excepted Provisions, serves the public interest by helping to deter fraudulent conduct and maintain the credibility of the markets under the Commission's jurisdiction. In the same vein, private civil actions for fraud and manipulation serve the public interest by supplementing the Commission's ability to address the same conduct. Further, the Commission proposes to determine that the Proposed Amendment is consistent with the purposes of the CEA because it will deter and prevent price manipulation or any other disruptions to market integrity.[73]

b. Other 4(c) Determinations

In the RTO-ISO Order, the Commission made a number of other determinations under CEA section 4(c), including:

- The Dodd-Frank Act applies to contracts and instruments traded in RTO or ISO markets pursuant to a FERC- or state-approved tariff or rate schedule, subject to the Commission's authority under CEA section 4(c)(6) to exempt contracts, agreements, or transactions traded pursuant to such a tariff or rate schedule upon determining that the exemption would be in the public interest and consistent with the purposes of the CEA; that the exemption would be applied only to agreements, contracts, or transactions that are entered into solely between appropriate persons; and that the exemption will not have

[72] The Commission notes that, since the Commission did not intend to provide an exemption from the private right of action in CEA section 22 in the RTO-ISO Order, the RTO-ISO Order did not consider or make any determination that it would be in the public interest to do so.
[73] See 7 U.S.C. 5(b) (listing the purposes of the CEA).

a material adverse effect on the ability of the Commission or any contract market to discharge its regulatory or self-regulatory duties under the CEA.[74]

- Due to the FERC or PUCT regulatory scheme and the RTO or ISO market structure already applicable to the Covered Transactions, the linkage between the Covered Transactions and those regulatory schemes, and the unique nature of the market participants that are eligible to rely on the exemption in the RTO-ISO Order, CEA section 4(a) should not apply to the Covered Transactions under the RTO-ISO Order.[75]

- Eligible contract participants, as defined in section 1a(18)(A) of the CEA and in Commission regulation 1.3(m), are appropriate persons for purposes of the RTO-ISO Order in light of their financial or other qualifications, or the applicability of regulatory protections.[76] In addition, a "person who actively participates in the generation, transmission, or distribution of electric energy," as defined within the RTO-ISO Order, is an appropriate person for purposes of the exemption provided therein.[77]

- The exemption in the RTO-ISO Order for the Covered Transactions would not have a material adverse effect on the Commission's or any contract market's ability to discharge its regulatory function.[78]

The Proposed Amendment does not alter the Commission's determination with respect to any of the above 4(c) determinations. Therefore, the Commission proposes to incorporate such prior 4(c) determinations, and the findings on which such determinations are based, herein. All transactions that were permitted pursuant to the

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[74] See RTO-ISO Order at 19893-94; see also CEA section 4(c)(6).
[75] See RTO-ISO Order at 19895; see also CEA section 4(c)(2)(A).
[76] See RTO-ISO Order at 19896; see also CEA section 4(c)(2)(B)(i).
[77] See RTO-ISO Order at 19897; see also CEA section 4(c)(2)(B)(i).
[78] See RTO-ISO Order at 19903-04; see also CEA section 4(c)(2)(B)(ii).

exemption set forth in the RTO-ISO Order would still be permitted under the RTO-ISO Order with the Proposed Amendment. The only change to the RTO-ISO Order made by the Proposed Amendment is that the Proposed Amendment would provide explicitly an additional means of deterring fraudulent or manipulative conduct—conduct that was already prohibited under the RTO-ISO Order—consistent with the public interest and the purposes of the Act.

IV. Related Matters

A. Regulatory Flexibility Act

The Regulatory Flexibility Act ("RFA") requires that the Commission consider whether the Proposed Amendment to the RTO-ISO Order will have a significant economic impact on a substantial number of small entities and, if so, provide a regulatory flexibility analysis respecting the impact.[79] In the RTO-ISO Order, the Commission determined that the RTO-ISO Order would not have a significant economic impact on a substantial number of small entities,[80] and the RFA analysis in the RTO-ISO Order is still valid. Specifically, the RTOs and ISOs covered by the RTO-ISO Order should not be considered small entities based on the central role they play in the operation of the electronic transmission grid and the creation of organized wholesale electric markets that are subject to FERC and PUCT regulatory oversight,[81] analogous to functions performed

[79] 5 U.S.C. 601 et seq.

[80] See RTO-ISO Order at 19906-07. The RFA analysis in the RTO-ISO Order determined that the Requesting Parties (CAISO, NYISO, PJM, MISO, ISO NE, and ERCOT) are not small entities. See id.

[81] The regulations of the Small Business Administration ("SBA") define the threshold for a small Electric Bulk Power Transmission and Control entity to be 500 employees. See 13 CFR 121.201 (Sector 22, Subsector 221; NAICS code 221121). FERC has previously determined under this standard that five of the Requesting Parties (CAISO, NYISO, PJM, MISO, and ISO NE) are not small entities. See Settlement Intervals and Shortage Pricing in Markets Operated by Regional Transmission Organizations and Independent System Operators, 80 FR 58393, 58403, Sept. 29, 2015. Additionally, the Commission understands that ERCOT is not a small entity, as defined by SBA's regulations.

by DCMs and DCOs, which the Commission has previously determined not to be "small entities."[82] In addition, the RTO-ISO Order, with the amendment proposed herein, includes entities that qualify as (1) "appropriate persons" pursuant to CEA sections 4(c)(3)(A) through (J), (2) ECPs, as defined in CEA section 1a(18)(A) and Commission regulation 1.3(m), or (3) persons who are in the business of: (i) generating, transmitting, or distributing electric energy, or (ii) providing electric energy services that are necessary to support the reliable operation of the transmission system. The Commission has previously determined that ECPs are not "small entities" for purposes of the RFA.[83] The Commission is of the view that, based on the Commission's existing information about the RTOs' and ISOs' markets, their market participants consist mostly of entities exceeding the thresholds defining "small entities."[84]

Also, the RTO-ISO Order, with the amendment proposed herein, would continue to alleviate the economic impact that the exempt entities, including any small entities that may opt to take advantage of the exemption set forth in the RTO-ISO Order, otherwise would be subjected to by continuing to exempt certain of their transactions from the application of substantive regulatory compliance requirements of the CEA and Commission regulations thereunder. In addition, there is no evidence of any substantial litigation with respect to fraud and manipulation under CEA section 22 in the RTO or ISO markets, particularly against any small entities that opt to take advantage of the exemption set forth in the RTO-ISO Order. Accordingly, the Commission does not

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[82] See RTO-ISO Order at 19906; see also A New Regulatory Framework for Clearing Organizations, 66 FR 45604, 45609, Aug. 29, 2001 (DCOs); Policy Statement and Establishment of Definitions of "Small Entities" for Purposes of the Regulatory Flexibility Act, 47 FR 18618, 18618-19, Apr. 30, 1982 (DCMs).
[83] See RTO-ISO Order at 19906; see also Opting Out of Segregation, 66 FR 20740, 20743, Apr. 25, 2001.
[84] See RTO-ISO Order at 19907; see also supra note 81.

expect the RTO-ISO Order, with the Proposed Amendment, to have a significant economic impact on a substantial number of small entities. Therefore, the Chairman, on behalf of the Commission, hereby certifies, pursuant to 5 U.S.C. 605(b), that the exemption set forth in the RTO-ISO Order, with the amendment proposed herein, would not have a significant economic impact on a substantial number of small entities.

B. Paperwork Reduction Act

The purposes of the Paperwork Reduction Act of 1995 ("PRA") [85] are, among other things, to minimize the paperwork burden to the private sector, ensure that any collection of information by a government agency is put to the greatest possible uses, and minimize duplicative information collections across the government. The PRA applies to all information, "regardless of form or format," whenever the government is "obtaining, causing to be obtained [or] soliciting" information, and includes and requires "disclosure to third parties or the public, of facts or opinions," when the information collection calls for "answers to identical questions posed to, or identical reporting or recordkeeping requirements imposed on, ten or more persons."[86]

The Commission previously determined that the RTO-ISO Order did not impose any new recordkeeping or information collection requirements, or other collections of information on ten or more persons that require OMB approval.[87] The Commission's Proposed Amendment to the RTO-ISO Order does not impose any recordkeeping or information collection requirements, or other collections of information on ten or more persons that require OMB approval.

[85] 44 U.S.C. 3501 et seq.
[86] 44 U.S.C. 3502(3).
[87] See RTO-ISO Order at 19907-08.

C. Cost-Benefit Considerations

1. Consideration of Costs and Benefits

a. Introduction

Section 15(a) of the CEA[88] requires the Commission to "consider the costs and benefits" of its actions before promulgating a regulation under the CEA or issuing certain orders. In proposing this amendment to the RTO-ISO Order, the Commission is required by CEA section 4(c)(6) to ensure the same is consistent with the public interest. In much the same way, section 15(a) further specifies that the costs and benefits shall be evaluated in light of five broad areas of market and public concern: (1) protection of market participants and the public; (2) efficiency, competitiveness, and financial integrity of futures markets; (3) price discovery; (4) sound risk management practices; and (5) other public interest considerations. The Commission considers the costs and benefits resulting from its discretionary determinations with respect to the section 15(a) factors.

As discussed above, the RTO-ISO Order currently exempts contracts, agreements, and transactions for the purchase or sale of the limited electric energy-related products that are specifically described within the RTO-ISO Order from certain provisions of the CEA and Commission regulations, with the exception of the Commission's general anti-fraud and anti-manipulation authority, and scienter-based prohibitions, under CEA sections 2(a)(1)(B), 4(d), 4b, 4c(b), 4o, 4s(h)(1)(A), 4s(h)(4)(A), 6(c), 6(d), 6(e), 6c, 6d, 8, 9, and 13, and any implementing regulations promulgated under these sections including, but not limited to, Commission regulations 23.410(a) and (b), 32.4, and part

[88] 7 U.S.C. 19(a).

180.[89] The RTO-ISO Order does not specifically note that the exemption contained therein does not apply to actions pursuant to CEA section 22 with respect to the Excepted Provisions. The Commission is proposing to amend the RTO-ISO Order to clarify that the RTO-ISO Order does not exempt the Covered Entities from the private right of action found in section 22 of the CEA with respect to the Excepted Provisions.[90] The Commission's Proposed Amendment to the RTO-ISO Order does not alter any of the other terms or conditions of the RTO-ISO Order.

In the discussion that follows, the Commission considers the costs and benefits of the Proposed Amendment to the RTO-ISO Order to the public and market participants generally, and to the Covered Entities specifically. It also considers the costs and benefits of the Proposed Amendment in light of the public interest factors enumerated in CEA section 15(a).

b. Proposed Baseline

The Commission's proposed baseline for consideration of the costs and benefits of the Proposed Amendment to the RTO-ISO Order is the costs and benefits that the public and market participants would experience if the existing RTO-ISO Order is interpreted to exempt market participants from liability under the CEA section 22 private right of action.

In the discussion that follows, where reasonably feasible, the Commission endeavors to estimate quantifiable dollar costs of the Proposed Amendment to the RTO-ISO Order. The costs and benefits of the Proposed Amendment, however, are not

[89] See RTO-ISO Order at 19912.
[90] See supra section III.A.

presently susceptible to meaningful quantification. Where it is unable to quantify, the Commission discusses proposed costs and benefits in qualitative terms.

c. Benefits

Using the hypothetical baseline described above,[91] the Commission notes that preserving the CEA section 22 private right of action with respect to fraud and manipulation will benefit the market because private claims for fraud and manipulation protect market participants and the public generally, as well as the financial markets for electric energy products. Moreover, making the preservation of the CEA section 22 private right of action with respect to fraud and manipulation explicit will benefit the market because it will clarify the scope of the RTO-ISO Order and prevent future uncertainty regarding the availability of the private right of action under CEA section 22 with respect to fraud and manipulation.

d. Costs

Using the hypothetical baseline described above,[92] the Commission recognizes that subjecting market participants to the CEA section 22 private right of action with respect to fraud and manipulation may increase legal and compliance costs due to a marginally increased chance of litigation, particularly to the extent that private counsel may pursue litigation based upon private, rather than public, concerns. However, this is a common criticism of private rights of action generally, and the Commission does not believe that such a possibility is a sufficient reason to exempt the Covered Transactions and Covered Entities from the private right of action that Congress explicitly provided for by statute. Thus, the Commission elects to propose to amend the RTO-ISO Order to

[91] See supra section IV.C.1.b.
[92] See supra section IV.C.1.b.

expressly retain the CEA section 22 private right of action with respect to Excepted Provisions.

e. Consideration of Alternatives

The Commission considered not issuing the Proposed Amendment to the RTO-ISO Order. The Commission considered the uncertainty that has arisen with respect to the scope of the RTO-ISO Order and the availability of a private right of action under the RTO-ISO Order, particularly following the court rulings in the Aspire v. GDF Suez action,[93] and proposes to determine that a no-amendment alternative would prolong such uncertainty and thus be contrary to the public interest.

The Commission also considered the costs and benefits of amending the RTO-ISO Order to explicitly exempt the CEA section 22 private right of action with respect to fraud and manipulation. In the absence of the availability of a private right of action to address fraudulent and manipulative conduct, the potential for market disruption would increase since market participants would not be able to address such conduct through private claims. On the other hand, the costs of private litigation would be avoided under this alternative. The Commission has considered these costs and benefits and has declined to elect the alternative of explicitly exempting the Covered Entities from the CEA section 22 private right of action.

The Commission has considered the costs and benefits of retaining the CEA section 22 private right of action with respect to fraud and manipulation that the Commission determined to except from the RTO-ISO Order, and has elected to propose

[93] See supra section II.B.

to amend the RTO-ISO Order to expressly retain the CEA section 22 private right of action with respect to the Excepted Provisions.

2. Consideration of CEA Section 15(a) Factors

a. Protection of Market Participants and the Public

The Commission believes that the Proposed Amendment, by clarifying the existence of a private right of action with respect to fraud and manipulation, will serve to protect market participants and the public because private actions for fraud and manipulation will help to deter misconduct in and maintain credibility of the markets subject to Commission jurisdiction.

b. Efficiency, Competitiveness, and Financial Integrity of Futures Markets

The Commission does not believe that the Proposed Amendment will have an effect on the efficiency, competitiveness, and financial integrity of the futures markets.

c. Price Discovery

The Commission does not believe that the Proposed Amendment will have an effect on price discovery.

d. Sound Risk Management Practices

The Commission does not believe that the Proposed Amendment will have a material effect on sound risk management practices.

e. Other Public Interest Considerations

The Commission does not believe that there are any additional public interest considerations with respect to the Proposed Amendment.

3. Request for Public Comment on Costs and Benefits

The Commission invites public comment on its cost-benefit considerations of the Proposed Amendment to the RTO-ISO Order, including the consideration of reasonable

alternatives. Commenters are invited to submit any data or other information that they may have quantifying or qualifying the costs and benefits of the proposal with their comment letters.

V. Request for Comment on the Proposed Amendment to the RTO-ISO Order

The Commission requests comment on all aspects of its Proposed Amendment to the RTO-ISO Order. In addition, the Commission specifically requests comment on the specific provisions and issues highlighted in the discussion above and on the issues presented in this section. For each comment submitted, please provide a detailed rationale supporting the response.

1. To the extent there are concerns that explicitly amending the RTO-ISO Order to preserve private claims for fraud and manipulation under CEA section 22 would result in frivolous litigation, the Commission requests comment on the following issues regarding such litigation.

a. Please provide details as to the specifics of such litigation, including:

i. What type of entity might sue what other type of entity?

ii. What are the theories under which such litigation might be brought?

iii. How might the causes of action in such litigation derive from the enumerated fraud and manipulation provisions of the CEA that are excepted from the RTO-ISO Order?

b. To the extent there is a concern about an increase in litigation regarding filed rates, how would such litigation survive a motion to dismiss based on the filed rate doctrine?[94]

2. In a letter submitted to the Commission's Energy and Environmental Markets Advisory Committee, PJM, ERCOT, and CAISO argued that "[a]llowing private actions will undermine the legal certainty provided by the exemptions and potentially could divest FERC and the PUCT of jurisdiction over certain ISO and RTO transactions."[95] The letter then set forth a hypothetical scenario involving alleged market manipulation in the RTO-ISO markets, and noted that, "[b]ecause the CFTC's jurisdiction over swaps is 'exclusive,' if a number of federal circuits hold that [financial transmission rights] or other ISO and RTO transactions are swaps or futures contracts, no other federal or state agency could regulate ISOs and RTOs or their transactions."[96] The Commission requests comment on how, given the effect of the savings clause in CEA section 2(a)(1)(I)(i), discussed supra in note 51, FERC or PUCT would be divested of jurisdiction in the event of a judicial finding that one or more of the Covered Transactions is a swap. More broadly, the Commission requests comment on how, given that savings clause, preservation of the private right of action would result in regulatory uncertainty and/or inconsistent rulings.

3. To the extent any commenters believe that preserving the private right of action in the RTO-ISO Order will have any other detrimental effect(s) on the RTO-ISO

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[94] See Nantahala Power & Light Co. v. Thornburg, 106 S. Ct. 2349, 2354-57 (1986); Texas Commercial Energy v. TXU Energy, Inc., 413 F.3d 503, 508-10 (5th Cir. 2005).

[95] Letter from Paul J. Pantano, Jr. to Christopher Kirkpatrick, Secretary of the Commission, Feb. 24, 2016, at 4, available at http://www.cftc.gov/idc/groups/public/@aboutcftc/documents/file/eemac022516_pantano.pdf.

[96] Id. at 5.

markets or market participants, the Commission requests that such commenters provide a specific and detailed basis for such a conclusion.

Issued in Washington, DC, on May 9, 2016, by the Commission.

Robert N. Sidman,

Deputy Secretary of the Commission.

NOTE: The following appendices will not appear in the Code of Federal Regulations.

Appendices to 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 – Commission Voting Summary, Chairman's Statement, and Commissioner's Statement

Appendix 1 – Commission Voting Summary

On this matter, Chairman Massad and Commissioner Bowen voted in the affirmative. Commissioner Giancarlo voted in the negative.

Appendix 2 – Statement of Chairman Timothy Massad in Support of the Proposed Amendment to the RTO-ISO Order

The proposal we have approved today would amend a 2013 CFTC order that exempted specified transactions of six independent system operators ("ISOs") and regional transmission organizations ("RTOs") from certain provisions of the Commodity Exchange Act (CEA). That order explicitly did not exempt ISOs and RTOs from the general CEA provisions that prohibit fraud and manipulation. If adopted, the proposed amendment would make clear that this exemption does not prohibit private rights of action for violations of the very same anti-fraud and anti-manipulation provisions that are explicitly reserved in the order.

Private rights of action have been instrumental in helping to protect market participants and deter bad actors. These actions can also augment the limited enforcement resources of the CFTC, and serve the public interest by allowing harmed parties to seek damages in instances where the Commission lacks the resources to do so on their behalf.

I appreciate the desire of businesses to have as little regulatory uncertainty as possible. Indeed, providing certainty for market participants is something upon which we're always striving to improve. But we also must make sure there is adequate recourse for those participants.

Moreover, private rights of action were called for by Congress under the CEA, to ensure wronged parties were provided with an appropriate remedy. Congress determined that the benefits to the public good outweigh any potential costs that may be incurred. Our job is to ensure that determination is properly implemented and enforced.

While some believe the Commission must have intended to exempt ISOs from private rights of action in the original order because it did not specifically preserve them, the proposal points out that it would be unusual for the Commission to have such an intention and say nothing about it, given that it expressly excluded general anti-fraud and anti-manipulation authority from the exemption. Regardless, we should decide the issue now on the merits. The proposal invites comment from all market participants and members of the public.

Finally, let me say that we are giving this proposal careful thought and consideration. We want to balance the value of regulatory certainty with the need to make sure that there is adequate recourse for market participants. We have heard from market participants in a number of venues, including a February meeting of the Energy and Environmental Markets Advisory Committee, and in other requests for comment. And we have tried to incorporate those concerns into the discussion of this proposal. This Notice of Proposed Amendment poses a number of specific questions that seek further detail with respect to the concerns we have heard from market participants. I encourage all interested parties to carefully consider these questions, and provide the Commission with your feedback.

I thank all those who have already provided us with the benefit of their perspective, as well as the CFTC staff and my fellow Commissioners for their work on this proposal. I look forward to hearing more as the comment period transpires.

Appendix 3 – Statement of Dissent by Commissioner J. Christopher Giancarlo

I dissent from the proposed amendment to the final RTO-ISO Order issued by the Commission in 2013.

For over three years, U.S. power market participants have been operating in reliance on the RTO-ISO Order. They have trusted in the reasonable, unambiguous understanding that transactions covered by the Order are exempt from all provisions of the Commodity Exchange Act ("CEA or Act") except for those specifically enumerated as reserved (the "Reserved Provisions"). They have relied on the plain language of the RTO-ISO Order that "[e]xempts … the execution of [specified] electric energy-related agreements, contracts and transactions … and any person or class of persons offering, entering into, rendering advice or rendering other services with respect thereto, from all provisions of the CEA except, in each case, the Commission's general anti-fraud and anti-manipulation authority, and scienter-based prohibitions ...."[1] Too bad for them.

Today's proposal 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.

By this action, the Commission contends that its silence with respect to section 22 of the CEA should be interpreted as evincing its intention all along to retain a private right of action for violations of the Reserved Provisions and that the proposed addition of section 22 to that list is nothing more than a technical clarification.

With all due respect, the Commission's position is disingenuous. It flies in the

[1] RTO-ISO Order, 78 FR 19880, 19912 (Apr. 2, 2013) (emphasis added) (referring to CEA sections 2(a)(1)(B), 4(d), 4b, 4c(b), 4o, 4s(h)(1)(A), 4s(h)(4)(A), 6(c), 6(d), 6(e), 6c, 6d, 8, 9, and 13).

face of well-accepted legal precedent established by the U.S. Supreme Court,[2] and was soundly rejected recently by the courts in the Aspire litigation.[3]

Of course, the Commission is free to change its mind and amend final orders through the notice and comment process, as it proposes to do now. Still, by taking this action the Commission is introducing a disturbing precedent regarding the legal certainty of its orders.[4] In particular, the Commission's proposal to change the scope of the RTO-ISO Order, based not on any change in facts or circumstances but on a legal fiction that it intended to reserve section 22 all along, calls into question the legal certainty of all other section 4(c) orders in which the Commission failed to discuss or reserve the applicability of section 22 for violations of the Act or regulations reserved for itself.[5] Commission orders should not be amended, expanded or withdrawn absent a change in facts or

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[2] Under well-accepted canons of construction, when a general rule is stated, "[but] there are enumerated exceptions[,] 'additional exceptions are not to be implied ….'" In re Condor Ins. Ltd., 601 F3d 319, 324 (5th Cir. 2010) (quoting Andrus v. Glover Constr. Co., 446 U.S. 608, 616-17 (1980)). This is a well-settled application of the canon expressio unius est exclusio alterius, which provides that when some provisions are listed, but other related provisions are omitted, courts infer "that items not mentioned were excluded by deliberate choice, not inadvertence." Barnhart v. Peabody Coal Co., 537 U.S. 149, 168 (2003). Moreover, the Supreme Court has explained that ordinarily, silence does not convey any meaning, much less the potential for sweeping liability. See Cmty. For Creative Non-Violence v. Reid, 490 U.S. 730, 749 (1989) ("Ordinarily, Congress' silence is just that—silence.").

[3] 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).

[4] The Supreme Court has cautioned that when an administrative agency changes its mind, which the Commission has clearly done here—its claim of clarification notwithstanding—it must be mindful of reliance interests that regulated persons have formed in the interim. FCC v. Fox Television Stations, Inc., 556 U.S. 502, 514-16 (2009) (citing Smiley v. Citibank (South Dakota), N.A., 517 U.S. 735, 742 (1996)).

[5] It is not unusual for the Commission to reserve its anti-fraud or anti-manipulation authority without also reserving section 22; the Commission has done so in the past. See, e.g., A New Regulatory Framework for Clearing Organizations, 65 FR 78020, 78025, 78027 (Dec. 13, 2000) (specifically enumerating section 22 as reserved for reserved provisions of the Act and regulations); A New Regulatory Framework for Multilateral Transaction Execution Facilities, Intermediaries and Clearing Organizations, 65 FR 77962, 77976, 77986 (Dec. 13, 2000) (specifically enumerating section 22 as reserved for reserved violations of the Act and regulations in connection with transactions executed of Derivatives Transaction Execution Facilities and as not reserved for certain purposes); Effective Date for Swap Regulation, 76 FR 42508, 42517 (Jul. 19, 2011) (discussing exemption from section 22); see also RTO-ISO Comment Letter at 6-7, n.11 (Jun. 22, 2015). To remove all doubt, treating the failure to reserve section 22 as intentional is consistent with Commission practice. As the 4(c) orders cited above demonstrate, when the Commission intends to reserve section 22, it has had little trouble either specifically enumerating section 22 as reserved, or including a discussion of its applicability or inapplicability.

circumstances or the law.

It can be argued that private claims may serve the public interest by empowering injured parties to seek compensation for damages where the Commission lacks the resources to do so on their behalf. Yet, the extensive regulation and monitoring of RTOs and ISOs significantly obviates the policing role of private suits in these markets. The six entities covered by the RTO-ISO Order are subject to extensive and effective regulation by the RTO-ISO's primary regulator (the Federal Energy Regulatory Commission, "FERC" or the Public Utility Commission of Texas, "PUCT"), and overseen by an independent market monitor responsible to the RTO-ISO's primary regulator. As the FERC has explained, RTOs and ISOs operate not only transmission facilities, but also markets for trading electric energy among utilities, and the "RTO and ISO markets and transmission services are tightly integrated and are regulated to a greater extent than other commodity markets."[6] The FERC has explained that these entities are "critical components in carrying out the FERC's statutory responsibilities,"[7] and the FERC therefore regulates them "more extensively than other public utilities."[8]

I believe that with the protection provided by such extensive regulatory oversight the Commission should not permit private litigation. Doing so would result in too many cooks in the proverbial oversight kitchen. It will lead to conflicting outcomes depriving market participants of the regulatory certainty and coherence Congress intended when it directed the CFTC and the FERC to apply "their respective authorities in a manner so as to ensure effective and efficient regulation in the public interest," to resolve conflicts

[6] FERC Comment Letter on Proposed Order and Request for Comment on Petition of ISOs and RTOs for Exemption of Specified Transactions from Certain Provisions of the CEA, at 2 (Sept. 27, 2012).
[7] Id. at 1.
[8] Id. at 2.

concerning their overlapping jurisdiction and to avoid, "to the extent possible, conflicting or duplicative regulation."[9] Moreover, exempting the transactions from section 22 would promote the congressionally-directed harmony between the CEA and the Federal Power Act ("FPA"), which expressly disclaims any private right of action for manipulative or deceptive trade practices.[10]

Disallowing private suits under the CEA does not leave persons alleging harm from fraudulent or manipulative practices without recourse. The CFTC may seek restitution on their behalf.[11] In addition, section 306 of the FPA permits the filing of private complaints with the FERC for any violation of the FPA.[12]

Aside from the injustice of changing the scope of the RTO-ISO Order three years after it was issued, subjecting the transactions covered by the Order to private suits under the CEA undermines carefully considered policy designed to promote affordable and reliable electricity for millions of American consumers. The defendants' conduct in the Aspire litigation was explicitly permitted under Texas law and related PUCT regulations.[13] Indeed, the plaintiffs in Aspire brought suit only after they tried and failed to convince the PUCT to change its rules permitting the conduct at issue.[14]

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[9] 15 U.S.C. 8308(a)(1).
[10] 16 U.S.C. 824v (2012).
[11] 7 U.S.C. 13a-1(d)(3) (2012).
[12] See Joint Trade Associations, Comment Letter on 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, at 7 n.17 (Jun. 22, 2015) (citations omitted); see also PUCT Comment Letter at 6-7 (Jun. 22, 2015) (explaining that market participants regulated by the Electric Reliability Council of Texas ("ERCOT") aggrieved by the activities of other market participants may bring complaints for adjudication by ERCOT, whose decisions are subject to review by PUCT and the Texas state courts).
[13] Aspire, 2015 WL 500482, at *1; see also 16 Tex. Admin. Code 25.504(c) (2006). I take no position on the specific PUCT Rule at issue, other to note that it appears to be backed by a broad consensus of Texas electricity stakeholders and vigorously defended by the PUCT. See Aspire, 2016 WL 758689, Brief for PUCT as Amicus Curiae, at 27-29.
[14] Aspire, 2015 WL 500482, at *1.

In my view, the Aspire case is a telling example of the problems with subjecting RTO-ISO transactions to private section 22 litigation. Even if a firm is only involved in the generation or transmission of electric power (and not in the derivatives markets), it may nonetheless be subject to extensive litigation—lasting years, exacting significant sums in defense costs, subjecting ratepayers to potential damages and distracting the firm from its core business—all for merely complying with standards crafted and enforced by its primary regulator.[15] Moreover, subjecting electricity providers to private litigation will deprive them of the certainty that the RTO-ISO Order was supposed to provide; if private section 22 claims are allowed, it will be impossible for market participants to be certain which FERC or state rules governing power markets can be adhered to without incurring liability. I fail to see how permitting these kinds of suits would "promote responsible economic or financial innovation and fair competition" that the Commission's exemptive authority is supposed to provide.[16]

Indeed, permitting these suits is in tension with long-standing jurisprudence disallowing private litigants from collaterally attacking a rate, tariff, protocol and/or rule approved or permitted to take effect by the PUCT and/or the FERC. Courts have regularly relied on the so-called "filed rate doctrine," which deprives them of jurisdiction to hear otherwise valid private rights of action where such action seeks to undermine or attack "any 'filed rate'—that is, one approved by the governing regulatory agency—[because such a rate] is per se reasonable and unassailable in judicial proceedings brought

[15] See PUCT Comment Letter on 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, at 7-10 (Jun. 22, 2014) (describing the Aspire litigation and its potential deleterious effects on the RTO-ISO markets).

[16] 7 U.S.C. 6(c); see also Feb. 25, 2016 Energy and Environmental Markets Advisory Committee Meeting, transcript at 21-70 (discussing the consequences for consumers and rate payers that would flow from permitting private rights of action against RTO-ISO participants).

by ratepayers."[17]

Here, the Commission dismisses concerns that preserving the section 22 private right of action may cause regulatory uncertainty or inconsistent or duplicative regulation by arguing that the same result could occur if the CFTC were to bring enforcement actions for violations of the Reserved Provisions. This is a concern, to be sure. But the CFTC may bring suit only after an affirmative vote of a majority of Commissioners and in accordance with its Memorandum of Understanding with the FERC under which staff of the CFTC and the FERC have agreed to consult each other on matters of mutual interest and overlapping jurisdiction.[18] The CFTC would therefore be far likelier than a private plaintiff to consider the impact an action for violating the CEA could have on the regulatory policy of co-equal regulators operating in their primary field. Furthermore, unlike private plaintiffs, the CFTC would have a thorough appreciation of a potential defendant's positions in derivatives markets and access to a potential defendant's positions in the cash markets, ensuring that only cases of true merit would be brought. One would expect the CFTC to conduct an extensive investigation and carefully consider any impact an action for CEA violations would have on electricity regulation before bringing suit. I certainly will. As commenters have pointed out, private parties—who may be interested primarily in winning a cash award and/or securing attorneys' fees—will not consider the matter so broadly.

In conclusion, adding section 22 to the list of Reserved Provisions is a serious

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[17] Tex. Commercial Energy v. TXU Energy, 413 F.3d 503, 508 (5th Cir. 2005 (quoting Wegoland, Ltd. v. NYNEX Corp., 27 F.3d 17, 18 (2d Cir. 1994) (barring otherwise valid antitrust law claim on the basis of the filed-rate doctrine based on PUCT oversight over the relevant electricity market).

[18] Memorandum of Understanding between the FERC and the CFTC (Jan. 2, 2014), http://www.cftc.gov/idc/groups/public/@newsroom/documents/file/cftcfercjmou2014.pdf.

misstep. At a time of stagnant wage growth, today's proposal may needlessly subject millions of American ratepayers to higher utility bills as a result of the almost certain increase in litigation, court costs and settlement damages. Permitting private rights of action in the heavily regulated RTO-ISO markets is in great tension with the congressional command that the CFTC, the FERC and where applicable, state regulators, work to ensure effective, efficient regulation that provides the RTO-ISO market participants with legal certainty.

As such, I emphatically dissent from the proposal.