FINAL

June 15, 2016

Christopher Kirkpatrick, Secretary
Commodity Futures Trading Commission
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Re: Comments of the IECA on CFTC's Proposed Amendment to Final Order Issued to Certain ISOs/RTOs and ERCOT to Exempt Specified Transactions Authorized by a Tariff or Protocol Approved by FERC or PUCT from Certain CEA Provisions, 81 Fed. Reg. 30245, published on May 16, 2016 ("PRA Amendment")

Dear Mr. Kirkpatrick:

On May 16, 2016, the Commodity Futures Trading Commission ("Commission" or "CFTC") published the above-captioned PRA Amendment as a notice of proposed amendment to that certain order issued by the CFTC on March 28, 2013 (the "RTO-ISO Order").[1] The RTO-ISO Order was issued in response to a consolidated petition from certain regional transmission operators ("RTOs"), independent system operators ("ISOs"), and the Electric Reliability Council of Texas ("ERCOT," collectively with RTOs and ISOs, the "Requesting Parties"), which sought, pursuant to Section 4(c)(6) of the Commodity Exchange Act ("CEA"), a "public interest" exemption from the CFTC's regulations that might otherwise apply to certain specified electric energy-related transactions that were purchased and sold on markets administered by the Requesting Parties ("Covered Transactions").

In the RTO-ISO Order, the CFTC granted an exemption for the Covered Transactions from the CFTC's rules and regulations under the CEA, but the CFTC provided that these exempt Covered Transactions would remain subject to certain enumerated CEA provisions that prohibit fraud and manipulation. In its proposed PRA Amendment, the CFTC now proposes that violations of these same enumerated CEA provisions that prohibit fraud and manipulation can be enforced by individual litigants in

[1] See *RTO-ISO Order*, 78 Fed. Reg. 19880 (published April 2, 2013).

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federal courts pursuant to the "private right of action" ("PRA") under Section 22 of the CEA.[2]

In its PRA Amendment, the CFTC has invited interested members of the public to submit comments regarding the CFTC's proposal that fraud and manipulation claims involving the Covered Transactions are subject to the PRA under Section 22 of the CEA. The International Energy Credit Association ("IECA") respectfully responds herein.

The IECA is an association of over 1,400 credit, risk management, legal and finance professionals that is dedicated to promoting the education and understanding of credit and other risk management-related issues in the energy industry. For over ninety years, IECA members have actively promoted the development of best practices that reflect the unique needs and concerns of the energy industry.

Following the passage of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank Act") and its amendments to the CEA, the IECA has filed numerous comments with the Commission on various proposed rulemakings affecting markets in energy commodities. Many of the IECA's members are representatives of small to large physical energy companies that rely on financial commodity markets (i.e., futures contracts, options on futures, and swaps to hedge the risks of energy commodity price volatility) and physical commodity markets to achieve their fundamental mission of providing safe, reliable, and reasonably priced energy commodities that US businesses and consumers require for our economy and our livelihood.

I. The CFTC Should Distinguish Between Markets and Products in which the CFTC has Exclusive Regulatory Oversight from Markets and Products in which the CFTC has Overlapping Regulatory Oversight; The CFTC Should Protect its Exclusive Suite of Products by Applying the PRA Requirements in the Former Markets, while Recognizing the Overlapping Regulatory Oversight and Not Applying its PRA Requirements in the Latter Markets.

The IECA encourages the CFTC to distinguish between markets and products in which the CFTC's regulatory oversight overlaps with other regulatory authorities from markets and products in which the CFTC has exclusive regulatory oversight. The CFTC's consideration of this PRA Amendment presents the CFTC with a unique opportunity to consider the impacts of its overlapping regulatory oversight with respect to the Covered Transactions purchased and sold on markets administered by the Requesting

[2] 7 U.S.C. Section 25.

Parties, while preserving the PRA provisions applicable to all other markets and products in which the CFTC has exclusive regulatory oversight.

As the CFTC made clear in granting the public interest exemption under the RTO-ISO Order:

> "To be eligible for the exemption contained in the Final Order [i.e., the RTO-ISO Order], the contract, agreement, or transaction must be offered or entered into in a market administered by a Requesting Party pursuant to that Requesting Party's tariff, rate schedule, or protocol (collectively, "Tariff"), and the relevant Tariff must have been approved or permitted to have taken effect by either the Federal Energy Regulatory Commission ("FERC") or the Public Utility Commission of Texas ("PUCT"), as applicable."[3]

Eligibility for the relief provided by the public interest exemption granted by the CFTC in the RTO-ISO Order is expressly dependent on regulatory oversight by, as applicable, the FERC or the PUCT.

Accordingly, with respect to the Covered Transactions purchased and sold in the markets administered by the Requesting Parties, the CFTC and the FERC (with respect to the markets administered by the ISOs and RTOs) and the CFTC and the PUCT (with respect to the markets administered by ERCOT) have overlapping regulatory oversight of these Covered Transactions and these markets.

A. Harmonizing Potential Statutory Inconsistencies Due to Overlapping Regulatory Oversight would be Enhanced by such a Distinction.

The IECA appreciates that Congress may well have granted the PRA in CEA Section 22 in recognition of the significant number of farmers and other small and medium sized businesses located throughout the United States that rely on the agricultural markets and other commodity markets that are subject to the exclusive regulatory oversight of the CFTC under the CEA. Under such circumstances, enabling private citizens to use the courts under CEA Section 22 to enforce the various provisions of the CEA that are applicable to such markets would allow private citizens to expand the enforcement reach of the CEA beyond the (limited) budgetary reach of the CFTC and its Staff.

In the unique circumstance presented by the PRA Amendment to the RTO-ISO Order, however, the markets administered by the RTOs, ISOs and ERCOT are not subject

[3] Id., 78 Fed. Reg. at 19880.

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to the exclusive regulatory oversight of the CFTC under the CEA. Instead, the energy markets administered by the RTOs and ISOs are subject to comprehensive regulatory oversight by the FERC under the Federal Power Act (FPA), which has established the market rules applicable to the RTO and ISO administered markets. Similarly, the energy markets administered by ERCOT are subject to comprehensive regulatory oversight by the PUCT under Texas State law, which has established the market rules applicable to the ERCOT administered markets.

As discussed above, the CFTC's RTO-ISO Order has exempted Covered Transactions entered into under the markets administered by the ISOs, RTOs and ERCOT from all of the CFTC's regulatory requirements, with the exception of certain specified CEA provisions applicable to market manipulation and fraud. And now, through the PRA Amendment, the CFTC intends to allow individual litigants to use the courts to enforce the fraud and manipulation prohibition provisions of the CEA with respect to such Covered Transactions entered into in these markets administered by the ISOs, RTOs and ERCOT.

The IECA notes that although Congress granted a private right of action in CEA Section 22, Congress manifested its intent to keep the regulation of energy markets, including with respect to market manipulation, exclusively within the purview of FERC, the agency entrusted with regulation of the energy markets administered by the ISOs and RTOs. Congress explicitly sought to prevent lawsuits by private parties from interfering with the comprehensive regulatory scheme enforced by FERC. In the Energy Policy Act of 2005, Congress authorized FERC to enforce prohibitions against market manipulation under both the Natural Gas Act (Section 4A) and the Federal Power Act (Section 222) and expressly said in each that:

> **"Nothing in this section shall be construed to create a private right of action."**

As a result of the PRA Amendment, the CFTC is creating a private right of action for markets subject to FERC's regulatory oversight under the FPA when Congress expressly said there should be no such private right of action. Not applying the PRA under CEA Section 22 to the markets administered by the Requesting Parties because those markets are subject to overlapping regulatory oversight by the CFTC, the FERC and the PUCT would remove that inconsistency.

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B. The Concern Is Not Academic; The Aspire Complaint Referenced in the PRA Amendment Involves A Challenge to Conduct Allowed by the Marketing Rules of ERCOT, which the PUCT Chose Not to Modify After "Extensive Stakeholder Comment and Study" by ERCOT and the PUCT.

Each of these markets for the Covered Transactions are administered by the Requesting Parties under operating rules established by the FERC or the PUCT under, respectively, the FPA and the applicable Texas Law, after taking into consideration the interests of the markets as a whole.

Pursuant to the rulemaking procedures under which the FERC and the PUCT operate, individual entities may submit comments to those agencies and may request modifications to those market rules to address individual grievances and situations that may arise from time to time under such market rules. Upon presentation of any such concerns, the FERC or the PUCT will decide to act or not to act based upon its analysis of the individual grievance as well as its analysis of the public interest affected by the impacts on the market as a whole.

In contrast, a court hearing a lawsuit by an individual market participant operating in one particular ISO, RTO or ERCOT market and seeking redress for its claims against another market participant under a claim of market manipulation or fraud would likely have as its focus the fraud or market manipulation alleged to have been committed by one market participant and the damages being claimed by the other market participant.

This is not a purely academic or hypothetical exercise. As the CFTC acknowledged its PRA Amendment:[4]

> "In February 2015, the U.S. 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. 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. The suit further alleged that this conduct created artificial and unpredictable prices in the secondary futures markets. The claim thus alleged that defendants were manipulating contract prices in the derivatives commodities market in violation of the Act."

[4] 81 Fed. Reg. at 30246-30247.

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In that specific example, the claimants, Aspire Commodities, LP ("Aspire") and Raiden Commodities, LP ("Raiden") filed a complaint before the U.S. District Court for the Southern District of Texas-Houston Division on April 22, 2014, which was denied by the U.S. District Court on February 3, 2015, and on February 25, 2016, the U.S. Court of Appeals for the Fifth Circuit affirmed the District Court's ruling.[5]

What the CFTC's PRA Amendment does not mention is that in April 2014, Raiden also filed a Petition for Rulemaking with the PUCT[6] seeking to remove Section 25.504(c) of the market rules applicable to ERCOT. Section 25.504(c) of ERCOT's market rules establishes an exemption from the market power definition for entities controlling less than 5% of the generation capacity in the ERCOT region. This rule is referred to as the "Small Fish Rule" by the PUCT, because it allows a lesser standard of scrutiny to be applied to the market behavior of an entity determined to fall below the PUCT's definition of an entity that possesses "market power." The Small Fish Rule permits a generator without market power to engage in conduct that might be impermissible for a larger generator or other market participant deemed to have "market power."

In the Aspire and Raiden lawsuit, the plaintiffs were seeking damages from a defendant generator who had been designated as a "Small Fish" under the PUCT's market rules for ERCOT, because the defendant engaged in market behavior which the defendant was permitted to do under that "Small Fish Rule," but which the plaintiffs alleged was manipulation of the market.[7]

The PUCT, in a decision issued on June 20, 2014, denied Raiden's Petition for Rulemaking. In the PUCT's comments submitted to the CFTC on June 22, 2015, the PUCT explained its decision, noting that <u>it had conducted a process of "extensive stakeholder comment and study,"</u> and based upon public support of the Small Fish Rule by a broad range of stakeholders representing a variety of interests in ERCOT's electric markets, including large and small generators, consumers, and public power providers, the PUCT decided to retain the Small Fish Rule.[8]

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[5] See PRA Amendment, 81 Fed. Reg. at 30247.
[6] See page 9 of 10 of the Comments of the Public Utility Commission of Texas, dated June 22, 2015, submitted to the CFTC in response to the CFTC's 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.
[7] See "Aspire Commodities L.P.'s and Raiden Commodities, L.P.'s Complaint for Damages and Injunctive and Declaratory Relief," filed with the U.S. District Court Southern District of Texas Houston Division on April 22, 2014.
[8] See page 9 of 10 of the Comments of the Public Utility Commission of Texas, dated June 22, 2015, as submitted to the CFTC (see footnote 6 above).

A court hearing a claim by a private litigant seeking damages for fraud or manipulation under CEA Section 22 would not likely seek and study the comments and views of participants in the relevant market to determine which outcome best served the public interest, as was done by the PUCT in its consideration of the allegations of manipulation by Raiden (and Aspire). And yet that recognition of the FERC's obligation to consider the larger public interest may be the very reason that Congress specified that no PRA would apply when, in 2005, Congress amended the FPA to authorize FERC to enforce prohibition of market manipulation in electricity markets.

C. Under All the Circumstances Outlined Above, Not Applying the PRA under CEA Section 22 to Products and Markets in which the CFTC and the FERC or the PUCT, as applicable, have Overlapping Regulatory Oversight Simply Makes Sense.

The IECA submits that in light of all of these unique circumstances:

(i) With respect to markets that are subject to the exclusive oversight of the CFTC under the CEA, such as energy futures contracts bought and sold on markets administered by ICE Futures US, Inc., or the NYMEX, the CFTC should protect its exclusive regulatory oversight of such markets under the CEA, including applying the PRA under CEA Section 22; and

(ii) With respect to markets that are subject to comprehensive regulatory oversight by another regulatory authority, such as the ISO, RTO and ERCOT administered markets which are subject to comprehensive regulatory oversight by FERC and the PUCT, plus overlapping regulatory oversight by the CFTC, the CFTC should exercise great caution and not insert a PRA into such markets, particularly in instances in which the regulatory authority with comprehensive regulatory oversight for such markets is prohibited by its controlling statute from authorizing any such PRA.

[SIGNATURE PAGE FOLLOWS]

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II. Conclusion.

The IECA appreciates the opportunity to provide these IECA Comments and would welcome the opportunity to discuss these comments further should you require any additional information on any of the topics discussed herein.

Please direct correspondence concerning these comments to:

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Yours truly,
INTERNATIONAL ENERGY CREDIT ASSOCIATION

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