June 15, 2016

Mr. Christopher Kirkpatrick
Commodity Futures Trading Commission
Three Lafayette Center
1155 21st Street, NW
Washington, DC 20581

Re: Amendment to 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

Dear Mr. Kirkpatrick:

Better Markets[1] appreciates the opportunity to comment on the above-captioned amendment proposed (Proposal) by the Commodity Futures Trading Commission (CFTC,-Commission).

INTRODUCTION AND SUMMARY

As an organization dedicated to accountability, oversight and transparency in the financial markets, we are pleased that the Commission is clarifying its intent in the 2013 RTO-ISO Order (Order) to expressly preserve the right of private litigants to sue utilities, power producers, marketers and other market participants for fraud, manipulation and other scienter-based prohibitions resulting from certain transactions occurring in the electricity markets administered by six regional transmission organizations (RTO) and independent system operators (ISO). We believe the Commission has developed the correct

[1] Better Markets is a non-profit, non-partisan, and independent organization founded in the wake of the 2008 financial crisis to promote the public interest in the financial markets, support the financial reform of Wall Street, and make our financial system work for all Americans again. Better Markets works with allies—including many in finance—to promote pro-market, pro-business, and pro-growth policies that help build a stronger, safer financial system that protects and promotes Americans' jobs, savings, retirements, and more.

Proposal that largely adheres to both the letter and the spirit of the Commodity Exchange Act (CEA).

In the Order, the Commission exempted six RTOs and ISOs from nearly all of the provisions of the CEA and its implementing regulations for certain energy products traded in the electricity markets – with the exception of those provisions related to fraud, manipulation and other scienter-based prohibitions. More specifically, the Order applies to certain defined financial transmission rights, energy, forward capacity, and reserve or regulation transactions offered or sold in the RTOs' and ISOs' markets pursuant to tariffs, rates, or protocols approved by either the Federal Energy Regulatory Commission (FERC) or, for certain transactions in the Electric Reliability Council of Texas (ERCOT), the Public Utility Commission of Texas (PUCT). While the preservation of private rights of action was not explicitly stated in the Order, we believe it was the intent of the Commission all along to preserve this right, and this Proposal simply makes clear the right of private litigants to sue utilities, power producers, marketers and other market participants for fraud, manipulation and other scienter-based prohibitions.

On the other hand, we are aware of the Fifth Circuit's February 2016 decision in *Aspire*.[2] In *Aspire*, the Court affirmed the District Court for the Southern District of Texas' 2015 decision to dismiss a private lawsuit on the ground that the CEA section 22 private right of action was not available to the plaintiffs under the Order.[3] Moreover, the suit alleged manipulation – specifically, that certain electricity generators had manipulated the ERCOT markets by intentionally withholding generation during peak periods to benefit from their positions in the secondary futures markets.[4] As such, we commend the Commission for swiftly taking action to clarify that the Order allows private litigants to sue for instances of fraud and manipulation in the Proposal. Indeed, the Proposal is very important because it will prevent any future misunderstanding regarding the availability of private rights of action with regard to fraud and manipulation.

The Proposal, if adopted as is, will amend the exemption to state: "This exemption also does not apply to actions pursuant to CEA section 22 with respect to the foregoing enumerated provisions." Therefore, the availability of private rights of action will be expressly clear in the Order. The explicit preservation of private rights of action is a commonsense and straightforward action, given the unintended misunderstanding on this matter.

COMMENTS

Historically, private rights of action have played an instrumental role in helping to protect market participants and deter bad actors. With the dearth of resources the Commission has at its disposal, these actions can serve as a vital tool for the Commission by augmenting its limited enforcement resources, while serving the public interest by

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2 *Aspire Commodities, L.P. v. GDF Suez Energy N. Am., Inc.*, No. 15–20125, 2016 WL 758689 (5th Cir. Feb. 25, 2016).

3 *Id.*

4 *Id.*

permitting aggrieved parties to seek damages in instances where the Commission lacks the resources to do so. Additionally, the threat of action through the additional vehicle of private lawsuits serves the public interest by discouraging unscrupulous behavior in, and maintaining integrity of, the markets. If private parties are precluded from actions seeking redress from fraudulent and manipulative conduct, the likelihood of predatory conduct and a market disruption would increase because private parties would not be able to address such conduct through private lawsuits. As a result, "covered participants" would be less accountable for their behavior, including intentional illegal misconduct. Thus, private rights of action provide an essential additional layer of protection for the public.

Congress intended that private rights of action would augment the Commission's enforcement actions.[5] Accordingly, the Release states: "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."[6] In addition, Congress determined that the benefits of private rights of action to the public good outweigh any potential costs that may be incurred on impacted parties.[7] Therefore, preserving the private right of action in the Proposal is consistent with the spirit and letter of the CEA.

Notably, in the Order, the Commission delineated exceptions to the exemptions which include fraud, manipulation and other scienter-based prohibitions. Furthermore, these prohibitions provide injured parties with redress in the forms of restitution and disgorgement of ill-gotten gains. Accordingly, if the Commission took the opportunity to delineate exceptions to the exemptions in the Order, it is unlikely that the Commission would have failed to explicitly carve out private rights of action to the excepted violations without an explicit statement and an accompanying detailed analysis of its reasoning.

Importantly, the Commission preserving the private right of action under section 22 of the CEA would not cause regulatory uncertainty, inconsistent or duplicative regulation, or substantial compliance costs for the following reasons. First, the "covered entities," by way of the Order should be on notice of, and already complying with, the CEA provisions on fraud and manipulation because they should already be aware that the Commission could bring an enforcement against them for violating these provisions. Second, irrespective of the type of plaintiff (the Commission or private party), "covered entities" remain subject to the fraud, manipulation and scienter-based prohibitions, which includes judicial interpretation of these provisions. Third, the Proposal presents no new provisions for compliance; consequently, there will be no additional costs of compliance. Lastly, the savings clause of the CEA prevents the Commission from thwarting FERC and PUCT's authority over "covered transactions."

While this Proposal raises jurisdictional issues amongst the CFTC, FERC and PUCT, given the savings clause in CEA section 2(a)(1)(I)(i), judicial interpretations regarding the

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5 Release pg. 30247.
6 *Id.* (emphasis added).
7 *Id.*

nature of the "covered transactions" would not affect the jurisdiction of FERC or PUCT. As per the Release, the savings clause of the CEA does the following:

> "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."[8]

As such, if a private litigant brings a claim alleging fraud or manipulation, in the event that a court finds that one of the "covered transactions" is a swap, this decision would not limit or otherwise affect FERC's or PUCT's authority over the "covered transactions." Therefore, the Proposal, if adopted as is, would not in fact cause the Commission to interfere with the jurisdiction of FERC or PUCT.

Moreover, to the extent that there is a concern about an increase in litigation regarding filed rates, given the "filed rate doctrine," frivolous lawsuits are unlikely to survive motions to dismiss and judges can, and will dismiss these types of suits. Under the "filed rate doctrine," ***courts refuse to hear cases*** against practices that are permitted under a FERC or PUCT approved rate or tariff and that have not caused blatant market dysfunction or distortion.[9] Therefore, with the benefit of the "filed rate doctrine," ***only meritorious claims*** will likely be filed because unmeritorious claims will not survive a threshold motion to dismiss.

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8 *Id.* at 30248 (emphasis added).

9 *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).

CONCLUSION

In short, we commend the Commission for clarifying its longstanding intent to preserve private rights of action in instances of fraud and manipulation in the Order. Private rights of action have played an instrumental role in protecting markets, market participants and deterring bad actors. Moreover, it provides an added layer of protection for the public. And, given that the "covered entities" already have to comply with these provisions against fraud and manipulation and that frivolous claims will be quickly filtered out, "covered entities" additional cost of compliance with the Proposal should be nonexistent, and the benefits to the public are substantial.

We hope these comments are helpful.

Sincerely,

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