



CFTC Likely Will Not Move Forward on Controversial Proposal to Allow Private Claims for Fraud and Market Manipulation in FERC-Regulated Organized Electric Markets

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While the CFTC likely expected the proposal to garner opposition from some segments of industry, the agency probably did not anticipate how widespread and forceful the opposition would be—especially from Congress. The [comments](#) received in response to the proposal reflect significant opposition from a wide range of stakeholders, including traditional utilities, merchant generators and traders, the public power sector, the ISOs and RTOs, and consumer representatives. In addition, FERC staff and the Public Utility Commission of Texas (PUCT) both opposed the proposal. The proposal also raised concerns in both houses of Congress. On June 24, 2016, the Chairman and Ranking Member of the House Committee on Energy and Commerce sent a letter to CFTC Chairman Massad expressing concerns about the proposal and requesting a briefing on it. On September 1, 2016, the Chairmen and Ranking Members of both the Senate Committee on Energy and Natural Resources and the Senate Committee on Agriculture, Nutrition and Forestry wrote to CFTC Chairman Massad expressing similar concerns. In April, prior to the CFTC issuing the proposal, but while it was considering the same issue in connection with one particular RTO market, Sen. Boozman (who serves as Chairman of the Senate Appropriations Committee’s Subcommittee on Financial Services and General Government and also on the Committee on Agriculture) included a bipartisan amendment in the Committee on Agriculture’s markup of the CFTC reauthorization bill that would require ISO and RTO exemptions to include exemptions from private rights of action.³

On September 13, 2016, Chairman Massad responded to these congressional concerns in the form of a letter to Sen. Boozman, noting that, “after careful review of the issue and comments submitted,” he “plan[ned] to recommend to the Commission that the final order

exempt RTOs and ISOs from all private rights of action” under the CEA. Chairman Massad further noted that he found concerns raised by commenters with respect to the potential consequences that private actions could create within FERC and PUCT-regulated markets to be “valid concerns.” Chairman Massad reiterated that the CFTC will retain its own authority to pursue fraud and manipulation within ISO and RTO markets.

The CFTC’s apparent change of course is a welcome development for ISO and RTO market participants and other stakeholders—avoiding additional regulation and regulatory uncertainty in the already heavily regulated organized electric markets.

¹ Our prior article discusses the relevant background, including the CFTC’s post-Dodd Frank jurisdiction over certain ISO and RTO transactions, and how the CFTC has exempted ISO and RTO transactions from many of the requirements of the CEA.

² One organized electric market covered by the proposal, ERCOT, is subject to regulation by the PUCT rather than FERC.

³ Although the CFTC, at the time, had not yet issued the proposed amendment to the 2013 ISO/RTO exemption order, as discussed in our prior [article](#), it was considering the same issue in connection with an exemption requested by Southwest Power Pool—an RTO that was not subject to the 2013 exemption order.

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