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Cover Page Footnote

Istanbul University, LL.B.; Georgetown, LL.M.; Fordham, J.D.; member of New York and Istanbul bar associations. The author wants to thank Professor Caroline Gentile for her valuable comments and guidance. The author has worked as a legal extern at U.S. Commodity Futures Trading Commission Division of Enforcement and Whistleblower Office. All errors found and opinions expressed herein belong solely to the author, and do not in any way convey or represent any official interpretation of the agency's staff.

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A REGULATORY RETREAT: ENERGY MARKET EXEMPTION FROM PRIVATE ANTI-MANIPULATION ACTIONS UNDER THE COMMODITY EXCHANGE ACT

Meric Sar[*]

In order to facilitate greater reform in energy markets, Dodd-Frank granted the CFTC wide-ranging powers as part of the greater mandate given to the CFTC in relation to OTC-swaps and the daily derivatives trading activity in commodities futures and options markets. As a result, Dodd-Frank subjected electricity market transactions—which traditionally occur under the oversight of the Federal Energy Regulatory Commission in markets organized around independent system operators and regional transmission organizations—to the anti-manipulation prohibitions of the Commodity Exchange Act. Thus, differently from FERC's regime, the post-Dodd-Frank statutory framework opened the way for enforcement of market discipline in electricity markets through a private right of action under Section 22 of the CEA. This development drew strong opposition from the industry, and also caused a conflict between courts and the CFTC in the interpretation of the relevant law. In October of 2016, the CFTC stepped back by issuing a final exemptive order to the participants of seven national energy markets, which constitute almost the entire U.S. wholesale electricity market. The withdrawal of the private right of action conflicts with the position previously advocated by the CFTC itself. It also raises questions about the CFTC's use of its exemptive powers, as the removal of a statutory right through agency rulemaking may potentially be in conflict with the text and statutory purpose of the CEA as amended by Dodd-Frank. The exemption not only removes an important tool in enforcing market discipline, but also has the potential to undermine the reform efforts in the transition of U.S. energy markets to a smart grid. This Note will provide a history of the developments that have unfolded since the enactment of Dodd-Frank

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in relation to the availability of a private right of action under the CEA in energy markets. The Note also analyzes commonly raised arguments against the availability of a private right of action and presents the various counter-arguments.

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INTRODUCTION

An often overlooked yet important reform opportunity introduced by the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") relates to the regulatory landscape surrounding energy and power markets,[1] where the supply and demand forces in the interstate electricity infrastructure meet on a daily basis to settle various transactions on energy, capacity, and transmission rights.[2] In the last two decades, recognizing the urgent need to improve efficiency and usher transformation in the energy grid against rapid developments in technology, Congress understood the importance of price integrity in the energy markets and resolved to eliminate trading practices that have a detrimental effect on the price formation process in the energy markets, which often put innovative enterprises at a disadvantage against the

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1. *See generally* Steven Ferrey, *Sustainable Energy, Environmental Policy, and States' Rights: Discerning the Energy Future Through the Eye of the Dormant Commerce Clause*, 12 N.Y.U. ENVTL. L.J. 507 (2004) ("Energy policy has been a primary domestic news story during the last two years: the Enron scandal, terrorist threats against nuclear power plants, the California electric energy market collapse, and the August 14, 2003 blackout affecting fifty million people in the eastern United States. Electric energy, although seldom analyzed in the literature, especially compared to the column inches devoted to the geopolitical role of oil, is the critical resource underwriting the modern post-industrial economy. Without adequate and reliable electric energy, the computer age, the information society, many industrial processes, and even high-rise or moderate height buildings would be impossible. Electric power is the critical energy input in the American economy.").

2. *See generally* Joel B. Eisen, *Distributed Energy Resources, "Virtual Power Plants," and the Smart Grid*, 7 ENVT'L & ENERGY L. & POL'Y J. 191, 193 (2012) ("Given the urgency to address climate change, [Distributed Energy Resources ('DERs')] have become especially important as part of a portfolio of solutions to reduce fossil fuel use . . . in the electricity sector of the economy and adapt to the changing climate. The transition from reliance on large power plants to DERs must 'occur rapidly to avert potentially catastrophic environmental effects.' DERs help the electric grid by increasing grid reliability and resilience, making the grid less vulnerable to prolonged power failures. They can also reduce energy delivery losses, and reduce emissions of conventional pollutants. Beyond the environmental and energy advantages, there are social benefits, such as widespread decentralized ownership of DG facilities to empower consumers." (citations omitted)); Paul L. Joskow, *Creating a Smarter U.S. Electricity Grid*, 26 J. ECON. PERSPECTIVES 29, 30 (2012) ("[A] smart grid may be needed if solar, wind, geothermal, and other renewable energy technologies are to make a sizable contribution to national electricity needs.").

legacy energy industry.[3] Dodd-Frank granted the Commodity Futures Trading Commission ("CFTC") wide-ranging powers over energy markets within the greater mandate given to the CFTC to reform OTC-swaps and daily derivatives trading activity occurring in commodities futures and options markets.[4] As a result, Dodd-Frank brought electricity market transactions—traditionally under the oversight of the Federal Energy Regulatory Commission ("FERC")—additionally under the anti-fraud/manipulation prohibitions of the Commodities Exchange Act ("CEA").[5] In contrast to the pre-existing FERC regime, the reformed CEA also allows private enforcement of market discipline in these markets under Section 22, which explicitly recognizes a private right of action against fraudulent and manipulative conduct occurring in all commodities markets.[6] The availability of a private right of action has been widely opposed by the energy industry on the grounds of regulatory overreach.[7] After several years of regulatory and legal uncertainty resulting from conflicting judicial and administrative actions, in October 2016 the CFTC issued a final exemptive order to the participants of seven national energy markets, which constitute almost the entirety of wholesale U.S. electricity

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3. *See generally* JOHN G. KASSAKIAN ET AL., MASS. INST. OF TECH., THE FUTURE OF THE ELECTRIC GRID 20 (2011) (noting that Section 1301 of the Energy Independence and Security Act of 2007 defines the Smart Grid in thirteen different objectives that make up "a broad collection of ambitious goals," citing 42 U.S.C. § 17381); Joseph T. Kelliher & Marie Farinella, *The Changing Landscape of Federal Energy Law*, 61 ADMIN. L. REV. 611, 613 (2009) ("Part II of the Federal Power Act and the Natural Gas Act have changed from a regulatory scheme that controlled market power exercise by utilities, pipelines, and producers through classic rate regulation to a regulatory regime that controls the exercise of market power through reliance on a mixture of competition and regulation.").

4. *See* 7 U.S.C. § 2 (2012). Minimum margin rules, registration, and reporting requirements comprise the majority of the CFTC reforms introduced by Dodd-Frank in relation to swap contracts. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified as amended in scattered sections of 7, 12, and 15 U.S.C.).

5. 7 U.S.C. § 6c(a)(5) (2012).

6. 7 U.S.C. § 25. FERC's enforcement statute does not provide a private right of action. The proposal in this regard was rejected by Congress during the reforms in 2000s.

7. David Perlman et al., *CFTC Proposal Creates Jurisdictional Controversy and Uncertainty in the RTO and ISO Markets*, BRACEWELL (May 19, 2016), http://energylegalblog.com/blog/2016/05/19/cftc-proposal-creates-jurisdictional-controversy-and-uncertainty-rto-and-iso-markets [https://perma.cc/844H-BN4H].

markets.[8] In effect, the order withdrew the statutory right of market participants to bring lawsuits against manipulative and disruptive trading practices in the relevant electricity markets.[9] Although the CFTC continues to reserve its anti-manipulation enforcement authority in relation to these markets, the CFTC's final order is remarkable, as it represents a retreat by the agency.[10] This conflicts with its prior actions, which had endorsed the availability of private rights of action under the CEA for the participants of the exempted markets under various statutory and policy grounds.[11]

The elimination of private enforcement is likely to undermine market discipline in electricity markets. FERC's statutory authority over anti-manipulative conduct is limited and lags behind the emerging norms in commodities and securities laws in relation to contemporary issues such as hyper-frequency trading.[12] Even if the CFTC continues to have anti-manipulation enforcement power over the exempted electricity markets, it is questionable whether, from a practical standpoint, the CEA's anti-manipulation provisions will have a wide reach over the exempted markets. This is for reasons such as the CFTC's limited enforcement resources and the likelihood of greater deference by the CFTC to FERC in recognition of FERC's role as the primary regulatory body in the energy markets.

This Note aims to provide an account of the regulatory and judicial developments that have unfolded since the enactment of Dodd-Frank in relation to the availability of private rights of action under the CEA in energy markets. First, the Note will articulate the regulatory authority of the CFTC under the CEA, including under the relevant CEA anti-manipulation provisions as amended by Dodd-Frank, and as applicable to electricity markets. Second, this Note will delineate the energy market-

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8. Final Order Regarding Southwest Power Pool, Inc. Application to Exempt Specified Transactions, 81 Fed. Reg. 73,062 (Oct. 24, 2016).

9. *See id*.

10. CFTC, Q & A–FINAL ORDER ON RTO AND ISO EXEMPTION FOR CERTAIN SPECIFIED TRANSACTIONS (2016), http://www.cftc.gov/idc/groups/public/@newsroom/documents/file/rto_iso_qa_final.pdf [https://perma.cc/5J5J-NHTF].

11. *See, e.g.*, Notice of Proposed Order and Request for Comment on an Application for an Exemptive Order From Southwest Power Pool, Inc., 80 Fed. Reg. 29,490 (May 21, 2015).

12. *See* Antony E. Ghee, *FERC Does Not Have Anti-Manipulation Authority in Financial Markets*, 18 FORDHAM J. CORP. & FIN. L. 379 (2013); Jody Freeman & David B. Spence, *Old Statutes, New Problems*, 163 U. PA. L. REV. 1, 63 (2014); Gregory Scopino, *The (Questionable) Legality of High-Speed "Pinging" and "Front Running" in the Futures Markets*, 47 CONN. L. REV. 607 (2015).

related exemptions granted by the CFTC after the adoption of Dodd-Frank and the interesting developments in the relevant rulemaking process. Courts' interpretation of the relevant CFTC rulemaking, which created a tension with the CFTC's own interpretation regarding the availability of a private right of action in energy markets under Section 22 of the CEA, will also be analyzed.

Lastly, the Note will address the commonly raised arguments against the availability of private rights of action and present various counter-arguments based on the CEA's statutory authority, administrative law policy, and market theory.

I. CEA AS AMENDED BY DODD-FRANK AND THE CFTC'S REGULATORY AUTHORITY OVER ENERGY MARKETS

Dodd-Frank expanded the CFTC's exclusive jurisdiction—which had included futures—to also cover swaps that are traded, executed or cleared on exchanges or clearinghouses.[13] Prior to Dodd-Frank, energy products were generally accepted as "exempt commodities"[14] under the CEA.[15] Amendments under Dodd-Frank eliminated the pre-existing regulatory exemption for "exempt commodities," which exempted swap trading by sophisticated counterparties in certain commodities (i.e., energy and metals products) from the entirety of the CEA, except for the

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13. 7 U.S.C. § 2(a)(1)(A) (2012).

14. An "exempt commodity" is defined as any "commodity that is not an excluded commodity or an agricultural commodity." 7 U.S.C. § 1a(20) (2012).

15. *See* Exemption for Certain Contracts Involving Energy Products, 58 Fed. Reg. 21,286, 21,294 (1993) ("The Commission . . . hereby exempts from all provisions of the [CEA] . . . except [provisions prohibiting manipulation of the market place of any commodity] in interstate commerce or for future delivery . . . [c]ontracts for the purchase and sale of crude oil, condensates, natural gas, natural gas liquids . . . ."). The energy exemption applied to transactions. *Id.* Even pre-Dodd-Frank, CFTC continued to exert anti-manipulation authority over non-transactional activities such as false advertising and reporting. *See* U.S. Commodity Futures Trading Comm'n v. Reed, 481 F. Supp. 2d 1190, 1198 (D. Colo. 2007) ("[B]y their terms, the exemptions are limited to contracts, agreements, or transactions. 'Each of these terms [contracts, agreements and transactions], as commonly understood, denotes a mutual understanding between parties creating rights or obligations that are enforceable or are recognized at law.' The illegal activity alleged in the Complaint—false reporting of market information concerning natural gas and attempted manipulation of natural gas price indices does not implicate an 'agreement, contract or transaction.'" (citations omitted)).

anti-fraud and anti-manipulation provisions.[16] Subsequently, the CFTC refused to issue grandfather relief with regards to the statutory "exempt commodities" exemption. Instead, it addressed the relevant swap activity by studying particular markets in detail and issuing rules and exemptions as tasked by Dodd-Frank.[17]

A. ENERGY TRANSACTIONS AS FUTURES AND SWAPS UNDER CEA

The CFTC has "exclusive" jurisdiction over "accounts, agreements (including . . . 'option[s]' . . .) . . . and transactions involving swaps or contracts of sale of a commodity for future delivery."[18] In determining

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16. Notice Regarding the Treatment of Petitions Seeking Grandfather Relief for Trading Activity Done in Reliance Upon Section 2(h)(1)–(2) of the Commodity Exchange Act, 75 Fed. Reg. 56,512 (Sept. 16, 2010); Press Release, CFTC, CFTC Determines to Not Issue Grandfather Relief for Bilateral Exempt Commodity Swaps at This Time; Commits to Using Available Exemptive Authorities in the Future (Sept. 10, 2010), http://www.cftc.gov/PressRoom/PressReleases/pr5890-10 [https://perma.cc/Z8JQ-6AT3].

17. 75 Fed. Reg. at 56,513 ("The Commission is aware of the transformational nature of [Dodd-Frank] and its potential impact on the swaps industry. The Commission also recognizes that bilateral swaps trading activity currently conducted in reliance upon the CEA's Exempt Commodity Exemption will likely become subject to any number of regulatory provisions implementing the requirements of the Dodd-Frank Act, including business conduct standards, recordkeeping and reporting requirements, and capital and margin requirements. Until the contents and timing of the Commission's regulations affecting bilateral swaps are better known, however, the Commission has determined not to grant grandfather relief as it is impossible to know at this time whether such relief will be necessary.").

18. 7 U.S.C. § 2(a)(1)(A) (2012). Sections 2(a)(I)(i) and 2(a)(I)(ii) of the CEA include declarations reinforcing both the FERC's and the CFTC's authority on energy market transactions, but they fail to draw a clear line except declaring absolute CFTC authority over transactions not occurring in a "trading facility that is not owned or operated by a regional transmission organization or independent system operator . . . ." 7 U.S.C. § 2(a)(I)(ii)(II) (2012); *see also* Hunter v. F.E.R.C., 711 F.3d 155, 159 (D.C. Cir. 2013) ("[I]f a scheme, such as manipulation, involves buying or selling commodity futures contracts, CEA section 2(a)(1)(A) vests the CFTC with jurisdiction to the exclusion of other agencies."). FERC generally has jurisdiction over the interstate transmission of electric energy, national interconnectivity, and the interstate wholesale electric markets. With regards to futures contracts, FERC generally claims jurisdiction over transactions that result in physical delivery. *See* DC Energy, LLC, 138 FERC ¶ 61,165 (2012) (requiring transactions to have "the potential for a physical transfer of energy" for FERC jurisdiction); Puget Sound Energy, Inc., 96 FERC ¶ 63,044 (2001); N.Y. Mercantile Exch., 74 FERC ¶ 61,311 (1996) (holding that electricity futures

whether a transaction constitutes a futures contract, the CFTC and the courts generally analyze the transaction "as a whole with a critical eye toward its underlying purpose."[19] In order to be legally enforceable, Section 4 of the CEA requires futures contracts to be traded on a commodity exchange that is designated as a contract market and registered as such with the CFTC.[20]

Although the CEA does not define the elements of a futures contract, Section 1(a)(27) provides that "[t]he term 'future delivery' does not include any sale of any cash commodity for deferred shipment or delivery."[21] Section 2(c)(2)(D)(ii)(III)(aa) excludes from the jurisdiction of the CFTC "forward contracts"—defined as any sale that results in "actual delivery within 28 days."[22] Under the CEA, delivery usually requires "[t]he formal act of transferring something," and thus requires handing over both possession and control of the underlying commodity.[23] Thus, exclusion from the CEA's application requires an energy market transaction to meet either the definition of a "forward" contract that provides for deferred shipment, or "delivery" within the meaning as set forth by the CEA and the CFTC regulations, or to qualify for another exception or exemption provided by the CFTC.[24]

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approved for trading by CFTC are not securities within the meaning of section 3(16) of the Federal Power Act, unless such a contract "goes to delivery, the electric energy sold under the contract will be resold in interstate commerce, and the seller is a public utility").

19. CFTC v. Co Petro Mktg. Grp., Inc., 680 F.2d 573, 581 (9th Cir. 1982).

20. 7 U.S.C. § 6(a) (2012).

21. *Id.* § 1a(27).

22. *Id.* § 2(c)(2)(D)(ii)(III)(aa).

23. CFTC v. Hunter Wise Commodities, LLC, 749 F.3d 967, 978-79 (11th Cir. 2014); *see also* CFTC v. Int'l Fin. Servs. Inc., 323 F. Supp. 2d 482, 495-96 (S.D.N.Y. 2004) ("The quintessential difference between futures contracts . . . and spot and forward contracts . . . is that the latter two contemplate actual exchange (delivery and receipt) of the commodity, whether immediately . . . or at some fixed future date. By contrast, individuals enter into futures contracts, almost without exception, solely to speculate on the fluctuations in various commodities prices.").

24. *See* Statutory Interpretation Concerning Forward Transactions, 55 Fed. Reg. 39,188 (Sept. 25, 1990). The "Brent Interpretation," developed by the CFTC in 1990, provides a facts and circumstances test in determining whether a particular transaction constitutes an excluded forward contract. *See id.* The Brent Interpretation was reaffirmed by the CFTC in the Swap Final Rule and accepted by the courts as a reasonable test in distinguishing a future contract. *See* Further Definition of "Swap," "Security-Based Swap," and "Security-Based Swap Agreement", Securities Act Release No. 9338, Exchange Act Release No. 67,453, 77 Fed. Reg. 48,208, 48,228 (Aug. 13, 2012);

On the other hand, Section 1a(47) of the CEA broadly defines "swaps" to include not only any transaction "commonly known as a commodity swap," but also any option of any kind that is for the purchase or sale of one or more commodities.[25] In informational materials released on September 30, 2013, the CFTC stated that commodity options would generally be regulated as swaps under Title VII of Dodd-Frank.[26] Similar to the definition of future contracts, which excludes forward contracts from its scope, Congress excluded from the term swap "any sale of a nonfinancial commodity . . . for deferred shipment or delivery, so long as the transaction is intended to be physically settled."[27]

Under the newly enacted Section 2(h)(7) of the CEA, Dodd-Frank also promulgated an end-user exception from the mandatory clearing and

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Regulation of Leverage Transactions and Other Off-Exchange Future Delivery Type Instruments—Statutory Interpretation, 50 Fed. Reg. 11,656, 11,657 (Mar. 25, 1985) ("Commission's Office of the General Counsel is of the view that . . . . [i]n general, these transactions share some of or all of the following indicia of futures contracts: they involve the purchase or sale of a commodity for delivery in the future at a price or pricing formula that is agreed upon when the transactions are initiated; they are standardized as to terms and conditions other than price; unlike commercial forward contracts or traditional installment agreements, they are undertaken primarily to assume or shift the risk of commodity price changes and are not generally entered into for purposes of obtaining delivery of the commodity, but rather are discharged through offsetting transactions or other buy-back arrangements.").

25. *See* 7 U.S.C. § 1a(47)(A) (2012) ("[T]he term swap means any . . . transaction—(i) that is a put, call, cap, floor, collar, or similar ***option*** of any kind that is for the purchase or sale, or based on the value, of 1 or more interest or other rates, currencies, commodities, securities, instruments of indebtedness, indices, quantitative measures, or other financial or economic interests or property of any kind; . . . (iii) that provides ***on an executory basis for the exchange*** . . . ***of 1 or more payments based on the value*** . . . of 1 or more interest or other rates, currencies, ***commodities***, securities, instruments of indebtedness, indices, quantitative measures, or ***other financial or economic interests*** or ***property of any kind***, or any interest therein or based on the value thereof, and that transfers . . . in whole or in part, the financial risk associated with a future change in any such value or level without also conveying a current or future direct or indirect ownership interest in an asset (including any enterprise or investment pool) or liability that incorporates the financial risk so transferred, including any agreement, contract, or transaction commonly known as . . . (XVIII) ***an energy swap***; . . . (XXII) ***a commodity swap*** . . . ." (emphasis added)).

26. CFTC, CFTC DIVISION OF MARKET OVERSIGHT RESPONDS TO FREQUENTLY ASKED QUESTIONS REGARDING COMMODITY OPTIONS (2013), https://forms.cftc.gov/_layouts/PublicForms/Docs/TradeOptionsFAQ.pdf [https://perma.cc/RQT7-MAMZ].

27. 7 U.S.C. § 1a(47)(B)(ii) (2012).

exchange requirement.[28] The exception applies when one counterparty to the swap (i) is not a financial entity,[29] (ii) uses the swap to hedge or mitigate commercial risk associated with its underlying business,[30] and (iii) provides a notification to the CFTC on how it meets its financial obligations associated with the relevant uncleared swaps.[31]

B. Prohibitions on Market Manipulation under the CEA

Section 753 of Dodd-Frank amended Section 6c of the CEA and expanded the CFTC's enforcement authority to prohibit manipulation and fraud in connection with any swap or a contract of sale of any commodity for future delivery on or subject to the rules of any registered entity.[32] Prohibited practices generally fall under two groups: price manipulation activities,[33] and other practices that have a disruptive effect on the functioning of the relevant commodity market.[34]

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28. *Id.* § (2)(h)(7)(A).

29. *Id.* § 2(h)(7)(A)(i). CEA section 2(h)(7)(C)(i) provides that the term financial entity will include (i) swap dealers and security-based swap dealers, (ii) major swap participants and major security-based swap participants, (iii) commodity pools, (iv) private funds as defined in the Investment Advisers Act of 1940, (v) employee benefit plans as defined in the Employee Retirement Income Security Act of 1974, and (iv) persons predominantly engaged in banking or financial activities as defined in the Bank Holding Company Act of 1956. *Id.* § 2(h)(7)(C)(i).

30. 7 U.S.C. § 2(h)(7)(A)(ii) (2012). Examples can include businesses using swaps to hedge their business related price risk exposures in industries such as manufacturing, energy exploration, farming, transportation, or other commercial endeavors. *See also* Further Definition of "Swap Dealer," "Security-Based Swap Dealer," "Major Swap Participant," "Major Security-Based Swap Participant," and "Eligible Contract Participant." Exchange Act Release No. 66,868, 77 Fed. Reg. 30,596, at 6-75.

31. 7 U.S.C. § 2(h)(7)(A)(iii) (2012).

32. *Id.* §§ 6c, 9, 13b.

33. *Id.* § 6c(a)(2) ("A transaction referred to in paragraph (1) is a transaction that— (A)(i) is, of the character of, or is commonly known to the trade as, a 'wash sale' or 'accommodation trade'; or (ii) is a fictitious sale; or (B) is used to cause any price to be reported, registered, or recorded that is not a true and bona fide price.").

34. *Id.* § 6c(a)(5) ("Disruptive practices—It shall be unlawful for any person to engage in any trading, practice, or conduct on or subject to the rules of a registered entity that— (A) violates bids or offers; (B) demonstrates intentional or reckless disregard for the orderly execution of transactions during the closing period; or (C) is, is of the character of, or is commonly known to the trade as, "spoofing" (bidding or offering with the intent to cancel the bid or offer before execution.").

The reformed provisions of the CEA are striking in their width of prohibited practices and potentially extend the range of trading activities that may fall under regulatory scrutiny.[35] In analyzing the price manipulation claims under the CEA, the courts generally conduct a deep inquiry into the mechanics of the trading activity.[36] The new anti-manipulation provisions include a strict liability prohibition regarding conduct that "violat[es] bids and offers."[37] Furthermore, the newly enacted statutory prohibition on "spoofing" (submitting market orders without an intent to enter into an actual transaction) potentially brings a wide range of daily market activity by professional traders under scrutiny.[38] The CEA's specific approach in addressing conduct like spoofing shows the importance Congress has placed on defining prohibited trading practices in order to lower the pleading standards and to ease plaintiffs' onerous burden to establish price manipulation elements such as the "ability to effect prices" and intent to "cause artificial prices."[39] The CEA, as amended by Dodd-Frank, also prohibits situations

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35. *See* Rosa M. Abrantes-Metz et al., *Revolution in Manipulation Law: The New CFTC Rules and the Urgent Need for Economic and Empirical Analyses*, 15 U. PA. J. BUS. L. 357 (2013).

36. *See* Ploss v. Kraft Foods Grp., Inc., 197 F. Supp. 3d 1037, 1055 (N.D. Ill. 2016) ("For example, '[b]ecause every transaction signals that the buyer and seller have legitimate economic motives for the transaction, if either party lacks that motivation, the signal is inaccurate,' . . . and using that false signal to manipulate commodity pricing can qualify as manipulation." (quoting *In re* Amaranth Nat'l Gas Commodities Litig., 587 F. Supp. 2d 513, 534 (S.D.N.Y. 2008))).

37. 7 U.S.C. § 6c(a)(5)(A) (2012).

38. *See* U.S. Commodity Futures Trading Comm'n v. Oystacher, 203 F. Supp. 3d 934 (N.D. Ill. 2016) (holding that spoofing statute was not unconstitutionally vague as applied); United States v. Coscia, 177 F. Supp. 3d 1087 (N.D. Ill. 2016) (first criminal case that resulted in a conviction for "spoofing"); Meric Sar, *Dodd-Frank and the Spoofing Prohibition in Commodities Markets*, 22 FORDHAM J. CORP. & FIN. L. 383 (2017); Matthew Leising, *Spoofing Went Mainstream in 2015*, BLOOMBERG (Dec. 21, 2015), http://www.bloomberg.com/news/articles/2015-12-22/nabbing-the-rogue-algo-inside-the-year-spoofing-went-mainstream [https://perma.cc/BH4E-633S]. Spoofing-type activity is argued to be one of the contributing factors to the Flash Crash of May 6, 2010. *See* Andrei Kirilenko et al., *The Flash Crash: High Frequency Trading in an Electronic Market*, 72 J. FIN. 967 (2017).

39. *See* Bart Chilton, Comm'r, CFTC, Statement Regarding Anti-Fraud and Anti-Manipulation Final Rules: The Waiting (July 7, 2011), http://www.cftc.gov/PressRoom/SpeechesTestimony/chiltonstatement070711 [https://perma.cc/T34H-PFT3] (discussing the difficulty of proving spoofing cases under the pre-Dodd-Frank anti-manipulation standard).

of "attempted" manipulation and therefore does not require the CFTC to show that the price resulting from the manipulative act was, in fact, artificial.[40] Under Section 22, the CEA also allows private individuals to bring claims for damages arising from such manipulative conduct.[41]

C. CFTC'S EXEMPTIVE AUTHORITY

All transactions tied to energy commodities will be deemed a commodity future or option contract subject to CEA and CFTC regulation, unless the transaction qualifies for an exception or an exemption (administrative exclusion from the entirety or parts of CEA) set forth in the CEA and regulations issued by the CFTC through its rulemaking authority and interpretive guidance.[42] So long as the relevant transaction envisions the future delivery of a certain energy product (e.g., electric power, rights for capacity or transmission), provides to one of its counterparties either an option with regards to the exact quantity of the underlying energy commodity to be delivered, or an optional right to execute a buy or sell order in the future, the transaction will be subject to the CEA.[43]

The most important CEA exemptions of a general nature available for energy market transactions are the "forward contract exclusion" and the "end-user exception."[44] However, the CFTC has issued other exemptions with consequences on energy markets in exercise of its more special rulemaking authorities under Section 4 of the CEA. Under Section 4(c), the CFTC has plenary authority (which pre-dates Dodd-Frank) to regulate commodity options differently than swaps.[45] This different regulation has reaffirmed the availability of "trade options" exemptions

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40. 7 U.S.C. §§ 9, 13(a)(2) (2012); Hohenberg Bros. Co., Comm. Fut. L. Rep. (CCH) ¶ 20271.

41. 7 U.S.C. § 25 (2012).

42. *See supra* Section I.A.

43. CFTC also recently issued an interpretation that explicitly excludes certain forward contracts with embedded volumetric optionality from its definition of options and futures contracts and proposed an interpretive guidance that will recognize an exception for certain natural and electric power contracts. *See* Forward Contracts with Embedded Volumetric Optionality, Exchange Act Release No. 74,936, 80 Fed. Reg. 28,239 (May 18, 2015).

44. 7 U.S.C. §§ 1a(47)(B)(ii), 2(h)(7) (2012).

45. *Id.* § 6(c).

for some non-financial companies as relief from certain reporting requirements and from designations as a "swap dealer" for activity related to physically settled commercial energy contracts.[46] However, it should be noted that most of these exemptions only provide relief from CEA provisions regarding centralized clearing, registration, and reporting requirements.[47] Anti-fraud and anti-manipulation provisions continue to apply to these exempted transactions as the CFTC regularly reserves the applicability of relevant CEA provisions and its own enforcement powers to exempted transactions.[48]

1. Dodd-Frank Provisions Guiding the Mutual Existence of the CFTC and FERC

When it comes to electricity markets, the statutory language of the CEA, as amended by Dodd-Frank, does not offer direct guidance on how to resolve potential disputes that may arise due to double regulation by FERC and the CFTC. First, Section 2(a)(1)(A) of the CEA provides that the CFTC shall have "exclusive jurisdiction . . . with respect to accounts, agreements . . . and transactions involving" futures contracts "traded or executed" on CFTC-licensed exchanges.[49] Secondly, Dodd-Frank incorporated a saving clause into the CEA that preserves FERC's and other state regulators' authority over market activity "entered into pursuant to a tariff or rate schedule approved by [FERC] or a State regulatory authority"[50] and that is "executed, traded, or cleared on a registered entity or trading facility owned or operated by a regional transmission organization ["RTO"] or independent system operator ["ISO"]."[51] However, this does not in any way restrict the CEA's applicability to such transactions.[52] In order to provide a venue for

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46. *See* Commodity Options, 77 Fed. Reg. 25,320 (Apr. 27, 2012).

47. *See id.* at 25,328 ("Finally, at § 32.3(d), the interim final rule also retains for trade options the antifraud and anti-manipulation rules under part 180, § 23.410, the specific options antifraud provisions of pre-Dodd-Frank § 32.9 (renumbered herein as § 32.4), and any other general antifraud, anti-manipulation, and enforcement provisions of the CEA, including but not limited to, CEA sections 2, 4b, 4c, 4o, 4s(h)(1)(A), 4s(h)(4)(A), 6, 6c, 6d, 9, and 13.").

48. *See id.*

49. *See* 7 U.S.C. § 2(a)(1)(A) (2012). *See generally* Ghee, *supra* note 12 (discussing the limitations of FERC jurisdiction over manipulative conduct in financial markets).

50. 7 U.S.C. § 2(a)(I)(i) (2012).

51. *Id.* § 2(a)(I)(i)(II).

52. *See* Ghee, *supra* note 12, at 390.

reconciling potential regulatory conflicts, Section 4(c)(6) authorizes the CFTC, subject to certain conditions, to issue exemptions from the "requirements"[53] of the CEA for "certain transactions entered into pursuant to a tariff or rate schedule approved or permitted to take effect by FERC[54] or a state regulatory authority."[55] However, the CEA limits the CFTC's authority to issue an exemption under Section 4(c)(6) by requiring the exemption to be consistent with Sections 4(c)(1) and 4(c)(2).[56] Sections 4(c)(1) and (2) require the exemption to be aimed at "promot[ing] responsible economic or financial innovation and fair competition."[57] The CFTC must also determine that (i) the exemption would be "consistent with the public interest and the purposes of the CEA;" (ii) the transaction would be entered into solely between "appropriate persons" as defined in 7 U.S.C. § 6(c); and (iii) the exemption would not have "a material adverse effect on the ability of the CFTC or any contract market to discharge its regulatory or self-regulatory responsibilities" under the CEA.[58]

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53. In various agency actions CFTC declared that it is interpreting the statutory language of "requirements" under CEA as meaning CEA provisions that stipulate mandatory margin, reporting, and registration requirements, and not including the CEA provisions that include prohibitions against manipulative conduct. Thus, according to the CFTC's own interpretation of its authority to grant exemptions to FERC regulated markets, CFTC does not have power under CEA § 4(c)(6) (7 U.S.C. § 6(c)(6)) to grant relief from compliance with prohibitions against manipulative conduct. *See infra* Section II.A.1.

54. Under the FPA, FERC can approve a tariff that is "just and reasonable." 16 U.S.C. § 824d(a) (2012). In defining "just and reasonable," courts have developed a cost-causation principle that requires FERC tariff approvals to establish that the parties bearing facility costs will receive benefits that are "roughly commensurate." Ill. Commerce Comm'n v. FERC, 576 F.3d 470, 476-78 (7th Cir. 2009).

55. *See* 7 U.S.C. § 6(c)(6) (2012). In enacting section 4(c), Congress noted that the purpose of the provision was 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. H.R. Rep. No. 102-978, 1992 U.S.C.C.A.N. 3179, 3213 (1992).

56. 7 U.S.C. § 6(c)(6) (2012).

57. *Id.* § 6(c)(1)-(2).

58. *Id.*

2. CFTC's Exemptive Orders For RTO/ISO Markets Under CEA Section 4(c)(6)

Under its Section 4(c)(6) authority, the CFTC has thus far issued two exemptive orders. The first and more significant exemptive order was issued in March 2013 in response to a petition by six RTOs and ISOs ("the RTO-ISO Order").[59] The RTO-ISO Order granted the energy futures and swaps markets administered by these organizations[60] relief from various mandatory margin, registration, and reporting requirements under the CEA—except CEA's anti-fraud and anti-manipulation provisions—and preserved the CFTC's authority to enforce these provisions through civil enforcement actions.[61] The scope of the RTO-ISO Order also included transactions that fall within the Electric Reliability Council of Texas

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59. Final Order in Response to a Petition from Certain Independent System Operators and Regional Transmission Organizations, 78 Fed. Reg. 19,880 (Apr. 2, 2013). The petitioners constitute almost the entirety of U.S. electricity markets: three RTOs (Midwest Independent Transmission System Operator, Inc., ISO New England, Inc., and PJM Interconnection, L.L.C.) and three ISOs (California Independent System Operator Corporation, New York Independent System Operator, Inc., and Electric Reliability Council of Texas, Inc. ("ERCOT")). *See id.* The only large-scale RTO that was not a party to the petition was Southwest Power Pool, which filed its own petition. *See* Notice of Proposed Order and Request for Comment on an Application for an Exemptive Order from Southwest Power Pool, Inc., 80 Fed. Reg. 29,490 (May 21, 2015).

60. For a background and discussion of policy issues, see Susan Kelly & Elise Caplan, *Time for a Day 1.5 Market: A Proposal to Reform Rto-Run Centralized Wholesale Electricity Markets*, 29 ENERGY L.J. 491 (2008) ("With the exception of the SPP, [all of these RTOs] currently or will soon operate, centralized day-ahead and real-time spot markets for electric energy, as well as markets for certain ancillary services needed to support open access transmission service.").

61. The exemption under the RTO-ISO Order is granted in particular for certain transactions that fall within the definitions of "Financial Transmission Rights," "Energy Transactions," "Forward Capacity Transactions," or "Reserve or Regulation 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 protocol that has been approved or permitted to take effect by FERC or PUCT. Final Order in Response to a Petition from Certain Independent System Operators and Regional Transmission Organizations, 78 Fed. Reg. at 19,912-14. To be eligible for the exemption the party to the transaction 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." *Id.*

("ERCOT"), which is the only electric grid in the U.S. that operates entirely within a single state.[62] Remarkably, the RTO-ISO Order as proposed and finalized, did not address Section 22 of the CEA[63] or involve any discussion regarding the private right of action throughout the notice and comment rulemaking period.[64]

In May 2015, the second exemption under Section 4(c)(6) was proposed by the CFTC in response to a petition by Southwest Power Pool ("SPP") ("SPP Proposed Order").[65] The RTO-ISO Order and SPP Proposed Order are almost identical with respect to the scope of the exemptions they provide to the transactions taking place in the respective energy markets. However, the SPP Proposed Order includes an explicit statement by the CFTC that the private right of action for market participants shall continue to exist with regards to the exempted transactions.[66] In the commentaries section of the SPP Proposed Order, the CFTC stated that the availability of a private right of action was a

62. The ERCOT only operates in Texas, which gets about 85% of its electricity from the ERCOT grid. *See* Daniel M. Gonzales, *Shockingly Certain: Why Is the Public Utility Commission of Texas Steadfast in Its Resolve to Keep Texas's Energy Market Deregulated Amidst Turmoil?*, 10 TEX. TECH ADMIN. L.J. 497, 502 (2009) ("In 1999, with the passage of the revised Public Utility Regulatory Act (PURA99), the Texas legislature changed its tune in regard to the nature of the electricity market. In PURA99, the Texas legislature declared that '[t]he legislature finds that the production and sale of electricity is not a monopoly warranting regulation of rates, operations, and services and that the public interest in competitive electric market requires that . . . electric services and their prices should be determined by customer choices and the normal forces of competition.'"); Paul B. Mohler, *Has the "Complete and Permanent Bond of Protection" Provided by FERC Refunds Eroded in the Transition to Market-Based Rates*?, 33 ENERGY L.J. 41 (2012). *See generally* Christopher J. Bateman & James T. B. Tripp, *Toward Greener FERC Regulation of the Power Industry*, 38 HARV. ENVTL. L. REV. 275 (2014) (discussing FERC regulation generally).

63. *See* Final Order in Response to a Petition from Certain Independent System Operators and Regional Transmission Organizations, 78 Fed. Reg. at 19,912. CFTC excepted its general anti-manipulation authority and other scienter-based prohibitions under CEA sections 2(a)(1)(B), 4(d), 4b, 4c(b), 4*o,* 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 from the exemption. *Id.*

64. *See* Final Order in Response to a Petition from Certain Independent System Operators and Regional Transmission Organizations, 78 Fed. Reg. at 19,880.

65. Notice of Proposed Order and Request for Comment on an Application for an Exemptive Order from Southwest Power Pool, Inc., 80 Fed. Reg. 29,490 (May 21, 2015).

66. *Id.* at 29,493.

matter of public importance.[67] Without the agency having explicitly addressed the issue through notice and comment rulemaking, the RTO/ISO Order as well as the SPP Proposed Order could not be interpreted in a way that bars private anti-manipulation claims.[68]

3. Aspire v. GDF: Fifth Circuit Holds that Private Right of Action is Unavailable Under the RTO-ISO Order

In February 2015, the U.S. District Court for the Southern District of Texas dismissed a private anti-manipulation lawsuit on the grounds that the CEA's Section 22 private right of action was not available to the plaintiffs under the RTO-ISO Order.[69] The lawsuit was brought by two trading companies alleging that the defendants, various electricity generators in ERCOT's market, violated CEA's prohibitions on manipulation[70] by "intentionally withholding electricity generation during

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67. *Id.*

68. *Id.* ("By enacting CEA section 22, Congress provided private rights of action as a means for addressing violations of the [CEA] alternative to [CFTC] enforcement action. It would be highly unusual for the [CFTC] 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 50—while at the same time denying private rights of action and damages remedies for the same violations. Moreover, if the [CFTC] 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. Thus, the [CFTC] did not intend to create such a limitation, and believes that the RTO-ISO Order does not prevent private claims for fraud or manipulation under the Act. For the avoidance of doubt, the [CFTC] notes that this view equally applies to SPP's Proposed Exemption. Therefore, [the RTO-ISO Order] also would not preclude such private claims.").

69. Aspire Commodities, LP v. GDF Suez Energy N. Am., Inc., No. H-14-1111, 2015 WL 500482, at *1 (S.D. Tex. Feb. 3, 2015), *aff'd sub nom.* Aspire Commodities, L.P. v. GDF Suez Energy N. Am., Inc., 640 F. App'x 358 (5th Cir. 2016), *and reh'g denied*, No. 15-20125, 2016 WL 3211288 (5th Cir. 2016).

70. 7 U.S.C. § 9(1), (3).

times of tight supply,"[71] which artificially created unpredictable prices in the secondary futures markets.[72]

In order to avoid a denial of their private right of action under the RTO-ISO Order for transactions in the ERCOT market, the plaintiffs initially built their commodity manipulation case on the alleged illegal conduct's secondary effects on the Intercontinental Exchange ("ICE"), which was outside the scope of the RTO-ISO Order.[73] However, in an unpublished opinion, the court rejected the lawsuit by relying on the explicit exemption from the CEA provisions that the RTO-ISO Order granted to ERCOT transactions.[74] In analyzing the plain meaning of the RTO-ISO Order, the court interpreted its relevant carve-out provision—which contained a list of CEA provisions that will continue to apply to the exempted transactions—as an exhaustive list.[75] Since Section 22—which is the private right of action provision of CEA—was not explicitly enumerated in the carve-out section of the RTO-ISO Order, the court

71. *Aspire*, 2015 WL 500482, at *1. ("ERCOT balances the real time supply with the demand for electricity by adjusting the market price, called the Locational Marginal Price ('LMP') to incentivize more or less energy production as needed. Generators like Defendants offer electricity to ERCOT in price/quantity pairings of their choosing, known as offer curves, which ERCOT uses to balance the system by using the next lowest-cost energy to serve the next unit of demanded energy. Generators can change their offer curves throughout the day but must supply an offer curve at least one hour in advance. A generator can effectively prevent dispatch of its energy by offering it to ERCOT at prices above the LMP, but if that generator's energy is needed, ERCOT will raise the LMP to attract and capture the needed energy. ERCOT's primary regulator is the Public Utility Commission of Texas ('PUCT').").

72. *Id.* Plaintiffs alleged numerous instances in which defendant GDF engaged in "economic withholding" by suddenly increasing its offer prices from their normal rates—at times from the usual price range of $100-1000 per MWh to $5000 MWh (which is the maximum allowable "Locational Marginal Price" under ERCOT rules). *Id.*

73. *Id.*

74. *Id.*

75. *See id.* at *5. Under the canon of *expressio unius est exclusio alterius* when certain items are listed in a statutory provision but other related items 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.").

opined that the CFTC clearly intended the private right of action to be suspended by the RTO-ISO Order.[76]

On appeal, the plaintiffs expanded their argument to also cover the transactions in the ERCOT market.[77] In support of this argument, the plaintiffs relied on the CFTC's May 2015 statement—found in the recently proposed SPP Proposed Order and the relevant CFTC commentary—reflecting the agency's view that the private right of action shall survive the RTO-ISO Final Order.[78] The Fifth Circuit rejected this argument based on *waiver* grounds and the SPP Proposed Order's lack of persuasiveness as an administrative act.[79] According to the Fifth Circuit, the RTO-ISO Order's language was unequivocal and the SPP Proposed Order could not be given weight as an agency act in direct conflict with a final order.[80]

76. *Aspire*, 2015 WL 500482, at *5 ("However, as Defendants correctly argue, GDF's transactions within ERCOT are exempted transactions under the Final Order. As observed above, the exempted transactions include "energy transactions," which are defined as transactions in a day-ahead or real time market for the purchase or sale of electricity, such as the transactions in this case. The Final Order exempts these transactions 'from all provisions of the CEA,' which includes 7 U.S.C. § 25 upon which Plaintiffs rely as the basis for their private cause of action. Moreover, § 7 U.S.C. § 25–which is Section 22 of the CEA-is not included in the Final Order's listing of CEA sections retained as part of the CFTC's general anti-fraud and anti-manipulation authority and scienter-based prohibitions.").

77. Aspire Commodities, L.P. v. GDF Suez Energy N. Am., Inc., 640 F. App'x 358, 362 (5th Cir.), *reh'g denied*, No. 15-20125, 2016 WL 3211288 (5th Cir. 2016).

78. *Id.*

79. *Id*. ("We recognize that the Commission issued the SPP Proposed Order after the district court decided this case, so Aspire could not have used the Order as support before the district court. Nonetheless, Aspire could have made the interpretive argument it makes now: that the Final Order should not be read to exempt ERCOT transactions from the private right of action provision even though that provision is not an enumerated exception. Even if we were to address the merits of Aspire's interpretive argument, the SPP Proposed Order does not change our analysis. We do not find the Final Order ambiguous. Accordingly, we only consider the Commission's interpretation of the Final Order as expressed in the SPP Proposed Order's preamble for its 'persuasive power.' [citation omitted]. We do not find the Commission's statements in the preamble of the SPP Proposed Order persuasive as they directly contradict the plain language of the Final Order.").

80. *Id.*

4. CFTC Reviews Private Right of Action for RTO-ISO Markets and Retreats After Opposition by the Industry

As a response to the Fifth Circuit ruling, in May 2016, the CFTC proposed an amendment to the RTO-ISO Order (the "Proposed RTO-ISO Amendment") specifically addressing the issue of private right of action in exempted energy markets.[81] In the Proposed RTO-ISO Amendment, which was issued by a 2-1 vote, the CFTC aimed to clarify the interpretation of the RTO-ISO Order and re-establish the availability of a private right of action under Section 22 of the CEA in relation to exempted transactions.[82] In favor of the availability of the private right of action, the CFTC articulated five main arguments: (1) the preservation of "the private right of action with respect to fraud and manipulation will not cause regulatory uncertainty or duplicative or inconsistent regulation;" (2) "conflicting judicial interpretations regarding the nature of the [RTO-ISO transactions] would not affect the jurisdiction of FERC or any relevant state regulatory authority;" (3) "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;" (4) "the private right of action under CEA [S]ection 22 was established by Congress as an integral part of the CEA's enforcement and remedial scheme;" and (5) "the Commission's preservation of [S]ection 22 liability with respect to the [carve-out provisions] is consistent with the Commission's actions in prior 4(c) orders."[83] Commissioner Giancarlo, who has opposed the proposed amendment, filed a dissenting opinion in which he articulated the reasons of his opposition.[84] According

81. 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, 81 Fed. Reg. 30,245 (May 16, 2016).

82. Timothy Massad, Chairman, CFTC, Statement in Support of the Proposed Amendment to the RTO-ISO Order (May 10, 2016), http://www.cftc.gov/PressRoom/Spe echesTestimony/massadstatement051016 [https://perma.cc/P7RT-PPV3] ("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.").

83. 81 Fed. Reg. at 30,248-49.

84. J. Christopher Giancarlo, Comm'r, CFTC, Statement on the Proposed Amendment to the RTO-ISO Order (May 10, 2016), http://www.cftc.gov/PressRoom/Sp

to Commissioner Giancarlo, the "plain language" of the RTO-ISO Order, relying on which the market participants have been operating for over three years, was unambiguous.[85] Therefore, the dissenting Commissioner argued that the private rights of action should not survive the exemption.[86] Furthermore, the CFTC's action created legal uncertainty by retroactively applying a previously unarticulated position, without following rulemaking procedures.[87] The Commissioner also recognized that, given the continuing availability of CFTC enforcement actions to seek restitution on behalf of aggrieved individuals, allowing private rights of action on top of them would unnecessarily cause electricity rate increases as companies would have to save for potentially expensive litigation matters.[88]

In the following months, the proposed amendment faced intense criticism from various actors such as utilities companies, trade organizations, RTOs, and FERC staff.[89] Meanwhile, the House Committee on Energy and Commerce, in a letter voicing the concerns raised by the commentators, also requested a briefing from the CFTC by July 15, 2016.[90] The primary concern of the critics was the regulatory burdens and the uncertainty that may be caused by dual regulation of the energy markets by both the CFTC and FERC.[91] The critics generally

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eechesTestimony/giancarlostatement051016 [https://perma.cc/BBX9-J5Q2] ("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. . . . 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.").

85. *Id.*

86. *Id.* In reaching this conclusion Commissioner Giancarlo relied on a canon of statutory interpretation, *expressio unius est exclusio alterius*. *See id.*

87. *Id.*

88. *Id.*

89. Dennis J. Hough, Jr., *FERC Opposes Private Right of Action in CFTC Proceeding; Congress Requests Briefing*, LEXOLOGY (July 6, 2016), http://www.lexology.com/library/detail.aspx?g=057af511-f522-4a92-8975-c683836db054 [https://perma.cc/TQR9-49VW].

90. Letter from Fred Upton, Chairman, House Comm. on Energy & Commerce, to Timothy G. Massad, Chairman, CFTC (June 24, 2016), https://energycommerce.house.gov/sites/republicans.energycommerce.house.gov/files/documents/114/letters/20160624CFTC.pdf [https://perma.cc/TX4E-EWRJ].

91. Hough, Jr., *supra* note 89.

argued that Congress granted FERC exclusive authority through the Federal Power Act ("FPA") to enforce anti-market manipulation provisions with respect to the RTOs, and the FPA expressly prohibits private rights of action.[92] Allowing the private right of action in energy markets would create uncertainty and costs that will negatively affect prices to the detriment of the users.[93]

After considering numerous comments provided by the industry and stakeholders, the CFTC in October 2016 issued and finalized the SPP Proposed Order and the Proposed RTO-ISO Amendment in a joint final order (the "Joint Final Order").[94] Remarkably, in the Joint Final Order the CFTC retreated from its prior position and expanded the exemptions granted to RTOs and ISOs under Section 4(c)(6) to bar private actions that could be brought under Section 22.[95] In doing so, the CFTC recognized its continuing enforcement authority, the special nature of the RTO-ISO markets, and their intensive regulation by FERC.[96] More interestingly, CFTC also recognized that the availability of a private right

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92. Letter from Max Minzner, Gen. Counsel, FERC, to Christopher Kirkpatrick, Sec'y, CFTC (June 14, 2016), https://www.findknowdo.com/sites/default/files/news/attachments/2016/06/ferccea-private-claims-rto-marketsopposition-6-14-16.pdf [https://perma.cc/7SMV-3A2X].

93. *Id.*

94. Final Order Regarding Southwest Power Pool, Inc. Application to Exempt Specified Transactions, 81 Fed. Reg. 73,062 (Oct. 24, 2016).

95. *Id.*

96. *Id.* at 73,071 ("Considering all of these factors together, rather than any of these factors alone . . . the Commission concludes that in the limited context of activities within the RTO-ISO markets, there should be a complete exemption from private claims under CEA section 22. Initially, the Commission agrees that the unique nature of the RTO-ISO markets differentiates this issue from other contexts in which a private right of action is essential. The RTO-ISO markets are heavily regulated by FERC and PUCT, with whom the Commission shares jurisdiction. This regulation is 'pervasive' and it includes rate monitoring, tariff approval, authorization of market rules and pricing mechanisms, and real-time oversight of markets. As part of an articulated regulatory structure, these markets are also subject to close surveillance not only by the regulators but also by independent market monitors. In addition, FERC and PUCT support their regulation of the electric power markets with an enforcement program that includes the authority to order civil penalties, disgorgement, and to resettle the market. Furthermore, the Commission will continue to police these markets for fraud, manipulation and other unfair trading activities and, as contemplated by Congress, it can and will cooperate with these fellow regulators to deter and prevent unlawful trading activities in the RTO-ISO markets.").

of action might conflict with the Congressional intent regarding electricity markets[97]: Congress considered the issue in 2005 in the context of amendments to the FPA and decided not to allow the private right of action in these markets.[98]

II. ANALYSIS

The CFTC's withdrawal of the anti-manipulation private right of action in RTO-ISO markets might be celebrated by the energy industry at first sight. But the true legal and economic ramifications of this policy choice—and the special status given to RTO-ISO markets among other commodities markets—are likely to unfold in the longer term.

A. ARGUMENTS IN FAVOR OF THE PRIVATE RIGHT OF ACTION'S AVAILABILITY

1. Plain Meaning of the CEA: Does CEA Give CFTC The Power to Suspend Private Right of Action in the First Case?

The withdrawal of the private right of action in RTO-ISO markets is remarkable, especially since it amounts to the removal of a statutory right through agency action.[99] Under *Chevron*, reasonable agency interpretations are generally given deference by the courts in relation to issues within their regulatory jurisdiction for which a statute does not provide an unambiguous rule.[100]

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97. *Id.* at 73,072 ("In 2005, Congress amended the FPA to give FERC the authority to pursue manipulation of the electricity markets. At that time, Congress focused on whether there should be a private right of action for manipulation of these specific markets. Congress explicitly declined to grant such a right of action. This was a more particularized determination regarding the merits of private enforcement in these unique markets than the legislative judgment reflected in CEA section 22 that there should be a generally applicable private right of action for fraud and manipulation in the Commission's jurisdictional markets.").

98. *Id.*

99. *See* David S. Rubenstein, *The Paradox of Administrative Preemption*, 38 HARV. J.L. & PUB. POL'Y 267 (2015) ("Administrative preemption is a convenience and contrivance for modern government. But, as hypothesized here, it is also a constitutional paradox. Administrative preemption requires that agency action simultaneously qualify as (1) 'Law' for federalism purposes and (2) 'not Law' for separation of powers.").

100. Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984); *see also* Auer v. Robbins, 519 U.S. 452, 461 (1997) (holding unanimously that an agency's

Section 4(c)(6) of the CEA provides that the Commission shall issue exemptions from the "requirements" of the CEA for the transactions entered into pursuant to a tariff or rate schedule approved or permitted to take effect by energy regulators.[101] Thus, one needs to make a closer textual inquiry on what the term "requirement" actually may entail within the context of the CEA to answer two questions: (i) whether the CEA provides unambiguous guidance with regards to the scope of the CFTC's exemptive powers, and (ii) in the corollary, whether the CFTC has acted in conflict with its authority under Section 4(c)(6).

In the Proposed RTO-ISO Amendment, CFTC provided an overview of its exemptive powers under Section 4(c)(6), and stated that within the context of the CEA the term "requirement" usually refers to various regulatory registration and reporting rules applicable to commodity options and swap trading parties and exchanges.[102] In the CFTC's opinion it was dubious at best to assume a Section 22 private right of action to qualify as such a "requirement."[103] In bold words, the CFTC itself

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interpretation of its own ambiguous regulation was entitled to particularly deferential respect); J. Lyn Entrikin Goering, *The Tailoring Deference to Variety with a Wink and a Nod to Chevron: The Roberts Court and the Amorphous Doctrine of Judicial Review of Agency Interpretations of Law*, 36 J. LEGIS. 18 (2010) ("The Court generally applied Chevron deference if a rule had been adopted in notice-and-comment proceedings, and otherwise defaulted to classic *Skidmore* analysis of various persuasive factors to determine whether a less formal agency interpretation warranted deference. In its final term, the Rehnquist Court resolved a complex issue concerning the *stare decisis* effect on agencies of judicial precedents interpreting black-letter law. In *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, the Court held that an agency is bound by a court's prior interpretation of a statute or rule only if the court declared its language unambiguous. In that event, the prior judicial interpretation controls over any subsequent agency interpretation to the contrary.").

101. 7 U.S.C. § 6(c)(6) (2012). Section 4(c)(1) contains a broader language that authorizes the CFTC to grant exemptions from the CEA's "requirements" as well as "from any other provision of this Act." *Id.* § 6(c)(1).

102. 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, 81 Fed. Reg. 30,245, 30,249 (May 16, 2016).

103. *Id.* ("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. Section 4(c)(6), by contrast,

declared its hesitation to conclude 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)."[104] The ordinary meaning of the word "requirement" indicates a necessity ("something that is needed or that must be done") rather than a prohibition (e.g., the rules against manipulative practices) or in the alternative, a pre-condition to some other result ("something that is necessary for something else to happen or be done").[105] Thus, there is an argument to be made that the withdrawal of the private right of action for exemptions granted under Section 4(c)(6) may in fact be in violation of the plain meaning of the CEA's text.

When interpreting the Supreme Court's case law regarding *Chevron* deference, some commentators argue that the threshold for deference to administrative acts may indeed be lowered if the relevant agency act causes major changes in a statutory program.[106] The CFTC resorted to notice and comment rulemaking and public comments when issuing the relevant Final Joint Order. However, as argued by Sunstein, the background principles of administrative law and various non-delegation doctrines may require the level of deference to agency action to be lowered if the relevant agency action creates a large scale change in the

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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).").

104. *Id.*

105. *Requirement*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/requirement [https://perma.cc/3FCP-U2YR].

106. *See* Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 244–45 (2006) ("Agencies would not receive deference when they attempt to exercise their authority in ways that produce large-scale changes in the structure of the statutory programs that they are administering. . . . In some cases, well-established background principles operate to 'trump' *Chevron*. Agencies are not permitted to interpret ambiguous statutes so as to apply beyond the territorial boundaries of the United States. Nor are agencies allowed to interpret ambiguous statutes to apply retroactively. An agency cannot construe an ambiguous statute so as to raise serious constitutional doubts. In these and other contexts, courts have insisted on a series of nondelegation canons, which require legislative, rather than merely executive, deliberation on the issue in question. Congress will not lightly be taken to have delegated to agencies the choice of how to resolve certain sensitive questions. Perhaps *MCI* and *Brown & Williamson* can be understood to build on these nondelegation canons to suggest a more general principle: Fundamental alterations in statutory programs, in the form of contractions or expansions, will not be taken to be within agency authority.").

statutory program administered by the agency.[107] In the present case, the CFTC's withdrawal of the private right of action arguably constitutes an extreme situation cautioned by Sunstein: a generally available statutory right being removed through an agency order issued in response to a petition by various private entities and which does not strictly meet the definition of a general rulemaking.[108] In this sense, analogies to similar SEC rulemaking may not hold much value either. The commodities law differs from the securities law in its approach to the private right of action. Section 22 of the CEA provides an explicit statutory authority for a private right of action contrary to the private right of action in securities laws,[109] which was to a great extent developed by the courts.[110]

2. Double Regulation Concerns

Most of the arguments raised against the availability of a private right of action in RTO-ISO markets were centered on concerns arising from the prospect of double regulation by the CFTC and FERC, and the potential

107. *Id.*

108. *Id.*

109. For a critique of the doctrine of *implied* private rights of action—namely, reading congressional intent into a statute to enable a private right of action when there is no explicit congressional disposition that establishes a private right of action—see Jonathan A. Marcantel, *Abolishing Implied Private Rights of Action Pursuant to Federal Statutes*, 39 J. LEGIS. 251 (2013).

110. *See* Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 737 (1975). Although § 10(b) does not create an express private cause of action, courts recognize an implied private cause of action to enforce the provision and its implementing regulation. 15 U.S.C.A. § 78j(b); *see* Halliburton Co. v. Erica P. John Fund, Inc., 134 S. Ct. 2398 (2014). For a review of private right of action in securities context, see Stanislav Dolgopolov, *Providing Liquidity in a High-Frequency World: Trading Obligations and Privileges of Market Makers and a Private Right of Action*, 7 BROOK. J. CORP. FIN. & COM. L. 303 (2013). For a critique of judicially created private rights of action in areas entrusted to agency enforcement, see Richard B. Stewart & Cass R. Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1193, 1206–07 (1982) ("Judicial creation of private rights of action raises greater difficulties when the legislature has entrusted enforcement of a statutory scheme to a specialized administrative agency that is empowered to issue rules or to adjudicate controversies under the statute. In this context, private rights of action may usurp the agency's responsibility for regulatory implementation, decrease legislative control over the nature and amount of enforcement activity, and force courts to determine in the first instance the meaning of a regulatory statute.").

of discrepancies between the rules of the two agencies.[111] These critics should be dealt with in two perspectives. First, double-regulation concerns imply that if a private right of action is available, it will impose on the market participants additional regulatory burdens that will conflict with the CFTC's exemption regime (intra-jurisdictional conflict within commodities laws). Secondly, the opposition raising double-regulation concerns argues that the availability of a private right of action will interfere with FERC's jurisdiction over the relevant energy markets (inter-jurisdictional conflict; conflict between energy and commodities regulations). However, neither side of the double-regulation argument can withstand a closer inquiry on whether the availability of a private right of action would actually increase the market participants' compliance burdens.

First—in relation to the intra-jurisdictional conflict argument—CEA's anti-manipulation provisions and the relevant norms continue to apply to exempted transactions through CFTC enforcement regardless of the availability of a private right of action.[112] Thus, private enforcement will not create or change any compliance norms under the CEA for market participants and will not affect the relief already granted to exempted transactions from various other CEA provisions. Thus, the compliance cost-related arguments against the private right of action do not really have a tangible basis. On the other hand, the argument that the private right of action will unduly burden the market participants could be justified based on an assumption that the centralized CFTC enforcement will act as a gatekeeper for a substantial number of frivolous actions that will create undue costs for market participants. Yet, from a costs and benefits perspective, the withdrawal of private enforcement may create actual social wealth, only if the saved *legal costs* that would be incurred for defending against frivolous claims indeed outweighed the *social benefits* of *bona fide* anti-manipulation actions brought by private market participants. As expressed by the CFTC, 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

111. Hough, Jr., *supra* note 89.

112. *See* Final Order Regarding Southwest Power Pool, Inc. Application to Exempt Specified Transactions, 81 Fed. Reg. 73,062 (Oct. 24, 2016).

Commission's jurisdiction."[113] The private right of action under Section 22 was "established by Congress as an integral part of the CEA's enforcement and remedial scheme."[114] Thus, it can be argued that these arguments are directly in conflict with the Congressional intent embodied in Dodd-Frank in relation to the contemplated reform agenda pertaining to the energy markets. This Note further addresses this issue when discussing regulatory efficiency and the benefits of supplemental private enforcement.[115]

Second, the availability of a private right of action will not create an *inter-jurisdictional* conflict between the CFTC and FERC. CFTC and FERC regulations can—and in fact do—co-exist under the CEA as amended by Dodd-Frank and the Federal Energy Act as affirmed by the courts.[116] As explained above, the CEA's anti-manipulation provisions continue to apply to the exempted transactions.[117] In fact, FERC's anti-manipulation authority was originally intended to have a broader scope than the CEA. After a rise in energy prices between 2002 and 2005, Congress enacted the Energy Policy Act of 2005, expanding FERC's powers to prosecute energy price manipulation.[118] The authority granted to FERC by this legislation incorporated the language of Section 10(b) of the Securities Exchange Act of 1934,[119] rather than the language used in the CEA. However, as a result of the Dodd-Frank amendments, the anti-manipulation prohibition under the CEA covers a broader range of trading activities—especially those that are defined by CEA as *per se* violations (e.g., spoofing)—than the FERC's current anti-manipulation authority.[120] FERC's statutory authority is limited in comparison to the CEA in relation

113. 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, 81 Fed. Reg. 30,245, 30,248–49 (May 16, 2016).

114. *Id.*

115. *See infra* Section II.A.3.

116. Hunter v. FERC, 711 F.3d 155, 160 (D.C. Cir. 2013). ("But [FEA Section 4A's] text fails to answer the question whether FERC may intrude upon the CFTC's exclusive jurisdiction. More importantly, because FERC is free to prohibit manipulative trading in markets outside the CFTC's exclusive jurisdiction, there is no 'irreconcilable conflict' between the two statutes and therefore no repeal by implication.").

117. *See supra* note 112 and accompanying text.

118. 16 U.S.C. § 824v (2012).

119. 15 U.S.C. § 78j(b) (2012).

120. *See Hunter*, 711 F.3d at 160; Joel B. Eisen, *FERC's Expansive Authority to Transform the Electric Grid*, 49 U.C. DAVIS L. REV. 1783, 1849 n.249 (2016).

to the types of unlawful conduct that constitutes price manipulation—as an example, spoofing is illegal only under CEA.[121] In today's interconnected markets, many parties enter into a wide range of financial contracts tied to various energy market-related prices and indexes. This increases the need for harmonious implementation of the applicable regulatory standards ensured by the actions of all interested parties, public and private. A sweeping withdrawal of private rights of action may create regulatory gray zones, where certain unlawful conduct may escape the oversight of both FERC and CFTC as demonstrated in the *Aspire* case—where the plaintiff's initial claim was based on an injury that occurred in a connected secondary derivatives market. As seen in *Aspire*, FERC's jurisdiction does not reach derivatives markets and parties who transact in derivative markets without ever becoming a direct party to the relevant RTO or ISO transaction.[122] Thus, manipulative conduct occurring in a RTO/ISO market may have the potential to affect prices of contracts that are outside the RTO/ISO market, and vice versa.

To further demonstrate how FERC's regulatory web may be potentially short over substantial secondary market activity, under the FERC-approved rules of ERCOT, "[a] single generation entity that controls less than 5% of the installed generation capacity in ERCOT . . . is deemed not to have ERCOT-wide market power."[123] The defendant in *Aspire* controlled about five percent of Texas' market share.[124] By entering into a Settlement Agreement and Voluntary Mitigation Plan with the [Texas market authority], the defendant obtained "an absolute defense against an allegation pursuant to [Texas law and the market authority's

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121. *See* 7 U.S.C. § 6c(a)(1)-(2) (2012) (prohibiting any "offer to enter into, enter into, or confirm the execution of a transaction" that "is used to cause any price to be reported, registered, or recorded that is not a true and bona fide price"); *id.* § 6c(a)(5) (prohibiting trading that (i) "violates bids or offers;" (ii) "demonstrates intentional or reckless disregard for the orderly execution of transactions during the closing period;" or (iii) "is, is of the character of, or is commonly known to the trade as, '*spoofing*' (bidding or offering with the intent to cancel the bid or offer before execution)"); *id.* § 13(a)(2) (prohibiting actions "caus[ing] [the delivery/transmission of] false or misleading or knowingly inaccurate reports concerning crop or market information or conditions that affect or tend to affect the price of any commodity in interstate commerce").

122. Aspire Commodities, LP v. GDF Suez Energy N. Am., Inc., No. H-14-1111, 2015 WL 500482, at *1 (S.D. Tex. Feb. 3, 2015), *aff'd sub nom.* Aspire Commodities, L.P. v. GDF Suez Energy N. Am., Inc., 640 F. App'x 358 (5th Cir. 2016), *and reh'g denied*, No. 15-20125, 2016 WL 3211288 (5th Cir. 2016).

123. *Id.*

124. *Id.*

regulations] of an abuse of market power through economic withholding."[125] This requirement of substantial market power as a condition to have an actual ability to manipulate market price more closely follows the outdated price manipulation concept of antitrust laws, and trails behind the emerging norms of market regulation in securities and commodities laws. As demonstrated by events such as the flash crash, in today's markets where sophisticated trading tools are more and more available to the general public, even a single trader with modest resources may have a disproportionate capacity to disrupt the price integrity of a market.[126]

Furthermore, as will be explained below, price distortion in electricity markets creates impediments for the strategic planning of smaller market entrants, which generally consist of renewable and alternative energy companies. Thus, the necessity to create the correct incentives during the transition of the U.S. energy infrastructure into a smart grid makes high enforcement standards regarding anti-manipulation authority an absolute priority to mitigate the associated losses. In any case, withdrawal of the private right of action cannot remedy the dichotomy inherent to the existing dual regulatory structure.

3. Regulatory Efficiency

The issue of regulation by private enforcement is usually dealt with by answering one question: will the co-existence of private and public enforcement cause inconsistent sets of policies for implementing a statute that should apply uniformly nationwide?[127] In the relevant literature and case law, it is generally accepted that courts should not create private causes of action for violations of "agency-administered statutes because adjudication of such cases inevitably requires judges to make policy decisions that should be made by agencies."[128] However, where the statute explicitly provides for a private right of action, it is legally questionable

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125. *Id.*

126. *See* Michael Lewis, *Crash Boys*, BLOOMBERG (Apr. 24, 2014), https://www.bloomberg.com/view/articles/2015-04-24/michael-lewis-has-questions-about-flash-crash [https://perma.cc/HD5P-DQ77].

127. Richard J. Pierce, Jr., *The Role of the Judiciary in Implementing an Agency Theory of Government*, 64 N.Y.U. L. REV. 1239, 1270 (1989).

128. *Id.* at 1243.

whether such right can be suspended by an agency action.[129] In the present case, it is widely argued that FERC's regulation should have a primary role over the relevant markets to ensure a coherent policy agenda. However, this argument ignores both the shortcomings of FERC's authority and Congress' clear intent in placing the energy markets under dual regulation, both by FERC and the CFTC.[130]

From a market governance policy perspective, the CFTC's withdrawal of private action in exempted markets represents a deliberate choice in favor of "exclusive public enforcement" and a rejection of the potential benefits of a more balanced "supplemental private right of action" approach.[131] From a regulatory policy perspective, the most important benefits of the supplemental private right of action approach are (i) greater compliance with the norms due to greater deterrence caused by the potential of private lawsuits, and (ii) lower costs for the agency due to the allocation of litigation costs between private claimants and the regulatory agency.[132] Thus, the unavailability of private right of action

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129. Cannon v. Univ. of Chi., 441 U.S. 677, 717 (1979) ("When Congress intends private litigants to have a cause of action to support their statutory rights, the far better course is for it to specify as much when it creates those rights. But the Court has long recognized that under certain limited circumstances the failure of Congress to do so is not inconsistent with an intent on its part to have such a remedy available to the persons benefited by its legislation.").

130. Renee Labuz, *Shareholders' Rights to a Cause of Action Under the Investment Company Act of 1940 Following Exxon Mobil v. Allapattah*, 39 J. MARSHALL L. REV. 1521, 1542 (2006) ("Had Congress not intended there to be a private right of action, it certainly would have amended the statute to so state or would have argued such during one of the Act's many floor discussions.").

131. *See* Stewart & Sunstein, *supra* note 110, at 1215.

132. Stewart & Sunstein, *supra* note 110, at 1214-15 ("Public regulation may be needed because of the inadequacies of the common law system in coping with industrial conditions. Public enforcement is, however, frequently inadequate because of budget constraints; private actions can be a useful supplementary remedy by providing additional enforcement resources. *J.I. Case Co. v. Borak* reflects these considerations. The Supreme Court created a private right of action under section 27 of the Securities and Exchange Act of 1934 on behalf of shareholders challenging management's proxy statements as deceptive, notwithstanding the power of the SEC to bring suit and the failure of Congress explicitly to authorize private enforcement. The Court emphasized the Act's 'broad remedial purposes' as well as the apparent inability of the SEC to effectuate those purposes adequately. The Court did not discuss the possibility that private enforcement might subvert political control over enforcement. Instead, the Court asserted that the statutory goal of 'protection of investors' . . . implies the availability of judicial relief where necessary to achieve that result. Private rights of action, unlike rights of initiation,

may undermine optimal compliance with the anti-manipulation provisions of the CEA.[133] On the other hand, although the exclusive public enforcement approach lacks these benefits, it is often desirable from the perspective of a regulatory authority due to the greater deference it provides to the agency in shaping the relevant case law with virtually absolute authority in (i) deciding which lawsuits are to be litigated before the courts, and (ii) shaping the development of the relevant legal doctrines through direct control over the litigation strategy.[134] Furthermore, the exclusive public enforcement approach can be desirable for the CFTC to maximize the agency's role as a central repository for all information regarding potential violations of the CEA through the agency's new whistleblower program.

Yet, from a normative perspective, it is yet to be seen whether the refusal of the private right of action will help in achieving the greater integrity in energy markets envisaged by Dodd-Frank. Furthermore, the inevitable transformation from legacy energy networks into the smart grid necessitates the leveling of the playing field, which requires harmonization in regulatory norms and a homogenous enforcement environment.[135] In the long term, asymmetries in regulatory norms and compliance behavior may undermine the transformation of the U.S. economy towards greater efficiency and sustainability.[136]

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do not divert limited agency resources from other violations that may be more important." (citations omitted)).

133. Brianne J. Gorod, *The Sorcerer's Apprentice: Sandoval, Chevron, and Agency Power to Define Private Rights of Action*, 113 YALE L.J. 939, 944–45 (2004) ("[T]he ability of agencies to expand upon statutorily created private rights of action can also be important in those instances when Congress explicitly creates a private right of action.").

134. *Id.* at 1218 (quoting a court endorsing this approach in the context of FTC regulations in Holloway v. Bristol-Myers Corp, 485 F.2d 986 (D.C. Cir. 1973)).

135. For FERC's indifference towards environmental considerations, see Christopher J. Bateman & James T. B. Tripp, *Toward Greener FERC Regulation of the Power Industry*, 38 HARV. ENVTL. L. REV. 275, 275 (2014) ("America's electricity industry is at the heart of some of the nation's and world's biggest environmental challenges, including climate change. Yet the Federal Energy Regulatory Commission . . . which has regulatory jurisdiction over wholesale sales and transmission of electricity in interstate commerce and is charged with ensuring that rates and other aspects of the industry are 'just and reasonable,' has an official policy of excluding environmental considerations from its regulation of the industry.").

136. Gabe Maser, *It's Electric, but FERC's Cost-Causation Boogie-Woogie Fails to Justify Socialized Costs for Renewable Transmission*, 100 GEO. L.J. 1829, 1830 (2012)

Developments like rapid technological changes, sophistication of daily trading firms that rely on speculative strategies, and the ongoing decentralization of the energy transmission networks require regulators to provide adequate protections to new incomers and smaller cap enterprises.[137] Due to public enforcement's limited resources, private enforcement can play an important supplementary role to eliminate anti-competitive and predatory trading practices, which undermine the price discovery function of energy markets and increase the risks borne by smaller enterprises.[138]

4. Effects on Secondary Markets Doctrine: Anti-manipulation Private Right of Action's Reach on Secondary Markets and the Case Law on Foreign Exchange Exemption

The Fifth Circuit's approach in *Aspire*, which precipitated the CFTC's retreat, was possibly in conflict with the existing commodities case law that dealt with jurisdictional questions regarding secondary

("When a new plant is necessary, the market decides what type of plant is built. The advent of renewable energy has brought a twist to this status quo. Renewable energy is not cost competitive with fossil-fuel power without state or federal subsidies. Consumers in states that have chosen to promote renewable energy may end up supporting renewable-energy development through their state tax dollars—and, perhaps unexpectedly, through their electric bills as well. This distribution of cost results because the cost of the transmission needed to connect to a renewable-power facility can be shared among ratepayers who 'benefit' from that power. These costs are not insubstantial. Electricity lines cost millions of dollars per mile. With this amount of money at stake, consumers deserve transparent and balanced mechanisms to ensure they truly benefit from what they are paying for.").

137. *See* Jody Freeman & David B. Spence, *Old Statutes, New Problems*, 163 U. PA. L. REV. 1, 62–63 (2014) ("Yet to promote competition, FERC forced the unbundling of electric power generation and transmission in interstate markets only, stopping short of exerting similar authority over retail markets traditionally governed by the states. To create incentives for additional transmission capacity, FERC has bootstrapped its authority over rates in numerous creative ways yet has eschewed more aggressive mandates over market design. Under the auspices of its rate-setting authority, FERC midwifed the birth of new regional institutions capable of managing the increasingly complex electricity grid, but never required the states to join them. Finally, FERC has sought to force wholesale markets to be more welcoming to renewable resources and demand response, taking risks that it believes will survive judicial scrutiny. All of these efforts have involved interpretations of eighty-year-old statutory language written by a Congress that could not have imagined most of the problems FERC now faces.").

138. *See generally* Craig Pirrong, *Energy Market Manipulation: Definition, Diagnosis, and Deterrence*, 31 ENERGY L.J. 1 (2010).

markets. Ultimately, the CFTC, by withdrawing the private right of action in exempted markets, sided with the holding of the Fifth Circuit in *Aspire*. Yet, in *Aspire* the court's dismissal of the claim was partially grounded upon the argument that the plaintiff's injury did not have a sufficient level of proximity to the alleged manipulative trading patterns because, although the suspect transactions took place in the exempted ERCOT market, the defendant was not transacting in ERCOT directly and the injuries he suffered in transacting in the ICE market were secondary in nature.[139] Since the resulting price change on ICE was an indirect consequence of the defendant's activities, and the defendant did not directly enter into any transactions on the ICE market, secondary market trading alone was insufficient to support an independent claim.[140]

Interestingly, in *In re Foreign Exchange Benchmark Rates Antitrust Litigation*, a joint antitrust and CEA manipulation case was filed before the Southern District of New York in relation to a manipulative act in the exempted forex OTC market based on the effects of these acts on the related secondary markets.[141] The defendants relied on *Aspire* to defend against the private action.[142] However, the court rejected the defendants' motion to dismiss based on prior precedents that allowed claims brought for misconduct occurring in physical natural gas and petroleum markets affecting the exempted derivatives markets.[143] The court found that the plaintiff sufficiently alleged a direct relationship between currency prices in the spot market and the value of each FX futures contract. Since "futures prices [and options prices] [were] based on and derived arithmetically from spot prices," the claim was sufficient in showing the defendants' ability to influence FX futures and options prices for a CEA

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139. Aspire Commodities, L.P. v. GDF Suez Energy N. Am., Inc., 640 F. App'x 358, 362 (5th Cir.), *reh'g denied*, No. 15-20125, 2016 WL 3211288 (5th Cir. 2016).

140. *Id*.

141. *In re* Foreign Exch. Benchmark Rates Antitrust Litig., No. 13 Civ. 7789 (LGS), 2016 WL 5108131, at *17 (S.D.N.Y. Sept. 20, 2016). Foreign currency transactions are excluded from CEA under the explicit authority of 7 U.S.C. § 2(c)(1)(A).

142. *Id.*

143. *Id.* (first quoting Dunn v. CFTC, 519 U.S. 465, 473 (1997) ("Congress' broad purpose in enacting the Treasury Amendment was to provide a general exemption from CFTC regulation for sophisticated off-exchange foreign currency trading . . ."); then citing CFTC v. Paragon FX Enters., LLC, Nos. 11 Civ. 7740(FM), 11 Civ. 7741(FM), 2015 WL 2250390, at *1-2 (S.D.N.Y. Feb. 2, 2015) (summarizing legislative history)).

anti-manipulation case.[144] The court strongly distinguished *Aspire* as unbinding authority, stating that it did not "read in the *Aspire* opinion an intent to create a blanket rule that manipulation claims cannot lie where the manipulative acts took place entirely in exempt markets."[145] The court reasoned that "such a rule would be overbroad, and would 'frustrate[] the CEA's primary purpose of preventing and deterring price manipulations.'"[146]

The aforementioned cases demonstrate the regulatory difficulties faced by lawmakers and agencies in drawing rules, especially in consideration of today's interconnected financial markets. In today's economy, where algorithmic trading, passive ETFs based on various commodity indexes, and various forms of other derivative transactions have become conventional investment tools, a more holistic and integrated approach to anti-manipulation enforcement policy holds the key to preventing market asymmetries and unfair regulatory arbitrage opportunities.[147]

5. Floodgates Argument to Prevent Strike Actions

The most popular argument against the availability of private anti-manipulation actions in energy markets is based on a belief that allowing private actions will create an unfair burden on market participants who will then incur the legal costs necessary to defend against frivolous cases. This argument seems to closely follow the similar concerns that have been raised in the securities law domain in response to the excess of speculative lawsuits. This led to the adoption of the Private Securities Litigation Reform Act of 1995 ("PSLRA") by Congress, which elevated the pleading standards for a *prima facie* case of securities manipulation.[148] However, a closer analysis of the issue reveals that the mechanics of anti-

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144. *Id.* at *21.
145. *Id.*
146. *Id.* at *19 (quoting *Parnon Energy*, 875 F. Supp. 2d at 243).
147. *See* Frank Partnoy, *Financial Derivatives and the Costs of Regulatory Arbitrage*, 22 J. CORP. L. 211, 227 (1996); Erich Schanze, *Hare and Hedgehog Revisited: The Regulation of Markets That Have Escaped Regulated Markets*, 151 J. OF INST. AND THEORETICAL ECON. 162, 162 (1995); Andrei Shleifer, *A Theory of Yardstick Competition*, 16 RAND J. ECON. 319, 319-20 (1985).
148. *See* Stephen J. Choi & Robert B. Thompson, *Securities Litigation and Its Lawyers: Changes During the First Decade After the PSLRA*, 106 COLUM. L. REV. 1489, 1489 (2006).

manipulation cases differ significantly in the commodities law domain from historical, economic, and legal perspectives.

Issues of the excessive private actions in securities usually arise in the context of derivative lawsuits. The PSLRA aims to curb frivolous lawsuits which do not necessarily represent a certain shareholder's financial interests. Similar to the shareholder disputes context, these lawsuits generally stem from the perverse incentives that certain members of the plaintiffs' bar may have in pursuing legal fees by filing cases against a corporation whose shares are owned by the lawyer's client.[149] Thus, the wide availability of private rights of action in shareholder and securities litigation poses the risk of destroying value by creating an artificial divergence between the best interests of a corporation and its shareholders. Researchers found that the lower thresholds for private securities actions and the potential liability risk affected the valuations of many companies negatively, especially in high-risk industries and growth companies.[150] Thus, in the securities context, private actions may pose significant conflicts of interest (among the legal profession, corporations, and both large and small shareholders), as the filing of lawsuits often has a direct effect on the stock price of the defendant company. Furthermore, the relative ease of meeting pleading standards, such as the standard to overcome a motion to dismiss, necessitates heightened norms. However, in practice, it is questionable whether the adoption of the PSLRA achieved the desired results. There is at least some evidence that demonstrates an increase in the number of lawsuits brought in the post-PSLRA era together with an increase in the average amount of damages sought and lengthened settlement periods.[151]

149. The problem of value destruction by shareholder disputes is even more acute in the M&A context. *See* Jill E. Fisch, Sean J. Griffith & Steven Davidoff Solomon, *Confronting the Peppercorn Settlement in Merger Litigation: An Empirical Analysis and a Proposal for Reform*, 93 TEX. L. REV. 557, 560 (2015).

150. *See* Marilyn F. Johnson, Karen K. Nelson & A.C. Pritchard, *In re Silicon Graphics Inc.: Shareholder Wealth Effects Resulting from the Interpretation of the Private Securities Litigation Reform Act's Pleading Standard*, 73 S. CAL. L. REV. 773, 777 (2000).

151. Choi & Thompson, *supra* note 148, at 1497; Michael A. Perino, *Did the Private Securities Litigation Reform Act Work?*, 2003 U. ILL. L. REV. 913, 913 (2003) ("The picture that emerges from studying these data is that the PSLRA did not work as intended. The article demonstrates that as many, if not more, class actions are filed after the Act as before. High technology issuers remain at significantly greater risk than issuers in other industries. There is statistically significant evidence, however, that suggests that the Act

On the other hand, in the commodities context, excessive private litigation does not pose the same risks as in the securities context. For example, contrary to that in the securities domain, a private anti-manipulation action in commodities is brought not against the issuer of a certain security, but against a trader who acts in breach of the CEA's anti-manipulation norms when trading a covered commodity. Thus, it is unlikely for prices in the commodity markets to be affected by the filing of a private lawsuit against a certain trader of the relevant commodity, as the price of the underlying commodity is generally independent from the commodities trader's liability risk. Although, in the context of the energy markets, liability risks faced by energy producers may cause an increase in energy prices, a private right of action does not alter the relevant compliance norms which must be adopted by the relevant market participants regardless of the availability of private rights of action. The CEA anti-manipulation provisions continue to apply to energy producers through CFTC enforcement.

Contrary to the pleading standards in the securities context prior to the PSLRA, proving price manipulation in the commodities context was already quite difficult in the commodities context prior to Dodd-Frank.[152] In fact, the adoption of independent statutory causes of action for manipulative activity, such as "violation of bids" and "spoofing" reflects a conscious effort by Congress to lower the relevant pleading standards to improve market discipline in the commodities markets.[153]

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improved overall case quality at least in the circuit that most strictly interprets one of the Act's key provisions, a heightened pleading requirement. The data also demonstrate that Congress did not achieve its goal of increasing the filing delay in class actions. Actions are filed as quickly now as they were before the Act's passage. Nonetheless, that too may provide indirect evidence that plaintiffs' attorneys are selecting more apparent cases of fraud that require less prefiling investigation.").

152. Chilton, *supra* note 39.

153. *See* Sar, *supra* note 38. Spoofing-type activity is argued to be one of the contributing factors to the flash crash of May 6, 2010. *See* Kirilenko et al., *supra* note 38; Lewis, *supra* note 126 ("On the day of the flash crash, Sarao never actually sold stocks. He was trying to trick the market into falling so that he could buy in more cheaply. But whom did he fool with his trick? Whose algorithms were so easily gamed that they responded to phony sell orders by creating a crash? Stupidity isn't a crime. Still, it would be interesting to know who, at this particular poker table, on this particular day, was the fool.").

B. POTENTIAL IMPLICATIONS OF THE NEW REGIME

1. CFTC As a Central Hub for Anti-Manipulation Actions

Exemption from the private right of action will cause the CFTC to take center stage in the enforcement of the CEA's anti-manipulation provisions with respect to energy markets. This will enable the agency to exert greater control over the development of anti-manipulation case law with respect to the energy markets. Anti-manipulation cases in the commodities context often require extensive economic analysis of market data, which is not always fully available to private plaintiffs. Thus, it is important for the CFTC to have greater influence in developing case law and interpreting the various new norms introduced by Dodd-Frank.

Furthermore, the CFTC as a standalone gateway for enforcement actions will significantly reduce the informational asymmetry that usually undermines the viability of private actions in complex cases. Usually, private plaintiffs have limited means to analyze and access market data, undermining the private litigants' chances of accessing and providing sufficient evidence to prove manipulative conduct.[154] Furthermore, many markets have obligatory arbitration provisions for disputes arising among their members. These restrictions greatly limit the ability of private litigants to enforce market manipulation cases.[155] Thus, the new regime

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154. This is especially true when considering the prominence of hyper frequency trading in today's markets. *See* U.S. Commodity Futures Trading Comm'n v. Oystacher, No. 15-CV-9196, 2016 WL 3693429, at *15 (N.D. Ill. July 12, 2016) ("Algorithmic traders include a variety of participants, ranging from brokerage firms who seek favorable trade executions on behalf of clients entering long-term investment positions or hedges to proprietary firms who trade on a principal basis in pursuit of short-term profit opportunities."); RICHARD HAYNES & JOHN S. ROBERTS, CFTC, AUTOMATED TRADING IN FUTURES MARKETS 1 (Mar. 13, 2015), http://www.cftc.gov/idc/groups/public/@economicanalysis/documents/file/oce_automatedtrading.pdf [https://perma.cc/PV8B-PCZQ] ("Recent studies on automated trading in domestic markets have found that often over half of the trades on securities and futures exchanges make some use of algorithms . . . to match trades, oversee certain order types (e.g.[,] stop orders)[,] and monitor general market risk.").

155. *See* HTG Capital Partners, LLC v. Doe, No. 15 C 02129, 2016 WL 612861, at *1 (N.D. Ill. Feb. 16, 2016). The plaintiff in *HTG Capital Partners* issued a non-party subpoena to CME Group that operates CBOT and CMEX exchanges to identify the anonymous counterparties allegedly involved in manipulative conduct, and provide the relevant market data pertaining to the suspicious activity. *Id.* This subpoena was

may at least improve the quality of anti-manipulative enforcement, since in addressing allegations of manipulative conduct, the agency is arguably better placed to access the market data and has expertise in policing violations involving sophisticated forms of manipulative trading activity. It will also increase efficiency in monitoring manipulative market behavior, since the agency will receive more complaints, which will in turn positively impact the ongoing research and studies to better understand the conduct that is detrimental to the healthy functioning of electricity markets.

However, the realization of the aforementioned positive externalities will largely depend on whether the CFTC will have the necessary resources and staff to duly and fairly address the increasing number of complaints, which the agency will surely receive. Despite its very broad jurisdiction over numerous markets and a wide range of trading activities, the CFTC has a significantly lower budget in comparison to the SEC. Additionally, the operational difficulties that may arise due to the agency's limited resources and staff may result in selective enforcement and unfairness in regulating the relevant energy markets. Furthermore, as the sole enforcer of the CEA, the CFTC's involvement with energy markets shall continue to cause tensions between FERC and the CFTC, which may cause the agency to act more cautiously and selectively in enforcement actions.

2. Potential Increase in and Importance of the Whistleblower Reports

In realizing the aforementioned efficiencies, an important vehicle for the CFTC to monitor and police manipulative activity in commodities markets will be the newly established whistleblower program.[156] Under the whistleblower program, the CFTC is authorized to grant monetary awards to parties who provide the agency with original information regarding manipulative conduct. The reported original information must substantially contribute to the filing or litigation of a successful

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challenged by the defendants on privacy grounds to which motion CME joined. *Id.* Subsequently, the anonymous defendants moved to compel arbitration under CBOT rules as required for the resolution of disputes arising between CBOT members. *Id.* The court ultimately granted both defendant's motion to proceed anonymously and the motion to compel arbitration after in camera review of the relevant evidence documenting the defendants' membership to the CBOT. *Id.*

156. 7 U.S.C. § 26 (2012); 17 C.F.R. § 165 (2016) (the rules and requirements of the whistleblower program).

enforcement action.[157] Reports sent to the CFTC whistleblower office are strictly confidential, and the whistleblowers will benefit from special protections against potential retaliation. It is not necessary for a whistleblower to have an employment relationship or other type of insider status with the trader who is allegedly involved in manipulative conduct. Any market observer, regardless of direct injuries suffered due to the manipulative conduct, can qualify as a whistleblower. This broad availability of whistleblower status can further solidify the agency's position as a central informational hub, since the whistleblower awards may provide compensation to some extent for the injuries a market participant has suffered from the manipulative conduct. It may also further encourage independent market participants and institutional traders to monetize the important information they may have in relation to suspicious patterns in the market.[158] In fact, some of the first successful spoofing cases were initiated by whistleblower reports, confirming the feasibility of the new regime so long as the CFTC has the means and resources to properly study and respond to whistleblower reports.[159]

CONCLUSION

The virtual suspension of private rights of action in relation to the exempted energy markets cannot be justified under regulatory cost-effectiveness grounds (as a prevention of double regulation) as popularly voiced before Congress and the agency. To the contrary, the lack of private enforcement as a market discipline tool in the exempted energy markets, which consist of the majority of U.S. electricity grids, inhibits

157. 17 C.F.R. § 165.14 (2016). The monetary award's value will vary between ten and thirty percent of the monetary sanctions successfully imposed in the resulting judicial or administrative action depending on various factors such as the quality of the original information and its contribution to the bringing of a successful enforcement action. *Id.* § 165.8.

158. *See generally* Matthew Leising & Janan Hanna, *Can a $24 Billion Hedge Fund Blow the Whistle? Citadel Thinks So*, BLOOMBERG (Apr. 26, 2016), https://www.bloomberg.com/news/articles/2016-04-29/can-a-24-billion-hedge-fund-blow-the-whistle-citadel-thinks-so [https://perma.cc/GJG7-VMMU].

159. Consent Order, CFTC v. Nav Sarao Futures Ltd. PLC, No. 15-cv-3398 (E.D. Ill. Nov. 14, 2016), http://www.cftc.gov/idc/groups/public/@lrenforcementactions/documents/legalpleading/enfsaraoorder111416.pdf [https://perma.cc/A3AU-VHZU].

the important reform efforts in the energy markets.[160] Indeed, sole regulation by FERC is likely to cause the electricity markets to lag behind the various market reforms promulgated in the CEA. The regulatory framework of FERC falls short of the heightened standards introduced by Dodd-Frank in relation to trading in the commodities markets.

However, the CFTC's retreat is also an opportunity for the agency to prioritize fully utilizing its own enforcement capacity. CFTC's new whistleblower program provides an important conduit and monetary incentive for private individuals to contribute in the enforcement process, and greater public awareness in this regard will increase compliance standards. Without the availability of a private right of action, the CFTC will be also in a more advantageous position to exert direct control over the developing case law involving commodities market manipulation.

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160. *See* Bradley J. McAlllister, *Prioritizing Demand Response: How Federal Legislation and Technological Innovation Changed the Electricity Supply Market and the Need to Revitalize FERC Order* 745, 15 U. PITT. J. TECH. L. POL'Y 162, 162 (2015) ("The wholesale electric power network, or grid, delivers the product on which modern life depends, but it is the last major network to hold out against fundamental change. Over the past ten years, the federal government has committed billions of dollars to update the nation's grid. These updates are redefining the way electric power is sold and creating business opportunities for new entrants in the power supply market. However, new entrants are facing strong opposition from traditional power utilities and independent power producers." (citations omitted)).