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Update on the Dodd-Frank Act

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Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“**Dodd-Frank**”) is intended to provide a comprehensive framework for the regulation of over-the-counter (“**OTC**”) derivatives.² The obligations of companies transacting in swaps in the natural gas and power markets have been shaped by recent court cases and by multiple final rules, no-action letters, and interpretive guidance and policy statements of the Commodity Futures Trading Commission (the “**CFTC**”). This paper identifies and discusses some of the developments in those areas arising since late 2012, with particular emphasis given to those developments that most impact end users.

I. FINAL RULES AND ORDERS

Over the past year, the CFTC has proposed rules, responded to comments, provided policy statements, and promulgated final orders. This section summarizes recent orders exempting certain transactions between government and cooperatively-owned electric utilities, transactions in certain regional transmission organization (“**RTO**”) or independent system operator (“**ISO**”) markets, the CICI-number requirement, the clearing exemption for swaps between affiliates, and a policy statement regarding the CFTC’s interpretation of certain antidisruptive trading practice rules.

A. Exemption for Transactions between FPA 201(f) and Similar Entities

Section 201(f) of the Federal Power Act (“**FPA**”) exempts certain government and cooperatively-owned electric utilities (“**201(f) Entities**”) from the Federal Energy Regulatory Commission’s (“**FERC**”) jurisdiction.³ Similarly, Dodd-Frank provides the CFTC the discretion to exempt from the Commodity Exchange Act (“**CEA**”) certain transactions between 201(f) Entities if the exemption is consistent with public interest and the CEA’s purpose.⁴ In April 2013 the CFTC adopted a final order that exempts the following non-financial energy derivative transactions between 201(f) Entities and/or other similar entities from most of Dodd-Frank’s amendments to the CEA:

1. Electric Energy Delivered;

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² Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376, 1641 (2010) [hereinafter Dodd-Frank Act] (codified in scattered sections of 7, 15 U.S.C. (2012)).

³ Federal Power Act § 201(f), 16 U.S.C. § 824(f) (2012).

⁴ Commodity Exchange Act § 4(c)(6)(C), 7 U.S.C. § 6(c)(6)(C) (2012).

2. Generation Capacity;
3. Transmission Services;
4. Fuel Delivered;
5. Cross-Commodity Pricing; or
6. Other goods and services related to sharing the costs and benefits of construction, operation, and maintenance of generation or transmission facilities.⁵

The order's exemption is not absolute. The CFTC explicitly reserves its general anti-fraud and anti-manipulation authority, enforcement authority, and its general authority to inspect books and records.⁶ Further, the exemption requires both an eligible entity and an eligible transaction. To be exempt, the *entity* must not be a "financial entity" according to the provisions of the CEA⁷ and must fit within one of the following categories:

1. A 201(f) government-owned electric utility or facility;
2. A cooperative-owned electric utility or facility that either
 - a. Receives financing from the Rural Utilities Service, or
 - b. Sells less than four million megawatts of electricity per year;
3. An electric utility or facility owned by a small non-profit cooperative that does not otherwise qualify under FPA Section 201(f); or
4. A federally-recognized Indian tribe-owned electric utility or facility.⁸

Additionally, any contemplated *transaction* must:

1. Be entered into for the purpose of managing supply and/or price risk arising from the entities' existing or anticipated public service obligations to physically generate, transmit, and/or deliver electric energy to customers;
2. Not be cleared;
3. Be associated with an obligation to make or take physical delivery and not be used for speculation; and
4. Not reference or be based on any financial asset class of a commodity.

⁵ CFTC Order Exempting Certain Transactions Between Entities, 78 Fed. Reg. 19,670, 19,688 (Apr. 2, 2013).

⁶ *Id.*

⁷ The term "financial entity" means: (i) a swap dealer; (ii) a security-based swap dealer; (iii) a major swap participant; (iv) a major security-based swap participant; (v) a commodity pool; (vi) a private fund (as defined by 15 U.S.C. § 80b-2(a)); (vii) an employee benefit plan (as defined by 29 U.S.C. §§ 1002(3), (32)); and (viii) a person predominantly engaged in activities that are in the business of banking, or in activities that are financial in nature (as defined by 12 U.S.C. § 1843(k)). Commodity Exchange Act § 2(h)(7)(C), 7 U.S.C. § 2(h)(7)(C).

⁸ CFTC Order Exempting Certain Transactions Between Entities, 78 Fed. Reg. at 19,688.

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