

CFTC Final Order: Appropriate Persons

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Background

- ◆ On March 28, 2013 the Commodities Futures Trading Commission (“CFTC”) issued its Final Order on a joint ISO/RTO petition requesting exemptive relief from CFTC regulation.
- ◆ The joint petition requested that the CFTC use its authority under Section 4(c)(6) of the Commodities Exchange Act (“CEA”) to exempt specified ISO/RTO transactions from certain provisions of the CEA and CFTC regulations.
- ◆ The Final Order generally exempts all products bought or sold in the ISO/RTO-administered markets from all provisions of the CEA, with the exception of those provisions related to the CFTC’s retention of its general anti-fraud, anti-manipulation and enforcement authority.

Background

- ◆ The Final Order exempts, from provisions of the CEA and CFTC regulations, transactions for the purchase or sale of the following:
 - *Financial Transmission Rights,*
 - *Energy Transactions (with clarification that these include virtual bids and offers),*
 - *Forward Capacity Transactions, and*
 - *Reserve or Regulation Transactions*

- ◆ The Final Order, however, contains certain conditions that the ISOs/RTOs must meet in order to be eligible for the exemption.
 - *One such condition is the requirement that to be eligible for the exemption, transactions must be entered into by “Appropriate Persons.”*
 - *The CFTC has extended its no-action relief until September 30 for necessary tariff revisions to satisfy this condition.*

Appropriate Persons - Overview

- ◆ Section 4(c)(2) provides that the CFTC may not approve an exemption from the CEA unless the transactions will be entered into solely between “appropriate persons.”
 - *The statutory definition of “appropriate person” under the CEA establishes ten defined categories of appropriate persons, including financial institutions and governmental entities.*
 - *In order to qualify as an appropriate person under one of the defined categories, however, most NYISO market participants would need to have a net worth exceeding \$1,000,000, or total assets exceeding \$5,000,000, or have their NYISO obligations guaranteed by a letter of credit or other agreement by an appropriate person (Section 4(c)(3)(F) of the CEA).*

Appropriate Persons - Overview

- ◆ An “appropriate person” also includes “such other persons that the CFTC determines to be appropriate in light of their financial or other qualifications, or the applicability of appropriate regulatory protections.”
- ◆ In the Petition, the ISOs/RTOs requested the CFTC to extend the definition of “appropriate persons” to include all customers that qualify to participate in the ISO/RTO markets.
 - *The Petitioners reasoned that each market participant must satisfy the minimum participation criteria the ISOs/RTOs implemented in response to Order No. 741, including minimum capitalization criteria, and as such each is financially qualified and subject to appropriate regulatory protections*
- ◆ In the Final Order, the CFTC declined to extend the definition of “appropriate persons” to include all ISO/RTO market participants.

Appropriate Persons - Overview

- ◆ The CFTC did expand the definition of appropriate person to include the following:
 - *(i) persons that satisfy the statutory definition of “eligible contract participant,”*
 - *(ii) persons who are in the business of generating, transmitting, or distributing electric energy, and*
 - *(iii) persons who are in the business of providing electric energy services that are necessary to support the reliable operation of the transmission system.*

Appropriate Persons - Overview

- ◆ The CFTC clarified the language including, as “appropriate persons,” a “person who actively participates in the generation, transmission, or distribution of electric energy”:
 - *The CFTC made clear that this would include an entity that is in the business of providing demand response services.*
 - *The CFTC further clarified that this language would not extend to transactions entered into by individuals or entities that are engaged in the business of facilitating financial transactions (such as virtual transactions) and that do not actively participate in the generation, distribution, or transmission of electric energy or are not otherwise “appropriate persons” or “eligible contract participants.”*

Appropriate Persons - Overview

- ◆ A Market Participant that does not satisfy the Final Order definition of “appropriate person” may participate in the NYISO-administered markets so long as its market obligations are “guaranteed or otherwise supported by a letter of credit or keepwell, support, or other agreement” by an appropriate person.

Proposed Revisions to Section 8 of the MST

- ◆ Revisions to Market Participant eligibility requirements in Section 8 of the Market Services and Control Area Tariff (“MST”) are required to ensure only “appropriate persons” are transacting in the NYISO markets.
- ◆ In order to ensure all Market Participants transacting in the NYISO-administered markets are appropriate persons as defined by the CEA, the NYISO proposes to include in its eligibility criteria a requirement that each Customer transacting in the NYISO-administered markets is an appropriate person as defined in the CEA.
 - *This requirement is distinct from the creditworthiness requirements, including but not limited to the NYISO’s minimum participation criteria.*

Proposed Revisions to Section 8 of the MST

- ◆ Each Market Participant will be required to provide an officer certification, under penalty of perjury, that it is an appropriate person as defined in the CEA.
 - *Market Participant will attest that it will immediately cease transacting in the NYISO-administered markets if it loses its appropriate person status.*
 - *Certification will be due September 15 for current Market Participants and as part of the application materials for new Market Participants.*

Appropriate Persons – Current Statutory Definition

- ◆ (A) A bank or trust company (acting in an individual or fiduciary capacity).
- ◆ (B) A savings association.
- ◆ (C) An insurance company.
- ◆ (D) An investment company subject to regulation under the Investment Company Act of 1940 (15 U.S.C. 80a-1 et seq.).
- ◆ (E) A commodity pool formed or operated by a person subject to regulation under this chapter.

Appropriate Persons – Current Statutory Definition

- ♦ (F) A corporation, partnership, proprietorship, organization, trust, or other business entity with a net worth exceeding \$1,000,000 or total assets exceeding \$5,000,000, or the obligations of which under the agreement, contract or transaction are guaranteed or otherwise supported by a letter of credit or keepwell, support, or other agreement by any such entity or by an entity referred to in subparagraph (A), (B), (C), (H), (I), or (K) of this paragraph.
- ♦ (G) An employee benefit plan with assets exceeding \$1,000,000, or whose investment decisions are made by a bank, trust company, insurance company, investment adviser registered under the Investment Advisers Act of 1940 [15 U.S.C.A. 80b-1 et seq.], or a commodity trading advisor subject to regulation under this chapter.
- ♦ (H) Any governmental entity (including the United States, any state, or any foreign government) or political subdivision thereof, or any multinational or supranational entity or any instrumentality, agency, or department of any of the foregoing.

Appropriate Persons – Current Statutory Definition

- ♦ (I) A broker-dealer subject to regulation under the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.) acting on its own behalf or on behalf of another appropriate person.
- ♦ (J) A futures commission merchant, floor broker, or floor trader subject to regulation under this chapter acting on its own behalf or on behalf of another appropriate person.
- ♦ (K) Such other persons that the Commission determines to be appropriate in light of their financial or other qualifications, or the applicability of appropriate regulatory protections.

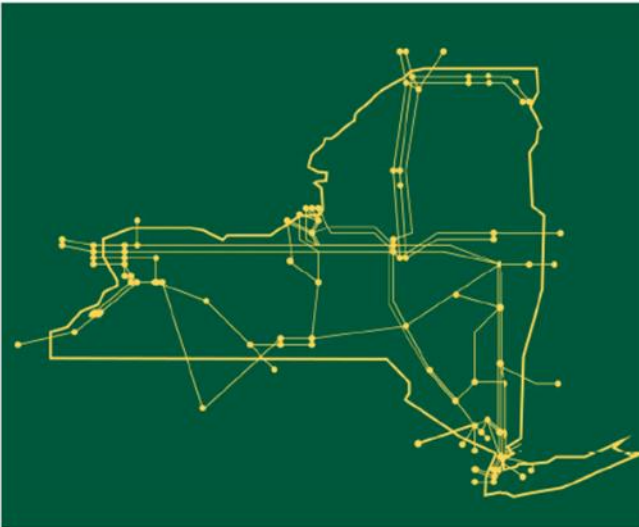
Appropriate Persons – Additional Definition

- ◆ As noted on slide 6, in its Final Order, the CFTC has expanded that definition to include:
 - *(i) persons that satisfy the statutory definition of “eligible contract participant,”*
 - *(ii) persons who are in the business of generating, transmitting, or distributing electric energy, and*
 - *(iii) persons who are in the business of providing electric energy services that are necessary to support the reliable operation of the transmission system.*

Next Steps

- ◆ BIC May 9
- ◆ MC May 29
- ◆ Board of Directors June 2013
- ◆ FERC Filing ASAP after Board Approval
- ◆ Market Participant Compliance September 15

The New York Independent System Operator (NYISO) is a not-for-profit corporation responsible for operating the state's bulk electricity grid, administering New York's competitive wholesale electricity markets, conducting comprehensive long-term planning for the state's electric power system, and advancing the technological infrastructure of the electric system serving the Empire State.



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