

# THE D.C. CIRCUIT COURT'S OPINION IN *HUNTER V. FERC*: A PANACEA FOR RESOLVING A JURISDICTIONAL DISPUTE OR MERE PANACHE?

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## Abstract

The Commodity Futures Trading Commission (“CFTC”) and the Federal Energy Regulatory Commission (“FERC”) were in a jurisdictional tug-of-war until March 2013, when the D.C. Circuit Court of Appeals issued a much anticipated decision in *Hunter v. FERC*. This Article discusses the *Hunter* case, which offered some clarity as to the jurisdictional boundaries of the CFTC and FERC with regard to certain types of futures contracts. Historically, the CFTC has been authorized by the Commodity Exchange Act (“CEA”) to prevent and regulate fraud and manipulation in the futures market. On the other hand, FERC is an independent agency charged with the task of regulating interstate transmission of electricity and natural gas. The Energy Policy Act of 2005 (“EP Act”) expanded FERC’s authority to prevent and prohibit manipulation in the purchase or sale of natural gas or electricity. However, as this Article mentions, it was clear to many that there would be some turf wars between the CFTC and FERC due to their overlapping jurisdiction. This Article examines the *Hunter* case and the court’s decision that the CFTC has exclusive jurisdiction over the natural gas futures market pursuant to the CEA.

## I. Introduction

After eight years of jurisdictional tussling between the Commodity Futures Trading Commission (“CFTC”) and the Federal Energy Regulatory Commission (“FERC”) over energy market manipulations—much to the confusion and chagrin

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of market participants—in March 2013, the D.C. Circuit Court of Appeals issued a highly anticipated decision in *Hunter v. FERC*.<sup>1</sup> The decision has already sparked widespread commentary,<sup>2</sup> with many applauding—and others decrying—the court’s decision.

This Article examines the CFTC’s and FERC’s respective historical jurisdictions over manipulative conduct and explores whether the court’s decision in *Hunter* is likely to clarify or further confuse market participants, as well as whether the court’s decision might prompt meaningful Congressional intervention.

Ultimately, with respect to the nature of transactions addressed by the decision—the trading of futures contracts in an attempt to manipulate swaps positions—the D.C. Circuit’s decision offers a measure of clarity with respect to the jurisdictional boundaries of the CFTC and FERC. Beyond such transactions, however, the *Hunter* decision raises more questions than it answers—questions that likely will need to be resolved by Congress.

## II. The Genesis of *Hunter v. FERC*

When Brian Hunter became a trader at Amaranth Advisors, LLP (“Amaranth”) and began trading in the futures market, he likely never imagined how three months of trading in the spring of 2006 would pit him for almost ten years against two powerful federal agencies—the FERC and CFTC. Both he and Amaranth would become embroiled in a power struggle with the FERC and the CFTC that would take Hunter all the way to the D.C. Circuit Court of Appeals.

At Amaranth, Hunter traded in natural gas futures contracts, which have a “settlement price.” This price is determined by the volume-weighted average price of trades during the “settlement period.” The settlement price can have an impact on the price of natural gas as a commodity. The relationship between trading and prices is the relationship Hunter allegedly sought to exploit. Hunter allegedly devised a plan to “short” the price of natural gas. He sold a large number of natural gas futures contracts, amounting to 15%-19% of the entire market, in the final thirty minutes of trading. Due to the timing and volume of his trades, the trades drove down the settlement price of the natural gas futures contract. Despite losing money on his natural gas futures position, however, Hunter could reap benefits in his opposing short natural gas swaps position.

Hunter’s trading strategy caught the attention of the CFTC and the FERC. On successive days in July 2007, the FERC and the CFTC filed enforcement actions against Amaranth, Hunter, and another trader, Mathew Donohoe.<sup>3</sup> Importantly, both the FERC and the CFTC claimed jurisdiction over this action as a result of each agency’s statutory anti-manipulation authority.

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1. *Hunter v. FERC*, 11-1477, 2013 WL 1003666 (D.C. Cir. Mar. 15, 2013).

2. See e.g., Kate Winston, Esther Whieldon, *Clark “Disappointed” in Hunter Decision, Eyes Reliability, Infrastructure Improvements*, INSIDE FERC, Mar. 25, 2013, available at [Platts.com](http://Platts.com) (click “Products and Services;” then follow “Newsletters and Reports” hyperlink; then follow Inside FERC hyperlink); Keith Goldberg, *FERC’s Turf War Over Futures Contracts May Hit Ratepayers*, LAW360 (Mar. 20, 2013), available at <http://www.law360.com/appellate/articles/425715>.

3. See *Amaranth Advisors L.L.C. et al*, 120 F.E.R.C. ¶ 61,085 (July 26, 2007); *CFTC v. Amaranth Advisors, L.L.C., et al*, No. ’07 CIV 6683 (S.D.N.Y.).

The CFTC's and FERC's actions against Hunter are an example of the jurisdictional turf war that has been brewing between the FERC and the CFTC since Congress expanded the FERC's enforcement authority in 2005 to include, among other things, a prohibition against market manipulation. The FERC's enforcement action against Hunter that culminated in a recent D.C. Circuit decision has shed significant light on the jurisdictional boundaries for the two agencies, but a number of questions still remain unresolved.

### III. Overview of the CFTC's and FERC's Jurisdiction and Anti-Manipulation Authority

#### A. The CFTC's Jurisdiction and Anti-Manipulation Authority

##### 1. CFTC Jurisdiction

When Congress created the CFTC in 1974, it conferred upon the CFTC "exclusive jurisdiction" in Commodity Exchange Act (CEA) § 2(a)(1)(A)<sup>4</sup> over commodity futures and options thereon, "which means that these instruments cannot be regulated by any other federal or state agency (except in certain limited circumstances where the CEA explicitly contemplates shared authority between the CFTC and another agency)."<sup>5</sup> In one of the most important sections in the CEA, Section 2(a)(1)(A) provides that:

The Commission shall have exclusive jurisdiction . . . with respect to accounts, agreements . . . and transactions involving swaps or contracts of sale of a commodity for future delivery . . . traded or executed on a contract market . . . or a swap execution facility . . . or any other board of trade, exchange, or market.<sup>6</sup>

Importantly, CEA § 2(a)(1)(A) further states that, "except as hereinabove provided," nothing in the CEA supersedes or limits the jurisdiction of any other regulatory authority or restricts other authorities from carrying out their duties.<sup>7</sup>

The statutory language thus essentially establishes three precepts with respect to the scope of the CFTC's jurisdiction: (i) the CFTC's jurisdiction "with respect to" all "accounts, agreements . . . and transactions" "involving" futures and swaps traded on any market or facility is "exclusive;" (ii) the exceptions to the CFTC's exclusive jurisdiction as set forth in the provision itself; and (iii) except for those areas expressly ceded to the CFTC's exclusive jurisdiction, the notion that other federal agencies retain their authority.

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4. "The Commission shall have exclusive jurisdiction . . . with respect to accounts, agreements, . . . and transactions involving swaps or contracts of sale of a commodity for future delivery . . . traded or executed on a contract market designated pursuant to section 7 of this title or a swap execution facility pursuant to section 7b-3 of this title or any other board of trade, exchange, or market, and transactions subject to regulation by the Commission pursuant to section 23 of this title." 7 U.S.C. § 2(a)(1)(A) (1936).

5. REPORT OF THE PRESIDENT'S WORKING GRP. ON FINANCIAL MARKETS, OVER-THE-COUNTER DERIVATIVES MARKETS AND THE COMMODITY EXCHANGE ACT 30 (1999).

6. 7 USC § 2(a)(1)(A) (1936).

7. "Except as hereinabove provided, nothing contained in this section shall (I) supersede or limit the jurisdiction at any time conferred on the Securities and Exchange Commission or other regulatory authorities under the laws of the United States or any State, or (II) restrict the Securities and Exchange Commission and such authorities from carrying out their duties and responsibilities in accordance with such laws." *Id.*

The purpose of the exclusive jurisdiction provision “was to separate the functions of the new CFTC from those of the Securities and Exchange Commission (“SEC”) and other regulators.”<sup>8</sup> The exclusive jurisdiction provision was incorporated as a key aspect of the 1974 amendments to the CEA in order to avoid subjecting market participants “to conflicting agency rulings.”<sup>9</sup> In ceding exclusive jurisdiction to the CFTC, Congress sought to “create one federal agency with the expertise to regulate the commodities industry.”<sup>10</sup>

For many years, courts had been in accord with Congress with respect to the legislative purpose of the CEA’s exclusivity provision.<sup>11</sup> For example, in 1974, the U.S. Supreme Court in *Curran* stated that, “[t]he purpose of the exclusive-jurisdiction provision in the bill passed by the House was to separate the functions of the Commission from those of the Securities and Exchange Commission and other regulatory agencies.”<sup>12</sup>

## *2. CFTC Anti-Manipulation Authority*

By any account, a fundamental—if not *the* fundamental—purpose of the CEA is to prevent manipulations in the futures markets. To accomplish this objective, the CEA not only contains a provision that makes manipulation a felony, but vests significant authority in the CFTC and the exchanges to prevent and address market manipulations.

The prohibitions against manipulation of prices are contained in CEA Sections 6(c), 6(d), and 9(a)(2).<sup>13</sup> CEA Sections 6(c) and 6(d) authorize the CFTC to issue a complaint if it “has reason to believe that any person . . . is manipulating or attempting to manipulate or has manipulated or attempted to manipulate the market price of any commodity, in interstate commerce, or for future delivery on or subject to the rules of any registered entity.”<sup>14</sup> CEA Section 9(a)(2) makes it unlawful for “[a]ny person to manipulate or attempt to manipulate the price of any commodity in interstate commerce, or for future delivery on or subject to the rules

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8. *Leist v. Simplot*, 638 F.2d 283, 314 (2d Cir. N.Y. 1980).

9. 120 CONG. REC. S 16,127, 16128 (daily ed. Sep. 9, 1974) (statement of Chairman Herman Talmadge).

10. Thomas A. Russo & Edwin L. Lyon, *The Exclusive Jurisdiction of the Commodity Futures Trading Commission*, 6 HOFSTRA L. REV. 57, 90 (1977).

11. *See e.g.*, *State v. Monex Int’l, Ltd.*, 527 S.W.2d 804, Blue Sky L. Rep. (CCH) ¶ 71234 (Tex. Civ. App. Eastland 1975), writ refused, (Dec. 17, 1975) (disallowing action by Texas to enjoin Monex from selling leverage contracts which had not been registered under the state securities laws on ground that newly established CFTC “now has exclusive jurisdiction to regulate [Monex’s] margin account sales”); *Clayton Brokerage Co. of St. Louis, Inc. v. Mouer*, 531 S.W.2d 805, Blue Sky L. Rep. (CCH) ¶ 71273 (D. Tex. Dec. 17, 1975) (dismissing as moot, state suit against brokerage company dealing in London commodity options on ground that CFTC’s jurisdiction to regulate such options was exclusive); *Int’l Trading Ltd. v. Bell*, [1977-1980 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 20,495 at 21,996 (D. Ark. Oct 3, 1977) (holding that “[w]here . . . Congress has made it clear that authority conferred by it is exclusive in a given area, the states cannot exercise concomitant or supplementary regulatory authority over the identical activity”).

12. *Merrill Lynch, Pierce, Fenner & Smith v. Curran*, 456 U.S. 353, 384 (1982); *see also Bibbo v. Dean Witter Reynolds, Inc.*, 151 F.3d 559, 560 (6th Cir. Ohio 1998); *Messer v. E.F. Hutton & Co.*, 847 F.2d 673, 675 (11th Cir. Fla. 1988).

13. 7 U.S.C. §§ 9, 13b, and 13(a)(2) (1936).

14. 7 U.S.C. §§ 9, 13b (1936).

of any contract market, or to corner or attempt to corner any such commodity.”<sup>15</sup> Together, CEA Sections 6(c), 6(d), and 9(a)(2) prohibit both manipulation and attempted manipulation. As mentioned above, the CEA does not define the term “manipulation,” and courts have grappled with its seemingly amorphous application.

The Dodd-Frank Act expanded the authority of the CFTC to prohibit fraudulent and manipulative behavior. In particular, the law amends CEA Section 6(c)(1) to prohibit the use of any manipulative or deceptive device or contrivance in contravention of the Commission’s proposed rules. Further, the law amends CEA Section 6(c)(3) to make it unlawful to manipulate or attempt to manipulate the price of any swap or commodity.

Shortly after passage of the Dodd-Frank Act, the CFTC adopted rules implementing its new anti-manipulation authority. The new prohibition of fraud-based manipulation in Rule 180.1 prohibits deceptive or manipulative practices (1) by any person (2) acting intentionally or recklessly (3) in connection with (4) any swap, cash commodity contract or futures contract subject to the rules of a designated contract market or swap execution facility. Rule 180.2 codifies the CFTC’s long-standing authority to prohibit manipulation and attempted manipulation in the absence of fraud. In applying the rule, the CFTC intends to be guided by the traditional four-part test for price manipulation that has developed in case law arising under CEA Sections 6(c) and 9(a)(2), which generally requires that (1) the accused had the ability to influence market prices; (2) the accused specifically intended to create or affect a price or price trend that does not reflect legitimate forces of supply and demand; (3) artificial prices existed; and (4) the accused caused the artificial prices.<sup>16</sup>

Until 2005, it was generally presumed that the CFTC had the sole anti-manipulation enforcement authority with respect to “any commodity in interstate commerce.”<sup>17</sup> After the adoption of the Energy Policy Act of 2005 and the Congressional ceding of certain anti-manipulation enforcement power to FERC, however, the CFTC’s exclusive jurisdiction has been questioned and debated.

## B. FERC’s Jurisdiction and Anti-Manipulation Authority

### 1. *FERC Jurisdiction*

The FERC is an independent agency under the Department of Energy empowered with the authority to regulate the interstate transmission of electricity and natural gas in the United States. Historically, the FERC has regulated the wholesale markets for natural gas and electricity primarily as a rate making

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15. 7 USC § 13(a)(2) (1936); *see* CFTC v. Reed, 481 F. Supp. 2d 1190, 1198 (D. Colo. 2007) (defense asserting that section 13(a)(2) is overbroad because the phrase “knowingly” modifies the words “deliver” and “inaccurate” but does not modify the words “false” and “misleading;” the court rejected the defendant’s argument, agreeing with the CFTC that the “statute’s prohibition against the knowing dissemination of knowingly false or misleading information into interstate commerce is not overbroad because it does not criminalize otherwise innocent conduct”).

16. 76 Fed. Reg. 41407, citing *In re* IN Farm Bureau Cooperative Ass’n., Inc., [1982–84 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 21,796, 182 WL 30249 (Dec. 17, 1982), citing *Volkart Bros., Inc. v. Freeman*, 311 F.2d 52 (5th Cir. 1962).

17. *See* 7 U.S.C. § 2(a)(1)(A) (1936).

authority with limited enforcement power. Prior to 2005, its enforcement authority extended only to regulated entities, such as electric utilities, oil and natural gas pipelines, natural gas distributors, and certain financial service companies registered as power marketers with the FERC.

## *2. FERC Anti-Manipulation Authority*

Originally, the FERC had limited, if any, anti-manipulation authority. However, in response to suspicions of unchecked manipulation in the energy markets in the early 2000s, FERC called for the same anti-manipulation enforcement tools as other federal regulators. Indeed, in 2002, Congress tasked the General Accounting Office (“GAO”) with evaluating the FERC’s efforts to develop an effective regulatory and oversight approach for competitive natural gas and electricity markets. The GAO found that FERC did not have an effective regime for monitoring competitive markets and that it was trapped by antiquated legal authorities designed for regulated monopolies.<sup>18</sup> The GAO thus recommended that Congress review and revise FERC’s legal authority in the context of competitive market structures, including providing FERC with the appropriate range of authority to assess penalties against market participants that engage in anticompetitive behavior or manipulation.

During the same time, Joseph T. Kelliher, then FERC chairman, began advocating for legislation that would grant the FERC with significant additional enforcement power. According to Kelliher:

In my view, [the FERC] lacks the necessary tools to address these dramatic industry changes, including the threat of market manipulation. A comparison of the Federal Power Act with other federal economic regulatory laws makes that plain. Securities and commodities laws include express prohibitions of market manipulation. This is lacking in the Federal Power Act. Securities and commodities laws also provide for tough and effective penalties for both attempts to manipulate markets and manipulation itself. There is no valid public policy reason why [the FERC] should not have the same enforcement tools as other federal economic regulatory agencies. A comparison of the Federal Power Act with other federal economic regulatory laws also demonstrates that there is a need for tough civil and criminal penalties. If violations of market rules can go unpunished, they will become more frequent. Again, the Federal Power Act comes up short.<sup>19</sup>

Congress responded in 2005 by enacting the Energy Policy Act of 2005, or the EP Act.<sup>20</sup> In “the most significant increase in Commission regulatory authority in 70 years,”<sup>21</sup> the EP Act gave FERC new explicit anti-manipulation rulemaking authority.

The EP Act amended both the Natural Gas Act (“NGA”) and the Federal Power Act (FPA), allowing the FERC to issue rules to prohibit and prevent manipulation in “connection with the purchase or sale of natural gas . . . subject to the jurisdiction of the [FERC].” Specifically, it amended NGA Section 4A to

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18. See U.S. GEN. ACCOUNTING OFFICE, CONCERTED ACTIONS NEEDED BY FERC TO CONFRONT CHALLENGES THAT IMPEDE EFFECTIVE OVERSIGHT 5 (2002).

19. Joseph T. Kelliher, *Market Manipulation, Market Power, and the Authority of the Federal Energy Regulatory Commission*, 26 ENERGY L.J. 1, 8–14 (2005).

20. Pub.L. No. 109-58, 119 Stat. 594 (2005).

21. ANNUAL REPORT 2006, FERC 3 (2007).

make it unlawful for “any entity” to “directly or indirectly” engage in manipulative trading of natural gas.<sup>22</sup> Congress modeled FERC’s new authority on the authority given to the SEC under the Securities Exchange Act of 1934 (the 1934 Act), stating that the words “manipulative or deceptive device or contrivance” should be given the same interpretation “as those terms are used in section [10(b) of the 1934 Act].”<sup>23</sup> In addition to addressing market manipulation, the EP Act 2005 expanded FERC’s civil penalty authority to deter anticompetitive behavior.<sup>24</sup> The EP Act also increased the maximum civil penalty for market manipulation to \$1 million per day per violation in addition to disgorgement of unjust profits.

The new anti-manipulation statutes were not self-implementing, so FERC was required to devise the “implementing provision[s] designed to prohibit manipulation and fraud in the markets the Commission is charged with regulating.”<sup>25</sup> Because Congress modeled the anti-manipulation statutes after Section 10(b) of the 1934 Act (Section 10(b)), FERC modeled its new regulations after Rule 10b-5,<sup>26</sup> the SEC’s regulation implementing Section 10(b). The FERC adopted a new anti-manipulation rule in Order No. 670.<sup>27</sup>

This order made it unlawful for any entity to directly or indirectly (i) use or employ any device, scheme or artifice to defraud; (ii) make any untrue statement of a material fact or omit any material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; or (iii) engage in any act, practice or course of business that operates or would operate as a fraud or deceit upon any entity in connection with the purchase or sale of natural gas or electricity. The “any entity” and “in connection with” language of Order No. 670 makes it relatively expansive. It appears to give the FERC jurisdiction over entities not subject to FERC’s traditional jurisdiction as long as that entity engages in conduct relating to a FERC jurisdictional transaction.

The FERC has interpreted this rule to give it jurisdiction over traders whose activities in the futures markets can impact or affect the prices charged in regulated energy markets. This has pitted the FERC against the CFTC in enforcement actions involving commodities futures contracts.

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22. The full text of Section 4A of the Natural Gas Act states:

It shall be unlawful for any entity, directly or indirectly, to use or employ, in connection with the purchase or sale of natural gas or the purchase or sale of transportation services subject to the jurisdiction of the Commission, any manipulative or deceptive device or contrivance (as those terms are used in section 78j(b) of this title) in contravention of such rules and regulations as the Commission may prescribe as necessary in the public interest or for the protection of natural gas ratepayers. Nothing in this section shall be construed to create a private right of action.

15 U.S.C. § 717c-1 (1938).

23. 15 U.S.C. § 717c-1 (1938); 16 U.S.C.S. § 824v (2006).

24. 15 U.S.C. §§ 717c-1, 717t-1 (1938); 16 U.S.C.S. §§ 824o-1, 824v (2006); *see also* Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594 (2005), 314, 315, 1283, 1284.

25. Prohibition of Energy Market Manipulation, Final Rule, Order No. 670 (“Order No. 670”), ¶ 5, 71 Fed. Reg. 4,244, 4,246 (Jan. 26, 2006); *see also* Prohibition of Energy Market Manipulation, Notice of Proposed Rulemaking, ¶ 7, 70 Fed. Reg. 61,930, 61,931 (Oct. 27, 2005).

26. 7 C.F.R. § 240.10b-5 (2005).

27. 17 C.F.R. § 240.10b-5 (2005). FERC also adopted Section 1c.2, which applies to “electric energy market manipulation” instead of to “natural gas market manipulation.” 18 C.F.R. § 1c.2 (2006). The text of Section 1c.2 is virtually identical to the text of Section 1c.1, with changes in the language to reflect the difference in the two markets.

### C. The CFTC/FERC Memorandum of Understanding

After Congress vested the FERC with anti-manipulation enforcement power in the EP Act, it quickly appeared to many that the jurisdictional boundaries of the CFTC and the FERC might overlap. In order to facilitate cooperation between the CFTC and the FERC, the EP Act, as codified in Section 23 of the NGA, specifically directed the FERC and the CFTC to enter into a memorandum of understanding (“MOU”) “relating to information sharing, which shall include, among other things, provisions ensuring that information requests to markets within the respective jurisdictions of each agency are properly coordinated to minimize duplicative information requests, and provisions regarding the treatment of proprietary trading information.”<sup>28</sup> Section 23 also included a savings clause providing that “nothing in this section may be construed to limit or affect the exclusive jurisdiction of the [CFTC].”

In 2005, the FERC and the CFTC entered into the MOU,<sup>29</sup> which provides for each agency to request information from one another and states that each agency will “coordinate on a regular basis oversight, investigative and enforcement activities of mutual interest.” However, conspicuously absent was any decision regarding the potentially overlapping anti-manipulation jurisdictions of the CFTC and the FERC.

### D. Jurisdictional Tussles Between the CFTC and the FERC

Since passage of the EP Act, the FERC has pursued a number of investigations involving cross-market manipulation of natural gas or electricity markets where companies have manipulated either the financial or physical market in order to realize gains in the other. For example, in 2007, the FERC alleged that Energy Transfer Partners (“ETP”) attempted to manipulate the price of natural gas for delivery by selling massive quantities of natural gas contracts on the Intercontinental Exchange (“ICE”) and reporting those transactions to *Inside FERC Gas Market Reports*. By doing this, ETP was attempting to manipulate the index price of natural gas, and to benefit from this manipulation with its financial basis swap positions tied to the *Inside FERC* natural gas index prices. The FERC has accused Barclays Bank, Constellation Energy Commodities Group, and BP of similar manipulation of physical commodity pricing to benefit its swap positions.<sup>30</sup> On July 16, 2013 the FERC issued an order assessing \$435 million in penalties against Barclays.<sup>31</sup> On July 30, 2013, the FERC entered into a settlement agreement with JP Morgan in which JP Morgan agreed to pay \$285 million in civil penalties and to disgorge \$125 million in profits resulting from alleged market manipulation.<sup>32</sup> Finally, on August 5, 2013, the FERC issued an

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28. Energy Policy Act of 2005, § 316, 15 U.S.C. § 717t-2(c).

29. Memorandum from FERC and CFTC Regarding Information Sharing and Treatment of Proprietary Trading and Other Information (Oct. 15, 2005).

30. Constellation Energy Commodities Group, Inc., 138 F.E.R.C. ¶ 61,168 (2012); Barclays Bank PLC, Daniel Brin, Scott Connelly, Karen Levine, and Ryan Smith, 141 F.E.R.C. ¶ 61,084 (2012).

31. Barclays Bank, PLC et al., 144 F.E.R.C. ¶ 61,041 (2013).

32. *In re* Make-Whole Payments & Related Bidding Strategies, 144 F.E.R.C. ¶ 61,068 (2013).



Order proposing to fine BP nearly \$29 million in penalties for allegedly manipulating the natural gas market at the Houston Ship Channel.<sup>33</sup>

Given the confusion regarding the boundaries between the CFTC and the FERC, both pressured Congress to provide some clarity when it passed the Dodd-Frank Act. However, as discussed below, the Dodd-Frank Act further confused the jurisdictional issue.<sup>34</sup>

## E. The Dodd-Frank Act

The Dodd-Frank Act provides that nothing in the CEA limits or affects any statutory authority of FERC with respect to an agreement, contract, or transaction that is (i) not executed, traded, or cleared on a registered entity or trading facility and (ii) entered into pursuant to a tariff or rate schedule approved by FERC.<sup>35</sup>

The Dodd-Frank Act also mandated that, within 180 days after enactment of the law, the CFTC and FERC were required to negotiate a MOU to establish procedures for:

- applying their respective authorities in a manner that ensures effective and efficient regulation in the public interest;
- resolving conflicts concerning overlapping jurisdiction between the two agencies; and
- avoiding, to the extent possible, conflicting or duplicative regulation.

The Dodd-Frank Act further provides that nothing in the Act limits or affects any statutory enforcement authority of FERC under the provisions of the Federal Power Act or the Natural Gas Act that existed prior to enactment of the Act. To date, the agencies have not entered into the required MOU.

## IV. *Hunter v. FERC*

### A. Procedural History

#### 1. *CFTC Action*

On July 25, 2007, the CFTC filed an enforcement proceeding against Amaranth and Hunter in the Southern District of New York, alleging that they attempted to manipulate the natural gas market on NYMEX by “hammering the close.”<sup>36</sup>

Hunter’s conduct pre-dated the CFTC’s fraud-based anti-manipulation rule promulgated under the Dodd-Frank Act and was instead prosecuted under an anti-manipulation rule that required the creation of an artificial price. Because the CFTC has historically had difficulty proving an artificial price, the CFTC’s

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33. BP Am., Inc., et al., 144 F.E.R.C. ¶ 61,100 (2013).

34. See Terence T. Healey, Joseph B. Williams, & Paul J. Pantano, Jr., *Energy Commodities: The Netherworld Between FERC and CFTC Jurisdiction*, 33 FUTURES & DERIVATIVES L. REP. 1 (2003).

35. See Dodd-Frank Wall Street Reform and Consumer Protection Act, § 722(e), 7 U.S.C. § 2(a)(1)(I).

36. See CFTC v. Amaranth Advisors, L.L.C., et al., No. ’07 CIV 6682 (S.D.N.Y. filed July 25, 2007); Press Release, CFTC, U.S. Commodity Futures Trading Commission Charges Hedge Fund Amaranth and its Former Head Energy Trader, Brian Hunter, with Attempted Manipulation of the Price of Natural Gas Futures (July 25, 2007).

complaint alleged that Amaranth and Hunter intentionally and unlawfully *attempted* to manipulate the price of natural gas futures contracts on the NYMEX on February 24, 2006 and April 26, 2006.

The date of February 24, 2006 represented the last day of trading (expiry day) for the March 2006 NYMEX natural gas futures contract, and April 26, 2006 was the expiry day of the May 2006 NYMEX natural gas futures contract. The settlement price of each NYMEX natural gas futures contract is determined by the volume-weighted average of trades executed from 2:00–2:30 p.m. (the closing range) on the expiry day of such contracts. The complaint alleges that, for each of the expiry days at issue, the defendants acquired more than 3,000 NYMEX natural gas futures contracts in advance of the closing range, which they planned to, and generally did, sell during the closing range.<sup>37</sup> The complaint also alleges that the defendants held large short natural gas financially settled swaps positions, primarily held on the ICE. The settlement price of the ICE swaps is based on the NYMEX natural gas futures settlement price determined by trading done during the closing range on expiry day. According to the complaint, the defendants intended to lower the prices of the NYMEX natural gas futures contracts to benefit the defendants' larger swaps positions on ICE. The complaint also alleges that in response to an inquiry from NYMEX about the April 26, 2006 trading, Amaranth made false statements to NYMEX to cover up the defendants' attempted manipulation.<sup>38</sup>

On August 12, 2009, the CFTC entered into a consent order settling charges brought against Amaranth Advisors and its Amaranth Advisors (Calgary) subsidiary for attempting to manipulate the price of natural gas futures contracts on the NYMEX on February 24 and April 26, 2006.<sup>39</sup> The Order requires that the Amaranth entities pay a \$7.5 million civil monetary penalty. It also permanently enjoins the Amaranth entities from violating the anti-manipulation provisions of the CEA, and prohibits Amaranth Advisors from violating CEA Section 9(a)(4), which prohibits anyone from making false, fictitious, or fraudulent statements to registered entities, such as the NYMEX. The consent order arises from the CFTC's complaint filed on July 25, 2007.<sup>40</sup>

## *2. FERC Action*

On July 26, 2007—one day after the CFTC filed its complaint—the FERC issued an Order to Show Cause and Notice of Proposed Penalties against Amaranth, Hunter, and Matthew Donohoe, based on a preliminary determination that Amaranth and former traders *manipulated* natural gas markets through trading on the NYMEX Natural Gas Futures Contract (“Show Cause Order”).<sup>41</sup> Because the elements of the FERC anti-manipulation rule did not require a showing of an artificial price, the FERC did not follow the CFTC's lead by alleging “attempted” manipulation. The FERC also alleged that Hunter's manipulation

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37. *See* CFTC v. Amaranth Advisors, L.L.C., et al., No. '07 CIV 6682 (S.D.N.Y. filed July 25, 2007).

38. *See id.*

39. *See* CFTC Press Release, Amaranth Entities Ordered to Pay a \$7.5 Million Civil Fine in CFTC Action Alleging Attempted Manipulation of Natural Gas Futures Prices, Release 5692-09 (Aug. 12, 2009).

40. *See* CFTC v. Amaranth Advisors, L.L.C., et al., 07-cv-6682 (DC) (S.D.N.Y.); CFTC Press Release 5359-07 (July 25, 2007).

41. Amaranth Advisors L.L.C. et al., 120 F.E.R.C. ¶ 61,085 (July 26, 2007).

occurred on the expiry day of three consecutive months in 2006, whereas the CFTC's action alleged manipulation only on February 24, 2006 (for the March contract) and April 26, 2006 (for the May contract). The FERC sought \$232 million in civil penalties against the named parties and the disgorgement of \$59 million plus interest in unjust profits from Amaranth.<sup>42</sup>

Although the alleged manipulation took place across two different markets—the futures markets and the over-the-counter (OTC) markets—neither of which are regulated by the FERC, the agency nevertheless claimed that it had a jurisdictional stake because the defendants conduct “affected” the interests of a third market—the wholesale natural gas market, over which FERC clearly does have jurisdiction.<sup>43</sup> Thus, in the Show Cause Order, the FERC concludes that “[t]his case concerns the important nexus between the wholesale interstate natural gas markets subject to our jurisdiction and the New York Mercantile Exchange (NYMEX) Natural Gas Futures Contract (the NG Futures Contract).”<sup>44</sup>

In the Show Cause Order, the FERC alleges that Amaranth manipulated the “settlement” price of the Natural Gas Futures Contract on February 24, March 29 and April 26, 2006, by selling an “extraordinary” amount of contracts during the last thirty minutes of trading before the contracts expired.<sup>45</sup> These actions allegedly drove the settlement price down, thereby benefiting Amaranth's positions in financially-settled swaps and options, which were primarily traded on the ICE. Amaranth's position in these derivatives was significantly larger than its position in the NYMEX contracts, and the value of these derivatives on ICE increased as a result of the decrease in the settlement price of these contracts.

On July 17, 2008, the FERC issued a ruling on several issues in its ongoing investigation of whether Amaranth, Hunter, and Donohoe violated the FERC's anti-manipulation rules.<sup>46</sup> First, the FERC reaffirmed its view that it has jurisdiction to impose penalties for manipulative trading of certain NYMEX natural gas futures contracts that had an effect on physical natural gas sales prices. Second, the FERC exercised personal jurisdiction over Hunter and Amaranth International Limited, an affiliate of Amaranth. Third, the FERC ruled that liability can be triggered when an entity, including individuals, acts with reckless disregard to physical natural gas prices subject to the FERC's jurisdiction, even if such conduct does not include the provision of false information. Fourth, the FERC ruled that parties may not seek *de novo* review in federal district court until FERC has first assessed penalties under the Natural Gas Act for violations of its market manipulation regulations.<sup>47</sup>

On November 25, 2008, FERC staff agreed to settle the matter with Amaranth, Hunter, and Donohoe, but FERC rejected the settlement offer on February 12, 2009.<sup>48</sup> FERC stated:

[T]he Commission estimated that Amaranth profited far in excess of the proposed settlement amounts as a direct result of alleged manipulation of NYMEX NG

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42. *Id.*

43. *Id.*

44. *Id.* at 2; *see also* FERC, Fact Sheet re Amaranth, FERC Docket No. IN0726-00 (July 26, 2007).

45. *Id.*

46. Amaranth Advisors LLC, 124 F.E.R.C. ¶ 61,050 (2008).

47. The FERC ordered an administrative law judge to hold a hearing to resolve the material facts in dispute on these matters.

48. *See* Amaranth Advisors LLC, Order Rejecting Settlement, 126 F.E.R.C. ¶ 61,112.

Futures Contract prices that recklessly affected the price of physical natural gas subject to Commission jurisdiction. Having considered the gravity of the alleged violations, the potential remedies for those violations if proven to have occurred, and the remedies offered in the Settlement, the Commission concludes that the settlement is not in the public interest and hereby rejects it.<sup>49</sup>

On August 12, 2009, FERC settled its anti-manipulation case against Amaranth Advisors, several of its affiliates, and Matthew Donohoe.<sup>50</sup> Under the settlement, Matthew Donohoe and the Amaranth parties stipulated to facts regarding their positions in the natural gas futures contracts, sales of those contracts and positions in derivative swaps.

The parties also stipulated that FERC “properly raised questions about the effects of futures contracts trading on prices in the physical natural gas market because the trading at issue appeared atypical, anomalous and unusual, and therefore had the potential to erode public confidence in the validity of the settlement price.”<sup>51</sup> Further, the settlement provides that the Amaranth parties “concede FERC’s subject matter jurisdiction in this proceeding.”<sup>52</sup>

Notably, however, January 22, 2010 marks the first time that FERC found that a futures trader violated the agency’s anti-manipulation rule.<sup>53</sup> A FERC administrative law judge (“ALJ”) found that Hunter “intentionally manipulated the settlement price of the at-issue natural gas futures contracts. His trading was specifically designed to lower the NYMEX price in order to benefit his swap positions on other exchanges.”<sup>54</sup>

With respect to Hunter’s fraudulent and deceptive behavior, the ALJ found that Hunter’s trading of a significant volume of natural gas futures contracts during the final settlement periods in March, April and May 2006 constituted fraudulent behavior.<sup>55</sup> According to the ALJ:

The evidence in this case compels the conclusion that Hunter had the incentive to lower the price to benefit his other positions in other trading platforms. Additionally, he took the actions necessary to effectuate his scheme. He traded significant volume (a condition necessary for and consistent with a manipulation scheme) in the closing period. His traders hit bids, which almost guarantees a lower price (again consistent with a manipulation scheme), and generally traded at prices below those of other traders. He acquired significant positions in the other platforms which would profit from his lowering the price on NYMEX.<sup>56</sup>

In finding that Hunter acted with scienter, the ALJ stated that Hunter’s trading was specifically designed to lower the NYMEX price in order to benefit his swap positions on other exchanges, and he knew that his NYMEX equivalent positions on other exchanges would benefit from a lower NYMEX settlement price.<sup>57</sup>

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49. *Id.*

50. *See* 128 F.E.R.C. ¶ 61,154 (2009); FERC approves \$7.5 million civil penalty in Amaranth Case, News Release, Docket No. IN07-26-000 (August 12, 2009).

51. *Id.*; 128 F.E.R.C. ¶ 61,154 at 10–11.

52. *Id.*

53. 130 F.E.R.C. ¶ 63,004.

54. *Id.* at ¶ 143.

55. *Id.* at ¶ 84.

56. *Id.*

57. *Id.* at ¶ 143.

Finally, the ALJ noted that futures contracts bought and sold on NYMEX were “related to natural gas transactions.”<sup>58</sup> In making this finding, the ALJ relied upon the fact that some NYMEX natural gas futures contracts become physical delivery obligations, and the notion that a trader “entering the futures market during times of manipulation with the intention to go to delivery is clearly affected by the manipulation.”<sup>59</sup> Moreover, according to the ALJ, the NYMEX settlement price also affects physical basis contract prices and “indirectly” affects index-based contracts.<sup>60</sup>

On April 21, 2011, FERC affirmed the ALJ’s initial decision and found that Hunter’s trading of NYMEX natural gas futures contracts in 2006 violated FERC’s anti-manipulation rule.<sup>61</sup> FERC issued an order imposing a \$30 million civil penalty on Hunter.

In its decision, FERC noted that “Hunter’s trading practices during the at-issue expiration days [in Spring 2006] were fraudulent or deceptive, undertaken with the requisite scienter, and carried out in connection with FERC-jurisdictional natural gas transactions.”<sup>62</sup> FERC concluded that his trading was “specifically intended to lower the settlement price” of natural gas futures contracts in order to benefit his financially-settled natural gas swap positions on other trading platforms, and that Hunter acted “with reckless disregard as to the impact of his conduct upon the physical market for natural gas.”<sup>63</sup> Hunter appealed this decision to the D.C. Circuit.

## B. The Appeal

### 1. *The Petitioner—Brian Hunter*

In an effort to avoid paying the \$30 million fine FERC had saddled him with, Hunter appealed the FERC’s decision on the grounds that FERC did not have jurisdiction to fine him. Hunter’s appeal to the court centered on two key arguments.<sup>64</sup> First, Hunter argued that FERC did not have jurisdiction over Hunter’s actions because the CFTC had exclusive jurisdiction. He pointed out that FERC has never denied that all of his alleged manipulative activities occurred in the natural gas futures contract market—a market only the CFTC had jurisdiction to regulate. Hunter argued that CEA Section 2(a)(1)(A) gave the CFTC exclusive jurisdiction to regulate the commodities futures market, leaving FERC without authority in this arena.

Hunter’s second argument dealt with FERC’s interpretation of the NGA language itself. Hunter contested FERC’s expansive interpretation of the phrase “any entity.” He argued that the NGA’s “any entity” applied only to “physical market participants,” such as municipalities. He maintained that applying the “any entity” language to individuals impermissibly extended the scope of the NGA’s anti-manipulation prohibition.

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58. *Id.* at ¶ 206.

59. *Id.* at ¶ 207.

60. *Id.* at ¶ 207.

61. *Hunter*, 135 F.E.R.C. ¶ 61,054 (2011).

62. *Id.* at 3.

63. *Id.* at 32.

64. Brief for the Petitioner, *Hunter, v. FERC*, 2012 WL 1202702 (C.A.D.C. Apr. 10, 2012).

## *2. The Respondent—FERC*

In response, FERC acknowledged the CFTC's jurisdiction over swaps or futures that Hunter traded in, but countered that the CFTC's jurisdiction was not exclusive over manipulation.<sup>65</sup> FERC argued that Section 4A of the NGA instead gave it complementary jurisdiction to prohibit manipulation, relying on the same broad "any entity" and "in connection with" language of the EP Act that Hunter argued should not apply to him. FERC took this argument a step further and suggested that, while the CEA gave the CFTC exclusive jurisdiction over the day-to-day regulation of its financial markets, it did not extend exclusive jurisdiction to manipulation. Instead, when an over-arching scheme of manipulation directly or indirectly affected another market, both agencies should have an enforcement role.

To further support its argument that Congress had intended complementary jurisdiction over manipulation, the FERC pointed to NGA Section 23, requiring that the CFTC and FERC execute an MOU to coordinate their anti-manipulation efforts. FERC cited to language in the MOU stating that the CFTC and FERC may from time to time "engage in oversight or investigations of activity affecting both CFTC jurisdictional and FERC jurisdictional markets." Furthermore, FERC noted that Congress had specifically declined to apply Section 23's savings clause to the entire Act. It argued that these statutory provisions supported its argument that the CFTC did not have exclusive jurisdiction over manipulation of commodities futures contracts. Therefore, there was no irreconcilable conflict between the CEA and the EP Act, and both should be given their effect.

## *3. The Intervenor—CFTC*

In a rare move, the CFTC decided to join the fray in an effort to protect its jurisdiction. On November 3, 2003, the CFTC filed a brief as an intervenor in the case.<sup>66</sup> In its brief, the CFTC generally mirrored Hunter's argument that the CFTC, and only the CFTC, has jurisdiction over the natural gas futures market. The CFTC also cited to CEA Section 2(a)(1)(A) to implore the court to decide that this statutory language granted it exclusive jurisdiction over futures trading.

In intervening in this action, it is likely the CFTC was hoping the court would settle the jurisdictional question once and for all. On March 15, 2013, the court reached a decision that will undoubtedly have an immense impact on all of the parties involved, and market participants generally.

### C. The Decision

In its opinion,<sup>67</sup> the D.C. Circuit Court quickly determined that FERC's jurisdiction over the enforcement action turned on the answers to two questions:

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65. Brief for the Respondent, *Hunter v. FERC*, 2010 WL 5779121 (C.A.D.C. Sep. 16, 2010).

66. Brief for the Intervenor—Commodity Futures Trading Commission, *Hunter v. FERC*, 2008 WL 4960214 (C.A.D.C. Nov. 3, 2008).

67. *Hunter v. FERC*, 11-1477, 2013 WL 1003666 (D.C. Cir. Mar. 15, 2013).

## Hunter v. FERC: *Resolving a Jurisdictional Dispute*

As we see it, this case reduces to two questions. First, does CEA Section 2(a)(1)(A) encompass manipulation of natural gas futures contracts? If yes, then we need to answer the second question: did Congress clearly and manifestly intend to impliedly repeal CEA Section 2(a)(1)(A) when it enacted the Energy Policy Act of 2005?<sup>68</sup>

To answer the first question, the court looked to the language of CEA Section 2(a)(1)(A).

A quick glance at the statute's text answers the first question. CEA Section 2(a)(1)(A) vests the CFTC with "exclusive jurisdiction . . . with respect to accounts, agreements[,] . . . and transactions involving contracts of sale of a commodity for future delivery, traded or executed" on a CFTC-regulated exchange. Here, FERC fined Hunter for trading natural gas futures contracts with the intent to manipulate the price of natural gas in another market. Hunter's scheme, therefore, involved transactions of a commodity futures contract. By CEA Section 2(a)(1)(A)'s plain terms, the CFTC has exclusive jurisdiction over the manipulation of natural gas futures contracts.<sup>69</sup>

The court reasoned that, if it read the language to mean FERC had overlapping jurisdiction over manipulation, as FERC argued it should, the CFTC's exclusive regulation over futures contracts would be decimated. It believed this went against Congress's clear goal of centralizing oversight of futures contracts in the CFTC. For these reasons, the court answered the first question in the affirmative, stating that "if 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."<sup>70</sup>

Because the CEA gave the CFTC exclusive jurisdiction over futures contracts, the court next recognized that, in order for the EP Act to award the FERC jurisdiction over the action, the EP Act must impliedly repeal CEA Section 2(a)(1)(A). The court noted that "repeals by implication will not be found unless an intent to repeal is clear and manifest."<sup>71</sup> The court made it clear that it would not infer that one statute partly repealed another unless the later statute expressly contradicted the original act and there existed clear and manifest Congressional intent to repeal the original statute.

First, the court was not persuaded that the text of Section 4A of the NGA contradicted CEA Section 2(a)(1)(A) in a way that would allow the FERC's anti-manipulation jurisdiction to infringe on the CEA's exclusive jurisdiction. Because the FERC was free to prohibit manipulative trading in other markets outside the CFTC's exclusive jurisdiction, the court did not believe the statutory provisions were irreconcilable.

The court was also unpersuaded that Section 23's savings clause and MOU mandate contradicted the CEA. It found that Section 23 did not unambiguously grant the FERC complementary or parallel jurisdiction over futures contracts.

Section 23 is far more ambiguous than FERC admits. By requiring the two agencies to enter into a memorandum of understanding to "ensur[e] that information requests to markets within the respective jurisdiction of each agency

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68. *Id.* at 3.

69. *Id.*

70. *Id.*

71. *Id.* at 4.

are properly coordinated,” Section 23 indicates that the CFTC and FERC regulate separate markets.<sup>72</sup>

Given that ambiguity, the court did not believe Congress’s failure to include a universal savings clause in the NGA constituted clear and manifest intent to impliedly repeal the CEA. Because the court found neither clear congressional intent to repeal the CEA nor an irreconcilable contradiction between the statutes, it held that the EP Act did not impliedly repeal CEA Section 2(a)(1)(A).

Because the CFTC had exclusive jurisdiction over natural gas futures contracts and the NGA did not implicitly repeal the CEA, the court ruled the FERC did not have jurisdiction to fine Hunter.

## **V. Implications of the D.C. Circuit Court’s Opinion in *Hunter v. FERC***

### **A. FERC’s Decision Not to Appeal the D.C. Circuit Opinion**

In a press briefing<sup>73</sup> following the D.C. Circuit Court’s opinion, FERC Chairman Wellinghoff declared that the FERC would not appeal the court’s jurisdictional ruling. The Chairman expressed his belief that the decision was narrowly focused on gas futures transactions and would not affect any pending manipulation actions involving products administered by regional transmission organizations. During the briefing, Wellinghoff hinted at a legislative solution to eliminate holes that might compromise FERC’s “ability to prevent fraud and manipulation in both the gas and electric markets.” But thus far, the Senate has merely punted back to the agencies, urging the two to work together on the problem.

On April 29, 2013, Senator Dianne Feinstein (D-Calif.), chairman of the Energy and Water Development Appropriations Subcommittee, and Senators Ron Wyden (D-Ore.) and Lisa Murkowski (R-Alaska), chairman and ranking member of the Committee on Energy and Natural Resources, sent a letter to the CFTC and FERC Chairmen urging the agencies to execute the statutorily mandated MOUs in compliance with Section 720 of the Dodd-Frank Act. Commenting that “[r]ecent disputes over the jurisdiction of each Commission to punish wrongdoing in these markets have undermined efforts to monitor energy commodity trading,” the Senators called upon the agencies to “cooperate in order to protect American consumers.”

### **B. Clarity or Confusion?**

In the absence of a legislative solution, Chairman Wellinghoff may have been overly confident in his assessment of the limited scope of the D.C. Circuit Court’s opinion, particularly in light of recent changes to the CEA after the enactment of the Dodd-Frank Act. The D.C. Circuit’s decision clarified for market participants and regulators that FERC cannot prosecute actors for manipulating a CFTC futures contract to benefit a related swaps position even if the transaction may affect a physical, FERC jurisdictional transaction. Less clear is whether

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<sup>72.</sup> *Id.* at 5.

<sup>73.</sup> *See* PLATTS MEGAWATT DAILY, Apr. 4, 2013, at 1, 18.



FERC retains its anti-manipulation authority over an actor's cross-market manipulative scheme that involves both a FERC-jurisdictional transaction and a CFTC-jurisdictional transaction. The D.C. Circuit suggests that FERC may not retain jurisdiction in the latter instance: "if 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."<sup>74</sup> The boundaries of the CFTC/FERC jurisdictional constraints are further complicated and blurred under the CFTC's expanded jurisdiction over swap transactions, as discussed below.

### C. The CFTC's Jurisdiction Over Swap Transactions

The D.C. Circuit Court relied on the exclusive jurisdiction provision of CEA Section 2(a)(1)(A) to state that, "if 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."<sup>75</sup> As amended by the Dodd-Frank Act, the CEA now vests the CFTC with exclusive jurisdiction over "transactions involving *swaps* or contracts for sale of a commodity for future delivery . . . traded or executed on . . . a swap execution facility . . . or any other board of trade, exchange, or market, and transactions subject to regulation by the Commission pursuant to section 23 of this title."<sup>76</sup>

Under the D.C. Circuit Court's analysis, a manipulative scheme in the energy markets involving a swap transaction could thus fall within the jurisdictional reach of the CFTC to the exclusion of the FERC. Nonetheless, FERC can find some comfort in the CEA's savings clause, which provides that the CEA does not limit or affect the statutory authority of the FERC with respect to any contract that is not executed, traded, or cleared on a registered entity or trading facility or entered into pursuant to a tariff or rate schedule.<sup>77</sup> However, in recent rulemakings, the CFTC has been careful to preserve its anti-manipulation authority over swap transactions even where it has granted other exemptions.

On March 28, 2013, the CFTC issued a final order exempting energy-related transactions offered or sold in ISO/RTO markets from the requirements of CEA with the exception of the CFTC's anti-fraud and anti-manipulation authority.<sup>78</sup> The CFTC's final order exempts four classes of ISO/RTO transactions from the CFTC's requirements under Dodd-Frank, including: (i) financial transmission rights; (ii) energy transactions in day-ahead and real time markets; (iii) forward capacity transactions; and (iv) reserve or regulation transactions. The transactions will qualify for exemptive relief if they are entered into between eligible parties pursuant to tariffs, rate schedules or protocols approved by FERC

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74. *Hunter*, 2013 WL 1003666 at 3 (emphasis added).

75. *Id.*

76. 7 U.S.C. § 2(a)(1)(A) (1936) (emphasis added).

77. 7 U.S.C. § 2(a)(1)(I) (1936).

78. Final Order in Response to a Petition From Certain Independent System Operators and Regional Transmission Organizations to Exempt Specified Transactions Authorized by a Tariff or Protocol Approved by the Federal Energy Regulatory Commission or the Public Utility Commission of Texas From Certain Provisions of the Commodity Exchange Act Pursuant to the Authority Provided in the Act, 78 FR 19879 (Apr. 2, 2013).

or, in the case of the Electric Reliability Council of Texas, the Public Utility Commission of Texas.

## **VI. Conclusion**

The CFTC's anti-manipulation authority over RTO transactions presents a potential reprise of the turf war at issue in *Hunter v. FERC*. FERC unsuccessfully attempted to head off this tussle in responsive comments to the CFTC's proposed RTO exemption by arguing that the exemption was unnecessary because energy transactions in RTO markets do not constitute swaps in the first instance.<sup>79</sup> However, the CFTC's final order fell short of proclaiming that financial energy transactions in ISOs/RTOs would not qualify under the definition of a swap. To the contrary, the CFTC ensured that it would have a jurisdictional card to play in the event of manipulative conduct in RTO markets by preserving its anti-manipulation authority. While this jurisdictional card may not trump FERC's authority due to the savings clause in CEA Section 2(a)(1)(I), future tussles between the agencies appear inevitable in the absence of a meaningful MOU or a legislative solution.

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79. Comments of the Staff of the Federal Energy Regulatory Commission in response to CFTC's proposed order on Petition of Independent System Operators and Regional Transmission Organizations for Specified Transactions from Certain Provisions of the Commodity Exchange Act, Sep. 27, 2012.