ORAL ARGUMENT HAS NOT BEEN SCHEDULED

In the United States Court of Appeals for the District of Columbia Circuit

No. 11-1477

BRIAN HUNTER,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

ON PETITION FOR REVIEW OF ORDERS OF THE FEDERAL ENERGY REGULATORY COMMISSION

BRIEF OF RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

MICHAEL A. BARDEE
GENERAL COUNSEL

ROBERT H. SOLOMON
SOLICITOR

LONA T. PERRY
SENIOR ATTORNEY

ROBERT M. KENNEDY
ATTORNEY

FOR RESPONDENT
FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, D.C. 20426
(202) 502-6600

June 11, 2012

CIRCUIT RULE 28(a)(1) CERTIFICATE

A. Parties and *Amici*

The parties before this Court are identified in Petitioner's brief.

B. Rulings Under Review

1. *Brian Hunter*, 135 FERC ¶ 61,054 (Apr. 21, 2011) ("Affirming Order"), JA797; and

2. *Brian Hunter*, 137 FERC ¶ 61,146 (Nov. 18, 2011) ("2011 Rehearing"), JA960.

C. Related Cases

There are a number of related actions. In *Hunter v. FERC*, D.C. Cir. No. 08-5380, Petitioner appealed a district court decision that dismissed for lack of jurisdiction his request for an injunction and a declaratory judgment that FERC lacked the authority to initiate an enforcement proceeding against him. *See Hunter v. FERC*, 527 F. Supp. 2d 9 (D.D.C. 2007) (denying preliminary injunction), and *Hunter v. FERC*, 569 F. Supp. 2d 12 (D.D.C. 2008) (granting motion to dismiss and denying declaratory relief). This Court affirmed the district court's ruling. *See Hunter v. FERC*, 348 Fed. Appx. 592, 2009 U.S. App. LEXIS 23417, at *5 (D.C. Cir. Oct. 13, 2009).

In *Hunter v. FERC*, D.C. Cir. No. 10-1017, the Court again rejected Hunter's attempt to secure interlocutory review of an order issued during the course of the Commission proceedings. *See Hunter v. FERC*, 403 Fed. Appx. 525, 2010 U.S. App. LEXIS 26034 (D.C. Cir. Dec. 22, 2010). And ten months

later, in *Hunter v. FERC*, D.C. Cir. No. 11-1236, the Court rejected for a third time Hunter's request for interlocutory review before the conclusion of the Commission proceedings. Order dated Oct. 14, 2011 in No. 11-1236.

Two other cases – *Amaranth Advisors, LLC v. FERC*, No. 07-1491 (D.C. Cir.), and *CFTC v. Amaranth Advisors, LLC*, No. 07-Civ-6682 (S.D.N.Y.) – are related to this case as they arise from the same acts at issue here. The former action was terminated on September 9, 2009, when the Court granted the petitioners' motion to dismiss in light of a settlement with the FERC's enforcement staff. (This followed the Court's denial, on December 13, 2007, of petitioners' emergency action to stay the underlying FERC enforcement proceeding.) The Commission understands that the latter case, in which Petitioner is a defendant, has been stayed pending resolution of this appeal. *See* Order dated January 30, 2012 in *CFTC v. Hunter*, No. 07-Civ-6682.

/s/ Robert M. Kennedy
Attorney

June 11, 2012

TABLE OF CONTENTS

TABLE OF AUTHORITIES

COURT CASES: **PAGE**

*** Cases chiefly relied upon are marked with an asterisk.**

ADMINISTRATIVE CASES:

STATUTES:

GLOSSARY

2007 Rehearing	*Amaranth Advisors, LLC., et al.*, 121 FERC ¶ 61,244 (2007), JA204
2010 Rehearing	*Brian Hunter*, 130 FERC ¶ 61,030 (2010), JA589
2011 Rehearing	*Brian Hunter*, 137 FERC ¶ 61,146 (2011), JA960
ALJ	Administrative Law Judge
Affirming Order	*Brian Hunter*, 135 FERC ¶ 61,054 (2011), JA797
Amaranth	collectively Amaranth Advisors, LLC, Amaranth LLC, Amaranth Management Limited Partnership, Amaranth International Limited, Amaranth Partners LLC, Amaranth Capital Partners, LLC, Amaranth Group, Inc., and Amaranth Advisors (Calgary) ULC
Anti-Manipulation Rule	18 C.F.R. § 1c.1
Br.	Brief of Petitioner, filed Apr. 10, 2012
CEA	Commodity Exchange Act
CFTC	Commodity Futures Trading Commission
CFTC Br.	Brief of Intervenor Commodity Futures Trading Commission, filed Apr. 25, 2012
Commission or FERC	Federal Energy Regulatory Commission
EPAct 2005	Energy Policy Act of 2005
SEA	Securities Exchange Act of 1934
Hearing Order	*Amaranth Advisors, LLC, et al.*, 124 FERC ¶ 61,050 (2008), JA244

Hunter	Petitioner Brian Hunter
Initial Decision	*Brian Hunter*, 130 FERC ¶ 63,004 (2010), JA601
JA	Joint Appendix
MOU	Memorandum of Understanding Between The Federal Energy Regulatory Commission and The Commodity Futures Trading Commission Regarding Information Sharing And Treatment of Proprietary Trading And Other Information (Oct. 12, 2005), JA49
NGA	Natural Gas Act
NG Futures Contracts	Natural gas futures contracts
NYMEX	New York Mercantile Exchange
SA	Supplemental Appendix
Show Cause Order	*Amaranth Advisors, LCC, et al.*, 120 FERC ¶ 61,085 (2007), JA125

In the United States Court of Appeals for the District of Columbia Circuit

No. 11-1477

BRIAN HUNTER,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

ON PETITION FOR REVIEW OF ORDERS OF THE FEDERAL ENERGY REGULATORY COMMISSION

BRIEF OF RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

STATEMENT OF THE ISSUES

1. Whether the Federal Energy Regulatory Commission ("FERC" or "Commission") reasonably determined that its jurisdiction under § 4A of the Natural Gas Act ("NGA"), 15 U.S.C. § 717c-1, to assess civil penalties for market manipulation by "any entity" occurring, "directly or indirectly," "in connection with" FERC-jurisdictional natural gas transactions, permits it to adjudicate an enforcement action against an individual who manipulates the natural gas futures market in a manner that has a direct effect on the price of such transactions,

without conflict with the jurisdiction of the Commodity Futures Trading Commission ("CFTC") under 7 U.S.C. § 2(a)(1)(A).

2. Whether FERC reasonably interpreted NGA § 4A as prohibiting conduct, undertaken with manipulative intent, that affects FERC-jurisdictional transactions, even in the absence of proof that such conduct was otherwise illegal or resulted in an artificial price.

3. Whether substantial evidence supports FERC's conclusion, after hearing and in agreement with the findings of an administrative law judge, that Brian Hunter intentionally manipulated the price of natural gas futures contracts ("NG Futures Contracts") in order to benefit related financial instruments held on other exchanges in a manner that recklessly affected FERC-jurisdictional natural gas transactions.

4. Whether FERC abused its discretion in determining that Hunter's manipulation warranted a $30,000,000 civil penalty.

STATUTES AND REGULATIONS

Pertinent statutory and regulatory provisions are contained in the Addendum. Of particular import is NGA § 4A, 15 U.S.C. § 717c-1, which broadly prohibits market manipulation "in connection with" FERC-jurisdictional transactions:

> 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.

This case in large measure concerns the reconciliation of NGA § 4A and NGA § 23, 15 U.S.C. § 717t-2 (directing that FERC enter into a Memorandum of Understanding with the CFTC), with § 2(a)(1)(A) of the Commodity Exchange Act ("CEA"), 7 U.S.C. § 2(a)(1)(A) (affording the CFTC exclusive jurisdiction over the regulation of the futures exchanges).

INTRODUCTION

In July 2007, FERC commenced an enforcement action against Amaranth,[1] a hedge fund, Brian Hunter, the fund's lead natural gas trader, and Matthew Donohoe, Hunter's execution trader, pursuant to NGA § 4A. The agency alleged that respondents engaged in a manipulative scheme in the NG Futures Contract market, which directly affected the price of FERC-jurisdictional natural gas transactions. *Amaranth Advisors, LLC*, 120 FERC ¶ 61,085 P 5 ("Show Cause Order"), JA130, *reh'g denied*, 121 FERC ¶ 61,224 (2007) ("2007 Rehearing"), JA204.

[1] Collectively Amaranth Advisors, LLC, Amaranth LLC, Amaranth Management Limited Partnership, Amaranth International Limited, Amaranth Partners LLC, Amaranth Capital Partners, LLC, Amaranth Group, Inc., and Amaranth Advisors (Calgary) ULC.

After a two-week hearing, an administrative law judge ("ALJ") found that Hunter's trading practices were fraudulent or deceptive, undertaken with the requisite scienter, and carried out in connection with FERC-jurisdictional natural gas transactions. *Brian Hunter*, 130 FERC ¶ 63,004 (2010) ("Initial Decision"), JA601. After a thorough review of the record and the parties' exceptions to the Initial Decision, FERC affirmed the ALJ's determination that Hunter had violated NGA § 4A and the Anti-Manipulation Rule (18 C.F.R. § 1c.1) promulgated thereunder. *Brian Hunter*, 135 FERC ¶ 61,054 (2011) ("Affirming Order"), JA797. FERC assessed a $30,000,000 civil penalty against Hunter. *Id*. P 3, JA798. On rehearing, FERC rejected Hunter's various challenges to the Commission's authority to conduct an enforcement proceeding against him, and its legal and factual determinations during the course of that proceeding. *Brian Hunter*, 137 FERC ¶ 61,146 ("2011 Rehearing"), JA960.

STATEMENT OF FACTS

I. THE EXPANSION OF FERC'S ANTI-MANIPULATION AUTHORITY

Following the manipulation of prices in the Western energy markets during 2000-01, Congress expanded FERC's anti-manipulation authority with the enactment of § 315 of the Energy Policy Act of 2005 ("EPAct 2005") (codified as NGA § 4A). "[I]n the aftermath of the manipulative practices of Enron and other companies that were uncovered in connection with the Western energy crisis of

2000-2001, Congress intended to give the Commission the tools needed to sanction future manipulation." 2007 Rehearing P19 (discussing legislative history), JA215.

Section 4A empowers FERC to prohibit manipulation by "any entity," "directly or indirectly," "in connection with" jurisdictional transactions. 15 U.S.C. § 717c-1. In Order No. 670 (JA55), FERC adopted the Anti-Manipulation Rule, which implemented NGA § 4A. *See* 18 C.F.R. § 1c.1 (proscribing manipulation affecting natural gas transactions). The implementing regulation was modeled on the SEC's Rule 10b-5, 17 C.F.R. § 240.10b-5, since § 4A itself was based on § 10(b) of the Securities Exchange Act of 1934 ("SEA"), 15 U.S.C. § 78j(b), and directs that FERC's new authority be exercised in a manner consistent with that statute. Order No. 670 P 7, JA63-64.

II. THE MANIPULATIVE SCHEME

A. Overview Of The Futures And Swap Markets

Hunter's manipulative scheme involved the sale of large numbers of NG Futures Contracts in a manner that was designed to artificially depress their settlement price. This, in turn, would benefit the significantly larger derivatives positions maintained by Amaranth on other trading platforms, whose value increased as the NG Futures Contract settlement price declined. Affirming Order P 6, JA799. NG Futures Contracts are standardized agreements to purchase or sell a volume of natural gas in the future at a pre-determined price. The instruments –

which specify the delivery of 10,000 MMBtu of natural gas at the Henry Hub in Louisiana in the month in which the contract matures – are traded on the New York Mercantile Exchange ("NYMEX"). Buyers, who hold a "long position," benefit if the price rises, and sellers, who hold a "short position," benefit if the price falls before the delivery date. Parties may cancel their obligation to physically deliver or accept natural gas by acquiring an equal and opposite position in a corresponding contract (*i.e.*, attaining a "flat position"). *Id*. P 7, JA799.

Contracts cease trading on the "expiration day," which is the third-to-last business day of the month prior to which delivery must be made on open contracts. The settlement price of an NG Futures Contract is the volume-weighted average price of trades during the "settlement period," which is the last 30 minutes of trading on the expiration day (from 2:00 p.m. to 2:30 p.m.). Net contract positions left open at the end of the expiration day are said to "go to delivery," since physical delivery and acceptance obligations attach. *Id*. P 8, JA799.

Traders may also enter into swaps, which are financial instruments exchanged in commercial markets such as the Intercontinental Exchange or the Clearport trading platforms. A buyer of a natural gas swap agrees to pay a "fixed" price and the seller agrees to pay a "floating" price, which will be the final settlement price of the NG Futures Contract. Rising settlement prices benefit the buyer, while the seller benefits if the price falls. *Id*. P 9, JA800.

B. Hunter's Manipulative Trading

Hunter's manipulative scheme began on February 24, 2006, the expiration day for the March 2006 NG Futures Contracts. Hunter told Donohoe, his execution trader, to make sure he had "lots of futures to sell" during the close of trading, even though Amaranth's standard practice was to flatten its futures position in advance of the settlement period. Affirming Order P 12, JA800-01. Amaranth subsequently increased its holdings from a short position of 1,729 to a long position of more than 3,000 March 2006 NG Futures Contracts. Concurrently, Amaranth increased its short swap position from 11,943 to 14,005. *Id*.

While amassing these positions, Hunter explained that he was going to engage in "a bit of an exp[e]riment," in which he needed the price of the March 2006 NG Futures Contracts "to get smashed on settle" – *i.e.*, fall quickly – "then day is done." *Id*. P 13 (quoting Ex. S-45), JA801. To that end, Amaranth sold close to 3,000 contracts in the last 30 minutes of trading, which amounted to nearly 20% of the market volume. The price of the March 2006 NG Futures Contracts fell from nearly $7.45 per MMBtu to less than $7.00, before settling at a volume-weighted average price of $7.11. Hunter concluded in an instant message that the day "came together quite nicely." *Id.*

This trading pattern repeated itself on March 29, 2006 and April 26, 2006, the expiration days for the April and May 2006 NG Futures Contracts. *Id*. PP 14-15, JA801-02.

C. Impact Upon FERC-Jurisdictional Transactions

Hunter's manipulation directly affected FERC-jurisdictional natural gas transactions because the NYMEX settlement price is a critical component of physical gas transactions. First, during the months in question, 4,674 NG Futures Contracts went to delivery based on the NYMEX settlement price. Affirming Order P 119, JA840. Second, the settlement price is the largest, or even sole, price component in "physical basis" transactions, which are priced by reference to the NYMEX settlement price plus a negotiated price differential (*e.g*., the NYMEX settlement price plus 2 cents). Such transactions are widely used for monthly physical delivery in North America. *Id*. PP 114, 119, JA839-40. Third, significant volumes of natural gas are sold via long-term contracts utilizing pricing indices, which calculate a volume-weighted average price for transactions taking place during the "Bid Week" – *i.e*., the last week of the month – at various delivery locations through the nation. The index prices are largely derived from physical basis transactions, which, in turn, rely upon the NYMEX settlement price. *Id*. PP 115, 119, JA839-40.

III. THE ENFORCEMENT PROCEEDING

A. The Show Cause Order

In the Show Cause Order, FERC ordered Amaranth, Hunter, and Donohoe to show cause why they had not violated the Anti-Manipulation Rule, and why they should not be assessed civil penalties for those violations. On rehearing, the Commission rejected the contention that it lacked jurisdiction because the alleged manipulative conduct was within the exclusive jurisdiction of the CFTC under CEA § 2(a)(1)(a), 7 U.S.C. § 2(a)(1)(a). The Commission explained that, while it does not directly regulate NG Futures Contracts, any manipulation of the NYMEX settlement price implicates its jurisdiction under NGA § 4A, 15 U.S.C. § 717c-1, given the nexus between that price and FERC-jurisdictional natural gas sales. 2007 Rehearing PP 11, 23, JA210, 217.

B. The Hearing Order

In a July 17, 2008 order, FERC denied the show cause respondents' motions for summary disposition, directed the ALJ to determine, *inter alia*, "whether any of the Respondents violated the Anti-Manipulation Rule," and reserved to itself the issue of whether civil penalties should be imposed. *Amaranth Advisors LLC*, 124 FERC ¶ 61,050 PP 13-14 (2008) ("Hearing Order"), JA249-50. After issuance of the Hearing Order, FERC Enforcement Litigation Staff and all respondents with the exception of Hunter reached a settlement which was approved by FERC in August 2009. *Amaranth Advisors LLC*, 128 FERC ¶ 61,154 (2009).

FERC denied Hunter's request for rehearing of the Hearing Order, explaining that its jurisdiction under NGA § 4A extends to "any entity," a "deliberately inclusive term" that "include[s] any person or form of organization" that engages in manipulation. *Brian Hunter*, 130 FERC ¶ 61,030 P 16 (2010) ("2010 Rehearing"), JA595. FERC also rejected Hunter's contention that civil penalties may only be imposed after a trial *de novo* in federal district court. FERC explained that "Congress intended" that such assessments should be made following an agency enforcement action that is subject to "review[] by a court of appeals." *Id*. P 27, JA599.

C. The Initial Decision

Following a two-week hearing, on January 22, 2010, the ALJ issued her Initial Decision. She found that "Hunter intended to manipulate the price of natural gas futures contracts, which in turn affected the price of jurisdictional transactions." *Id*. P 212, JA677. The "evidence … conclusively shows that Hunter knew the natural gas futures market could be manipulated" (*id*. P 144, JA650), and traded in a manner "specifically designed to lower the NYMEX price in order to benefit his swap positions on other exchanges." *Id*. P 143, JA650. "Hunter's explanations of his conduct [were] not credible and amount[ed] to after-the-fact defenses of his actions." *Id*. P 212, JA678.

D. The Affirming Order

In an April 21, 2011 order, FERC determined that the record supported the ALJ's factual findings and affirmed the Initial Decision. Affirming Order P 3, JA797-98. FERC explained that "[t]he record strongly indicates that Hunter knew that his conduct was improper and that his subsequent explanations for his trading were *ex post facto* and solely intended to obfuscate the truth." *Id*. P 143, JA849. "Hunter's conduct was felt by a significant portion of physical natural gas market participants," given that sellers in transactions using the NYMEX "settlement price as a price benchmark were paid significantly less than the market price for their gas." *Id*. P 139, JA848. In light of the serious nature of Hunter's violations and the need to deter such conduct, FERC imposed a $30,000,000 penalty. *Id*. P 148, JA850.

E. The 2011 Rehearing

On rehearing, FERC rejected Hunter's wide-ranging challenge to the Affirming Order. With respect to Hunter's contention that so-called "open market" trading cannot constitute market manipulation, FERC explained that NGA § 4A prohibits otherwise legal conduct undertaken with manipulative intent, where a party intends to affect, or recklessly affects, FERC-jurisdictional transactions. 2011 Rehearing P 12, JA963. In rejecting Hunter's assertion that, because he manipulated the settlement price on only three days, his scheme only involved

three violations of the NGA, FERC explained that it was within its discretion, and consistent with precedent, to consider each transaction in furtherance of the manipulative scheme – *i.e.*, each sale of an NG Futures Contract – as a separate violation. Given the nearly 7,000 NG Futures Contract sold by Hunter in connection with his manipulative scheme, the $30,000,000 penalty was well below the statutorily permissible maximum penalty of $1,000,000 per day per violation. *Id*. PP 85-88, JA1000-02.

SUMMARY OF ARGUMENT

1. FERC's NGA § 4A authority over Hunter's manipulative conduct does not conflict with the CFTC's jurisdiction under CEA § 2(a)(1)(A). Settled principles of statutory construction require that both statutes be given effect, absent clear Congressional intent to the contrary. Here, Congress recognized that FERC's broad new anti-manipulation authority might overlap with that of the CFTC and, in NGA § 23, 15 U.S.C. § 717t-2, expressly directed FERC and the CFTC to execute a Memorandum of Understanding ("MOU") addressing potentially overlapping investigative activities.

This overlapping jurisdiction does not create a conflict between the statutes because the CFTC's jurisdiction is not exclusive with regard to manipulation. As this Court and other courts have recognized, the CFTC exercises sole regulatory authority over futures contracts and futures markets. But outside of market

regulation, the CFTC's jurisdiction is not exclusive. Based on this distinction, courts have consistently found that statutes interfering with futures market operations are preempted, while those prohibiting fraud and manipulation may continue to operate since they do not conflict with the CEA.

2. Hunter's additional jurisdictional challenges are without merit. NGA § 4A prohibits "any entity" from engaging in manipulative conduct – a term which is reasonably interpreted broadly to encompass all types of actors, including natural persons like Hunter. Hunter's conduct in the futures market was "in connection with" FERC-jurisdictional transactions because it had a direct impact on the price of physical natural gas sales. As illustrated by precedent under SEA § 10(b) (on which NGA § 4A was modeled), conduct that affects jurisdictional transactions is sufficient to satisfy the "in connection with" requirement. Hunter likewise is not entitled to a *de novo* trial in district court; in contrast to other statutory provisions, NGA § 22, 15 U.S.C. § 717t-1 (authorizing assessment of civil penalties), contains no requirement for *de novo* district court proceedings. Rather, the courts of appeals have exclusive jurisdiction to review FERC's NGA § 22 penalty orders under the general judicial review provisions of NGA § 19(b), 15 U.S.C. § 717r(b).

3.a. FERC reasonably interpreted the term "manipulative device" in NGA § 4A as encompassing purportedly lawful conduct undertaken with manipulative

intent. Courts have upheld this construction of the identical phrase in SEA § 10(b). Consistent with cases construing SEA § 10(b), upon which NGA § 4A was modeled, FERC also reasonably found that the existence of an artificial price is not an element of a manipulation claim.

b. FERC's detailed review of the record reasonably found that substantial evidence supported the ALJ's determination, after hearing, that Hunter employed a deceptive trading scheme designed to manipulate the NYMEX settlement price with reckless disregard as to the impact of his conduct upon FERC-jurisdictional markets. While Hunter repeatedly contends FERC "ignored" evidence, he actually wants this Court to second-guess FERC's conclusions regarding the import of that evidence. That is not the relevant standard. Moreover, Hunter ignores the ALJ's numerous adverse credibility determinations – determinations that are crucial to issues of intent.

c. The proceedings below afforded Hunter due process. In adopting the Anti-Manipulation Rule, FERC placed the public on notice that the prohibitions of NGA § 4A extend to conduct otherwise beyond FERC's jurisdiction if it affects jurisdictional markets. Caselaw establishes that so-called open market trading undertaken with manipulative intent could give rise to liability. Equally unavailing is Hunter's claim that the ALJ erred in using two FERC economists as technical advisors. The advisors did not supply evidence, rely on materials outside the

record, or otherwise undermine the judicial function. They served in a manner akin to law clerks and their appointment was a reasonable exercise of the ALJ's inherent authority.

4. FERC reasonably imposed a $30,000,000 civil penalty against Hunter. Such an amount is well below the statutory maximum of $1 million per violation given that each NG Futures Contract sold in furtherance of Hunter's manipulative scheme constituted a violation of the NGA. And it was warranted in light of the manipulative scheme's substantial impact upon the physical natural gas market, both economically upon affected transactions and more generally upon the efficient and transparent functioning of the market.

ARGUMENT

I. STANDARD OF REVIEW

The Court reviews FERC orders under the Administrative Procedure Act's arbitrary and capricious standard. *See, e.g.*, *Sithe/Independence Power Partners v. FERC*, 165 F.3d 944, 948 (D.C. Cir. 1999). The pertinent inquiry is whether the agency has "examine[d] the relevant data and articulate[d] a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). The Commission's factual findings are conclusive if supported by substantial evidence. NGA § 19(b), 15 U.S.C. § 717r(b).

This case concerns FERC's interpretation of provisions of the NGA enacted by Congress as part of EPAct 2005. To review FERC's interpretation of a statute it administers, the Court applies the framework set forth in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). Under *Chevron*, the Court "giv[es] effect to clear statutory text and defer[s] to an agency's reasonable interpretation of any ambiguity." *MetroPCS Cal., LLC v. FCC*, 644 F.3d 410, 412 (D.C. Cir. 2011). This deference includes FERC's interpretation of its own jurisdiction. *Conn. Dep't of Pub. Util. Control v. FERC*, 569 F.3d 477, 481 (D.C. Cir. 2009).

The Commission's exercise of its anti-manipulation authority under NGA § 4A is particularly deserving of *Chevron* respect. Under *Chevron*, administrative agencies receive deference "when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001). Here, NGA § 4A expressly proscribes manipulative conduct "in contravention of such rules and regulations as the Commission may prescribe." 15 U.S.C. § 717c-1. This case concerns an administrative adjudication of Hunter's alleged violation of FERC's Anti-Manipulation Rule, 18 C.F.R. § 1c.1, promulgated under authority of NGA § 4A.

FERC does not claim deference in its interpretation of other statutory provisions, such as CEA § 2(a)(1)(A), that it does not administer or otherwise have particular expertise in administering. Nor is the CFTC entitled to deference in its interpretation of NGA § 4A (or any other provision of the NGA). Neither agency is entitled to deference when reconciling its organic statute with another statute outside its area of expertise. *U. S. Dept. of the Navy v. FLRA*, 665 F.3d 1339, 1348 (D.C. Cir. 2012).

II. FERC'S NGA § 4A AUTHORITY DOES NOT CONFLICT WITH THE CFTC'S EXCLUSIVE JURISDICTION.

The threshold issue in this appeal is whether FERC's exercise of jurisdiction over Hunter's manipulative conduct conflicts with the CFTC's exclusive jurisdiction under CEA § 2(a)(1)(A), "with respect to accounts, agreements ... and transactions involving swaps or contracts of sale of a commodity for future delivery." Br. 19-20; CFTC Br. 11-13. "[W]e live in 'an age of overlapping and concurring regulatory jurisdiction.'" *FTC v. Ken Roberts Co.*, 276 F.3d 583, 593 (D.C. Cir. 2002) (quoting *Thompson Med. Co., Inc. v. FTC*, 791 F.2d 189, 192 (D.C. Cir. 1986)). FERC understands this fact of regulatory life, all too well. *See, e.g.*, *City of Fall River v. FERC*, 507 F.3d 1, 8 (1st Cir. 2007) (FERC approval of liquefied natural gas terminal effectively vetoed by failure of Coast Guard to allow tanker passage); *Wisconsin Power & Light Co. v. FERC*, 363 F.3d 453, 457 (D.C. Cir. 2004) (noting "unusual statutory configuration where, in granting

hydroelectric licenses, the [FERC] is obligated both to conduct its own environmental assessment to protect and enhance fish and wildlife and to include such prescription conditions for fishways as the Secretary of the Interior may direct").

Accordingly, where "statutes are 'capable of co-existence,' it becomes the *duty* of this court 'to regard each as effective' – at least absent clear congressional intent to the contrary." *Ken Roberts*, 276 F.3d at 593 (quoting *Morton v. Mancari*, 417 U.S. 535, 551 (1974)). *See* 2007 Rehearing P 57 (noting obligation to "harmonize the various provisions" relating to FERC and CFTC jurisdiction), JA238. Here, FERC's authority over manipulation affecting its jurisdictional markets is complementary to, and can co-exist with, the CFTC's jurisdiction. 2007 Rehearing P 11, JA210.

A. The Language And Purpose Of EPAct 2005 Support FERC's Interpretation.

1. EPAct 2005 contemplates overlapping jurisdiction.

In EPAct 2005, Congress extended FERC's jurisdiction beyond its traditional boundaries. NGA § 4A vests FERC with jurisdiction over "any entity" that engages in manipulation, not merely traditionally-regulated entities. 15 U.S.C. § 717c-1. And that manipulation need not occur in jurisdictional markets, so long as it coincides with – *i.e.*, is "in connection with," "directly or indirectly" – FERC-jurisdictional gas transactions. *See SEC v. Zandford*, 535 U.S. 813, 819 (2002)

(construing identical provision in SEA § 10(b)); *Ass'n of Private Sector Colleges and Universities v. Duncan*, No. 11-5174, 2012 U.S. App. LEXIS 11269, at *31 (D.C. Cir. June 5, 2012) (noting breadth of words and phrases like "any" and "directly or indirectly"); s*ee also Hunter v. FERC*, 527 F. Supp. 2d 9, 17 n.6 (D.D.C. 2007) (rejecting Hunter's contention that FERC's assertion of jurisdiction was *ultra vires*, finding that "[t]his is particularly true when Congress, in adopting the EPAct in 2005, expanded FERC's enforcement authority to reach *any* entity, that directly or indirectly, engages in manipulative practices, *in connection with*, natural gas transportation and sales").

Recognizing its creation of concurrent jurisdiction in NGA § 4A (EPAct 2005 § 315), in the next EPAct 2005 section, NGA § 23 (EPAct 2005 § 316), Congress directed FERC and the CFTC to coordinate investigative activities through a Memorandum of Understanding "relating to information sharing, which shall include, among other things, provisions ensuring that information requests to markets within the respective jurisdiction of each agency are properly coordinated to minimize duplicative information requests." 15 U.S.C. § 717t-2(c)(1). *See also CFTC v. Amaranth Advisors, LLC*, 523 F. Supp. 2d 328, 332 (S.D.N.Y. 2007) (noting Congress' recognition of the possibility of overlapping FERC and CFTC jurisdiction).

In acknowledging the need for FERC to obtain information from CFTC-jurisdictional markets, Congress necessarily presumed a jurisdictional overlap with respect to enforcement. Congress directed the two agencies to "coordinate" together to "minimize duplicative" efforts – not to eliminate duplication altogether. "It is an odd notion indeed that Congress intended [FERC] to gather information pertaining to exchanges under the CFTC's jurisdiction, but if [FERC] thereby detected manipulation affecting [its] jurisdictional markets to have no enforcement role to punish and deter such manipulation." 2007 Rehearing P 62, JA241. Indeed, the MOU itself provides that "the CFTC and the FERC may from time to time engage in oversight or investigations of activity affecting both CFTC-jurisdictional and FERC-jurisdictional markets." MOU at 3, JA 51. Accordingly, the agencies agreed to "coordinate on a regular basis oversight, investigative, and enforcement activities of mutual interest" by sharing information. *Id*. *See also Amaranth*, 523 F. Supp. 2d. at 333 (noting agencies' recognition of overlapping enforcement activities).

The agencies' contemporaneous understanding of the scope of their respective jurisdictions is entitled to respect. *See, e.g., United States v. Int'l Union of Operating Engineers*, 638 F.2d 1161, 1166-67 (9th Cir. 1979) (affording "substantial deference" to agencies' statutory interpretation documented in a MOU, which is "a reflection of the interpretation of a new statute by the officers

charged with its administration contemporaneous with its enactment"). Indeed, while this Court does not preclude affording *Chevron* deference to agency positions asserted in legal briefs, as the CFTC's here, *see, e.g.*, *Noble Energy, Inc. v. Salazar*, 671 F.3d 1241, 1246 (D.C. Cir. 2012), the statutorily-mandated MOU negotiated at the agencies' highest levels may be expected to best represent the agencies' "fair and considered judgment" on the proper interpretation of the respective statutes. *Auer v. Robbins*, 519 U.S. 452, 462 (1997). An agency may, of course, reverse policy with adequate explanation, *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005), but the CFTC has not established here that its legal brief is a sufficiently authoritative interpretation to supersede the MOU.

The broad language of NGA § 4A, coupled with the express recognition of the need to coordinate overlapping investigative activities in NGA § 23, support FERC's interpretation that "although the Commission and the CFTC each have exclusive jurisdiction over the day-to-day regulation of their respective physical energy and financials markets, where, as here, there is manipulation in one market that directly or indirectly affects the other market, both agencies have an enforcement role." 2007 Rehearing P 12, JA211. *See also Va. Dept. of Medical Assistance Servs. v. HHS*, No. 11-511, 2012 U.S. App. LEXIS 9293, at *22 (D.C. Cir. May 8, 2012) (agency's responsibility is to "maintai[n] the integrity of each

provision" of the statute it administers). "This is a dual role that was contemplated by Congress, that should be coordinated and consistent wherever possible, and that, in the end, will redound to the benefit of all market participants." 2007 Rehearing P 12, JA211.

2. Overlapping jurisdiction works both ways.

FERC's jurisdiction over the interstate natural gas market is just as exclusive as the CFTC's jurisdiction over the futures market. *See, e.g.*, *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 300-01 (1988) ("The NGA confers upon FERC exclusive jurisdiction over the transportation and sale of natural gas in interstate commerce for resale."); *Pub. Utils. Comm'n of Cal. v. FERC*, 900 F.2d 269, 274 (D.C. Cir. 1990) (same; citing cases). *See also* MOU at 2, JA50 (acknowledging FERC's exclusive jurisdiction). But the FERC did not resist when the CFTC initiated dozens of enforcement actions, and collected hundreds of millions of dollars in civil penalties, in pursuit of alleged wrongdoing in FERC-jurisdictional energy markets during the western energy crisis of 2000-2001.[2] And in some of those actions, the CFTC and FERC prosecuted enforcement actions against the same entities for the same manipulative conduct. *See, e.g.*, *In re Coral Energy Res., L.P.*, 110 FERC ¶ 61,205 P 8 (2005) (FERC investigation of manipulation in

[2] *See* CFTC Energy Markets Enforcement Results (Nov. 17, 2008), *available at* http://cftc.gov/ucm/groups/public/@newsroom/documents/file/enfenergyenforcementactions.pdf.

physical gas markets opened based upon information provided by CFTC, citing *In re Coral Energy Res., L.P.*, Comm. Fut. L. Rep. (CCH) ¶ 29,815 (CFTC July 28, 2004)).

After enactment of EPAct 2005 and execution of the agencies' MOU, the CFTC and FERC exercised concurrent jurisdiction in enforcement actions against Energy Transfer Partners for alleged manipulative trading in the physical natural gas market, whose day-to-day operations are subject to FERC's exclusive jurisdiction. 2007 Rehearing PP 49, 58, JA233, 239. *See Hershey v. Energy Transfer Partners, L.P.*, 610 F.3d 239, 243-44 (5th Cir. 2010) (describing actions). In that proceeding, the CFTC stated:

> The CFTC coordinated closely with the FERC on this matter, per the agencies' Memorandum of Understanding. Today, the FERC also filed charges against ETP. The agencies worked in conjunction to achieve a common goal – using all the authority each agency has and the resources provided to combat manipulation attempts in the energy arena.[3]

The CFTC made a similar statement here, when it initiated its enforcement action against Hunter:

> The Commission wishes to thank the Federal Energy Regulatory Commission (FERC), the Securities and Exchange Commission, and the New York Mercantile Exchange for their assistance with this

[3] Press Release, CFTC Alleges that Energy Transfer Partners, L.P. and Three of Its Subsidiaries Used the Intercontinental Exchange in Attempted Manipulation of the Natural Gas Market (July 26, 2007), *available at* http://www.cftc.gov/pressroom/pressreleases/pr5471-08.

> investigation. Of particular note is the CFTC's coordination with the FERC on this matter, per the agencies' Memorandum of Understanding.[4]

While the CFTC thanked FERC for its efforts on the Hunter investigation, it chose not to support FERC's own enforcement action.

The CFTC (Br. 35) and Hunter (Br. 21) explain that the "savings clause" in NGA § 23(c)(2) – providing that "[n]othing in this section may be construed to limit or affect the exclusive jurisdiction" of the CFTC, 15 U.S.C. § 717t-2(c)(2) – preserves the CFTC's "exclusive" jurisdiction generally. But this argument misinterprets the precise language of the clause. It applies, by its terms, only to "this section" (NGA § 23, EPAct 2005 § 316) and does not apply more broadly to other sections – in particular NGA § 4A (EPAct 2005 § 315) under which FERC exercised its anti-manipulation authority. NGA § 23(c)(2) evidences Congress' "explicit choice to refer to the CFTC's exclusive jurisdiction only in the regulatory arena of information gathering." 2007 Rehearing P 60, JA240. Indeed, Congress rejected a proposed section expressly stating that "This Act" (the NGA) shall not affect the CFTC's exclusive jurisdiction. *Id*. (*see* text of rejected Section 26 at CFTC Br. 34).

---

[4] Press Release, CFTC 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), *available at* http://www.cftc.gov/pressroom/pressreleases/pr5359-07.

"Thus, with respect to day-to-day regulation, such as gathering data as discussed in NGA section 23, the CFTC's jurisdiction is exclusive and the agencies must work through each other. With respect to enforcement against manipulation as specified in section 4A, jurisdiction is not exclusive and Congress did not include a savings clause." 2007 Rehearing P 60, JA240.

3. The legislative history supports FERC's interpretation.

NGA § 4A was enacted in response to the crisis that engulfed Western energy markets in 2000-01 and the later discovery of market abuses by Enron and others (2007 Rehearing P 19, JA215), which revealed that "Federal energy regulators did not have enough authority to prevent widespread market manipulation." 151 Cong. Rec. S7454 (June 28, 2005) (Floor Statement of Senator Feinstein). In filling that regulatory gap, Congress rejected a narrowly-drafted anti-manipulation provision specifying certain prohibited practices, in favor of broad anti-manipulation authority modeled after SEA § 10(b). *See id.* (noting that the "consumer protections" in the bill "include[] a broad ban on manipulation in the energy markets "); 2007 Rehearing P 17 (discussing rejection of narrow list of prohibited practices), JA214.

At the time, Congress was well aware of the scope of the CFTC's jurisdiction and it considered concerns regarding unnecessary duplication of efforts by enforcement agencies now raised by Hunter (at 19) and the CFTC (at 16). 2007

Rehearing P 59, JA239 (citing 149 Cong. Rec. S14000 (Nov. 5, 2003) (statement of Sen. Bennett) (expressing concern that a broad prohibition of market manipulation would "only lead to unnecessary duplication and potential conflict between various enforcement agencies"). What ultimately emerged were two EPAct 2005 provisions, one general and inclusive (NGA § 4A, EPAct § 315) and one specific and exclusive (NGA § 23(c), EPAct § 316). The latter specifically refers to the possibility of overlap with CFTC authority, and preserves the CFTC's exclusive jurisdiction only with respect to information gathering, not market manipulation more broadly. The former carves out a special place for fraud – where there is no exclusive jurisdiction and where FERC is entitled to be particularly vigilant. *See* 2007 Rehearing P 59 (noting that Congress chose to place "another cop on the beat" to ensure that "manipulative and deceptive practices do not occur in energy markets"), JA239; *see also Ricci v. DeStefano*, 129 S. Ct. 2658, 2699 (2009) (court's "task in interpreting separate provisions of a single Act is to give the Act the most harmonious, comprehensive meaning possible in light of the legislative policy and purpose") (internal marks and alteration omitted).[5]

[5] As the CFTC concedes (Br. 17), the 2010 Dodd-Frank Act makes no change in the preexisting authority of, or relationship between, FERC and the CFTC.

B. There Is No Irreconcilable Conflict Between FERC's Jurisdiction Under NGA § 4A And The CFTC's Jurisdiction Under CEA § 2(a)(1)(A).

The NGA and the CEA must both be given effect absent an "'irreconcilable conflict' in the sense that there is a positive repugnancy between them or that they cannot mutually coexist." *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 155 (1976). *See also Massachusetts v. EPA*, 549 U.S. 497, 532 (2007) (although EPA and DOT jurisdiction over vehicle emissions overlap, "there is no reason to think the two agencies cannot both administer their obligations and yet avoid inconsistency"). Hunter and the CFTC have not demonstrated an "irreconcilable conflict" or "positive repugnancy" between the CEA and NGA § 4A. *See* 2007 Rehearing P 57, JA238.

1. The CFTC's exclusive jurisdiction does not extend to manipulation.

The CFTC's "exclusive jurisdiction" over futures "accounts, agreements … and transactions," 7 U.S.C. § 2(a)(1)(A), affords the agency authority "to oversee the operation of the futures markets," including "the terms and conditions of sale of NG Futures contracts, the operating rules of the NYMEX Exchange, or traders' commodity accounts." 2007 Rehearing P 58, JA238. *See also* H.R. REP. NO. 93-1383 (1974) (Conf. Rep.), *reprinted in* 1974 U.S.C.C.A.N. 5894, 5897 (CFTC's exclusive jurisdiction extends to "the regulation of commodity accounts, commodity trading agreements, and commodity options").

Such exclusivity does not, however, extend to "fraudulent or deceptive practices" associated with transactions on the futures exchange that fall within the purview of other statutes. 2007 Rehearing P 47, JA231. In *Ken Roberts* (CFTC Br. 18-20), the Court distinguished between the CFTC's exclusive jurisdiction over "accounts, agreements, and transactions" under CEA § 2(a)(1)(A) and its non-exclusive jurisdiction over fraudulent practices. 2007 Rehearing P 50 (citing *Ken Roberts*, 276 F.3d at 591), JA233-34. "[Section] 2(a)(1)(A) confers exclusive jurisdiction to the CFTC over a limited, discrete set of items related to the making of futures contracts," which "comports with Congress' goal of conferring the CFTC with sole regulatory authority over 'futures contracts *markets* and other *exchanges.*'" *Ken Roberts*, 276 F.3d at 589-90 (quoting H.R. CONF. REP. NO. 93-1383, 1974 U.S.C.C.A.N. at 5897). The statutory goal was "to bring the futures markets 'under a uniform set of regulations;'" consequently, "'only in the context of market regulation does the need for uniform legal rules apply.'" *Id*. at 591 (quoting *Am. Agric. Movement, Inc. v. Bd. of Trade of Chicago*, 977 F.2d 1147, 1155-57 (7th Cir. 1992)).

Outside of market operations, however, *Ken Roberts* rejected as "specious" the contention that "whatever [the CFTC] may regulate, it regulates exclusively." *Id*. This stems from the "imperfect overlap" between CEA § 2(a)(1)(A) and the rest of the CEA. *Id*. For example, while the CFTC has jurisdiction over a trader's

deceitful "practices" under 7 U.S.C. §6*o*, that jurisdiction is not exclusive. 2007 Rehearing P 50, JA234 (discussing *Ken Roberts*). Here, the CFTC is prosecuting Hunter under the anti-manipulation authority granted by 7 U.S.C. § 13(a)(2). CFTC Br. 4. But just like the CFTC's jurisdiction over fraudulent acts (7 U.S.C. §6*o*), that jurisdiction is not exclusive.

2. Caselaw reflects this distinction.

Caselaw reflects the distinction between the CFTC's exclusive jurisdiction over market operations and its non-exclusive jurisdiction over fraud and manipulation. 2007 Rehearing PP 50-51, JA233-34. Courts find statutes preempted when they interfere with CFTC control over market operations. Thus, in *American Agric. Movement* (CFTC Br. 23), the Seventh Circuit found that the CEA preempted state law claims challenging emergency action by the Chicago Board of Trade because they "directly affect trading on or the operation of a futures market" and "would frustrate Congress' intent to bring the markets under a uniform set of regulations." 977 F.2d at 1156. State law claims against individual brokers were permissible, however, because "they have little or no bearing upon the actual operation of the commodity futures markets." *Id*.

The Seventh Circuit likewise overturned SEC orders authorizing exchange trading of financial instruments within the CFTC's jurisdiction – actions certainly affecting the CFTC's control over market operation. *See Chicago Merc. Exch. v.*

SEC, 883 F.2d 537 (7th Cir. 1989) (CFTC Br. 22) (SEC authorized trading of index participations on stock exchanges); *Chicago Bd. of Trade v. SEC*, 677 F.2d 1137 (7th Cir. 1982), *vacated as moot*, 459 U.S. 1026 (1982) (CFTC Br. 21) (SEC authorized trading of options on the Chicago Board Options Exchange). *See also* 2007 Rehearing P 51 (discussing cases), JA234-35.

On the other hand, statutes that concern fraudulent or manipulative conduct are not preempted, even when such conduct touches upon matters within an agency's exclusive jurisdiction. 2007 Rehearing P 50 (citing cases), JA234. Where both statutes at issue prohibit fraud and manipulation, there is no conflict between them and both can be given effect.

For example, *Ken Roberts* rejected the argument that the Investment Advisor Act preempted the ability of the Federal Trade Commission to prosecute the fraudulent practices of investment advisers. 276 F.3d at 593. "[W]hile it may be true that the [Investment Advisor Act] and the [Federal Trade Commission] Act employ different verbal formulae to describe their antifraud standards, it hardly follows that they therefore impose conflicting or incompatible obligations;" entities "can – and of course should – " refrain from committing fraud as defined in either statute. *Id*. Similarly, in *Strobl v. New York Mercantile Exch.*, 768 F.2d 22 (2d Cir. 1985), the court found that claims arising from price manipulation of futures contracts could be asserted under both the CEA and the antitrust laws. Since

"price manipulation is an evil that is always forbidden under every circumstance" by both statutes, "application of the [antitrust laws] cannot be said to be repugnant to the purposes of the [CEA]." *Id*. at 28. And in *United States v. Reliant Energy Servs., Inc*., 420 F. Supp. 2d 1043 (N.D. Cal. 2006), the court found that FERC's exclusive jurisdiction over the physical electricity market did not preempt criminal charges for manipulation in that market under the CEA, as there was no unresolvable or repugnant conflict. *Id*. at 1065.

The fact that FERC and the CFTC are addressing the same conduct under different statutes, *see* CFTC Br. 23, provides no basis for finding the statutes repugnant. Mere "differing results when applied to the same factual situation" is not enough, "for that no more than states the problem." *Radzanower,* 426 U.S. at 155. Indeed, overlapping and concurring regulatory jurisdiction is commonplace, *Ken Roberts*, 276 F.3d at 593, and judicial precedent permits multiple agencies to pursue claims for the same conduct to discharge their respective statutory duties. 2007 Rehearing P 57 n.142 (citing cases), JA237-38. *See also Galliano v. U.S. Postal Serv*., 836 F.2d 1362, 1369 (D.C. Cir. 1988) ("the same issues and parties may be proceeded against simultaneously by more than one agency").

The CFTC finally argues that CEA § 2(a)(1)(A) is more "precisely drawn" than NGA § 4A and therefore EPAct 2005 cannot preempt the CFTC's exclusive jurisdiction. CFTC Br. 31. But preemption is not at issue since the two statutes

can be harmonized. Moreover, it is "inaccurate" to refer to one grant of statutory authority as "general" and another as "specific;" "'[w]hen … two statutes apply to intersecting sets … neither is more specific.'" *Core Commc'ns, Inc. v. FCC*, 592 F.3d 139, 143 (D.C. Cir. 2010) (quoting *Hemenway v. Peabody Coal Co.*, 159 F.3d 255, 264 (7th Cir. 1998)). As both statutes here involve intersecting realms of regulatory responsibility, neither is more specific than the other.

In any event, if any canon of statutory construction were to apply, it should be that "'a specific policy embodied in a later federal statute should control [the court's] construction of the [earlier] statute, even though it has not been expressly amended.'" *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 143 (2000) (quoting *United States v. Estate of Romani*, 523 U.S. 517, 530-31 (1998)). "The 'classic judicial task of reconciling many laws enacted over time, and getting them to 'make sense' in combination, necessarily assumes that the implications of a statute may be altered by the implications of a later statute.'" *Id.* (quoting *United States v. Fausto*, 484 U.S. 439, 453 (1988)).

III. HUNTER'S REMAINING JURISDICTIONAL ARGUMENTS ARE WITHOUT MERIT.

Hunter raises a series of additional jurisdictional challenges, asserting that the NGA: (a) does not permit the imposition of monetary penalties against natural persons, (b) limits FERC's authority only to those who participate directly in FERC-jurisdictional markets, and (c) vests district courts with exclusive

jurisdiction to adjudicate alleged violations of the Act. These arguments have no merit.

A. "Any Entity" In NGA § 4A Includes Hunter.

Rather than employ the existing defined terms in the NGA of "person" or "natural gas company," Congress chose to extend the prohibitions of NGA § 4A to "any entity." *See* Hearing Order P 49, JA266. This is an undefined term to be interpreted by FERC "'as necessary in the public interest or for the protection of natural gas ratepayers.'" *Id*. P 50 (quoting 15 U.S.C. § 717c-1), JA266. FERC determined that a broad interpretation of "entity" – one that includes natural persons – was appropriate to fulfill Congress' mandate to deter and punish manipulative conduct. *See id*. P 55, JA269. That assessment, which is neither arbitrary nor capricious, must be afforded "controlling weight." *United States v. O'Hagan*, 521 U.S. 642, 673 (1997).

While Hunter contends (Br. 24) that the plain language of NGA § 4A excludes individuals from its scope, the term "entity" is "'the broadest of all definitions which relate to bodies or units.'" Hearing Order P 36 (quoting *Alarm Indus. Commc'n Comm. v. FCC*, 131 F.3d 1066, 1069 (D.C. Cir. 1997)), JA260. It may "include a natural person, a corporation, a partnership, a limited liability company, a limited liability partnership, a trust, an estate, an association." *City of Abilene, TX v. FCC*, 164 F.3d 49, 52 (D.C. Cir. 1999). The coupling of "entity"

with the term "any" further supports an expansive reading. 2007 Rehearing P 31, JA221. *See, e.g.*, *Massachusetts*, 549 U.S. at 529 n.25 ("any … has an expansive meaning, that is, one or some indiscriminately of whatever kind").

Other provisions of EPAct 2005 confirm Congress' intent to include individuals within the term "entity." For instance, § 1282 prohibits false reporting by "the person or any other entity." 16 U.S.C. § 824u. Likewise, § 1284(c) grants rehearing rights to any aggrieved "*person*, electric utility, State, municipality, or State commission," and provides that no appellate proceeding "shall be brought by *any entity unless such entity*" has applied for rehearing. 16 U.S.C. § 825*l*(a) (emphasis added). Thus, unlike the statute at issue in *American Dental Ass'n v. Shalala*, 3 F.3d 445 (D.C. Cir. 1993) (Br. 23), which reflected the "unvarying practice" of using "entity" to refer to groups and organizations, and other terms to refer to individuals, *id*. at 447, EPAct 2005 repeatedly includes natural persons within the term "entity." *See, e.g.*, *Brown v. Garner*, 513 U.S. 115, 118 (1994) (recognizing "presumption that a given term is used to mean the same thing throughout a statute").

The rule of lenity (Br. 25) does not require a narrow interpretation. *Chevron*, not the rule of lenity, provides the standard of review for agency interpretations of ambiguous statutory provisions, even where criminal

enforcement is authorized. *See, e.g.*, *United States v. Kanchanalak*, 192 F.3d 1037, 1050 n.23 (D.C. Cir. 1999).

Hunter argues alternatively that, even if NGA § 4A applies to individuals, NGA § 20(d), 15 U.S.C. § 717s(d) – which provides that "individuals" who have violated NGA § 4A may be barred from participating in jurisdictional activities – provides the only remedy against natural persons. Br. 24. But the NGA's injunctive relief (15 U.S.C. § 717s(a)), general penalty (15 U.S.C. § 717t), and civil penalty (15 U.S.C. § 717t-1) provisions expressly apply to "persons," a defined term that includes individuals (15 U.S.C. § 717a(1)). *See* Hearing Order P 51, JA267.

B. Hunter's Manipulation Is "In Connection With" FERC-Jurisdictional Transactions.

While NGA § 4A did not expand the natural gas transactions subject to FERC's jurisdiction, it broadened the conduct *affecting* such transactions that the Commission may police, namely manipulation "in connection with" FERC-jurisdictional transactions. 2007 Rehearing PP 25, 30-45, 59, JA218, 221-31, 239. Here, Hunter manipulated the settlement price for NG Futures Contracts during three months in 2006, which served as a critical price component in FERC-jurisdictional gas transactions. *See, e.g.*, Affirming Order PP 112-22, JA 838-42. Indeed, "[i]t is difficult to imagine how much more 'coincidence' there could be

between [Hunter's] trading and Commission-jurisdictional sales." 2007 Rehearing P 44, JA230.

Hunter claims that precedent applying SEA § 10(b) – which is explicitly referenced in NGA § 4A and has an identical "in connection with" requirement – limits FERC's jurisdiction to actors who "participate in the purportedly manipulated market." Br. 22. But the Supreme Court "has espoused a broad interpretation" of the "in connection with" element; "it is enough that the fraud alleged 'coincide' with a securities transaction." *Merrill, Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 85 (2006). *See also Zandford*, 535 U.S. at 819 ("in connection with" element should be construed "flexibly to effectuate [the statute's] remedial purposes"); 2007 Rehearing PP 37-42, JA225-28. Under this standard, fraudulent manipulation of stock prices "unquestionably" qualifies as fraud "in connection with the purchase or sale of securities." *Merrill Lynch*, 547 U.S. at 89. This is especially true where, as here, the statute covers acts of manipulation that only "indirectly" (as well as "directly") touch jurisdictional activity.

Thus, the prohibitions of SEA § 10(b) apply to all "frauds which mislead the general public as to the market value of the securities," *United States v. Russo*, 74 F.3d 1383, 1391 (2d Cir. 1996), regardless of whether aimed at the securities market or perpetrated by actors in that market. *See, e.g.*, *Basic, Inc. v. Levinson*,

485 U.S. 224 (1988) (permitting Rule 10b-5 suit based on a company's allegedly misleading statements, where the company did not trade); *SEC v. Rocklage*, 470 F.3d 1, 8-10 (1st Cir. 2006) (sister who provided insider information to brother acted "in connection with" brother's securities trades); *In re Carter-Wallace, Inc. Sec. Litig*., 150 F.3d 153, 156 (2d Cir. 1998) (drug advertisements in medical journals are "in connection with" securities transaction if relied upon by investors); *SEC v. Savoy Indus., Inc*., 587 F.2d 1149, 1171 (D.C. Cir. 1978) ("in connection with" requirement is satisfied where investors are influenced "regardless of the motive or existence of contemporaneous transactions by … the violator").

Hunter's reliance upon *Conoco, Inc. v. FERC*, 90 F.3d 536 (D.C. Cir. 1996) (Br. 21) – which held that FERC's authority under NGA § 4(a) to regulate matters "in connection with" jurisdictional pipeline services did not extend to gathering facilities expressly exempted from jurisdiction under NGA § 1(b) – is misplaced. *Id*. at 552. Unlike the provision at issue in *Conoco*, NGA § 4A is not limited to FERC-jurisdictional entities but rather applies to "any entity" engaged "directly or indirectly" in manpulation "in connection with" jurisdictional services. 2007 Rehearing P 28, JA220. Moreover, *Conoco* expressed "no reason to doubt" FERC's conclusion that it could assert jurisdiction over otherwise exempt entities when they manipulate FERC-jurisdictional markets. 90 F.3d at 549.

C. Hunter Is Not Entitled To *De Novo* Review In District Court.

Hunter next contends that FERC lacks authority to pursue an enforcement action against him administratively, and that this action should have been tried in federal district court. Br. 25-26. FERC determined, however, that the NGA – which authorizes the agency to assess civil penalties "after notice and opportunity for public hearing" (NGA § 22, 15 U.S.C. § 717t-1(a)) – vests it with authority to adjudicate alleged violations of the Act in the first instance and provides for judicial review of such assessment orders in the courts of appeal. 2010 Rehearing P 27, JA599.[6] That conclusion is consistent with the language of the relevant statutory provisions and ensures that all are given effect.

NGA § 22 grants FERC authority to assess civil penalties and contains no language providing for *de novo* proceedings in federal district court. This contrasts with earlier-enacted FERC statutes that specifically provide for *de novo* district court adjudication. *See, e.g.*, 15 U.S.C. § 3414(b)(6)(F) and 16 U.S.C. § 823b(d)(3)(B) (both granting district courts jurisdiction to "review *de novo* the law and the facts" underlying a civil penalty assessment, and to "enter a judgment enforcing, modifying, … or setting aside in whole or in part, such assessment"). FERC concluded this choice was deliberate and that *de novo* district court review

---

[6] In doing so, the Commission referred to its extensive analysis of this issue in *Energy Transfer Partners, L.P.*, 121 FERC ¶ 61,282, *reh'g denied* 124 FERC ¶ 61,149 (2008), *petition dismissed, Energy Transfer Partners v. FERC*, 567 F.3d 134 (5th Cir. 2009).

was not available for NGA civil penalty assessments. *Energy Transfer Partners*, 121 FERC ¶ 61,282 P 55.

FERC's analysis also took into account NGA § 19(b), which governs judicial review under the NGA. *Id*. at PP 57, 62. When construing the Federal Power Act's companion provision, 16 U.S.C. § 825*l*(b), the Supreme Court explained that it "necessarily preclude[s] *de novo* litigation between the parties of all issues inhering in the controversy, and all other modes of judicial review." *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 336 (1958). This Court has similarly explained that NGA § 19(b) "vest[s] exclusive jurisdiction in the courts of appeals to review FERC's orders," *Hunter v. FERC*, 348 Fed. Appx. 592, 593 (D.C. Cir. 2009), a fact repeatedly recognized by district courts in this proceeding. Hearing Order P 77, JA278. *See, e.g.*, *Hunter v. FERC*, 569 F. Supp. 2d 12, 16 (D.D.C. 2008); *Amaranth*, 523 F. Supp. 2d at 338.

Thus, while NGA § 24 provides district courts with "exclusive jurisdiction" over "violations" and suits to "enforce any liability or duty" under the Act, 15 U.S.C. § 717u, it "does not provide an independent basis to seek review of a Commission order assessing a civil penalty." *Energy Transfer Partners*, 124 FERC ¶ 61,149 P 17. Rather, NGA § 24 serves as a vehicle for FERC to bring a district court action to enjoin violations or enforce obligations created under the Act, such as a civil penalty liability created by a FERC order. *Id*. P 16. *See also*

Panhandle E. Pipe Line Co. v. Trunkline Gas Co., 928 F. Supp. 466, 471 (D. Del. 1996) (NGA § 24 jurisdiction only extends to suits seeking "enforcement of any liability or duty created by the FERC's orders"); *Miss. Power & Light Co. v. FPC*, 131 F.2d 148, 150 (5th Cir. 1942) (identical provision in Federal Power Act (16 U.S.C. § 825p) gives district courts "exclusive jurisdiction to enforce or enjoin … definitive orders, establishing rights and duties, such as may be reviewed before the Circuit Court of Appeals").

A similar statutory scheme can be found in the SEA (which is referenced in NGA § 4A), where: § 21B (15 U.S.C. § 78u-2) authorizes the SEC to impose civil penalties "after notice and opportunity for hearing;" § 25(a) (15 U.S.C. § 78y(a)) provides for direct review in the courts of appeal, which possess exclusive jurisdiction; and § 27 (15 U.S.C. § 78aa) provides district courts with "exclusive jurisdiction" over "violations" and suits to "enforce any liability or duty" created by the Act. There, as here, a district court's jurisdiction over proceedings for violations of the SEA does not repeal the exclusive jurisdiction in the courts of appeal to review SEC-assessed civil penalties. *See Wright v. SEC*, 112 F.2d 89, 95 (2d Cir. 1940); *Maschler and Datek Sec. Corp. v. NASD*, 827 F. Supp. 131, 132 (E.D.N.Y. 1993) (no district court jurisdiction under SEA § 27 because SEA § 25(a)(1) "limits judicial review of final disciplinary orders of the SEC exclusively to the U.S. Courts of Appeals").

IV. HUNTER'S CHALLENGES TO FERC'S FINDINGS ARE WITHOUT MERIT.

Hunter's challenges to FERC's findings against him (Br. 27-59) fall into two broad categories: (1) that Hunter's so-called open-market trading on NYMEX and other platforms cannot provide a basis for liability; and (2) that FERC failed to establish that Hunter's trading created an artificial price. Hunter's arguments in this regard lack merit, as does his contention that the ALJ's use of technical advisors impaired his due process rights.

A. The Commission Reasonably Found That Hunter's Trading Constituted Manipulation.

1. Trading undertaken with manipulative intent is proscribed by NGA § 4A.

Hunter contends that if a manipulative scheme is carried out through "open-market" transactions, unaccompanied by other illegal conduct, it cannot give rise to liability. Br. 28. In *Markowski v. SEC*, 274 F.3d 525 (D.C. Cir. 2001), however, this Court construed the term "manipulative device" used in SEA § 10(b) to encompass open-market transactions undertaken with manipulative intent. Since NGA § 4A dictates that the terms "manipulative or deceptive device or contrivance" are to be used "as those terms are used in [SEA § 10(b)]," 15 U.S.C. § 717c-1, *Markowski* forecloses any claim that FERC's interpretation is unreasonable. Affirming Order PP 48-49 (discussing *Markowski*), JA813-14; 2011 Rehearing P 13 (same), JA963-64.

Hunter asserts that *Markowski* "merely rejected the notion that non-fictitious or 'real' transactions could never be the basis" for a manipulation claim "even when accompanied by … other deceptive conduct." Br. 31. But that is an incorrect reading. *Markowski* addressed whether liability could be imposed "where manipulative behavior is solely defined in terms of the actor's purpose." 274 F.3d at 528. While acknowledging practical concerns associated with having liability depend on the investor's intent, *id*., the Court could not find such an interpretation unreasonable "in light of what appears to be Congress' determination that 'manipulation' can be illegal solely because of the actor's purpose." *Id*. at 529.

Additional courts have concluded that open-market transactions, accompanied by manipulative intent, can give rise to liability under the SEA and the CEA. For instance, *SEC v. Masri*, 523 F. Supp. 2d 361, 372 (S.D.N.Y. 2007), held that "if an investor conducts an open-market transaction with the intent of artificially affecting the price of the security, and not for any legitimate economic reason, it can constitute market manipulation." *See also Initial Public Offering Sec. Litig*., 241 F. Supp. 2d 281, 391 (S.D.N.Y. 2004) (finding no support for any additional requirements in "so-called open market" cases); *In re Amaranth Natural Gas Commodities Litig.*, 587 F. Supp. 2d 513, 534 (S.D.N.Y. 2008) ("a legitimate transaction combined with an improper motive is commodities manipulation");

CFTC v. Amaranth Advisors, LLC, 554 F. Supp. 2d 523, 534 (S.D.N.Y. 2008) (same).[7]

Transactions undertaken with manipulative intent deceive the market. Br. 30. "Because 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." *In re Amaranth*, 587 F. Supp. 2d at 534. *See also Masri*, 523 F. Supp. 2d at 373 n.17 (same). Indeed, the assumption that prices are set by the natural interplay between supply and demand is a core component of the efficient market hypothesis largely endorsed in *Basic Inc. v. Levinson*, 485 U.S. 224, 246 (1988). Thus, the demand for NG Futures Contracts during the at-issue months – rather than being "real" as Hunter claims (Br. 29) – was affected by inaccurate price signals sent by his manipulative trading. *See* Affirming Order P 51, JA814.

2. FERC reasonably found that Hunter engaged in prohibited manipulation.

FERC affirmed the ALJ's conclusion that Hunter employed a deceptive trading scheme designed to manipulate the NG Futures Contract settlement price with scienter in connection with FERC-jurisdictional transactions. *See, e.g.*,

[7] Hunter's cases (Br. 30) do not hold that open-market trading, accompanied by manipulative intent, can never give rise to liability. *ATSI Commc'ns v. Shaar Fund Ltd.*, 493 F.3d 87, 102 (2d Cir. 2007), noted that often scienter "is the only factor that distinguishes legitimate trading from improper manipulation." *GFL Advantage Fund, Ltd. v. Colkitt*, 272 F.3d 189, 204-10 (3d Cir. 2001), and *Sullivan & Long, Inc. v. Scattered Corp.*, 47 F.3d 857, 860 (7th Cir. 1995), dismissed claims lacking evidence of manipulative intent.

Affirming Order PP 46-47, 75-77, 118-22, JA811-12, 823-24, 840-42. Hunter now seeks to re-litigate these fact-intensive issues by pointing to isolated pieces of evidence and asking the Court to draw conclusions that differ from those drawn below. But an agency's "findings of fact, if supported by substantial evidence ... are conclusive even if a reviewing court on *de novo* review would reach a different result." *Citizens Inv. Serv. Corp. v. NLRB*, 430 F.3d 1195, 1198 (D.C. Cir. 2005).

Further, Hunter ignores the ALJ's numerous adverse credibility determinations,[8] which are particularly relevant to the "elusive factors of motive or intent" that "'hinge entirely upon the degree of credibility to be accorded the testimony of interested witnesses.'" *Williams Natural Gas Co*., 41 FERC ¶ 61,037, 61,095 (1987) (quoting *Pennzoil Co. v. FERC*, 789 F.2d 1128, 1135 (5th Cir. 1986)). *See* 2011 Rehearing PP 29-30 (discussing deference owed to credibility determinations), JA971. FERC's adoption of these determinations are not subject to reversal unless they are "hopelessly incredible, self-contradictory, or patently unsupportable." *Hard Rock Holdings, LLC v. NLRB*, 672 F.3d 1117, 1121 (D.C. Cir. 2012).

---

[8] *See, e.g*., Initial Decision P 212 (Hunter "has not been forthright with this tribunal," his explanations "are not credible and amount to after-the-fact defenses of his actions"), JA678; *id*. P 172 (Hunter "developed a story ... inconsistent with the record evidence"), JA663; *id.* P 165 (Hunter "exhibited significant selective memory"), JA660; *id*. P 189 (Hunter's explanations "studiously … attempt to obfuscate the issue of the positions on other exchanges"), JA671.

a. FERC reasonably found manipulative intent.

The bulk of Hunter's challenges relate to FERC's findings of manipulative intent. Contrary to Hunter's claim, FERC did not infer unlawful intent "from a purpose to effectuate a scheme involving solely legal trading" (Br. 32), or from the impact of that scheme upon the at-issue settlement prices. Br. 44. The record – including Hunter's testimony, expert analysis, and contemporaneous instant messages – established that, in addition to trading against his interest on the NYMEX to benefit opposing positions in the swap market, Hunter (1) "knew the NYMEX settlement period could be manipulated" (Affirming Order P 63, JA819), (2) had a financial motive to engage in manipulation (*id*. P 47, JA812), and (3) employed a trading strategy that departed from Amaranth's policy of trading out of any open futures positions well before the expiration day (*id*. P 88, JA828). The record also contained a number findings regarding Hunter's state of mind during the months in question. *See id*. PP 63-111 (addressing evidence supporting scienter finding), JA819-38; 2011 Rehearing PP 35-56 (same), JA974-86.

Hunter asserts that there were no findings that his compensation arrangement could supply a motive to manipulate. Br. 45. While motive is not an element of the offense, it can support a finding of scienter. On rehearing Hunter himself cited evidence indicating that the at-issue trades resulted in a "profit to Amaranth of $18,224,777," and that Hunter "stood to take home at least seven

percent (that is, potentially more than $1,275,000)." 2011 Rehearing P 41, JA976. FERC thus found "it entirely reasonable for the ALJ to conclude that these profits … could provide a sufficient motive for manipulation. *Id*. *See also* Affirming Order PP 83-88, JA826-28 (same).

Finally, Hunter contends that "FERC [never] attempted to explain why" his purported decision to leave the timing of his February 2006 sales to his brokers, rather than instructing them to sell immediately regardless of price, is consistent with an inference that he intended to manipulate the settlement price. Br. 45. This is not surprising given the issue was not raised on rehearing (or at any other time). Rehearing Request at 45-51 (rehearing arguments regarding FERC's analysis of February 2006 trading), JA903-09. Accordingly, it has been waived. *See* 15 U.S.C. § 717r(b) ("No objection … shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing"). Moreover, the belated contention that Amaranth's brokers had total discretion is inconsistent with Hunter's own testimony as to the February 2006 sales. "Hunter testified that he ordered his futures to be sold market on close, in roughly equal amounts during the thirty-minute settlement period." Initial Decision P 157, JA656.

b. FERC reasonably rejected Hunter's explanations for his trading conduct.

FERC's determination that Hunter intentionally manipulated the NG Futures Contract settlement price was not based simply on general findings – such as Hunter's belief that the NYMEX settlement price could be manipulated, and that doing so would benefit his related positions on other trading platforms. *See* Affirming Order PP 75-89, JA823-29; 2011 Rehearing PP 35-43, JA974-78. Rather, FERC (and the ALJ) also rested on an analysis of Hunter's trading and purported business motives during the at-issue months. *See* Affirming Order PP 90-111, JA829-38; Rehearing Order PP 44-56, JA978-86.

i. Hunter intentionally manipulated the NG Futures Contract settlement price on February 24, 2006.

Hunter contends FERC ignored evidence establishing a legitimate business motive for his February 2006 trading; namely, that it was an experiment to take advantage of buying pressure he expected to carry over from an unusual options rally witnessed the previous day. Br. 47-48. FERC explained, however, why the record supported the ALJ's determination that "this explanation lacked credibility, suffered from 'several anomalies,' and amounted to an '*ex post facto*' justification that was 'solely intended to obfuscate the truth.'" Affirming Order P 94 (quoting Initial Decision PP 160, 167), JA830.

For instance, Hunter's proffered explanation ignored that he simultaneously amassed a substantial short swap position that "would be significantly harmed if the buying pressure (and resulting increase in the settlement price) that Hunter purportedly hoped for did in fact emerge." *Id*. P 95, JA830. FERC further explained how Hunter's proffered explanation made little statistical sense, failed to account for associated transaction costs, and was contradicted by contemporaneous documentation. *Id*. PP 96-100, JA831-34. *See also* 2011 Rehearing PP 44-48, JA978-81. FERC did not ignore the evidence. It determined that the preponderance of the evidence contradicted Hunter's *ex post facto* rationale for his conduct.

ii. Hunter intentionally manipulated the NG Futures Contract settlement price on March 29, 2006.

Hunter asserts that FERC disregarded evidence establishing that Matthew Donohoe was vested with "full discretion" "to execute" the challenged trades during the March 2006 settlement period, while Hunter was on vacation. Br. 49. But Donohoe testified that he was simply the "execution trader" (Tr. 959, JA549), and had "very little authority to determine Amaranth's natural gas trading strategy." Tr. 957, SA15. Hunter established the "macro strategy" that Donohoe "would implement … via trading." *Id.* In addition, the March 2006 "trading mirrored that which took place in February and April – two months in which

Hunter admittedly directed the trading at issue." Affirming Order P 103, JA834. While such evidence "is circumstantial, 'circumstantial evidence can be more than sufficient' when establishing scienter." 2011 Rehearing P 49 (quoting *Herman & Maclean v. Huddleston*, 459 U.S. 375, 390 n.83 (1983)), JA981.

Hunter now contends that FERC "ignored" testimony from Enforcement Staff's economic expert "revealing significant discrepancies between" Hunter's trading in February and March 2006. Br. 49. This argument, however, is not properly before the Court as it was not raised on rehearing (or at any other time). *See* 15 U.S.C. § 717r(b); Request for Rehearing at 51-52 (rehearing arguments regarding FERC's analysis of March 2006 trading), JA909-10. In any event, the expert cited by Hunter found that the "March '06 strategy resembles … the February '06 strategy," "except for the details of the second order of importance." Ex. S-1 at 111, JA425. Both involved the liquidation of Amaranth's "long NYMEX position ... mostly in the last thirty minutes of trading," in an effort to "drive the price of the expiring contract down, in order to benefit from much bigger short positions established on other platforms." *Id.*

iii. Hunter intentionally manipulated the NG Futures Contract settlement price on April 26, 2006.

Hunter contends that his April 2006 trading was driven by a portfolio reduction directive from Amaranth management. Br. 50. FERC affirmed the

ALJ's determination that this explanation lacked credibility. Among other things, Hunter could not adequately explain why such a directive required him to sell extraordinary amounts of NG Futures Contracts during the last eight minutes of the settlement period. Affirming Order P 107, JA836. And the record "reveal[ed] 'little evidence of trimming' of Hunter's portfolio," whose "natural gas positions generally increased in size between March and September 2006." *Id*. P 110 (quoting Initial Decision P 188), JA837-38. *See also* 2011 Rehearing PP 50-56, JA981-86.

Nonetheless, Hunter points to a snippet from an instant message purportedly demonstrating that he did not want a lower settlement price on April 26, 2006. Br. 50-51. Hunter himself testified, however, that "this message expressed his concern that the settlement price for the May 2006 NG Futures Contracts would not be low enough," given Hunter's related position in June 2006 NG Futures Contracts. 2011 Rehearing P 55, JA985. Hunter similarly contends that his complaints about the outcome of a trade with Centaurus demonstrate that all trading was done at management's directive and that he did not want a lower settlement price. Br. 51. FERC explained, however, that the depressed settlement price made the Centaurus trade "profitable to Hunter, although not as profitable as it would have been had there been no early rally in the settlement period." 2011 Rehearing P 54, JA984. Moreover, "a consideration of Hunter's entire portfolio indicate[d] that Hunter

would not lack incentive to depress the settlement price on April 26." *Id*. P 55, JA985.

B. FERC Reasonably Determined That – Although Not Necessary For Liability – Hunter's Trading Created An Artificial Price.

1. Artificial price is not an element of a manipulation claim.

FERC reasonably determined that artificial price – *i.e.*, one "determined by forces other than supply and demand," *Frey v. CFTC*, 931 F.2d 1171, 1175 (7th Cir. 1991) – "is not an element of a claim under [NGA] § 4A." Affirming Order P 54, JA815. Hunter claims FERC's interpretation is barred by the "law of the case" (Br. 34) because the Hearing Order required that the ALJ consider whether Hunter's trading was intended to and did create an artificial price. Hearing Order P 64, JA273. But this did not establish artificial price as an element of the offense. FERC simply observed that if such evidence existed, then "it would be reasonable ... to find that [Hunter] engaged in manipulation." *Id*. In other words, such evidence "would be a sufficient, *but not a necessary*, basis for finding manipulation." Affirming Order P 55, JA816 (emphasis added).

Nor does the SEA require proof of price artificiality. Br. 34. Hunter's sole cited case confirms that "the government need not demonstrate that the defendant's conduct ... affected the price of the security." *GFL Advantage Funds*, 272 F.3d at

206 n.6.[9] And under CEA § 6(c)(1) – the CFTC's anti-manipulation authority which, like NGA § 4A, is modeled on SEA § 10(b) – proof of price artificiality is not a prerequisite to a finding of market manipulation. *See Prohibition on the Employment, or Attempted Employment, of Manipulative and Deceptive Devices and Prohibition on Price Manipulation*, 76 Fed. Reg. 41398, 41401 (CFTC July 14, 2011) ("a violation of [CEA § 6(c)(1), 7 U.S.C. § 9(1)] may exist in the absence of any market or price effect"). The pertinent authority thus supports FERC's interpretation of NGA § 4A.

2. FERC reasonably found that Hunter's conduct resulted in an artificial price.

Contrary to Hunter's arguments (Br. 35) – while not required – the record contained substantial evidence establishing that Hunter's trading resulted in an artificial settlement price. *See, e.g.*, Affirming Order P 56, JA816-17; 2011 Rehearing PP 18-25, JA996-70. "The Initial Decision include[d] a number of findings in support of the [ALJ's] conclusion that, on the expiration days in question, the settlement price … was not established by *bona fide* forces of supply and demand." Affirming Order P 56, JA816. For instance, Hunter's massive sell

[9] *See also Chemetron Corp. v. Business Funds, Inc*., 718 F.2d 725, 728 (5th Cir. 1983) (a SEA § 10(b) claim "is not defeated by the fact that the jury found the activities did not have an 'affect' on Chemetron's purchase price of the stock"); *In re Blech Sec. Litig*., 928 F. Supp. 1279, 1298 (S.D.N.Y. 1996) (allegations of "price movement" are not required; while a "classic attribute[] of market manipulation," it is not a prerequisite).

orders "forced [his] brokers to hit bids to sell the volume," and resulted in Amaranth trading at a "lower price than … had it been fortunate enough to have its offers lifted." *Id*.[10] And because Amaranth traded "below the volume-weighted average price for the at issue-settlement period … the challenged trades – as a matter of mathematics – impacted the price." 2011 Rehearing P 19, JA967. *See also* Affirming Order PP 58-67 (evaluating expert testimony regarding price artificiality), JA817-21.

This impact was not *de minimis*. Br. 45. The record established that "Amaranth was a very larger trader that accounted for 19.4, 15.0, and 14.4 percent of the market volume" for the relevant settlement periods. Affirming Order P 40, JA809. Amaranth's "'extraordinary selling … exerted downward pressure on the market and created prices that were not the result of normal supply and demand.'" *Id*. P 56 (quoting Initial Decision P 143 n.64), JA816-17.

Nor did FERC conflate the artificial price requirement with the deceptive conduct and scienter elements. Br. 35. FERC performed distinct analyses of Hunter's deceptive conduct, his scienter, and the impact of his conduct upon the market. *See, e.g.*, Affirming Order PP 32-47, PP 63-111, PP 112-22, JA807-12,

[10] In NYMEX parlance, a "bid" refers to the price someone is willing to pay for a contract, while an "offer" is the price at which someone is willing to sell. The highest bidder and lowest seller set the prevailing bid and offer prices. A buyer accepting the prevailing offer is "lifting the offer," and a seller accepting the prevailing bid is "hitting the bid." Affirming Order P 34, JA807-08.

819-38, 838-42. Hunter's argument, moreover, wrongly assumes that an artificial price can only result from otherwise illegal conduct. *See Anderson v. Dairy Farmers of Am. Inc*., No. 08-4726, 2010 U.S. Dist. LEXIS 104191, *14 (D. Minn. Sept. 30, 2010) ("to establish that an artificial price existed for the purposes of a CEA manipulation claim, a plaintiff need not establish fraud, misrepresentation, or a violation of the exchange rules"). *See also* 2011 Rehearing P 18 (citing cases), JA966.

C. FERC Reasonably Based Hunter's Liability On A Nexus To FERC-Jurisdictional Transactions.

1. Hunter's manipulation of the NG Futures Contract market is "in connection with" FERC-jurisdictional transactions.

Because the NYMEX settlement price is a key component of physical gas transactions, *see supra* p. 8, FERC found that Hunter's manipulation occurred "in connection with" jurisdictional transactions. *See*, *e.g.*, Affirming Order PP 112-122, JA838-42; 2011 Rehearing PP 57-70, JA986-92. Hunter does not contest the nexus between the financial and physical gas markets. Instead, he asserts that there is insufficient evidence in the record to support the Commission's (and ALJ's) finding that his manipulation specifically affected FERC-jurisdictional physical gas transactions (as opposed to physical gas transactions in general), or that he was aware his conduct specifically affected FERC-jurisdictional transactions. Br. 52-54. These challenges to FERC's factual findings were not raised on rehearing, and

are thus not properly before this Court. *See* 15 U.S.C. § 717r(b); Request for Rehearing at 63-72 (rehearing arguments regarding FERC's analysis of the "in connection with" requirement), JA921-29.

In any event, the record establishes that municipalities and local distribution companies – whose gas purchases are wholesale transactions subject to FERC's jurisdiction – relied heavily on index pricing and physical basis transactions during the relevant period. *See, e.g.*, Exs. S-3 at 4-8, SA21-25; S-3-1 at 1-4, SA28-31, S-3-3 at 10-15, SA68-73; Initial Decision PP 207-08, JA675-76; 2011 Rehearing P 59, JA987. The pricing of both types of transactions is intimately tied to the NYMEX settlement price. *See* Affirming Order PP 119-20, JA840-41; 2011 Rehearing PP 59-65, JA986-90.

2. Hunter had fair notice that his manipulative trading could violate NGA § 4A.

The record established that Hunter knew of the close relationship between the NYMEX settlement price and FERC-jurisdictional physical gas transactions. *See, e.g.*, Affirming Order P 121, JA841-42. He nonetheless claims to have lacked adequate notice that his manipulation could subject him to liability under the NGA because, when he embarked on his manipulative scheme, FERC purportedly had given no indication that "the Anti-Manipulation Rule would be applied to conduct occurring outside of FERC-regulated markets." Br. 38. In developing its Rule, however, FERC explained that NGA § 4A permits it "to police all forms of fraud

and manipulation that affect natural gas" transactions. Order No. 670 P 25, JA77. "If any entity engages in manipulation and the conduct is found to be 'in connection with' a jurisdictional transaction, the entity is subject to the Commission's anti-manipulation authority." *Id*. P 16, JA69.

FERC further emphasized that "energy markets are made up of both jurisdictional and non-jurisdictional transactions," and that NGA § 4A would apply whenever "there is a nexus between the fraudulent conduct … and a jurisdictional transaction." *Id*. P 22, JA75. FERC even provided an example of such a nexus to a manipulative "non-jurisdictional transaction" undertaken "with intent or with recklessness" as to its affect on the price of jurisdictional transactions. *Id*. While Order No. 670 does not mention the possibility that futures transactions could give rise to liability under NGA § 4A, such precision is not required to satisfy due process. *See Throckmorton v. Nat'l Transp. Safety Bd*., 963 F.3d 441, 445 (D.C. Cir. 1992) (only "a reasonable degree of certainty can be demanded and it is not unfair to require that one who deliberately goes perilously close to an area of proscribed conduct shall take the risk that he may cross the line").

Hunter points to the CFTC's contention that it possesses exclusive jurisdiction in this case. Br. 37. But the inter-agency dispute regarding overlapping jurisdictional mandates does nothing to negate FERC's statement of intent, based on the broad, expansive language of NGA § 4A, to apply NGA § 4A

to the manipulation of non-jurisdictional markets that affect FERC-jurisdictional transactions.

Finally, Hunter contends that he lacked fair warning that purportedly "lawful, open-market trading activities unaccompanied by any deceptive conduct" could violate NGA § 4A because, in Hunter's view, such conduct is not prohibited by the CFTC under the CEA. Br. 38. Hunter is incorrect regarding the scope of the CEA[11] and its relevance, and the CFTC in its brief makes no effort to support Hunter on this point. Congress directed FERC to construe the term "manipulative device" in accordance with SEA § 10(b). Under that statute, "'manipulation' can be illegal solely because of the actor's purpose." *Markowski*, 274 F.3d at 529. *See also* 2011 Rehearing PP 74-75 (addressing notice arguments), JA993-94.

D. The ALJ's Use Of Technical Advisors Did Not Deprive Hunter Of Due Process.

Faced with a "very complex case," the ALJ exercised her inherent authority and appointed two FERC economists as technical advisors to "act[] in the capacity of [her] law clerks." Tr. 128, SA11. *See Ex parte Peterson*, 253 U.S. 300, 312 (1920) ("Courts have … inherent power to provide themselves with appropriate instruments required for the performance of their duties"); *General Elec. Co. v.*

[11] Indeed, the CFTC has commenced an enforcement action against Hunter premised on virtually the same conduct at issue here. *See, e.g.*, *Amaranth*, 554 F. Supp. 2d at 534 (rejecting contention that it is necessary to plead a fraudulent act to state a manipulation claim under the CEA). *See also supra* pp. 41-43.

Joiner, 522 U.S. 136, 149 (1997) (Breyer, J., concurring) (endorsing appointment of specially-trained law clerks to assist district courts with scientific or technical evidence).

Hunter claims that such appointment denied him due process. Br. 39-40. But the advisors were only used as "sounding boards;" they did not submit testimony, nor use evidence outside of the record. Tr. 128, SA11. The ALJ "independently" reviewed all evidence and made "a decision independently of what anybody says." *Id*. 129, SA12. *See also* 2011 Rehearing P 79 ("the ALJ exercised due care to define the proper role of her technical advisors and to avoid any improper influence from them"), JA997. And, of course, FERC on exceptions to the Initial Decision independently reviewed the ALJ's findings and made its own decision.

Hunter asserts that the technical advisors played "an extensive role" and provided "*ex parte*, off-the-record input on critical fact issues." Br. 40, 41. But he points to nothing in the Initial Decision, or anywhere else – apart from the unremarkable observation the ALJ conversed with her advisors during the hearings (*id*.) – suggesting the advisors contributed evidence or otherwise undermined the judicial function. *See, e.g., Ass'n of Mexican Am. Educators v. California*, 231 F.3d 572, 591 (9th Cir. 2000) ("the absence of any evidence even suggesting an impropriety on the part of the district court [regarding its interactions with a

technical advisor] militates against a conclusion that the court abused its discretion"); *Reilly v. United States*, 863 F.2d 149, 158 (1st Cir. 1988) ("The opinion on the merits indicates plainly that the judge neither relied on evidence supplied by [the technical advisor] nor deferred unduly to the expert in finding the facts.").

Hunter also complains that the economists were FERC employees and engaged in *ex parte* communications with the ALJ. FERC explained, however, that the "economists assisting Judge Cintron [were] from the Office of Administrative Litigation," and did "not serve as litigation staff in this particular proceeding," which was prosecuted by the separate Office of Enforcement. 2011 Rehearing P 80, JA998. Moreover, the economists were "precluded from advising the Commission or any advisory staff regarding the issues in [the] proceeding." *Id*.[12] The separation of functions between the ALJ's advisors, the trial staff appearing before her, and the advisory staff reviewing her decision ensured that Hunter's due process rights were protected.

The relationship here between the ALJ and her advisors – more "akin to law clerks" than to expert witnesses (Tr. 128, SA11) – justifies the confidentiality of

[12] *See also* 18 C.F.R. § 385.2202 ("In any proceeding in which a Commission adjudication is made after hearing, … no officer, employee, or agent assigned to work upon the proceeding or to assist in the trial thereof … shall participate or advise as to the findings, conclusion or decision, except as a witness or counsel in public proceedings.").

their communications. *See, e.g.*, *Reilly*, 863 F.2d at 160 n.8 ("The essence of the engagement … requires that the judge and the advisor be able to communicate informally, in a frank and open fashion."). Moreover, Hunter makes no showing that communications at the ALJ level affected the Commission itself on review of the ALJ's Initial Decision. *See Lichoulas v. FERC*, 606 F.3d 769, 779 (D.C. Cir. 2010) ("even assuming *arguendo* the challenged contacts violated FERC regulations, there is no indication that they influenced the ultimate decision makers").

V. FERC REASONABLY ASSESSED A $30 MILLION PENALTY AGAINST HUNTER.

The Commission's discretion is at its "zenith" when fashioning sanctions. *Niagara Mohawk Power Corp. v. FPC*, 379 F.2d 153, 159 (D.C. Cir. 1967). Accordingly, the Court "will not overturn the Commission's choice of a sanction unless [it] is either unwarranted in law … or without justification in fact." *Bluestone Energy Design, Inc. v. FERC*, 74 F.3d 1288, 1294 (D.C. Cir. 1996). Neither can be said about FERC's determination that Hunter's violations had a substantial impact on the physical gas market and warranted the imposition of a $30 million penalty. Affirming Order PP 132-49, JA845-51.

The $30 million penalty assessed against Hunter reflected a percentage of the larger penalty amount proposed for the Amaranth entities. *See* Show Cause Order P 134-38, JA200-01. Hunter argues that this penalty exceeds the statutory

maximum of $1 million per day per violation (15 U.S.C. § 717t-1(a)) because his scheme only resulted in three violations, one for each of the manipulated settlement prices. Br. 57. As the NGA does not specify how violations should be "counted," it is within FERC's discretion to base the number of violations "on the facts and circumstances of each case." Show Cause Order P 115, JA192.

Here, Hunter directed the sale of nearly 7,000 NG Futures Contracts in furtherance of his manipulative scheme, each of which "played a role in exerting downward pressure on the settlement prices during the" at-issue months. Affirming Order P 134, JA 845-46. Whether violations are counted in terms of "fills" (*i.e.*, groups of futures contracts bundled for sale) or individual contracts, the resulting number was more than sufficient to support the penalty imposed. *Id*. P 135, JA846. *See In re DiPlacido*, No. 01-23, 2008 CFTC LEXIS 101, at *127 (CFTC Nov. 5, 2008) (CFTC employs a "broad but common sense approach" in counting violations "to ensure that the ultimate penalty imposed falls within the statutory maximum").[13] Consistent with this approach, "the CFTC has similarly charged that 'every purchase, sale, bid, offer' in furtherance of [Hunter's] manipulative scheme constituted a separate violation of the CEA." 2011

[13] In *DiPlacido*, the CFTC did not, as Hunter claims, simply equate the number of violations to the number of manipulated settlement prices. Rather, the agency found that DiPlacido was on notice of the potential "imposition of a fine in the millions of dollars" because the complaint alleged that "each and every act or transaction" in the manipulative scheme constituted a violation. 2008 CFTC LEXIS 101, at *129.

Rehearing P 88 (quoting Complaint in *CFTC v. Amaranth Advisors, LLC*, No. 07-6682 (S.D.N.Y. 2007) at ¶ 74), JA1001.

Hunter further argues that FERC failed to make "specific findings regarding the impact of" his manipulation "on jurisdictional sales of physical natural gas." Br. 59. But FERC made findings regarding the impact of Hunter's manipulation, and reasonably concluded that it affected "a significant portion of physical natural gas market participants." Affirming Order P 139, JA848. *See also* 2011 Rehearing PP 89-91, JA1002-03. FERC also explained that manipulation has long-term effects on the "efficient and transparent functioning of the market." Affirming Order P 140, JA848. While Hunter argues that such impacts would arise from "any futures trading intentionally affecting NYMEX settlement prices" (Br. 59), this does not make them any less real.

CONCLUSION

For the foregoing reasons, FERC respectfully requests that the petition for review be denied and its orders upheld in all respects.

Respectfully submitted,

Michael A. Bardee
General Counsel

Robert H. Solomon
Solicitor

Lona T. Perry
Senior Attorney

/s/ Robert M. Kennedy
Robert M. Kennedy
Attorney

Federal Energy Regulatory
Commission
Washington, D.C. 20426
TEL: (202) 502-6600
FAX: (202) 273-0901

June 11, 2012

Hunter v. FERC **D.C. Cir. No. 11-1477**

CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 32(a)(7)(C), I hereby certify that this brief contains 13,922 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Circuit Rule 32(a)(1).

/s/ Robert M. Kennedy
Attorney

Federal Energy Regulatory
Commission
Washington, DC 20426
TEL: (202) 502-6600
FAX: (202) 273-0901

June 11, 2012

ADDENDUM

STATUTES

AND

REGULATIONS

TABLE OF CONTENTS

repealing section 26 of this title, enacting provisions set out as notes under sections 1a, 4a, 6c, 6e, 6j, 6p, 7a, 13, 16a, 21, and 22 of this title, and repealing provisions set out as a note under section 4a of this title], this Act and the amendments made by this Act shall become effective on the date of enactment of this Act [Oct. 28, 1992].''

OTHER AUTHORITY

Pub. L. 111–203, title VII, § 743, July 21, 2010, 124 Stat. 1735, provided that: ''Unless otherwise provided by the amendments made by this subtitle [subtitle A (§§ 711–754) of title VII of Pub. L. 111–203, see Tables for classification], the amendments made by this subtitle do not divest any appropriate Federal banking agency, the Commodity Futures Trading Commission, the Securities and Exchange Commission, or other Federal or State agency of any authority derived from any other applicable law.''

[For definitions of ''appropriate Federal banking agency'' and ''State'' as used in section 743 of Pub. L. 111–203, set out above, see section 5301 of Title 12, Banks and Banking.]

§ 1b. Requirements of Secretary of the Treasury regarding exemption of foreign exchange swaps and foreign exchange forwards from definition of the term "swap"

(a) Required considerations

In determining whether to exempt foreign exchange swaps and foreign exchange forwards from the definition of the term ''swap'', the Secretary of the Treasury (referred to in this section as the ''Secretary'') shall consider—

(1) whether the required trading and clearing of foreign exchange swaps and foreign exchange forwards would create systemic risk, lower transparency, or threaten the financial stability of the United States;

(2) whether foreign exchange swaps and foreign exchange forwards are already subject to a regulatory scheme that is materially comparable to that established by this chapter for other classes of swaps;

(3) the extent to which bank regulators of participants in the foreign exchange market provide adequate supervision, including capital and margin requirements;

(4) the extent of adequate payment and settlement systems; and

(5) the use of a potential exemption of foreign exchange swaps and foreign exchange forwards to evade otherwise applicable regulatory requirements.

(b) Determination

If the Secretary makes a determination to exempt foreign exchange swaps and foreign exchange forwards from the definition of the term ''swap'', the Secretary shall submit to the appropriate committees of Congress a determination that contains—

(1) an explanation regarding why foreign exchange swaps and foreign exchange forwards are qualitatively different from other classes of swaps in a way that would make the foreign exchange swaps and foreign exchange forwards ill-suited for regulation as swaps; and

(2) an identification of the objective differences of foreign exchange swaps and foreign exchange forwards with respect to standard swaps that warrant an exempted status.

(c) Effect of determination

A determination by the Secretary under subsection (b) shall not exempt any foreign exchange swaps and foreign exchange forwards traded on a designated contract market or swap execution facility from any applicable antifraud and antimanipulation provision under this chapter.[1]

(Sept. 21, 1922, ch. 369, § 1b, as added Pub. L. 111–203, title VII, § 722(h), July 21, 2010, 124 Stat. 1674.)

REFERENCES IN TEXT

This chapter, referred to in subsec. (c), was in the original ''this title'', and was translated as reading ''this Act'', meaning act Sept. 21, 1922, ch. 369, 42 Stat. 998, which is classified generally to this chapter, to reflect the probable intent of Congress, because act Sept. 21, 1922, does not contain titles.

EFFECTIVE DATE

Section effective on the later of 360 days after July 21, 2010, or, to the extent a provision of subtitle A (§§ 711–754) of title VII of Pub. L. 111–203 requires a rulemaking, not less than 60 days after publication of the final rule or regulation implementing such provision of subtitle A, see section 754 of Pub. L. 111–203, set out as an Effective Date of 2010 Amendment note under section 1a of this title.

§ 2. Jurisdiction of Commission; liability of principal for act of agent; Commodity Futures Trading Commission; transaction in interstate commerce

(a) Jurisdiction of Commission; Commodity Futures Trading Commission

(1) Jurisdiction of Commission

(A) In general

The Commission shall have exclusive jurisdiction, except to the extent otherwise provided in the Wall Street Transparency and Accountability Act of 2010 (including an amendment made by that Act) and subparagraphs (C), (D), and (I) of this paragraph and subsections (c) and (f), with respect to accounts, agreements (including any transaction which is of the character of, or is commonly known to the trade as, an ''option'', ''privilege'', ''indemnity'', ''bid'', ''offer'', ''put'', ''call'', ''advance guaranty'', or ''decline guaranty''), and transactions involving swaps or contracts of sale of a commodity for future delivery (including significant price discovery contracts), 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. 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 of any State, or (II) restrict the Securities and Exchange Commission and such other authorities from carrying out their duties and responsibilities in accordance with such laws. Nothing in this section shall supersede or limit the jurisdiction con-

[1] See References in Text note below.

ferred on courts of the United States or any State.

(B) Liability of principal for act of agent

The act, omission, or failure of any official, agent, or other person acting for any individual, association, partnership, corporation, or trust within the scope of his employment or office shall be deemed the act, omission, or failure of such individual, association, partnership, corporation, or trust, as well as of such official, agent, or other person.

(C) Designation of boards of trade as contract markets; contracts for future delivery; security futures products; filing with Board of Governors of Federal Reserve System; judicial review

Notwithstanding any other provision of law—

(i)(I) Except as provided in subclause (II), this chapter shall not apply to and the Commission shall have no jurisdiction to designate a board of trade as a contract market for any transaction whereby any party to such transaction acquires any put, call, or other option on one or more securities (as defined in section 77b(1)[1] of title 15 or section 3(a)(10) of the Securities Exchange Act of 1934 [15 U.S.C. 78c(a)(10)] on January 11, 1983), including any group or index of such securities, or any interest therein or based on the value thereof.

(II) This chapter shall apply to and the Commission shall have jurisdiction with respect to accounts, agreements, and transactions involving, and may permit the listing for trading pursuant to section 7a–2(c) of this title of, a put, call, or other option on 1 or more securities (as defined in section 77b(a)(1) of title 15 or section 3(a)(10) of the Securities Exchange Act of 1934 [15 U.S.C. 78c(a)(10)] on January 11, 1983), including any group or index of such securities, or any interest therein or based on the value thereof, that is exempted by the Securities and Exchange Commission pursuant to section 36(a)(1) of the Securities Exchange Act of 1934 [15 U.S.C. 78mm(a)(1)] with the condition that the Commission exercise concurrent jurisdiction over such put, call, or other option; provided, however, that nothing in this paragraph shall be construed to affect the jurisdiction and authority of the Securities and Exchange Commission over such put, call, or other option.

(ii) This chapter shall apply to and the Commission shall have exclusive jurisdiction with respect to accounts, agreements (including any transaction which is of the character of, or is commonly known to the trade as, an ''option'', ''privilege'', ''indemnity'', ''bid'', ''offer'', ''put'', ''call'', ''advance guaranty'', or ''decline guaranty'') and transactions involving, and may designate a board of trade as a contract market in, or register a derivatives transaction execution facility that trades or executes, contracts of sale (or options on such contracts) for future delivery of a group or index of securities (or any interest therein or based upon the value thereof): *Provided, however*, That no board of trade shall be designated as a contract market with respect to any such contracts of sale (or options on such contracts) for future delivery, and no derivatives transaction execution facility shall trade or execute such contracts of sale (or options on such contracts) for future delivery, unless the board of trade or the derivatives transaction execution facility, and the applicable contract, meet the following minimum requirements:

(I) Settlement of or delivery on such contract (or option on such contract) shall be effected in cash or by means other than the transfer or receipt of any security, except an exempted security under section 77c of title 15 or section 3(a)(12) of the Securities Exchange Act of 1934 [15 U.S.C. 78c(a)(12)] as in effect on January 11, 1983, (other than any municipal security, as defined in section 3(a)(29) of the Securities Exchange Act of 1934 [15 U.S.C. 78c(a)(29)] on January 11, 1983);

(II) Trading in such contract (or option on such contract) shall not be readily susceptible to manipulation of the price of such contract (or option on such contract), nor to causing or being used in the manipulation of the price of any underlying security, option on such security or option on a group or index including such securities; and

(III) Such group or index of securities shall not constitute a narrow-based security index.

(iii) If, in its discretion, the Commission determines that a stock index futures contract, notwithstanding its conformance with the requirements in clause (ii) of this subparagraph, can reasonably be used as a surrogate for trading a security (including a security futures product), it may, by order, require such contract and any option thereon be traded and regulated as security futures products as defined in section 3(a)(56) of the Securities Exchange Act of 1934 [15 U.S.C. 78c(a)(56)] and section 1a of this title subject to all rules and regulations applicable to security futures products under this chapter and the securities laws as defined in section 3(a)(47) of the Securities Exchange Act of 1934 [15 U.S.C. 78c(a)(47)].

(iv) No person shall offer to enter into, enter into, or confirm the execution of any contract of sale (or option on such contract) for future delivery of any security, or interest therein or based on the value thereof, except an exempted security under or[2] section 3(a)(12) of the Securities Exchange Act of 1934 [15 U.S.C. 78c(a)(12)] as in effect on January 11, 1983 (other than any municipal security as defined in sec-

[1] See References in Text note below.

[2] So in original. The word ''or'' probably should not appear.

cations, writings, or other literature or advice distributed to clients, subscribers, or participants, or prospective clients, subscribers, or participants.

(B) Unless otherwise authorized by the Commission by rule or regulation, all commodity trading advisors and commodity pool operators shall make a full and complete disclosure to their subscribers, clients, or participants of all futures market positions taken or held by the individual principals of their organization.

(4) Every commodity pool operator shall regularly furnish statements of account to each participant in his operations. Such statements shall be in such form and manner as may be prescribed by the Commission and shall include complete information as to the current status of all trading accounts in which such participant has an interest.

(Sept. 21, 1922, ch. 369, §4n, as added Pub. L. 93–463, title II, §205(a), Oct. 23, 1974, 88 Stat. 1398; amended Pub. L. 95–405, §9, Sept. 30, 1978, 92 Stat. 870; Pub. L. 97–444, title II, §213, Jan. 11, 1983, 96 Stat. 2305.)

AMENDMENTS

1983—Par. (5). Pub. L. 97–444 struck out par. (5) which authorized Commission, without hearing, to deny registration to any person as a commodity trading advisor or commodity pool operator if such person was subject to an outstanding order under this chapter denying to such person trading privileges on any contract market, or suspending or revoking the registration of such person as a commodity trading advisor, commodity pool operator, futures commission merchant, or floor broker, or suspending or expelling such person from membership on any contract market.

Par. (6). Pub. L. 97–444 struck out par. (6) which authorized Commission to deny registration or revoke or suspend the registration of any commodity trading advisor or commodity pool operator if the Commission found that such denial, revocation, or suspension was in the public interest and that such person had been guilty of certain specified activities. See section 12a(2), (3), and (4) of this title.

1978—Par. (2). Pub. L. 95–405, §9(1)–(3), redesignated par. (3) as (2) and substituted ''Each registration'' for ''All registrations'' and inserted ''or at such other time, not less than one year from the effective date thereof, as the Commission may rule, regulation, or order prescribe,'' after ''June of each year,''. Former par. (2), which provided that registration under this section becomes effective thirty days after the receipt of such application by the Commission, or within such shorter period of time as the Commission may determine, was struck out.

Pars. (3) to (6). Pub. L. 95–405, §9(1), redesignated pars. (4) to (7) as (3) to (6), respectively. Former par. (3) redesignated (2).

EFFECTIVE DATE OF 1983 AMENDMENT

Amendment by Pub. L. 97–444 effective Jan. 11, 1983, see section 239 of Pub. L. 97–444, set out as a note under section 2 of this title.

EFFECTIVE DATE OF 1978 AMENDMENT

Amendment by Pub. L. 95–405 effective Oct. 1, 1978, see section 28 of Pub. L. 95–405, set out as a note under section 2 of this title.

EFFECTIVE DATE

For effective date of section, see section 418 of Pub. L. 93–463, set out as an Effective Date of 1974 Amendment note under section 2 of this title.

§ 6*o*. Fraud and misrepresentation by commodity trading advisors, commodity pool operators, and associated persons

(1) It shall be unlawful for a commodity trading advisor, associated person of a commodity trading advisor, commodity pool operator, or associated person of a commodity pool operator, by use of the mails or any means or instrumentality of interstate commerce, directly or indirectly—

(A) to employ any device, scheme, or artifice to defraud any client or participant or prospective client or participant; or

(B) to engage in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or participant or prospective client or participant.

(2) It shall be unlawful for any commodity trading advisor, associated person of a commodity trading advisor, commodity pool operator, or associated person of a commodity pool operator registered under this chapter to represent or imply in any manner whatsoever that such person has been sponsored, recommended, or approved, or that such person's abilities or qualifications have in any respect been passed upon, by the United States or any agency or officer thereof. This section shall not be construed to prohibit a statement that a person is registered under this chapter as a commodity trading advisor, associated person of a commodity trading advisor, commodity pool operator, or associated person of a commodity pool operator, if such statement is true in fact and if the effect of such registration is not misrepresented.

(Sept. 21, 1922, ch. 369, §4*o*, as added Pub. L. 93–463, title II, §205(a), Oct. 23, 1974, 88 Stat. 1399; amended Pub. L. 95–405, §10, Sept. 30, 1978, 92 Stat. 870; Pub. L. 97–444, title II, §214, Jan. 11, 1983, 96 Stat. 2305.)

AMENDMENTS

1983—Par. (1). Pub. L. 97–444 made the antifraud prohibition applicable to an associated person of a commodity trading advisor or a commodity pool operator.

Par. (2). Pub. L. 97–444 made the misrepresentation prohibition applicable to an associated person of a commodity training advisor or a commodity pool operator, authorized registration statements of such persons, and substituted ''such person'' and ''such person's abilities'' for ''he'' before ''has been sponsored'' and ''his abilities'', respectively.

1978—Par. (1). Pub. L. 95–405 struck out ''registered under this chapter'' after ''pool operator''.

EFFECTIVE DATE OF 1983 AMENDMENT

Amendment by Pub. L. 97–444 effective Jan. 11, 1983, see section 239 of Pub. L. 97–444, set out as a note under section 2 of this title.

EFFECTIVE DATE OF 1978 AMENDMENT

Amendment by Pub. L. 95–405 effective Oct. 1, 1978, see section 28 of Pub. L. 95–405, set out as a note under section 2 of this title.

EFFECTIVE DATE

For effective date of section, see section 418 of Pub. L. 93–463, set out as an Effective Date of 1974 Amendment note under section 2 of this title.

§ 6*o*–1. Transferred

CODIFICATION

Section, Sept. 21, 1922, ch. 369, §4q, formerly §4p, as added Pub. L. 106–554, §1(a)(5) [title I, §121], Dec. 21,

Par. (a). Pub. L. 90–258, §15, amended par. (a) generally, striking out such parts both of first sentence and of proviso of last sentence as described the commission as made up of the Secretary of Agriculture, Secretary of Commerce, and Attorney General (covered in definition of ''Commission'' in section 2 of this title, including representation of such officials by their designees), extending grounds for suspension or revocation of designation to include violations of any provisions of this chapter or rules, regulations, or orders of the Secretary of Agriculture or commission, requiring delivery of appeal petitions to Secretary of Agriculture rather than any member of the commission, who would notify the other members, and filing of commission records of proceedings on appeal by the Secretary of Agriculture and not the commission, striking out provisions describing Secretary of Agriculture as Chairman (now found in section 2 of this title), superseding such part of proviso of seventh sentence as authorized appeals to the commission from Secretary of Agriculture's refusal of a contract market designation by provisions of first par. of this section, and striking out such other part as made decision of court on appeal from commission final and binding on the parties.

1958—Pub. L. 85–791 substituted ''thereupon file in the court the record in such proceedings, as provided in section 2112 of title 28'' for ''forthwith prepare, certify, and file in the court a full and accurate transcript of the record in such proceedings including the notice to the board of trade, a copy of the charges, the evidence, and the report and order'' in third notice, and struck out ''certified and'' after ''duly'' in fourth sentence.

CHANGE OF NAME

Act June 25, 1948, as amended by act May 24, 1949, substituted ''court of appeals'' for ''circuit court of appeals'' wherever appearing in this section.

EFFECTIVE DATE OF 2010 AMENDMENT

Amendment by Pub. L. 111–203 effective on the later of 360 days after July 21, 2010, or, to the extent a provision of subtitle A (§§711–754) of title VII of Pub. L. 111–203 requires a rulemaking, not less than 60 days after publication of the final rule or regulation implementing such provision of subtitle A, see section 754 of Pub. L. 111–203, set out as a note under section 1a of this title.

EFFECTIVE DATE OF 2008 AMENDMENT

Amendment of this section and repeal of Pub. L. 110–234 by Pub. L. 110–246 effective May 22, 2008, the date of enactment of Pub. L. 110–234, except as otherwise provided, see section 4 of Pub. L. 110–246, set out as an Effective Date note under section 8701 of this title.

Amendment by section 13203(m) of Pub. L. 110–246 effective June 18, 2008, see section 13204(a) of Pub. L. 110–246, set out as a note under section 2 of this title.

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98–620 not applicable to cases pending on Nov. 8, 1984, see section 403 of Pub. L. 98–620, set out as an Effective Date note under section 1657 of Title 28, Judiciary and Judicial Procedure.

EFFECTIVE DATE OF 1983 AMENDMENT

Amendment by Pub. L. 97–444 effective Jan. 11, 1983, see section 239 of Pub. L. 97–444, set out as a note under section 2 of this title.

EFFECTIVE DATE OF 1978 AMENDMENT

Amendment by Pub. L. 95–405 effective Oct. 1, 1978, see section 28 of Pub. L. 95–405, set out as a note under section 2 of this title.

EFFECTIVE DATE OF 1974 AMENDMENT

For effective date of amendment by Pub. L. 93–463, see section 418 of Pub. L. 93–463, set out as a note under section 2 of this title.

EFFECTIVE DATE OF 1968 AMENDMENT

Amendment by Pub. L. 90–258 effective 120 days after Feb. 19, 1968, see section 28 of Pub. L. 90–258, set out as a note under section 2 of this title.

§ 9. Prohibition regarding manipulation and false information

(1) Prohibition against manipulation

It shall be unlawful for any person, directly or indirectly, to use or employ, or attempt to use or employ, in connection with any swap, or a contract of sale of any commodity in interstate commerce, or for future delivery on or subject to the rules of any registered entity, any manipulative or deceptive device or contrivance, in contravention of such rules and regulations as the Commission shall promulgate by not later than 1 year after July 21, 2010, provided no rule or regulation promulgated by the Commission shall require any person to disclose to another person nonpublic information that may be material to the market price, rate, or level of the commodity transaction, except as necessary to make any statement made to the other person in or in connection with the transaction not misleading in any material respect.

(A) Special provision for manipulation by false reporting

Unlawful manipulation for purposes of this paragraph shall include, but not be limited to, delivering, or causing to be delivered for transmission through the mails or interstate commerce, by any means of communication whatsoever, a false or misleading or inaccurate report concerning crop or market information or conditions that affect or tend to affect the price of any commodity in interstate commerce, knowing, or acting in reckless disregard of the fact that such report is false, misleading or inaccurate.

(B) Effect on other law

Nothing in this paragraph shall affect, or be construed to affect, the applicability of section 13(a)(2) of this title.

(C) Good faith mistakes

Mistakenly transmitting, in good faith, false or misleading or inaccurate information to a price reporting service would not be sufficient to violate paragraph (1)(A).

(2) Prohibition regarding false information

It shall be unlawful for any person to make any false or misleading statement of a material fact to the Commission, including in any registration application or any report filed with the Commission under this chapter, or any other information relating to a swap, or a contract of sale of a commodity, in interstate commerce, or for future delivery on or subject to the rules of any registered entity, or to omit to state in any such statement any material fact that is necessary to make any statement of a material fact made not misleading in any material respect, if the person knew, or reasonably should have known, the statement to be false or misleading.

(3) Other manipulation

In addition to the prohibition in paragraph (1), it shall be unlawful for any person, directly or

indirectly, to manipulate or attempt to manipulate the price of any swap, or of any commodity in interstate commerce, or for future delivery on or subject to the rules of any registered entity.

(4) Enforcement

(A) Authority of Commission

If the Commission has reason to believe that any person (other than a registered entity) is violating or has violated this section, or any other provision of this chapter (including any rule, regulation, or order of the Commission promulgated in accordance with this section or any other provision of this chapter), the Commission may serve upon the person a complaint.

(B) Contents of complaint

A complaint under subparagraph (A) shall—

(i) contain a description of the charges against the person that is the subject of the complaint; and

(ii) have attached or contain a notice of hearing that specifies the date and location of the hearing regarding the complaint.

(C) Hearing

A hearing described in subparagraph (B)(ii)—

(i) shall be held not later than 3 days after service of the complaint described in subparagraph (A);

(ii) shall require the person to show cause regarding why—

(I) an order should not be made—

(aa) to prohibit the person from trading on, or subject to the rules of, any registered entity; and

(bb) to direct all registered entities to refuse all privileges to the person until further notice of the Commission; and

(II) the registration of the person, if registered with the Commission in any capacity, should not be suspended or revoked; and

(iii) may be held before—

(I) the Commission; or

(II) an administrative law judge designated by the Commission, under which the administrative law judge shall ensure that all evidence is recorded in written form and submitted to the Commission.

(5) Subpoena

For the purpose of securing effective enforcement of the provisions of this chapter, for the purpose of any investigation or proceeding under this chapter, and for the purpose of any action taken under section 16(f) of this title, any member of the Commission or any Administrative Law Judge or other officer designated by the Commission (except as provided in paragraph (7)) may administer oaths and affirmations, subpoena witnesses, compel their attendance, take evidence, and require the production of any books, papers, correspondence, memoranda, or other records that the Commission deems relevant or material to the inquiry.

(6) Witnesses

The attendance of witnesses and the production of any such records may be required from any place in the United States, any State, or any foreign country or jurisdiction at any designated place of hearing.

(7) Service

A subpoena issued under this section[1] may be served upon any person who is not to be found within the territorial jurisdiction of any court of the United States in such manner as the Federal Rules of Civil Procedure prescribe for service of process in a foreign country, except that a subpoena to be served on a person who is not to be found within the territorial jurisdiction of any court of the United States may be issued only on the prior approval of the Commission.

(8) Refusal to obey

In case of contumacy by, or refusal to obey a subpoena issued to, any person, the Commission may invoke the aid of any court of the United States within the jurisdiction in which the investigation or proceeding is conducted, or where such person resides or transacts business, in requiring the attendance and testimony of witnesses and the production of books, papers, correspondence, memoranda, and other records. Such court may issue an order requiring such person to appear before the Commission or member or Administrative Law Judge or other officer designated by the Commission, there to produce records, if so ordered, or to give testimony touching the matter under investigation or in question.

(9) Failure to obey

Any failure to obey such order of the court may be punished by the court as a contempt thereof. All process in any such case may be served in the judicial district wherein such person is an inhabitant or transacts business or wherever such person may be found.

(10) Evidence

On the receipt of evidence under paragraph (4)(C)(iii), the Commission may—

(A) prohibit the person that is the subject of the hearing from trading on, or subject to the rules of, any registered entity and require all registered entities to refuse the person all privileges on the registered entities for such period as the Commission may require in the order;

(B) if the person is registered with the Commission in any capacity, suspend, for a period not to exceed 180 days, or revoke, the registration of the person;

(C) assess such person—

(i) a civil penalty of not more than an amount equal to the greater of—

(I) $140,000; or

(II) triple the monetary gain to such person for each such violation; or

(ii) in any case of manipulation or attempted manipulation in violation of this section or section 13(a)(2) of this title, a civil penalty of not more than an amount equal to the greater of—

(I) $1,000,000; or

(II) triple the monetary gain to the person for each such violation; and

[1] See References in Text note below.

(D) require restitution to customers of damages proximately caused by violations of the person.

(11) Orders

(A) Notice

The Commission shall provide to a person described in paragraph (10) and the appropriate governing board of the registered entity notice of the order described in paragraph (10) by—

(i) registered mail;
(ii) certified mail; or
(iii) personal delivery.

(B) Review

(i) In general

A person described in paragraph (10) may obtain a review of the order or such other equitable relief as determined to be appropriate by a court described in clause (ii).

(ii) Petition

To obtain a review or other relief under clause (i), a person may, not later than 15 days after notice is given to the person under clause (i), file a written petition to set aside the order with the United States Court of Appeals—

(I) for the circuit in which the petitioner carries out the business of the petitioner; or

(II) in the case of an order denying registration, the circuit in which the principal place of business of the petitioner is located, as listed on the application for registration of the petitioner.

(C) Procedure

(i) Duty of clerk of appropriate court

The clerk of the appropriate court under subparagraph (B)(ii) shall transmit to the Commission a copy of a petition filed under subparagraph (B)(ii).

(ii) Duty of Commission

In accordance with section 2112 of title 28, the Commission shall file in the appropriate court described in subparagraph (B)(ii) the record theretofore made.

(iii) Jurisdiction of appropriate court

Upon the filing of a petition under subparagraph (B)(ii), the appropriate court described in subparagraph (B)(ii) may affirm, set aside, or modify the order of the Commission.

(Sept. 21, 1922, ch. 369, §6(c), formerly §6(b), 42 Stat. 1002; June 15, 1936, ch. 545, §8, 49 Stat. 1498; June 25, 1948, ch. 646, §32(a), 62 Stat. 991; May 24, 1949, ch. 139, §127, 63 Stat. 107; June 16, 1955, ch. 151, 69 Stat. 160; Pub. L. 85–791, §7(b), Aug. 28, 1958, 72 Stat. 944; Pub. L. 86–507, §1(2), June 11, 1960, 74 Stat. 200; Pub. L. 90–258, §16, Feb. 19, 1968, 82 Stat. 30; Pub. L. 91–452, title II, §202, Oct. 15, 1970, 84 Stat. 928; Pub. L. 93–463, title I, §103(a), (b), (d), (e), title II, §§204(b), 205(b), 212(a)(1), (2), title IV, §408, Oct. 23, 1974, 88 Stat. 1392, 1397, 1400, 1403, 1414; Pub. L. 95–405, §13(3), Sept. 30, 1978, 92 Stat. 871; Pub. L. 97–444, title II, §219, Jan. 11, 1983, 96 Stat. 2308; Pub. L. 99–641, title I, §103, Nov. 10, 1986, 100 Stat. 3557; renumbered §6(c) and amended Pub. L. 102–546, title II, §§209(a)(1), 212(b), 223, title III, §301, title IV, §402(1)(C), (6), (7), (9)(B), Oct. 28, 1992, 106 Stat. 3606, 3609, 3617, 3622, 3624, 3625; Pub. L. 106–554, §1(a)(5) [title I, §123(a)(12)(C)], Dec. 21, 2000, 114 Stat. 2763, 2763A–409; Pub. L. 110–234, title XIII, §13103(a), May 22, 2008, 122 Stat. 1433; Pub. L. 110–246, §4(a), title XIII, §13103(a), June 18, 2008, 122 Stat. 1664, 2195; Pub. L. 111–203, title VII, §§741(b)(3), 753(a), July 21, 2010, 124 Stat. 1731, 1750.)

REFERENCES IN TEXT

This section, referred to in par. (7), means section 6 of act Sept. 21, 1922, ch. 369, 42 Stat. 1001. For classification of section 6 to the Code, see Codification note below.

CODIFICATION

Pub. L. 110–234 and Pub. L. 110–246 made identical amendments to this section. The amendments by Pub. L. 110–234 were repealed by section 4(a) of Pub. L. 110–246.

Section is comprised of subsec. (c) of section 6 of act Sept. 21, 1922. Prior to amendment by Pub. L. 111–203, a further provision of subsec. (c) was contained in section 15 of this title and, prior to its incorporation into the Code, contained a provision as to finality of judgments and review by the Supreme Court which is covered by section 1254 of Title 28, Judiciary and Judicial Procedure. Subsecs. (a) and (b) of section 6 are classified to section 8 of this title. Subsecs. (d), (e), (f), and (g) of section 6 are classified to sections 13b, 9a, 9b, and 9c of this title, respectively.

AMENDMENTS

2010—Pub. L. 111–203, §753(a), amended section generally. Prior to amendment, section related to exclusion of persons from privilege of ''registered entities'', procedure for exclusion, review by court of appeals, and enforcement powers of Commission.

Pub. L. 111–203, §741(b)(3), in first sentence, inserted ''or of any swap,'' before ''or has willfully made''.

2008—Pub. L. 110–246, §13103(a), in cl. (3) of third sentence inserted ''(A)'' after ''assess such person'' and added subcl. (B).

2000—Pub. L. 106–554 substituted ''registered entity'' for ''contract market'' wherever appearing, ''registered entities'' for ''contract markets'' wherever appearing, and ''privileges'' for ''trading privileges'' in two places.

1992—Pub. L. 102–546, §402(9)(B), which directed amendment of first sentence by striking ''the Secretary of Agriculture or'', could not be executed because of amendment by Pub. L. 93–463, §103(a). See 1974 Amendment note below.

Pub. L. 102–546, §§209(a)(1), 212(b), 223, 402(1)(C), (6), substituted, in first sentence, ''Commission thereunder'' for ''commission thereunder'', in sentence beginning ''Upon evidence received'', inserted ''(1)'', substituted ''(2) if'' for ''and, if'', ''suspend'' for ''may suspend'', ''(3)'' for ''and may'', ''the higher of $100,000 or triple the monetary gain to such person'' for ''$100,000'', and inserted before period ''and (4) require restitution to customers of damages proximately caused by violations of such persons'', and in sentence beginning ''After the issuance'', substituted ''offending person'' for ''offending person.''.

1983—Pub. L. 97–444 struck out ''as futures commission merchant or any person associated therewith as described in section 6k of this title, commodity trading advisor, commodity pool operator, or as floor broker hereunder'' after ''such person, if registered'' and also after ''such person is registered'' and inserted '', or in the case of an order denying registration, the circuit in which the petitioner's principal place of business listed on petitioner's application for registration is located,'' after ''court of appeals of the circuit in which the petitioner is doing business''.

1974—Pub. L. 93–463, §§103(e), 204(b), 205(b), 212(a)(1), (2), 408, substituted ''it'' for ''he'', inserted ''or any person associated therewith as described in section 6k of this title,'' after ''futures commission merchant'' wherever appearing, inserted ''commodity trading advisor, commodity pool operator'' before ''or as floor broker'' wherever appearing, inserted provision for the assessment of civil penalties of not more than $100,000 for each violation, set a limit of fifteen days after the issuance of an order within which period the person against whom the order was issued must file with the court of appeals his petition that the order be set aside, and substituted ''an Administrative Law Judge'' and ''Administrative Law Judge'' for ''a referee'' and ''referee'', respectively.

Pub. L. 93–463, §103(a), provided for substitution of ''Commission'' for ''Secretary of Agriculture'' except where such words would be stricken by section 103(b), which directed striking the words ''the Secretary of Agriculture or'' where they appeared in the phrase ''the Secretary of Agriculture or the Commission''. Section 103(a) was executed wherever the term ''Secretary of Agriculture'' appeared in this section including in the phrase ''the Secretary of Agriculture or the commission'' in the first sentence. Because the word ''commission'' was not capitalized in that phrase in the first sentence, section 103(b) did not apply to that phrase and therefore section 103(a) was executed, resulting in the substitution of ''the Commission or the commission'' for ''the Secretary of Agriculture or the commission''.

1968—Pub. L. 90–258 amended first sentence generally, providing for denial of trading privileges to persons other than contract markets and suspension or revocation of registration of futures commission merchants and floor brokers, who are manipulating or have attempted to manipulate prices, for willful, material, misstatements in, or omissions from, reports or registration statements, and for violations of orders of Secretary of Agriculture or commission, and authorizing the Secretary to prohibit such persons from trading on or subject to rules of any contract market.

1960—Pub. L. 86–507 inserted ''or by certified mail'' after ''registered mail''.

1958—Pub. L. 85–791 substituted ''transmitted by the clerk of the court to the Secretary of Agriculture and thereupon the Secretary of Agriculture shall file in the court the record theretofore made, as provided in section 2112 of Title 28'' for ''served upon the Secretary of Agriculture by delivering such copy to him and thereupon the Secretary of Agriculture shall forthwith certify and file in the court a transcript of the record theretofore made, including evidence received'' in seventh sentence, and substituted ''petition'' for ''transcript'' in eighth sentence.

1936—Act June 15, 1936, among other changes, amended section by inserting provisions relating to the service of complaints and penalties for violations of this chapter.

CHANGE OF NAME

Act June 25, 1948, as amended by act May 24, 1949, substituted ''court of appeals'' for ''circuit court of appeals'' wherever appearing in this section.

EFFECTIVE DATE OF 2010 AMENDMENT

Amendment by section 741(b)(3) of Pub. L. 111–203 effective on the later of 360 days after July 21, 2010, or, to the extent a provision of subtitle A (§§711–754) of title VII of Pub. L. 111–203 requires a rulemaking, not less than 60 days after publication of the final rule or regulation implementing such provision of subtitle A, see section 754 of Pub. L. 111–203, set out as a note under section 1a of this title.

Pub. L. 111–203, title VII, §753(d), July 21, 2010, 124 Stat. 1754, provided that:

''(1) The amendments made by this section [amending this section and sections 13b and 25 of this title] shall take effect on the date on which the final rule promulgated by the Commodity Futures Trading Commission [see 76 F.R. 41398, effective Aug. 15, 2011] pursuant to this Act [see Tables for classification] takes effect.

''(2) Paragraph (1) shall not preclude the Commission from undertaking prior to the effective date any rulemaking necessary to implement the amendments contained in this section.''

EFFECTIVE DATE OF 2008 AMENDMENT

Amendment of this section and repeal of Pub. L. 110–234 by Pub. L. 110–246 effective May 22, 2008, the date of enactment of Pub. L. 110–234, see section 4 of Pub. L. 110–246, set out as an Effective Date note under section 8701 of this title.

EFFECTIVE DATE OF 1983 AMENDMENT

Amendment by Pub. L. 97–444 effective Jan. 11, 1983, see section 239 of Pub. L. 97–444, set out as a note under section 2 of this title.

EFFECTIVE DATE OF 1974 AMENDMENT

For effective date of amendment by Pub. L. 93–463, see section 418 of Pub. L. 93–463, set out as a note under section 2 of this title.

EFFECTIVE DATE OF 1968 AMENDMENT

Amendment by Pub. L. 90–258 effective 120 days after Feb. 19, 1968, see section 28 of Pub. L. 90–258, set out as a note under section 2 of this title.

EFFECTIVE DATE OF 1936 AMENDMENT

Amendment by act June 15, 1936, effective 90 days after June 15, 1936, see section 13 of act June 15, 1936, set out as a note under section 1 of this title.

§ 9a. Assessment of money penalties

(1) In determining the amount of the money penalty assessed under section 9 of this title, the Commission shall consider the appropriateness of such penalty to the gravity of the violation.

(2) Unless the person against whom a money penalty is assessed under section 9 of this title shows to the satisfaction of the Commission within fifteen days from the expiration of the period allowed for payment of such penalty that either an appeal as authorized by section 9 of this title has been taken or payment of the full amount of the penalty then due has been made, at the end of such fifteen-day period and until such person shows to the satisfaction of the Commission that payment of such amount with interest thereon to date of payment has been made—

(A) such person shall be prohibited automatically from the privileges of all registered entities; and

(B) if such person is registered with the Commission, such registration shall be suspended automatically.

(3) If a person against whom a money penalty is assessed under section 9 of this title takes an appeal and if the Commission prevails or the appeal is dismissed, unless such person shows to the satisfaction of the Commission that payment of the full amount of the penalty then due has been made by the end of thirty days from the date of entry of judgment on the appeal—

(A) such person shall be prohibited automatically from the privileges of all registered entities; and

(B) if such person is registered with the Commission, such registration shall be suspended automatically.

section (a) of this section pending review thereof.

(e) Major disciplinary rule violations

(1) The Commission shall issue regulations requiring each registered entity to establish and make available to the public a schedule of major violations of any rule within the disciplinary jurisdiction of such registered entity.

(2) The regulations issued by the Commission pursuant to this subsection shall prohibit, for a period of time to be determined by the Commission, any individual who is found to have committed any major violation from service on the governing board of any registered entity or registered futures association, or on any disciplinary committee thereof.

(Sept. 21, 1922, ch. 369, § 8c, as added Pub. L. 93–463, title II, § 216, Oct. 23, 1974, 88 Stat. 1405; amended Pub. L. 95–405, § 18, Sept. 30, 1978, 92 Stat. 874; Pub. L. 102–546, title II, § 206(a)(2), Oct. 28, 1992, 106 Stat. 3602; Pub. L. 106–554, § 1(a)(5) [title I, § 123(a)(20)], Dec. 21, 2000, 114 Stat. 2763, 2763A–410.)

AMENDMENTS

2000—Subsec. (e). Pub. L. 106–554 substituted ''registered entity'' for ''contract market'' wherever appearing.

1992—Pub. L. 102–546 redesignated pars. (1) to (4) as subsecs. (a) to (d), respectively, in subsec. (a) redesignated subpars. (A) and (B) as pars. (1) and (2), respectively, in subsec. (c) substituted references to subsection (b) for references to paragraph (2), in subsec. (d) substituted reference to subsection (a) for reference to paragraph (1), and added subsec. (e).

1978—Par. (1)(B). Pub. L. 95–405 substituted ''An exchange shall make public its findings and the reasons for the exchange action in any such proceeding, including the action taken or the penalty imposed, but shall not disclose the evidence therefor, except to the person who is suspended, expelled, or disciplined or denied access, and to the Commission'' for ''Otherwise the notice and reasons shall be kept confidential''.

EFFECTIVE DATE OF 1978 AMENDMENT

Amendment by Pub. L. 95–405 effective Oct. 1, 1978, see section 28 of Pub. L. 95–405, set out as a note under section 2 of this title.

EFFECTIVE DATE

For effective date of section, see section 418 of Pub. L. 93–463, set out as an Effective Date of 1968 Amendment note under section 2 of this title.

§ 12d. Commission action for noncompliance with export sales reporting requirements

The Commission may, in accordance with the procedures provided for in this chapter, refuse to register, register conditionally, or suspend, place restrictions upon, or revoke the registration of, any person, and may bar for any period as it deems appropriate any person from using or participating in any manner in any market regulated by the Commission, if such person is subject to a final decision or order of any court of competent jurisdiction or agency of the United States finding such person to have knowingly violated any provision of the export sales reporting requirements of section 612c–3[1] of this title, or of any regulation issued thereunder.

(Sept. 21, 1922, ch. 369, § 8d, as added Pub. L. 97–444, title II, § 226, Jan. 11, 1983, 96 Stat. 2316.)

REFERENCES IN TEXT

Section 612c–3 of this title, referred to in text, was repealed by Pub. L. 101–624, title XV, § 1578, Nov. 28, 1990, 104 Stat. 3702.

EFFECTIVE DATE

Section effective Jan. 11, 1983, see section 239 of Pub. L. 97–444, set out as an Effective Date of 1983 Amendment note under section 2 of this title.

§ 12e. Repealed. Pub. L. 106–554, § 1(a)(5) [title I, § 123(a)(21)], Dec. 21, 2000, 114 Stat. 2763, 2763A–410

Section, act Sept. 21, 1922, ch. 369, § 8e, as added Pub. L. 102–546, title II, § 202(a), Oct. 28, 1992, 106 Stat. 3598, related to Commission oversight and deficiency orders.

§ 13. Violations generally; punishment; costs of prosecution

(a) Felonies generally

It shall be a felony punishable by a fine of not more than $1,000,000 or imprisonment for not more than 10 years, or both, together with the costs of prosecution, for:

(1) Any person registered or required to be registered under this chapter, or any employee or agent thereof, to embezzle, steal, purloin, or with criminal intent convert to such person's use or to the use of another, any money, securities, or property having a value in excess of $100, which was received by such person or any employee or agent thereof to margin, guarantee, or secure the trades or contracts of any customer or accruing to such customer as a result of such trades or contracts or which otherwise was received from any customer, client, or pool participant in connection with the business of such person. The word ''value'' as used in this paragraph means face, par, or market value, or cost price, either wholesale or retail, whichever is greater.

(2) Any 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 of any registered entity, or of any swap, or to corner or attempt to corner any such commodity or knowingly to deliver or cause to be delivered for transmission through the mails or interstate commerce by telegraph, telephone, wireless, or other means of communication 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, or knowingly to violate the provisions of section 6, section 6b, subsections (a) through (e) of subsection[1] 6c, section 6h, section 6*o*(1), or section 23 of this title.

(3) Any person knowingly to make, or cause to be made, any statement in any application, report, or document required to be filed under this chapter or any rule or regulation thereunder or any undertaking contained in a registration statement required under this chapter, or by any registered entity or registered

[1] See References in Text note below.

[1] So in original. Probably should be ''section''.

futures association in connection with an application for membership or participation therein or to become associated with a member thereof, which statement was false or misleading with respect to any material fact, or knowingly to omit any material fact required to be stated therein or necessary to make the statements therein not misleading.

(4) Any person willfully to falsify, conceal, or cover up by any trick, scheme, or artifice a material fact, make any false, fictitious, or fraudulent statements or representations, or make or use any false writing or document knowing the same to contain any false, fictitious, or fraudulent statement or entry to a registered entity, board of trade, swap data repository, or futures association designated or registered under this chapter acting in furtherance of its official duties under this chapter.

(5) Any person willfully to violate any other provision of this chapter, or any rule or regulation thereunder, the violation of which is made unlawful or the observance of which is required under the terms of this chapter, but no person shall be subject to imprisonment under this paragraph for the violation of any rule or regulation if such person proves that he had no knowledge of such rule or regulation.

(6) Any person to abuse the end user clearing exemption under section 2(h)(4) of this title, as determined by the Commission.

(b) Suspension of convicted felons

Any person convicted of a felony under this section shall be suspended from registration under this chapter and shall be denied registration or reregistration for five years or such longer period as the Commission may determine, and barred from using, or participating in any manner in, any market regulated by the Commission for five years or such longer period as the Commission shall determine, on such terms and conditions as the Commission may prescribe, unless the Commission determines that the imposition of such suspension, denial of registration or reregistration, or market bar is not required to protect the public interest. The Commission may upon petition later review such disqualification and market bar and for good cause shown reduce the period thereof.

(c) Transactions by Commissioners and Commission employees prohibited

It shall be a felony punishable by a fine of not more than $500,000 or imprisonment for not more than five years, or both, together with the costs of prosecution, for any Commissioner of the Commission or any employee or agent thereof, to participate, directly or indirectly, in any transaction in commodity futures or any transaction of the character of or which is commonly known to the trade as an ''option'', ''privilege'', ''indemnity'', ''bid'', ''offer'', ''put'', ''call'', ''advance guaranty'', or ''decline guaranty'', or any transaction for the delivery of any commodity under a standardized contract commonly known to the trade as a margin account, margin contract, leverage account, or leverage contract, or under any contract, account, arrangement, scheme, or device that the Commission determines serves the same function or functions as such a standardized contract, or is marketed or managed in substantially the same manner as such a standardized contract, or for any such person to participate, directly or indirectly, in any investment transaction in an actual commodity if nonpublic information is used in the investment transaction, if the investment transaction is prohibited by rule or regulation of the Commission, or if the investment transaction is effected by means of any instrument regulated by the Commission. The foregoing prohibitions shall not apply to any transaction or class of transactions that the Commission, by rule or regulation, has determined would not be contrary to the public interest or otherwise inconsistent with the purposes of this subsection.

(d) Use of information by Commissioners and Commission employees prohibited

It shall be a felony punishable by a fine of not more than $500,000 or imprisonment for not more than five years, or both, together with the costs of prosecution—(1) for any Commissioner of the Commission or any employee or agent thereof who, by virtue of his employment or position, acquires information which may affect or tend to affect the price of any commodity futures or commodity and which information has not been made public to impart such information with intent to assist another person, directly or indirectly, to participate in any transaction in commodity futures, any transaction in an actual commodity, or in any transaction of the character of or which is commonly known to the trade as an ''option'', ''privilege'', ''indemnity'', ''bid'', ''offer'', ''put'', ''call'', ''advance guaranty'', or ''decline guaranty'', or in any transaction for the delivery of any commodity under a standardized contract commonly known to the trade as a margin account, margin contract, leverage account, or leverage contract, or under any contract, account, arrangement, scheme, or device that the Commission determines serves the same function or functions as such a standardized contract, or is marketed or managed in substantially the same manner as such a standardized contract; and (2) for any person to acquire such information from any Commissioner of the Commission or any employee or agent thereof and to use such information in any transaction in commodity futures, any transaction in an actual commodity, or in any transaction of the character of or which is commonly known to the trade as an ''option'', ''privilege'', ''indemnity'', ''bid'', ''offer'', ''put'', ''call'', ''advance guaranty'', or ''decline guaranty'', or in any transaction for the delivery of any commodity under a standardized contract commonly known to the trade as a margin account, margin contract, leverage account, or leverage contract, or under any contract, account, arrangement, scheme, or device that the Commission determines serves the same function or functions as such a standardized contract, or is marketed or managed in substantially the same manner as such a standardized contract.

(e) Insider trading prohibited

It shall be a felony for any person—

(1) who is an employee, member of the governing board, or member of any committee of

tion shall be treated as a violation of a rule or order of the Commission under this chapter.

(e) Fees for studies

The Commission, in addition to the requirements of section 803(e) of this title, shall establish fees which shall be paid by an applicant for a license or exemption for a project that is required to meet terms and conditions set by fish and wildlife agencies under subsection (c) of this section. Such fees shall be adequate to reimburse the fish and wildlife agencies referred to in subsection (c) of this section for any reasonable costs incurred in connection with any studies or other reviews carried out by such agencies for purposes of compliance with this section. The fees shall, subject to annual appropriations Acts, be transferred to such agencies by the Commission for use solely for purposes of carrying out such studies and shall remain available until expended.

(June 10, 1920, ch. 285, pt. I, §30, as added Pub. L. 95–617, title II, §213, Nov. 9, 1978, 92 Stat. 3148; amended Pub. L. 99–495, §7, Oct. 16, 1986, 100 Stat. 1248.)

REFERENCES IN TEXT

The Fish and Wildlife Coordination Act, referred to in subsec. (c), is act Mar. 10, 1934, ch. 55, 48 Stat. 401, as amended, which is classified generally to sections 661 to 666c of this title. For complete classification of this Act to the Code, see Short Title note set out under section 661 of this title and Tables.

PRIOR PROVISIONS

A prior section 30 of act June 10, 1920, was classified to section 791 of this title, prior to repeal by act Aug. 26, 1935, ch. 687, title II, §212, 49 Stat. 847.

AMENDMENTS

1986—Subsec. (b). Pub. L. 99–495, §7(a), inserted provision setting the maximum installation capacity for exemptions under subsec. (a) at 40 megawatts in the case of a facility constructed, operated, and maintained by an agency or instrumentality of a State or local government solely for water supply for municipal purposes.

Subsec. (c). Pub. L. 99–495, §7(b), which directed the insertion of ''National Marine Fisheries Service'' after ''the Fish and Wildlife Service'' in both places such term appears, was executed by inserting ''National Marine Fisheries Service'' after ''the United States Fish and Wildlife Service'' and ''the Fish and Wildlife Service'', as the probable intent of Congress.

Subsec. (e). Pub. L. 99–495, §7(c), added subsec. (e).

EFFECTIVE DATE OF 1986 AMENDMENT

Amendment by Pub. L. 99–495 effective with respect to each license, permit, or exemption issued under this chapter after Oct. 16, 1986, see section 18 of Pub. L. 99–495, set out as a note under section 797 of this title.

APPLICATION OF SUBSECTION (c)

Section 8(c) of Pub. L. 99–495 provided that: ''Nothing in this Act [see Short Title of 1986 Amendment note set out under section 791a of this title] shall affect the application of section 30(c) of the Federal Power Act [16 U.S.C. 823a(c)] to any exemption issued after the enactment of this Act [Oct. 16, 1986].''

§ 823b. Enforcement

(a) Monitoring and investigation

The Commission shall monitor and investigate compliance with each license and permit issued under this subchapter and with each exemption granted from any requirement of this subchapter. The Commission shall conduct such investigations as may be necessary and proper in accordance with this chapter. After notice and opportunity for public hearing, the Commission may issue such orders as necessary to require compliance with the terms and conditions of licenses and permits issued under this subchapter and with the terms and conditions of exemptions granted from any requirement of this subchapter.

(b) Revocation orders

After notice and opportunity for an evidentiary hearing, the Commission may also issue an order revoking any license issued under this subchapter or any exemption granted from any requirement of this subchapter where any licensee or exemptee is found by the Commission:

(1) to have knowingly violated a final order issued under subsection (a) of this section after completion of judicial review (or the opportunity for judicial review); and

(2) to have been given reasonable time to comply fully with such order prior to commencing any revocation proceeding.

In any such proceeding, the order issued under subsection (a) of this section shall be subject to de novo review by the Commission. No order shall be issued under this subsection until after the Commission has taken into consideration the nature and seriousness of the violation and the efforts of the licensee to remedy the violation.

(c) Civil penalty

Any licensee, permittee, or exemptee who violates or fails or refuses to comply with any rule or regulation under this subchapter, any term, or condition of a license, permit, or exemption under this subchapter, or any order issued under subsection (a) of this section shall be subject to a civil penalty in an amount not to exceed $10,000 for each day that such violation or failure or refusal continues. Such penalty shall be assessed by the Commission after notice and opportunity for public hearing. In determining the amount of a proposed penalty, the Commission shall take into consideration the nature and seriousness of the violation, failure, or refusal and the efforts of the licensee to remedy the violation, failure, or refusal in a timely manner. No civil penalty shall be assessed where revocation is ordered.

(d) Assessment

(1) Before issuing an order assessing a civil penalty against any person under this section, the Commission shall provide to such person notice of the proposed penalty. Such notice shall, except in the case of a violation of a final order issued under subsection (a) of this section, inform such person of his opportunity to elect in writing within 30 days after the date of receipt of such notice to have the procedures of paragraph (3) (in lieu of those of paragraph (2)) apply with respect to such assessment.

(2)(A) In the case of the violation of a final order issued under subsection (a) of this section, or unless an election is made within 30 calendar

days after receipt of notice under paragraph (1) to have paragraph (3) apply with respect to such penalty, the Commission shall assess the penalty, by order, after a determination of violation has been made on the record after an opportunity for an agency hearing pursuant to section 554 of title 5 before an administrative law judge appointed under section 3105 of such title 5. Such assessment order shall include the administrative law judge's findings and the basis for such assessment.

(B) Any person against whom a penalty is assessed under this paragraph may, within 60 calendar days after the date of the order of the Commission assessing such penalty, institute an action in the United States court of appeals for the appropriate judicial circuit for judicial review of such order in accordance with chapter 7 of title 5. The court shall have jurisdiction to enter a judgment affirming, modifying, or setting aside in whole or in Part,[1] the order of the Commission, or the court may remand the proceeding to the Commission for such further action as the court may direct.

(3)(A) In the case of any civil penalty with respect to which the procedures of this paragraph have been elected, the Commission shall promptly assess such penalty, by order, after the date of the receipt of the notice under paragraph (1) of the proposed penalty.

(B) If the civil penalty has not been paid within 60 calendar days after the assessment order has been made under subparagraph (A), the Commission shall institute an action in the appropriate district court of the United States for an order affirming the assessment of the civil penalty. The court shall have authority to review de novo the law and the facts involved, and shall have jurisdiction to enter a judgment enforcing, modifying, and enforcing as so modified, or setting aside in whole or in Part,[1] such assessment.

(C) Any election to have this paragraph apply may not be revoked except with the consent of the Commission.

(4) The Commission may compromise, modify, or remit, with or without conditions, any civil penalty which may be imposed under this subsection, taking into consideration the nature and seriousness of the violation and the efforts of the licensee to remedy the violation in a timely manner at any time prior to a final decision by the court of appeals under paragraph (2) or by the district court under paragraph (3).

(5) If any person fails to pay an assessment of a civil penalty after it has become a final and unappealable order under paragraph (2), or after the appropriate district court has entered final judgment in favor of the Commission under paragraph (3), the Commission shall institute an action to recover the amount of such penalty in any appropriate district court of the United States. In such action, the validity and appropriateness of such final assessment order or judgment shall not be subject to review.

(6)(A) Notwithstanding the provisions of title 28 or of this chapter, the Commission may be represented by the general counsel of the Commission (or any attorney or attorneys within the Commission designated by the Chairman) who shall supervise, conduct, and argue any civil litigation to which paragraph (3) of this subsection applies (including any related collection action under paragraph (5)) in a court of the United States or in any other court, except the Supreme Court. However, the Commission or the general counsel shall consult with the Attorney General concerning such litigation, and the Attorney General shall provide, on request, such assistance in the conduct of such litigation as may be appropriate.

(B) The Commission shall be represented by the Attorney General, or the Solicitor General, as appropriate, in actions under this subsection, except to the extent provided in subparagraph (A) of this paragraph.

(June 10, 1920, ch. 285, pt. I, § 31, as added Pub. L. 99–495, § 12, Oct. 16, 1986, 100 Stat. 1255.)

EFFECTIVE DATE

Section applicable to licenses, permits, and exemptions without regard to when issued, see section 18 of Pub. L. 99–495, set out as an Effective Date of 1986 Amendment note under section 797 of this title.

§ 823c. Alaska State jurisdiction over small hydroelectric projects

(a) Discontinuance of regulation by the Commission

Notwithstanding sections 797(e) and 817 of this title, the Commission shall discontinue exercising licensing and regulatory authority under this subchapter over qualifying project works in the State of Alaska, effective on the date on which the Commission certifies that the State of Alaska has in place a regulatory program for water-power development that—

(1) protects the public interest, the purposes listed in paragraph (2), and the environment to the same extent provided by licensing and regulation by the Commission under this subchapter and other applicable Federal laws, including the Endangered Species Act (16 U.S.C. 1531 et seq.) and the Fish and Wildlife Coordination Act (16 U.S.C. 661 et seq.);

(2) gives equal consideration to the purposes of—

(A) energy conservation;

(B) the protection, mitigation of damage to, and enhancement of, fish and wildlife (including related spawning grounds and habitat);

(C) the protection of recreational opportunities;

(D) the preservation of other aspects of environmental quality;

(E) the interests of Alaska Natives; and

(F) other beneficial public uses, including irrigation, flood control, water supply, and navigation; and

(3) requires, as a condition of a license for any project works—

(A) the construction, maintenance, and operation by a licensee at its own expense of such lights and signals as may be directed by the Secretary of the Department in which the Coast Guard is operating, and such fishways as may be prescribed by the Secretary of the Interior or the Secretary of Commerce, as appropriate;

[1] So in original. Probably should not be capitalized.

not adequately providing price discovery or market transparency. Nothing in this section, however, shall affect any electronic information filing requirements in effect under this chapter as of August 8, 2005.

(b) Exemption of information from disclosure

(1) Rules described in subsection (a)(2) of this section, if adopted, shall exempt from disclosure information the Commission determines would, if disclosed, be detrimental to the operation of an effective market or jeopardize system security.

(2) In determining the information to be made available under this section and time to make the information available, the Commission shall seek to ensure that consumers and competitive markets are protected from the adverse effects of potential collusion or other anticompetitive behaviors that can be facilitated by untimely public disclosure of transaction-specific information.

(c) Information sharing

(1) Within 180 days of August 8, 2005, the Commission shall conclude a memorandum of understanding with the Commodity Futures Trading Commission relating to information sharing, which shall include, among other things, provisions ensuring that information requests to markets within the respective jurisdiction of each agency are properly coordinated to minimize duplicative information requests, and provisions regarding the treatment of proprietary trading information.

(2) Nothing in this section may be construed to limit or affect the exclusive jurisdiction of the Commodity Futures Trading Commission under the Commodity Exchange Act (7 U.S.C. 1 et seq.).

(d) Exemption from reporting requirements

The Commission shall not require entities who have a de minimis market presence to comply with the reporting requirements of this section.

(e) Penalties for violations occurring before notice

(1) Except as provided in paragraph (2), no person shall be subject to any civil penalty under this section with respect to any violation occurring more than 3 years before the date on which the person is provided notice of the proposed penalty under section 825*o*–1 of this title.

(2) Paragraph (1) shall not apply in any case in which the Commission finds that a seller that has entered into a contract for the sale of electric energy at wholesale or transmission service subject to the jurisdiction of the Commission has engaged in fraudulent market manipulation activities materially affecting the contract in violation of section 824v of this title.

(f) ERCOT utilities

This section shall not apply to a transaction for the purchase or sale of wholesale electric energy or transmission services within the area described in section 824k(k)(2)(A) of this title.

(June 10, 1920, ch. 285, pt. II, § 220, as added Pub. L. 109–58, title XII, § 1281, Aug. 8, 2005, 119 Stat. 978.)

REFERENCES IN TEXT

The Commodity Exchange Act, referred to in subsec. (c)(2), is act Sept. 21, 1922, ch. 369, 42 Stat. 998, as amended, which is classified generally to chapter 1 (§ 1 et seq.) of Title 7, Agriculture. For complete classification of this Act to the Code, see section 1 of Title 7 and Tables.

§ 824u. Prohibition on filing false information

No entity (including an entity described in section 824(f) of this title) shall willfully and knowingly report any information relating to the price of electricity sold at wholesale or the availability of transmission capacity, which information the person or any other entity knew to be false at the time of the reporting, to a Federal agency with intent to fraudulently affect the data being compiled by the Federal agency.

(June 10, 1920, ch. 285, pt. II, § 221, as added Pub. L. 109–58, title XII, § 1282, Aug. 8, 2005, 119 Stat. 979.)

§ 824v. Prohibition of energy market manipulation

(a) In general

It shall be unlawful for any entity (including an entity described in section 824(f) of this title), directly or indirectly, to use or employ, in connection with the purchase or sale of electric energy or the purchase or sale of transmission 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 title 15), in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of electric ratepayers.

(b) No private right of action

Nothing in this section shall be construed to create a private right of action.

(June 10, 1920, ch. 285, pt. II, § 222, as added Pub. L. 109–58, title XII, § 1283, Aug. 8, 2005, 119 Stat. 979.)

§ 824w. Joint boards on economic dispatch

(a) In general

The Commission shall convene joint boards on a regional basis pursuant to section 824h of this title to study the issue of security constrained economic dispatch for the various market regions. The Commission shall designate the appropriate regions to be covered by each such joint board for purposes of this section.

(b) Membership

The Commission shall request each State to nominate a representative for the appropriate regional joint board, and shall designate a member of the Commission to chair and participate as a member of each such board.

(c) Powers

The sole authority of each joint board convened under this section shall be to consider issues relevant to what constitutes ''security constrained economic dispatch'' and how such a mode of operating an electric energy system affects or enhances the reliability and affordability of service to customers in the region concerned and to make recommendations to the Commission regarding such issues.

ation, management, and control of all facilities for such generation, transmission, distribution, and sale; the capacity and output thereof and the relationship between the two; the cost of generation, transmission, and distribution; the rates, charges, and contracts in respect of the sale of electric energy and its service to residential, rural, commercial, and industrial consumers and other purchasers by private and public agencies; and the relation of any or all such facts to the development of navigation, industry, commerce, and the national defense. The Commission shall report to Congress the results of investigations made under authority of this section.

(June 10, 1920, ch. 285, pt. III, § 311, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 859.)

§ 825k. Publication and sale of reports

The Commission may provide for the publication of its reports and decisions in such form and manner as may be best adapted for public information and use, and is authorized to sell at reasonable prices copies of all maps, atlases, and reports as it may from time to time publish. Such reasonable prices may include the cost of compilation, composition, and reproduction. The Commission is also authorized to make such charges as it deems reasonable for special statistical services and other special or periodic services. The amounts collected under this section shall be deposited in the Treasury to the credit of miscellaneous receipts. All printing for the Federal Power Commission making use of engraving, lithography, and photolithography, together with the plates for the same, shall be contracted for and performed under the direction of the Commission, under such limitations and conditions as the Joint Committee on Printing may from time to time prescribe, and all other printing for the Commission shall be done by the Public Printer under such limitations and conditions as the Joint Committee on Printing may from time to time prescribe. The entire work may be done at, or ordered through, the Government Printing Office whenever, in the judgment of the Joint Committee on Printing, the same would be to the interest of the Government: *Provided*, That when the exigencies of the public service so require, the Joint Committee on Printing may authorize the Commission to make immediate contracts for engraving, lithographing, and photolithographing, without advertisement for proposals: *Provided further*, That nothing contained in this chapter or any other Act shall prevent the Federal Power Commission from placing orders with other departments or establishments for engraving, lithographing, and photolithographing, in accordance with the provisions of sections 1535 and 1536 of title 31, providing for interdepartmental work.

(June 10, 1920, ch. 285, pt. III, § 312, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 859.)

CODIFICATION

''Sections 1535 and 1536 of title 31'' substituted in text for ''sections 601 and 602 of the Act of June 30, 1932 (47 Stat. 417 [31 U.S.C. 686, 686b])'' on authority of Pub. L. 97–258, § 4(b), Sept. 13, 1982, 96 Stat. 1067, the first section of which enacted Title 31, Money and Finance.

§ 825*l*. Review of orders

(a) Application for rehearing; time periods; modification of order

Any person, electric utility, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this chapter to which such person, electric utility, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any entity unless such entity shall have made application to the Commission for a rehearing thereon. Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b) of this section, the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this chapter.

(b) Judicial review

Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the United States court of appeals for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the

hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28.

(c) Stay of Commission's order

The filing of an application for rehearing under subsection (a) of this section shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.

(June 10, 1920, ch. 285, pt. III, § 313, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 860; amended June 25, 1948, ch. 646, § 32(a), 62 Stat. 991; May 24, 1949, ch. 139, § 127, 63 Stat. 107; Pub. L. 85–791, § 16, Aug. 28, 1958, 72 Stat. 947; Pub. L. 109–58, title XII, § 1284(c), Aug. 8, 2005, 119 Stat. 980.)

CODIFICATION

In subsec. (b), ''section 1254 of title 28'' substituted for ''sections 239 and 240 of the Judicial Code, as amended (U.S.C., title 28, secs. 346 and 347)'' on authority of act June 25, 1948, ch. 646, 62 Stat. 869, the first section of which enacted Title 28, Judiciary and Judicial Procedure.

AMENDMENTS

2005—Subsec. (a). Pub. L. 109–58 inserted ''electric utility,'' after ''Any person,'' and ''to which such person,'' and substituted ''brought by any entity unless such entity'' for ''brought by any person unless such person''.

1958—Subsec. (a). Pub. L. 85–791, § 16(a), inserted sentence to provide that Commission may modify or set aside findings or orders until record has been filed in court of appeals.

Subsec. (b). Pub. L. 85–791, § 16(b), in second sentence, substituted ''transmitted by the clerk of the court to'' for ''served upon'', substituted ''file with the court'' for ''certify and file with the court a transcript of'', and inserted ''as provided in section 2112 of title 28'', and in third sentence, substituted ''jurisdiction, which upon the filing of the record with it shall be exclusive'' for ''exclusive jurisdiction''.

CHANGE OF NAME

Act June 25, 1948, eff. Sept. 1, 1948, as amended by act May 24, 1949, substituted ''court of appeals'' for ''circuit court of appeals''.

§ 825m. Enforcement provisions

(a) Enjoining and restraining violations

Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this chapter, or of any rule, regulation, or order thereunder, it may in its discretion bring an action in the proper District Court of the United States or the United States courts of any Territory or other place subject to the jurisdiction of the United States, to enjoin such acts or practices and to enforce compliance with this chapter or any rule, regulation, or order thereunder, and upon a proper showing a permanent or temporary injunction or decree or restraining order shall be granted without bond. The Commission may transmit such evidence as may be available concerning such acts or practices to the Attorney General, who, in his discretion, may institute the necessary criminal proceedings under this chapter.

(b) Writs of mandamus

Upon application of the Commission the district courts of the United States and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have jurisdiction to issue writs of mandamus commanding any person to comply with the provisions of this chapter or any rule, regulation, or order of the Commission thereunder.

(c) Employment of attorneys

The Commission may employ such attorneys as it finds necessary for proper legal aid and service of the Commission or its members in the conduct of their work, or for proper representation of the public interests in investigations made by it or cases or proceedings pending before it, whether at the Commission's own instance or upon complaint, or to appear for or represent the Commission in any case in court; and the expenses of such employment shall be paid out of the appropriation for the Commission.

(d) Prohibitions on violators

In any proceedings under subsection (a) of this section, the court may prohibit, conditionally or unconditionally, and permanently or for such period of time as the court determines, any individual who is engaged or has engaged in practices constituting a violation of section 824u of this title (and related rules and regulations) from—

(1) acting as an officer or director of an electric utility; or

(2) engaging in the business of purchasing or selling—

(A) electric energy; or

(B) transmission services subject to the jurisdiction of the Commission.

(June 10, 1920, ch. 285, pt. III, § 314, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 861; amended June 25, 1936, ch. 804, 49 Stat. 1921; June 25, 1948, ch. 646, § 32(b), 62 Stat. 991; May 24, 1949, ch. 139, § 127, 63 Stat. 107; Pub. L. 109–58, title XII, § 1288, Aug. 8, 2005, 119 Stat. 982.)

CODIFICATION

As originally enacted subsecs. (a) and (b) contained references to the Supreme Court of the District of Columbia. Act June 25, 1936, substituted ''the district court of the United States for the District of Columbia'' for ''the Supreme Court of the District of Columbia'', and act June 25, 1948, as amended by act May 24, 1949, substituted ''United States District Court for the District of Columbia'' for ''district court of the United States for the District of Columbia''. However, the words ''United States District Court for the District of Columbia'' have been deleted entirely as superfluous in

§ 825*o*–1. Enforcement of certain provisions

(a) Violations

It shall be unlawful for any person to violate any provision of subchapter II of this chapter or any rule or order issued under any such provision.

(b) Civil penalties

Any person who violates any provision of subchapter II of this chapter or any provision of any rule or order thereunder shall be subject to a civil penalty of not more than $1,000,000 for each day that such violation continues. Such penalty shall be assessed by the Commission, after notice and opportunity for public hearing, in accordance with the same provisions as are applicable under section 823b(d) of this title in the case of civil penalties assessed under section 823b of this title. In determining the amount of a proposed penalty, the Commission shall take into consideration the seriousness of the violation and the efforts of such person to remedy the violation in a timely manner.

(June 10, 1920, ch. 285, pt. III, § 316A, as added Pub. L. 102–486, title VII, § 725(b), Oct. 24, 1992, 106 Stat. 2920; amended Pub. L. 109–58, title XII, § 1284(e), Aug. 8, 2005, 119 Stat. 980.)

AMENDMENTS

2005—Pub. L. 109–58 substituted ''subchapter II of this chapter'' for ''section 824j, 824k, 824*l*, or 824m of this title'' in subsecs. (a) and (b) and ''$1,000,000'' for ''$10,000'' in subsec. (b).

STATE AUTHORITIES; CONSTRUCTION

Nothing in this section to be construed as affecting or intending to affect, or in any way to interfere with, authority of any State or local government relating to environmental protection or siting of facilities, see section 731 of Pub. L. 102–486, set out as a note under section 796 of this title.

§ 825p. Jurisdiction of offenses; enforcement of liabilities and duties

The District Courts of the United States, and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction of violations of this chapter or the rules, regulations, and orders thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by, or to enjoin any violation of this chapter or any rule, regulation, or order thereunder. Any criminal proceeding shall be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty created by, or to enjoin any violation of, this chapter or any rule, regulation, or order thereunder may be brought in any such district or in the district wherein the defendant is an inhabitant, and process in such cases may be served wherever the defendant may be found. Judgments and decrees so rendered shall be subject to review as provided in sections 1254, 1291, and 1292 of title 28. No costs shall be assessed against the Commission in any judicial proceeding by or against the Commission under this chapter.

(June 10, 1920, ch. 285, pt. III, § 317, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 862; amended June 25, 1936, ch. 804, 49 Stat. 1921; June 25, 1948, ch. 646, § 32(b), 62 Stat. 991; May 24, 1949, ch. 139, § 127, 63 Stat. 107.)

CODIFICATION

As originally enacted, this section contained reference to the Supreme Court of the District of Columbia. Act June 25, 1936, substituted ''the district court of the United States for the District of Columbia'' for ''the Supreme Court of the District of Columbia'', and act June 25, 1948, as amended by act May 24, 1949, substituted ''United States District Court for the District of Columbia'' for ''district court of the United States for the District of Columbia''. However, the words ''United States District Court for the District of Columbia'' have been deleted entirely as superfluous in view of section 132(a) of Title 28, Judiciary and Judicial Procedure, which states that ''There shall be in each judicial district a district court which shall be a court of record known as the United States District Court for the district'', and section 88 of Title 28 which states that ''the District of Columbia constitutes one judicial district''.

''Sections 1254, 1291, and 1292 of title 28'', referred to in text, were substituted for ''sections 128 and 240 of the Judicial Code, as amended (U.S.C. title 28, secs. 225 and 347)'' on authority of act June 25, 1948, ch. 646, 62 Stat. 869, the first section of which enacted Title 28, Judiciary and Judicial Procedure.

§ 825q. Repealed. Pub. L. 109–58, title XII, § 1277(a), Aug. 8, 2005, 119 Stat. 978

Section, act June 10, 1920, ch. 285, pt. III, § 318, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 863, related to conflict of jurisdiction.

EFFECTIVE DATE OF REPEAL

Repeal effective 6 months after Aug. 8, 2005, with provisions relating to effect of compliance with certain regulations approved and made effective prior to such date, see section 1274 of Pub. L. 109–58, set out as an Effective Date note under section 16451 of Title 42, The Public Health and Welfare.

§ 825q–1. Office of Public Participation

(a)(1) There shall be an office in the Commission to be known as the Office of Public Participation (hereinafter in this section referred to as the ''Office'').

(2)(A) The Office shall be administered by a Director. The Director shall be appointed by the Chairman with the approval of the Commission. The Director may be removed during his term of office by the Chairman, with the approval of the Commission, only for inefficiency, neglect of duty, or malfeasance in office.

(B) The term of office of the Director shall be 4 years. The Director shall be responsible for the discharge of the functions and duties of the Office. He shall be appointed and compensated at a rate not in excess of the maximum rate prescribed for GS–18 of the General Schedule under section 5332 of title 5.

(3) The Director may appoint, and assign the duties of, employees of such Office, and with the concurrence of the Commission he may fix the compensation of such employees and procure temporary and intermittent services to the same extent as is authorized under section 3109 of title 5.

(b)(1) The Director shall coordinate assistance to the public with respect to authorities exercised by the Commission. The Director shall also coordinate assistance available to persons

(d) Vehicular natural gas jurisdiction

The provisions of this chapter shall not apply to any person solely by reason of, or with respect to, any sale or transportation of vehicular natural gas if such person is—

(1) not otherwise a natural-gas company; or

(2) subject primarily to regulation by a State commission, whether or not such State commission has, or is exercising, jurisdiction over the sale, sale for resale, or transportation of vehicular natural gas.

(June 21, 1938, ch. 556, §1, 52 Stat. 821; Mar. 27, 1954, ch. 115, 68 Stat. 36; Pub. L. 102–486, title IV, §404(a)(1), Oct. 24, 1992, 106 Stat. 2879; Pub. L. 109–58, title III, §311(a), Aug. 8, 2005, 119 Stat. 685.)

AMENDMENTS

2005—Subsec. (b). Pub. L. 109–58 inserted ''and to the importation or exportation of natural gas in foreign commerce and to persons engaged in such importation or exportation,'' after ''such transportation or sale,''.

1992—Subsec. (d). Pub. L. 102–486 added subsec. (d).

1954—Subsec. (c). Act Mar. 27, 1954, added subsec. (c).

TERMINATION OF FEDERAL POWER COMMISSION; TRANSFER OF FUNCTIONS

Federal Power Commission terminated and functions, personnel, property, funds, etc., transferred to Secretary of Energy (except for certain functions transferred to Federal Energy Regulatory Commission) by sections 7151(b), 7171(a), 7172(a), 7291, and 7293 of Title 42, The Public Health and Welfare.

STATE LAWS AND REGULATIONS

Section 404(b) of Pub. L. 102–486 provided that: ''The transportation or sale of natural gas by any person who is not otherwise a public utility, within the meaning of State law—

''(1) in closed containers; or

''(2) otherwise to any person for use by such person as a fuel in a self-propelled vehicle,

shall not be considered to be a transportation or sale of natural gas within the meaning of any State law, regulation, or order in effect before January 1, 1989. This subsection shall not apply to any provision of any State law, regulation, or order to the extent that such provision has as its primary purpose the protection of public safety.''

EMERGENCY NATURAL GAS ACT OF 1977

Pub. L. 95–2, Feb. 2, 1977, 91 Stat. 4, authorized President to declare a natural gas emergency and to require emergency deliveries and transportation of natural gas until the earlier of Apr. 30, 1977, or termination of emergency by President and provided for antitrust protection, emergency purchases, adjustment in charges for local distribution companies, relationship to Natural Gas Act, effect of certain contractual obligations, administrative procedure and judicial review, enforcement, reporting to Congress, delegation of authorities, and preemption of inconsistent State or local action.

EXECUTIVE ORDER NO. 11969

Ex. Ord. No. 11969, Feb. 2, 1977, 42 F.R. 6791, as amended by Ex. Ord. No. 12038, Feb. 3, 1978, 43 F.R. 4957, which delegated to the Secretary of Energy the authority vested in the President by the Emergency Natural Gas Act of 1977 except the authority to declare and terminate a natural gas emergency, was revoked by Ex. Ord. No. 12553, Feb. 25, 1986, 51 F.R. 7237.

PROCLAMATION NO. 4485

Proc. No. 4485, Feb. 2, 1977, 42 F.R. 6789, declared that a natural gas emergency existed within the meaning of section 3 of the Emergency Natural Gas Act of 1977, set out as a note above, which emergency was terminated by Proc. No. 4495, Apr. 1, 1977, 42 F.R. 18053, formerly set out below.

PROCLAMATION NO. 4495

Proc. No. 4495, Apr. 1, 1977, 42 F.R. 18053, terminated the natural gas emergency declared to exist by Proc. No. 4485, Feb. 2, 1977, 42 F.R. 6789, formerly set out above.

§ 717a. Definitions

When used in this chapter, unless the context otherwise requires—

(1) ''Person'' includes an individual or a corporation.

(2) ''Corporation'' includes any corporation, joint-stock company, partnership, association, business trust, organized group of persons, whether incorporated or not, receiver or receivers, trustee or trustees of any of the foregoing, but shall not include municipalities as hereinafter defined.

(3) ''Municipality'' means a city, county, or other political subdivision or agency of a State.

(4) ''State'' means a State admitted to the Union, the District of Columbia, and any organized Territory of the United States.

(5) ''Natural gas'' means either natural gas unmixed, or any mixture of natural and artificial gas.

(6) ''Natural-gas company'' means a person engaged in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such gas for resale.

(7) ''Interstate commerce'' means commerce between any point in a State and any point outside thereof, or between points within the same State but through any place outside thereof, but only insofar as such commerce takes place within the United States.

(8) ''State commission'' means the regulatory body of the State or municipality having jurisdiction to regulate rates and charges for the sale of natural gas to consumers within the State or municipality.

(9) ''Commission'' and ''Commissioner'' means the Federal Power Commission, and a member thereof, respectively.

(10) ''Vehicular natural gas'' means natural gas that is ultimately used as a fuel in a self-propelled vehicle.

(11) ''LNG terminal'' includes all natural gas facilities located onshore or in State waters that are used to receive, unload, load, store, transport, gasify, liquefy, or process natural gas that is imported to the United States from a foreign country, exported to a foreign country from the United States, or transported in interstate commerce by waterborne vessel, but does not include—

(A) waterborne vessels used to deliver natural gas to or from any such facility; or

(B) any pipeline or storage facility subject to the jurisdiction of the Commission under section 717f of this title.

(June 21, 1938, ch. 556, §2, 52 Stat. 821; Pub. L. 102–486, title IV, §404(a)(2), Oct. 24, 1992, 106 Stat. 2879; Pub. L. 109–58, title III, §311(b), Aug. 8, 2005, 119 Stat. 685.)

force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Authority of Commission to hold hearings concerning new schedule of rates

Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, State commission, or gas distributing company, or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

(f) Storage services

(1) In exercising its authority under this chapter or the Natural Gas Policy Act of 1978 (15 U.S.C. 3301 et seq.), the Commission may authorize a natural gas company (or any person that will be a natural gas company on completion of any proposed construction) to provide storage and storage-related services at market-based rates for new storage capacity related to a specific facility placed in service after August 8, 2005, notwithstanding the fact that the company is unable to demonstrate that the company lacks market power, if the Commission determines that—

(A) market-based rates are in the public interest and necessary to encourage the construction of the storage capacity in the area needing storage services; and

(B) customers are adequately protected.

(2) The Commission shall ensure that reasonable terms and conditions are in place to protect consumers.

(3) If the Commission authorizes a natural gas company to charge market-based rates under this subsection, the Commission shall review periodically whether the market-based rate is just, reasonable, and not unduly discriminatory or preferential.

(June 21, 1938, ch. 556, § 4, 52 Stat. 822; Pub. L. 87–454, May 21, 1962, 76 Stat. 72; Pub. L. 109–58, title III, § 312, Aug. 8, 2005, 119 Stat. 688.)

REFERENCES IN TEXT

The Natural Gas Policy Act of 1978, referred to in subsec. (f)(1), is Pub. L. 95–621, Nov. 9, 1978, 92 Stat. 3350, as amended, which is classified generally to chapter 60 (§ 3301 et seq.) of this title. For complete classification of this Act to the Code, see Short Title note set out under section 3301 of this title and Tables.

AMENDMENTS

2005—Subsec. (f). Pub. L. 109–58 added subsec. (f).

1962—Subsec. (e). Pub. L. 87–454 inserted ''or gas distributing company'' after ''State commission'', and struck out proviso which denied authority to the Commission to suspend the rate, charge, classification, or service for the sale of natural gas for resale for industrial use only.

ADVANCE RECOVERY OF EXPENSES INCURRED BY NATURAL GAS COMPANIES FOR NATURAL GAS RESEARCH, DEVELOPMENT, AND DEMONSTRATION PROJECTS

Pub. L. 102–104, title III, Aug. 17, 1991, 105 Stat. 531, authorized Federal Energy Regulatory Commission, pursuant to this section, to allow recovery, in advance, of expenses by natural-gas companies for research, development and demonstration activities by Gas Research Institute for projects on use of natural gas in motor vehicles and on use of natural gas to control emissions from combustion of other fuels, subject to Commission finding that benefits, including environmental benefits, to both existing and future ratepayers resulting from such activities exceed all direct costs to both existing and future ratepayers, prior to repeal by Pub. L. 102–486, title IV, § 408(c), Oct. 24, 1992, 106 Stat. 2882.

§ 717c–1. Prohibition on market manipulation

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.

(June 21, 1938, ch. 556, § 4A, as added Pub. L. 109–58, title III, § 315, Aug. 8, 2005, 119 Stat. 691.)

therein, rules and regulations of the Commission shall be effective thirty days after publication in the manner which the Commission shall prescribe. Orders of the Commission shall be effective on the date and in the manner which the Commission shall prescribe. For the purposes of its rules and regulations, the Commission may classify persons and matters within its jurisdiction and prescribe different requirements for different classes of persons or matters. All rules and regulations of the Commission shall be filed with its secretary and shall be kept open in convenient form for public inspection and examination during reasonable business hours.

(June 21, 1938, ch. 556, § 16, 52 Stat. 830.)

§ 717p. Joint boards

(a) Reference of matters to joint boards; composition and power

The Commission may refer any matter arising in the administration of this chapter to a board to be composed of a member or members, as determined by the Commission, from the State or each of the States affected or to be affected by such matter. Any such board shall be vested with the same power and be subject to the same duties and liabilities as in the case of a member of the Commission when designated by the Commission to hold any hearings. The action of such board shall have such force and effect and its proceedings shall be conducted in such manner as the Commission shall by regulations prescribe. The Board shall be appointed by the Commission from persons nominated by the State commission of each State affected, or by the Governor of such State if there is no State commission. Each State affected shall be entitled to the same number of representatives on the board unless the nominating power of such State waives such right. The Commission shall have discretion to reject the nominee from any State, but shall thereupon invite a new nomination from that State. The members of a board shall receive such allowances for expenses as the Commission shall provide. The Commission may, when in its discretion sufficient reason exists therefor, revoke any reference to such a board.

(b) Conference with State commissions regarding rate structure, costs, etc.

The Commission may confer with any State commission regarding rate structures, costs, accounts, charges, practices, classifications, and regulations of natural-gas companies; and the Commission is authorized, under such rules and regulations as it shall prescribe, to hold joint hearings with any State commission in connection with any matter with respect to which the Commission is authorized to act. The Commission is authorized in the administration of this chapter to avail itself of such cooperation, services, records, and facilities as may be afforded by any State commission.

(c) Information and reports available to State commissions

The Commission shall make available to the several State commissions such information and reports as may be of assistance in State regulation of natural-gas companies. Whenever the Commission can do so without prejudice to the efficient and proper conduct of its affairs, it may, upon request from a State commission, make available to such State commission as witnesses any of its trained rate, valuation, or other experts, subject to reimbursement of the compensation and traveling expenses of such witnesses. All sums collected hereunder shall be credited to the appropriation from which the amounts were expended in carrying out the provisions of this subsection.

(June 21, 1938, ch. 556, § 17, 52 Stat. 830.)

§ 717q. Appointment of officers and employees

The Commission is authorized to appoint and fix the compensation of such officers, attorneys, examiners, and experts as may be necessary for carrying out its functions under this chapter; and the Commission may, subject to civil-service laws, appoint such other officers and employees as are necessary for carrying out such functions and fix their salaries in accordance with chapter 51 and subchapter III of chapter 53 of title 5.

(June 21, 1938, ch. 556, § 18, 52 Stat. 831; Oct. 28, 1949, ch. 782, title XI, § 1106(a), 63 Stat. 972.)

CODIFICATION

Provisions that authorized the Commission to appoint and fix the compensation of such officers, attorneys, examiners, and experts as may be necessary for carrying out its functions under this chapter ''without regard to the provisions of other laws applicable to the employment and compensation of officers and employees of the United States'' are omitted as obsolete and superseded.

As to the compensation of such personnel, sections 1202 and 1204 of the Classification Act of 1949, 63 Stat. 972, 973, repealed the Classification Act of 1923 and all other laws or parts of laws inconsistent with the 1949 Act. The Classification Act of 1949 was repealed by Pub. L. 89–554, Sept. 6, 1966, § 8(a), 80 Stat. 632, and reenacted as chapter 51 and subchapter III of chapter 53 of Title 5, Government Organization and Employees. Section 5102 of Title 5 contains the applicability provisions of the 1949 Act, and section 5103 of Title 5 authorizes the Office of Personnel Management to determine the applicability to specific positions and employees.

Such appointments are now subject to the civil service laws unless specifically excepted by those laws or by laws enacted subsequent to Executive Order 8743, Apr. 23, 1941, issued by the President pursuant to the Act of Nov. 26, 1940, ch. 919, title I, § 1, 54 Stat. 1211, which covered most excepted positions into the classified (competitive) civil service. The Order is set out as a note under section 3301 of Title 5.

''Chapter 51 and subchapter III of chapter 53 of title 5'' substituted in text for ''the Classification Act of 1949, as amended'' on authority of Pub. L. 89–554, § 7(b), Sept. 6, 1966, 80 Stat. 631, the first section of which enacted Title 5.

AMENDMENTS

1949—Act Oct. 28, 1949, substituted ''Classification Act of 1949'' for ''Classification Act of 1923''.

REPEALS

Act Oct. 28, 1949, ch. 782, cited as a credit to this section, was repealed (subject to a savings clause) by Pub. L. 89–554, Sept. 6, 1966, § 8, 80 Stat. 632, 655.

§ 717r. Rehearing and review

(a) Application for rehearing; time

Any person, State, municipality, or State commission aggrieved by an order issued by the

Commission in a proceeding under this chapter to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon. Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b) of this section, the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this chapter.

(b) Review of Commission order

Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which is supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28.

(c) Stay of Commission order

The filing of an application for rehearing under subsection (a) of this section shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.

(d) Judicial review

(1) In general

The United States Court of Appeals for the circuit in which a facility subject to section 717b of this title or section 717f of this title is proposed to be constructed, expanded, or operated shall have original and exclusive jurisdiction over any civil action for the review of an order or action of a Federal agency (other than the Commission) or State administrative agency acting pursuant to Federal law to issue, condition, or deny any permit, license, concurrence, or approval (hereinafter collectively referred to as ''permit'') required under Federal law, other than the Coastal Zone Management Act of 1972 (16 U.S.C. 1451 et seq.).

(2) Agency delay

The United States Court of Appeals for the District of Columbia shall have original and exclusive jurisdiction over any civil action for the review of an alleged failure to act by a Federal agency (other than the Commission) or State administrative agency acting pursuant to Federal law to issue, condition, or deny any permit required under Federal law, other than the Coastal Zone Management Act of 1972 (16 U.S.C. 1451 et seq.), for a facility subject to section 717b of this title or section 717f of this title. The failure of an agency to take action on a permit required under Federal law, other than the Coastal Zone Management Act of 1972, in accordance with the Commission schedule established pursuant to section 717n(c) of this title shall be considered inconsistent with Federal law for the purposes of paragraph (3).

(3) Court action

If the Court finds that such order or action is inconsistent with the Federal law governing such permit and would prevent the construction, expansion, or operation of the facility subject to section 717b of this title or section 717f of this title, the Court shall remand the proceeding to the agency to take appropriate action consistent with the order of the Court. If the Court remands the order or action to the Federal or State agency, the Court shall set a reasonable schedule and deadline for the agency to act on remand.

(4) Commission action

For any action described in this subsection, the Commission shall file with the Court the

consolidated record of such order or action to which the appeal hereunder relates.

(5) Expedited review

The Court shall set any action brought under this subsection for expedited consideration.

(June 21, 1938, ch. 556, § 19, 52 Stat. 831; June 25, 1948, ch. 646, § 32(a), 62 Stat. 991; May 24, 1949, ch. 139, § 127, 63 Stat. 107; Pub. L. 85–791, § 19, Aug. 28, 1958, 72 Stat. 947; Pub. L. 109–58, title III, § 313(b), Aug. 8, 2005, 119 Stat. 689.)

REFERENCES IN TEXT

The Coastal Zone Management Act of 1972, referred to in subsec. (d)(1), (2), is title III of Pub. L. 89–454, as added by Pub. L. 92–583, Oct. 27, 1972, 86 Stat. 1280, as amended, which is classified generally to chapter 33 (§ 1451 et seq.) of Title 16, Conservation. For complete classification of this Act to the Code, see Short Title note set out under section 1451 of Title 16 and Tables.

CODIFICATION

In subsec. (b), ''section 1254 of title 28'' substituted for ''sections 239 and 240 of the Judicial Code, as amended [28 U.S.C. 346, 347]'' on authority of act June 25, 1948, ch. 646, 62 Stat. 869, the first section of which enacted Title 28, Judiciary and Judicial Procedure.

AMENDMENTS

2005—Subsec. (d). Pub. L. 109–58 added subsec. (d).

1958—Subsec. (a). Pub. L. 85–791, § 19(a), inserted sentence providing that until record in a proceeding has been filed in a court of appeals, Commission may modify or set aside any finding or order issued by it.

Subsec. (b). Pub. L. 85–791, § 19(b), in second sentence, substituted ''transmitted by the clerk of the court to'' for ''served upon'', substituted ''file with the court'' for ''certify and file with the court a transcript of'', and inserted ''as provided in section 2112 of title 28'', and, in third sentence, substituted ''petition'' for ''transcript'', and ''jurisdiction, which upon the filing of the record with it shall be exclusive'' for ''exclusive jurisdiction''.

CHANGE OF NAME

Act June 25, 1948, eff. Sept. 1, 1948, as amended by act May 24, 1949, substituted ''court of appeals'' for ''circuit court of appeals'' wherever appearing.

§ 717s. Enforcement of chapter

(a) Action in district court for injunction

Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this chapter, or of any rule, regulation, or order thereunder, it may in its discretion bring an action in the proper district court of the United States, or the United States courts of any Territory or other place subject to the jurisdiction of the United States, to enjoin such acts or practices and to enforce compliance with this chapter or any rule, regulation, or order thereunder, and upon a proper showing a permanent or temporary injunction or decree or restraining order shall be granted without bond. The Commission may transmit such evidence as may be available concerning such acts or practices or concerning apparent violations of the Federal antitrust laws to the Attorney General, who, in his discretion, may institute the necessary criminal proceedings.

(b) Mandamus

Upon application of the Commission the district courts of the United States and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have jurisdiction to issue writs of mandamus commanding any person to comply with the provisions of this chapter or any rule, regulation, or order of the Commission thereunder.

(c) Employment of attorneys by Commission

The Commission may employ such attorneys as it finds necessary for proper legal aid and service of the Commission or its members in the conduct of their work, or for proper representation of the public interest in investigations made by it, or cases or proceedings pending before it, whether at the Commission's own instance or upon complaint, or to appear for or represent the Commission in any case in court; and the expenses of such employment shall be paid out of the appropriation for the Commission.

(d) Violation of market manipulation provisions

In any proceedings under subsection (a) of this section, the court may prohibit, conditionally or unconditionally, and permanently or for such period of time as the court determines, any individual who is engaged or has engaged in practices constituting a violation of section 717c–1 of this title (including related rules and regulations) from—

(1) acting as an officer or director of a natural gas company; or

(2) engaging in the business of—

(A) the purchasing or selling of natural gas; or

(B) the purchasing or selling of transmission services subject to the jurisdiction of the Commission.

(June 21, 1938, ch. 556, § 20, 52 Stat. 832; June 25, 1948, ch. 646, § 1, 62 Stat. 875, 895; Pub. L. 109–58, title III, § 318, Aug. 8, 2005, 119 Stat. 693.)

CODIFICATION

The words ''the District Court of the United States for the District of Columbia'' in subsec. (a) following ''district court of the United States'' and in subsec. (b) following ''district courts of the United States'' omitted as superfluous in view of section 132(a) of Title 28, Judiciary and Judicial Procedure, which states that ''There shall be in each judicial district a district court which shall be a court of record known as the United States District Court for the district'', and section 88 of title 28 which states that ''The District of Columbia constitutes one judicial district''.

AMENDMENTS

2005—Subsec. (d). Pub. L. 109–58 added subsec. (d).

§ 717t. General penalties

(a) Any person who willfully and knowingly does or causes or suffers to be done any act, matter, or thing in this chapter prohibited or declared to be unlawful, or who willfully and knowingly omits or fails to do any act, matter, or thing in this chapter required to be done, or willfully and knowingly causes or suffers such omission or failure, shall, upon conviction thereof, be punished by a fine of not more than $1,000,000 or by imprisonment for not more than 5 years, or both.

(b) Any person who willfully and knowingly violates any rule, regulation, restriction, condi-

tion, or order made or imposed by the Commission under authority of this chapter, shall, in addition to any other penalties provided by law, be punished upon conviction thereof by a fine of not exceeding $50,000 for each and every day during which such offense occurs.

(June 21, 1938, ch. 556, § 21, 52 Stat. 833; Pub. L. 109–58, title III, § 314(a)(1), Aug. 8, 2005, 119 Stat. 690.)

AMENDMENTS

2005—Subsec. (a). Pub. L. 109–58, § 314(a)(1)(A), substituted ''$1,000,000'' for ''$5,000'' and ''5 years'' for ''two years''.

Subsec. (b). Pub. L. 109–58, § 314(a)(1)(B), substituted ''$50,000'' for ''$500''.

§ 717t–1. Civil penalty authority

(a) In general

Any person that violates this chapter, or any rule, regulation, restriction, condition, or order made or imposed by the Commission under authority of this chapter, shall be subject to a civil penalty of not more than $1,000,000 per day per violation for as long as the violation continues.

(b) Notice

The penalty shall be assessed by the Commission after notice and opportunity for public hearing.

(c) Amount

In determining the amount of a proposed penalty, the Commission shall take into consideration the nature and seriousness of the violation and the efforts to remedy the violation.

(June 21, 1938, ch. 556, § 22, as added Pub. L. 109–58, title III, § 314(b)(1)(B), Aug. 8, 2005, 119 Stat. 691.)

PRIOR PROVISIONS

A prior section 22 of act June 21, 1938, was renumbered section 24 and is classified to section 717u of this title.

§ 717t–2. Natural gas market transparency rules

(a) In general

(1) The Commission is directed to facilitate price transparency in markets for the sale or transportation of physical natural gas in interstate commerce, having due regard for the public interest, the integrity of those markets, fair competition, and the protection of consumers.

(2) The Commission may prescribe such rules as the Commission determines necessary and appropriate to carry out the purposes of this section. The rules shall provide for the dissemination, on a timely basis, of information about the availability and prices of natural gas sold at wholesale and in interstate commerce to the Commission, State commissions, buyers and sellers of wholesale natural gas, and the public.

(3) The Commission may—

(A) obtain the information described in paragraph (2) from any market participant; and

(B) rely on entities other than the Commission to receive and make public the information, subject to the disclosure rules in subsection (b) of this section.

(4) In carrying out this section, the Commission shall consider the degree of price transparency provided by existing price publishers and providers of trade processing services, and shall rely on such publishers and services to the maximum extent possible. The Commission may establish an electronic information system if it determines that existing price publications are not adequately providing price discovery or market transparency.

(b) Information exempted from disclosure

(1) Rules described in subsection (a)(2) of this section, if adopted, shall exempt from disclosure information the Commission determines would, if disclosed, be detrimental to the operation of an effective market or jeopardize system security.

(2) In determining the information to be made available under this section and the time to make the information available, the Commission shall seek to ensure that consumers and competitive markets are protected from the adverse effects of potential collusion or other anticompetitive behaviors that can be facilitated by untimely public disclosure of transaction-specific information.

(c) Information sharing

(1) Within 180 days of August 8, 2005, the Commission shall conclude a memorandum of understanding with the Commodity Futures Trading Commission relating to information sharing, which shall include, among other things, provisions ensuring that information requests to markets within the respective jurisdiction of each agency are properly coordinated to minimize duplicative information requests, and provisions regarding the treatment of proprietary trading information.

(2) Nothing in this section may be construed to limit or affect the exclusive jurisdiction of the Commodity Futures Trading Commission under the Commodity Exchange Act (7 U.S.C. 1 et seq.).

(d) Compliance with requirements

(1) The Commission shall not condition access to interstate pipeline transportation on the reporting requirements of this section.

(2) The Commission shall not require natural gas producers, processors, or users who have a de minimis market presence to comply with the reporting requirements of this section.

(e) Retroactive effect

(1) Except as provided in paragraph (2), no person shall be subject to any civil penalty under this section with respect to any violation occurring more than 3 years before the date on which the person is provided notice of the proposed penalty under section 717t–1(b) of this title.

(2) Paragraph (1) shall not apply in any case in which the Commission finds that a seller that has entered into a contract for the transportation or sale of natural gas subject to the jurisdiction of the Commission has engaged in fraudulent market manipulation activities materially affecting the contract in violation of section 717c–1 of this title.

(June 21, 1938, ch. 556, § 23, as added Pub. L. 109–58, title III, § 316, Aug. 8, 2005, 119 Stat. 691.)

REFERENCES IN TEXT

The Commodity Exchange Act, referred to in subsec. (c)(2), is act Sept. 21, 1922, ch. 369, 42 Stat. 998, as amended, which is classified generally to chapter 1 (§1 et seq.) of Title 7, Agriculture. For complete classification of this Act to the Code, see section 1 of Title 7 and Tables.

PRIOR PROVISIONS

A prior section 23 of act June 21, 1938, was renumbered section 25 and is classified to section 717v of this title.

§ 717u. Jurisdiction of offenses; enforcement of liabilities and duties

The District Courts of the United States and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction of violations of this chapter or the rules, regulations, and orders thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by, or to enjoin any violation of, this chapter or any rule, regulation, or order thereunder. Any criminal proceeding shall be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty created by, or to enjoin any violation of, this chapter or any rule, regulation, or order thereunder may be brought in any such district or in the district wherein the defendant is an inhabitant, and process in such cases may be served wherever the defendant may be found. Judgments and decrees so rendered shall be subject to review as provided in sections 1254, 1291, and 1292 of title 28. No costs shall be assessed against the Commission in any judicial proceeding by or against the Commission under this chapter.

(June 21, 1938, ch. 556, §24, formerly §22, 52 Stat. 833; June 25, 1948, ch. 646, §1, 62 Stat. 875, 895; renumbered §24, Pub. L. 109–58, title III, §314(b)(1)(A), Aug. 8, 2005, 119 Stat. 690.)

CODIFICATION

The words ''the District Court of the United States for the District of Columbia'' following ''The District Courts of the United States'' omitted as superfluous in view of section 132(a) of Title 28, Judiciary and Judicial Procedure, which states that ''There shall be in each judicial district a district court which shall be a court of record known as the United States District Court for the district'' and section 88 of title 28 which states that ''The District of Columbia constitutes one judicial district''.

''Sections 1254, 1291, and 1292 of title 28'' substituted in text for ''sections 128 and 240 of the Judicial Code, as amended [28 U.S.C. 225 and 347]'' on authority of act June 25, 1948, ch. 646, 62 Stat. 869, the first section of which enacted Title 28.

PRIOR PROVISIONS

A prior section 24 of act June 21, 1938, was renumbered section 26 and is classified to section 717w of this title.

§ 717v. Separability

If any provision of this chapter, or the application of such provision to any person or circumstance, shall be held invalid, the remainder of the chapter, and the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby.

(June 21, 1938, ch. 556, §25, formerly §23, 52 Stat. 833; renumbered §25, Pub. L. 109–58, title III, §314(b)(1)(A), Aug. 8, 2005, 119 Stat. 690.)

§ 717w. Short title

This chapter may be cited as the ''Natural Gas Act.''

(June 21, 1938, ch. 556, §26, formerly §24, 52 Stat. 833; renumbered §26, Pub. L. 109–58, title III, §314(b)(1)(A), Aug. 8, 2005, 119 Stat. 690.)

SHORT TITLE OF 1988 AMENDMENT

Pub. L. 100–474, §1, Oct. 6, 1988, 102 Stat. 2302, provided that: ''This Act [amending section 717f of this title and enacting provisions set out as a note under section 717f of this title] may be cited as the 'Uniform Regulatory Jurisdiction Act of 1988'.''

§ 717x. Conserved natural gas

(a) Determination of entitlement

(1) For purposes of determining the natural gas entitlement of any local distribution company under any curtailment plan, if the Commission revises any base period established under such plan, the volumes of natural gas which such local distribution company demonstrates—

(A) were sold by the local distribution company, for a priority use immediately before the implementation of conservation measures, and

(B) were conserved by reason of the implementation of such conservation measures,

shall be treated by the Commission following such revision as continuing to be used for the priority use referred to in subparagraph (A).

(2) The Commission shall, by rule, prescribe methods for measurement of volumes of natural gas to which subparagraphs (A) and (B) of paragraph (1) apply.

(b) Conditions, limitations, etc.

Subsection (a) of this section shall not limit or otherwise affect any provision of any curtailment plan, or any other provision of law or regulation, under which natural gas may be diverted or allocated to respond to emergency situations or to protect public health, safety, and welfare.

(c) Definitions

For purposes of this section—

(1) The term ''conservation measures'' means such energy conservation measures, as determined by the Commission, as were implemented after the base period established under the curtailment plan in effect on November 9, 1978.

(2) The term ''local distribution company'' means any person engaged in the transportation, or local distribution, of natural gas and the sale of natural gas for ultimate consumption.

(3) The term ''curtailment plan'' means a plan (including any modification of such plan required by the Natural Gas Policy Act of 1978 [15 U.S.C. 3301 et seq.]) in effect under the Natural Gas Act [15 U.S.C. 717 et seq.] which provides for recognizing and implementing prior-

(Pub. L. 95–621, title IV, § 404, Nov. 9, 1978, 92 Stat. 3396.)

REFERENCES IN TEXT

The Natural Gas Act, referred to in subsec. (b), is act June 21, 1938, ch. 556, 52 Stat. 821, as amended, which is classified generally to chapter 15B (§ 717 et seq.) of this title. For complete classification of this act to the Code, see section 717w of this title and Tables.

SUBCHAPTER V—ADMINISTRATION, ENFORCEMENT, AND REVIEW

§ 3411. General rulemaking authority

(a) In general

Except where expressly provided otherwise, the Commission shall administer this chapter. The Commission, or any other Federal officer or agency in which any function under this chapter is vested or delegated, is authorized to perform any and all acts (including any appropriate enforcement activity), and to prescribe, issue, amend, and rescind such rules and orders as it may find necessary or appropriate to carry out its functions under this chapter.

(b) Authority to define terms

Except where otherwise expressly provided, the Commission is authorized to define, by rule, accounting, technical, and trade terms used in this chapter. Any such definition shall be consistent with the definitions set forth in this chapter.

(Pub. L. 95–621, title V, § 501, Nov. 9, 1978, 92 Stat. 3396; Pub. L. 101–60, § 3(b)(4), July 26, 1989, 103 Stat. 159.)

AMENDMENTS

1989—Subsec. (c). Pub. L. 101–60 struck out subsec. (c) which authorized Commission to delegate to any State agency (with consent of such agency) any of its functions with respect to sections 3315, 3316(b), and 3319(a)(1) and (3) of this title.

EFFECTIVE DATE OF 1989 AMENDMENT

Amendment by Pub. L. 101–60 effective Jan. 1, 1993, see section 3(b) of Pub. L. 101–60, set out as a note under section 3372 of this title.

§ 3412. Administrative procedure

(a) Administrative Procedure Act

Subject to subsection (b) of this section, the provisions of subchapter II of chapter 5 of title 5 shall apply to any rule or order issued under this chapter having the applicability and effect of a rule as defined in section 551(4) of title 5; except that sections 554, 556, and 557 of such title 5 shall not apply to any order under such section 3361, 3362, or 3363 of this title.

(b) Opportunity for oral presentations

To the maximum extent practicable, an opportunity for oral presentation of data, views, and arguments shall be afforded with respect to any proposed rule or order described in subsection (a) of this section (other than an order under section 3361, 3362, or 3363 of this title). To the maximum extent practicable, such opportunity shall be afforded before the effective date of such rule or order. Such opportunity shall be afforded no later than 30 days after such date in the case of a waiver of the entire comment period under section 553(d)(3) of title 5, and no later than 45 days after such date in all other cases. A transcript shall be made of any such oral presentation.

(c) Adjustments

The Commission or any other Federal officer or agency authorized to issue rules or orders described in subsection (a) of this section (other than an order under section 3361, 3362, or 3363 of this title) shall, by rule, provide for the making of such adjustments, consistent with the other purposes of this chapter, as may be necessary to prevent special hardship, inequity, or an unfair distribution of burdens. Such rule shall establish procedures which are available to any person for the purpose of seeking an interpretation, modification, or rescission of, exception to, or exemption from, such applicable rules or orders. If any person is aggrieved or adversely affected by the denial of a request for adjustment under the preceding sentence, such person may request a review of such denial by the officer or agency and may obtain judicial review in accordance with section 3416 of this title when such denial becomes final. The officer or agency shall, by rule, establish procedures, including an opportunity for oral presentation of data, views, and arguments, for considering requests for adjustment under this subsection.

(Pub. L. 95–621, title V, § 502, Nov. 9, 1978, 92 Stat. 3397; Pub. L. 101–60, § 3(a)(3), July 26, 1989, 103 Stat. 158.)

AMENDMENTS

1989—Subsec. (d). Pub. L. 101–60 struck out subsec. (d) which directed that any determination made under section 3347(c) of this title be made in accordance with procedures applicable to the granting of any authority under the Natural Gas Act to import natural gas or liquefied natural gas (as the case might be).

§ 3413. Repealed. Pub. L. 101–60, § 3(b)(5), July 26, 1989, 103 Stat. 159

Section, Pub. L. 95–621, title V, § 503, Nov. 9, 1978, 92 Stat. 3397, related to various determinations to be made by State or Federal agencies for qualifying under certain categories of natural gas.

EFFECTIVE DATE OF REPEAL

Repeal effective Jan. 1, 1993, see section 3(b) of Pub. L. 101–60, set out as an Effective Date of 1989 Amendment note under section 3372 of this title.

§ 3414. Enforcement

(a) General rule

It shall be unlawful for any person to violate any provision of this chapter or any rule or order under this chapter.

(b) Civil enforcement

(1) In general

Except as provided in paragraph (2), whenever it appears to the Commission that any person is engaged or about to engage in any act or practice which constitutes or will constitute a violation of any provision of this chapter, or of any rule or order thereunder, the Commission may bring an action in the District Court of the United States for the District of Columbia or any other appropriate

district court of the United States to enjoin such act or practice and to enforce compliance with this chapter, or any rule or order thereunder.

(2) Enforcement of emergency orders

Whenever it appears to the President that any person has engaged, is engaged, or is about to engage in acts or practices constituting a violation of any order under section 3362 of this title or any order or supplemental order issued under section 3363 of this title, the President may bring a civil action in any appropriate district court of the United States to enjoin such acts or practices.

(3) Repealed. Pub. L. 101–60, § 3(a)(4)(B), July 26, 1989, 103 Stat. 158

(4) Relief available

In any action under paragraph (1) or (2), the court shall, upon a proper showing, issue a temporary restraining order or preliminary or permanent injunction without bond. In any such action, the court may also issue a mandatory injunction commanding any person to comply with any applicable provision of law, rule, or order, or ordering such other legal or equitable relief as the court determines appropriate, including refund or restitution.

(5) Criminal referral

The Commission may transmit such evidence as may be available concerning any acts or practices constituting any possible violations of the Federal antitrust laws to the Attorney General who may institute appropriate criminal proceedings.

(6) Civil penalties

(A) In general

Any person who knowingly violates any provision of this chapter, or any provision of any rule or order under this chapter, shall be subject to—

(i) except as provided in clause (ii) a civil penalty, which the Commission may assess, of not more than $1,000,000 for any one violation; and

(ii) a civil penalty, which the President may assess, of not more than $1,000,000, in the case of any violation of an order under section 3362 of this title or an order or supplemental order under section 3363 of this title.

(B) "Knowing" defined

For purposes of subparagraph (A) the term ''knowing'' means the having of—

(i) actual knowledge; or

(ii) the constructive knowledge deemed to be possessed by a reasonable individual who acts under similar circumstances.

(C) Each day separate violation

For purposes of this paragraph, in the case of a continuing violation, each day of violation shall constitute a separate violation.

(D) Statute of limitations

No person shall be subject to any civil penalty under this paragraph with respect to any violation occurring more than 3 years before the date on which such person is provided notice of the proposed penalty under subparagraph (E). The preceding sentence shall not apply in any case in which an untrue statement of material fact was made to the Commission or a State or Federal agency by, or acquiesced to by, the violator with respect to the acts or omissions constituting such violation, or if there was omitted a material fact necessary in order to make any statement made by, or acquiesced to by, the violator with respect to such acts or omissions not misleading in light of circumstances under such statement was made.

(E) Assessed by Commission

Before assessing any civil penalty under this paragraph, the Commission shall provide to such person notice of the proposed penalty. Following receipt of notice of the proposed penalty by such person, the Commission shall, by order, asssess[1] such penalty.

(F) Judicial review

If the civil penalty has not been paid within 60 calendar days after the assessment order has been made under subparagraph (E), the Commission shall institute an action in the appropriate district court of the United States for an order affirming the assessment of the civil penalty. The court shall have authority to review de novo the law and the facts involved, and shall have jurisdiction to enter a judgment enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part, such assessment.

(c) Criminal penalties

(1) Violations of chapter

Except in the case of violations covered under paragraph (3), any person who knowingly and willfully violates any provision of this chapter shall be subject to—

(A) a fine of not more than $1,000,000; or

(B) imprisonment for not more than 5 years; or

(C) both such fine and such imprisonment.

(2) Violation of rules or orders generally

Except in the case of violations covered under paragraph (3), any person who knowingly and willfully violates any rule or order under this chapter (other than an order of the Commission assessing a civil penalty under subsection (b)(4)(E) of this section), shall be subject to a fine of not more than $50,000 for each day on which the offense occurs.

(3) Violations of emergency orders

Any person who knowingly and willfully violates an order under section 3362 of this title or an order or supplemental order under section 3363 of this title shall be fined not more than $50,000 for each violation.

(4) Each day separate violation

For purposes of this subsection, each day of violation shall constitute a separate violation.

(5) "Knowingly" defined

For purposes of this subsection, the term ''knowingly'', when used with respect to any

[1] So in original. Probably should be ''assess''.

act or omission by any person, means such person—

(A) had actual knowledge; or

(B) had constructive knowledge deemed to be possessed by a reasonable individual who acts under similar circumstances.

(Pub. L. 95–621, title V, § 504, Nov. 9, 1978, 92 Stat. 3401; Pub. L. 101–60, § 3(a)(4), (b)(6), July 26, 1989, 103 Stat. 158, 159; Pub. L. 109–58, title III, § 314(a)(2), (b)(2), Aug. 8, 2005, 119 Stat. 690, 691.)

AMENDMENTS

2005—Subsec. (b)(6)(A). Pub. L. 109–58, § 314(b)(2), substituted ''$1,000,000'' for ''$5,000'' in cl. (i) and ''$1,000,000'' for ''$25,000'' in cl. (ii).

Subsec. (c)(1). Pub. L. 109–58, § 314(a)(2)(A), substituted ''$1,000,000'' for ''$5,000'' in subpar. (A) and ''5 years'' for ''two years'' in subpar. (B).

Subsec. (c)(2). Pub. L. 109–58, § 314(a)(2)(B), substituted ''$50,000 for each day on which the offense occurs'' for ''$500 for each violation''.

1989—Subsec. (a). Pub. L. 101–60, § 3(b)(6), struck out par. (2) designation and par. (1) making it unlawful to sell natural gas at a first sale price in excess of any applicable maximum lawful price under this chapter.

Subsec. (b). Pub. L. 101–60, § 3(a)(4), substituted ''paragraph (2)'' for ''paragraphs (2) and (3)'' in par. (1), struck out par. (3) which related to enforcement of incremental pricing, and substituted ''paragraph (1) or (2)'' for ''paragraph (1), (2), or (3)'' in par. (4).

EFFECTIVE DATE OF 1989 AMENDMENT

Amendment by section 3(b)(6) of Pub. L. 101–60 effective Jan. 1, 1993, see section 3(b) of Pub. L. 101–60, set out as a note under section 3372 of this title.

§ 3415. Intervention

(a) Authority to intervene

(1) Intervention as matter of right

The Secretary of Energy may intervene as a matter of right in any proceeding relating to the prorationing of, or other limitations upon, natural gas production which is conducted by any State agency having regulatory jurisdiction over the production of natural gas.

(2) Enforcement of right to intervene

The Secretary may bring an action in any appropriate court of the United States to enforce his right to intervene under paragraph (1).

(3) Access to information

As an intervenor in a proceeding described in subsection (a) of this section, the Secretary shall have access to information available to other parties to the proceeding if such information is relevant to the issues to which his participation in such proceeding relates. Such information may be obtained through reasonable rules relating to discovery of information prescribed by the State agency.

(b) Access to State courts

(1) Review in State courts

The Secretary may obtain review of any determination made in any proceeding described in subsection (a)(1) of this section in the appropriate State court if the Secretary intervened or otherwise participated in the original proceeding or if State law otherwise permits such review.

(2) Participation as amicus curiae

In addition to his authority to obtain review under paragraph (1), the Secretary may also participate an[1] amicus curiae in any judicial review of any proceeding described in subsection (a)(1) of this section.

(Pub. L. 95–621, title V, § 505, Nov. 9, 1978, 92 Stat. 3403.)

§ 3416. Judicial review

(a) Orders

(1) In general

The provisions of this subsection shall apply to judicial review of any order, within the meaning of section 551(6) of title 5 (other than an order assessing a civil penalty under section 3414(b)(4) of this title or any order under section 3362 of this title or any order under section 3363 of this title), issued under this chapter and to any final agency action under this chapter required to be made on the record after an opportunity for an agency hearing.

(2) Rehearing

Any person aggrieved by any order issued by the Commission in a proceeding under this chapter to which such person is a party may apply for a rehearing within 30 days after the issuance of such order. Any application for rehearing shall set forth the specific ground upon which such application is based. Upon the filing of such application, the Commission may grant or deny the requested rehearing or modify the original order without further hearing. Unless the Commission acts upon such application for rehearing within 30 days after it is filed, such application shall be deemed to have been denied. No person may bring an action under this section to obtain judicial review of any order of the Commission unless—

(A) such person shall have made application to the Commission for rehearing under this subsection; and

(B) the Commission shall have finally acted with respect to such application.

For purposes of this section, if the Commission fails to act within 30 days after the filing of such application, such failure to act shall be deemed final agency action with respect to such application.

(3) Authority to modify orders

At any time before the filing of the record of a proceeding in a United States Court of Appeals, pursuant to paragraph (4), the Commission may, after providing notice it determines reasonable and proper, modify or set aside, in whole or in part, any order issued under the provisions of this chapter.

(4) Judicial review

Any person who is a party to a proceeding under this chapter aggrieved by any final order issued by the Commission in such proceeding may obtain review of such order in the United States Court of Appeals for any circuit in which the party to which such order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia circuit. Review

[1] So in original. Probably should be ''as''.

Subsec. (g). Pub. L. 97–303, § 3(2), added subsec. (g).

EFFECTIVE DATE OF 2010 AMENDMENT

Amendment by sections 929L(1) and 929X(b) of Pub. L. 111–203 effective 1 day after July 21, 2010, except as otherwise provided, see section 4 of Pub. L. 111–203, set out as an Effective Date note under section 5301 Title 12, Banks and Banking.

Amendment by sections 762(d)(2) and 763(f), (g) of Pub. L. 111–203 effective on the later of 360 days after July 21, 2010, or, to the extent a provision of subtitle B (§§ 761–774) of title VII of Pub. L. 111–203 requires a rulemaking, not less than 60 days after publication of the final rule or regulation implementing such provision of subtitle B, see section 774 of Pub. L. 111–203, set out as a note under section 77b of this title.

TRANSFER OF FUNCTIONS

For transfer of functions of Securities and Exchange Commission, with certain exceptions, to Chairman of such Commission, see Reorg. Plan No. 10 of 1950, §§ 1, 2, eff. May 24, 1950, 15 F.R. 3175, 64 Stat. 1265, set out under section 78d of this title.

§ 78j. Manipulative and deceptive devices

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—

(a)(1) To effect a short sale, or to use or employ any stop-loss order in connection with the purchase or sale, of any security other than a government security, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(2) Paragraph (1) of this subsection shall not apply to security futures products.

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, or any securities-based swap agreement (as defined in section 206B of the Gramm-Leach-Bliley Act), any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(c)(1) To effect, accept, or facilitate a transaction involving the loan or borrowing of securities in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(2) Nothing in paragraph (1) may be construed to limit the authority of the appropriate Federal banking agency (as defined in section 1813(q) of title 12), the National Credit Union Administration, or any other Federal department or agency having a responsibility under Federal law to prescribe rules or regulations restricting transactions involving the loan or borrowing of securities in order to protect the safety and soundness of a financial institution or to protect the financial system from systemic risk.

Rules promulgated under subsection (b) of this section that prohibit fraud, manipulation, or insider trading (but not rules imposing or specifying reporting or recordkeeping requirements, procedures, or standards as prophylactic measures against fraud, manipulation, or insider trading), and judicial precedents decided under subsection (b) of this section and rules promulgated thereunder that prohibit fraud, manipulation, or insider trading, shall apply to security-based swap agreements (as defined in section 206B of the Gramm-Leach-Bliley Act) to the same extent as they apply to securities. Judicial precedents decided under section 77q(a) of this title and sections 78i, 78*o*, 78p, 78t, and 78u–1 of this title, and judicial precedents decided under applicable rules promulgated under such sections, shall apply to security-based swap agreements (as defined in section 206B of the Gramm-Leach-Bliley Act) to the same extent as they apply to securities.

(June 6, 1934, ch. 404, title I, § 10, 48 Stat. 891; Pub. L. 106–554, § 1(a)(5) [title II, § 206(g), title III, § 303(d)], Dec. 21, 2000, 114 Stat. 2763, 2763A–432, 2763A–454; Pub. L. 111–203, title VII, § 762(d)(3), title IX, §§ 929L(2), 984(a), July 21, 2010, 124 Stat. 1761, 1861, 1932.)

AMENDMENT OF SECTION

Pub. L. 111–203, title VII, §§ 762(d)(3), 774, July 21, 2010, 124 Stat. 1761, 1802, provided that, effective on the later of 360 days after July 21, 2010, or, to the extent a provision of subtitle B (§§ 761–774) of title VII of Pub. L. 111–203 requires a rulemaking, not less than 60 days after publication of the final rule or regulation implementing such provision of subtitle B, this section is amended as follows:

(1) in subsection (b), by striking ''(as defined in section 206B of the Gramm-Leach-Bliley Act),'' in each place that such term appears; and

(2) in the matter following subsection (b), by striking ''(as defined in section 206B of the Gramm-Leach-Bliley Act), in each place that such terms appear'' [sic].

REFERENCES IN TEXT

Section 206B of the Gramm-Leach-Bliley Act, referred to in text, is section 206B of Pub. L. 106–102, which is set out in a note under section 78c of this title.

AMENDMENTS

2010—Subsec. (a)(1). Pub. L. 111–203, § 929L(2), substituted ''other than a government security'' for ''registered on a national securities exchange''.

Subsec. (c). Pub. L. 111–203, § 984(a), which directed amendment of this section by adding subsec. (c) at the end, was executed by adding subsec. (c) after subsec. (b) to reflect the probable intent of Congress.

2000—Pub. L. 106–554, § 1(a)(5) [title III, § 303(d)(2)], inserted concluding provisions at end.

Subsec. (a). Pub. L. 106–554, § 1(a)(5) [title II, § 206(g)], designated existing provisions as par. (1) and added par. (2).

Subsec. (b). Pub. L. 106–554, § 1(a)(5) [title III, § 303(d)(1)], inserted ''or any securities-based swap agreement (as defined in section 206B of the Gramm-Leach-Bliley Act),'' before ''any manipulative or deceptive device''.

EFFECTIVE DATE OF 2010 AMENDMENT

Amendment by sections 929L(2) and 984(a) of Pub. L. 111–203 effective 1 day after July 21, 2010, except as otherwise provided, see section 4 of Pub. L. 111–203, set out as an Effective Date note under section 5301 Title 12, Banks and Banking.

(f) Limitation on Commission authority

The authority of the Commission under this section with respect to security-based swap agreements (as defined in section 206B of the Gramm-Leach-Bliley Act) shall be subject to the restrictions and limitations of section 78c–1(b) of this title.

(June 6, 1934, ch. 404, title I, § 21A, as added Pub. L. 100–704, § 3(a)(2), Nov. 19, 1988, 102 Stat. 4677; amended Pub. L. 101–429, title II, § 202(b), Oct. 15, 1990, 104 Stat. 938; Pub. L. 106–554, § 1(a)(5) [title II, § 205(a)(4), title III, § 303(k), (*l*)], Dec. 21, 2000, 114 Stat. 2763, 2763A–426, 2763A–456, 2763A–457; Pub. L. 107–204, title III, § 308(d)(2), July 30, 2002, 116 Stat. 785; Pub. L. 111–203, title VII, § 762(d)(7), title IX, § 923(b)(2), July 21, 2010, 124 Stat. 1761, 1850.)

AMENDMENT OF SECTION

Pub. L. 111–203, title VII, §§ 762(d)(7), 774, July 21, 2010, 124 Stat. 1761, 1802, provided that, effective on the later of 360 days after July 21, 2010, or, to the extent a provision of subtitle B (§§ 761–774) of title VII of Pub. L. 111–203 requires a rulemaking, not less than 60 days after publication of the final rule or regulation implementing such provision of subtitle B, subsections (a)(1) and (g) of this section are amended by striking ''(as defined in section 206B of the Gramm-Leach-Bliley Act)''.

REFERENCES IN TEXT

This chapter, referred to in subsecs. (a) and (d)(4), (5), was in the original ''this title''. See References in Text note set out under section 78a of this title.

Section 206B of the Gramm-Leach-Bliley Act, referred to in subsecs. (a)(1) and (f), is section 206B of Pub. L. 106–102, which is set out in a note under section 78c of this title.

Subsec. (f) of section 78*o* of this title, referred to in subsec. (b)(1)(B), was redesignated (g) by Pub. L. 111–203, title IX, § 929X(c)(1), July 21, 2010, 124 Stat. 1870.

AMENDMENTS

2010—Subsec. (d)(1). Pub. L. 111–203, § 923(b)(2)(A), struck out ''(subject to subsection (e) of this section)'' after ''shall'' and inserted ''and section 78u–6 of this title'' after ''section 7246 of this title''.

Subsec. (e). Pub. L. 111–203, § 923(b)(2)(B), (C), redesignated subsec. (f) as (e) and struck out former subsec. (e). Prior to amendment, text of subsec. (e) read as follows: ''Notwithstanding the provisions of subsection (d)(1) of this section, there shall be paid from amounts imposed as a penalty under this section and recovered by the Commission or the Attorney General, such sums, not to exceed 10 percent of such amounts, as the Commission deems appropriate, to the person or persons who provide information leading to the imposition of such penalty. Any determinations under this subsection, including whether, to whom, or in what amount to make payments, shall be in the sole discretion of the Commission, except that no such payment shall be made to any member, officer, or employee of any appropriate regulatory agency, the Department of Justice, or a self-regulatory organization. Any such determination shall be final and not subject to judicial review.''

Subsec. (f). Pub. L. 111–203, § 923(b)(2)(C), redesignated subsec. (g) as (f). Former subsec. (f) redesignated (e).

Subsec. (g). Pub. L. 111–203, § 923(b)(2)(C), redesignated subsec. (g) as (f).

2002—Subsec. (d)(1). Pub. L. 107–204 inserted '', except as otherwise provided in section 7246 of this title'' before period at end.

2000—Subsec. (a)(1). Pub. L. 106–554, § 1(a)(5) [title III, § 303(k)], inserted ''or security-based swap agreement (as defined in section 206B of the Gramm-Leach-Bliley Act)'' after ''purchasing or selling a security'' in introductory provisions.

Pub. L. 106–554, § 1(a)(5) [title II, § 205(a)(4)], substituted ''standardized options or security futures products, the Commission—'' for ''standardized options, the Commission—'' in introductory provisions.

Subsec. (g). Pub. L. 106–554, § 1(a)(5) [title III, § 303(*l*)], added subsec. (g).

1990—Pub. L. 101–429 inserted ''for insider trading'' in section catchline.

EFFECTIVE DATE OF 2010 AMENDMENT

Amendment by section 923(b)(2) of Pub. L. 111–203 effective 1 day after July 21, 2010, except as otherwise provided, see section 4 of Pub. L. 111–203, set out as an Effective Date note under section 5301 of Title 12, Banks and Banking.

Amendment by section 762(d)(7) of Pub. L. 111–203 effective on the later of 360 days after July 21, 2010, or, to the extent a provision of subtitle B (§§ 761–774) of title VII of Pub. L. 111–203 requires a rulemaking, not less than 60 days after publication of the final rule or regulation implementing such provision of subtitle B, see section 774 of Pub. L. 111–203, set out as a note under section 77b of this title.

EFFECTIVE DATE OF 1990 AMENDMENT

Amendment by Pub. L. 101–429 effective Oct. 15, 1990, with provisions relating to civil penalties and accounting and disgorgement, see section 1(c)(1), (2) of Pub. L. 101–429, set out in a note under section 77g of this title.

EFFECTIVE DATE

Section not applicable to actions occurring before Nov. 19, 1988, see section 9 of Pub. L. 100–704 set out as an Effective Date of 1988 Amendment note under section 78*o* of this title.

CONGRESSIONAL FINDINGS

Section 2 of Pub. L. 100–704 provided that: ''The Congress finds that—

''(1) the rules and regulations of the Securities and Exchange Commission under the Securities Exchange Act of 1934 [15 U.S.C. 78a et seq.] governing trading while in possession of material, nonpublic information are, as required by such Act, necessary and appropriate in the public interest and for the protection of investors;

''(2) the Commission has, within the limits of accepted administrative and judicial construction of such rules and regulations, enforced such rules and regulations vigorously, effectively, and fairly; and

''(3) nonetheless, additional methods are appropriate to deter and prosecute violations of such rules and regulations.''

COMMISSION RECOMMENDATIONS FOR ADDITIONAL CIVIL PENALTY AUTHORITY REQUIRED

Section 3(c) of Pub. L. 100–704 provided that: ''The Securities and Exchange Commission shall, within 60 days after the date of enactment of this Act [Nov. 19, 1988], submit to each House of the Congress any recommendations the Commission considers appropriate with respect to the extension of the Commission's authority to seek civil penalties or impose administrative fines for violations other than those described in section 21A of the Securities Exchange Act of 1934 [15 U.S.C. 78u–1] (as added by this section).''

§ 78u–2. Civil remedies in administrative proceedings

(a) Commission authority to assess money penalties

(1) In general

In any proceeding instituted pursuant to sections 78*o*(b)(4), 78*o*(b)(6), 78*o*–6, 78*o*–4, 78*o*–5,

78*o*–7, or 78q–1 of this title against any person, the Commission or the appropriate regulatory agency may impose a civil penalty if it finds, on the record after notice and opportunity for hearing, that such penalty is in the public interest and that such person—

(A) has willfully violated any provision of the Securities Act of 1933 [15 U.S.C. 77a et seq.], the Investment Company Act of 1940 [15 U.S.C. 80a–1 et seq.], the Investment Advisers Act of 1940 [15 U.S.C. 80b–1 et seq.], or this chapter, or the rules or regulations thereunder, or the rules of the Municipal Securities Rulemaking Board;

(B) has willfully aided, abetted, counseled, commanded, induced, or procured such a violation by any other person;

(C) has willfully made or caused to be made in any application for registration or report required to be filed with the Commission or with any other appropriate regulatory agency under this chapter, or in any proceeding before the Commission with respect to registration, any statement which was, at the time and in the light of the circumstances under which it was made, false or misleading with respect to any material fact, or has omitted to state in any such application or report any material fact which is required to be stated therein; or

(D) has failed reasonably to supervise, within the meaning of section 78*o*(b)(4)(E) of this title, with a view to preventing violations of the provisions of such statutes, rules and regulations, another person who commits such a violation, if such other person is subject to his supervision;[1]

(2) Cease-and-desist proceedings

In any proceeding instituted under section 78u–3 of this title against any person, the Commission may impose a civil penalty, if the Commission finds, on the record after notice and opportunity for hearing, that such person—

(A) is violating or has violated any provision of this chapter, or any rule or regulation issued under this chapter; or

(B) is or was a cause of the violation of any provision of this chapter, or any rule or regulation issued under this chapter.

(b) Maximum amount of penalty

(1) First tier

The maximum amount of penalty for each act or omission described in subsection (a) of this section shall be $5,000 for a natural person or $50,000 for any other person.

(2) Second tier

Notwithstanding paragraph (1), the maximum amount of penalty for each such act or omission shall be $50,000 for a natural person or $250,000 for any other person if the act or omission described in subsection (a) of this section involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement.

(3) Third tier

Notwithstanding paragraphs (1) and (2), the maximum amount of penalty for each such act or omission shall be $100,000 for a natural person or $500,000 for any other person if—

(A) the act or omission described in subsection (a) of this section involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement; and

(B) such act or omission directly or indirectly resulted in substantial losses or created a significant risk of substantial losses to other persons or resulted in substantial pecuniary gain to the person who committed the act or omission.

(c) Determination of public interest

In considering under this section whether a penalty is in the public interest, the Commission or the appropriate regulatory agency may consider—

(1) whether the act or omission for which such penalty is assessed involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement;

(2) the harm to other persons resulting either directly or indirectly from such act or omission;

(3) the extent to which any person was unjustly enriched, taking into account any restitution made to persons injured by such behavior;

(4) whether such person previously has been found by the Commission, another appropriate regulatory agency, or a self-regulatory organization to have violated the Federal securities laws, State securities laws, or the rules of a self-regulatory organization, has been enjoined by a court of competent jurisdiction from violations of such laws or rules, or has been convicted by a court of competent jurisdiction of violations of such laws or of any felony or misdemeanor described in section 78*o*(b)(4)(B) of this title;

(5) the need to deter such person and other persons from committing such acts or omissions; and

(6) such other matters as justice may require.

(d) Evidence concerning ability to pay

In any proceeding in which the Commission or the appropriate regulatory agency may impose a penalty under this section, a respondent may present evidence of the respondent's ability to pay such penalty. The Commission or the appropriate regulatory agency may, in its discretion, consider such evidence in determining whether such penalty is in the public interest. Such evidence may relate to the extent of such person's ability to continue in business and the collectability of a penalty, taking into account any other claims of the United States or third parties upon such person's assets and the amount of such person's assets.

(e) Authority to enter order requiring accounting and disgorgement

In any proceeding in which the Commission or the appropriate regulatory agency may impose a penalty under this section, the Commission or the appropriate regulatory agency may enter an order requiring accounting and disgorgement, including reasonable interest. The Commission is authorized to adopt rules, regulations, and or-

[1] So in original. The semicolon probably should be a period.

ders concerning payments to investors, rates of interest, periods of accrual, and such other matters as it deems appropriate to implement this subsection.

(June 6, 1934, ch. 404, title I, § 21B, as added Pub. L. 101–429, title II, § 202(a), Oct. 15, 1990, 104 Stat. 937; amended Pub. L. 107–204, title V, § 501(b), July 30, 2002, 116 Stat. 793; Pub. L. 109–291, § 4(b)(1)(B), Sept. 29, 2006, 120 Stat. 1337; Pub. L. 111–203, title VII, § 773, title IX, § 929P(a)(2), July 21, 2010, 124 Stat. 1802, 1863.)

AMENDMENT OF SECTION

Pub. L. 111–203, title VII, §§ 773, 774, July 21, 2010, 124 Stat. 1802, provided that, effective on the later of 360 days after July 21, 2010, or, to the extent a provision of subtitle B (§§ 761–774) of title VII of Pub. L. 111–203 requires a rulemaking, not less than 60 days after publication of the final rule or regulation implementing such provision of subtitle B, this section is amended by adding at the end the following:

(f) Security-based swaps

(1) Clearing agency

Any clearing agency that knowingly or recklessly evades or participates in or facilitates an evasion of the requirements of section 78c–3 of this title shall be liable for a civil money penalty in twice the amount otherwise available for a violation of section 78c–3 of this title.

(2) Security-based swap dealer or major security-based swap participant

Any security-based swap dealer or major security-based swap participant that knowingly or recklessly evades or participates in or facilitates an evasion of the requirements of section 78c–3 of this title shall be liable for a civil money penalty in twice the amount otherwise available for a violation of section 78c–3 of this title.

REFERENCES IN TEXT

The Securities Act of 1933, referred to in subsec. (a)(1)(A), is act May 27, 1933, ch. 38, title I, 48 Stat. 74, which is classified generally to subchapter I (§ 77a et seq.) of chapter 2A of this title. For complete classification of this Act to the Code, see section 77a of this title and Tables.

The Investment Company Act of 1940, referred to in subsec. (a)(1)(A), is title I of act Aug. 22, 1940, ch. 686, 54 Stat. 789, which is classified generally to subchapter I (§ 80a–1 et seq.) of chapter 2D of this title. For complete classification of this Act to the Code, see section 80a–51 of this title and Tables.

The Investment Advisers Act of 1940, referred to in subsec. (a)(1)(A), is title II of act Aug. 22, 1940, ch. 686, 54 Stat. 847, which is classified generally to subchapter II (§ 80b–1 et seq.) of chapter 2D of this title. For complete classification of this Act to the Code, see section 80b–20 of this title and Tables.

This chapter, referred to in subsec. (a)(1)(A), (C), (2), was in the original ''this title''. See References in Text note set out under section 78a of this title.

AMENDMENTS

2010—Subsec. (a). Pub. L. 111–203, § 929P(a)(2), designated existing provisions as par. (1) and inserted heading, inserted ''that such penalty is in the public interest and'' before ''that such person—'' in introductory provisions, redesignated former pars. (1) to (4) as subpars. (A) to (D), respectively, of par. (1) and realigned margins, struck out concluding provisions which read ''and that such penalty is in the public interest.'', and added par. (2).

2006—Subsec. (a). Pub. L. 109–291 inserted ''78*o*–7,'' after ''78*o*–5,'' in introductory provisions.

2002—Subsec. (a). Pub. L. 107–204 inserted ''78*o*–6,'' before ''78*o*–4,'' in introductory provisions.

EFFECTIVE DATE OF 2010 AMENDMENT

Amendment by section 929P(a)(2) of Pub. L. 111–203 effective 1 day after July 21, 2010, except as otherwise provided, see section 4 of Pub. L. 111–203, set out as an Effective Date note under section 5301 of Title 12, Banks and Banking.

Amendment by section 773 of Pub. L. 111–203 effective on the later of 360 days after July 21, 2010, or, to the extent a provision of subtitle B (§§ 761–774) of title VII of Pub. L. 111–203 requires a rulemaking, not less than 60 days after publication of the final rule or regulation implementing such provision of subtitle B, see section 774 of Pub. L. 111–203, set out as a note under section 77b of this title.

EFFECTIVE DATE

Section effective Oct. 15, 1990, with provisions relating to civil penalties and accounting and disgorgement, see section 1(c)(1), (2) of Pub. L. 101–429, set out in an Effective Date of 1990 Amendment note under section 77g of this title.

§ 78u–3. Cease-and-desist proceedings

(a) Authority of Commission

If the Commission finds, after notice and opportunity for hearing, that any person is violating, has violated, or is about to violate any provision of this chapter, or any rule or regulation thereunder, the Commission may publish its findings and enter an order requiring such person, and any other person that is, was, or would be a cause of the violation, due to an act or omission the person knew or should have known would contribute to such violation, to cease and desist from committing or causing such violation and any future violation of the same provision, rule, or regulation. Such order may, in addition to requiring a person to cease and desist from committing or causing a violation, require such person to comply, or to take steps to effect compliance, with such provision, rule, or regulation, upon such terms and conditions and within such time as the Commission may specify in such order. Any such order may, as the Commission deems appropriate, require future compliance or steps to effect future compliance, either permanently or for such period of time as the Commission may specify, with such provision, rule, or regulation with respect to any security, any issuer, or any other person.

(b) Hearing

The notice instituting proceedings pursuant to subsection (a) of this section shall fix a hearing date not earlier than 30 days nor later than 60 days after service of the notice unless an earlier or a later date is set by the Commission with the consent of any respondent so served.

(c) Temporary order

(1) In general

Whenever the Commission determines that the alleged violation or threatened violation specified in the notice instituting proceedings pursuant to subsection (a) of this section, or the continuation thereof, is likely to result in significant dissipation or conversion of assets, significant harm to investors, or substantial

privilege recognized under Federal, State, or foreign law;

(B) the term ''foreign law enforcement authority'' means any foreign authority that is empowered under foreign law to detect, investigate or prosecute potential violations of law; and

(C) the term ''State securities or law enforcement authority'' means the authority of any State or territory that is empowered under State or territory law to detect, investigate, or prosecute potential violations of law.

(g) Savings provision

Nothing in this section shall—

(1) alter the Commission's responsibilities under the Right to Financial Privacy Act (12 U.S.C. 3401 et seq.), as limited by section 78u(h) of this title, with respect to transfers of records covered by such statutes, or

(2) authorize the Commission to withhold information from the Congress or prevent the Commission from complying with an order of a court of the United States in an action commenced by the United States or the Commission.

(June 6, 1934, ch. 404, title I, § 24, 48 Stat. 901; Aug. 23, 1935, ch. 614, § 203(a), 49 Stat. 704; Pub. L. 94–29, § 19, June 4, 1975, 89 Stat. 158; Pub. L. 101–550, title II, § 202(a), Nov. 15, 1990, 104 Stat. 2715; Pub. L. 111–203, title IX, §§ 929I(a), 929K, July 21, 2010, 124 Stat. 1857, 1860; Pub. L. 111–257, § 1(a), Oct. 5, 2010, 124 Stat. 2646.)

REFERENCES IN TEXT

This chapter, referred to in subsecs. (a) and (e)(2), was in the original ''this title''. See References in Text note set out under section 78a of this title.

The Right to Financial Privacy Act, referred to in subsec. (g)(1), probably means the Right to Financial Privacy Act of 1978, title XI of Pub. L. 95–630, Nov. 10, 1978, 92 Stat. 3697, which is classified generally to chapter 35 (§ 3401 et seq.) of Title 12, Banks and Banking. For complete classification of this Act to the Code, see Short Title note set out under section 3401 of Title 12 and Tables.

AMENDMENTS

2010—Subsec. (d). Pub. L. 111–203, § 929K(1), substituted ''subsection (g)'' for ''subsection (f)''.

Pub. L. 111–203, § 929I(a)(1), substituted ''subsection (f)'' for ''subsection (e)''.

Subsec. (e). Pub. L. 111–257 added subsec. (e) and struck out former subsec. (e). Prior to amendment, text read as follows:

''(1) IN GENERAL.—Except as provided in subsection (g), the Commission shall not be compelled to disclose records or information obtained pursuant to section 78q(b) of this title, or records or information based upon or derived from such records or information, if such records or information have been obtained by the Commission for use in furtherance of the purposes of this chapter, including surveillance, risk assessments, or other regulatory and oversight activities.

''(2) TREATMENT OF INFORMATION.—For purposes of section 552 of title 5, this subsection shall be considered a statute described in subsection (b)(3)(B) of such section 552. Collection of information pursuant to section 78q of this title shall be an administrative action involving an agency against specific individuals or agencies pursuant to section 3518(c)(1) of title 44.''

Pub. L. 111–203, § 929K(2), substituted ''subsection (g)'' for ''subsection (f)'' in par. (1).

Pub. L. 111–203, § 929I(a)(3), added subsec. (e). Former subsec. (e) redesignated (f).

Subsec. (f). Pub. L. 111–203, § 929K(4), added subsec. (f). Former subsec. (f) redesignated (g).

Pub. L. 111–203, § 929I(a)(2), redesignated subsec. (e) as (f).

Subsec. (g). Pub. L. 111–203, § 929K(3), redesignated subsec. (f) as (g).

1990—Subsec. (b). Pub. L. 101–550, § 202(a)(1), struck out at end ''Nothing in this subsection shall authorize the Commission to withhold information from the Congress.''

Subsecs. (c) to (e). Pub. L. 101–550, § 202(a)(2), added subsecs. (c) to (e).

1975—Subsec. (a). Pub. L. 94–29 substituted ''For purposes of section 552 of title 5, the term 'records' includes all applications, statements, reports, contracts, correspondence, notices, and other documents filed with or otherwise obtained by the Commission pursuant to this chapter or otherwise'' for ''Nothing in this chapter shall be construed to require, or to authorize the Commission to require, the revealing of trade secrets or processes in any application, report, or document filed with the Commission under this chapter''.

Subsecs. (b), (c). Pub. L. 94–29 redesignated subsec. (c) as (b) and substituted ''application, statement, report, contract, correspondence, notice, or other document filed with or otherwise obtained by the Commission (1) in contravention of the rules and regulations of the Commission under section 552 of title 5, or (2) in circumstances where the Commission has determined pursuant to such rules to accord confidential treatment for such information. Nothing in this subsection shall authorize the Commission to withhold information from Congress'' for ''application, report, or document filed with the Commission which is not made available to the public pursuant to subsection (b) of this section: Provided, That the Commission may make available to the Board of Governors of the Federal Reserve System any information requested by the Board for the purpose of enabling it to perform its duties under this chapter''. Former subsec. (b), providing for written objection to public disclosure of information, was struck out.

CHANGE OF NAME

Section 203(a) of act Aug. 23, 1935, substituted ''Board of Governors of the Federal Reserve System'' for ''Federal Reserve Board''.

EFFECTIVE DATE OF 2010 AMENDMENT

Amendment by Pub. L. 111–203 effective 1 day after July 21, 2010, except as otherwise provided, see section 4 of Pub. L. 111–203, set out as an Effective Date note under section 5301 of Title 12, Banks and Banking.

EFFECTIVE DATE OF 1975 AMENDMENT

Amendment by Pub. L. 94–29 effective June 4, 1975, see section 31(a) of Pub. L. 94–29, set out as a note under section 78b of this title.

TRANSFER OF FUNCTIONS

For transfer of functions of Securities and Exchange Commission, with certain exceptions, to Chairman of such Commission, see Reorg. Plan No. 10 of 1950, §§ 1, 2, eff. May 24, 1950, 15 F.R. 3175, 64 Stat. 1265, set out under section 78d of this title.

§ 78y. Court review of orders and rules

(a) Final Commission orders; persons aggrieved; petition; record; findings; affirmance, modification, enforcement, or setting aside of orders; remand to adduce additional evidence

(1) A person aggrieved by a final order of the Commission entered pursuant to this chapter may obtain review of the order in the United States Court of Appeals for the circuit in which he resides or has his principal place of business, or for the District of Columbia Circuit, by filing in such court, within sixty days after the entry

of the order, a written petition requesting that the order be modified or set aside in whole or in part.

(2) A copy of the petition shall be transmitted forthwith by the clerk of the court to a member of the Commission or an officer designated by the Commission for that purpose. Thereupon the Commission shall file in the court the record on which the order complained of is entered, as provided in section 2112 of title 28 and the Federal Rules of Appellate Procedure.

(3) On the filing of the petition, the court has jurisdiction, which becomes exclusive on the filing of the record, to affirm or modify and enforce or to set aside the order in whole or in part.

(4) The findings of the Commission as to the facts, if supported by substantial evidence, are conclusive.

(5) If either party applies to the court for leave to adduce additional evidence and shows to the satisfaction of the court that the additional evidence is material and that there was reasonable ground for failure to adduce it before the Commission, the court may remand the case to the Commission for further proceedings, in whatever manner and on whatever conditions the court considers appropriate. If the case is remanded to the Commission, it shall file in the court a supplemental record containing any new evidence, any further or modified findings, and any new order.

(b) Commission rules; persons adversely affected; petition; record; affirmance, enforcement, or setting aside of rules; findings; transfer of proceedings

(1) A person adversely affected by a rule of the Commission promulgated pursuant to section 78f, 78i(h)(2), 78k, 78k–1, 78*o*(c)(5) or (6), 78*o*–3, 78q, 78q–1, or 78s of this title may obtain review of this rule in the United States Court of Appeals for the circuit in which he resides or has his principal place of business or for the District of Columbia Circuit, by filing in such court, within sixty days after the promulgation of the rule, a written petition requesting that the rule be set aside.

(2) A copy of the petition shall be transmitted forthwith by the clerk of the court to a member of the Commission or an officer designated for that purpose. Thereupon, the Commission shall file in the court the rule under review and any documents referred to therein, the Commission's notice of proposed rulemaking and any documents referred to therein, all written submissions and the transcript of any oral presentations in the rulemaking, factual information not included in the foregoing that was considered by the Commission in the promulgation of the rule or proffered by the Commission as pertinent to the rule, the report of any advisory committee received or considered by the Commission in the rulemaking, and any other materials prescribed by the court.

(3) On the filing of the petition, the court has jurisdiction, which becomes exclusive on the filing of the materials set forth in paragraph (2) of this subsection, to affirm and enforce or to set aside the rule.

(4) The findings of the Commission as to the facts identified by the Commission as the basis, in whole or in part, of the rule, if supported by substantial evidence, are conclusive. The court shall affirm and enforce the rule unless the Commission's action in promulgating the rule is found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; contrary to constitutional right, power, privilege, or immunity; in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; or without observance of procedure required by law.

(5) If proceedings have been instituted under this subsection in two or more courts of appeals with respect to the same rule, the Commission shall file the materials set forth in paragraph (2) of this subsection in that court in which a proceeding was first instituted. The other courts shall thereupon transfer all such proceedings to the court in which the materials have been filed. For the convenience of the parties in the interest of justice that court may thereafter transfer all the proceedings to any other court of appeals.

(c) Objections not urged before Commission; stay of orders and rules; transfer of enforcement or review proceedings

(1) No objection to an order or rule of the Commission, for which review is sought under this section, may be considered by the court unless it was urged before the Commission or there was reasonable ground for failure to do so.

(2) The filing of a petition under this section does not operate as a stay of the Commission's order or rule. Until the court's jurisdiction becomes exclusive, the Commission may stay its order or rule pending judicial review if it finds that justice so requires. After the filing of a petition under this section, the court, on whatever conditions may be required and to the extent necessary to prevent irreparable injury, may issue all necessary and appropriate process to stay the order or rule or to preserve status or rights pending its review; but (notwithstanding section 705 of title 5) no such process may be issued by the court before the filing of the record or the materials set forth in subsection (b)(2) of this section unless: (A) the Commission has denied a stay or failed to grant requested relief, (B) a reasonable period has expired since the filing of an application for a stay without a decision by the Commission, or (C) there was reasonable ground for failure to apply to the Commission.

(3) When the same order or rule is the subject of one or more petitions for review filed under this section and an action for enforcement filed in a district court of the United States under section 78u(d) or (e) of this title, that court in which the petition or the action is first filed has jurisdiction with respect to the order or rule to the exclusion of any other court, and thereupon all such proceedings shall be transferred to that court; but, for the convenience of the parties in the interest of justice, that court may thereafter transfer all the proceedings to any other court of appeals or district court of the United States, whether or not a petition for review or an action for enforcement was originally filed in the transferee court. The scope of review by a district court under section 78u(d) or (e) of this

title is in all cases the same as by a court of appeals under this section.

(d) Other appropriate regulatory agencies

(1) For purposes of the preceding subsections of this section, the term ''Commission'' includes the agencies enumerated in section 78c(a)(34) of this title insofar as such agencies are acting pursuant to this chapter and the Secretary of the Treasury insofar as he is acting pursuant to section 78*o*–5 of this title.

(2) For purposes of subsection (a)(4) of this section and section 706 of title 5, an order of the Commission pursuant to section 78s(a) of this title denying registration to a clearing agency for which the Commission is not the appropriate regulatory agency or pursuant to section 78s(b) of this title disapproving a proposed rule change by such a clearing agency shall be deemed to be an order of the appropriate regulatory agency for such clearing agency insofar as such order was entered by reason of a determination by such appropriate regulatory agency pursuant to section 78s(a)(2)(C) or 78s(b)(4)(C) of this title that such registration or proposed rule change would be inconsistent with the safeguarding of securities or funds.

(June 6, 1934, ch. 404, title I, § 25, 48 Stat. 901; June 7, 1934, ch. 426, 48 Stat. 926; June 25, 1948, ch. 646, § 32(a), 62 Stat. 991; May 24, 1949, ch. 139, § 127, 63 Stat. 107; Pub. L. 85–791, § 10, Aug. 28, 1958, 72 Stat. 945; Pub. L. 94–29, § 20, June 4, 1975, 89 Stat. 158; Pub. L. 99–571, title I, § 102(k), Oct. 28, 1986, 100 Stat. 3220; Pub. L. 101–432, § 6(b), Oct. 16, 1990, 104 Stat. 975.)

REFERENCES IN TEXT

This chapter, referred to in subsecs. (a)(1) and (d)(1), was in the original ''this title''. See References in Text note set out under section 78a of this title.

The Federal Rules of Appellate Procedure, referred to in subsec. (a)(2), are set out in the Appendix to Title 28, Judiciary and Judicial Procedure.

AMENDMENTS

1990—Subsec. (b)(1). Pub. L. 101–432 inserted ''78i(h)(2),'' after ''section 78f,''.

1986—Subsec. (d)(1). Pub. L. 99–571 inserted ''and the Secretary of the Treasury insofar as he is acting pursuant to section 78*o*–5 of this title''.

1975—Subsec. (a). Pub. L. 94–29 revised existing provisions into five numbered paragraphs.

Subsec. (b). Pub. L. 94–29 substituted provisions permitting persons adversely affected by any rule promulgated by the Commission pursuant to sections 78f, 78k, 78k–1, 78*o*(c)(5) or (6), 78*o*–3, 78q, 78q–1, or 78s of this title to obtain direct review in an appropriate Court of Appeals for provisions that commencement of proceedings under subsec. (a) shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.

Subsecs. (c), (d). Pub. L. 94–29 added subsecs. (c) and (d).

1958—Subsec. (a). Pub. L. 85–791, in second sentence, substituted ''transmitted by the clerk of the court to'' for ''served upon'', struck out ''certify and'' before ''file in the court'', struck out ''a transcript of'' after ''file in the court'', and inserted ''as provided in section 2112 of title 28'', and, in third sentence, substituted ''petition'' for ''transcript'', and ''jurisdiction, which upon the filing of the record shall be exclusive'' for ''exclusive jurisdiction''.

CHANGE OF NAME

Act June 25, 1948, eff. Sept. 1, 1948, as amended by act May 24, 1949, substituted ''court of appeals'' for ''circuit court of appeals''.

Act June 7, 1934, substituted ''United States Court of Appeals for the District of Columbia'' for ''Court of Appeals for District of Columbia''.

EFFECTIVE DATE OF 1986 AMENDMENT

Amendment by Pub. L. 99–571 effective 270 days after Oct. 28, 1986, see section 401 of Pub. L. 99–571, set out as an Effective Date note under section 78*o*–5 of this title.

EFFECTIVE DATE OF 1975 AMENDMENT

Amendment by Pub. L. 94–29 effective June 4, 1975, see section 31(a) of Pub. L. 94–29, set out as a note under section 78b of this title.

TRANSFER OF FUNCTIONS

For transfer of functions of Securities and Exchange Commission, with certain exceptions, to Chairman of such Commission, see Reorg. Plan No. 10 of 1950, §§1, 2, eff. May 24, 1950, 15 F.R. 3175, 64 Stat. 1265, set out under section 78d of this title.

§ 78z. Unlawful representations

No action or failure to act by the Commission or the Board of Governors of the Federal Reserve System, in the administration of this chapter shall be construed to mean that the particular authority has in any way passed upon the merits of, or given approval to, any security or any transaction or transactions therein, nor shall such action or failure to act with regard to any statement or report filed with or examined by such authority pursuant to this chapter or rules and regulations thereunder, be deemed a finding by such authority that such statement or report is true and accurate on its face or that it is not false or misleading. It shall be unlawful to make, or cause to be made, to any prospective purchaser or seller of a security any representation that any such action or failure to act by any such authority is to be so construed or has such effect.

(June 6, 1934, ch. 404, title I, § 26, 48 Stat. 902; Pub. L. 105–353, title III, § 301(b)(5), Nov. 3, 1998, 112 Stat. 3236.)

REFERENCES IN TEXT

This chapter, referred to in text, was in the original ''this title''. See References in Text note set out under section 78a of this title.

AMENDMENTS

1998—Pub. L. 105–353 substituted ''Board of Governors of the Federal Reserve System'' for ''Federal Reserve Board''.

TRANSFER OF FUNCTIONS

For transfer of functions of Securities and Exchange Commission, with certain exceptions, to Chairman of such Commission, see Reorg. Plan No. 10 of 1950, §§1, 2, eff. May 24, 1950, 15 F.R. 3175, 64 Stat. 1265, set out under section 78d of this title.

§ 78aa. Jurisdiction of offenses and suits

(a) In general

The district courts of the United States and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction of violations of this chapter or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by this chapter or the rules

and regulations thereunder. Any criminal proceeding may be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty created by this chapter or rules and regulations thereunder, or to enjoin any violation of such chapter or rules and regulations, may be brought in any such district or in the district wherein the defendant is found or is an inhabitant or transacts business, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found. In any action or proceeding instituted by the Commission under this chapter in a United States district court for any judicial district, a subpoena issued to compel the attendance of a witness or the production of documents or tangible things (or both) at a hearing or trial may be served at any place within the United States. Rule 45(c)(3)(A)(ii) of the Federal Rules of Civil Procedure shall not apply to a subpoena issued under the preceding sentence. Judgments and decrees so rendered shall be subject to review as provided in sections 1254, 1291, 1292, and 1294 of title 28. No costs shall be assessed for or against the Commission in any proceeding under this chapter brought by or against it in the Supreme Court or such other courts.

(b) Extraterritorial jurisdiction

The district courts of the United States and the United States courts of any Territory shall have jurisdiction of an action or proceeding brought or instituted by the Commission or the United States alleging a violation of the antifraud provisions of this chapter involving—

(1) conduct within the United States that constitutes significant steps in furtherance of the violation, even if the securities transaction occurs outside the United States and involves only foreign investors; or

(2) conduct occurring outside the United States that has a foreseeable substantial effect within the United States.

(June 6, 1934, ch. 404, title I, § 27, 48 Stat. 902; June 25, 1936, ch. 804, 49 Stat. 1921; June 25, 1948, ch. 646, § 32(b), 62 Stat. 991; May 24, 1949, ch. 139, § 127, 63 Stat. 107; Pub. L. 100–181, title III, § 326, Dec. 4, 1987, 101 Stat. 1259; Pub. L. 111–203, title IX, §§ 929E(b), 929P(b)(2), July 21, 2010, 124 Stat. 1853, 1865.)

REFERENCES IN TEXT

This chapter, referred to in text, was in the original ''this title''. See References in Text note set out under section 78a of this title.

The Federal Rules of Civil Procedure, referred to in subsec. (a), are set out in the Appendix to Title 28, Judiciary and Judicial Procedure.

CODIFICATION

As originally enacted section contained references to the Supreme Court of the District of Columbia. Act June 25, 1936, substituted ''the district court of the United States for the District of Columbia'' for ''the Supreme Court of the District of Columbia'', and act June 25, 1948, as amended by act May 24, 1949, substituted ''United States District Court for the District of Columbia'' for ''district court of the United States for the District of Columbia''. Pub. L. 100–181 struck out reference to the United States District Court for the District of Columbia. Previously, such words had been editorially eliminated as superfluous in view of section 132(a) of Title 28, Judiciary and Judicial Procedure, which provides that ''There shall be in each judicial district a district court which shall be a court of record known as the United States District Court for the district'', and section 88 of Title 28 which provides that ''the District of Columbia constitutes one judicial district''.

AMENDMENTS

2010—Pub. L. 111–203, § 929P(b)(2), designated existing provisions as subsec. (a), inserted heading, and added subsec. (b).

Pub. L. 111–203, § 929E(b), inserted ''In any action or proceeding instituted by the Commission under this chapter in a United States district court for any judicial district, a subpoena issued to compel the attendance of a witness or the production of documents or tangible things (or both) at a hearing or trial may be served at any place within the United States. Rule 45(c)(3)(A)(ii) of the Federal Rules of Civil Procedure shall not apply to a subpoena issued under the preceding sentence.'' after ''defendant may be found.''

1987—Pub. L. 100–181 struck out '', the United States District Court for the District of Columbia,'' after ''district courts of the United States'' and substituted ''sections 1254, 1291, 1292, and 1294 of title 28'' for ''sections 128 and 240 of the Judicial Code, as amended (U.S.C., title 28, secs. 225 and 347)''. See Codification note above.

EFFECTIVE DATE OF 2010 AMENDMENT

Amendment by Pub. L. 111–203 effective 1 day after July 21, 2010, except as otherwise provided, see section 4 of Pub. L. 111–203, set out as an Effective Date note under section 5301 of Title 12, Banks and Banking.

TRANSFER OF FUNCTIONS

For transfer of functions of Securities and Exchange Commission, with certain exceptions, to Chairman of such Commission, see Reorg. Plan No. 10 of 1950, §§ 1, 2, eff. May 24, 1950, 15 F.R. 3175, 64 Stat. 1265, set out under section 78d of this title.

§ 78aa–1. Special provision relating to statute of limitations on private causes of action

(a) Effect on pending causes of action

The limitation period for any private civil action implied under section 78j(b) of this title that was commenced on or before June 19, 1991, shall be the limitation period provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such laws existed on June 19, 1991.

(b) Effect on dismissed causes of action

Any private civil action implied under section 78j(b) of this title that was commenced on or before June 19, 1991—

(1) which was dismissed as time barred subsequent to June 19, 1991, and

(2) which would have been timely filed under the limitation period provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such laws existed on June 19, 1991,

shall be reinstated on motion by the plaintiff not later than 60 days after December 19, 1991.

(June 6, 1934, ch. 404, title I, § 27A, as added Pub. L. 102–242, title IV, § 476, Dec. 19, 1991, 105 Stat. 2387.)

§ 78bb. Effect on existing law

(a) Addition of rights and remedies; recovery of actual damages; State securities commissions

Except as provided in subsection (f) of this section, the rights and remedies provided by this

mails, or of any facility of any national securities exchange, to use or employ, in connection with the purchase or sale of any security otherwise than on a national securities exchange, any act, practice, or course of business defined by the Commission to be included within the term ''manipulative, deceptive, or other fraudulent device or contrivance'', as such term is used in section 15(c)(1) of the act.

(b) It shall be unlawful for any municipal securities dealer directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange, to use or employ, in connection with the purchase or sale of any municipal security, any act, practice, or course of business defined by the Commission to be included within the term ''manipulative, deceptive, or other fraudulent device or contrivance,'' as such term is used in section 15(c)(1) of the act.

(Secs. 10, 12, 48 Stat. 891, 892, as amended; 15 U.S.C. 78j, 78*l*)

CROSS REFERENCES: See also § 240.10b–5. For regulation relating to prohibition of manipulative or deceptive devices, see § 240.10b–1. For the term ''manipulative, deceptive, or other fraudulent device or contrivance'', as used in section 15(c)(1) of the act, see §§ 240.15c1–2 to 240.15c1–9.

[13 FR 8183, Dec. 22, 1948, as amended at 19 FR 8017, Dec. 4, 1954; 41 FR 22824, June 7, 1976]

§ 240.10b–4 [Reserved]

§ 240.10b–5 Employment of manipulative and deceptive devices.

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

(a) To employ any device, scheme, or artifice to defraud,

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,

in connection with the purchase or sale of any security.

(Sec. 10; 48 Stat. 891; 15 U.S.C. 78j)

[13 FR 8183, Dec. 22, 1948, as amended at 16 FR 7928, Aug. 11, 1951]

§ 240.10b5–1 Trading "on the basis of" material nonpublic information in insider trading cases.

Preliminary Note to § 240.10b5–1: This provision defines when a purchase or sale constitutes trading ''on the basis of'' material nonpublic information in insider trading cases brought under Section 10(b) of the Act and Rule 10b–5 thereunder. The law of insider trading is otherwise defined by judicial opinions construing Rule 10b–5, and Rule 10b5–1 does not modify the scope of insider trading law in any other respect.

(a) *General.* The ''manipulative and deceptive devices'' prohibited by Section 10(b) of the Act (15 U.S.C. 78j) and § 240.10b–5 thereunder include, among other things, the purchase or sale of a security of any issuer, on the basis of material nonpublic information about that security or issuer, in breach of a duty of trust or confidence that is owed directly, indirectly, or derivatively, to the issuer of that security or the shareholders of that issuer, or to any other person who is the source of the material nonpublic information.

(b) *Definition of ''on the basis of.''* Subject to the affirmative defenses in paragraph (c) of this section, a purchase or sale of a security of an issuer is ''on the basis of'' material nonpublic information about that security or issuer if the person making the purchase or sale was aware of the material nonpublic information when the person made the purchase or sale.

(c) *Affirmative defenses.* (1)(i) Subject to paragraph (c)(1)(ii) of this section, a person's purchase or sale is not ''on the basis of'' material nonpublic information if the person making the purchase or sale demonstrates that:

(A) Before becoming aware of the information, the person had:

(*1*) Entered into a binding contract to purchase or sell the security,

(*2*) Instructed another person to purchase or sell the security for the instructing person's account, or

(*3*) Adopted a written plan for trading securities;

may seek information or the informal resolution of a dispute by calling or writing to the Hotline at the telephone number and address in paragraph (f) of this section. The Hotline Staff will informally seek information from the caller and any respondent, as appropriate. The Hotline Staff will attempt to resolve disputes without litigation or other formal proceedings. The Hotline Staff may not resolve matters that are before the Commission in docketed proceedings.

(c) All information and documents obtained through the Hotline Staff shall be treated as non-public by the Commission and its staff, consistent with the provisions of section 1b.9 of this part.

(d) Calls to the Hotline may be made anonymously.

(e) Any person who contacts the Hotline is not precluded from filing a formal action with the Commission if discussions assisted by Hotline Staff are unsuccessful at resolving the matter. A caller may terminate use of the Hotline procedure at any time.

(f) The Hotline may be reached by calling (202) 502–8390 or 1–888–889–8030 (toll free), by e-mail at *hotline@ferc.gov*, or writing to: Enforcement Hotline, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

(g) Any person affected by either the construction or operation of a certificated natural gas pipeline under the Natural Gas Act or by the construction or operation of a project under the Federal Power Act may seek the informal resolution of a dispute by calling or writing the Commission's Dispute Resolution Service. The Dispute Resolution Service may be reached by calling the DRS Helpline toll-free at 1–877–337–2237, or by e-mail at *ferc.adr@ferc.gov*, or writing to: Dispute Resolution Service, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

(h) Any person who contacts the Dispute Resolution Service Helpline is not precluded from filing a formal action with the Commission if discussions assisted by the Dispute Resolution Service staff are unsuccessful at resolving the matter. A caller may terminate the use of alternative dispute resolution procedures at any time.

[Order 602, 64 FR 17097, Apr. 8, 1999, as amended by Order 647, 69 FR 32438, June 10, 2004; Order 734, 75 FR 21505, Apr. 26, 2010]

PART 1c—PROHIBITION OF ENERGY MARKET MANIPULATION

Sec.

AUTHORITY: 15 U.S.C. 717–717z; 16 U.S.C. 791–825r, 2601–2645; 42 U.S.C. 7101–7352.

SOURCE: 71 FR 4258, Jan. 26, 2006, unless otherwise noted.

§ 1c.1 Prohibition of natural gas market manipulation.

(a) It shall be unlawful for any entity, directly or indirectly, 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,

(1) To use or employ any device, scheme, or artifice to defraud,

(2) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) To engage in any act, practice, or course of business that operates or would operate as a fraud or deceit upon any entity.

(b) Nothing in this section shall be construed to create a private right of action.

§ 1c.2 Prohibition of electric energy market manipulation.

(a) It shall be unlawful for any entity, directly or indirectly, in connection with the purchase or sale of electric energy or the purchase or sale of transmission services subject to the jurisdiction of the Commission,

(1) To use or employ any device, scheme, or artifice to defraud,

(2) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

why the party's claim or interest in the proceeding should not be dismissed, denied, disregarded, or otherwise adversely affected because of the prohibited off-the-record communication.

(2) If a person knowingly makes or causes to be made a prohibited off-the-record communication, the Commission may disqualify and deny the person, temporarily or permanently, the privilege of practicing or appearing before it, in accordance with Rule 2102 (Suspension).

(3) Commission employees who are found to have knowingly violated this rule may be subject to the disciplinary actions prescribed by the agency's administrative directives.

(j) *Section not exclusive.* (1) The Commission may, by rule or order, modify any provision of this section as it applies to all or part of a proceeding, to the extent permitted by law.

(2) The provisions of this section are not intended to limit the authority of a decisional employee to decline to engage in permitted off-the-record communications, or where not required by any law, statute or regulation, to make a public disclosure of any exempted off-the-record communication.

[Order 607–A, 65 FR 71254, Nov. 30, 2000, as amended by Order 623, 66 FR 67482, Dec. 31, 2001; Order 699, 72 FR 45328, Aug. 14, 2007; Order 718, 73 FR 62886, Oct. 22, 2008]

§ 385.2202 Separation of functions (Rule 2202).

In any proceeding in which a Commission adjudication is made after hearing, or in any proceeding arising from an investigation under part 1b of this chapter beginning from the time the Commission initiates a proceeding governed by part 385 of this chapter, no officer, employee, or agent assigned to work upon the proceeding or to assist in the trial thereof, in that or any factually related proceeding, shall participate or advise as to the findings, conclusion or decision, except as a witness or counsel in public proceedings.

[Order 718, 73 FR 62886, Oct. 22, 2008]

PART 388—INFORMATION AND REQUESTS

Sec.

AUTHORITY: 5 U.S.C. 301–305, 551, 552 (as amended), 553–557; 42 U.S.C. 7101–7352.

SOURCE: Order 488, 53 FR 1473, Jan. 20, 1988, unless otherwise noted.

§ 388.101 Scope.

This part prescribes the rules governing public notice of proceedings, publication of decisions, requests for informal advice from Commission staff, procedures for press, television, radio and photographic coverage, requests for Commission records, requests for confidential treatment of documents submitted to the Commission, procedures for responding to subpoenas seeking documents or testimony from Commission employees or former employees, fees for various requests for documents, and requests for reduction or waiver of these fees.

§ 388.102 Notice of proceedings.

(a) Public sessions of the Commission for taking evidence or hearing argument; public conferences and hearings before a presiding officer; and public

Hunter v. FERC **D.C. Cir. No. 11-1477**

CERTIFICATE OF SERVICE

In accordance with Fed. R. App. P. 25(d), and the Court's Administrative Order Regarding Electronic Case Filing, I hereby certify that I have, this 11th day of June 2011, served the foregoing upon the counsel listed in the Service Preference Report via email through the Court's CM/ECF system or via U.S. Mail, as indicated below:

Andrew Clark Lourie Leanne Abrams Bortner Kobre & Kim LLP 1919 M Street, NW Washington, DC 20036	Email
Jonathan Lee Marcus Mary T. Connelly Commodity Futures Trading Commission (CFTC) Office of General Counsel 1155 21st Street, NW Three Lafayette Center Washington, DC 20581	Email
Melanie Lisa Oxhorn 101 East State Street Suite 128 Ithaca, NY 14850	Email

Michael Sang Yun Kim — Email
Kobre & Kim LLP
800 Third Avenue
6th Floor
New York, NY 10022

/s/ Robert M. Kennedy
Robert M. Kennedy
Attorney