drums along the potomac

Why, why, why? We thought FERC and CFTC policy matters had entered into a sort of Golden Age, or at the very least a quasi-symbiotic phase. They have that memorandum of understanding thing going on. They've both claimed to be over the whole Brian-Hunter-Amaranth-jurisdictional dust-up. And for the past year, CFTC has largely signaled that for all those arcane, FERC jurisdictional contracts that sort of walk like a derivative and talk like a derivative, that well, maybe the boys at 21st St. NW can give them a pass. Let's face it, the CFTC has little expertise in these contracts or markets and FERC has done a dandy job managing those markets heretofore, so why muddy the waters? If you move on one aspect of these pseudo-derivatives, it unlocks all sorts of other potential links. Like, for example, private rights of action. But, we're getting ahead of ourselves. "Let it ride," has been the general consensus from folks inside and outside the energy sector. Alas. Recall at the most recent CFTC EEMAC meeting that the panel took a long, hard look at the implications of the CFTC's proposed order to exempt (not exempt actually) certain types of transactions in FERC-regulated, markets run by RTOs ISOs. The big matter at hand focused on the consequences for consumers and ratepayers of permitting private rights of action against RTO and ISO participants. Cadwalader's Paul Pantano, an EEMAC member, offered a particularly deep assessment of the issue and consequences of the CFTC pressing ahead with a ruling that didn't exempt certain derivative-like power contracts. No dice apparently. Earlier this month the agency proposed a long-awaited amendment to the original 2013 RTO-ISO order. That earlier order moved to exempt certain power-related transactions from various Commodity Exchange Act rules and related CFTC regulations. The new amendment language basically punts on the earlier language. If the new language is adopted, plaintiffs would now be permitted to pursue CEA-based allegations of fraud and price manipulation in connection with wholesale power market transactions – you know, FERC stuff. This is unbelievable. Of course, the new amendment language also has a comment period, more review and so on, so there is a possibility that this may still all go away, leaving both agencies in their respective sandboxes. It's up to the market to make some noise. We agree this amendment is unnecessary, folks. Plaintiffs are well protected already under FERC jurisdiction and this new language simply muddies things. Pantano and company published an analysis of the amendment that is available for free on the Cadwalader site. Go to *http://www.cadwalader.com/resources/clients-friends-memos/cftc-proposes-amendment-to-rto-iso-order*. The amendment can be seen at *http://www.cftc.gov/PressRoom/PressReleases/pr7367-16#PRBoxR2*. Commissioner Chris Giancarlo dissented from the amendment and issued a well-rationalized argument that ran something like this: For over three years, US power market participants have been operating in reliance on the RTO-ISO order. They have trusted in the reasonable, unambiguous understanding that transactions covered by the order are exempt from all provisions of the Commodity Exchange Act except for those specifically enumerated as reserved. They have relied on the

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plain language of the RTO-ISO order that "(e)xempts … the execution of (specified) electric energy-related agreements, contracts and transactions … and any person or class of persons offering, entering into, rendering advice or rendering other services with respect thereto, from *all* provisions of the CEA except, in each case, the commission's general anti-fraud and anti-manipulation authority, and scienter-based prohibitions ... Too bad for them … " It gets better. Go to *http://www.cftc.gov/PressRoom/SpeechesTestimony/giancarlostatement051016*. Chairman Tim Massad wasn't moved. On Giancarlo's "legal uncertainty" point, the chairman said basically, nuts to that. We're not so sure why this amendment came out the way it did – history would suggest that this chairman would have stayed with the original language. Hmm. As we said, it's up to the market to make some noise on this one. Submit comments in the next 20 or so days before the deadline ends. We pinged a FERC politico on the matter and he noted that the commission has not yet prepared a response.

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"What do you do for a living, daddy?" "Why, I'm a whistleblower, sweetie," said the man from the fantail of his 60-foot yacht. We read the SEC press release recently about the whistleblower who was awarded $3.5 million in cold, hard cash for offering some "added details" to an ongoing investigation. We're not making this up. The release noted that the tip provided by the unnamed employee of the unnamed company "bolstered an ongoing investigation with additional evidence of wrongdoing that strengthened the SEC's case." The SEC order said that the claimant's information redirected the agency's enforcement staff to basically poke around under the rock to the left (as opposed to the rock to the right), "when staff might otherwise not have done so, and this evidentiary development strengthened the commission's case by meaningfully increasing enforcement staff's leverage during the settlement negotiations. As such, claimant's information significantly contributed to the successful enforcement of the covered action within the meaning of Rule 21F-4(c) (2)." $3.5 million. Just like that. Cadwalader's Steve Lofchie had a thing or two to say about this one: "This case may be the first in which a whistleblower award was granted to an employee who did not produce evidence that initiated a case, but rather evidence that furthered an ongoing investigation of which the employee was aware. For those who find the concept of whistleblower payments troubling, at least in the case of whistleblowers who do not first raise the issue within their own organization, this case should raise the level of discomfort. In effect, the SEC offers a bounty to employees to provide unfavorable information about their employer without resolving the matter internally. To even the playing field, perhaps private litigants should be able to offer payoffs to government employees who come forward with evidence pointing to weaknesses in the government's evidence. Why should government activities be conducted without the guards against improper behavior that apply to private activities?" An excellent point.

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The CFTC Whistleblower office had a booth at the recent FIA Legal & Compliance Summit in Baltimore earlier this month. They gave out great tchotchkes, besides brochures. Mouse pads with all the contact info; metal whistles with the agency logo and these blue, whistle-shaped squishy-stress reliever things, also with the agency logo. I grabbed one of each. When I got home, I noted that somebody had previously added their own opinion of the free stuff, or perhaps on the idea in general.

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Attorney Gary Dewaal of Katten in NYC publishes a weekly blog called "Bridging the Week." He picks apart all sorts of key policy and regulatory happenings, rules and law, from the SEC and CFTC and aligned regulators around the globe. He often goes deep into the weeds on rules. **One of his entries this week pointed to the case of an alleged spoofer in a CFTC enforcement action who claims that the relevant statute and regulation are "unconstitutionally vague."** Dewaal notes that the trader and his company filed a motion to dismiss the CFTC's action on the grounds that the law prohibiting spoofing and the CFTC rule prohibiting deceptive contrivances (CFTC rule 180.1) are constitutionally void for vagueness. According to papers filed by the defendants in support of their motion, the CFTC has never provided official notice of what activity might qualify as spoofing or be of "the character of or commonly known to the trade as 'spoofing.'" Defendants argued that "[t]he CFTC has had five years to try to rectify the vagueness of the spoofing statute by issuing a rule or regulation to prohibit trading practices that may constitute spoofing, but it has failed to do so." Defendants acknowledged that the CFTC issued a guidance and policy statement in May 2013 regarding spoofing, but said that document "does not conclude that there is any common understanding in the trade of what constitutes 'spoofing' or set forth what that understanding might be." Just recently, a federal court judge refused to set aside the spoofing conviction of Michael Coscia, declining to find the relevant statute void for vagueness. Dewaal says that from the outset, he's had difficulty understanding the meaning of "spoofing" as defined under the Commodity Exchange Act. "Although the law expressly defines spoofing in a parenthetical phrase as "bidding or offering with the

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