

110TH CONGRESS
2D SESSION

S. 3185

To provide for regulation of certain transactions involving energy commodities, to strengthen the enforcement authorities of the Federal Energy Regulatory Commission under the Natural Gas Act and the Federal Power Act, and for other purposes.

IN THE SENATE OF THE UNITED STATES

JUNE 24 (legislative day, JUNE 23), 2008

Ms. CANTWELL (for herself, Mr. WHITEHOUSE, Mr. SANDERS, Mr. KERRY, Mr. WYDEN, and Mr. NELSON of Florida) introduced the following bill; which was read twice and referred to the Committee on Agriculture, Nutrition, and Forestry

A BILL

To provide for regulation of certain transactions involving energy commodities, to strengthen the enforcement authorities of the Federal Energy Regulatory Commission under the Natural Gas Act and the Federal Power Act, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Prevent Unfair Manip-
5 ulation of Prices Act of 2008”.

1 **SEC. 2. REGULATION OF CERTAIN TRANSACTIONS IN DE-**
2 **RIVATIVES INVOLVING ENERGY COMMOD-**
3 **ITIES.**

4 (a) ENERGY COMMODITY DEFINED.—Section 1a of
5 the Commodity Exchange Act (7 U.S.C. 1a) is amended—

6 (1) in paragraph (14), by inserting “, an energy
7 commodity,” after “excluded commodity”;

8 (2) by redesignating paragraphs (13) through
9 (21) and paragraphs (22) through (34) as para-
10 graphs (14) through (22) and paragraphs (24)
11 through (36), respectively;

12 (3) by inserting after paragraph (12) the fol-
13 lowing:

14 “(13) ENERGY COMMODITY.—The term ‘energy
15 commodity’ means—

16 “(A) coal;

17 “(B) crude oil, gasoline, diesel fuel, jet
18 fuel, heating oil, and propane;

19 “(C) electricity;

20 “(D) natural gas; and

21 “(E) any other substance (other than an
22 excluded commodity, a metal, or an agricultural
23 commodity) that is used as a source of energy,
24 as the Commission, in its discretion, deems ap-
25 propriate.”; and

1 (4) by inserting after paragraph (22) (as so re-
2 designated by paragraph (2) of this subsection) the
3 following:

4 “(23) INCLUDED ENERGY TRANSACTION; BI-
5 LATERAL ENERGY TRANSACTION.—The term ‘in-
6 cluded energy transaction’ means a contract, agree-
7 ment, or transaction in an energy commodity for fu-
8 ture delivery that provides for a delivery point of the
9 energy commodity in the United States, or that is
10 transacted on a computer terminal located in the
11 United States. The term ‘bilateral included energy
12 transaction’ means an included energy transaction
13 that is executed or traded other than on or through
14 a trading facility.”.

15 (b) EXTENSION OF REGULATORY AUTHORITY TO
16 SWAPS INVOLVING INCLUDED ENERGY TRANSACTIONS.—
17 Section 2(g) of such Act (7 U.S.C. 2(g)) is amended—

18 (1) by inserting “or an energy commodity”
19 after “agricultural commodity”; and

20 (2) by inserting “not an included energy trans-
21 action and is” before “—”.

22 (c) EXEMPTION FOR TRANSACTIONS IN ENERGY
23 COMMODITIES THAT ARE NOT INCLUDED ENERGY
24 TRANSACTIONS.—Section 2 of such Act (7 U.S.C. 2) is
25 amended by adding at the end the following:

1 “(j) EXEMPTION FOR TRANSACTIONS IN ENERGY
2 COMMODITIES WHICH ARE NOT INCLUDED ENERGY
3 TRANSACTIONS.—This Act shall not apply to a contract,
4 agreement, or transaction in an energy commodity which
5 is not an included energy transaction.”.

6 (d) EXTENSION OF REGULATORY AUTHORITY TO IN-
7 CLUDED ENERGY TRANSACTIONS ON FOREIGN BOARDS
8 OF TRADE.—Section 4 of such Act (7 U.S.C. 6) is amend-
9 ed—

10 (1) in subsection (a), by inserting “, and which
11 is not an included energy transaction” after “terri-
12 tories or possessions” the 2nd place it appears; and

13 (2) in subsection (b), by adding at the end the
14 following: “The preceding sentence shall not apply
15 with respect to included energy transactions.”.

16 (e) LIMITATION OF CFTC AUTHORITY TO PROVIDE
17 CERTAIN EXEMPTIONS WITH RESPECT TO INCLUDED
18 ENERGY TRANSACTIONS.—

19 (1) IN GENERAL.—Section 4(c) of such Act (7
20 U.S.C. 6(c)) is amended by adding at the end the
21 following:

22 “(6) The Commission may not exempt any in-
23 cluded energy transaction from the requirements of
24 subsection (a), unless the Commission provides 60
25 days advance notice to the Congress and solicits

1 public comment about the provision of the exemp-
2 tion.”.

3 (2) NULLIFICATION OF NO-ACTION LETTER EX-
4 EMPTIONS TO CERTAIN REQUIREMENTS APPLICABLE
5 TO INCLUDED ENERGY TRANSACTIONS.—Beginning
6 180 days after the date of the enactment of this Act,
7 any exemption provided by the Commodity Futures
8 Trading Commission that has allowed included en-
9 ergy transactions (as defined in section 1a(13) of
10 the Commodity Exchange Act) to be conducted with-
11 out regard to the requirements of section 4(a) of
12 such Act shall be null and void.

13 (f) REQUIREMENT TO ESTABLISH UNIFORM POSI-
14 TION LIMITS FOR INCLUDED ENERGY TRANSACTIONS.—
15 Section 4a(a) of such Act (7 U.S.C. 6a(a)) is amended—

16 (1) by inserting after the 2nd sentence the fol-
17 lowing: “With respect to included energy trans-
18 actions, the Commission shall fix limits on the ag-
19 gregate number of positions which may be held by
20 any person for the prompt month, and the aggregate
21 number of positions which may be held by any per-
22 son for each month, and the aggregate number of
23 positions which may be held by any person for all
24 months, in all markets subject to the jurisdiction of
25 the Commission.”; and

1 (2) in the 4th sentence by inserting “, con-
2 sistent with the 3rd sentence,” after “Commission”.

3 (g) SWAPS INVOLVING INCLUDED ENERGY TRANS-
4 ACTIONS EXCLUDED FROM EXEMPTION FOR BONA FIDE
5 HEDGING TRANSACTIONS.—Section 4a(c) of such Act (7
6 U.S.C. 6a(c)) is amended by adding at the end the fol-
7 lowing: “The preceding provisions of this subsection shall
8 not apply to swaps that involve an included energy trans-
9 action.”.

10 (h) SPECIAL RULES APPLICABLE TO BILATERAL IN-
11 CLUDED ENERGY TRANSACTIONS.—

12 (1) EXEMPTION FROM REQUIREMENT THAT
13 TRANSACTIONS BE MADE ON OR THROUGH A DES-
14 IGNATED CONTRACT MARKET, ETC.—Section 4(a) of
15 such Act (7 U.S.C. 6(a)), as amended by subsection
16 (d)(1) of this section, is amended by inserting
17 “(other than a bilateral included energy trans-
18 action)” after “any transaction”.

19 (2) REPORTING AND RECORDKEEPING RE-
20 QUIREMENTS.—

21 (A) IN GENERAL.—Section 4g of such Act
22 (7 U.S.C. 6g) is amended by adding at the end
23 the following:

24 “(g) REQUIREMENTS APPLICABLE TO BILATERAL
25 INCLUDED ENERGY TRANSACTIONS.—

1 “(1) IN GENERAL.—An eligible contract partici-
2 pant that enters into or executes a bilateral included
3 energy transaction shall—

4 “(A) provide to the Commission on a time-
5 ly basis the information required under para-
6 graph (2);

7 “(B) consistent with section 4i, maintain
8 books and records relating to the transaction
9 for at least 5 years after the date of the trans-
10 action, in such form as the Commission shall
11 require; and

12 “(C) keep the books and records open to
13 inspection by any representative of the Commis-
14 sion or the United States Department of Jus-
15 tice.

16 “(2) REQUIRED INFORMATION.—

17 “(A) IN GENERAL.—The Commission shall
18 require eligible contract participants to provide
19 the Commission with such information regard-
20 ing bilateral included energy transactions en-
21 tered into or executed by the participants as the
22 Commission considers necessary to assist in de-
23 tecting and preventing price manipulation.

24 “(B) INFORMATION TO BE PROVIDED.—
25 The information to be provided shall include in-

1 formation regarding large trading positions (as
2 defined by the Commission) obtained through 1
3 or more bilateral included energy transactions
4 that involve—

5 “(i) substantial quantities of the un-
6 derlying energy commodity in the cash
7 market; or

8 “(ii) substantial positions, invest-
9 ments, or trades in agreements or con-
10 tracts related to energy commodities.”.

11 (B) REGULATIONS.—Not later than 180
12 days after the date of the enactment of this
13 Act, the Commodity Futures Trading Commis-
14 sion shall issue a notice of proposed rule-
15 making, and not later than 1 year after such
16 date of enactment, the Commission shall pro-
17 mulgate final regulations, specifying the infor-
18 mation to be maintained and provided under
19 section 4g(g)(2) of the Commodity Exchange
20 Act.

21 (i) PUBLIC DISCLOSURE OF NUMBER AND VALUE OF
22 POSITIONS HELD IN COMMODITY INDEX FUNDS.—Sec-
23 tion 8 of such Act (7 U.S.C. 12) is amended by adding
24 at the end the following:

1 “(j) The Commission shall publish on its website
2 monthly the aggregate number and value of the long posi-
3 tions, and the aggregate number and value of the short
4 positions, that are held by any person in any portfolio con-
5 structed to match or track the components of an index
6 of all commodities, and the portion of the positions that
7 are net long positions in included energy transactions.”.

8 (j) NO EFFECT ON FERC AUTHORITY.—Section 2
9 of such Act (7 U.S.C. 2), as amended by subsection (c)
10 of this section, is amended by adding at the end the fol-
11 lowing:

12 “(k) NO EFFECT ON FERC AUTHORITY.—This Act
13 shall not be interpreted to affect the jurisdiction of the
14 Federal Energy Regulatory Commission with respect to
15 the authority of the Federal Energy Regulatory Commis-
16 sion under the Federal Power Act (16 U.S.C. 791a et
17 seq.), the Natural Gas Act (15 U.S.C. 717 et seq.), or
18 other law to obtain information or otherwise carry out the
19 responsibilities of the Federal Energy Regulatory Commis-
20 sion.”.

21 **SEC. 3. CEASE-AND-DESIST AUTHORITY.**

22 (a) NATURAL GAS ACT.—Section 20 of the Natural
23 Gas Act (15 U.S.C. 717s) is amended by adding the fol-
24 lowing at the end:

1 “(e) CEASE-AND-DESIST PROCEEDINGS; TEMPORARY
2 ORDERS; AUTHORITY OF THE COMMISSION.—If the Com-
3 mission finds, after notice and opportunity for hearing,
4 that any entity may be violating, may have violated, or
5 may be about to violate any provision of this Act, or any
6 rule, regulation, restriction, condition, or order made or
7 imposed by the Commission under the authority of this
8 Act, the Commission may publish its findings and issue
9 an order requiring such entity, and any other entity that
10 is, was, or would be a cause of the violation, due to an
11 act or omission the entity knew or should have known
12 would contribute to such violation, to cease and desist
13 from committing or causing such violation and any future
14 violation of the same provision, rule, or regulation. Such
15 order may, in addition to requiring an entity to cease and
16 desist from committing or causing a violation, require such
17 entity to comply, to provide an accounting and
18 disgorgement, or to take steps to effect compliance, with
19 such provision, rule, or regulation, upon such terms and
20 conditions and within such time as the Commission may
21 specify in such order. Any such order may, as the Commis-
22 sion deems appropriate, require future compliance or steps
23 to effect future compliance, either permanently or for such
24 period of time as the Commission may specify.

1 “(f) HEARING.—The notice instituting proceedings
2 pursuant to subsection (e) shall fix a hearing date not ear-
3 lier than 30 days nor later than 60 days after service of
4 the notice unless an earlier or a later date is set by the
5 Commission with the consent of any respondent so served.

6 “(g) TEMPORARY ORDER.—Whenever the Commis-
7 sion determines that the alleged violation or threatened
8 violation specified in the notice instituting proceedings
9 pursuant to subsection (e), or the continuation thereof, is
10 likely to result in significant dissipation or conversion of
11 assets, significant harm to energy consumers, or substan-
12 tial harm to the public interest, prior to the completion
13 of the proceedings referred to in subsection (e). The Com-
14 mission may issue a temporary order requiring the re-
15 spondent to cease and desist from the violation or threat-
16 ened violation and to take such action to prevent the viola-
17 tion or threatened violation and to prevent dissipation or
18 conversion of assets, significant harm to energy con-
19 sumers, or substantial harm to the public interest, frustra-
20 tion of the Commission’s ability to conduct the pro-
21 ceedings, or frustration of the Commission’s ability to re-
22 dress said violation at the conclusion of the proceedings,
23 as the Commission deems appropriate pending completion
24 of such proceedings. Such an order shall be entered only
25 after notice and opportunity for a hearing, unless the

1 Commission determines that notice and hearing prior to
2 entry would be impracticable or contrary to the public in-
3 terest. A temporary order shall become effective upon
4 service upon the respondent and, unless set aside, limited,
5 or suspended by the Commission or a court of competent
6 jurisdiction, shall remain effective and enforceable pending
7 the completion of the proceedings.

8 “(h) REVIEW OF TEMPORARY ORDERS.—

9 “(1) COMMISSION REVIEW.—At any time after
10 the respondent has been served with a temporary
11 cease-and-desist order pursuant to subsection (g),
12 the respondent may apply to the Commission to have
13 the order set aside, limited, or suspended. If the re-
14 spondent has been served with a temporary cease-
15 and-desist order entered without a prior Commission
16 hearing, the respondent may, within 10 days after
17 the date on which the order was served, request a
18 hearing on such application and the Commission
19 shall hold a hearing and render a decision on such
20 application at the earliest possible time.

21 “(2) JUDICIAL REVIEW.—Within—

22 “(A) 10 days after the date the respondent
23 was served with a temporary cease-and-desist
24 order entered with a prior Commission hearing;
25 or

1 “(B) 10 days after the Commission ren-
2 ders a decision on an application and hearing
3 under paragraph (1), with respect to any tem-
4 porary cease-and-desist order entered without a
5 prior Commission hearing, the respondent may
6 apply to the United States district court for the
7 district in which the respondent resides or has
8 its principal place of business, or for the Dis-
9 trict of Columbia, for an order setting aside,
10 limiting, or suspending the effectiveness or en-
11 forcement of the order, and the court shall have
12 jurisdiction to enter such an order. A respond-
13 ent served with a temporary cease-and-desist
14 order entered without a prior Commission hear-
15 ing may not apply to the court except after
16 hearing and decision by the Commission on the
17 respondent’s application under paragraph (1) of
18 this subsection.

19 “(3) NO AUTOMATIC STAY OF TEMPORARY
20 ORDER.—The commencement of proceedings under
21 paragraph (2) of this subsection shall not, unless
22 specifically ordered by the court, operate as a stay
23 of the Commission’s order.

1 “(4) EXCLUSIVE REVIEW.—Sections 19(d) and
2 24 shall not apply to a temporary order entered pur-
3 suant to this section.

4 “(i) IMPLEMENTATION.—The Commission is author-
5 ized to adopt rules, regulations, and orders as it deems
6 appropriate to implement this subsection.”.

7 (b) FEDERAL POWER ACT.—Section 314 of the Fed-
8 eral Power Act (16 U.S.C. 825m) is amended by adding
9 the following at the end:

10 “(e) CEASE-AND-DESIST PROCEEDINGS; TEMPORARY
11 ORDERS; AUTHORITY OF THE COMMISSION.—If the Com-
12 mission finds, after notice and opportunity for hearing,
13 that any entity may be violating, may have violated, or
14 may be about to violate any provision of this Act, or any
15 rule, regulation, restriction, condition, or order made or
16 imposed by the Commission under the authority of this
17 Act, the Commission may publish its findings and issue
18 an order requiring such entity, and any other entity that
19 is, was, or would be a cause of the violation, due to an
20 act or omission the entity knew or should have known
21 would contribute to such violation, to cease and desist
22 from committing or causing such violation and any future
23 violation of the same provision, rule, or regulation. Such
24 order may, in addition to requiring an entity to cease and
25 desist from committing or causing a violation, require such

1 entity to comply, to provide an accounting and
2 disgorgement, or to take steps to effect compliance, with
3 such provision, rule, or regulation, upon such terms and
4 conditions and within such time as the Commission may
5 specify in such order. Any such order may, as the Commis-
6 sion deems appropriate, require future compliance or steps
7 to effect future compliance, either permanently or for such
8 period of time as the Commission may specify.

9 “(f) HEARING.—The notice instituting proceedings
10 pursuant to subsection (e) shall fix a hearing date not ear-
11 lier than 30 days nor later than 60 days after service of
12 the notice unless an earlier or a later date is set by the
13 Commission with the consent of any respondent so served.

14 “(g) TEMPORARY ORDER.—Whenever the Commis-
15 sion determines that the alleged violation or threatened
16 violation specified in the notice instituting proceedings
17 pursuant to subsection (e), or the continuation thereof, is
18 likely to result in significant dissipation or conversion of
19 assets, significant harm to energy consumers, or substan-
20 tial harm to the public interest, prior to the completion
21 of the proceedings referred to in subsection (e), the Com-
22 mission may issue a temporary order requiring the re-
23 spondent to cease and desist from the violation or threat-
24 ened violation and to take such action to prevent the viola-
25 tion or threatened violation and to prevent dissipation or

1 conversion of assets, significant harm to energy con-
2 sumers, or substantial harm to the public interest, frustra-
3 tion of the Commission's ability to conduct the pro-
4 ceedings, or frustration of the Commission's ability to re-
5 dress said violation at the conclusion of the proceedings,
6 as the Commission deems appropriate pending completion
7 of such proceedings. Such an order shall be entered only
8 after notice and opportunity for a hearing, unless the
9 Commission determines that notice and hearing prior to
10 entry would be impracticable or contrary to the public in-
11 terest. A temporary order shall become effective upon
12 service upon the respondent and, unless set aside, limited,
13 or suspended by the Commission or a court of competent
14 jurisdiction, shall remain effective and enforceable pending
15 the completion of the proceedings.

16 “(h) REVIEW OF TEMPORARY ORDERS.—

17 “(1) COMMISSION REVIEW.—At any time after
18 the respondent has been served with a temporary
19 cease-and-desist order pursuant to subsection (g),
20 the respondent may apply to the Commission to have
21 the order set aside, limited, or suspended. If the re-
22 spondent has been served with a temporary cease-
23 and-desist order entered without a prior Commission
24 hearing, the respondent may, within 10 days after
25 the date on which the order was served, request a

1 hearing on such application and the Commission
2 shall hold a hearing and render a decision on such
3 application at the earliest possible time.

4 “(2) JUDICIAL REVIEW.—Within—

5 “(A) 10 days after the date the respondent
6 was served with a temporary cease-and-desist
7 order entered with a prior Commission hearing;
8 or

9 “(B) 10 days after the Commission ren-
10 ders a decision on an application and hearing
11 under paragraph (1), with respect to any tem-
12 porary cease-and-desist order entered without a
13 prior Commission hearing, the respondent may
14 apply to the United States district court for the
15 district in which the respondent resides or has
16 its principal place of business, or for the Dis-
17 trict of Columbia, for an order setting aside,
18 limiting, or suspending the effectiveness or en-
19 forcement of the order, and the court shall have
20 jurisdiction to enter such an order. A respond-
21 ent served with a temporary cease-and-desist
22 order entered without a prior Commission hear-
23 ing may not apply to the court except after
24 hearing and decision by the Commission on the

1 respondent’s application under paragraph (1) of
2 this subsection.

3 “(3) NO AUTOMATIC STAY OF TEMPORARY
4 ORDER.—The commencement of proceedings under
5 paragraph (2) of this subsection shall not, unless
6 specifically ordered by the court, operate as a stay
7 of the Commission’s order.

8 “(4) EXCLUSIVE REVIEW.—Section 317 shall
9 not apply to a temporary order entered pursuant to
10 this section.

11 “(i) IMPLEMENTATION.—The Commission is author-
12 ized to adopt rules, regulations, and orders as it deems
13 appropriate to implement this subsection.”.

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