

**Prohibitions On Market Manipulation in Subtitle B of Title VIII of
The Energy Independence and Security Act of 2007, Project No. P082900
Summary of Communications Pursuant to Commission Rule 1.26(b)(5)**

Donald S. Clark
Secretary
September 8, 2009

MEMORANDUM

To: Don Clark
From: Robert Davis
Re: Market Manipulation Rulemaking Comments – Please place on the public record
Date: September 8, 2009

On Thursday July 16, 2009, representatives of the American Petroleum Institute and the National Petrochemical and Refiners Association (hereinafter “association representatives”) met with FTC Chairman Leibowitz and with FTC staff members to discuss the proposed rule.

While the association representatives made clear their belief that no rule should be promulgated at all, they agreed that the overall purpose of the rule is to protect consumers while maintaining flexibility for the industry and avoiding any chilling of competitive conduct. The association representatives commended the staff on the progress in the language and form of the rule. However, assuming a rule was going to be promulgated, the association representatives continued to have some concerns with the form of the rule as published in the RNPRM.

The primary concern of the association representatives was with the scienter requirement in 317.3(a). The association representatives urged that the rule should cover only intentional acts, rather than using the standard of extreme recklessness that is currently present in 317.3(a). The association representatives were concerned with the wide range of possible interpretations of an extreme recklessness standard, the possible imputation of knowledge from one part of a large company to another, and the possibility that this lack of clarity would actually lead to less disclosure and competitive activity. The association representatives also proposed that the “market conditions” proviso in 317.3(b) in the RNPRM be applied to part (a) as well.

The association representatives also generally opposed coverage of omissions. Policing omissions, they argued, would make both industry compliance and agency enforcement difficult and inconsistent. In the case that omissions are covered by the rule, the association representatives requested more time to develop and implement compliance programs.

The association representatives stressed the need for greater clarity and suggested several changes to that end. They proposed that the language in 317.3(b) be changed from “tends to” distort market conditions to “likely to,” and a clarification that supply and inventory decisions should not be covered by

the Rule. The association representatives were also concerned that 317.3(a), as currently worded, might be interpreted to cover omissions, and requested a clarification that it does not.



UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Office of Policy Planning

July 31, 2009

MEMORANDUM

TO: Market Manipulation Rule Making File

FROM: James Cooper
Attorney Advisor to Commissioner William E. Kovacic

SUBJECT: Meeting with Representatives from API and NPRA on July 17, 2009

On July 17, 2009, Commissioner Kovacic, Amanda Reeves, and I met with the following individuals to discuss the FTC's market manipulation rule making:

- Janice Raburn, Senior Counsel, American Petroleum Institute
- Gregg Scott, General Counsel, National Petrochemicals and Refiners Association
- Alan Hallock, General Counsel, Flint Hills Resources
- Katie Funk, Sonnenschein, Nath, & Rosenthal
- Maryanne Mason, Hogan & Hartson
- Bob Long, Covington & Burling
- Tim Muris, O'Melveny & Myers
- Maryanne Kane, O'Melveny & Myers

The parties expressed their view that the Commission should use its discretion and not promulgate a rule at all. They also noted their concern that the rule proposed in the Revised Notice of Proposed Rulemaking (RNPRM) would unnecessarily retard market information flows. More specifically, they were concerned that the "omissions" prong of the proposed rule would cause, for example, confusion over how much information a refiner would be required to tell retailers. This uncertainty, the parties contended, could have a chilling effect on transactions. Additionally, concern was expressed about the ability to muster relevant information that resides in disparate parts of large organizations, and liability for failure to do so. They also described how the rule may adversely affect exchange transactions among refiners. The parties expressed concern about how transactions will be affected by the possibility of antitrust liability for excessive disclosure of private information. They were also concerned that unilateral supply decisions may be covered by the rule.

The parties also proposed that a "recklessness" standard for the rule would cover too much conduct, and that all prohibited conduct should be covered with a "specific intent"

requirement. They additionally expressed concern over the time period contemplated in the RNPRM for compliance, stating that they would likely need more time.