



## U.S. COMMODITY FUTURES TRADING COMMISSION

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Office of General Counsel

September 19, 2008

Donald S. Clark  
Secretary  
Federal Trade Commission  
Office of the Secretary  
Room H-135 (Annex G)  
600 Pennsylvania Avenue, N.W.,  
Washington, D.C. 20580

Re: Market Manipulation Rulemaking, PO 82900

Dear Mr. Clark:

We appreciate the opportunity to submit these comments on behalf of the Commodity Futures Trading Commission ("CFTC") regarding the Federal Trade Commission's ("FTC") anti-manipulation rulemaking proposal (the "Proposal") implementing the Energy Independence and Security Act of 2007 ("EISA"). *See Prohibitions On Market Manipulation and False Information in Subtitle B of Title VIII of The Energy Independence and Security Act of 2007*, 73 Fed. Reg. 48317 (Aug. 19, 2008). These comments incorporate and supplement the comments that we submitted in response to the FTC's Advance Notice of Proposed Rulemaking ("ANPR").

We are concerned that the Proposal does not adequately address the issues that we raised in our ANPR comment letter. We again urge the FTC to incorporate an exception from its rule for commodity futures and options trading activity on regulated futures exchanges, which is subject to the CFTC's exclusive jurisdiction granted by the Commodity Exchange Act ("CEA").

The Proposal declined to incorporate such an exception based on its reading of: 1) the CEA; 2) the D.C. Circuit's decision in *FTC v. Ken Roberts Company*, 276 F.3d 583 (D.C. Cir. 2001); and 3) EISA. *See* 73 Fed. Reg. at 48324-48325. Respectfully, the Proposal misreads each of these three legal authorities.

First, in CEA Section 2(a)(1)(A), Congress granted the CFTC exclusive jurisdiction over futures trading on designated contract markets (the statutory term in the CEA for futures exchanges).<sup>1</sup> The first sentence of Section 2(a)(1)(A) states that accounts, agreements and

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<sup>1</sup> Section 2(a)(1)(A) provides:

The Commission shall have exclusive jurisdiction . . . with respect to accounts, agreements . . . and transactions involving contracts of sale of a commodity for future delivery (including significant price discovery contracts), traded or executed on a contract market designated or

transactions involving futures contracts traded on designated contract markets are within the CFTC's exclusive jurisdiction. The second sentence of Section 2(a)(1)(A) then goes on to provide that with respect to such accounts, agreements, and transactions where the CFTC's jurisdiction is exclusive, other federal and state regulatory authorities are without jurisdiction. It states that "[e]xcept as hereinabove provided" (i.e., except as provided in the first sentence), the jurisdiction of other federal and state regulatory authorities is not superseded or limited by the grant of exclusive jurisdiction to the CFTC. This leads unavoidably to the conclusion that the jurisdiction of other federal and state regulatory authorities is superseded or limited with respect to the accounts, agreements and transactions as to which the CFTC possesses exclusive jurisdiction.<sup>2</sup>

Second, the Proposal misunderstands the teaching of the *Roberts* case, where the court distinguished cases involving the CFTC's exclusive jurisdiction from those where the CFTC shares jurisdiction with another federal agency. In *Roberts*, the D.C. Circuit addressed the permissibility under Section 2(a)(1)(A) of an FTC investigation into whether "investor-education" advertisements constituted deceptive trade practices. The court held that the CFTC's exclusive jurisdiction over futures trading did not bar the FTC from issuing a civil investigative demand to look into marketing practices that were separate from actual futures trading. 276 F.3d at 584, 592. In the course of reaching this conclusion, the court analyzed the text and legislative history of Section 2(a)(1)(A) to determine what falls within, and outside of, the exclusive jurisdiction provision. The court's decision makes clear that while the marketing activities there at issue fell outside the scope of Section 2(a)(1)(A), the trading of futures contracts on designated contract markets falls squarely within that provision. *Id.* at 590-91.

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derivatives transaction execution facility registered pursuant to section 7 or 7a 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 conferred on courts of the United States or any State.

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

<sup>2</sup> The Proposal also cites the CFTC's anti-manipulation authority over cash markets in Section 9(a)(2) of the CEA, 7 U.S.C. § 13(a)(2) (making it unlawful for "[a]ny person to manipulate or attempt to manipulate the price of any commodity in interstate commerce"). *See* 73 Fed. Reg. at 48324 n.90. The CFTC has never maintained that its cash market anti-manipulation jurisdiction is exclusive; the non-exclusive grant of anti-manipulation jurisdiction over cash markets in CEA Section 9(a)(2) has no relevance to the exclusivity of the CFTC's jurisdiction over futures trading on regulated futures exchanges under CEA Section 2(a)(1)(A).


Third, the Proposal observes that “[n]othing in EISA itself indicates that Congress intended to exempt conduct in the futures markets from the reach of any rule that the [FTC] might promulgate . . .” See 73 Fed. Reg. at 48324. Respectfully, that is the wrong question. The exclusive jurisdiction provision has been an integral part of the CEA for decades. The correct question, then, is whether there is anything in the subsequently-enacted EISA indicating that Congress intended to repeal or limit the CEA’s exclusive jurisdiction with respect to the FTC’s new anti-manipulation authority? The Proposal cites to none.<sup>3</sup>

Finally, we note the statement in the Proposal that it “is not intended to impose contradictory requirements on regulated entities in the futures markets or otherwise.” See 73 Fed. Reg. at 48324. Yet, that is precisely what the Proposal, if adopted as final, would do. Although not required by the text of EISA, the Proposal adopts a securities fraud standard in markets where the CFTC’s anti-manipulation standard already applies. These differing standards will necessarily result in a situation where conduct on a regulated futures exchange that is lawful under the CEA could, nonetheless, be deemed illegal under the FTC’s rule. Congress granted the CFTC exclusive jurisdiction over futures trading on designated contract markets in order to avoid this very type of inconsistency in standards. See *Messer v. E.F. Hutton & Co.*, 847 F.2d 673, 676 (11th Cir. 1988) (citing “the fundamental congressional design in revamping the Commodity Exchange Act in 1974 and granting exclusive jurisdiction to the new CFTC – to avoid a duplicative or contradictory regulatory structure”).

We commend the FTC for its aggressive implementation of its new anti-manipulation authority under EISA with respect to the broad expanse of market activity outside of the CFTC’s exclusive jurisdiction under the CEA. As noted in our comment letter on the ANPR, the CFTC looks forward to working in close cooperation with the FTC to efficiently prosecute illegal activity in the petroleum industry where our agencies share jurisdiction. With respect to the trading of commodity futures and options on regulated futures exchanges, though, we urge the FTC to take to heart the poet’s wisdom that good fences make good neighbors, and to incorporate a specific exception from its rule for futures trading activity that is subject to the CFTC’s exclusive jurisdiction under the CEA.

We hope that the FTC will reconsider this one aspect of its Proposal. We again thank the FTC for this opportunity to comment.

Very truly yours,

  
Terry S. Arbit  
General Counsel

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<sup>3</sup> The CFTC Reauthorization Act of 2008, which was recently enacted as part of the Food, Conservation and Energy Act of 2008 (Pub. L. 110-246, 222 Stat. 1651, Title XIII), amended the CEA’s exclusive jurisdiction provision in Section 2(a)(1)(A) to extend it to significant price discovery contracts traded on exempt commercial markets. Notably, though, although EISA had been enacted during the same session of Congress just a few months earlier, Congress did not amend the CEA to carve out FTC anti-manipulation actions.