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***VIA ELECTRONIC SUBMISSION AND U.S. MAIL***

Federal Trade Commission  
Market Manipulation Rulemaking  
P.O. Box 2846  
Fairfax VA 22031-0846

**Re: Market Manipulation Rulemaking, P082900**

To the Commission:

We are pleased to offer the following comments in response to the Federal Trade Commission's ("Commission") April 22, 2009 Revised Notice of Proposed Rulemaking ("Revised NPRM") in the above-referenced matter.<sup>1</sup>

Sutherland represents over a dozen crude oil, petroleum product, and liquefied petroleum gas ("LPG") importing, processing, marketing, and trading companies in commercial, regulatory and energy policy matters. Among the law firm's clients are foreign-based and domestic oil marketing and trading companies, several offshore refiners that produce petroleum products for U.S. consumption, and a number of firms that hold ownership or leasehold interests in petroleum and LPG pipeline, distribution, and storage facilities. All of these companies are physical oil and/or LPG buyers and sellers, and most participate in the financial energy markets, principally for price risk management (*i.e.*, hedging) purposes. The companies endorsing these comments are referenced in the margin, although the views expressed in this letter are those of Sutherland based upon its more than thirty years of experience representing clients in the energy markets.<sup>2</sup>

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<sup>1</sup> 74 Fed. Reg. 18304 (April 22, 2009) (to be codified at 16 C.F.R. Part 317).

<sup>2</sup> Colonial Oil Industries, Inc.; George E. Warren Corp.; Nestle Oy; Statoil Marketing & Trading (USA), Inc.; Trafigura AG; and Vitol, Inc.

In our June 23, 2008 comments on the Commission's Advance Notice of Proposed Rulemaking,<sup>3</sup> we voiced concern that overly broad and prescriptive regulation of petroleum markets could hinder healthy market activities and, ultimately, increase costs to market participants and energy consumers. In our October 17, 2008 comments on the Commission's subsequent Notice of Proposed Rulemaking,<sup>4</sup> we welcomed the Commission's decision not to propose affirmative duties that would supplant supply and demand decisions but continued to question the broad scope of the proposal, including the Commission's decision to duplicate Commodity Futures Trading Commission ("CFTC") efforts and to adopt the Securities Exchange Commission's ("SEC") scienter standard for market manipulation.

The Commission's Revised NPRM does much to address the issues raised by our clients by striking a balance between protecting consumers from manipulation and avoiding unnecessary costs to market participants. Accordingly, we commend the Commission's efforts, noting our continuing concern that the proposal does not sufficiently delimit the scope of the Commission's projected enforcement activities with respect to the purely financial markets.

We also ask that as the Commission considers the benefits and costs of (i) adopting the revised proposed rule, (ii) adopting the initial proposed rule, (iii) adopting the alternative rule language proposed on page 88 of the Revised NPRM,<sup>5</sup> (iv) adopting a final rule that is limited to false statements, and (v) declining to issue a final rule, it endeavor to intrude on market-based decisions only to the extent necessary to protect unsophisticated market participants.

Of these alternatives, the prohibition of intentional false statements would do the least harm to the markets and provide the most clarity. The alternative rule language also provides greater

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<sup>3</sup> Advance Notice of Proposed Rulemaking, 73 Fed. Reg. 25614 (May 7, 2008).

<sup>4</sup> Notice of Proposed Rulemaking, 73 Fed. Reg. 48317 (Aug. 19, 2008) *extension granted* 73 Fed. Reg. 53393 (Sept. 16, 2008).

<sup>5</sup> The Commission requested comments on the following alternative rule language:

It shall be unlawful for any person, directly or indirectly, in connection with the purchase or sale of crude oil, gasoline, or petroleum distillates at wholesale, to engage in any act (including the making of any untrue statement), practice, or course of conduct with the intent\* to defraud or deceive, provided that such act, practice, or course of conduct distorts or tends to distort market conditions for any such product.

\* The phrase "with the intent" shall mean that the alleged violator intended to mislead – regardless of whether he or she specifically intended to affect market prices (*e.g.*, specific intent), or knew or must have known of the probable consequences of such conduct – and regardless of whether the conduct was likely to succeed in defrauding or deceiving the target.



clarity than the Revised NPRM. By creating one specific intent standard, whether through a prohibition against intentional false statements or a prohibition against intentional fraudulent conduct, the Commission could target essentially the same conduct as is targeted by the Revised NPRM but with less risk of chilling desirable market behavior.

In making its decision, the Commission should recognize that, while participants in the petroleum wholesale markets have a vested interest in preventing fraud and other abuses, wholesale market participants are sophisticated parties who generally do not require special remediation for exaggerations, omissions, and other forms of puffery by their counterparties in the context of negotiations.

For example, in the Hypothetical questions on page 89 of the Revised NPRM,<sup>6</sup> scenarios (a) and (c) of the second hypothetical should result in no action by the Commission, and we question even the need for scenario (b) of the hypothetical to invoke Commission action in light of the presumably sophisticated parties involved. Interjecting the Commission's judgment *ex post facto* into bilateral negotiations that have little or no impact on the broader wholesale markets would supplant the terms that were or could have been contracted for by the parties. In the hypothetical, the party purchasing the Cepo crude oil appears not to have *required* the crude be from a country other than Cepo but only preferred it, and the party presumably had the opportunity to create a contractual right for damages and there is no negative impact on the oil markets. Similarly, the first hypothetical on page 89 of the Revised NPRM gives us pause, because inadvertent omissions and omissions that are not intended to defraud should not be punishable.

We support the Commission's decision to limit its proposal to fraudulent conduct rather than imposing a more onerous and unnecessary affirmative duty to disclose or establishing any mandatory disclosure obligation. Mandatory disclosure requirements are not well-suited for bilateral negotiations between sophisticated parties and likely would increase the cost of compliance significantly.

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<sup>6</sup> The Commission posed the following hypothetical on page 89 of the Revised NPRM:

Trader A receives a request from RST Refinery for crude oil of a particular grade, specifying that it prefers not to buy crude from the country of Cepo for political reasons. Trader A is unable to find the kind of crude RST requires except in Cepo. Trader A:

- (a) Sells the crude from Cepo to RST without disclosing that it is from Cepo.
- (b) Sells the crude to RST and represents that it is from the country of West Friendly, knowing that it is from Cepo.
- (c) Does not know and does not ask where the crude is from and sells it to RST without representing its origin.

Finally, we continue to encourage the Commission to avoid duplicative regulation of the futures markets and to require prohibited behavior to impact the market. As discussed in our October 17, 2008 comments, to prosecute conduct already regulated by the CFTC and to pursue conduct that has no potential impact on the petroleum wholesale markets will waste sparse resources and increase the costs to all market participants, including purported victims or bystanders who will be required to provide data to the Commission as part of the Commission's investigations.

### **Conclusion**

While we commend the Commission for its efforts in crafting the Revised NPRM, we encourage it to further narrow the scope of the proposed rule to avoid duplicative and overly intrusive and burdensome regulation.

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We look forward to the Commission's decision and stand ready to answer any questions that the Commission may have.

Very truly yours

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Peter H. Rodgers  
Michael W. Brooks