



May 20, 2009

Federal Trade Commission
Office of the Secretary
Room H-135
600 Pennsylvania Avenue, NW
Washington, DC 20580

Re: Prohibitions on Market Manipulation and False Information in Subtitle B of the Energy Independence and Security Act of 2007, Revised Notice of Proposed Rulemaking, P082900

Platts, the energy information division of The McGraw-Hill Companies, Inc., submits these comments for consideration by the Federal Trade Commission (the "Commission") in its Revised Notice of Proposed Rulemaking ("RNPRM") on implementation of Section 811 of the Energy Independence and Security Act of 2007.

I. Statement of Platts' interest

Platts is a global leader in price discovery in the oil, natural gas, electricity, nuclear, coal, petrochemical and metals industries across more than 150 countries from 15 major offices worldwide. Founded in 1888, The McGraw-Hill Companies is a leading global publisher in the financial services, education and business information markets through leading brands such as Standard & Poor's, McGraw-Hill Education, BusinessWeek and J.D. Power and Associates.

In particular, certain Platts publications include assessments of prices in the crude oil, gasoline and petroleum distillate markets in the United States that are the subject of this rulemaking. The outcome of this proceeding could have a direct effect on the price discovery process in which Platts gathers the information on which its assessments are based. Platts has previously submitted comments on both the Advance Notice of Proposed Rulemaking and the Notice of Proposed Rulemaking, in which it detailed its price assessment process, and also has participated in the November 6, 2008, workshop in this proceeding.

Platts specializes in providing price discovery in the physical commodities markets. Effective price discovery in physical energy markets, particularly very complex ones such as oil, depends on the willingness of companies to recognize the collective good of engaging in price formation through the voluntary and transparent reporting of trade data, including bids, offers and actual transactions, to publishers of price assessments such as Platts. This market information is not just the lifeblood that brings efficiency to trade in markets; it is also essential to the processes that Platts and other publishers perform in generating price assessments of the physical commodity that are reflective of market value. As it has stated in earlier stages of this rulemaking, Platts urges the Commission in the course of enacting a final rule on market manipulation to exercise great care to avoid creating disincentives to market data gathering and information dissemination.

II. Overview of Platts' comments

Platts welcomes the Commission's efforts to provide greater specificity in how a rule promulgated under Section 811 of the Energy Independence and Security Act of 2007 would apply to the wholesale petroleum markets. Platts also appreciates the Commission's efforts to address concerns – including Platts' – that the initial proposed rule could have chilled legitimate business conduct and thus inadvertently could have led to a decrease in market liquidity and, ultimately, transparency.

Platts submits that the hallmarks of any rule on market manipulation should be clarity, simplicity and consistency. The objective should be to incent companies that participate in the petroleum markets to adopt measures to prevent market manipulation through effective compliance programs. To the extent a rule meets these hallmarks, companies will have greater confidence that they can establish the appropriate guidelines to keep their market activity within bounds. In light of that objective, Platts urges the Commission to consider adopting the alternative definition set out in Section IV.I(2)(v) of the RNPRM. The single standard for scienter embodied in that alternative would help provide the desired clarity and simplicity and encourage behavior that would benefit the petroleum markets.

III. The Commission's revised proposed rule

In comparison with the notice of proposed rulemaking (NPRM), the revised proposed rule “more precisely identifies the conduct prohibited, and thus achieves a more appropriate balance between consumer protection interests and compliance burdens” (RNPRM at 16). In particular, the revised rule recognizes that the originally proposed provision on omissions of statements of material fact “could discourage legitimate business conduct in wholesale petroleum markets that benefits consumers” (RNPRM at 23). Consequently, the Commission “has added language both to sharpen its focus on fraudulent and deceptive conduct and to reduce potential adverse effects on legitimate

business conduct,” in part by adding an explicit scienter standard for each subsection of Section 317.3 (RNPRM at 24). The change addresses comments that a perceived lack of specificity “would lead to adverse consequences, such as a reduction in voluntary information disclosures by industry participants, and a reduction in the number of new participants entering the marketplace” (RNPRM at 43).

The RNPRM would make it unlawful for “any person, directly or indirectly, in connection with the purchase or sale of crude oil, gasoline or petroleum distillates at wholesale, to (a) knowingly engage in any act, practice or course of business – including the making of any untrue statement of material fact – that operates or would operate as a fraud or deceit upon any person; or (b) intentionally fail to state a material fact that under the circumstances renders a statement made by such person misleading, provided that such omission distorts or tends to distort market conditions for any such product” (RNPRM at 47).

The two parts of the proposed rule have different scienter standards. The “knowingly” standard in proposed Section 317.3(a) derives from the “extreme recklessness” standard adopted by the U.S. Court of Appeals for the District of Columbia and the U.S. Court of Appeals for the Seventh Circuit. By prohibiting the knowing misstatement of material fact, part (a) is consistent with the enforcement approach of other government agencies, such as the Commodity Futures Trading Commission, which has adopted rules that prohibit such misstatements or other misrepresentations in commodities markets (RNPRM at 63).

The standard for Section 317.3(b), on the other hand, requires a showing that the party intended to mislead, regardless of whether he or she specifically intended to affect market prices. Mere reckless or negligent behavior would not violate this section of the rule. The requirement that an omission distorts or tends to distort market conditions is similar to the anti-manipulation provision of the Commodity Exchange Act (“CEA”), the proposed rule notes. Consistent with the Federal Energy Regulatory Commission’s market manipulation rule, the proposal would not require a showing of an actual effect on market prices “because there is no economic justification for fraudulent or deceptive conduct in any market” (RNPRM at 72).

The proposed rule notes that the market conditions proviso in Section 317.3(b) would be satisfied by proof that “an actor intentionally reported price information to a private data reporting company that is in the business of providing price reports to the marketplace – and that the actor intentionally omitted material facts which the reporting company required to be reported” (RNPRM at 73). That approach would be consistent with CEA precedent insofar as courts and the CFTC have generally assumed that a false report of price or volume information to a source widely used by market participants would affect or tend to affect market conditions, the proposed rule notes. Likewise, false reports, through the omission of material information such as the operational status of a refinery, terminal or pipeline, would permit an inference that the conduct tended to distort market conditions (RNPRM at 74).

The revised proposed rule does not adopt a safe harbor for inadvertent errors made in reporting prices to publishers such as Platts. However, the Commission notes that the revised proposed rule “would not extend to inadvertent conduct or mere mistakes” (RNPRM at 57). That approach, the proposal says, is consistent with FERC’s market manipulation rule, which “is not intended to regulate negligent practices or corporate mismanagement, but rather to deter or punish fraud in wholesale energy markets” (RNPRM at 57).

IV. Platts’ comments on the revised proposed rule

Platts commends the Commission for taking the opportunity to refine the applicability of the proposed rule to wholesale petroleum markets. While Platts takes no position on whether the rule should continue to be guided by the Securities and Exchange Commission’s broad anti-fraud rule set forth in Rule 10b-5, it agrees that any rule must account for the distinctive aspects of the petroleum markets and how they function when compared to the financial markets regulated by the SEC.

Platts shares the Commission’s interest in well functioning, competitive wholesale petroleum markets, and an effective regulatory oversight program is an integral component. Platts’ primary concern throughout this proceeding has been to ensure that exercise of any new authority on market manipulation does not unintentionally diminish the quality or amount of market information available to independent publishers, since the quality of those publishers’ price assessments is directly tied to the quality and quantity of the market information upon which the assessments are based. As the revised proposed rule notes, a number of market participants raised concerns that they would need to implement conservative and onerous compliance programs to comply with the original proposal. Platts therefore welcomes the Commission’s objective of achieving “a more appropriate balance between consumer protection interests and compliance burdens.”

Platts’ experience in a variety of global commodity markets is that participants highly value regulatory consistency and predictability. To the extent the Commission can apply principles and standards similar to those employed by other government agencies, companies will have a clearer understanding of what behavior is and isn’t acceptable, and will be able to craft compliance programs that function well in a variety of markets. This goal of consistency is particularly desirable given the Commission’s position that it “intends to work cooperatively with the CFTC in furtherance of the Commission’s duty to prevent fraud in wholesale petroleum markets” rather than to include an exception for futures and options trading on regulated exchanges, as some parties had urged (RNPRM at 29). Therefore, Platts sees significant value in the Commission’s efforts to craft a rule that is generally consistent with FERC’s market manipulation rule and with the CFTC’s enforcement of the Commodity Exchange Act.

Clarity and simplicity are two additional hallmarks of an effective rule. The revised proposed rule represents a step forward in this regard, particularly with respect to the omission provision. By focusing on the wholesale petroleum market, the revised rule should provide market participants with more guidance as they create compliance plans. However, while the revised proposed rule would boil down the original three-part Section 317.3 to two parts, it would impose two different scienter standards for proposed Sections 317.3(a) and 317.3(b). A number of the detailed questions posed by the Commission go to the distinctions between the two subsections, and whether those distinctions would achieve the intended outcomes.

Platts is concerned that two different scienter requirements will introduce uncertainty among certain market participants and dissuade them from providing market information to publishers out of fear of liability. To address this concern, Platts encourages the Commission to seriously consider the alternative laid out in Section IV.I(2)(v) of the RNPRM. That alternative would combine the two-part Section 317.3 into a single part that imposes a single scienter standard, stating: “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” (RNPRM at 88).

Platts believes that the single scienter standard embodied in the alternative rule – requiring an intention to mislead – provides a considerable advantage by adding clarity and certainty. Platts believes this “intent” standard is appropriate for both sets of conduct proscribed by Section 317.3: engagement in any acts, including untrue statements, that are intended to defraud or deceive, and failure to state a material fact. As the proposed rule now stands, individual cases could turn on which of the two subsections of Section 317.3 an alleged course of action falls under. The making of any untrue statement of fact that operates as a fraud or deceit upon any person would be subject to the “extreme recklessness” standard that would apply to Section 317.3(a), thereby potentially covering conduct that did not intentionally operate as a fraud or deceit on another person. On the other hand, the intentional failure to state a material fact that makes the statement misleading, provided the omission distorts or tends to distort market conditions, would fall under the “intent” standard of Section 317.3(b). Platts submits this distinction could lead to unnecessary disputes over the appropriate scienter standard for specific sets of conduct. Whether a fraud is committed by making an untrue statement or by intentionally failing to state a fact, the effect upon market conditions may well be exactly the same and the governing scienter standard should therefore be the same in both cases.

While the alternative language in Section IV.I(2)(v) does not explicitly address an intentional failure to state a material fact, as does the proposed Section 317.3(b), the language is broad enough to encompass omissions. Under the alternative language, the reporting of untrue price information clearly would be covered. An intentional failure to state material facts that made the report misleading would be covered as well, since that action would be an act, practice or course of conduct covered by the provision. In short,

the form of the act – an untrue statement or an intentional omission – would not be the controlling factor in determining whether the rule was violated in a given case. The advantage of the alternative language is that companies would be able to establish compliance programs based on a relatively clear and straightforward scienter standard of intent, rather than trying to account for a separate “extreme recklessness” standard depending on the particular details of the case.

Section IV.I(2)(w) requests comments on two hypothetical sets of facts, one of which involves price reporting. As Platts noted previously in its October 17, 2008 comments on the Notice of Proposed Rulemaking, Platts’ reporting on wholesale petroleum prices in the US market utilizes a “market-on-close” process in which companies post public bids and offers in the “Platts window,” and thus Platts’ price reporting does not fit the set of facts laid out in the first hypothetical. However, Platts understands the Commission’s interest in obtaining feedback on the basic circumstances posed in the hypotheticals.

In both instances, Platts believes either the proposed Sections 317.3(a) and 317.3(b) or the alternative language in Section IV.I(2)(v) would yield similar results. Inadvertent errors would not constitute a violation. Intentional misrepresentations, whether by the omission of information or misstatement of fact, would be prohibited. The advantage to both the Commission and companies establishing compliance programs in response to the rule would be that a single standard of intent would be applicable to all factual situations.

Finally, Platt notes that the Commission has not included a safe harbor for price reporting in the revised proposed rule. The rule “would not reach inadvertent conduct or mere mistakes. Thus, the Commission does not believe that prohibiting fraudulent or deceptive conduct is likely to reduce voluntary reporting and disclosures” (RNPRM at 62). Platts is encouraged by the Commission’s clear statement that inadvertent errors would not be subject to the rule.

Still, Platts continues to believe the Commission could take additional steps to ensure the vital flow of price data to publishers. One possible approach would be to create a safe harbor that would exempt any reporting company from liability for violations of the rule if the company has adopted a policy governing the participation by its traders in price formation activities such as the Platts window and the company can demonstrate reasonable efforts to monitor and enforce the policy. The Commission could develop principles – perhaps in consultation with publishers such as Platts – to which companies would need to adhere in adopting and implementing their policies. Under this additional safe harbor, as long as the company could demonstrate good faith efforts to inform employees of the policy and monitor and enforce the policy, the actions by an individual trader to manipulate the market, in violation of his or her company’s policy, would not subject the company itself to liability. The trader himself or herself would have exposure, but only in his or her individual capacity and the normal scienter requirements and safe harbor for innocent errors or omissions would apply to him or her. This “policy” safe harbor for companies that participate in the petroleum markets would be intended to further encourage such companies to participate in the price discovery process without fear of enterprise liability under the Commission’s rule.

V. Conclusion

Platts believes the Commission has taken positive steps to tailor any market manipulation rule to the particular circumstances of the wholesale petroleum industry and to avoid any chilling of beneficial market conduct. The alternative language combining proposed Sections 317.3(a) and 317.3(b), by providing for a single scienter standard, offers the opportunity for additional clarity and ease in interpretation for companies that would be charged with complying with the rule.

Respectfully submitted,

By: ___/s/_____

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