

# United States Senate

WASHINGTON, DC 20510-4705

May 20, 2009

Federal Trade Commission  
600 Pennsylvania Avenue, NW  
Washington, DC 20580

Dear Chair Leibowitz and Commissioners Harbour, Kovacic, and Rosch:

As the author of the legislation codified in 42 U.S.C. 17301-17305, I am pleased to offer the following comments on the Federal Trade Commission's recently-published Revised Notice of Proposed Rulemaking (RNPRM) as it considers a Final Rule to implement Section 811 of the Energy Independence and Security Act of 2007 (EISA).

Recent energy price spikes have caused severe economic hardship and diminished the quality of life for millions of American families and businesses. Ongoing energy price volatility, in particular the unprecedented tripling of crude oil prices last summer, have led Americans to question the integrity and fairness of our nation's energy markets. With oil central to our nation's economy, Congress charged the Commission in the EISA to establish clear procedures to ensure that the U.S. petroleum markets are as free from manipulation as possible, and to levy penalties against those who might seek to profit from such illegal activities.

## Legislation Purposefully Modeled After SEC Rule 10b-5

Congress specifically modeled the Commission's new authority on the anti-manipulation authorities utilized by other agencies such as the Securities and Exchange Commission (SEC) and the Federal Energy Regulatory Commission (FERC). Specifically, Title VIII, Subtitle B of the EISA carefully and purposefully tracks section 10(b) of the Securities Exchange Act (SEA) of 1934 for which a substantial body of case law has been developed over the last half century. In fact, Congress' inspiration for granting the Commission this new authority was based on the success of complimentary provisions provided to FERC for electricity and natural gas markets in the Energy Policy Act of 2005, which also closely tracked SEA section 10(b).

Thus, the RNPRM's reliance on SEC Rule 10b-5 and accompanying case law is critical to effecting Congressional intent in shaping the contours of a Final Rule. To the extent that this approach is too narrow to prohibit all manipulative conduct that may occur in covered markets, Congress intended the Commission to utilize its expertise from several decades of protecting consumers and analyzing competition in petroleum markets to extend the scope of any final rule.

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## Scope

The Commission's RNPRM appropriately declines to adopt an exception to its rule for commodity futures and options trading activity. In granting the Commission this new anti-manipulation authority over wholesale petroleum markets, Congress recognized the Commodity Futures Trading Commission's (CFTC) jurisdiction with respect to contracts for sale of a commodity for future delivery. Congress, however, specifically intended for the Commission to exercise this new authority by working cooperatively and in tandem with the CFTC to prevent and deter any manipulative activity, including in the futures markets, which would affect wholesale petroleum markets.

Whether anti-manipulation authority granted to FERC under the Energy Policy Act of 2005 covered futures market activity that could affect wholesale markets jurisdictional to FERC was challenged by the CFTC in 2007. This occurred during the same period in which Congress debated the Commission's identical authority. In a hearing before the Subcommittee on Oversight and Investigations of the House Committee on Energy and Commerce on December 12, 2007, Ranking Member Joe Barton – who was the Committee Chair in 2005 – stated “I’m also disappointed to see that the CFTC has challenged FERC’s authority to investigate and pursue the energy market manipulators despite the Congress’ explicit grant of authority to FERC in the Energy Policy Act of 2005.”<sup>1</sup> Rep. Barton went on to explain that when FERC pursued an alleged market manipulator whose activities in the futures market impacted FERC jurisdictional markets, FERC was “doing exactly, or at least attempting to do exactly what we hoped they would do...”<sup>2</sup>

It was in this backdrop – of FERC exercising its new anti-manipulation authority by pursuing an alleged market manipulator in the futures market when that activity impacted a FERC jurisdictional market – that Congress passed the Commission's identical authority. Congress clearly intended for the Commission's new anti-manipulation authority to cover commodity futures and options trading activity that impacts wholesale petroleum markets.

## Prohibited Conduct

### *“In-Connection With”*

The RNPRM correctly interprets its new anti-manipulation authority to authorize the prohibition of manipulative conduct undertaken “in connection with” the purchase or sale of petroleum products at wholesale. Congress intended the term “in connection with” to be interpreted broadly to allow the Commission to prevent and deter any manipulative conduct that could impact wholesale petroleum markets. Congress contemplated that such manipulative conduct could include operational or supply decisions upstream from specific petroleum transactions.

For instance, the Commission correctly identified in its May 7, 2008 Advance Notice of Proposed Rulemaking (ANPRM) examples of manipulation in the petroleum market involving

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<sup>1</sup> Rep. Joe Barton, Subcommittee on Oversight and Investigations, statement during the hearing “Energy Speculation: Is Greater Regulation Necessary to Stop Price Manipulation?”, December 12, 2007.

<sup>2</sup> *Id.*

operational or supply decisions. *In the Matter of BP Amoco p.l.c. and Atlantic Richfield Company*,<sup>3</sup> the Commission had reason to believe that BP occasionally had exported Alaska North Slope (ANS) crude oil to the Far East in order to increase spot prices for ANS crude oil on the West Coast, and that BP benefitted from those higher spot prices because of its status as a merchant marketer. Congress intended the Commission to prevent this type of activity using its new authority.

In fact, Congress sought to prohibit a broad range of activities related to withholding supply which would result in artificial market scarcity. For example, the final rule should prevent a person or entity from purposely keeping an oil or petroleum tanker from delivering its product to the United States if the intent of such action is to cause a supply shortage, which subsequently raises prices, thereby securing greater revenues than the person or entity would have secured if it had not delayed delivering its supply to the market.

#### *“Recklessness Standard”*

The Commission correctly retains the scienter standard of recklessness and should resist calls for a higher standard of specific intent. Congress specifically modeled the Commission’s new anti-manipulation authority after identical SEC and FERC authority to provide certainty in how this new law would be interpreted. In fact, the Supreme Court has compared this robust body of case law to a “judicial oak which has grown from little more than a legislative acorn.”<sup>4</sup>

Congress purposefully employed language that it has previously used in the context of the securities laws with the understanding that courts have interpreted such language to connote recklessness. By using language identical to that used in the FERC and SEC regulations, Congress intended for the courts and the Commission to interpret the new authority in an similar manner that includes the adoption of a recklessness standard.<sup>5</sup>

While the oil and petroleum markets differ from the electricity and natural gas markets, and the Commission’s regulatory role and responsibilities may not always mirror those of the SEC or FERC, the RNPRM correctly identifies the clear obligation of market participants to not engage in manipulative activity regardless of other requirements that may exist in more extensively regulated markets. Thus, the Commission’s Final Rule should reflect Congress’ intent that a finding of recklessness should be sufficient to satisfy the scienter element for manipulative conduct, including for false statements and omissions of material fact.

#### *“Price Effects”*

A primary focus of the prohibition on manipulation is on practices that are manipulative, regardless of whether a manipulative practice actually causes a distortion in market prices. That is, Congress did not intend for price affects to be a required element of a manipulation claim.

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<sup>3</sup> FTC File No. 9910192, Docket No. C-3938 (August 25, 2000) (BP Amoco/ARCO).

<sup>4</sup> *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 737 (1975).

<sup>5</sup> See *McDonald v. United States*, 89 F.2d 128, 133 (8th Cir. 1937) (“When a statute uses words whose meaning under the judicial decisions has become well-known and well-settled, it will be presumed that the Legislature used such words in the sense justified by long judicial sanction.”) (citing *Kepner v. United States*, 195 U.S. 100 (1904)).

Rather, Congress intended for the Commission's new authority to be aimed at identifying and holding accountable those who employ any manipulative "device or contrivance" in wholesale oil and petroleum markets.

Because there is no economic justification for fraudulent or deceptive conduct in any market, a person need not actually succeed in moving prices to establish a violation of the Commission's rule. It is for this reason that Congress also did not intend for the Commission to limit the scope of this authority to manipulative activity that is "of sufficient scope to distort or tend to distort the market conditions that guide market participants' decision-making" as it did in the RNPRM. The Commission's Final Rule should reflect Congress' intent that the manipulative practice itself, regardless of its scope or potential for market impact, should be sufficient to constitute a violation.

I look forward to the Commission implementing a Final Rule for this urgently needed new anti-manipulation authority. Without a bright line demarcating the distinction between healthy market practices and illegal manipulation – especially when supplies are tight in markets with extremely inelastic demand – unscrupulous market participants may be more apt to take advantage of consumers. Such actions may already be seriously burdening our country's economy and impacting the welfare of our constituents, so I urge the Commission to finalize this critical rule in the most expedient manner possible.

Sincerely,

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Maria Cantwell