

Federal Trade Commission

# Market Manipulation Rulemaking Workshop

600 Pennsylvania Avenue, NW  
Washington, DC  
November 6, 2008

The Federal Trade Commission (“FTC” or “Commission”) based its proposed Rule on Securities and Exchange Commission (“SEC”) Rule 10b-5. The proposed Rule would prohibit fraud and deception in wholesale petroleum markets. At this workshop, staff will examine support for and opposition to this approach, as well as any alternatives raised in response to the Notice of Proposed Rulemaking (“NPRM”). The workshop will be conducted as a moderated roundtable discussion with panelists who submitted a timely request to participate and a comment on the NPRM. An FTC moderator will ask questions of panelists who will be seated at the table throughout the day. The workshop will feature a morning session and an afternoon session that will cover the following discussion topics in the general order identified below. The Commission will consider the views expressed at the workshop, along with previously submitted comments, in determining whether a rule prohibiting market manipulation in the petroleum industry should be developed, and if so, what the format and content of the rule should be.

## Workshop Schedule

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|----------------|---|
| 8:45 - 9:30a   | Registration  |
| 9:30 - 11:00a  | Morning Session   |
| 11:00 - 11:15a | Break   |
| 11:15 - 12:30p | Morning Session, continued  |
| 12:30 - 2:00p  | Lunch (on your own)   |
| 2:00 - 3:15p   | Afternoon Session   |
| 3:15 - 3:30p   | Break   |
| 3:30 - 5:00p   | Afternoon Session, continued (including “open mike” session, time permitting, at conclusion of afternoon session) |

## **Discussion Topics**

### **I. Using SEC Rule 10b-5 as a Model for a FTC Market Manipulation Rule**

- Is the broad anti-fraud SEC Rule 10b-5 an appropriate model for the FTC's proposed Rule to prohibit market manipulation in wholesale petroleum markets?
- What differences exist between wholesale petroleum markets and securities markets that should be accounted for in the application of the proposed Rule to wholesale petroleum markets?
- Is the adoption of securities law precedent appropriate to define the scope and application of the proposed Rule?
- Are there other models upon which the FTC should base any final rule, such as the Commodity Futures Trading Commission's price manipulation authority under the Commodity Exchange Act? Is there a meaningful distinction between price discovery in commodity futures markets and price discovery in wholesale petroleum markets that limits the application of standards used to prohibit price manipulation in commodity futures markets to wholesale petroleum markets?

### **II. Proper Scierter Standard for a FTC Market Manipulation Rule**

- What are the potential costs and benefits to industry and consumers, and to effective law enforcement, if recklessness is sufficient to satisfy the intent element of a rule violation (using the SEC Rule 10b-5 legal precedent as a guide)?
- Should the FTC require a showing of specific intent rather than recklessness to prove a violation of any final rule? What are the potential costs and benefits to industry and consumers, and to effective law enforcement, of requiring a showing of specific intent?
- To what extent does the adoption of a scierter standard – of recklessness or specific intent – help to ensure that only harmful conduct is prohibited by any final rule?
- Regardless of the scierter standard selected, is it desirable to articulate the standard within the text of any final market manipulation rule?

### **III. Appropriate Reach of a FTC Market Manipulation Rule**

- Should conduct that does not directly pertain to an actual purchase or sale, such as production, supply, and operational decisions, be subject to the proposed Rule?
- Is it appropriate to read the "in connection with" language of the proposed Rule to enable the FTC to reach market manipulation pertaining to products that are blending components for gasoline or petroleum distillates, such as ethanol or biodiesel?
- Does conduct in the energy futures markets affect wholesale petroleum markets, and if so, under what circumstances? Should the FTC reach futures market activity under its proposed Rule?
- Should any final FTC market manipulation rule encompass conduct not captured by the proposed Rule?
- Should the FTC revise the proposed definition of wholesale to include or exclude conduct from the proposed Rule, such as terminal rack sales?
- Would manipulation of oil and refined products pipeline transportation meet the "in connection with" requirement under the proposed Rule?

#### **IV. Conduct that Would Violate a FTC Market Manipulation Rule**

- What types of conduct would violate the proposed Rule?
- In light of the hypothetical conduct scenarios proposed by some commenters, is the language and application of the proposed Rule sufficiently clear to the business community?
- When should a partial disclosure of information be a violation of the proposed Rule? Does the SEC Rule 10b-5 legal precedent interpreting the materiality standard for misstatements or omissions adequately address concerns raised by some commenters about subpart (b) of the proposed Rule?
- Does the proposed Rule impose any affirmative duties or obligations to disclose proprietary information or other information?
- Should a final rule include any safe harbors or be subject to affirmative defenses?
- What potential burdens or conflicts may arise from enforcement of any final rule?

#### **V. Desirability of Including Market or Price Effects as an Element of a Cause of Action Under a FTC Market Manipulation Rule**

- Although the FTC declined to include such a requirement in its NPRM, should a showing of market or price effects be a required element of a cause of action under any FTC market manipulation rule? What are the advantages and disadvantages of including such a requirement?
- How would price effects from manipulative or deceptive conduct in wholesale petroleum markets be identified and demonstrated? Do the enforcement efforts of other federal agencies to prohibit price manipulation serve as a useful guide in applying the FTC's proposed Rule?
- Is it desirable to require a showing that prohibited conduct affects or tends to affect market conditions – as opposed to a showing of price effects – to prove a violation of any final rule? Would such a showing adequately address concerns raised by some commenters about the absence of a price effects requirement in the proposed Rule?

### **Relevant Statutory Language**

#### **Energy Independence and Security Act of 2007 (“EISA”)**

Pub. L. No. 110-140, 121 Stat. 1723 (Dec. 19, 2007), Title VIII, Subtitle B, codified at 42 U.S.C. §§ 17301-17305.

#### **SEC. 811. PROHIBITION ON MARKET MANIPULATION.**

It is unlawful for any person, directly or indirectly, to use or employ, in connection with the purchase or sale of crude oil gasoline or petroleum distillates at wholesale, any manipulative or deceptive device or contrivance, in contravention of such rules and regulations as the Federal Trade Commission may prescribe as necessary or appropriate in the public interest or for the protection of United States citizens.

#### **SEC. 812. PROHIBITION ON FALSE INFORMATION.**

It is unlawful for any person to report information related to the wholesale price of crude oil gasoline or petroleum distillates to a Federal department or agency if –

- (1) the person knew, or reasonably should have known, the information to be false or misleading;
- (2) the information was required by law to be reported; and
- (3) the person intended the false or misleading data to affect data compiled by the department or agency for statistical or analytical purposes with respect to the market for crude oil, gasoline, or petroleum distillates.

## **FTC Proposed Market Manipulation Rule**

### **§ 317.1 Scope.**

This part implements Subtitle B of Title VIII of The Energy Independence and Security Act of 2007 (“EISA”), Pub. L. 110-140, 121 Stat. 1723 (December 19, 2007), codified at 42 U.S.C. §§ 17301-17305. This rule applies to any person over which the Federal Trade Commission has jurisdiction under the Federal Trade Commission Act, 15 U.S.C. § 41 et seq.

### **§ 317.2 Definitions.**

The following definitions shall apply throughout this rule:

- (a) Crude oil means the mixture of hydrocarbons that exist: (1) in liquid phase in natural underground reservoirs and which remain liquid at atmospheric pressure after passing through separating facilities, or (2) as shale oil or tar sands requiring further processing for sale as a refinery feedstock.
- (b) Gasoline means (1) finished gasoline, including, but not limited to, conventional, reformulated, and oxygenated blends, and (2) conventional and reformulated gasoline blendstock for oxygenate blending.
- (c) Person means any individual, group, unincorporated association, limited or general partnership, corporation, or other business entity.
- (d) Petroleum distillates means (1) jet fuels, including, but not limited to, all commercial and military specification jet fuels, and (2) diesel fuels and fuel oils, including, but not limited to, No. 1, No. 2, and No. 4 diesel fuel, and No. 1, No. 2, and No. 4 fuel oil.
- (e) Wholesale means purchases or sales at the terminal rack level or upstream of the terminal rack level. Transactions conducted at wholesale do not include retail gasoline sales to consumers.

### **§ 317.3 Prohibited practices.**

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,

- (a) To use or employ any device, scheme, or artifice to defraud,
- (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
- (c) To engage in any act, practice, or course of business that operates or would operate as a fraud or deceit upon any person.

### **§ 317.4 Preemption.**

The Federal Trade Commission does not intend, through the promulgation of this Rule, to preempt the laws of any state or local government, except to the extent that any such law conflicts with this Rule. A law is not in conflict with this Rule if it affords equal or greater protection from the use or employment, directly or indirectly, of any deceptive or manipulative device or contrivance, in connection with the purchase or sale of crude oil, gasoline, or petroleum distillates at wholesale.

### **§ 317.5 Severability.**

The provisions of this Rule are separate and severable from one another. If any provision is stayed or determined to be invalid, it is the Commission’s intention that the remaining provisions shall continue in effect.

## **Workshop Participants**

American Petroleum Institute (API)  
*Robert A. Long, Jr., Covington & Burling LLP*  
*Jonathan Gimblett, Covington & Burling LLP*

Association of Oil Pipe Lines (AOPL)  
*Linda G. Stuntz, Stuntz, Davis & Staffier, PC*

Committee on Futures and Derivatives Regulation of the Association of the Bar of the City of New York (CFDR)  
*Charles R. Mills, K&L Gates LLP*

Consumer Federation of America (CFA)  
*Mark Cooper, CFA*

CME Group  
*De'Ana Dow, CME Group*

Flint Hills Resources, LP (FHR)  
*Alan Hallock, FHR*

Fulbright & Jaworski LLP  
*David Van Susteren, Fulbright & Jaworski LLP*

Futures Group (Futures Industry Association; Managed Funds Association; National Futures Association; Intercontinental Exchange; CME Group)  
*Mark D. Young, Kirkland & Ellis LLP*

International Swaps and Derivatives Association, Inc. (ISDA)  
*Steven M. Bunkin, Goldman Sachs*  
*Greg Zerzan, IDSA*  
*Athena Y. Velie, McDermott, Will & Emery LLP*

National Petrochemical and Refiners Association (NPRA)  
*Charles T. Drevna, NPRA*

Navajo Participants (Navajo Nation; Resolute Natural Resources Company; Navajo Nation Oil and Gas Company)  
*James Piccone, Resolute Natural Resources Company*  
*Wilson Groen, Navajo Nation Oil and Gas Company*  
*Gale T. Miller, Davis, Graham and Stubbs LLP*

Petroleum Marketers Association of America (PMAA)  
*Robert S. Bassman, Bassman, Mitchell & Alfano, Chtd.*

*Craig Pirrong, Professor of Finance, The University of Houston, C.T. Bauer College of Business*

Platts  
*John Kingston, Platts*

Society of Independent Gasoline Marketers of America (SIGMA)  
*James D. Barnette, Steptoe & Johnson LLP*  
*R. Timothy Columbus, Steptoe & Johnson LLP*