



U.S. COMMODITY FUTURES TRADING COMMISSION

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Office of General Counsel

June 23, 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:

On behalf of the Commodity Futures Trading Commission ("CFTC"), I am pleased to offer the following comments on the recently-published Advance Notice of Proposed Rulemaking ("ANPR") in the above-referenced matter.¹ The CFTC commends the Federal Trade Commission ("FTC") for its prompt action in responding to the rulemaking authority provided in Section 811 of the Energy Independence and Security Act of 2007. The ANPR reflects a thoughtful consideration of the existing array of anti-manipulation authorities and standards, which will inform the FTC as it evaluates its own new anti-manipulation authority.

As recognized in the ANPR, Congress has provided the CFTC with exclusive jurisdiction over futures trading. *See* Fed. Reg. at 25618 n. 39, *citing* Section 2(a)(1)(A) of the Commodity Exchange Act (CEA), 7 U.S.C. § 2(a)(1)(A). The CFTC's exclusive jurisdiction over trading in futures is based upon the concern that futures markets remain subject to a single, federal regulatory standard. *See, e.g., FTC v. Ken Roberts Company*, 276 F.3d 583, 588 (D.C. Cir. 2001)(CFTC's exclusive jurisdiction needed to avoid unnecessary, overlapping, and duplicative regulation of futures trading among regulators).

Depending upon how the FTC defines the elements of the regulatory offense under its anti-manipulation rule, traders on futures exchanges could be faced with a different standard of liability than applies under the CEA. More specifically, depending upon the FTC's regulatory choices now, traders on futures exchanges could face the prospect of engaging in conduct that is lawful under the primary governing statute, the CEA, but that is nonetheless illegal under the

¹ We note that the ANPR specifically requested comment from other federal agencies. *See* Prohibitions on Market Manipulation and False Information in Subtitle B of the Energy Independence and Security Act of 2007, 73 Fed. Reg. 25614, 25616 (May 7, 2008).

FTC rule. This would yield the very result that Congress sought to avoid in granting the CFTC exclusive jurisdiction under the CEA.

In particular, we urge the FTC to avoid proposing regulatory measures that could lead to futures-market manipulation charges based solely on the downstream effects of futures exchange prices on off-exchange prices in physical or cash-market transactions, and that may be inconsistent or duplicative of CEA provisions. Consistent with Congress's intent to preserve the CFTC's exclusive jurisdiction over futures trading under the CEA, the FTC might also consider specifically excluding from a new rule the trading of futures on registered entities under the CEA, which are within the CFTC's exclusive purview under that statute.

As the ANPR also recognized, under the CEA the CFTC has non-exclusive anti-manipulation authority over cash and physical energy transactions. *See* Fed. Reg. at 25618 n. 39. The CFTC's Enforcement Division has been particularly active in its efforts to combat misconduct in these energy markets in recent years.

Section 8 of the CEA contemplates information sharing with other law enforcement agencies, *see* 7 U.S.C. § 12, and the CFTC has a long history of working closely with other law enforcement agencies in areas of mutual interest. The CFTC has brought numerous joint and parallel enforcement actions with the Securities and Exchange Commission over the years. And, since the enactment of the Energy Policy Act of 2005, the CFTC similarly has worked closely with the Federal Energy Regulatory Commission ("FERC") in enforcement matters relating to the physical natural gas markets, as reflected in the parallel actions that the agencies filed involving Energy Transfer Partners in July 2007.

The CFTC looks forward to a similarly productive working relationship with the FTC to efficiently prosecute manipulators and root out their misconduct in the petroleum sector of the energy markets. Cooperative enforcement efforts between the CFTC and FTC in areas of shared jurisdiction will improve efficiency and reduce costs in investigating and prosecuting manipulative conduct, which will prove beneficial for both agencies, market participants, taxpayers, and the public interest.

We again thank the FTC for this opportunity to comment on the ANPR. The CFTC looks forward to the FTC's proposed rules, and we may offer further comments as the public rulemaking process moves forward.

Terry S. Arbit
General Counsel