

October 15, 2008

Federal Trade Commission
Office of the Secretary
The Honorable Donald S. Clark
Room 159-H
600 Pennsylvania Avenue, N.W.
Washington, DC 20580

Re: Market Manipulation Rulemaking, P082900

Dear Secretary Clark:

The Canadian Association of Petroleum Producers (CAPP)¹ appreciates the opportunity to submit these comments on the Notice of Proposed Rulemaking (NPRM), issued in the referenced matter on August 18, 2008. The NPRM recites and responds to numerous comments submitted pursuant to the June, 2008 Advance Notice of Proposed Rulemaking in this docket, including comments submitted by CAPP. CAPP's interests and perspectives on the overall issues being addressed were amply set forth in those comments, were given due regard in many respects and will not be reiterated here. CAPP limits its brief comments at this juncture to 1) support of the scienter requirement included in the proposed rule, and 2) concern over the potential ramifications of an overly intrusive and unduly expansive disclosure requirement under certain conditions, discussed below.

Scienter as an Element of Proscribed Conduct.

The NPRM incorporates scienter as an element of a cause of action against proscribed fraud or manipulation. (Section E. Elements of Proof of a Rule Promulgated Under EISA; Section 2) CAPP commends the Commission for adopting this approach, which is explicitly designed "to ensure that the proposed rule does not chill competitive behavior." Moreover, by explicitly keying the scienter requirement to the SEC's Rule 10b standard, the proposal would afford participants access to a body of regulatory experience, which by reference will furnish an interpretative structure for use in governing their practices under the proposed rule. Both steps are important to carry out the conceptual goal of avoiding unnecessary interference with legitimate commercial practices while protecting the marketplace from proscribed, deliberate actions.

Disclosure Obligations.

Proposed Rule 317(b) proscribes the issuance of an untrue statement of material fact in connection with the sale or purchase of the subject petroleum commodities.

¹ CAPP is a trade association incorporated pursuant to the laws of Alberta, Canada. It represents approximately 140 companies engaged in the production of oil, natural gas and other petroleum products. Its principal offices are located in Calgary, Alberta.

Further, the rule would make the omission of a material fact a violation, if the omitted material fact is “necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading.” The NPRM seeks comment on this element of the proposed rule:

“What factors should the Commission consider in weighing whether, once an announcement is made by a person subject to the proposed Rule, an affirmative obligation may then exist to provide full and complete disclosure.” (Question i.)

CAPP submits that this element of the proposed rule is fraught with difficulties and highly problematic. First, the “circumstances” under which an “announcement” may be made are inherently ambiguous, given the vast range of information that may be furnished in connection with any commodities transaction, the range of other information that a corporate market participant may be exchanging with market participants at any point in time, and the tangential nature of the vast majority of such information. Second, the scope of information subsumed within the “full and complete” formulation is potentially so far reaching as to impose an undue and unwarranted burden on a market participant. Third, given the first two concerns, there is a real potential for the proposed scope of a mandatory disclosure requirement to have a serious chilling effect on statements of any type, including those relating to vital information that is central to the efficient functioning of the markets. Fourth, in virtually all instances the full extent of the disclosure requirement would only be known after the fact, and in any given instance might well extend to include information that cannot be anticipated to be material at the time of the transaction in question. Finally, market participants should not be placed in the conundrum of having to make a subjective determination as to whether they have an obligation to disclose additional information in circumstances in which they consider the material facts to have been accurately portrayed or conveyed in the first instance.

CAPP would suggest that the Commission frame the inquiry in a conservative way, so as to make clear that the reach of the “full and complete disclosure” requirement is intended to be narrow. Such a requirement should be explicitly recognized as being rarely invoked and idiosyncratic, and mandatory disclosure of non-essential information should not be intended to become a norm of commodities markets.

In conclusion, CAPP again appreciates the opportunity to participate in this rulemaking process and looks forward to the successful implementation of a rule that carries out the Congressional purposes of the underlying statutory provisions, consistent with the maintenance of a healthy and robust market for critically needed energy commodities.

THE CANADIAN ASSOCIATION OF
PETROLEUM PRODUCERS

James H. Holt
Betts & Holt LLP
1333 H Street, NW
Suite 1000 West Tower
Washington, DC 20016

Mark Pinney
Canadian Association of Petroleum
Producers
1st Canadian Center
2100, 350 - 7th Avenue, S.W.
Calgary, Alberta T2P 3W5
CANADA

October 15, 2008