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BY ELECTRONIC SUBMISSION AND BY U.S. MAIL

Federal Trade Commission
Office of the Secretary
Market Manipulation Rulemaking
P.O. Box 2846
Fairfax, VA 22031-0846

Re: **Market Manipulation Rulemaking, P082900**

To the Commission, Office of the Secretary:

This letter responds to the invitation of the Federal Trade Commission (“FTC” or “the Commission”) to comment on its Notice of Proposed Rulemaking (the “Notice”),¹ issued August 19, 2008 with respect to Section 811 of the Energy Independence and Security Act of 2007 (“EISA”).² Please note that while Fulbright & Jaworski L.L.P. represents many clients in the petroleum industry, these comments reflect only the opinions of the undersigned and do not necessarily reflect the views or opinions of the Firm or its clients.

In Section 811 of the EISA, Congress prohibited market manipulation in connection with the purchase or sale of crude oil, gasoline or petroleum distillates at wholesale “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.”³ The EISA statute does not define “market manipulation” nor the elements necessary to establish a violation of the prohibition. In its Notice, the FTC has issued proposed Part 317 of its rules that makes it unlawful to engage in certain enumerated acts or conduct using language that directly tracks rule 10b-5 of the Securities and Exchange Commission’s rules; however, the FTC’s Notice also does not define “market manipulation” nor state specifically how it is effected.

¹ Prohibitions on Market Manipulation and False Information in Subtitle B of Title VIII of The Energy Independence and Security Act of 2007, 73 Fed. Reg. 48317 (August 19, 2008) (to be published at 16 C.F.R. pt. 317)

² Pub. L. 110-140, 121 Stat. 1723 (December 19, 2007), Title VIII, Subtitle B, *codified at* 42 U.S.C. §§ 17301-17305.

³ 42 U.S.C. § 17301 (2008).

The Commission outlined the three elements it considers necessary for it to prove a violation of Section 811 as follows: First, the Commission states it would need to prove a “completed manipulative or deceptive act.” Second, the Commission acknowledges it would need to prove scienter on the part of the defendant which, in conjunction with the first element, would connote, in the Commission’s opinion, “intentional or willful conduct that is designed to deceive or defraud.” The Commission also believes a showing of recklessness would suffice to establish scienter.⁴ Third, the Commission asserts it would need to prove the defendant engaged in such conduct “in connection with” the purchase or sale of a covered commodity at wholesale.⁵ The Commission does not identify any other element of proof under the rule it proposes to establish a violation of the statute. More specifically, the Commission asserts that it is not required to make a showing of price effects in order to establish liability under its proposed rule.⁶

The lack of a requirement of a showing of price effects to establish culpability leaves the rule overbroad and risks inconsistent or unwarranted enforcement efforts by the Commission. In discussing the elements of proof needed under the proposed rule prohibiting market manipulation, the Commission contends in its Notice that “[t]here is no need to determine separately whether there is evidence of harm; therefore, requiring proof of price effects is unnecessary.”⁷ The Commission should amend its Notice to state expressly that a direct and identifiable effect upon market price is a required element of a cause of action for market manipulation in the wholesale petroleum industry.

While inclusion of the element of price effects to establish a market manipulation finding may result in certain cases not being prosecuted by the Commission or in marginal cases not being successfully prosecuted, the risk of finding liability for conduct that may more closely resemble negligence than willful fraud is a cost that should be tolerated. Absent a requirement of price effects and causation, minor or peripheral market participants whose conduct did not result in any effect on market price whatsoever, could be threatened with expensive and protracted litigation unless they were to settle or offer cooperation against other more direct participants.

The Commission suggests in its Notice that because there is no economic justification for fraud or deception in an exchange economy,⁸ that “harm to the market can be inferred” by the mere existence of an alleged manipulative act done with intent.⁹ Such rationale for eliminating the element of causation in a statutory cause of action with extraordinary per day fines seems too tenuous to support the desired effect of ensuring a fair and open marketplace. Using economic theory that “fraudulent behavior interferes with price signals” and “reduces transparency in the marketplace,” the Commission concludes that there is no need to determine separately whether a

⁴ Notice at 73 Fed. Reg. at 48328.

⁵ *Id.* at 48329.

⁶ *Id.* at 48329-30.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

defendant's conduct caused harm.¹⁰ Yet a standard which does not include a showing of price effects risks misconstruing legitimate profit-maximizing behavior as showing the requisite scienter and liability attaching.

If elimination of the element of causation were permitted to stand in the Commission's proposed rule, each case brought under such a rule would more closely approximate an attempted market manipulation case rather than an actual manipulation case. The evidence undoubtedly would be emails and trading reports argued by the Commission as showing the intent to manipulate and the burden, without the causation element, would simply be too easily met by the Commission for a defendant whose conduct was not actually manipulative or was marginally suspect to stand trial.

For these reasons, the Commission should amend and clarify its Notice to state expressly that the required elements of a cause of action for market manipulation include the element of a showing that a direct and identifiable effect on market prices occurred as a result of the conduct in question before liability can attach. I would respectfully request the Commission grant the opportunity to supplement this comment with additional authorities or argument once other commentators remarks have been reviewed and considered.

Thank you for this opportunity to comment on the Commission's proposed market manipulation rule.

Very truly yours,

/s/ David J. Van Susteren

David J. Van Susteren

DV/rr

¹⁰ *Id.* at 48329.