

May 20, 2009

Federal Trade Commission  
Office of the Secretary  
Room H-135 (Annex G)  
600 Pennsylvania Avenue, NW  
Washington, DC 20580

**Re: Market Manipulation Rulemaking, P082900**

Argus submits the following comments with respect to the Federal Trade Commission's ("FTC's") Revised Notice of Proposed Rulemaking prohibiting market manipulation in the petroleum industry, pursuant to Section 811 of the Energy Independence and Security Act of 2007.

Argus originally responded to the Notice of Proposed Rulemaking on November 18, 2008. In this response to the Revised Notice of Proposed Rulemaking, Argus now submits comments regarding:

- Definition of the scienter standard
- Forms of information
- Mandatory disclosure

**Definition of the Scienter Standard**

Argus responds to two questions raised by the FTC on the definition of the scienter standard (Section IV.I.2):

f. Does the inclusion of the explicit scienter requirement in revised proposed Rule Section 317.3(b) adequately reduce any danger of a chilling effect on the flow of information essential to the functioning of, and transparency in, wholesale petroleum markets? Why or why not?

g. Does the inclusion of the explicit scienter requirement – intentionally fail – in revised proposed Rule Section 317.3(b) sufficiently reduce the danger of a chilling effect on benign or desirable business activity within wholesale petroleum markets? Why or why not?

Argus shared the concern of the FTC enunciated in the recent Notice of Proposed Rulemaking that the “recklessness” formulation in the previous draft of the proposed rule would create a “chilling effect,” discouraging companies from submitting transaction information to the trade press, and therefore create less accurate and less representative published prices. Argus sees the proposed addition of the term “knowingly” to 317.3(a) and “intentionally” to 317.3(b) as a significant effort to reduce this chilling effect and to draw the rule closer to the existing Commodity Exchange Act language that has been used to prosecute manipulation in the physical petroleum markets for many years.

Many companies had told Argus that the prior proposed rule’s “recklessness” standard created a risk of prosecution as a result of inadvertent errors or omissions when submitting transaction information to companies like Argus. These companies could avoid such risk by declining to submit such information to the trade press. Argus argued in prior filings that such a result would harm the consumer by decreasing transparency, making the balancing of supply and demand more difficult, while possibly increasing price volatility.

The current rule and its supporting material make clear to the petroleum industry that “the revised proposed Rule would not reach inadvertent conduct or mere mistakes.” Argus believes that including this scienter standard to limit the reach of the 317.3(b) to intentional conduct is crucial to the continuation of the free flow of market information, particularly that of transactional data to the trade press. Furthermore, defining “knowingly” as conforming to “extreme departure from standards of ordinary care” should make it clear to contributors of transaction data that inadvertent mistakes – caused perhaps by the disorderly nature of markets – would not be actionable as manipulation.

Some companies have expressed to Argus that the current proposed rule provides them with the necessary clarity to submit transaction information to the trade press. Other companies feel that additional clarification of 317.3(a) is necessary, as those companies believe that omissions are covered by 317.3(a) as well as (b). Those companies have expressed that they may not report data to Argus as a result. The FTC may therefore wish to clarify that omissions are covered only under 317.3(b) and not 317.3(a). The FTC will need to look to individual company and trade association comments in order to determine if the rule’s new language provides them with the necessary clarity to continue to submit transaction information to the trade press. Should this not be the case, or at any time in the future fail to be the case, Argus would request that the Commission consider raising the scienter standard to one of “specific intent,” introduce a safe harbor for transactional data submissions as suggested in our previous filings, or issue further guidance that would allay industry concerns.

Argus shares the Commission’s concern that the submission of knowingly misleading or intentionally incomplete information to trade publishers may distort published prices and therefore affect market conditions and harm the consumer. As a result, Argus follows internal procedures intended to identify inaccurate or omitted information, routinely contacts submitting companies for clarifications and excludes transaction data from the price formation process should our standards not be met. Although not an absolute check, Argus believes that it is able to discover the vast majority of inadvertent errors, omissions, and inaccuracies and mitigate their

impact on published prices. Our success in upholding these standards is why we believe petroleum companies use our prices in contracts and the various other purposes noted in our prior filings.

## Forms of Information

Section IV.I.2.h asks about the forms of information, and “under what circumstances, if any, would the failure to provide such information render otherwise truthful statements misleading.” In addition, the hypothetical question presented in IV.I.w.1 also refers to a submission of transactional information that fails to identify that a transaction is below a specified volume minimum. The specific question we address is:

h. What forms of information, if any, should market participants be required to disclose in order to promote the functioning and integrity of wholesale petroleum markets? Explain. Under what circumstances, if any, would the failure to provide such information render otherwise truthful statements misleading?

The ability of such omissions to “distort or tend to distort market conditions” can be greatly informed by a description of how Argus typically collects, confirms, and utilizes submitted information in its price formation process.

Every transaction contains several elements (“forms of information”) that materially affect value. These elements are clearly defined for every commodity price that Argus publishes in our extensive methodology documents, which are publicly available on our website, and will typically include the following:

1. Price
2. Volume
3. Specification or grade
4. Location basis
5. Timing
6. Counterparty

Price and volume information alone are not sufficient to validate a price. An example of this can be seen in the following excerpt from the *Argus US Products* report, specifically on gasoline. Argus assesses gasoline prices for waterborne cargoes in New York and Boston, barges in New York, the Buckeye pipeline in New Jersey, and the Laurel pipeline in Philadelphia. As can be seen from the table below, prices vary widely depending on both specification and location basis:

## GASOLINE

New York Waterborne		Low/High Diff	Low/High Price
87 M	Jun	-1.75/-1.25	168.80/169.30
83.7 RBOB	Jun	+1.25/+2.50	171.80/173.05
89 Conv			174.14/174.64
91.3 RBOB	Jun	+17.88/+19.13	188.43/189.68
93 V	Jun	+13.50/+14.00	184.05/184.55
<b>Boston Waterborne</b>			
83.7 RBOB	Jun	+2.88/+3.38	173.43/173.93
<b>New York Barge</b>			
87 M Prompt	Jun	-1.00/-0.50	169.55/170.05
87 M Any May	Jun	-4.25/-3.75	166.30/166.80
83.7 RBOB Prompt	Jun	+1.25/+2.50	171.80/173.05
83.7 RBOB Any May	Jun	+1.25/+1.75	171.80/172.30
89 Conv Prompt			174.80/175.48
93 V Prompt	Jun	+14.00/+15.00	184.55/185.55
91.3 RBOB Prompt	Jun	+18.00/+19.00	188.55/189.55
84 CBOB (7.8 RVP)	Jun	-1.25/-0.75	169.30/169.80
90 CBOB (7.8 RVP)	Jun	+15.00/+16.00	185.55/186.55
Ethanol			176.00/178.00
Alkylate	Jun	+23.00/+24.00	193.55/194.55
<b>Buckeye</b>			
87 M	Jun	-1.00/-0.50	169.55/170.05
83.7 RBOB	Jun	+1.25/+1.75	171.80/172.30
89 Conv			174.80/175.48
93 V	Jun	+14.00/+15.00	184.55/185.55
91.3 RBOB	Jun	+18.00/+19.00	188.55/189.55
<b>Laurel</b>			
87 Conv	Jun	0.00/+0.50	170.55/171.05
89 Conv			175.28/175.78
93 Conv	Jun	+13.50/+14.00	184.05/184.55

Timing information also is important, as the price or value of a commodity can vary depending on when it is available. Finally, counterparty information is used to verify transactional data, and in the formation of a volume weighted average price.

If any information element of a transaction submitted is missing, and that element would have a material effect on the interpretation of the prices to be published, Argus has strict procedures to verify the transaction, including contacting the contributing firm to obtain complete information. Argus seeks to confirm individual transaction elements with counterparties and intermediaries. Argus also has procedures for identifying transaction elements that fall outside of normal boundaries and that should therefore be subject to further scrutiny in order to ensure accuracy. Should the relevant element not be available for whatever reason, and should Argus conclude that the element missing would have a material effect on the interpretation of the price, Argus would not include the transaction in its published reports.

In the particular hypothetical posed in IV.I.w.1, Argus would require that Company ABC identify the specific volume of the transaction, not just ask ABC to identify only transactions that cross a volume threshold. If Argus cannot obtain the volume information, it would not use the data to establish a price quotation.

Transactions are not the only forms of information that circulate in petroleum markets. Companies may make public statements about refinery maintenance or pipeline operations, for example, with the intent to serve the public interest or to be transparent about operations. But whereas price reporting firms detail in published methodologies the elements required for transaction reporting, no analogous guidelines exist for other types of market information. As a result, there is no clarity as to what constitutes an omission. For example, if a company has

sufficient facts to make a statement about a refinery shutdown, but not enough to announce duration or affected volume, they may choose to make no statement at all in order not to violate the rule's prohibition on omissions that tend to distort markets. Furthermore, because markets are constantly moving, a mere delay in a statement or update, perhaps for the purpose of confirming a fact, could be seen as actionable because the delay itself may have distorted the markets temporarily and be viewed after the fact as a type of omission.

As a result, companies may prefer to disclose no information, instead of risking violating the rule's prohibition on omissions that distort or tend to distort markets. But silence in these cases may well distort markets more than even the simplest statement. Should this be the result, the interest of the consumer would not be served, and a clear chilling effect on the desirable disclosure activity would result.

The FTC should consider a proviso for 317.3(b) which states that it is not a violation of (b) if the absence of the statement would tend to distort the market more than the omission in the statement made distorts the market. This would continue to support the free flow of market information without creating an unnecessary burden of risk on the disclosure. Alternatively, the FTC should look to other company or association filings for other formulations that resolve this problem and encourage voluntary disclosures.

Argus and other publishers are important conduits for disseminating these forms of information. Without the security of knowing that information can flow freely, the market will not function efficiently which will be to the detriment of the consumer and contrary to the goals of the FTC.

## **Mandatory disclosure**

In section IV.I.2.h and IV.I.2.i, the Commission asks about requiring mandatory disclosure. The specific questions are:

- h. What forms of information, if any, should market participants be required to disclose in order to promote the functioning and integrity of wholesale petroleum markets? Explain. Under what circumstances, if any, would the failure to provide such information render otherwise truthful statements misleading?
- i. To what extent would any danger of a chilling effect on benign or desirable business activity depend upon the existence (or lack thereof) of mandatory disclosure obligations in the petroleum industry? Explain.

In regards the submission of transaction data or other market information to the trade press, such submission is currently voluntary. Argus would like to see submissions remain voluntary. Many participants in the physical spot markets for petroleum are involved infrequently, and often have relatively few staff involved in the buying or selling of petroleum. These companies would be unduly burdened by a requirement to disclose due to the imposition of costs to comply, and might simply exit the spot market rather than comply, thus leading to less liquidity and less efficiency. Furthermore, certain publishers of trade information specialize in particular

commodities or regions. Requiring firms to discover and disclose transaction information to all publishers would lead to confusion and place a severe burden on market participants.

Mandatory submission would likely require specifying the scope of the data to be submitted. Markets evolve but regulations change at a slower pace and will inevitably lag this market evolution. Mandatory submission could therefore hinder both petroleum firms and reporting agencies adapting to the market, and in the case of publishers prevent innovation to the detriment of the industry and the consumer. These effects would be most noticeable in emerging markets such as bio-fuels, but would also affect petroleum markets as the structure of these markets changes over time with national, regional, and local environmental rules.

As discussed above under “forms of information,” Argus sees no need for participants to “be required to disclose” certain forms of information by the FTC, because Argus already requires those forms of information before including a transaction in its price formation process.

This system of submitting deals on a voluntary basis is functioning adequately at present. It will continue to function adequately as long as firms are confident that regulators presume that transactional data is submitted in good faith, and that regulators do not pursue unintentional errors or omissions. Argus feels that the introduction of mandatory disclosure obligations will have a chilling effect on desirable business activity.

## **Conclusions**

It remains paramount that the FTC look to individual company and trade association comments in order to determine if the revised rule language is sufficient to maintain the existing free flow of information from industry firms to trade publishers. This flow of information is at the core of transparency, and benefits the interests of the consumer by making opaque markets clearly visible. The FTC cannot discover or prosecute manipulation without the published prices that this communication generates. Should comments from industry reveal concern that such communication will be put in jeopardy despite the very constructive proposed modifications, or should future case law put it in jeopardy, the FTC should work quickly to adopt language or issue guidance that protects and provides a safe harbor for such communication.

Sincerely,

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