FEDERAL TRADE COMMISSION

16 CFR Part 317

[Project No. P082900]

RIN 3084–AB12

Prohibitions on Market Manipulation

AGENCY: Federal Trade Commission.

ACTION: Final Rule.

SUMMARY: In this document, the Federal Trade Commission (''Commission'' or ''FTC'') issues its Statement of Basis and Purpose (''SBP'') and final Rule, pursuant to Section 811 of Subtitle B of Title VIII of The Energy Independence and Security Act of 2007 (''EISA''). [1] The final Rule prohibits any person, directly or indirectly, in connection with the purchase or sale of crude oil, gasoline, or petroleum distillates at wholesale, from knowingly engaging in any act, e oil gasotF6 1 Tf 7.he purchase /ao1 oine, busleuss – [S]ectionncluT* (or savailabion of unfy, and with t)Tj T* (Purtititu pefribe–itle B)Tj Tes distillateswou, 2 or drica or inecti 0 Ti 19,t, fTf ilab error; toe prio drtititu pefribetle B''any otheiously a irTj ograoceerecurrr drt

[1] Section 811 is part of Subtitle B of Title VIII of EISA, which has been codified at 42 U.S.C. 17301-17305.

[2] 42 U.S.C. 17001-17386.

[3] 42 U.S.C. 17301.

[4] 42 U.S.C. 17302.

[5] Section 813(a) provides that Subtitle B shall be enforced by the FTC ''in the same manner, by the same means, and with the same jurisdiction as though all applicable terms of the Federal Trade Commission Act [(''FTC Act'')] (15 U.S.C. 41 et seq.) were incorporated into and made a part of [Subtitle B].'' Section 813(b) provides that a violation of any provision of Subtitle B ''shall be treated as an unfair or deceptive act or practice proscribed under a rule issued under [S]ection 18(a)(1)(B) of the [FTC Act] (15 U.S.C. 57a(a)(1)(B)).'' 42 U.S.C. 17303.

[6] Section 814(a) of Subtitle B provides that – ''[i]n addition to any penalty applicable under the [FTC Act]'' – ''any supplier that violates [S]ection 811 or 812 shall be punishable by a civil penalty of not more than $1,000,000.'' Further, Section 814(c) provides that ''each day of a continuing violation shall be considered a separate violation.'' 42 U.S.C. 17304.

[7] Section 815(a) provides that nothing in Subtitle B ''limits or affects'' Commission authority ''to bring an enforcement action or take any other measure'' under the FTC Act or ''any other provision of law.'' Section 815(b) provides that ''[n]othing in [Subtitle B] shall be construed to modify, impair, or supersede the operation'' of: (1) any of the antitrust laws (as defined in Section 1(a) of the Clayton Act, 15 U.S.C. 12(a)), or (2) Section 5 of the FTC Act ''to the extent that . . . [S]ection 5 applies to unfair methods of competition.'' Section 815(c) provides that nothing in Subtitle B ''preempts any State law.'' 42 U.S.C. 17305.

[8] As the Commission stated in each of the prior Notices issued in this proceeding, the phrase ''crude oil gasoline or petroleum distillates'' is used without commas in Section 811 (as well as in the first clause of Section 812), while the phrase is used with commas in Section 812(3): ''crude oil, gasoline, or petroleum distillates.'' The absence of commas is obviously a non-substantive, typographical error; therefore, the Commission reads all parts of both sections to cover all three types of products: crude oil, gasoline, and petroleum distillates. See FTC, Prohibitions On Market Manipulation and False Information in Subtitle B of The Energy Independence and Security Act of 2007 , 73 FR 25614, 25621 n.59 (May 7, 2008); FTC, Prohibitions On Market Manipulation and False Information in Subtitle B of Title VIII of The Energy Independence and Security Act of 2007 , 73 FR 48317, 48320 n.40 (Aug. 19, 2008); FTC, Prohibitions On Market Manipulation in Subtitle B of Title VIII of The Energy Independence and Security Act of 2007 , 74 FR 18304, 18305 n.11 (Apr. 22, 2009).

[9] Rulemaking documents are available at: (http://www.ftc.gov/ftc/oilgas/rules.htm).

[10] 73 FR 25614.

[11] 73 FR at 25620-24. The comment period for the ANPR closed on June 23, 2008, after the Commission granted an extension requested by a major industry trade association. Letter from the American Petroleum Institute to FTC Secretary Donald S. Clark, (May 19, 2008), available at (http://www.ftc.gov/os/comments/marketmanipulation/080519ampetrolinstreqeot.pdf); FTC, Prohibitions On Market Manipulation and False Information in Subtitle B of Title VIII of The Energy Independence and Security Act of 2007 , 73 FR 32259 (June 6, 2008).

[12] Attachment D contains a list of commenters who submitted comments on the ANPR. Electronic

versions of the comments are available at: (http://www.ftc.gov/os/comments/marketmanipulation/index.shtm). In calculating the number of comments submitted in response to a Notice issued in this proceeding, the Commission treated multiple filings by the same commenter, or a comment filed jointly by a group of commenters, as a single comment.

[13] Section II.A. of the Notice of Proposed Rulemaking (''NPRM'') discusses commenters' views and the Commission's response to commenters on the propriety of a Section 811 rule. See 73 FR at 48320-23.

[14] Section III. of the ANPR provides an overview of the antecedents of Section 811 and relevant legal precedent. See 73 FR at 25616-19. Section I.B. of the NPRM describes ANPR commenters' views on the appropriate model for a Section 811 rule. See 73 FR at 48319 & nn.31-32.

[15] See Securities Exchange Act of 1934 (''SEA'') 10(b), 15 U.S.C. 78j(b); 17 CFR 240.10b-5 (''Rule 10b-5'').

[16] See Natural Gas Act 4A, 15 U.S.C. 717c-1; Federal Power Act 222, 16 U.S.C. 791a; Prohibition of Natural Gas Market Manipulation, 18 CFR 1c.1; Prohibition of Electric Energy Market Manipulation, 18 CFR 1c.2.

[17] See Commodity Exchange Act (''CEA'') 9(a)(2), 7 U.S.C. 13(a)(2).

[18] 73 FR 48317.

[19] 73 FR at 48332-34. In response to a petition from a major trade association, the Commission extended the deadline for submission of comments on the NPRM from September 18, 2008, to October 17, 2008. Letter from the American Petroleum Institute to FTC Secretary Donald S. Clark, (Sept. 5, 2008), available at (http://www.ftc.gov/os/comments/marketmanipulation2/538416-00006.pdf); FTC, Prohibitions on Market Manipulation and False Information in Subtitle B of Title VIII of The Energy Independence and Security Act of 2007 , 73 FR 53393 (Sept. 16, 2008).

[20] Attachment B contains a list of commenters who responded to the NPRM.

[21] Attachment C contains a list of participants in

Change, and Antitrust Enforcement, at 1 (Aug. 2004), available at (http://www.ftc.gov/os/2004/08/040813mergersinpetrolberpt.pdf).

[28] Markets absorb all available information – good or bad – and continually adjust price signals and other market data to any new information. When economic actors can presume that market data have not been artificially manipulated, they can rely on that data to make decisions that they believe will advance their individual economic objectives. Fraudulent or deceptive conduct taints the integrity of the market process.

[29] Commenters recognized the negative effects of fraud and deceit in wholesale petroleum markets. See, e.g, CAPP, ANPR, at 1 (''CAPP recognizes that fraud and manipulation pose a potential threat to the successful and efficient functioning of petroleum markets in North America.''); MFA, ANPR, at 1 (''Price manipulation has a corrosive effect on the proper functioning of any market.''); API, ANPR, at 50 (''We agree that the provision of false or misleading pricing information to private reporting entities could be problematic.''); Sutherland, ANPR, at 3 (''[O]il marketers and traders are the first victims of unfair business practices. They, therefore, support efforts by Congress to deter manipulation and the use of deceptive devices.''); see also MS AG, NPRM, at 2 (''The proposed Rule will benefit consumers significantly because market manipulation can artificially inflate prices of petroleum products and cause consumers to pay more for essential goods, such as gasoline.'').

[30] See 73 FR at 48321 (noting that ''a rule that allows the Commission to guard against conduct that undermines the integrity of the petroleum market would be in the public interest'').

[31] 15 U.S.C. 78j(b).

[32] Id. (emphasis added). See generally Ernst & Ernst v. Hochfelder , 425 U.S. 185, 197 (1976).

[33] The language from the Securities Act of 1933 also supported issuance of SEC Rule 10b-5. Section 17(a) of the Securities Act of 1933 originally prohibited:

> any person in the sale of securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly –
>
> (1) to employ any device, scheme or artifice to defraud, or
>
> (2) to obtain money or property by means of any untrue statement of a material fact or any omission 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
>
> (3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

Through the promulgation of Rule 10b-5, the SEC intended, inter alia , to apply the same prohibitions contained in Section 17(a) of the 1933 Act to purchasers as well as to sellers. Birnbaum v. Newport Steel Corp ., 193 F.2d 461, 463 (2d Cir. 1952). Amended several times over the intervening years, the current text of Section 17(a) is codified at 15 U.S.C. 77q(a).

[34] 17 CFR 240.10b-5. In addition, the SEC's rules under SEA Section 10(b) prohibit a number of specific practices in specific circumstances. See 17 CFR 240.10b-1 through 240.10b-18.

[35] Schreiber v. Burlington Northern, Inc ., 472 U.S. 1, 6 (1985) (quoting Ernst & Ernst , 425 U.S. at 199)) (emphasis in original). The Supreme Court has defined ''the term [manipulation to refer] generally to practices, such as wash sales, matched orders, or rigged prices, that are intended to mislead investors by artificially affecting market activity.'' Santa Fe Indus., Inc. v. Green , 430 U.S. 462, 476 (1977). ''A matched order is the entering of a sell (or buy) order knowing that a corresponding buy (or sell) order of substantially the same size, at substantially the same time and at substantially the same price either has been or will be entered. A wash trade [or wash sale] is a securities transaction which involves no change in the beneficial ownership of the security. Parking [another form of manipulation] is the sale of securities subject to an agreement or understanding that the securities will be repurchased by the seller at a later time and at a price which leaves the economic risk on the seller.'' SEC v. Farni, Exchange Act Release No. 39133 (Sept. 25, 1997), available at (http://www.sec.gov/litigation/admin/3439133.txt).

[36]

finding defendant engaged in wash sales and imposing sanctions); United States v. Reliant Energy Servs., Inc., 420 F. Supp. 2d 1043, 1059-60 (N.D. Cal. 2006) (finding allegations that defendant withheld supply from the market while intentionally disseminating false and misleading rumors and information to the California Independent System Operator, brokers, and other traders regarding defendant's power generation plants were sufficient to withstand a motion to dismiss for failure to state a claim of manipulation).

[42] See, e.g, FERC, Final Report on Price Manipulation in Western Markets, Dkt. No. PA02-2-000 (Mar. 2003), available at (http://www.ferc.gov/industries/electric/indus-act/wec.asp). The FERC issued a Policy Statement and promulgated regulations to address price formation concerns that resulted from the reporting of false information to price index publishers. See FERC, Transparency Provisions of Section 23 of the Natural Gas Act , 73 FR 1014 (Jan. 4, 2008); FERC, Report on Natural Gas and Electricity Price Indices, Dkt. No. PL03-3-004, AD03-7-004 (May 5, 2004), available at (http://www.ferc.gov/EventCalendar/Files/20040505135203-Report-Price-Indices.pdf); FERC, Policy Statement on Natural Gas and Electric Price Indices , 104 F.E.R.C. ? 61,121 (July 24, 2003).

[43] See, e.g, SEC v. Rana Research, Inc., 8 F.3d 1358, 1361, 1364 (9th Cir. 1993) (finding that the defendant's press release contained materially false and misleading statements); SEC v. Softpoint, Inc. , 958 F. Supp. 846 (S.D.N.Y. 1997) (finding defendant liable under SEC Rule 10b-5 when defendant disseminated false information to the market through press releases and SEC filings).

[44] The Commission believes that the language of Section 811 reflects congressional intent that the Commission look to SEC Rule 10b-5 in crafting a market manipulation rule. See Evans v. United States, 504 U.S. 255, 260 n.3 (1992) ('''[I]f a word is obviously transplanted from another legal source, whether the common law or legislation, it brings the old soil with it.''' (quoting Felix Frankfurter, Some Reflections on the Reading of Statutes , 47 Colum. L. Rev. 527, 537 (1947))); Morissette v. United States , 342 U.S. 246, 263 (1952) (noting where Congress borrows terms of art it ''presumably knows and adopts the cluster of ideas that were attached to each borrowed word''); see also Nat'l Treasury Employees Union v. Chertoff , 452 F.3d 839, 857 (D.C. Cir. 2006) (stating that ''[t]here is a presumption that Congress uses the same term consistently in different statutes.'').

[45] 73 FR at 48322.

[46] Most NPRM commenters who addressed the initially proposed Rule opined that it would be appropriate. See, e.g, ATA, NPRM, at 2 (supporting the proposed Rule ''as an additional tool to help preserve the integrity of vital energy markets''); IPMA, NPRM, at 4 (''The proposed Rule does meet the rulemaking standard that it is 'necessary or appropriate in the public interest or for the protection of United States[] citizens.'''); see also MFA, ANPR, at 4-5 (''We believe the Commission should adopt appropriate rules prohibiting manipulation in the purchase and sale of crude oil, gasoline and petroleum distillates at wholesale . . . .'').

[47] As with prior comments submitted in this proceeding, most RNPRM commenters directed their statements to the application of a Section 811 rule, rather than to whether the revised proposed Rule met Section 811's rulemaking standard. See also 74 FR at 18308 n.40 (noting that most NPRM commenters focused their comments on the application of the proposed Rule). See, e.g, CAPP at 1-2 (opining that the modifications to the revised proposed Rule – including, in particular, the adoption of an express scienter standard and the inclusion of market conditions language in the omissions section – ensured that the Rule ''would serve the public interest''); CFA at 4 (stating that the revised proposed Rule ''promotes the public interest and is perfectly consistent with the legislative language''); PMAA at 3 (noting that the

language ''as necessary or appropriate'' in Section 811 provides the Commission with flexibility – within the framework of an anti-fraud model – to use its expertise to tailor the Rule to the characteristics of wholesale petroleum markets.

The Commission therefore has promulgated an anti-fraud Rule that, although modeled on SEC Rule 10b-5, is tailored to account for significant differences between wholesale petroleum markets and securities markets.[53] In this regard, the Commission has determined that the level of needed protection against fraud or deceit in wholesale petroleum market transactions should take into account that market participants typically are sophisticated and experienced commercial actors who are able to engage in a substantial amount of self protection, including filling in relevant information gaps. By contrast, small individual retail securities investors often possess less complete information than counter-parties such as securities brokers – and may also be significantly less sophisticated in discerning relevant information gaps. Additionally, the regulatory system overlaying securities markets, of which SEC Rule 10b-5 is a part, prescribes more comprehensive requirements – including in particular more comprehensive disclosure requirements – than the regulatory system applicable to wholesale petroleum markets. [54] Accounting for these contextual differences in crafting the final Rule, the Commission has sought to achieve the appropriate balance between the flexibility needed to prohibit fraud-based market manipulation without burdening legitimate business activity. To achieve this result, the final Rule differs from the initially proposed Rule in three significant ways.

First, the final Rule, like the revised proposed Rule, comprises a two-part conduct prohibition in contrast to the three-part conduct prohibition in the initially proposed Rule. The consolidation of parts ''more clearly and precisely denote[s] the unlawful conduct [that the Rule] prohibits.'' [55] Second, each paragraph of the conduct prohibition in the final Rule contains an explicit and tailored scienter standard. [56] The Commission has adopted differing scienter standards in order to address commenters' concerns that the initially proposed Rule – which used only a single, ''knowingly'' scienter standard – would have chilled some legitimate business conduct, especially with respect to the prohibition on misleading omissions of material facts from affirmative statements. Third, the final Rule prohibits only those omissions of material facts that distort or are likely to distort market conditions for a covered product. This limitation too addresses concerns about unintended interference with legitimate business activity.

B. Section 317.1: Scope

Section 813 provides the Commission with the same jurisdiction and power under Subtitle B of EISA as does the FTC Act, 15 U.S.C. 41 et seq.[57] With certain exceptions, the FTC Act provides the agency with jurisdiction over nearly every economic sector. Because EISA does not expand or contract coverage under the FTC Act, any ''person'' engaged in any activity subject to Commission jurisdiction under the FTC Act is covered by the final Rule. Conversely, any ''person'' engaged in any activity not subject to Commission jurisdiction under the FTC Act is not subject to Commission jurisdiction under the final Rule.

The only comments received in response to the RNPRM with respect to the scope of a final rule concerned pipelines and futures markets, and contained essentially the same arguments the commenters had made in

---

the FERC to rely upon SEA Section 10(b) in defining the terms ''manipulative or deceptive device or contrivance.'' See 15 U.S.C. 717c-1; 16 U.S.C. 824v.

[53] Some commenters argued that the final Rule should extend to conduct such as speculative activity or the unilateral exercise of market power, because in their view such conduct is inherently manipulative. See, e.g, CFA at 8 (arguing that the Commission ''could have considered the exercise of market power and excessive speculation as manipulation'' because they ''have no economic justification''); Greenberger at 1 (opining that the proposed Rule could offer a tough enforcement mechanism against speculative activity); Senator Cantwell at 2-3 (asserting that Congress intended for the FTC's rule to reach a broad range of conduct, including the withholding of supply); Pirrong, NPRM, at 2 (arguing that the proposed Rule should not focus on fraud or deceit, but rather on the exercise of market power). However, the rulemaking record does not support extending the final Rule to cover such conduct, except to the extent that the practices used are part of a course of conduct that otherwise violates the final Rule.

[54] Many commenters, in this regard, urged the Commission to be cognizant of the realities of normal business practice within wholesale petroleum markets so as to avoid crafting a rule that unduly chills legitimate business conduct. See ISDA at 5-6; API at 32; Sutherland at 3. For example, commenters asserted that discerning an unlawful material omission in the context of complex wholesale petroleum market transactions would be far more difficult than in securities markets. See CFDR at 4; API at 15.

[55] 74 FR at 18316.

[56] See 74 FR at 18316.

[57] Section 813(a) of EISA provides that Subtitle B shall be enforced by the FTC ''in the same manner, by the same means, and with the same jurisdiction as though all applicable terms of the [FTC] Act (15 U.S.C. 41 et seq.) were incorporated into and made a part of [Subtitle B].'' 42 U.S.C. 17303 (emphasis added).

[58] In response to the RNPRM, AOPL continued to urge the Commission to ''state explicitly that oil pipelines regulated by FERC under the [Interstate Commerce Act] are outside the coverage'' of any FTC rule. AOPL at 1-2. ATAA, on the other hand, continued to oppose any safe harbors or exemptions for pipelines in order to give full effect to the purpose of EISA. ATAA at 3-4 (''[N]othing in either Section 811 or Subtitle B suggests the FTC should consider limiting or competing concerns in its implementing regulations.''); see also PMAA at 2 (agreeing with the Commission's decision not to adopt a safe harbor for pipelines); cf. Greenberger at 3 (contending that the Commission should ''not offer[] an overly broad safe harbor from the FTC's statutorily mandated jurisdiction'').

Other commenters renewed their request for the Commission to recognize what they believed to be the CFTC's ''exclusive jurisdiction'' over futures markets by making clear that its rule would not extend to futures trading activity. See CFTC at 2 (''There is no language in EISA that supersedes or limits the CFTC's exercise of [the CEA's] exclusive jurisdiction over futures trading.''); MFA at 2 (asking ''the Commission to adopt a safe harbor from its proposed Part 317 rules for futures markets activities'' and that ''the safe harbor . . . apply even if the market participant's futures trading allegedly had an impact on cash or other non-futures market oil or gasoline prices''); see also Sutherland at 4 (stating that ''to prosecute conduct already regulated by the CFTC . . . will waste sparse resources and increase the costs to all market participants''). But see, e.g., Senator Cantwell at 2 (''Congress, however, specifically intended for the Commission to exercise this new authority by working cooperatively and in tandem with the CFTC to prevent and deter any manipulative activity, including in the futures markets, which would affect wholesale petroleum markets.''); Greenberger at 2 (''Congress clearly intended the FTC to have power in this area that would not be blocked by the CFTC . . . .''); CFA at 8 (stating that Congress did not preclude the Commission from extending its rule to futures markets). See generally Section IV.B. of the RNPRM for a discussion of the arguments previously raised by commenters regarding the jurisdictional scope of any Section 811 rule with respect to pipelines and futures markets. 74 FR at 18310-11.

Appeals cases). The Supreme Court, however, has reserved the question whether extreme reckless behavior is, in fact, sufficient to establish civil liability under SEA Section 10(b) and Rule 10b-5. See Tellabs, Inc., 551 U.S. at 319 n.3.

[73] Phillips v. LCI Int'l, Inc. , 190 F.3d 609, 621 (4th Cir. 1999); SEC v. Steadman, 967 F.2d 636, 641 (D.C. Cir. 1992); Hollinger v. Titan Capital Corp. , 914 F.2d 1564, 1569 (9th Cir. 1990) (en banc); Hackbert v. Holmes , 675 F.2d 1114, 1118 (10th Cir. 1982); Broad v. Rockwell , 642 F.2d 929, 961 (5th Cir. 1981) (en banc); McLean v. Alexander , 599 F.2d 1190, 1197 (3d. Cir. 1979); Mansbach v. Prescott, Ball, & Turben , 598 F.2d 1017, 1025 (6th Cir. 1979); see also Greebel v. FTP Software, 194 F.3d 185, 198 (1st Cir. 1999); Camp v. Dema, 948 F.2d 455, 461 (8th Cir. 1991).

[74] Sundstrand Corp. v. Sun Chem. Corp. , 553 F.2d 1033, 1045 (7th Cir.), cert. denied , 434 U.S. 875 (1977) (quoting Franke v. Midk ,2 Tm 0 Tw (74)Tj /F5 1cvir. 1991).

''wholesale'' in revised proposed Rule Section 317.2(f).

D. Section 317.3: Prohibited Practices

Section 317.3 sets forth the conduct prohibited by the final Rule. Specifically, this provision states:

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, to:

(a) Knowingly engage in any act, practice, or course of business – including the making of any untrue statement of material fact – that operates or would operate as a fraud or deceit upon any person; or

(b) Intentionally mislead by failing to state a material fact that under the circumstances renders a statement made by such person misleading, provided that such omission distorts or is likely to distort market conditions for any such product.

The final Rule thus prohibits fraudulent or deceptive conduct, including statements made misleading as a result of an omission of material fact, within or in connection with wholesale petroleum markets.

Final Rule Section 317.3 is virtually identical to Section 317.3 in the revised proposed rule. [88] As the Commission detailed in the RNPRM in discussing the proposed scope and application of the two paragraphs of Section 317.3, the final Rule therefore broadly prohibits fraudulent or deceptive conduct, which may take various forms, including statements that are misleading as the result of an omission of material information. As articulated in the RNPRM, the Commission has altered the initially proposed Rule and its conduct prohibitions to clarify the type of conduct covered by the final Rule. [89] First, the Commission has consolidated the conduct prohibition in Section 317.3 of the initially proposed Rule from three paragraphs into two paragraphs. The first paragraph applies to overt conduct that is fraudulent or deceptive; the second paragraph applies only to material omissions. The Commission has determined that this consolidation defines the unlawful conduct that the Rule prohibits more precisely than the three paragraphs in the initially proposed Rule did. Second, the Commission has adopted separate scienter standards for each of the two paragraphs to address concerns that the initially proposed Rule would chill legitimate business activity, and, in so doing, has established a higher scienter standard for the second paragraph than for the first. [90] Third, the Commission has addressed concerns that specifically prohibiting material omissions would create an undue risk of deterring voluntary disclosures of information. It has addressed this concern by requiring a showing that the omission at issue distorts or is likely to distort market conditions for a covered product. [91] By tailoring the final Rule in this fashion, the Commission believes it achieves an appropriate balance between the needs of effective enforcement and unduly burdening legitimate business practices.

Accordingly, final Rule Section 317.3(a) prohibits any conduct that operates or would operate as a fraud or a deceit, provided that the alleged violator engaged in the prohibited conduct knowingly; that is – as defined in the final Rule – with extreme recklessness. Final Rule Section 317.3(b) separately prohibits statements that are misleading because a material fact is omitted intentionally and the omission distorts or is likely to distort conditions in a wholesale petroleum market. The intent requirement – and the proviso that an omission must distort or be likely to distort market conditions for a covered product in order to violate Section 317.3(b) – address many commenters' concerns that the omissions provision in initially proposed Rule Section 317.3(b) would have chilled legitimate business activity. The Commission believes that these features of final Rule Section 317.3(b) focus it on fraudulent or deceptive conduct likely to threaten the integrity of wholesale petroleum markets.

The Commission has concluded that the final Rule does not cover inadvertent mistakes, unintended conduct, or legitimate conduct undertaken in the ordinary course of business. [92] This limitation further helps to avoid impeding beneficial business behavior. The final Rule also does not impose any recordkeeping requirements. [93]

Nearly all the commenters who discussed the conduct prohibition in the revised proposed Rule supported the modifications that the Commission made to the initially proposed Rule. [94]

---

[88] In addition to the revised proposed rule, the RNPRM invited commenters to consider a single, unified conduct provision prohibiting all fraudulent or deceptive conduct, including material omissions (and deleting the separate prohibition of such omissions). In particular, the alternative provision would have made it unlawful for ''any person, directly or indirectly, in connection with the purchase or sale of crude oil, gasoline, or petroleum distillates at wholesale, to engage in any act (including the making of any untrue statement), practice, or course of conduct with the intent* to defraud or deceive, provided that such act, practice, or course of conduct distorts or tends to distort market conditions for any such product.'' 74 FR at 18327. The phrase ''with the intent'' would have been defined to mean that the alleged violator intended to mislead – regardless of whether he or she specifically intended to affect market prices (that is, possessed specific intent), or knew or must have known of the probable consequences of such conduct – and regardless of whether the conduct was likely to defraud or deceive the target successfully. Id.

[89] The initially proposed Rule stated:

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.

73 FR at 48334. This wording and format were virtually identical to SEC Rule 10b-5.

[90] As the Commission noted in the ANPR, the NPRM, and the RNPRM, nothing in connection with this Section 811 [r]ulemaking, any subsequently enacted rules, or related efforts should be construed to alter the standards associated with establishing a deceptive or an unfair practice in a case brought by the Commission. 73 FR at 48322 n.61; 73 FR at 25619 n.55; 74 FR at 18316 n.144. Specifically, no showing of any degree of scienter is required to establish that a particular act or practice is deceptive or unfair, and therefore violates Section 5 of the FTC Act. See, e.g, FTC v. Bay Area Bus. Council, Inc. , 423 F.3d 627, 635 (7th Cir. 2005); FTC v. Freecom Commc'ns., Inc. , 401 F.3d 1192, 1202 (10th Cir. 2005); FTC v. Amy Travel Serv., Inc., 875 F.2d 564, 573-74 (7th Cir. 1989).

[91] Revised proposed Rule Section 317.3(b) contained a market conditions proviso that did not exist in the initially proposed Rule; that is, that the material omission ''distorts or tends to distort market conditions'' for a covered product. As noted above, the Commission has determined to substitute the phrase ''is likely'' for the word ''tends'' in final Rule Section 317.3(b). See Section IV.D.3.b. below for further discussion.

[92] Consistent with its position in the NPRM and the RNPRM, the Commission currently does not expect to impose specific conduct or duty requirements such as a duty to supply product, a duty to provide access to pipelines or terminals, a duty to disclose, or a duty to update or correct information. In particular, the final Rule would not require covered entities to disclose price, volume, and other data to individual market participants, or to the market at large, beyond any obligation that may already exist. See 73 FR at 48326-27; 74 FR at 18325.

[93] See 73 FR at 48332.

[94] See, e.g, ISDA at 2 (contending that the revised proposed Rule ''includes several significant improvements''); SIGMA at 1 (stating that the revised proposed Rule ''dramatically improv[ed]'' upon the NPRM and ANPR); API at 25, 34 (noting the improvements in the revised proposed Rule); CFA at 2 (''[T]he Commission has done a good job in its revisions.''); Sutherland at 2 (commending the revised proposed Rule for ''striking a balance between protecting consumers from manipulation and avoiding unnecessary costs to market participants''); Argus at 2 (stating that the revised proposed Rule provided greater clarity to the petroleum industry); CAPP at 1-2 (supporting the

Continued

inclusion of an explicit scienter requirement and market conditions proviso to Section 317.3(b)); CFDR at 2 (stating that the revised proposed Rule was a ''substantial improvement[]''); Platts at 2 (contending that the revised proposed Rule improved upon the proposed Rule); PMAA at 2-3 (noting that the revised proposed Rule was an improvement). Greenberger and ATAA, however, recommended that the Commission adopt the initially proposed Rule, arguing that it best fulfilled the broad mandate of EISA. Greenberger at 2; ATAA at 1. Some commenters took no position on the revised proposed Rule except to advance specific concerns regarding the scope of a rule. See generally CFTC; MFA; IPMA; AOPL.

[95] See, e.g, Senator Cantwell at 3 (''[T]he Commission's Final Rule should reflect Congress' intent that a finding of recklessness should be sufficient to satisfy the scienter element for manipulative conduct . . . .''); CFA at 9 (suggesting that the Commission apply the recklessness standard to both prongs of the final Rule); see also Greenberger at 3 (agreeing that recklessness is the appropriate scienter standard under a Section 811 rule).

[96] See, e.g, Senator Cantwell at 4 (arguing that the market conditions proviso unnecessarily limited the scope of the Commission's authority); Greenberger at 3 (advocating against the market conditions proviso in Section 317.3(b)); CFA at 8 (stating that the modifications to the Rule ''unnecessarily narrow[ed] the scope of protection afforded to the public'').

[97] See, e.g, Sutherland at 3 (stating that a single specific intent standard would allow the Commission to ''target essentially the same conduct as is targeted by the Revised NPRM but with less risk of chilling desirable market behavior''); Argus at 2 (advocating for a specific intent requirement if individual companies and trade associations do not believe the revised proposed Rule provides the necessary clarity); API at 26 (contending that a single specific intent standard would make rule enforcement more effective). But see CFDR at 2 (noting that the scienter requirement in the revised proposed Rule is ''relatively clear'').

[98] See, e.g, ISDA at 3, 14 (suggesting that the Commission apply a market conditions proviso to both prongs of Section 317.3); API at 37-38 (arguing that a showing of market effects should be required, but that if instead the market conditions proviso were retained, it should apply to all conduct covered by the Rule); Sutherland at 4 (encouraging the Commission to ''require prohibited behavior to impact the market''); CFDR at 4-5 (asking the Commission to ''make intent to corrupt market pricing an element of the offense'').

[99] See, e.g, API at 12 (recommending that the Commission eliminate the prohibition on omissions); Sutherland at 3 (arguing that market participants are sophisticated parties who ''generally do not require special remediation'' for omissions in the context of negotiations); CFDR at 4 (advocating against adopting an explicit omissions liability provision).

[100] See, e.g, Sutherland at 2-3 (arguing that the alternative rule language provided ''greater clarity than the Revised NPRM''); ISDA at 4-5 (contending that the alternative rule language was ''better suited'' to wholesale petroleum markets because it better defined the scope of impermissible conduct); API at 20 (arguing for adoption of the alternative rule language with clarifications); Platts at 2 (urging the Commission to consider adopting the alternative rule language); CFDR at 4 n.3 (preferring the approach of the alternative rule language to omissions). Many of these commenters suggested further modifications to the alternative rule language. See, e.g, API at 2-4; Platts at 2; Sutherland at 2-3.

[101] See

[105] AOPL argued that the phrase ''in connection with'' cannot give the Commission jurisdiction over oil pipelines regulated by the FERC under the ICA. AOPL at 7-8. The Commission addresses the final Rule's application to pipelines in Section IV.B.

[106] Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit, 547 U.S. 71, 85 (2006) (holding that the ''in connection with'' language requires a nexus between fraudulent conduct and a securities transaction).

[107] Senator Cantwell at 2-3.

[108] IPMA at 4.

[109] See 74 FR at 18317-18.

[110] See Dabit, 547 U.S. at 85 (affirming a broad interpretation of the ''in connection with'' requirement).

[111] The Commission emphasizes that it does not

The Commission has considered these issues and concerns, but has determined that final Rule Section 317.3(a) should be identical to revised proposed Rule Section 317.3(a) so that it broadly prohibits all types of fraudulent or deceptive conduct likely to harm wholesale petroleum markets. The Commission has thus retained the ''knowingly'' scienter standard in final Rule Section 317.3(a) and has chosen not to require a showing that prohibited conduct adversely affect market conditions. This determination comports with the Commission conclusion that there is no economic

(encouraging the Commission to modify the Rule to apply the market conditions proviso to both prongs); see also Sutherland at 4 (urging the Commission ''to require [a showing that] prohibited behavior . . . impact the market'').

120 74 FR at 18320 n.188. API expressed concern that if Section 317.3(a) reaches omissions also covered by Section 317.3(b), it would render paragraph (b) superfluous. See API at 22-23; see also Argus at 2 (stating that some companies need clarification that omissions will only be covered by Section 317.3(b)).

121 74 FR at 18318. The extreme recklessness standard was also the scienter standard contemplated for the initially proposed Rule. See 73 FR at 48329.

122 74 FR at 18318.

123 See, e.g, API at 32, 34 n.38 (arguing that a final rule should require a ''specific intent to manipulate the market as a prerequisite for liability'' because such a standard ''would considerably reduce the element of subjectivity and uncertainty that currently exists in [Section 317.3(a)]''); ISDA at 6 (positing that, because wholesale petroleum market participants trade and make decisions in real time, often without perfect information, the Commission should only ''prosecute intentionally fraudulent conduct''); CFDR at 2 (urging the Commission to ''require that a person act with an intent to corrupt market pricing or otherwise to cause market prices to be false, fictitious and artificial''); see also MFA at 3 (stating that if the Commission captures futures markets under its final Rule, it should adopt specific intent, which is consistent with Section 4b of the CEA).

124 See, e.g, Senator Cantwell at 3 (''[T]he Commission's Final Rule should reflect Congress' intent that a finding of recklessness should be sufficient to satisfy the scienter element for manipulative conduct, including for false statements and omissions of material fact.''); CFA at 4 (agreeing with the Commission that the recklessness standard would be ''appropriate to protect the public and [would be] entirely consistent with the act''); CAPP at 1 (supporting the revised proposed Rule's scienter requirement); see also Greenberger at 3 (arguing against the addition of explicit scienter requirements, which, in his view, ''unnecessarily inhibit[ed] the FTC from exercising its authority to protect the public from market manipulation by making the evidentiary requirements more onerous under the revised rule'').

125 CFA at 4 (stating that a specific intent standard ''would lower the standard to allow market participants to engage in careless conduct'').

126 The Commission has clarified the definition of ''knowingly'' from that set forth in the RNPRM. In particular, establishing liability under Section 317.3(a) will require establishing only that an alleged violator ''knew or must have known that his or her conduct was fraudulent or deceptive.'' The words ''with actual or constructive knowledge such that a person'' have been deleted. Significantly, this modification is not intended to change the meaning of ''knowingly'' or limit the types of evidence that the Commission may rely upon in establishing the requisite scienter, including both direct and circumstantial evidence of a defendant's state of mind. See Section IV.C.3. in ''Definitions'' for further discussion.

127 As the Commission observed in the NPRM and the RNPRM, the FERC adopted a similar approach in its interpretation of its anti-manipulation rule, noting that ''[t]he final rule is not intended to regulate negligent practices or corporate mismanagement, but rather to deter or punish fraud in wholesale energy markets.'' 71 FR at 4246; see 73 FR at 48328 n.123; 74 FR at 18318 n.168.

128 The scienter element would also be satisfied if the trader is acting at the behest of another person within the same organization who ''knew or must have known'' that the conduct would operate as a fraud or deceit. The Commission does not intend, however, that the requisite state of mind be imputed across persons within an organization. See also Section IV.D.1.a. above for a discussion of the level of involvement necessary to establish liability under the final Rule.

129 See Sundstrand Corp. v. Sun Chem. Corp. , 553 F.2d 1033, 1045 (7th Cir.), cert. denied , 434 U.S. 875 (1977) (quoting Franke v. Midwestern Okla. Dev. Auth. , 428 F. Supp. 719, 725 (W.D. Okla. 1976)).

defendant or is so obvious that the actor must have been aware of it. [130]

b. Materiality Standard

Section 317.3(a) of the final Rule prohibits conduct that operates or would operate as a fraud or deceit, ''including the making of any untrue statement of material fact.'' In the RNPRM, the Commission proposed a materiality standard that treated a fact as material if there was a substantial likelihood that a reasonable market participant would consider it important in making a decision to transact because the material fact significantly altered the total mix of information available. [131] No commenter addressed the materiality standard in the RNPRM. Consequently, the Commission adopts that same standard for the final Rule.

The Commission notes that the element of materiality limits the

[130] As also discussed above in Section IV.C.3, proof of scienter under final Rule Section 317.3(a) shall not require evidence of a departure from ordinary standards of care.

[131] 74 FR at 18320; see also 73 FR at 48326. See Basic Inc. v. Levinson , 485 U.S. 224, 231-32 (1988) (''[A]n omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote.''' (quoting TSC Indus., Inc. v. Northway, Inc. , 426 U.S. 438, 449 (1976))); see, e.g, Greenhouse v. MCG Capital Corp. , 392 F.3d 650, 658-659 (4th Cir. 2004) (holding a false statement regarding the educational background of the defendant company's Chairman of the Board to be immaterial).

[132] See Basic Inc., 485 U.S. at 234 (''The role of the materiality requirement is . . . to filter out essentially useless information that a reasonable investor would not consider significant, even as part of a larger 'mix' of factors to consider in making his investment decision.'' (citing TSC Indus. , 426 U.S. at 448-49)); see also 3 Thomas Lee Hazen, Treatise on Securities Regulation 12.9[3], at 284 (5th ed. 2005). In addition, it should be noted that a purchaser or seller is not necessarily entitled to all information relating to each of the circumstances surrounding a particular transaction. See, e.g, In re Apple Computer Sec. Litig. , 886 F.2d 1109, 1115 (9th Cir. 1989) (concluding that ''the defendant's failure to disclose material information may be excused where that information has been made credibly available to the market by other sources''); see also In re Northern Telecom Ltd. Sec. Litig. , 116 F. Supp. 2d 446, 459 (S.D.N.Y. 2000) (''A company is generally not obligated to disclose internal problems because '[t]he securities laws do not require management to bury the shareholders' in internal details . . . .'') (internal quotations omitted).

[133] See, e.g, Folger Adam Co. v. PMI Indus., Inc ., 938 F.2d 1529, 1533 (2d Cir. 1991) (''No matter how stated, however, it is well-established that a material fact need not be outcome-determinative; that is, it need not be important enough that it 'would have caused the reasonable investor to change his vote.''' (quoting TSC Indus. , 426 U.S. at 449)).

[134] As the NPRM noted, Section 317.3(a) of the proposed Rule was intended to provide a clear ban on ''the reporting of false or misleading information to government agencies, to third-party reporting services, and to the public through corporate announcements.'' 73 FR at 48326. Congress gave the Commission authority under Section 812, a separate provision from Section 811, to prohibit any person from reporting false or misleading information related to the wholesale price of petroleum products only if it is required by law to be reported to a federal department or agency. The prohibitions embodied in Section 812 became effective with the enactment of EISA on December 19, 2007. See 42 U.S.C. 17302.

[135] 74 FR at 18320.

[136] CFDR contended that the revised proposed Rule's language ''operates or would operate as a fraud'' was at odds with the Rule's ''knowingly'' standard because federal securities case law interprets that phrase as establishing a non-scienter standard. CFDR at 4. ISDA also suggested that the language ''operates as a fraud'' confuses the scienter standard because the standard merely ''require[s] intent to engage in any volitional act that happens to 'operate as a fraud.''' ISDA at 8.

[137] See Ernst & Ernst v. Hochfelder , 425 U.S. 185, 193 (1976).

[138] As noted above, final Rule Section 317.3(b) substitutes the phrase ''is likely'' for the word ''tends'' in revised proposed Rule Section 317.3(b). See discussion in Section IV.D.3.b. below.

[139] See McMahan & Co. v. Wherehouse Ent., Inc. , 900 F.2d 576, 579 (2d Cir. 1990) (''Some statements, although literally accurate, can become, through their context and manner of presentation, devices which mislead investors.'').

[140] A violation of final Rule Section 317.3(b) requires that the person make an affirmative statement that is rendered misleading by reason of a material omission. The Commission generally does not intend that Section 317.3(b) reach silence where no statement has been made.

[141] Compare Greenberger at 3 (contending that the omissions provision provided ''adequate protection to industry participants''), with API at 12 (recommending that ''the Commission eliminate liability for omissions''). Some commenters favored the alternative rule language because it did not explicitly prohibit material omissions. See API at 19

Continued

that the Section 317.3(b) prohibition on omissions would lead firms to adopt compliance programs that curtail voluntary disclosures, thereby ''denying markets the benefits of the information that is readily disclosed today.'' [142] Some commenters also questioned whether a specific omissions prohibition would be ''efficacious'' given the absence of any existing disclosure obligations in wholesale petroleum markets. [143] Still other commenters stated that revised proposed Section 317.3(b) was superior to the initially proposed Rule because the revisions enhanced the Rule's clarity regarding the coverage of material omissions.

(urging ''the Commission to adopt the proposed alternative rule language and clarify that it would cover affirmative statements but not omissions''); CFDR at 4 n.3.

[142] API at 17; see, e.g, Argus at 5 (''[C]ompanies may prefer to disclose no information, instead of risking violating the rule's prohibition on omissions . . . .'').

[143] CFDR at 2, 4 (contending that an express prohibition on material omissions created ''the premise of a disclosure duty [to be] formally implicated by a rule''); see also Sutherland at 3 (''[W]holesale market participants are sophisticated parties who generally [would] not require special remediation for . . . omissions . . . .'').

[144] See, e.g, ISDA at 2 (stating that the Commission's modifications to the omissions provision ''made an important enhancement to the ability of firm[s] to ensure compliance with the rule''); Platts at 5 (noting that the revised proposed Rule's omissions provision was ''a step forward'' with regard to clarity and simplicity); CAPP at 2 (''With [the modifications to the omissions provisions], CAPP concur[red] that the revised proposed Rule would serve the public interest.'').

[145] 74 FR at 18321 (noting that the revised proposed Rule ''would not . . . impose an affirmative duty to disclose information). This determination comports with the suggestions of several commenters. See, e.g, Sutherland at 3 (arguing against imposing mandatory disclosure obligations on wholesale petroleum market participants); CAPP at 2 (''CAPP remains concerned that mandatory disclosure is a problematic approach in the absence of specific, empirical evidence of damaging practices or incidences of specific harm.''); Argus at 5 (stating that imposing mandatory disclosure obligations would lead to confusion and would place a severe burden on market participants); ISDA at 12-13 (stating that ''[s]uch a requirement would create a level of regulatory risk that would deter market participants from communicating in any substantive way with market participants''); API at 23 (arguing that a final rule should not impose a duty to correct or update information).

[146] SEC Rule 10b-5 similarly does not create an affirmative duty of disclosure. See, e.g, In re Time Warner Inc. Sec. Litig. , 9 F.3d 259, 267 (2d Cir. 1993) (''[A] corporation is not required to disclose a fact merely because a reasonable investor would very much like to know that fact.'' (citing Basic Inc. v. Levinson , 485 U.S. 224, 239 n. 17 (1988))).

[147] API asked the Commission to preserve market participants' incentive to gather and evaluate market intelligence by promulgating a rule that does not require disclosure of such information. API at 32-33 & n.37. API argued that collecting and evaluating market intelligence is costly, and market participants are unlikely to incur these costs if they are required to disclose such information. API at 32. The Commission agrees that a party should not be required to reveal such market intelligence in order to comply with the final Rule. For example, a party would not be required to reveal estimates of its future inventory levels to a counter-party during a business negotiation.

[148] In these instances, parties may seek redress under state laws for contract or tort claims. These laws are more appropriate in such cases. For example, state law better addresses issues such as whether a counter-party in a commercial transaction had an independent ability to verify representations made by a party or was otherwise entitled to rely on such representations in reaching an agreement; whether a contract was entered into under false pretenses; or whether a party had a pre-existing legal duty to provide information to a counter-party.

[149] See also ISDA at 8 (asking the Commission to clarify that the Rule's scienter standard applies to a fraudulent act rather than to any volitional act).

[150] See, e.g, API at 3 (stating the Commission ''correctly recognize[d] the shortcomings of a knowledge / extreme recklessness standard as applied to omissions''); CAPP at 1 (approving of the revised scienter requirement); Argus at 2 (supporting the addition of ''intentionally'' as ''a significant effort to reduce [a] chilling effect and . . . draw[s] the rule closer to the existing [CEA] language''); see also Platts at 5 (praising revisions to the omissions provision, which it believed enhanced the clarity and simplicity of the Rule).

But see, e.g., Greenberger at 3 (stating that the addition of ''intentionally'' to Section 317.3(b)

[159] This standard conforms to the approach the Commission followed in the RNPRM and NPRM with respect to materiality. 74 FR at 18323 n.214; 73 FR at 48326.

[160] 42 U.S.C. 17305.

[161] See, e.g, Disclosure Requirements and Prohibitions Concerning Franchising, 16 CFR 436.10(b).

[162] 74 FR at 18323.

[163] See 74 FR at 18323.

[164] See, e.g, Telemarketing Sales Rule, 16 CFR 310.9; Used Motor Vehicle Trade Regulation Rule, 16 CFR 455.7.

[165] 74 FR at 18323.

[166] 5 U.S.C. 601-612.

[167] 5 U.S.C. 603.

[168] 5 U.S.C. 604.

[169] See 5 U.S.C. 605(b).

[170] The RFA definition of ''small entity'' refers to the definition provided in the Small Business Act, which defines a ''small-business concern'' as a business that is ''independently owned and operated and which is not dominant in its field of operation.'' 15 U.S.C. 632(a)(1). As noted above, Section 317.2(d) of the final Rule defines a ''person'' as ''any individual, group, unincorporated association, limited or general partnership, corporation, or other business entity.''

[171] Although no commenters addressed 0(d) o‘74 T3 Tr. d

[175] See id.

[176] Directly covered Directly covered entities under the final Rule are classified as small businesses under the Small Business Size Standards component of the North American Industry Classification System (''NAICS'') as follows: petroleum refineries (NAICS code 324110) with no more than 1,500 employees nor greater than 125,000 barrels per calendar day total Operable Atmospheric Crude Oil Distillation capacity; petroleum bulk stations and terminals (NAICS code 424710) with no more than 100 employees; and petroleum and petroleum products merchant wholesalers (except bulk stations and terminals) (NAICS code 424720) with no more than 100 employees. See Small Business Administration (''SBA''), Table of Small Business Size Standards Matched to North American Industry Classification System Codes (Aug. 22, 2008), available at (http://www.sba.gov/idc/groups/public/documents/sba_homepage/serv_sstd_tablepdf.pdf).

[177] The SBA publication providing data on the number of firms and number of employees by firm does not provide sufficient precision to gauge the number of small businesses that may be impacted by the final Rule accurately. The data are provided in increments of 0-4 employees, fewer than 20 employees, and fewer than 500 employees. SBA, Employer Firms, & Employment by Employment Size of Firm by NAICS Codes, 2006, available at (http://www.sba.gov/advo/research/us06 _n6.pdf).

[1] Congress authorized the rule in section 811 of the Act using language from an earlier bill offered by Senator Maria Cantwell. See Petroleum Consumer Price Gouging Protection Act, S. 1263, 110th Cong. §§ 4 and 5(a) (2007).

[2] See generally, Comments of the American Petroleum Institute and the National Petrochemical and Refiners Association in Response to Revised Notice of Proposed Rulemaking (May 20, 2009), available at (http://www.ftc.gov/os/comments/marketmanipulation3/541354-00009.pdf).

[4] Id. (to be codified at 16 C.F.R. § 317.2(c)).

[5] Such a rule would be similar to the alternative rule proposed in the Revised Notice of Proposed Rule Making, 74 Fed. Reg. 18304, 18327 (Apr. 22, 2009).

[6] See 42 U.S.C. § 17301 (permitting the

[1] In addition to the text of Section 811, which reflects congressional intent that the Commission look to SEC Rule 10b-5 in crafting a market manipulation rule, I also find the statements of Sen. Cantwell (the bill's sponsor) which are consistent with this text persuasive. See 151 Cong. Rec. S10238 (daily ed. Sept. 20, 2005) (statement of Sen. Cantwell introducing S. 1735, a bill to Improve the Federal Trade Commission's Ability to Protect Consumers from Price-Gouging During Energy Emergencies, which was reintroduced in the 110th Congress as S.1263);New Haven Bd. of Educ. v.

American Petroleum Institute (''API''): Robert A. Long, Jr., Covington & Burling LLP
Argus Media Inc. (''Argus''): Dan Massey
Consumer Federation of America (''CFA''): Mark Cooper
New York City Bar Association, Committee on Futures & Derivatives Regulation (''CFDR''): Charles R. Mills, K&L Gates
CME Group (''CME''): De'Ana Dow
Flint Hills Resources, LP (''Flint Hills''): Alan Hallock
International Swaps and Derivatives Association, Inc. (''ISDA''): Athena Y. Velie, McDermott, Will & Emery LLP
Futures Industry Association, CME Group, Managed Funds Association, Intercontinental Exchange, Inc., National Futures Association (''MFA''): Mark D. Young, Kirkland & Ellis LLP
Resolute Natural Resources Company (''Navajo Nation''): James Piccone
Navajo Nation Oil and Gas Corporation (''Navajo Nation''): Perry Shirley
National Petrochemical and Refiners Association (''NPRA''): Susan S. DeSanti, Sonnenschein Nath & Rosenthal LLP
National Petrochemical and Refiners Association (''NPRA''): Charles T. Drevna
Craig Pirrong, The University of Houston: Bauer College of Business (''Pirrong'')
Platts (''Platts''): John Kingston
Petroleum Marketers Association of America (''PMAA''):
Robert Bassman, Bassman, Mitchell & Alfano, Chtd.
Society of Independent Gasoline Marketers of America (''SIGMA''): James D. Barnette, Steptoe & Johnson LLP
Society of Independent Gasoline Marketers of America (''SIGMA''): R. Timothy Columbus, Steptoe & Johnson LLP
David J. Van Susteren, Fulbright & Jaworski LLP (''Van Susteren'')

Federal Register

Attachment D

ANPR Commenters

American Bar Association/Section of Antitrust Law (''ABA'')
Association of Oil Pipe Lines (''AOPL'')
American Petroleum Institute and the National Petrochemical and Refiners Association (''API'')
Patrick Barrett (''Barrett'')
Lawrence Barton (''Barton'')
Dave Beedle (''Beedle'')
Stanley Bergkamp (''Bergkamp'')
Louis Berman (''Berman'')
Bezdek Associates, Engineers PLLC (''Bezdek'')
Katherine Bibish (''Bibish'')
John Booke (''Booke'')
Bradley (''Bradley'')
Jeremy Bradley (''J. Bradley'')
Charles Bradt (''Bradt'')
Wendell Branham (''Branham'')
Lorraine Bremer (''Bremer'')
Gloria Briscolino (''Briscolino'')
Rick Brownstein (''Brownstein'')
Byrum (''Byrum'')
Canadian Association of Petroleum Producers (''CAPP'')
Jeff Carlson (''Carlson'')
Jacquelynne Catania (''Catania'')
Marie Cathey (''Cathey'')
New York City Bar, Association Committee on Futures & Derivatives Regulation (''CFDR'')
U. S. Commodities Futures Trading Commission (''CFTC'')
Manuel Chavez (''Chavez'')
Michael Chudzik (''Chudzik'')
D. Church (''Church'')
Earl Clemons (''Clemons'')
Dan Clifton (''Clifton'')
Kim Cruz (''Cruz'')
Jerry Davidson (''Davidson'')
Don Deresz (''Deresz'')
Charlene Dermond (''Dermond'')
Kimberly DiPenta (''DiPenta'')
Penny Donaly (''Donaly1'')
Penny Donaly (''Donaly2'')
Penny Donaly (''Donaly3'')
Penny Donaly (''Donaly4'')
Deep River Group, Inc. (''DRG'')
Harold Ducote (''Ducote'')
Mary Dunaway (''Dunaway'')
Econ One Research, Inc. (''Econ One'')
Terri Edelson (''Edelson'')
Kevin Egan (''Egan'')
DJ Ericson (''Ericson'')
Mark Fish (''Fish'')
Flint Hills Resources, LP (''Flint Hills'')
Bob Frain (''Frain'')
Joseph Fusco (''Fusco'')
Tricia Glidewell (''Glidewell'')
Robert Gould (''Gould'')
James Green (''Green'')
Michael Greenberger (''Greenberger'')
Christine Gregoire, Governor, State of Washington (''Gregoire'')
Hagan (''Hagan'')
Toni Hagan (''Toni'')
Charles Hamel (''Hamel'')
Chris Harris (''Harris'')
Thomas Herndon (''Herndon'')
Johnny Herring (''Herring'')
Hess Corporation (''Hess'')
David Hill (''Hill'')
Hopper (''Hopper'')
Sharon Hudecek (''Hudecek'')
IntercontinentalExchange, Inc. (''ICE'')
Institute for Energy Research (''IER'')
Independent Lubricant Manufacturers Association (''ILMA'')
Illinois Petroleum Marketers Association (''IPMA'')
International Swaps and Derivatives Association, Inc. (''ISDA'')
Micki Jay (''Jay'')
Kenneth Jensen (''Jensen'')
Paul Johnson (''Johnson'')
Tacie Jones (''Jones'')
Joy (''Joy'')
John Kaercher (''Kaercher'')
Kas Kas (''Kas'')
Kipp (''Kipp'')
Paola Kipp (''P. Kipp'')
Jerry LeCompte (''LeCompte'')
Kurt Lennert (''Lennert'')
Loucks (''Loucks'')
Robert Love (''Love'')
R. Matthews (''Matthews'')
Catherine May (''May'')
Mike Mazur (''Mazur'')
Sean McGill (''McGill'')
Kathy Meadows (''Meadows'')
Futures Industry Association, CME Group, Managed Funds Association, IntercontinentalExchange, National Futures Association (''MFA'')
Bret Morris (''Morris'')
Theresa Morris-Ramos (''Morris-Ramos'')
Scott Morosini (''Morosini'')
Timothy J. Muris and J. Howard Beales, III (''Muris'')
Navajo Nation Resolute Natural Resources Company and Navajo Nation Oil and Gas Company (''Navajo Nation'')
Laurie Nenortas (''Nenortas'')
James Nichols (''Nichols'')
Virgil Noffsinger (''Noffsinger'')
Noga (''Noga'')
Richard Nordland (''Nordland'')
National Propane Gas Association (''NPGA'')
Kerry O'Shea, (''O'Shea'')
Jeffery Py apie CatPy api'')
Pamela Py zynski CatPy zynski'')
Brook Pyschkes (''Pyschkes'')
Brijesh Patel (''Pytel'')
Stefanie Patsiavos (''Pytsiavos'')
P D (''PD'')
Guillermo Pereira (''Pereira'')
James Persinger (''Persinger'')
Mary Phillips (''Phillips'')
Plains All American Pipeline, LLP (''Plains'')
Platts (''Platts'')
Betty Pike (''Pike'')
Petroleum Marketers Association of America (''PMAA'')
Joel Poston (''Poston'')
Radzicki (''Radzicki'')
Gary Reinecke (''Reinecke'')
Steve Roberson (''Roberson'')
Shawn Roberts (''Roberts'')
Linda Rooney (''Rooney'')
Mel Rubinstein (''Rubinstein'')secret (''secret'')
Joel Sharkey (''Sharkey'')
Society of Independent Gasoline Marketers of America (''SIGMA'')
Daryl Simon (''Simon'')
David Smith (''D. Smith'')

Donald Smith (''Do. Smith'')
Mary Smith (''M. Smith'')
Donna Spader (''Spader'')
Stabila (''Stabila'')
Alan Stark (''A. Stark'')
Gary Stark (''G. Stark'')
Robert Stevenson (''Stevenson'')
Ryan Stine (''Stine'')
Maurice Strickland (''Strickland'')
Sutherland, Asbill, and Brennan, LLP (''Sutherland'')
L. D. Tanner (''Tanner'')
Dennis Tapalaga (''Tapalaga'')
Tennessee Oil Marketers Association (''TOMA'')
Theisen (''Theisen'')
Greg Turner (''Turner'')
U. S. citizen (''U.S. citizen'')
U. S. Department of Justice, Criminal Fraud Section (''USDOJ'')
Jeff Van Hecke (''Van Hecke'')
Louis Vera (''Vera'')
Thomas Walker (''Walker'')
Victoria Warner (''Warner'')
Lisa Wathen (''Wathen'')
Watson (''Watson'')
Gary Watson (''G. Watson'')
Joseph Weaver (''Weaver'')
Webb (''Webb'')
Vaughn Weming (''Weming'')
Douglas Willis (''Willis'')

[FR Doc. E9–19257 Filed 8–11–09: 8:45 am]
BILLING CODE 6750–01–S