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October 1, 2008

## BY ELECTRONIC SUBMISSION AND BY U.S. MAIL

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

Re: Market Manipulation Rulemaking Workshop – Request to Participate, P082900

To the Commission, Office of the Secretary:

We respectfully request an opportunity for one or both of us to participate as panelists in the upcoming workshop hosted by the Federal Trade Commission (“FTC” or “the Commission”) on November 6, 2008 in Washington DC to discuss aspects of the proposed rule prohibiting market manipulation in wholesale petroleum markets. We intend to submit comments to the FTC in response to the Notice of Proposed Rulemaking, published at 73 Fed. Reg. 48317 (Aug. 19, 2008) on or before the current deadline of October 17, 2008. Our comments will be directed to the advisability of requiring a showing of “price effects” as an element of any final market manipulation rule.

Both of the undersigned have expertise and knowledge of many of the issues on which the workshop will focus. Mr. Kruse is former chair of the Fuel and Energy Committee of the ABA Antitrust Section and has moderated an ABA “Brown Bag” program on the FTC’s Market Manipulation Rules in May 2008, and earlier authored a note in the ABA Energy Antitrust Newsletter.<sup>1</sup> Mr. Van Susteren is former chair of the Energy Litigation Committee of the ABA Section of Litigation and has made presentations on false price reporting under the Commodity

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<sup>1</sup> <http://www.abanet.org/antitrust/at-bb/08/AT8523.pdf> (copy enclosed). Portions of this program will also be presented at Texas Utilities Lawyers Association CLE Program and Annual Meeting, *Key Antitrust Issues Facing Utilities: What do you really need to know about antitrust and market manipulation?* (October 3, 2008).

Federal Trade Commission  
October 1, 2008  
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Exchange Act.<sup>2</sup> Both Mr. Kruse and Mr. Van Susteren have authored briefing on energy price manipulation.<sup>3</sup>

The contact information for the proposed panelists is as follows:

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Please let us know if you have any questions about our request to participate or if you require any further information from us. Thank you for the opportunity to request this involvement and we look forward to hearing from you soon.

Very truly yours,

*/s/ David J. Van Susteren*

David J. Van Susteren

DV/rr  
Enclosures

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<sup>2</sup> Energy Bar Association, Natural Gas Regulation 101 Seminar, New Orleans, LA, March 27-28, 2008 (CFTC energy market manipulation efforts).

<sup>3</sup> See, e.g.,

<http://www.fulbright.com/images/publications/ALERTFTCProposesRuleProhibitingMarketManipulation.pdf>;  
<http://www.fulbright.com/images/publications/Prosecution%20of%20Market%20Manipulation.pdf>; and  
<http://www.fulbright.com/images/publications/BRIEFINGEnergyBillGivesFTCNNewPower2.pdf>. (copies of cited materials attached).

**AMERICAN BAR ASSOCIATION ANTITRUST SECTION  
& ENERGY BAR ASSOCIATION**

**New Authority for the FTC:  
*What Market Manipulation Rules Should Be Adopted for the Petroleum Industry?***

**Friday, May 23, 2008 • 12:00 p.m. to 1:30 p.m. EDT**

Please join us via telephone or at one of two Fulbright & Jaworski L.L.P. office locations:  
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**Houston**

*Bates Conference Room – 51st Floor  
Fulbright Tower  
1301 McKinney*

***There will be dial-in numbers for this session. Dial-in information will follow.***

**Program:**

The Energy Independence and Security Act of 2007 mandated FTC rulemaking to implement the new prohibition on "market manipulation" in the purchase or sale of crude oil, gasoline, or petroleum distillates at wholesale. The FTC has now invited comments by June 6, 2008 on questions in its Advanced Notice of Proposed Rulemaking. What are the key questions that the FTC should answer? What advice should be given to the FTC? These questions and others will be discussed.

**Moderator:**

**Mary Coleman**, Economist with LECG, ABA Antitrust Section, Vice Chair of Fuel and Energy Committee

**Speakers:**

**Joel C. Merkel**, Legislative Counsel, Office of U.S. Senator Maria Cantwell

**Michael Salinger**, Professor of Economics, Boston University, Former Head of FTC Bureau of Economics

**Layne Kruse**, Partner, Fulbright & Jaworski L.L.P., ABA Antitrust Section, Chair Fuel and Energy Committee

**Registration:**

If you would like to attend in person at either host site or just call in to listen, RSVP and indicated your preference to Allison Shirley, [ashirley@fulbright.com](mailto:ashirley@fulbright.com).

Dial-in information will be sent to you prior to the program. Lunch will be served in both locations. Please come early or stay late.

Recordings of this Brown Bag will be posted on the Section's website following the program and downloadable in an MP3 format, free of charge at <http://www.abanet.org/antitrust/at-bb/bb-audio08.html>.

**FTC PROPOSES RULE PROHIBITING "MARKET MANIPULATION" IN THE PETROLEUM INDUSTRY: COMMENTS DUE BY SEPTEMBER 18**

The Energy Independence and Security Act of 2007 ("EISA"), 42 U.S.C. §§ 17001-17386, *available at* <http://thomas.loc.gov>, granted the Federal Trade Commission ("FTC") new authority to promulgate regulations prohibiting "market manipulation" in wholesale petroleum markets. Exercising this recently granted authority, the FTC has issued and is seeking public comment on a proposed rule prohibiting petroleum market manipulation. The public comment period on the proposed rule begins tomorrow, August 19, 2008, and ends on September 18, 2008. The FTC expects to conclude the rulemaking process by the end of this year.

The proposed rule focuses on fraudulent or deceptive conduct affecting the wholesale petroleum market. As anticipated in light of the language of the statute, which followed the Exchange Act of 1934, the rule itself was modeled after the Securities and Exchange Commission ("SEC") Rule 10b-5 and includes a scienter requirement, which is met when there is intentional, willful, or sometimes even reckless conduct. Specifically, the FTC's proposed rule would make it 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." The FTC has identified specific acts as potential violations of the proposed rule, such as false reporting to private reporting services or misleading announcements by refineries, pipelines, or investment banks. Similarly, the FTC suggests that trading practices in physical or futures markets may also be covered.

Additionally, the proposed rule clarifies the scope of the FTC's jurisdiction under the EISA by limiting the rule's applicability to crude oil, gasoline, and petroleum distillates and defining each of those terms specifically. In particular, the proposed rule defines petroleum distillates to include only jet fuel and diesel fuel oils. Thus, natural gas products, such as natural gas and natural gas liquids are not covered by the proposed rule. Furthermore, the proposed rule applies only to wholesale purchases and sales of the enumerated petroleum products. Because the proposed rule defines "wholesale" as purchases and sales occurring at or above the terminal rack level, retail sales of gasoline or other covered products to consumers at gasoline stations or other retail establishments are not covered.

Although the FTC's proposed rule does not currently impose specific affirmative duties, obligations, or record-keeping requirements, the FTC indicates in the Notice of Proposed Rulemaking that there remains a possibility that a company's unilateral decision to withhold supply or access could be deemed a violation.

The penalties for violating the rule are substantial and include up to a \$1 million civil fine per day for each violation. Unlike the similar rule enacted by the Federal Energy Regulatory Commission pursuant to the Energy Policy Act of 2005, Public Law 109-58, at § 315, the FTC's proposed rule is silent as to whether there is a private right of action. Moreover, the proposed rule does not require the FTC to demonstrate reliance, loss causation, or damages, and therefore, it appears that an attempt to violate the proposed rule could trigger liability.

As part of the rulemaking process, the FTC has identified certain areas in which it seeks comments from the public. Specifically, the FTC would like comments regarding: (1) the rule's impact on small businesses; (2) whether the proposed rule imposes any costs other than general compliance costs on covered businesses; (3) whether the proposed rule duplicates other federal, state, local, or industry requirements; and (4) alternatives to the proposed rule that accomplish the FTC's objectives and minimize the impact on small businesses. The FTC also seeks comments regarding the proposed rule's specific provisions, including the scope of its coverage and whether there should be safe harbors or other exceptions to the rule for certain acts and practices.

Public comments on the proposed rule must be received by the FTC no later than September 18, 2008. Comments may be submitted to the FTC on paper or electronically at <http://secure.commentworks.com/ftc-marketmanipulationNPRM/>. Copies of the FTC's Notice of Proposed Rulemaking are available from the FTC's Web site at <http://www.ftc.gov/os/2008/05/P082900frn.pdf> and the FTC's Consumer Response Center, Room 130, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580.

The FTC may hold a public workshop to discuss in greater detail the comments submitted by the public in response to the proposed rule. The FTC has stated in the Notice of Proposed Rulemaking that eligibility to attend the workshop will be limited only to those who submitted comments to the proposed rule. Details regarding the date and time of the workshop will be announced in a press release and be available at <http://www.ftc.gov/ftc/oilgas/index.html>.

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# A Short Guide to the Prosecution of “Market Manipulation” in the Energy Industry: CFTC, FERC, and FTC

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Layne Kruse and Amy Garzon

Fulbright & Jaworski L.L.P.

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## A Short Guide to the Prosecution of “Market Manipulation” in the Energy Industry: CFTC, FERC, and FTC

Layne Kruse and Amy Garzon \*

"Market manipulation" has been a potential target for U.S. prosecutors for over seventy years. However, the focus on market manipulation in the energy industry is more recent, and now the U.S. Federal Trade Commission ("FTC") has joined the Commodity Futures Trading Commission ("CFTC") and Federal Energy Regulatory Commission ("FERC") with statutory authority to police market manipulation in the energy industry. With three federal agencies, the lines of authority are far from clear. This article provides a brief guide to the statutory framework for the three agencies and explains the similarities and differences in their authority.<sup>1</sup>

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\* Layne Kruse is a partner in Fulbright & Jaworski L.L.P.'s Houston office. He chairs the litigation department in the Houston office and co-chairs the firm's nationwide Antitrust, Marketing, and Trade Regulation Practice Group. Layne handles business litigation and arbitration matters and government investigations. He has represented clients in oil and gas production, the marketing of refined petroleum products, the transportation and processing of natural gas, electric power generation, and other industries. He is a former chair of the Fuel and Energy Committee, ABA Antitrust Section. He holds a B.A. in Economics from Texas A&M University, a M.Sc. from the London School of Economics, and a J.D. from Yale Law School.

Amy Garzon is a litigation associate in Fulbright & Jaworski L.L.P.'s Houston office. Before joining Fulbright, Amy served as a law clerk to Chief Judge Carolyn Dineen King in the United States Court of Appeals for the Fifth Circuit and to Judge Nina Gershon in the United States District Court for the Eastern District of New York. She received her J.D., summa cum laude, from New York Law School, and her B.S., cum laude, from John Jay College of Criminal Justice.

<sup>1</sup> As used in this article, the term "market manipulation" is distinguished from how the same term may be used under the antitrust laws, either as a conspiracy among competitors or as an abuse of monopoly power. "Market manipulation," as used by the CFTC and FERC, is focused on single-firm conduct, which may involve little, if any, monopoly power, as defined under the antitrust laws.

## I. COMMODITY FUTURES TRADING COMMISSION

The Commodity Futures Trading Commission, which was created in 1974, is an independent federal agency with five commissioners appointed by the President. It is specifically charged with regulating the “futures and options markets” in the United States. It prosecutes violations of the Commodity Exchange Act and commission regulations, and its focus is on maintaining the integrity of markets and protecting market users and the public from fraud, manipulation, and abusive practices.

The CFTC derives its market manipulation enforcement authority from the Commodity Exchange Act of 1936 (“CEA”). The CFTC’s authority under the CEA is very broad. The CEA applies to “any commodity” and makes it unlawful for:

Any person to *manipulate* or *attempt to manipulate* the price of *any commodity* in interstate commerce, or for future delivery ... or knowingly to deliver or cause to be delivered for transmission through the mails or interstate commerce ... false or misleading or knowingly inaccurate reports concerning crop or market information or conditions that affect or tend to affect the price of any commodity in interstate commerce.<sup>2</sup>

There is no definition of the word “manipulate” in this statute. The case law definition focuses on intent: “Manipulation, broadly stated, is an intentional exaction of a price determined by forces other than supply and demand”<sup>3</sup> and “[i]t is the intent of the parties which separates otherwise lawful business conduct from unlawful manipulative activity.”<sup>4</sup>

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<sup>2</sup> 7 U.S.C. § 13(a)(2) (emphasis added).

<sup>3</sup> Frey v. CFTC, 931 F.2d 1171, 1175 (7th Cir. 1991) [hereinafter *Frey*]; CFTC v. Amaranth Advisors, L.L.C., --- F. Supp. 2d ---, 2008 WL 2123323, at \*8 (S.D.N.Y. May 21, 2008); United States v. Reliant Energy Serv. Inc., 420 F. Supp. 2d 1043, 1056 (N.D. Cal. 2006) [hereinafter *Reliant*].

<sup>4</sup> In re Indiana Farm Bureau Coop. Ass’n, No. 75-14, 1982 WL 30249, at \*5 (CFTC Dec. 17, 1982).



Moreover, the courts have recognized that it is not the price that is the problem; rather, the issue is the process in which the price is set:

The criminal manipulation provision does not criminalize the selling of a product at an unreasonable price. Rather, [it] prohibits defendants from engaging in intentional conduct aimed at preventing the basic forces of supply and demand from operating properly. [It] is concerned less with the price itself than it is with the process by which the price is set.<sup>5</sup>

The courts have recognized the following elements to prove price manipulation under the CEA:

1. the ability to influence price;
2. the existence of an artificial price;
3. the “cause” of the artificial price is the accused’s actions; and
4. the intention to so affect the price.<sup>6</sup>

In its enforcement efforts in natural gas, the CFTC has focused on price reporting and natural gas trading practices.<sup>7</sup> The CFTC recently announced its first crude oil manipulation case, resulting from its ongoing investigation of crude oil trading. On July 24, 2008, the CFTC filed a civil enforcement action in the Southern District of New York against Optiver Holding BV, a global proprietary trading fund headquartered in the Netherlands, and two subsidiaries—Optiver US, LLC, a Chicago-based corporation, Optiver VOF, a Dutch company, and several individual defendants. The complaint

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<sup>5</sup> *Reliant*, *supra* note 3, at 1057.

<sup>6</sup> *Frey*, *supra* note 3, at 1177; *United States v. Radley*, --- F. Supp. 2d ---, 2008 WL 2372062, at \*6 (N.D. Ill. Jun. 11, 2008); *Reliant*, *supra* note 3, at 1056.

<sup>7</sup> *See, e.g.*, *CFTC v. Valencia*, 394 F.3d 352 (5th Cir. 2004); *CFTC v. Amaranth Advisors LLC*, 523 F. Supp. 2d 328 (S.D.N.Y. 2007).

alleges that the defendants successfully manipulated certain crude oil futures contracts, causing artificial prices.<sup>8</sup>

## II. FEDERAL ENERGY REGULATORY COMMISSION

The Federal Energy Regulatory Commission was created in 1977 to replace the Federal Power Commission. FERC, which like the CFTC also has five commissioners appointed by the President, is charged with regulating interstate transmission of electricity and natural gas in the United States.

In 2005, FERC was provided with market manipulation enforcement authority through § 315 of the Energy Policy Act of 2005 (“EPA”). The enforcement authority was expressly provided for both electricity and natural gas. The natural gas provision of the EPA, which is similar to the electric power provision, states:

It shall be unlawful for any entity, directly or indirectly, to use or employ, in connection with the purchase or sale of natural gas or the purchase or sale of transportation services subject to the jurisdiction of the Commission, any manipulative or deceptive device or contrivance (as those terms are used in section 78j(b) of this title) in contravention of such rules and regulations as the Commission may prescribe as necessary in the public interest or for the protection of natural gas ratepayers. Nothing in this section shall be construed to create a private right of action.<sup>9</sup>

A year later, FERC issued Order No. 670 on January 19, 2006, which sets forth the acts and practices it considers unlawful for market manipulation. In general, FERC adopted the language from SEC Rule 10b-5 under the Securities Exchange Act of 1934. The authority given to FERC in the Energy Policy Act to prosecute market manipulation

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<sup>8</sup> Press Release, U.S. Commodity Futures Trading Commission, CFTC Charges Optiver Holding BV, Two Subsidiaries, and High-Ranking Employees with Manipulation of NYMEX Crude Oil, Heating Oil, and Gasoline Futures Contracts (July 24, 2008) *available at*, <http://www.cftc.gov/newsroom/enforcementpressreleases/2008/pr5521-08.html>.

<sup>9</sup> Energy Policy Act of 2005, Public Law 109-58, at § 315.

was based on the Securities Exchange Act of 1934, and thus in Order No. 670, FERC made clear that it will look to the SEC precedents on a case-by-case basis. It also expressly declared that scienter is a required element of any case brought under its market manipulation authority. In particular, the rule for natural gas provides as follows:

(a) It shall be unlawful for any entity, directly or indirectly, in connection with the purchase or sale of natural gas or the purchase or sale of transportation services subject to the jurisdiction of the Commission,

(1) To use or employ any device, scheme, or artifice to defraud,

(2) 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

(3) To engage in any act, practice, or course of business that operates or would operate as a fraud or deceit upon any entity.

(b) Nothing in this section shall be construed to create a private right of action.<sup>10</sup>

As summarized by FERC, the elements needed for prosecution under Order No.

670 are as follows:

(1) [u]ses a fraudulent device, scheme or artifice, or makes a material misrepresentation or a material omission as to which there is a duty to speak under a Commission-filed tariff, Commission order, rule or regulation, or engages in any act, practice, or course of business or that would operate as a fraud or deceit upon any entity; (2) with the requisite scienter; (3) in connection with the purchase or sale of natural gas or electric energy or transportation of natural gas or transmission of electric energy subject to the jurisdiction of the Commission.<sup>11</sup>

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<sup>10</sup> 18 C.F.R. § 1c.1 (2006).

<sup>11</sup> FERC, Prohibition of Energy Market Manipulation, 71 Fed. Reg. 4244, 4253 (Jan. 26, 2006).

The CFTC and the FERC have entered into an agreement to work cooperatively on information sharing.<sup>12</sup> The CFTC, however, is not necessarily guided by applicable securities law precedent in its energy market manipulation enforcement efforts.<sup>13</sup>

### III. FEDERAL TRADE COMMISSION

The Federal Trade Commission was granted specific authority under Section 811 of the Energy Independence and Security Act of 2007 (“EISA”) to impose civil penalties for market manipulation. The key provision, “Prohibition on Market Manipulation,” states:

It is unlawful for any person, directly or indirectly, to use or employ, in connection with the purchase or sale of crude oil gasoline or petroleum distillates at wholesale, any manipulative or deceptive device or contrivance, 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.<sup>14</sup>

The language of this new statute is borrowed from the FERC authority, the Energy Policy Act of 2005, which is, as explained previously, borrowed from Section 10(b) of the Securities Exchange Act of 1934, making it unlawful for any person, “directly or indirectly ... to use or employ, in connection with the purchase or sale of any security ... any manipulative or deceptive device or contrivance....”

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<sup>12</sup> Federal Energy Regulatory Commission, Memorandum of Understanding between the Federal Energy Regulatory Commission and the Commodity Futures Trading Commission Regarding Information Sharing and Treatment of Proprietary Trading and Other Information (Oct. 12, 2005), *available at* <http://www.ferc.gov/EventCalendar/Files/20051020121515-MOU.pdf>.

<sup>13</sup> See Commissioner Bart Chilton, A Better Understanding: Current Issues with SEC; Exempt Commercial Market Regulation, Remarks before the Futures Industry Association Expo Conference Washington Regulators’ Panel, Chicago, Illinois (Nov. 29, 2007), *available at* <http://www.cftc.gov/stellent/groups/public/@newsroom/documents/speechandtestimony/opachilton-5.pdf> (advocating increased coordination and communication between the CFTC and the SEC and commenting on recent U.S. Department of Treasury efforts to reform domestic financial market oversight by the proposed merger of the SEC and CFTC).

<sup>14</sup> Energy Independence and Security Act of 2007, Public Law 110-140, at § 811.

Under the EISA, the FTC may prescribe “rules and regulations” that it believes are “necessary or appropriate in the public interest or for the protection of United States citizens.” The FTC is currently in the rulemaking process under this statute, and its new rules are expected to provide additional guidance.

Section 811 is more limited than the FERC and CFTC statutory counterparts. The FTC is given only civil penalty authority against “any supplier” that violates § 811 for “not more than \$1,000,000.”<sup>15</sup> No criminal penalties are mentioned. These new civil penalties are imposed through the same process as are penalties under the Federal Trade Commission Act, which means that matters will be brought initially before an administrative law judge.

Moreover, the FTC is limited to “crude oil gasoline or petroleum distillates at wholesale.” The language of this statute is somewhat confusing, apart from fact that commas were omitted. The language by itself could be limited to wholesale transactions, although there may be a textual argument that wholesale only modifies petroleum distillates. The term “distillates” should also cover only refined products like diesel fuel and fuel oil. However, it is unclear if petroleum distillation processes might even include natural gas liquids.

Another key question arises over the possible creation of a private right of action. The Energy Policy Act of 2005 expressly stated that the new FERC authority created no private right of action. However, there is no similar language in the EISA. This becomes problematic if the language of the FTC authority is interpreted in light of the Securities

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<sup>15</sup> *Id.* at § 814.



Exchange Act of 1934. Of course, under the Exchange Act, there is an implied private right of action, which has resulted in litigation under Rule 10b-5.<sup>16</sup> Thus, if FTC authority is to be interpreted similarly to FERC authority, which is based on the 1934 Exchange Act, then one might argue that the statute should also create an implied private right of action, which Congress did not specifically prohibit in the EISA.

The EISA, unlike the EPA, also has an antitrust savings clause, which states, “Nothing in this subtitle shall be construed to modify, impair, or supersede the operation of any of the antitrust laws.”<sup>17</sup> Congress also tried to bar any preemption defense for state law claims. Section 815(c) provides that “[n]othing in this subtitle preempts any State law.” In short, it appears that Congress allowed all antitrust laws and state laws to be enforced simultaneously with this new law, as well as allowing prosecution by CFTC and FTC for what may be essentially the same conduct.

#### IV. CONCLUSION

All three agencies will now play a role in policing market manipulation in energy. Obviously, the new effort by Congress to grant the FTC market manipulation prosecution power, which is based essentially on a securities-fraud model, opens a broad new front of regulatory action. The fraud approach being used by FERC and now by the FTC is not linked to traditional market power analysis under the antitrust laws. Moreover, there is little, if any, public guidance on how the agencies will divide their jurisdictional authority to avoid conflicts.

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<sup>16</sup> See *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta*, 128 S.Ct. 761 (2008); *Superintendent of Ins. of N.Y. v. Bankers Life & Cas. Co.*, 404 U.S. 6, 13 n.9 (1971).

<sup>17</sup> Energy Independence and Security Act of 2007, Public Law 110-140, at § 815(b).



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## **ENERGY BILL GIVES FEDERAL TRADE COMMISSION NEW POWER TO PROSECUTE "MARKET MANIPULATION" IN PETROLEUM INDUSTRY**

The FTC now joins the CFTC and FERC in policing "market manipulation" in the petroleum industry, as now authorized under the Energy Independence and Security Act of 2007, signed by the President on December 19, 2007.

### ***Background of Multi-Agency Enforcement***

In 2005, FERC was provided with market manipulation enforcement authority through section 315 of the Energy Policy Act of 2005, 15 U.S.C. § 717c-1 (2006) which prohibits: "any entity, directly or indirectly, in connection with the purchase or sale of natural gas or the purchase or sale of transportation services subject to the jurisdiction of the Commission [from using] . . . any manipulative or deceptive device or contrivance . . . in contravention of such rules and regulations as the [FERC] may prescribe as necessary in the public interest or for the protection of natural gas ratepayers."

To implement this statute, FERC issued Order No. 670 which sets forth the acts and practices it considers unlawful: using or employing any device, scheme, or artifice to defraud; making any untrue statement of material fact or omitting 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, engaging in any act, practice, or course of business that operates or would operate as a fraud or deceit upon any entity. Order No. 670, 114 FERC Stats. & Regs. 31,202 (anti-manipulation rule published at 18 C.F.R. §1c.1 (2006)).

The authority given to FERC in the Energy Policy Act to prosecute market manipulation was based on the Securities Exchange Act of 1934, and FERC uses SEC precedent in interpreting its authority. In its Order No. 670, FERC made clear that it will look to the SEC precedents it finds applicable to natural gas markets on a case by case basis; and expressly declared that scienter is a required element of any case brought under its market manipulation authority.

The CFTC, on the other hand, derives its market manipulation enforcement authority from the Commodity Exchange Act, which makes it unlawful for: "any person to manipulate or attempt to manipulate the price of any commodity in interstate commerce, or for future delivery . . . or to corner or attempt to corner any such commodity or knowingly to deliver or cause to be delivered . . . false or misleading or knowingly inaccurate reports concerning . . . market information or conditions that affect or tend to affect the price of any commodity in interstate commerce . . . See 7 U.S.C. §13(a)(2).

In its enforcement efforts, the CFTC has focused on price reporting and natural gas trading practices. See, e.g., *CFTC v. Valencia*, 394 F.3d 352 (5th Cir. 2004) and *CFTC v. Amananth Advisors LLC*, No. 07-Civ-6682 (S.D.N.Y. July 25, 2007). Although the CFTC and the FERC have entered into an agreement pledging to work cooperatively on information sharing, (see Memorandum of Understanding between the Federal Energy Regulatory Commission and the Commodity Futures Trading Commission Regarding Information Sharing and Treatment of Proprietary Trading and Other Information, dated October 12, 2005 available at <http://www.cftc.gov>), the CFTC has not issued an order indicating its intent to be guided by applicable securities law precedent in its energy market manipulation enforcement efforts. But see Comments of CFTC Commissioner Bart Chilton, Current Issues with SEC; Exempt Commercial Market Regulation, November 29, 2007, available at <http://www.cftc.gov> (advocating increased coordination and communication between the CFTC and the SEC and commenting on recent Department of Treasury efforts to reform domestic financial market oversight by the proposed merger of the SEC and CFTC).

### ***New FTC Authority***

Under the Energy Independence and Security Act of 2007, Pub. L. No. 110-140, 121 Stat. 1492, available at <http://thomas.loc.gov>, the FTC was granted specific authority to impose civil penalties for market manipulation. The key provision is Section 811 on "Prohibition on Market Manipulation." This section makes it unlawful for "any person, directly or indirectly, to use or employ, in connection with the purchase or sale of crude oil, gasoline or petroleum distillates at wholesale, any manipulative or deceptive device or contrivance, in contravention of such rules and regulations as the Federal Trade Commission may prescribe as necessary or appropriate. . . ." Section 811 expressly covers the "wholesale" purchase and sale of "crude oil, gasoline, and petroleum distillates." "Distillates" generally cover refined products like diesel fuel and fuel oil.

However, to the extent distillation processes are applied to natural gas products, natural gas liquids (NGLs), including raw make and fractionated components, might fall under the coverage of the statute.

The language of this new statute is obviously borrowed from Section 10(b) of the Securities Exchange Act of 1934, which makes it unlawful for any person, "directly or indirectly. . . to use or employ, in connection with the purchase or sale of any security. . . any manipulative or deceptive device or contrivance. . . ." This is the same statute in which the language under the Energy Policy Act for FERC authority was derived.

To interpret Section 811, the FTC may also prescribe "rules and regulations" that it believes are "necessary or appropriate in the public interest or for the protection of United States citizens." If SEC practice is any guide, then these rules will be the key to advising and counseling any clients subject to this statute.

In addition, Section 812 makes it unlawful for any person to report "false or misleading" information to a federal department or agency "related to the wholesale price of crude oil, gasoline or petroleum distillates." This raises the same issue that has been the subject of CFTC enforcement in how energy traders report prices, not just to government authorities, but to the private press as well. Section 812, however, is specifically limited to price reports to the federal government.

#### *New Penalties*

The FTC is given civil penalty authority against "any supplier" that violates Section 811 or 812 of a "civil penalty of not more than \$1,000,000." No criminal penalties are mentioned. These new civil penalties are imposed through the same process as are penalties under the FTC Act, which means that matters will be brought initially before an administrative law judge.

#### *Impact on Other Laws*

Section 815(b) specifically states that "[n]othing in this subtitle shall be construed to modify, impair, or supersede the operation of any of the antitrust laws." Moreover, Congress tried to bar any preemption defense for state laws. Section 815(c) provides that "[n]othing in this subtitle preempts any State law."

In short, it appears that Congress was intent on allowing all antitrust laws and state laws to be enforced simultaneously with this new law. However, it is unclear how the "market manipulation" authority for FERC, CFTC, and FTC is expected to coexist.

#### *Problems of Enforcement*

The new effort by Congress to grant the FTC "market manipulation" prosecution power, which is based essentially on a securities fraud model, opens a new front of regulatory concern. The fraud approach being used by FERC and now by the FTC is not linked to traditional market power analysis. SEC precedent also provides broad definitions of "manipulative or deceptive device or contrivance," and if those same definitions are applied by the FTC, then this statute creates a new chapter for defending petroleum companies in FTC proceedings. Moreover, right now, there is no guidance on how the agencies will divide their jurisdictions. In short, each company must now look at each agency's authority in evaluating its conduct.



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