Issued in Kansas City, Missouri, on August 12, 2008.

G. Wes Ryan,

Acting Manager, Small Airplane Directorate, Aircraft Certification Service.

[FR Doc. E8–19168 Filed 8–18–08; 8:45 am]

BILLING CODE 4910–13–P

FEDERAL TRADE COMMISSION

16 CFR Part 317

[Project No. P082900]

RIN 3084-AB12

Prohibitions On Market Manipulation and False Information in Subtitle B of Title VIII of The Energy Independence and Security Act of 2007

AGENCY: Federal Trade Commission.

ACTION: Notice of proposed rulemaking; request for public comment.

SUMMARY: Pursuant to Title VIII, Subtitle B of the Energy Independence and Security Act of 2007 (''EISA''), the Federal Trade Commission (''Commission'' or ''FTC'') is proposing a rule to implement Section 811 of Subtitle B prohibiting the use or employment of manipulative or deceptive devices or contrivances in wholesale petroleum markets.[1] The Commission invites written comments on issues raised by the proposed Rule and seeks answers to the specific questions set forth in Section II.L of this Notice of Proposed Rulemaking (''NPRM'').

DATES: Written comments must be received by September 18, 2008.

ADDRESSES: Interested parties are invited to submit written comments electronically or in paper form. Comments should refer to ''Market Manipulation Rulemaking, P082900'' to facilitate the organization of comments. Comments containing material for which confidential treatment is requested must be filed in paper form, must be clearly labeled ''Confidential,'' and must comply with Commission Rule 4.9(c).[2] Comments should not include any sensitive personal information, such as an individual's Social Security Number; date of birth; driver's license number or other state identification number or foreign country equivalent; passport number; financial account number; or credit or debit card number. Comments also should not include any sensitive health information, such as medical records and other individually identifiable health information.

Because paper mail in the Washington area, and specifically to the FTC, is subject to delay due to heightened security screening, please consider submitting your comments in electronic form. Comments filed in electronic form should be submitted by using the following weblink: (*http://secure.commentworks.com/ftc-marketmanipulationNPRM/*)(and following the instructions on the web-based form). To ensure that the Commission considers an electronic comment, you must file it on the web-based form at the weblink(*http://secure.commentworks.com/ftc-marketmanipulationNPRM/*). If this NPRM appears at (*http://www.regulations.gov/search/index.jsp*), you may also file an electronic comment through that website. The Commission will consider all comments that regulations.gov forwards to it. You may also visit the FTC website at (*http://www.ftc.gov/os/2008/08/P082900nprm.pdf*) to read the NPRM and the news release describing it.

A comment filed in paper form should include the ''Market Manipulation Rulemaking, P082900'' reference both in the text and on the envelope, and should be mailed to the following address: Federal Trade Commission, Market Manipulation Rulemaking, P.O. Box 2846, Fairfax, VA 22031-0846. This address does not accept courier or overnight deliveries. Courier or overnight deliveries should be delivered to: Federal Trade Commission/Office of the Secretary, Room H-135 (Annex G), 600 Pennsylvania Avenue, NW, Washington, DC 20580.

The Federal Trade Commission Act (''FTC Act'') and other laws the Commission administers permit the collection of public comments to consider and use in this proceeding as appropriate. The Commission will consider all timely and responsive public comments that it receives, whether filed in paper or electronic form. Comments received will be available to the public on the FTC website, to the extent practicable, at (*http://www.ftc.gov/os/publiccomments.shtm*). As a matter of discretion, the Commission makes every effort to remove home contact information for individuals from the public comments it receives before placing those comments on the FTC website. More information, including routine uses permitted by the Privacy Act, may be found in the FTC's privacy policy, at (*http://www.ftc.gov/ftc/privacy.shtm*).

FOR FURTHER INFORMATION CONTACT: James Mongoven, Deputy Assistant Director of Policy and Coordination, Bureau of Competition, Federal Trade Commission, Market Manipulation Rulemaking, P.O. Box 2846, Fairfax, VA 22031-0846, (202) 326-3772.

SUPPLEMENTARY INFORMATION:

I. Background

A. The Energy Independence and Security Act of 2007

EISA became law on December 19, 2007.[3] Subtitle B of Title VIII of the Act prohibits market manipulation in connection with the purchase or sale of crude oil, gasoline, or petroleum distillates at wholesale, and reporting false or misleading information related to the wholesale price of those products. Specifically, Section 811 prohibits ''any person'' from directly or indirectly: (1) using or employing ''any manipulative or deceptive device or contrivance;'' (2) ''in connection with the purchase or sale of crude oil gasoline or petroleum distillates at wholesale;'' (3) that violates a rule or regulation that the FTC ''may prescribe as necessary or appropriate in the public interest or for the protection of United States citizens.''[4]

Section 812 prohibits ''any person'' from reporting information that is ''required by law to be reported'' — and that is ''related to the wholesale price of crude oil gasoline or petroleum distillates'' — to a Federal department or agency if the person: (1) ''knew, or reasonably should have known, [that] the information [was] false or misleading;'' and (2) intended such false or misleading information ''to affect data compiled by the department or agency for statistical or analytical purposes with respect to the market for crude oil, gasoline, or petroleum distillates.''[5]

Subtitle B also contains three additional sections, which address, respectively, enforcement of the Subtitle (Section 813),[6] penalties for violations

[1] Section 811 is part of Subtitle B of Title VIII of EISA, which has been codified at 42 U.S.C. 17301-17305. Hereinafter, citations to EISA sections shall be made to the United States Code.

[2] The comment must be accompanied by an explicit request for confidential treatment, including the factual and legal basis for the request, and must identify the specific portions of the comment to be withheld from the public record. The request will be granted or denied by the Commission's General Counsel, consistent with applicable law and the public interest. *See* Commission Rule 4.9(c), 16 CFR 4.9(c).

[3] Pub. L. No. 110-140, *codified at* 42 U.S.C. 17001-17386.

[4] 42 U.S.C. 17301.

[5] 42 U.S.C. 17302.

[6] Section 813 provides that Subtitle B ''shall be enforced by the [FTC] in the same manner, by the same means, and with the same jurisdiction as

Continued

of Section 812 or any FTC rule promulgated pursuant to Section 811 (Section 814),[7] and the interplay between Subtitle B and existing laws (Section 815).[8]

B. Advance Notice of Proposed Rulemaking

On May 1, 2008, the Commission issued an Advance Notice of Proposed Rulemaking (''ANPR'') that solicited comments on whether it should promulgate a rule under Section 811, and, if so, the appropriate scope and content of such a rule.[9] In particular, the ANPR requested comment on the interplay between any proposed FTC rule and other existing federal rules prohibiting market manipulation; the scope of certain definitions; the level of scienter necessary to establish a violation of any proposed rule; the efficacy of the civil penalty authority provided to the Commission in EISA; the inclusion or exclusion of certain conduct from the scope of any proposed rule; and the potential costs and benefits of any proposed rule.[10] The ANPR set a deadline of June 6, 2008, by which to submit comments.[11] In response to a petition from a major trade association,[12] the Commission extended the comment period until June 23, 2008.[13]

In response to the ANPR, the Commission received 155 comments from interested parties, including other federal agencies, state government agencies, industry members, trade and bar associations, academics, and individual members of the public.[14] The comments respond to questions posed in the ANPR and highlight several issues of particular concern to commenters. An overview of the major themes reflected in the comments follows.

The overwhelming majority of the comments submitted in response to the ANPR were from consumers. These consumers voice concern about the rising cost of gasoline, attributing the increase to many variables, including: (1) OPEC control over prices;[15] (2) price manipulation by oil companies;[16] (3) speculation by investors;[17] (4) corporate greed;[18] (5) the decreasing value of the U.S. dollar;[19] and (6) increased demand from China and India.[20] Although many of these consumers urge the United States government, as a whole, to take action to address gasoline prices,[21] few expressly support a FTC market manipulation rule.[22] Some of the consumer commenters, although not addressing the need for a specific market manipulation rule, nonetheless urge the FTC to investigate the petroleum industry for various types of alleged misconduct or to take other action to control increasing prices.[23]

---

though all applicable terms'' of the FTC Act were incorporated into and made a part of Subtitle B.

42 U.S.C. 17303.

[7] 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.

[8] 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.

[9] FTC, *Prohibitions On Market Manipulation and False Information in Subtitle B of the Energy Independence and Security Act of 2007*, 73 FR 25614 (May 7, 2008). The ANPR was announced in a press release and made available to the public on May 1, 2008, *available at* (*http://www.ftc.gov/opa/2008/05/anpr.shtm*).

[10] *Id.* at 25620-25624.

[11] *Id.* at 25614.

[12] Letter from the American Petroleum Institute to FTC Secretary Donald S. Clark, (May 19, 2008), *available at* (*http://www.ftc.gov/os/comments/marketmanipulation/index.shtm*).

[13] FTC, *Extension of Period to Submit Comments in Response to the ANPR*, 73 FR 32259 (June 6, 2008). The extension was announced in a press release and made available to the public on May 30, 2008, *available at* (*http://www.ftc.gov/opa/2008/05/anprfyi.shtm*).

[14] Attachment A contains a list of commenters who responded to the ANPR, together with the acronyms used to identify each commenter in this NPRM. The full rulemaking record can be found at (*http://www.ftc.gov/ftc/oilgas/index.html*), and electronic versions of the comments can be accessed at (*http://www.ftc.gov/os/comments/marketmanipulation/index.shtm*).

[15] *See, e.g.*, Bergkamp (''The biggest problem is that the major OPEC countries are not only determining the price by controlling out put, they have also figured out that they can inject millions of dollars into the futures market and manipulate the price of oil in that capacity.''); Noga (''Since we are an exporter of food products, the price of our exported food to OPEC members should be tied to their oil production and prices.''); Pereira (''I feel that prices are being manipulated by OPEC.''); A. Stark (''Why are we allowing OPEC to get away with $125.00 per barrel of oil?'').

[16] *See, e.g.*, Bremer (''The big oil companies need to be investigated for price gouging and manipulation.''); McGill (''Oil companies should not be allowed to ship oil overseas, store it until the price rises, and then return it to the United States. That is manipulation.''); Phillips (''[S]ince all of the major oil companies have made, and continue to make record profits (definition: the monetary surplus left to a producer or employer after deducting wages, rent, cost of raw materials, etc.) It is highly likely that they are, together, manipulating the cost of a gallon of gasoline.''); Love (''BIG OIL controls gasoline prices thru the refineries which stand BETWEEN primary fuel supplies [including biofuel] and consumers.''); Reinecke (''Here in Wichita Ks when gas prices go up over night all stations go up in price over night, and they say they don't talk to each other,''); Theisen (''I believe the oil companies should be severely punished for manipulating the sale and purchase of oil to boost the price of oil.'').

[17] *See, e.g.*, Barton (''There is no reason gas should be his high, get rid of the traders and it will drop $ 3.00/ Dth.''); Gould (''It seems like the real manipulation in fuel cost is happening in the futures markets and not at the oil companies.''); Nichols (''[T]he price is now purely speculative and [completely] out of line with supply and demand. The problem will be if the price does collapse will the government bail out the speculators and what will it cost.''); Noga (''This like the tech stocks, housing market bubble, is a market driven by the greed of speculators and hedge markets.''); Parker (''OIL/GAS SPECULATION ON WALL STREET IS OUT OF CONTROL, BECAUSE THE HIGHER THE PRICE THE MORE COMMISSION THEY GET.''); Patel (''What has change in the last year to make the price almost double? SPECULATION BY ANALYSTS.''); D. Smith (''As much as 60% of today's crude oil price is pure speculation driven by large trader banks and hedge funds.''); Van Hecke (''I also feel there needs to be regulations put in place to have some sort of control on the way the stock traders are able to continually drive up the costs through speculation.''). *See also* Greenberger (arguing that excessive speculation, fraud, and illegal manipulation are causing higher gasoline prices).

[18] *See, e.g.*, Brownstein (''The oil companies have used their profits to line their pockets instead of putting it back into increasing refinery & exploration.''); Nenortas (''While I am for companies making a profit I am NOT for gluttony which the oil companies seem to be guilty. Their costs do not justify the outrageous prices they are demanding.'').

[19] *See, e.g.*, Rubinstein (''Gas/fuel prices are high because the value of the dollar has fallen. . . .'').

[20] *See, e.g.*, Tanner (''Oil price rises caused from importing from China and India. Most oil demand caused by these two countries having 40 percent of the world's population.'').

[21] *See, e.g.*, Bergkamp (''[I]f any other business [construction companies, farmers, etc.] were working in collusion in a form of bid rigging [and fundamentally that is what is happening with the price of oil] the Justice Department would have them in a court so fast it would boggle the mind. But we allow the market to be exploited with no legal recourse what so ever.''); Berman (''[President Bush] must call in the executives of the large oil companies who are making billions and billions in profits in the current crisis and make them lower their prices.''); Love (''Our government seems to be able to create a BUBBLE for just about every economic good . . . except fuel. It can be done for fuel as well and this will bring BIG OIL back to a levelled playing field.''); Loucks (''Set some laws and make the oil companies abide by them. This hike of gasoline costs is outrageous! Someone needs to be held accountable. Please hurry!''); Noga (''Something needs to be done, the profits are obscene, the terrorists are the oil companies.''); A. Stark (''We need regulation and protection from the Oil Industry . . . .'').

[22] *See, e.g.*, Bradley (''Put in place a new ban on market manipulation and giving false information to the FTC or the Department of Justice. Give the FTC the authority to levy fines up to $1 million for each violation of market manipulation.''); Nenortas (''IF making federal regulations that will do this on a permanent basis and NOT be a band-aid or quick fix to this problem, then I am all for it.'').

[23] *See, e.g.*, Bremer (''The big oil companies need to be investigated for price gouging and manipulation.''); Hudecek (''[T]he FTC should be able to regulate the price of crude oil prices to stop all price gauging that is going on in America and in Europe at this time. The FTC should bring the

Twenty-nine industry members, associations, and other organizations responded to the ANPR. Most organizational commenters express concern about the prospect of a FTC rule.[24] In support of their position, these commenters advance a variety of arguments, including: (1) a rule is unnecessary because there is no empirical evidence that market manipulation is occurring;[25] (2) a rule would be duplicative of existing laws, including the Commodity Exchange Act (''CEA''), existing antitrust laws, and the FTC Act;[26] and (3) a rule could harm the efficient functioning of petroleum markets to the detriment of consumers.[27] Many of the organizational commenters who express concern about FTC rulemaking in this area advance the view that if the Commission promulgates a rule, it should be narrowly tailored to reach only fraudulent conduct in the marketplace.[28] Only a few organizational commenters affirmatively favor a FTC market manipulation rule.[29] A few commenters recommend specific conduct that a FTC rule should prohibit.[30]

Organizational commenters express differing views regarding the appropriate legal basis for, and form of, any such rule. For example, some commenters argue that the Commission should model its rule after market manipulation authority under which other federal agencies, such as the Securities and Exchange Commission (''SEC''), the CFTC, and the Federal Energy Regulatory Commission (''FERC''), currently police market manipulation.[31] Other commenters disagree, questioning whether it is appropriate to apply approaches designed for regulated industries to the comparatively unregulated petroleum industry.[32]

Organizational commenters also advance several significant suggestions regarding the elements of a cause of action that they believe the Commission should employ in enforcing the proposed Rule. In particular, commenters express strong views about the appropriate level of scienter[33] and

price of crude oil back down to a reasonable price per barrel, that is under $60 a barrel, and set a reasonable gas price for all gas stations in every State in America . . . .''); Kas (''I want to see real action taken against those who are stealing from the rest of us.''); Morris-Ramos (''This is clearly price gouging by private companies and our government needs to protect us. This is the clear mission of the FTC and Congress.''); A. Stark (''Why hasn't the FTC investigated this in earnest?''); Strickland (''I believe the FTC should investigate market manipulation.''); Warner (''ENOUGH of would of, should of, could of. Our Government NEEDS to do something NOW about these gas prices. Don't say it can't be done because it CAN! The government can do anything it wants to do.'').

[24] Three commenters specifically argue that the FTC should not promulgate a rule. *See* API at 12-16 (arguing that the Commission should refrain from promulgating a rule); Flint Hills at 1-2, 8-11 (asserting that a rule is unnecessary in the absence of any evidence of inefficiencies or anticompetitive behavior in the U.S. oil refining industry); IER at 1 (arguing that existing statutes provide FTC and other agencies ''with adequate powers to deal with legitimately anti-competitive and/or fraudulent practices in the petroleum and financial markets''). Many commenters, without expressly stating whether they support a rule, urge the Commission to consider a variety of concerns in drafting a Section 811 rule. *See, e.g.*, ICE at 1-2 (recommending that the Commission draft a rule with a ''well defined jurisdictional boundary'' to avoid duplicative enforcement); Plains at 1, 3 (recommending that the Commission craft a rule that will ''avoid any overlap with other regulatory regimes''); Sutherland at 8 (urging the Commission to adopt a rule that avoids any overlap with futures trading which is the exclusive jurisdiction of the Commodity Futures Trading Commission (''CFTC'')); AOPL at 1 (seeking clarification from the Commission that a Section 811 rule will not apply to crude oil and petroleum products pipelines); CFDR at 2 (encouraging the FTC to draft a rule that is clear and easily understood, ''advances the development of one universal definition of price manipulation'' in the markets for petroleum products, and does not create or alter existing obligations among market participants); Hess at 12 (urging the Commission to ''consider the entire spectrum of possible consequences stemming from the contemplated rulemaking''); Sutherland at 2, 4 (urging the Commission to avoid adopting regulations that will have a chilling effect on legitimate market activities). *Cf.* Platts at 2 (supporting a FTC rule that encourages the voluntary reporting of data, such as price, inventory volumes, and import/export volumes); CAPP at 2-3 (raising a concern about the FTC's ability to construct a market manipulation rule appropriately in the face of little empirical evidence of market manipulation).

[25] *See, e.g.*, API at 12-13 (stating that a Section 811 rule is unnecessary because there is no evidence that market manipulation is occurring or has occurred); CAPP at 2-3 (arguing that little empirical evidence exists of market manipulation or any adverse effects on crude oil markets); Sutherland at 3 (asserting that the FTC has found U.S. oil markets to be generally free of manipulation in its past investigations). *See also* Flint Hills at 1-2, 8-11.

[26] *See, e.g.*, Flint Hills at 3-4 (arguing that Section 811 ''overlaps and arguably duplicates authority conferred by [Section 5 of the FTC Act]''); AOPL at 1-2 (stating that a FTC rule will overlap with and be duplicative of other agencies' regulations). *See also* ISDA at 2-3; API at 14-16.

[27] *See, e.g.*, IER at 1-2 (arguing that a rule could interfere with healthy market operations, leading to higher volatility in oil and gas prices and less efficiency in distribution); Flint Hills at 2-3 (stating that a rule would likely be harmful to the industry and consumers); API at 16 (stating that a Section 811 rule could deter beneficial market activity); Sutherland at 3-4 (stating that the FTC needs to take great care not to chill legitimate market activities by adopting rules that substitute governmentally created norms for the rules of the marketplace); CAPP at 5 (stating that it could be damaging to the petroleum industry to enact rules to prohibit conduct described in the ANPR).

[28] *See, e.g.*, API at 2, 16-17 (recommending that any FTC rule be drafted narrowly to avoid duplication with other laws and to avoid deterring pro-competitive conduct); Flint Hills at 5, 8-9, 15 (stating that a rule should cover ''only conduct that contains an element of fraud or dishonesty''); ISDA at 2-3 (urging the Commission to adopt a rule under Section 811 that is tailored to target manipulative schemes involving wholesale, physical petroleum products); Muris at 13 (advocating that any rule be limited to fraudulent and deceptive conduct). *Contra*NPGA at 5 (urging the FTC to ''view its mandate broadly'' and focus ''on practices that are not a reaction to market forces'').

[29] *See, e.g.*, Greenberger at 21-25 (urging the Commission to move quickly to adopt a rule); Gregoire at 1 (recommending that the FTC promulgate an interim rule so it can commence an investigation into the oil and gas markets). *See also* NPGA at 2 (''[R]apid increase in price levels and volatility recently . . . raise concerns regarding potential manipulation and the need for stronger regulatory oversight.''). *See also* MFA at 4-5.

[30] *See, e.g.*, IPMA at 3-4; TOMA at 2-3 (recommending that the FTC treat an oil company's decision to sell only gasoline blended with ethanol instead of unblended gasoline at the terminal rack as a potentially manipulative practice); Navajo Nation at 3-5 (asking the FTC to treat the denial of access by terminals and common carrier pipelines to other suppliers as a manipulative practice); ILMA at 1 (requesting that the FTC consider as potentially manipulative a refiner's decision to increase the price of base oils sold to others (non-refiner blenders/marketers) at wholesale faster than the refiner increases the retail price for its own branded finished oils).

[31] *See, e.g.*, CFDR (advising that the FTC model its rule after SEC, FERC, and CFTC market manipulation standards to varying degrees); Gregoire (recommending that the FTC model a rule after FERC and SEC market manipulation rules); Greenberger at 23 (urging the FTC to use FERC's market manipulation rule as a template for drafting a Section 811 rule); ISDA at 7 (encouraging the FTC to ''propose a rule that draws on the most analogous aspects of those anti-manipulation standards already applicable to the commodities markets, in particular those existing under the [CEA]''); MFA at 5-6, 21-23 (arguing for the adoption of a CFTC-style anti-manipulation regulation in the wholesale energy market because of its relevance to the FTC's mission); CAPP at 3-4 (urging the Commission to adopt CEA's specific intent standard); Sutherland at 7 (urging the Commission to draw on precedent developed under the CEA). *But see* ISDA at 12-14 (urging the FTC not to use FERC and SEC market manipulation standards as models in determining what constitutes manipulative behavior); MFA at 5-6, 19-21 (stating that ''the absence of a securities law disclosure foundation . . . argues against the adopting of an SEC-style anti-manipulation formulation . . . .''). *See also* Flint Hills at 10 n.25, 13-14, 22-23.

[32] *See, e.g.*, Muris at 2 (''[T]he Commission should follow its own clear precedents regarding when a failure to disclose is deceptive, and avoid importing broad disclosure requirements from highly regulated markets that simply have no place in wholesale petroleum markets.''); PMAA at 3 (''Given the very wide gap between regulated and unregulated behavior, existing precedents should be looked to as informational only and not as having any binding effect upon interpretation of rules promulgated under Section 811.''); Flint Hills at 10 n.25, 13-14, 22-23 (stating that FERC and SEC market manipulation statutes were promulgated in a different regulatory context than EISA). *Cf.* API at 18-19, 30 (recognizing the value of FERC and SEC approaches to an extent).

[33] Many commenters urge the Commission to require specific intent as a prerequisite for finding liability under Section 811. *See, e.g.*, ISDA at 7 (urging the FTC to require a specific intent to manipulate prices); Muris at 11 (''In any manipulation rule, the Commission should require specific intent, rather than relying solely on the knowledge standard in the FTC Act.''); CFDR at 4,

Continued

whether a price effect should be a prerequisite to a finding of liability.[34]

Several commenters also respond to questions and hypotheticals presented in the ANPR about the types of conduct that might violate EISA and any proposed market manipulation rule.[35] Other topics that the comments address include: possible definitions,[36] costs and benefits of a market manipulation rule,[37] and appropriate penalties for violations of EISA or any FTC rule.[38]

C. Notice of Proposed Rulemaking Pursuant to EISA

Based on the ANPR comments and the Commission's extensive experience studying, analyzing, and investigating the petroleum industry, the Commission has determined to propose a rule to prevent manipulative and deceptive conduct in the petroleum markets.[39] The Commission invites written comments on the proposed Rule and answers to the questions in Section II.L, to assist it in determining whether the proposed Rule provisions strike an appropriate balance to maximize protections for consumers from market manipulation while avoiding the imposition of unnecessary compliance burdens on law-abiding industry members.

II. Discussion of the Proposed Rule

A. Determination to Promulgate a Rule to Proscribe Market Manipulation

In considering whether to exercise its discretionary rulemaking authority pursuant to Section 811, the Commission relies upon several sources of information in addition to the statute, including its extensive background knowledge of the petroleum industry, the ANPR comments, independent research, and consultation with sister agencies charged with administering similar market manipulation rules. Based on its findings, the Commission tentatively concludes that promulgating a rule to address market manipulation in connection with the wholesale purchase or sale of crude oil, gasoline, or petroleum distillates is appropriate and in the public interest.[40] This Section of the NPRM sets forth the Commission's reasoning for the proposed Rule. The Commission invites comment on the issues raised in this Section.

1. The proposed Rule must meet Section 811's ''necessary or appropriate'' standard

Section 811 states that the Commission ''may prescribe'' a rule ''as necessary or appropriate in the public interest or for the protection of United States citizens.''[41] Thus, the Commission may only promulgate a rule to prohibit manipulation in the petroleum industry if, in its discretion, it finds that a rule under EISA is ''necessary or appropriate'' and ''in the public interest or for the protection of United States citizens.'' The Commission has tentatively determined that promulgating a market manipulation rule narrowly tailored to address fraudulent practices would be appropriate to ensure that the objective of EISA is carried out, and therefore would be in the public interest.

The Commission believes that the initial inquiry in determining whether it should promulgate a rule requires understanding the phrase ''necessary or appropriate in the public interest or for the protection of United States citizens.''[42] The use of the disjunctive ''or'' in the first clause of this phrase indicates that the Commission would be within its mandate to promulgate a rule

13 (asserting that the FTC should require a specific intent to affect market prices); MFA at 6, 23-25 (arguing that the Commission should include a ''specific intent to create an artificial price'' standard to ensure protection of legitimate commercial conduct); CAPP at 3 (recommending that the FTC adopt the intent standard set out in the CEA); API at 28-29 (arguing that the legislative history of EISA supports inclusion of a scienter standard); Sutherland at 7 (encouraging the Commission to follow CEA by requiring proof of specific intent). *Cf.* PMAA at 4-5 (''[T]he focus is on practices that intentionally, willfully or recklessly cause distortion in the market.''). *But see, e.g.*, Flint Hills at 16 (asserting that the Commission should apply the same standard of intent under the FTC's existing authority to address fraud and deception). One commenter counsels the Commission against adopting an intent requirement. NPGA at 5 (arguing that proof of intent creates an ''impossible burden of proof,'' which will ''ultimately waste the Commission's resources and contribute little to the efficiency of the markets or the wellbeing of consumers'').

[34] Several commenters support, as an element of a Section 811 rule violation, a showing of a price effect. *See, e.g.*, API at 23, 31-32 (stating that, as a prerequisite to finding liability, the FTC should require a showing that manipulative conduct caused the market price to deviate materially from the price that would have existed but for the deception or fraud). *See also* ISDA at 15; Muris at 9; CFDR at 4; Sutherland at 7. *But see* USDOJ (''Certainly, there should be no requirement that one succeed in moving prices . . . the only requirement should be an attempt to do so . . . whether successful or not.''); NPGA at 5 (arguing that the FTC should focus ''on practices that are not a reaction to market forces'').

[35] *See generally* ABA at 6-9 (stating that the antitrust laws should be the guide for determining when unilateral supply decisions should be lawful or when firms may be required to provide competitors with access to facilities); API at 46-47 (arguing that the Commission should not draft a rule that imposes an affirmative obligation to release inventory during a price spike); Plains at 2-5 (arguing that the decision to release inventory is complicated, and the FTC should not substitute its judgment for others); Hess at 8-10 (arguing against imposing an affirmative obligation to release inventory during price spikes because such an obligation would have a negative impact on long term supply); PMAA at 6-10 (arguing against restricting common carrier pipelines' announcements concerning future capacity constraints); Sutherland at 6 (''To mandate inventory releases would distort the U.S. oil markets and is contrary to the healthy structure of the markets.''). *See also* AOPL at 20-33; CAPP at 4-6; IER at 4-8; ISDA at 17-18; CFDR at 15-16.

[36] *See generally* ISDA at 19 (seeking clarification of the FTC's proposed definition of wholesale distillates products under Section 811); CAPP at 3 (stating that the definition of market manipulation is appropriate because it reflects the language contained in EISA); Flint Hills at 15 (stating that the FTC's proposed definition of market manipulation ''makes no sense''); PMAA at 2; Sutherland at 7.

[37] *See generally* API at 16 (''Without evidence of significant 'manipulative' conduct in the petroleum industry, the costs of additional enforcement and their impact on competitive market activity outweigh any benefit to be gained from the FTC applying Section 811 to conduct that is already addressed by other rules.''); Muris at 7 (''In addressing market manipulation, the potential costs of mistakenly regulating are likely to be high because these are well-functioning, highly competitive markets crucial to the operation of our economy.'').

[38] *See generally* API at 38 (urging the FTC to adopt Section 5(m)(1)(C) of the FTC Act as the standard for determining the amount of civil penalties under Section 811); PMAA at 6 (''The very large penalty should only be applied, if at all, to the very largest entities (refiners, trading companies) who participate in the upstream portion of crude and finished product, manufacture and sales.'').

[39] In the ANPR, the Commission stated that this rulemaking proceeding is governed by the Administrative Procedure Act (''APA''), 5 U.S.C. 553, and Part 1, Subpart C, of the Commission Rules of Practice concerning the adoption of non-Section 18 rules, 16 CFR 1.21-1.26. 73 FR 25614, 25615 n.4. One commenter, however, asserts that this proceeding should be commenced as a rulemaking under Section 18 of the FTC Act, 15 U.S.C. 57a, requiring, among other things, more lengthy and detailed notice and comment procedures. *See* API at 58-59. The Commission disagrees. Nothing in the plain language of EISA requires Section 18 rulemaking, and the use of APA rulemaking procedures is consistent with Congressional expectations that this proceeding be conducted expeditiously.

[40] As the Commission stated in the ANPR, the phrase ''crude oil gasoline or petroleum distillates,'' without commas, is used in Section 811 (as well as in the first clause of Section 812), while the phrase ''crude oil, gasoline, or petroleum distillates'' (with commas) is used in Section 812(3). This drafting is presumably a non-substantive typographical error; therefore, all parts of both sections should be read to cover all three types of products (that is, crude oil, gasoline, and petroleum distillates). *See* 73 FR at 25621 n.59.

[41] 42 U.S.C. 17301.

[42] Some commenters address the phrase ''necessary or appropriate'' in their comments; however, none attempt to define the phrase. *See, e.g.*, API at 36 (''[T]here are solid grounds to conclude that adoption of a market manipulation rule for petroleum wholesale markets is neither necessary nor appropriate.''); CAPP at 4 (''In order to ensure that rules are . . . necessary or appropriate in the public interest . . . the Commission must set objective standards as to what these concepts are and how they will manifest themselves in reality.''). *See also*AOPL at 11-12 (''Regulation of oil [pipelines] . . . would not be 'necessary or appropriate in the public interest or for the protection of the United States citizens.'').

that is either: (1) ''necessary . . . in the public interest or for the protection of United States citizens,'' *or* (2) ''appropriate in the public interest or for the protection of United States citizens.''[43] Similarly, the Commission need only show that a rule would be either ''in the public interest'' or ''for the protection of United States citizens.'' Thus, the Commission could proceed in its rulemaking if, at a minimum, the endeavor is ''appropriate . . . in the public interest.'' The Commission has determined that a rule that achieves EISA's plainly stated purpose — that is, the prohibition of market manipulation in the petroleum industry — would be appropriate.

The Commission carefully considered concerns raised by organizational commenters about the necessity or appropriateness of a rule in determining whether to move forward in the rulemaking process. Some of these commenters argue, for example, that petroleum markets are competitive, and, in the absence of specific evidence of market manipulation, the Commission should refrain from promulgating a rule.[44] Some point to FTC and CFTC authority to argue that any rule would be duplicative of existing laws and lead to uncertainty and confusion among market participants about compliance.[45] Many commenters also express concerns about the scope and contours of a rule and whether any rule that the Commission promulgates would be appropriate for petroleum markets.[46]

EISA targets manipulative and deceptive conduct in the petroleum markets, thereby seeking to eliminate conduct which serves no legitimate purpose and may in fact harm the market to the detriment of market participants and consumers.[47] In the view of the Commission, a rule that allows the Commission to guard against conduct that undermines the integrity of the petroleum market would be in the public interest.[48] The Commission notes that fraud and deception may occur in competitive marketplaces. Further, the Commission notes that Congress specifically authorized it to determine whether a rule would be appropriate and in the public interest despite the existence of other laws that potentially cover fraud or deceit.[49] Therefore, as the agency charged with protecting consumers and preserving the competitiveness of markets (such as petroleum markets), the Commission believes that it would be appropriate for it to propose a rule targeting fraudulent or deceptive conduct in wholesale petroleum markets under this new authority.

2. SEC Rule 10b-5 provides an appropriate regulatory model on which to base the FTC's proposed Rule

By its plain language, Section 811 declares unlawful the use of manipulative or deceptive devices or contrivances — in connection with the purchase or sale of crude oil, gasoline, or petroleum distillates at wholesale — that violates any FTC rule prohibiting their use.[50] As one commenter observes, ''Section 811 is not discussed in any Senate, House, or Conference Report, nor is there any reported Congressional debate on this provision.''[51] Nevertheless, the statutory language — especially the use of the phrase ''manipulative or deceptive device or contrivance'' — reveals its legislative antecedents.[52]

In particular, it is instructive that the language that Congress chose to frame the conduct prohibition in Section 811 is identical to language found in Section 10(b) of the Securities Exchange Act of 1934 (''SEA''),[53] which prohibits the use of any ''manipulative or deceptive device or contrivance'' in contravention of such rules as the SEC may prescribe.[54] Congress used identical

[43] 42 U.S.C. 17301 (emphasis added). The use of a disjunctive indicates alternatives and requires that each be treated separately unless there is clear legislative intent that indicates otherwise. *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979) (''Canons of construction ordinarily suggest that terms connected by a disjunctive be given separate meanings, unless the context dictates otherwise . . . .''). *See also FCC v. Pacifica Foundation*, 438 U.S. 726, 739-740 (1978); *Azure v. Morton*, 514 F.2d 897, 900 (9th Cir. 1975) (''As a general rule, the use of a disjunctive in a statute indicates alternatives and requires that they be treated separately.''); Norman J. Singer, Statutes and Statutory Construction 21.14, at 180-182 (6th ed. rev. vol. 2002) (''Generally, courts presume that 'or' is used in a statute disjunctively . . . .'').

[44] *See, e.g.*, AOPL at 18 (noting that the Commission has found little evidence of price manipulation in previous investigations); API at 12-14, 36; Flint Hills at 10 (''[T]he Commission lacks evidence of 'manipulation' in wholesale petroleum markets that warrants the kind of extensive regulatory intervention that a proposed rule could engender.''); Hess at 10-11; Muris at 2 (asserting that the petroleum industry is highly competitive). *See also* Sutherland at 3 (stating that the Commission should not ''adopt rules that substitute governmentally created norms for the rules of the marketplace.'').

[45] Commenters express the view that a FTC rule is unnecessary because it would duplicate existing laws and regulations. *See, e.g.*, API at 40-41 (arguing against a FTC rule that would duplicate the existing CEA enforcement scheme and antitrust laws); Flint Hills at 8-9 (asserting that existing Commission authority under Section 5 of the FTC Act is sufficient to protect against ''[d]isingenuous business practices''); MFA at 17 (''FTC Rules that purport to overlap with CFTC exclusive jurisdiction would not serve the public interest.''). Although it is true that other agencies have market manipulation regulations in place already, this fact was well-known to Congress when it enacted EISA. Therefore, the Commission disagrees with commenters that argue that a Commission rule is unnecessary because it may be redundant with other regulatory authority.

[46] For a general discussion of organizational commenters' concerns about a FTC rule, *see* Section I.B above.

[47] Commenters recognize the negative effects of fraud and deceit. *See, e.g.*, Greenberger at 1 (arguing that excessive speculation, fraud, and illegal manipulation are causing higher gasoline prices); MFA at 1 (''Price manipulation has a corrosive effect on the proper functioning of any market.''); API at 50 (''We agree that the provision of false or misleading pricing information to private reporting entities could be problematic.''); ISDA at 19 (''ISDA . . . both supports and encourages the development of dynamic markets undistorted by manipulative trading activity.''); Sutherland at 3 (''[O]il marketers and traders often are the first victims of unfair business practices. They, therefore, support efforts by Congress to deter manipulation and the use of deceptive devices.''); Flint Hills at 18 (''[R]estrictions on disclosures that 'leave customers in the dark' may be inimical to the smooth operations of the relevant markets. Of course, false or deceptive reports can also raise familiar [sic] problems.''); CAPP at 1 (''CAPP recognizes that fraud and manipulation pose a potential threat to the successful and efficient functioning of petroleum markets in North America.'').

[48] Some commenters opine on the meaning of the language: ''in the public interest or for the protection of United States citizens.'' *See, e.g.*, CFDR at 4-5 (''The public interest and the protection of U.S. citizens . . . are best served by the adoption of a clear legal standard for market manipulation.'' CFDR goes on to say that a clear legal standard ''will allow market participants to conduct their business with a clear understanding of the relevant legal boundaries.''); MFA at 17 (''FTC rules that purport to overlap with CFTC exclusive jurisdiction would not serve the public interest,''). Noting the absence of the phrase ''public interest'' from other laws the Commission enforces, Flint Hills states that Congress must have intended that the Commission rely upon its experience in promoting the public interest through enforcement of the consumer protection and antitrust principles governed by Section 5 of the FTC Act. *See* Flint Hills at 17-18.

[49] 42 U.S.C. 17301.

[50] 42 U.S.C. 17301. The statute itself does not describe the manipulative or deceptive devices or contrivances that are illegal. Rather, it vests in the FTC discretionary rulemaking authority to identify such conduct.

[51] ABA at 3.

[52] As the ANPR discusses in detail, the Commission studied SEC, FERC, and CFTC enabling statutes, and their respective implementing regulations, and asked questions in the ANPR about whether these existing regulatory schemes should serve as a model for a FTC Rule. 73 FR at 25616-25618.

[53] 15 U.S.C. 78j(b).

[54] *See, e.g.*, ABA at 2 (asserting that ''Section 811 is modeled on FERC and SEC authority to challenge deceptive conduct''); Greenberger at 27 (''Congress modeled the FTC's new 2007 anti-manipulation provision on 10(b) of the [SEA] and Rule 10b-5 to once again make it clear . . . that the FTC must use the extensive securities precedent to guide its manipulation investigations in the petroleum markets.''); CFDR at 3 (recognizing that the language of Section 811 is ''effectively identical to the anti-manipulation proscriptions found in Section 10(b) . . . of the [SEA], as amended''); Sutherland at 4 (''Congress, in fashioning Section 811, used language similar to that used in the Energy Policy Act of 2005 . . . which in turn drew upon the securities laws . . . .''); Gregoire at 1 (arguing that the Commission's ''authority is very similar to the

Continued

language — ''manipulative or deceptive device or contrivance'' — when it gave FERC anti-manipulation authority over electricity and natural gas under the Energy Policy Act of 2005 (''EPAct 2005''). In doing so, Congress specifically instructed FERC to define the terms ''any manipulative or deceptive device or contrivance'' ''as those terms are used in [SEA Section 10(b)].''[55] The use of this language suggests that any proposed FTC Rule should follow the contours of SEC Rule 10b-5, promulgated by the SEC pursuant to that agency's market manipulation authority.[56]

Floor statements made in connection with a predecessor bill to Subtitle B of EISA[57] and correspondence from Congress regarding EISA[58] support the Commission's decision to model its proposed Rule on SEC Rule 10b-5. Thus, the language of the statute, taken together with other indicators of Congressional expectations, suggests that any proposed FTC market manipulation rule should be modeled on SEC Rule 10b-5.

The Commission believes that, in addition to adhering to the mandate implied by the statutory language, there are several advantages to modeling its proposed Rule on SEC Rule 10b-5. The Commission believes that using an existing anti-fraud market manipulation regulatory scheme as a model for the proposed Rule is beneficial for market participants because it leverages the significant body of legal precedent interpreting that scheme.[59] This determination is consistent with the views of some commenters who assert that SEC Rule 10b-5 provides a well-developed framework for the FTC to follow.[60] Moreover, using an established regulatory scheme as the basis for the proposed Rule should reduce regulatory uncertainty and thereby assure greater compliance.

The structure and scope of SEC Rule 10b-5 also provide a useful model for the substantive prohibitions of the proposed Rule. EISA contemplates the FTC using a new authority — separate and apart from antitrust law and FTC Act Section 5 authority — to target manipulation and deception based on the SEC anti-fraud model.[61] By mirroring the established SEC Rule 10b-5, the Commission believes it strikes at the core of what EISA explicitly proscribes — market manipulation.[62]

3. The provisions of the proposed Rule appropriately prohibit fraudulent conduct in wholesale petroleum markets

The Commission believes that an appropriate means to achieve this objective would be to adopt largely the language and structure of SEC Rule 10b-5 in promulgating the proposed Rule.[63] Accordingly, the proposed Rule contains the following conduct prohibitions. First, Section 317.3(a) prohibits the use or employment of any ''device, scheme, or artifice to defraud.'' Second, proposed Rule Section 317.3(b) states that it is a violation of the rule for any person 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.'' Finally, proposed Rule Section 317.3(c) makes it illegal for any person ''[t]o engage in any act, practice, or course of business that operates or would operate as a fraud or deceit upon any person.''[64] The Commission believes that adopting the general conduct prohibitions embodied in SEC Rule 10b-5 provides the necessary flexibility for the Commission to adapt to changing market conditions in enforcing its proposed Rule.[65]

Moreover, the Commission is not invoking the entire body of SEC law in this rulemaking, but rather the anti-fraud provisions of SEC Rule 10b-5. Thus, the proposed Rule does not impose affirmative disclosure or record-keeping obligations, and does not regulate supply decisions or require that market participants provide access to terminals or pipelines.[66] In making this determination, the Commission considered arguments raised by commenters who oppose the promulgation of an SEC-style rule on the grounds that securities markets are qualitatively different from petroleum product markets because securities markets are subject to a significant degree of regulation.[67] The Commission

---

authority Congress previously gave the [FERC] . . . which in turn was based on the statutory authority of the [SEC]''). *See also* Muris at 2 (arguing that ''the statutory language and the legislative history point to the SEC, FERC, and CFTC as relevant regulatory models''); MFA at 19-20 (acknowledging that the provisions of Section 811 were modeled after Section 10(b) of the SEA, but also taking the position that the Commission should not follow its statutory precedent). *Cf.* API at 18 (arguing that EISA does not require the Commission to follow the SEC model in every respect, despite an acknowledgment that Section 811 was modeled after the SEA).

[55] *See* 15 U.S.C. 717c-1; 16 U.S.C. 824v; FERC, *Prohibition of Energy Market Manipulation*, 71 FR 4244, 4246 (Jan. 19, 2006).

[56] 17 CFR 240.10b-5.

[57] Energy Emergency Consumer Protection Act of 2005, S.1735, 109th Cong. (2005). In these remarks, Senator Maria Cantwell stated that the market manipulation provisions in that bill would ensure ''the same kind of anti-manipulation and transparency rules as those with which electricity and natural gas industries must comply [under the EPAct 2005].'' The FERC rules, to which the Senator refers, similarly derive from the SEA, and target fraudulent marketplace conduct. 151 Cong. Rec. S10238 (daily ed. Sept. 20, 2005).

[58] An April 2008 letter to the Commission from Senators Maria Cantwell, Olympia Snowe, Byron Dorgan, Daniel Inouye, and Gordon Smith also supports the interpretation that EISA is designed to provide the FTC with anti-fraud market manipulation authority similar to that already vested in the SEC and recently given to FERC in the EPAct 2005. Letter from Senators Cantwell, Snowe, Dorgan, Inouye, and Smith to FTC Chairman Kovacic and Commissioners Harbour, Leibowitz, and Rosch (Apr. 8, 2008), *available at* (*http://www.ftc.gov/os/comments/marketmanipulation/congress/080414cantwell.pdf*).

See EPAct 2005, 42 U.S.C. 15801-16503.

[59] *See, e.g.*, Greenberger at 23, 25, 27; Gregoire at 1; CFDR at 11, 13; SIGMA at 6.

[60] *See, e.g.*, Gregoire at 1; Greenberger at 23-25, 27; CFDR at 11, 13. *But see* CAPP at 2 (arguing that EISA was enacted in anticipation of market abuses, not in response to them, and thus is not analogous to SEC rules); Sutherland at 4 (arguing that SEC rules operate in a highly regulated environment and that modeling a rule that is aimed at the comparatively unregulated petroleum industry after SEC rules would be inappropriate).

[61] As the Commission noted in the ANPR, ''nothing in connection with this Section 811 Rulemaking, any subsequently enacted rules, or related efforts should be construed to alter the standards associated with establishing a deceptive practice or an unfair practice in a case brought by the Commission.'' 73 FR at 25619 n.55.

[62] The Commission believes this careful tailoring addresses concerns that a new rule prohibiting market manipulation in the petroleum industry might interfere with legitimate, pro-consumer business behavior. *See generally* API at 16 (''New rules have the potential to over-deter, discouraging beneficial market activity.''); Sutherland at 2 (stating that the FTC must not ''deter important and economically efficient business activities that are fundamental to the energy markets'').

[63] Several commenters, while not necessarily advocating a FTC rule, appear to support a rule based on SEC Rule 10b-5. *See, e.g.*, Gregoire at 1 (''The FTC should be similarly informed by the FERC and SEC rules and model its rules on theirs.''); Greenberger at 22 (urging the FTC to model its rule after FERC's rule because FERC resolved its ''major interpretative issues'' by ''adopting the anti-manipulation definitions within Section 10(b) of the [SEA]''); API at 17 (recognizing the value of FERC and SEC approaches to an extent). *See also* CFDR at 3. The determination to prohibit manipulative and deceptive conduct under the proposed Rule does not preclude the Commission from finding that other conduct violates EISA and any other applicable laws or rules that the Commission enforces.

[64] Proposed Rule 317.3(a)-(c).

[65] Any ''laundry list'' of specifically proscribed conduct could quickly become out of date, requiring that the Commission frequently revisit the rulemaking process. *See also* Muris at 11 (''Because defining the specific deceptions that might manipulate wholesale markets is virtually impossible, any manipulation rule will of necessity be more general.'').

[66] *See Chiarella v. United States*, 445 U.S. 222, 235 (1980) (stating that SEC Rule 10b-5 did not create a duty of disclosure; rather, the duty to disclose was created by a fiduciary relationship between traders).

[67] *See, e.g.*, PMAA at 3 (arguing that given the differences between regulated and unregulated markets, ''existing precedents should be looked to as informational only''); Sutherland at 4 (stating that ''as a rule'' SEC market manipulation standards

believes that excluding these affirmative duties should alleviate commenter concerns and make clear that the Commission is using only the relevant portions of the SEC regulatory model in crafting the proposed Rule.[68]

In crafting the proposed Rule, the Commission intends to prohibit manipulative and deceptive conduct without discouraging pro-competitive or otherwise desirable market practices. Following the example of SEC Rule 10b-5, the Commission believes that its proposed Rule would contribute to well-functioning marketplaces. Markets function best when market participants can presume that the best available information relevant to their decision-making is not distorted.[69] Manipulative or deceptive conduct distorts the marketplace signals that guide resource allocation.[70] When market participants react to distorted market price signals, short-term purchase and sale decisions may be altered and long-term capital investments may be adversely influenced. Finally, if manipulative or deceptive conduct recurs, it may increase the cost of doing business if market participants are required to invest in defensive measures.[71] The Commission believes eliminating or reducing these effects is in the public interest.

The Commission addresses the elements of a cause of action under the proposed Rule in Section II.E. This discussion should provide guidance to the industry on how the Commission would enforce the proposed Rule. The Commission would not likely act except in cases where an entity: (1) uses a fraudulent device, scheme or artifice, or makes a material misrepresentation or a material omission, or engages in any act, practice, or course of business that operates or would operate as a fraud or deceit upon any entity; (2) with scienter; (3) in connection with the purchase or sale of crude oil, gasoline, or petroleum distillates at wholesale.[72] For example, false reporting to private data reporting services or misleading announcements by refineries, pipelines, or investment banks done with the requisite scienter, in connection with the purchase or sale of a covered product at wholesale, would be covered by the proposed Rule. Similarly, trading practices in physical or futures markets would also be covered if the conduct met all the elements of a cause of action.

In sum, the Commission has paid careful attention to maximizing the proposed Rule's benefits while minimizing its costs from both a legal and an economic perspective. The Commission believes that the proposed Rule, by specifically targeting manipulative or deceptive conduct, not only achieves the goals of Section 811, but also complements the Commission's antitrust and consumer protection missions. The Commission seeks comments on the specific formulation of the proposed Rule, and in particular on whether using SEC Rule 10b-5 as a model is appropriate.

B. Section 317.1 - Scope

Section 813 makes clear that the Commission possesses the same jurisdiction and power under Subtitle B as it possesses under the FTC Act.[73] Because EISA does not expand or contract Commission jurisdiction or the scope of any rule's coverage, any person to which Commission jurisdiction under the FTC Act does not extend would also lie outside Commission jurisdiction under the proposed Rule. Conversely, any person currently subject to Commission jurisdiction under the FTC Act would be covered by the proposed Rule.[74]

In response to the ANPR, the Commission received some comments requesting that the Commission clarify the scope of the application of any proposed rule. One commenter, AOPL, expresses the belief that Commission jurisdiction does not extend to pipelines.[75] Another opines that any rule could not and should not reach any non-profits or banks.[76] Several suggest that any proposed rule should not, by its terms or construction, reach futures trading activities regulated by the CFTC, including any futures market manipulation.[77]

As to pipelines in particular, Commission jurisdiction under Section 5 of the FTC Act does not extend to common carriers that are subject to the ICA and its amendments,[78] including the ICC Termination Act of 1994. Those acts apply to interstate rail, trucking and busing; domestic offshore water carriage; and pipelines carrying commodities *other than water, gas, or oil.*[79] Accordingly, oil and gas pipelines enjoy no exemption from the FTC Act and would be subject to the proposed Rule.[80]

---

are not useful precedents for a Section 811 rule); ISDA at 12 (''Securities precedent is not illuminating with respect to how to develop a rule to prosecute manipulation in wholesale, physical Petroleum Products markets because there are substantial differences between the market frameworks.''). *See also* API at 19-20, 30; CAPP at 2-3.

[68] Many commenters raise concerns about a FTC rule that would impose affirmative duties or obligations on persons covered by the rule. For a discussion of any potential duties or obligations imposed by the proposed Rule, *see* Section II.B.4 below.

[69] Several commenters discuss the consequences of manipulative or deceptive conduct on the overall health of the marketplace and note the importance of ensuring a legitimate price discovery process. *See, e.g.*, Muris at 6 (''Fraudulent and deceptive conduct undermine the market's competitive process because they impair efficient price discovery, which is the process of incorporating information in the market price.''); Platts at 2 (''Confidence in price discovery processes is vital for market participants, regulators and the public alike . . . .''); MFA at 1 (''Price manipulation has a corrosive effect on the proper functioning of any market.'').

[70] In a market economy, resources are allocated to productive activities on the basis of impersonal price signals that reflect both consumer preferences and profit opportunities. When resources flow to their highest valued use, social wealth is maximized. Intentional manipulative or deceptive conduct impedes this process. *See also* Milton Friedman & Rose Friedman, *Free to Choose*, 14-18 (Harcourt 1980); Friedrich Hayek, *The Use of Knowledge in Society*, 35(4) Am. Econ. Rev. 519 (1945). For example, disseminating misinformation that is relied on by market participants may prevent wealth-generating exchanges from taking place. If so, an opportunity cost is imposed on society at large.

[71] Such investments, although perceived as necessary by the investor, are socially wasteful because they utilize resources that otherwise might have been allocated to wealth-generating activities.

[72] Section II.E of this NPRM also addresses whether actual price effects should be a required element of proof.

[73] ''This subtitle shall be enforced by the Federal Trade Commission 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 this subtitle.'' 42 U.S.C. 17303 (emphasis added).

[74] Moreover, any person subject to Commission jurisdiction must comply with Section 812 and with any rule promulgated under Section 811. Several commenters asked the FTC to clarify its proposed definition of ''person.'' *See e.g.*, ISDA at 4 n.5; AOPL at 1.

[75] AOPL at 1 (''Common carrier oil pipelines subject to the Interstate Commerce Act (''ICA'') are exempt from the Commission's jurisdiction under the [FTC Act] and thus are also exempt from the Commission's jurisdiction under the EISA.''). Conversely, Navajo Nation asserts that FERC's regulations are not directly applicable to the crude oil market. Therefore the Commission should tailor a rule to ''eliminate anticompetitive practices that [FERC] may have determined are beyond its jurisdiction . . . .'' Navajo Nation at 4.

[76] DRG at 3-4. *Cf.* Greenberger at 28-29 (arguing that the Commission has authority to investigate banks for manipulation in the crude oil markets).

[77] *See, e.g.*, CFTC at 2 (''[W]e urge the FTC to avoid proposing regulatory measures that could lead to futures-market manipulation charges based solely on the downstream effects of futures exchange prices on off-exchange prices in physical or cash-market transactions, and that may be inconsistent or duplicative of CEA provisions.''); MFA at 13-14 (''But futures market manipulation claims do involve both actual futures transactions and the core price discovery operations of the futures markets and should be outside the limits of Section 811 due to the CEA's exclusive jurisdiction provision.''). *See also* Flint Hills at 12; Sutherland at 8; Hess at 12 n.10; CFDR at 6 n.4.

[78] 49 U.S.C. 10101-16106. Section 4 of the FTC Act defines the '''Acts to regulate commerce''' to mean, *inter alia*, ''subtitle IV of title 49 . . . and all Acts amendatory thereof and supplementary thereto.'' 15 U.S.C. 44.

[79] 49 U.S.C. 4(c) (emphasis added).

[80] 15 U.S.C. 45(a)(2).

With respect to banks, Commission jurisdiction under Section 5 of the FTC Act does not extend to ''banks, savings and loan institutions described in section 57a(f)(3) of this title, [and] Federal credit unions described in section 57a(f)(4) of this title.''[81] Nevertheless, the Commission does have jurisdiction over entities affiliated with or contracting with banks that are not themselves banks.[82] Whether any particular person would be exempt from the FTC Act or the proposed Rule as a ''bank'' must be assessed on a case-by-case basis.[83]

As to non-profit organizations, although Commission jurisdiction under Section 5 of the FTC Act extends to ''corporations,'' that term does not cover any organization that does not carry on business for its own profit or that of its members.[84] The form of a corporation as a ''non-profit'' is not necessarily determinative, however. Organizations with both non-profit and for-profit activities may be subject to the FTC Act. For example, in *California Dental Ass'n v. FTC*,[85] the Supreme Court held that the FTC Act applies to anti-competitive practices used by non-profit associations whose activities provide substantial economic benefits to the businesses of their for-profit members. Moreover, the Commission has asserted that its jurisdiction over ''persons'' under Section 5 of the FTC Act extends to nonprofit municipal corporations such as the City of New Orleans and the City of Minneapolis.[86] Whether any particular person would be exempt from the FTC Act or the proposed Rule as a non-profit must be assessed on a case-by-case basis.

Commenters argue that a safe harbor provision or other explicit exemption for the futures markets is necessary to avoid an overlap with the CFTC's exclusive jurisdiction under Section 2 of the CEA.[87] According to commenters, including the CFTC, such an overlap potentially would create duplicative or inconsistent regulatory requirements and thus undermine a uniform regulatory scheme that Congress sought to establish for the futures markets under the CEA.[88] Several other commenters express concern that even if the Commission could avoid inconsistent regulatory requirements, market participants would still be unfairly burdened by duplicative enforcement.[89]

The Commission does not believe a safe harbor provision or exemption from the proposed Rule is warranted. CFTC authority over manipulation relating to commodities futures markets is not exclusive and, moreover, is separate from CFTC's exclusive authority under CEA Section 2(a)(1)(A).[90] The Commission believes the proper approach, and the one courts favor, is to give full effect to all statutory schemes that may address the conduct at issue here.[91] Nothing in EISA itself indicates that Congress intended to exempt conduct in the futures markets from the reach of any rule that the Commission might promulgate under Section 811. Accordingly, the Commission believes that its proposed Rule proscribes manipulative or deceptive conduct in wholesale futures markets and it would not improperly intrude upon the jurisdiction of the CFTC or any other agency whose authority may overlap in whole or in part with respect to such activities.[92]

The proposed Rule is not intended to impose contradictory requirements on regulated entities in the futures markets or otherwise. To the extent, if any, that the proposed Rule's requirements could duplicate requirements already

---

[81] *Id.*

[82] *See Minnesota v. Fleet Mortg. Corp.*, 181 F. Supp. 2d 995, 1000 (D. Minn. 2001).

[83] Investment banks (*e.g.*, Goldman Sachs and Morgan Stanley), many of which are voluntarily regulated by the SEC, are not necessarily ''banks'' as that term is typically defined under traditional banking law. *See* 12 U.S.C. 1813(a)(1). Therefore, whether an investment bank would be covered by the proposed FTC Rule must be determined on a case-by-case basis.

[84] 15 U.S.C. 44 (defining ''corporation'').

[85] 526 U.S. 756 (1999).

[86] *See In the Matter of The City of New Orleans*, 105 F.T.C. 1, 1-2 (1985); *In the Matter of The City of Minneapolis*, 105 F.T.C 304, 305 (1985). In each complaint, the Commission alleged that the respondent was a ''municipal corporation'' and ''a *person* or corporation within the meaning of the [FTC Act], as amended (15 U.S.C. 45).'' (emphasis added). *See* 105 F.T.C. at 5-6; 105 F.T.C. at 308-309. The Commission subsequently issued orders dismissing the complaints on other grounds.

[87] Section 2 of the CEA states that ''[t]he Commission shall have exclusive jurisdiction . . . with respect to accounts, agreements . . . and transactions involving contracts of sale of a commodity for future delivery, traded or executed on a contract market designated . . . pursuant to section 7 or 7a of this title'' of the CEA. *See* CEA 2(a)(1)(A); 7 U.S.C. 2(a)(1)(A). *See e.g.*, MFA at 5 (''[Requesting] that the Commission propose and adopt a safe harbor provision or other appropriate exception from its rules confirming that nothing in its Section 811 rules would govern or apply . . . 'with respect to accounts, agreements . . . and transactions involving' futures and options markets and other trading instruments which are subject to CFTC exclusive jurisdiction.''); CFTC at 2 (''[T]he FTC might also consider specifically excluding from a new rule the trading of futures on registered entities under the CEA, which are within the CFTC's exclusive purview under that statute.'').

[88] *See, e.g.*, MFA at 3-4 (arguing that Congress enacted the CEA's ''exclusive jurisdiction'' provision to ensure that CFTC regulations and the CEA would be the sole legal standards applied to U.S. futures trading); CFTC at 1 (''The CFTC's exclusive jurisdiction over trading in futures is based upon the concern that futures markets remain subject to a single, federal regulatory standard.''). *See also* Flint Hills at 12 (arguing that a rule overlapping with the CFTC's broad oversight over futures trading markets could subject market participants to ''differing standards of conduct and multiple levels of liability''); API at 14 (''It is unnecessary and undesirable to overlay a parallel system of FTC regulation to address the same conduct and markets already subject to oversight by the CFTC.'').

[89] *See, e.g.*, Sutherland at 8 (arguing that private parties would be unfairly burdened by ''multiple enforcement actions by federal agencies examining identical facts or suffer double jeopardy in terms of fines and disgorgement orders''); ICE at 2 (''Duplicative enforcement and regulation is unduly burdensome and could possibly deprive market participants of due process.''); NPGA at 2 (''A flawed regulatory scheme may result in . . . penalties being cumulative and ultimately excessive.'').

[90] *See* CEA 2(a)(1)(A) (CFTC exclusive jurisdiction is not intended to remove jurisdiction conferred to other agencies under other laws); *FTC v. Ken Roberts Co.*, 276 F.3d 583, 593 (D.C. Cir. 2001) (holding that the Commission's authority under the FTC Act to investigate deceptive marketing of commodities trading courses did not conflict with the CFTC's exclusive authority under CEA 2(a)(1)(A)); *SEC v. Hopper*, No. 04-1054, 2006 U.S. Dist. LEXIS 17772, at *35 (S.D. Tex. Mar. 24, 2006) (allowing the SEC to challenge fraudulent and deceptive energy trading transactions under Rule 10b-5, despite assertions that the CFTC and FERC had exclusive jurisdiction to regulate commodities transactions and interstate wholesale electricity rates, respectively). *Cf.* CEA 9(a)(2), 7 U.S.C. 13(a)(2) (making it unlawful for ''[a]ny person to manipulate or attempt to manipulate the price of any commodity in interstate commerce''); 7 U.S.C. 13b (authorizing the CFTC to issue cease and desist orders against commodities price manipulation); *United States v. Reliant Energy Serv.*, 420 F. Supp. 2d 1043, 1062 (N.D. Cal. 2006) (holding that FERC's exclusive jurisdiction to regulate wholesale electricity markets did not bar CFTC enforcement action against commodities price manipulation); *Amaranth Advisors LLC,* 120 F.E.R.C. ¶ 61,085; 2007 FERC LEXIS 1463, at *52 (July 26, 2007) (show cause order) (observing that the ''CFTC has jurisdiction over trading on its regulated exchanges [under the CEA], we have jurisdiction [under the EPAct 2005] over certain types of natural gas and electric markets, and where these markets are interconnected, both agencies have jurisdiction to prohibit market manipulation.'').

[91] *See Ken Roberts*, 276 F.3d at 593 (''[In] 'an age of overlapping and concurring regulatory jurisdiction,''' declining to conclude ''that one agency may not regulate merely because another may.'') (citations omitted).

[92] Likewise, certain commenters urge the Commission to avoid any overlap with FERC authority to regulate certain energy markets. *See, e.g.*, API at 15 n.26 (noting that a rule reaching oil pipelines would address conduct and markets already subject to FERC regulation); Plains at 1 (''FERC has extensive authority over oil pipelines and the adoption of an anti-manipulation provision applicable to these same entities by another regulatory authority creates a risk of conflicting and inconsistent standards, with resulting uncertainty.''); AOPL at 12, 20 (arguing that the Commission should avoid conflicts of jurisdiction with FERC because the cost of inconsistent and overlapping enforcement standards would be substantial). FERC's authority with respect to price manipulation in such markets is not exclusive, however, and would not preclude the Commission from promulgating an anti-manipulation rule that may reach conduct also subject to FERC's authority. *See United States v. Reliant Energy Serv.*, 420 F. Supp. 2d 1043 (N.D. Cal. 2006).

established by other agencies for such markets, it would not impose additional compliance costs. Although the Commission acknowledges that different agencies could simultaneously initiate enforcement action with respect to the same activities, the Commission has had a longstanding practice of coordinating its enforcement efforts with agencies with which it shares overlapping jurisdiction.[93] The Commission expects that it would continue that practice here, as feasible and appropriate, to ensure fairness to regulated entities and to conserve enforcement resources and maximize agency efficiency.[94] The Commission seeks additional comments on the scope of persons covered by the proposed Rule.

C. Section 317.2: Definitions

The proposed Rule sets forth five definitions, adding precision to the following terms used in EISA: ''crude oil;'' ''gasoline;'' ''person;'' ''petroleum distillates;'' and ''wholesale.'' The proposed definitions establish the scope of the proposed Rule's coverage and provide guidance as to the Commission's intended enforcement of the proposed Rule. It is important to note, however, that Section 811 prohibits manipulative or deceptive devices or contrivances ''in connection with'' the purchase or sale of the defined commodities at wholesale. As discussed in Section II.E.3 below, the proposed Rule would also reach manipulative conduct that extends beyond the defined terms if that conduct directly or indirectly impacts wholesale prices for the covered products.[95] The Commission solicits comments on these proposed definitions, as well as any alternative or additional definitions, or other comments on this Section of the proposed Rule.

1. Section 317.2(a): Crude oil

The proposed Rule is intended to capture the direct or indirect use or employment of any manipulative or deceptive device or contrivance in connection with the wholesale purchase or sale of enumerated petroleum products, including crude oil. Section 317.2(a) of the proposed Rule defines ''crude oil'' to mean: ''the mixture of hydrocarbons that exist: (1) in liquid phase in natural underground reservoirs and which remain liquid at atmospheric pressure after passing through separating facilities, or (2) as shale oil or tar sands requiring further processing for sale as a refinery feedstock.'' As defined, ''crude oil,'' includes liquid crude oil and any hydrocarbon form that can be processed into a refinery feedstock. ''Crude oil'' does not include natural gas, natural gas liquids, or non-crude refinery feedstocks.

2. Section 317.2(b): ''Gasoline''

The proposed Rule also covers the use or employment of any manipulative or deceptive device or contrivance in connection with the wholesale purchase or sale of ''gasoline.'' Section 317.2(b) of the proposed Rule defines ''gasoline'' to mean: ''(1) finished gasoline, including, but not limited to, conventional, reformulated, and oxygenated blends, and (2) conventional and reformulated gasoline blendstock for oxygenate blending.'' The proposed definition of ''gasoline'' is intended to capture those commodities regularly traded as finished products or as products requiring only oxygenate blending to be finished.

Manipulative or deceptive conduct involving non-petroleum based commodities that directly or indirectly affect the price of gasoline (*e.g.*, ethanol, reformate, or alkylate that may be blended into the finished product) may be the subject of Commission enforcement under the proposed Rule.[96] For example, although ethanol is excluded from the definition of ''gasoline,'' the Commission believes that manipulation of ethanol may be covered under the proposed Rule where changes in ethanol prices directly or indirectly affect wholesale gasoline prices.

3. Section 317.2(c): ''Person''

The proposed Rule makes it unlawful for any ''person'' to engage in manipulative or deceptive conduct in connection with the wholesale purchase or sale of the enumerated petroleum products. Section 317.2(c) defines the term ''person'' to mean: ''any individual, group, unincorporated association, limited or general partnership, corporation, or other business entity.'' This definition is identical to that used in other Commission rules,[97] and is consistent with the jurisdictional reach of the FTC Act.[98]

4. Section 317.2(d): ''Petroleum distillates''

The proposed Rule also covers the use or employment of a manipulative or deceptive device or contrivance in connection with the wholesale purchase or sale of ''petroleum distillates.'' Section 317.2(d) of the proposed Rule defines ''petroleum distillates'' to mean: ''(1) jet fuels, including, but not limited to, all commercial and military specification jet fuels, and (2) diesel fuels and fuel oils, including, but not limited to, No. 1, No. 2, and No. 4 diesel fuel, and No. 1, No. 2, and No. 4 fuel oil.''

''Petroleum distillates'' include the middle distillate refinery streams from heavy fuel oils to lighter products such as on-road diesel, heating oil, and kerosene-based jet fuels. Similar to the Commission's proposed definition of ''gasoline,'' the definition of ''petroleum distillates'' is limited to finished fuel products, other than ''gasoline'' produced at a refinery or blended in tank at a terminal. The proposed definition of ''petroleum distillates'' also responds to the request of ANPR commenters that the Commission

[93] One commenter warns that poor coordination between the Commission and other agencies could lead to a situation wherein ''multiple agencies may pursue certain potential violations, while other violations are left unchecked because each oversight agency expects or desires another to take the appropriate action.'' NPGA at 2. To prevent such pitfalls of regulatory overlap, NPGA encourages the issuance of an Executive Order that clearly draws lines of jurisdiction among agencies. NPGA at 3.

[94] *See, e.g.*, PMAA at 6 (urging the formation of a standing inter-agency task force on market manipulation charged with coordination and information sharing tasks); ISDA at 4 (encouraging the Commission to work with the CFTC to ensure that both agencies implement their anti-manipulation enforcement programs in a coordinated and efficient manner); CFDR at 6 (encouraging the Commission to work with the CFTC and FERC to adopt a clear anti-manipulation standard for the wholesale crude oil, gasoline and petroleum distillates markets); ICE at 2 (''The Commission should coordinate with FERC and the CFTC to define their respective roles in the energy markets.''); SIGMA at 10 (urging the Commission to coordinate its present rulemaking with the CFTC to ''ensure that regulated parties are governed appropriately''); MFA at 22 (stating the Commission could avoid duplicative efforts if it developed a formal or informal arrangement to coordinate investigatory activities and even enforcement actions with the CFTC); Sutherland at 8 (urging the Commission and the CFTC to ''develop clear rules as to which agency will assume jurisdiction when the futures and financial market conditions are not in issue'').

[95] The Commission does not believe, as some commenters argue, that the terms in Section 811 preclude the Commission from reaching supply decisions or services. *See, e.g.*, API at 25-26 (urging the Commission to avoid construing the language of Section 811 to apply to supply decisions unconnected with a wholesale transaction); AOPL at 10 (arguing that EISA does not expressly cover ''transportation and related services provided by oil pipelines'').

[96] Two commenters express concern about practices involving ethanol. TOMA at 2-3; IPMA at 2-3. *But see* ISDA at 19 (encouraging the Commission to ''exclude non-petroleum based ethanol products from the definition of petroleum distillates'').

[97] *See, e.g.*, Telemarketing Sales Rule, 16 CFR Part 310; Disclosure Requirements and Prohibitions Concerning Franchising, 16 CFR Part 436.

[98] 73 FR at 25616 n.14. For a discussion of comments submitted on the scope of the application of the proposed rule, *see* Section II.B.

specifically define the term ''petroleum distillates'' more precisely.[99]

5. Section 317.2(e): ''Wholesale''

As previously noted, the proposed Rule prohibits the use or employment of a manipulative or deceptive device or contrivance in connection with the wholesale purchase or sale of enumerated petroleum products — crude oil, gasoline, and petroleum distillates. The proposed Rule defines the term ''wholesale'' to mean: ''purchases or sales at the terminal rack level or upstream of the terminal rack level. Transactions conducted at wholesale do not include retail gasoline sales to consumers.''

This definition is intended to make it clear that the proposed Rule would apply to any conduct that directly or indirectly affects market prices of an enumerated petroleum product at the terminal rack level or upstream of the terminal rack level.[100] The proposed definition of ''wholesale'' also makes explicit that the proposed Rule does not apply to ordinary sales of gasoline or other covered products to consumers at gasoline stations or other retail establishments.

The Commission disagrees with commenters that define wholesale to exclude transactions at the terminal rack level. API, for example, asserts that wholesale transactions should not include terminal rack transactions, Dealer Tankwagon sales to dealers, and other terminal-level sales.[101] The Department of Energy's Energy Information Administration (''EIA''), however, defines a ''wholesale price'' to include rack prices.[102] Moreover, a common definition of ''wholesale'' is ''the sale of goods in quantity, as to retailers or jobbers, for resale.''[103] Accordingly, the Commission believes it is appropriate for the proposed Rule to cover transactions at the terminal level.

D. Section 317.3: Prohibited Practices

The Commission intends its proposed Rule to prohibit manipulative or deceptive conduct in connection with the purchase or sale of crude oil, gasoline, or petroleum distillates at wholesale. Specifically, Section 317.3 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,
>
> (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.

1. Section 317.3(a): Device, scheme, or artifice to defraud

Section 317.3(a) prohibits the use or employment of any ''device, scheme, or artifice to defraud.'' As noted before, this language is derived from SEA Section 10(b) and SEC Rule 10b-5. It is intended to be a broad anti-fraud provision that will enable the Commission to police all forms of fraud and manipulation that affect wholesale petroleum markets. At the same time, the term ''fraud'' is not intended to cover every act that happens to affect a wholesale market for petroleum. Rather, as discussed in greater detail in the required elements section of this NPRM, it covers intentional acts that obstruct or impair wholesale petroleum markets.[104] Determining whether specific conduct constitutes fraud is a question of fact that requires a case-by-case determination in light of all the circumstances.

2. Section 317.3(b): False material facts and omissions of material fact

Section 317.3(b) of the proposed Rule prohibits covered entities from misrepresenting, and in some instances omitting, material information in a wholesale petroleum market. Consistent with securities law, a fact is material if there is a substantial likelihood that a reasonable market participant would consider it in making its decision to transact because the material fact significantly alters the total mix of information available.[105] As the Supreme Court has stated, ''[t]he 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.''[106] Thus, it is often not enough simply to show that a particular statement is false or incomplete if the misrepresented fact is otherwise insignificant.[107] However, under securities law precedent, it is not necessary to prove that an investor would have acted differently if he or she had known the actual truth of the matter.[108]

a. Misrepresentations of material fact

One type of misrepresentation of material fact captured by the proposed Rule is the reporting of false or misleading information to government agencies, to third-party reporting services, and to the public through corporate announcements. Many commenters agree that this type of behavior is problematic because industry participants rely on such market information to conduct business transactions.[109] For example, false or deceptive announcements by refiners or pipelines, in particular, are likely to have an adverse impact on the market and the pricing of petroleum products, thereby harming market participants and ultimately consumers, because of the close attention paid to even slight changes in supply or inventory. Similarly, the reporting of false or misleading information to private data reporting services may have an impact on market prices and supply decisions.[110]

b. Omissions of material information

Section 317.3(b) imposes no general duty upon covered entities to disclose information such as cost and volume data. Nonetheless, Section 317.3(b) prohibits omissions of material fact that

---

[99] *See, e.g.*, MFA at 2 n.2 (encouraging the Commission to define the term ''petroleum distillate''); API at 23 n.42 (proposing that the definition of ''petroleum distillates'' include diesel, kerosene, jet fuel, and home heating oil); ISDA at 19 (proposing that the definition of ''petroleum distillates'' include diesel, home heating oil, and jet fuel).

[100] *See, e.g.*, CFDR at 3 n.1; PMAA at 4-5.

[101] API at 24-25. *See also* PMAA at 4-5 (urging the Commission to exclude activities that occur at the terminal rack level).

[102] (*http://www.eia.doe.gov/glossary/glossary_w.htm*).

[103] (*http://dictionary.reference.com/browse/wholesale*).

[104] *See, e.g.*, *Dennis v. United States*, 384 U.S. 855, 861 (1966) (noting that fraud within the meaning of a statute need not be confined to the common law definition of fraud: any false statement, misrepresentation or deceit may suffice).

[105] *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438 (1976) sets forth the ''total mix'' or ''substantial likelihood'' test of materiality: a substantial likelihood that the disclosure of the omitted fact would have been viewed by a reasonable investor as having significantly altered the total mix of information made available. *Accord Basic, Inc. v. Levinson*, 485 U.S. 224, 231-2 (1988) (adopting *TSC Indus.* test for materiality in Section 10(b) and Rule 10b-5 context).

[106] *Basic, Inc.* 485 U.S. at 234.

[107] *Id.* at 238.

[108] *See Folger Adam Co. v. PMI Indus., Inc.*, 938 F.2d 1529, 1534 (2d Cir. 1991), *cert. denied*, 502 U.S. 983 (1991).

[109] API at 50; Plains at 4; PMAA at 7 (urging the Commission to prohibit the dissemination of false or misleading information made with the intent to defraud).

[110] Congress recognized the importance of truthful reporting by adopting Section 812 of EISA, which prohibits false reporting to the government. 42 U.S.C. 17302. *See* Platts at 2 (''Confidence in price discovery processes is vital for market participants, regulators and the public alike . . . .'').

are necessary to ensure that a previously made statement is not misleading.[111] Accordingly, there may be a violation of Section 317.3(b) if a covered entity voluntarily provides information — or is compelled to provide information by statute, order, or regulation — but then fails to disclose a material fact, thereby making the information provided misleading.

3. Section 317.3(c): Conduct operating as a fraud or deceit

Section 317.3(c) of the proposed Rule prohibits any act, practice, or course of business that ''operates or would operate as a fraud or deceit.'' This provision, also modeled after SEC Rule 10b-5, is intended to be a catch-all provision that prohibits any other conduct that constitutes a fraud on wholesale petroleum markets.

In proposing this language — ''operates as a fraud'' — the Commission is mindful of objections raised to the identical language used in the FERC market manipulation rulemaking proceeding. A few commenters to FERC's proposed rule questioned whether the phrase ''would operate as a fraud'' implied that no scienter is required, and some urged FERC specifically to add a scienter requirement to this language in the FERC rule.[112] Following FERC's analysis, the Commission stresses that the phrase ''would operate as a fraud'' is to be read consistently with securities law precedent, meaning that there can be no law violation without a showing of scienter.[113] Commenters to the FERC proceeding also questioned whether this language in the FERC rule is necessary in light of the anti-fraud language in the first section of the FERC rule, which is the same language used in proposed Rule Section 317.3(a).[114] FERC noted in its final rule that the SEC brings numerous cases under this language in SEC Rule 10b-5, and removing this language from the FERC rule would ''create uncertainty by distinguishing the final rule from SEC Rule 10b-5 as to render analogous securities law precedent inapplicable.''[115] That same reasoning applies here as well. Consequently, the Commission has tentatively decided to include subsection (c) (prohibiting conduct operating as a fraud or deceit) in the proposed Rule.

4. Section 317.3 imposes no affirmative duties or obligations upon covered entities

Based upon the comments and its own experience, the Commission chooses at this time not to propose any specific conduct obligations, such as a duty to supply, provide access, or disclose. The Commission in the ANPR requested comment on whether specific types of conduct should be prohibited by an anti-manipulation rule. In response, commenters generally oppose requiring specific conduct standards and focus their comments instead upon whether there should be a duty to: (1) supply product;[116] (2) provide access to terminals or pipelines;[117] or (3) disclose information.[118] The Commission agrees with commenters that the market is generally the best determiner of supply and demand decisions. The Commission does not, however, foreclose the possibility that facts and circumstances may lead it to find that a decision to withhold supply or access that otherwise meets the requirements of the proposed Rule violates the proposed Rule.

The Commission seeks comments on the foregoing, and specifically on the use of the SEC 10b-5 Rule as a model for the conduct prohibitions in the proposed Rule.

E. Elements of Proof Under a Rule Promulgated Pursuant to EISA

The Commission believes that clarifying the elements of a violation under the proposed Rule will reduce regulatory uncertainty and assure greater compliance. In doing so, the Commission has looked to SEC precedent for guidance in the application of the proposed Rule. The Commission has determined that it would not likely act except in cases where an entity: (1) uses a fraudulent device, scheme or artifice, or makes a material misrepresentation or a material omission, or engages in any act, practice, or course of business that operates or would operate as a fraud or deceit upon any entity; (2) with scienter; and (3) in connection with the purchase or sale of crude oil, gasoline, or petroleum distillates at wholesale.

These elements track the elements that courts have prescribed under SEC

[111] Based on securities law precedent, the relevant time period for determining materiality is at the time of the statement or omission, and not in hindsight. *See Ganino v. Citizens Utils. Co.*, 228 F.3d 154, 165 (2d Cir. 2000).

[112] 71 FR at 4252.

[113] *See id.*

[114] *Id.*

[115] *Id.*

[116] Several commenters state that a firm's supply decisions could be considered manipulative or deceptive, but only under limited circumstances. For example, IER recommends that the Commission reach supply decisions only if they are fraudulent, but it does not recommend new rules. IER at 4. Sutherland asserts that the only circumstance in which a firm's market supply decisions could be considered manipulative is if there is evidence of both ''a specific intent to manipulate a properly defined market [which the Commission can properly define, ''given its long experience under the antitrust laws.''] and the power to do so.'' Sutherland at 5 & n.9. Likewise, ISDA states that a rule should reach only supply decisions involving intentional deceptive or anticompetitive conduct resulting in manipulated prices. ISDA at 17.

By contrast, many commenters oppose any attempt to regulate supply decisions. ABA, Flint Hills, and API contend that regulation of supply decisions should be beyond the authority of Section 811. ABA at 6-7; API at 47. *See also* Flint Hills at 19 (''The idea that the Commission can regulate business decisions about how much petroleum to sell, to whom to sell it, and at what price is misguided and potentially dangerous.''); Plains at 2-3 (FTC should not impose a duty to supply). ABA asserts that the antitrust laws are the best vehicle for determining the circumstances in which unilateral supply decisions should be lawful or unlawful. ABA at 6-7. Moreover, ABA, API, and Flint Hills suggest that it would be difficult for the Commission to regulate such complex supply decisions. ABA at 6-7; API at 43-44; Flint Hills at 20.

Similarly, several commenters assert that the Commission should not regulate supply decisions after natural disasters or require firms to release inventory during price spikes. IER, Flint Hills, ABA, and API describe the need for markets to respond freely to natural disasters. IER at 8; Flint Hills at 21; ABA at 7; API at 42-43. ABA and API note the aftermath of Hurricanes Katrina and Rita as an example of the petroleum industry's quick response to a product shortage after a natural disaster. They assert that high prices were short-lived due to the industry's quick response. ABA at 7 n.20; API at 42-43.

[117] Several commenters, API, AOPL, and Plains, oppose any rule imposing a duty to provide access to terminals or pipelines, because a terminal or common carrier pipeline operator may have legitimate business reasons for denying access to third parties, or because FERC already regulates such access and terms of access. API at 15 n.26, 51-52; AOPL at 25-27; Plains at 3. By contrast, Navajo Nation contends that a denial of pipeline access or to ''exchange transportation'' can result in an artificial limitation on a crude producer's ability to reach refineries, which may depress prices, thereby reducing output and discouraging investment to expand crude production. Navajo Nation proposes that the Commission adopt a rule ''prohibiting an owner-operator of an interstate pipeline from denying a request for either actual physical transportation or exchange transportation on the pipeline when the owner-operator or its affiliate is an actual or potential purchaser or consumer of the crude oil supplied by the requesting party,'' unless the owner-operator can provide an enumerated defense. Navajo Nation at 5-7.

[118] Some commenters observe that the SEC has broad authority to regulate the sale of and trade in securities, including imposing disclosure requirements. They voice concern that, by basing the proposed Rule on Section 10(b) and Rule 10b-5, the Commission is adopting the SEC's disclosure requirements as well. Although the proposed Rule is based on SEC law, the Commission is invoking only the SEC's anti-fraud provisions, not the entire body of SEC law in the proposed Rule. In a similar vein, the Commission chooses not to include any record-keeping requirement in the proposed Rule. *See, e.g.*, API at 20 (arguing that the Commission ''should not create new disclosure obligations similar to those imposed on securities market participants by SEC regulations'').

Rule 10b-5.[119] Specifically, in enforcement actions under Rule 10b-5, the SEC must show: (1) a material misrepresentation; (2) in connection with the purchase or sale of a security; (3) scienter; and (4) use of the jurisdictional means.[120] The SEC does not need to prove investor reliance, loss causation, or damages (or harm)[121] because ''the [SEC's] duty is to enforce the remedial and preventive terms of the statute in the public interest, and not merely to police those whose plain violations have already caused demonstrable loss or injury.''[122]

1. The first element is a showing of manipulative conduct

Under the first element, the Commission would need to show a completed manipulative or deceptive act. A manipulative or deceptive act is one that injects information that is materially false, misleading, or deceptive into the marketplace. For example, providing information that is false or misleading to companies that report details of transactions to the industry, such as price reporting services, would satisfy this element. Uncompleted acts would not be sufficient, however. For example, preparing false or misleading data for a reporting service but not actually transmitting it would not likely satisfy this element. Preparing a public announcement containing false or misleading information about sales or available supplies — but not actually making the announcement — also would not likely satisfy this element.

2. The second element is a showing of scienter

Under the second element, the Commission would need to show scienter.[123] As discussed below, a scienter requirement parallels securities law precedent[124] and would help to ensure that the proposed Rule does not chill competitive behavior. Several commenters support such a requirement.[125]

As an initial matter, the conduct addressed by Section 811 — use or employment of a manipulative or deceptive device or contrivance — is substantially similar to the conduct prohibited by Section 10(b) of the SEA.[126] The Supreme Court has determined that this Section 10(b) language connotes ''intentional or willful conduct that is designed to deceive or defraud,'' and has concluded, therefore, that a violation of SEA Section 10(b) and Rule 10b-5 requires scienter; that is, ''a mental state embracing intent to deceive, manipulate, or defraud.''[127] As several commenters argue, SEA Section 10(b) provides the most directly relevant precedents for analyzing the market manipulation standard of Section 811.[128]

Moreover, the Commission believes a showing of recklessness would satisfy the scienter element.[129] This proposal is consistent with the legal and regulatory precedent governing SEC Rule 10b-5. As the Supreme Court has noted, ''[e]very Court of Appeals that has considered the issue [of civil liability under SEA Section 10(b) and Rule 10b-5] has held that a plaintiff may meet the scienter requirement by showing that the defendant acted intentionally or recklessly, though the Circuits differ on the degree of recklessness.''[130]

---

[119] The elements are also similar to those that FERC adopted for its final market manipulation rule. *See* 71 FR at 4253.

[120] *Geman v. SEC*, 334 F.3d 1183, 1192 (10th Cir. 2003); *SEC v. C. Jones & Co.*, 312 F. Supp. 2d 1375, 1379 (D. Colo. 2004); *SEC v. Autocorp Equities, Inc.*, 292 F. Supp. 2d 1310, 1318 (D. Utah 2003); SEA, 10(b), 15 U.S.C. 78j(b); 17 CFR 240.10b-5.

[121] *SEC v. Credit Bancorp,* Ltd., 195 F. Supp. 2d 475, 490-91 (S.D.N.Y. 2002) (*citing SEC v. North Am. Research & Dev. Corp.*, 424 F.2d 63, 84 (2d Cir. 1970)). *See also SEC v. Todt*, 2000 U.S. Dist. LEXIS 2087, at *27 (S.D.N.Y. Feb. 25, 2000), *aff'd*, 2001 U.S. App. LEXIS 6042 (2d Cir. 2001); *SEC v. Norton*, 1997 U.S. Dist. LEXIS 15167, at * 9 n.2 (S.D.N.Y. Oct. 3, 1997); 71 FR 4244, 4253; 3 Thomas Lee Hazen, Treatise on the Law of Securities Regulation 12.1 (5th ed. 2005) (''[A] successful government prosecution does not depend on a showing the price was actually driven above or below the security's fair value. It is sufficient to establish that the manipulator engaged in conduct calculated to artificially affect the security's price. However, *in the context of private suit*, an actual effect on price must be shown.'' (emphasis added)).

[122] *SEC v. Credit Bancorp, Ltd.*, 195 F. Supp. 2d at 491 (*quoting Berko v. SEC*, 316 F.2d 137, 143 (2d Cir. 1963), and *citing SEC v. North American Research & Dev. Corp.*, 424 F.2d 63, 84 (2d Cir. 1970) (reliance not an element of a Rule 10b-5 claim in the context of an SEC proceeding)). Similarly, the government need not demonstrate specific reliance by the investor in a criminal prosecution for securities fraud, although it must show that the scheme at issue had some impact on the investor. *See United States v. Ashdown*, 509 F.2d 793, 799 (5th Cir. 1975); *United States v. Schaefer*, 299 F.2d 625, 629 (7th Cir. 1962). Although reliance, loss causation, and damages are not necessary for a violation of the proposed Rule, the Commission, like FERC, has determined that these elements will inform the assessment of any remedies, such as disgorgement or civil penalties, that may be appropriate under the circumstances. *See* 71 FR at 4253 n.102.

[123] Although not explicitly in its rule, FERC included an intent requirement in its interpretation of its 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 4245-4246. *See also, e.g.*, SIGMA at 6 (asserting that any rule proposed under Section 811, like the FERC rule, ''cannot 'regulate negligent practices or . . . mismanagement but rather [are meant] . . . to deter or punish fraud.'''').

[124] *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 127 S.Ct. 2499, 2507 (June 21, 2007) (*quoting Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193-194 & n.12 (1976)); *Ernst & Ernst*, 425 U.S. at 197. In *Ernst & Ernst*, the Court continued that the terms '''manipulative,' 'device,' and 'contrivance' . . . make unmistakable a congressional intent to proscribe a type of conduct quite different from negligence.'' *Ernst & Ernst*, 425 U.S. at 199. *See also Schreiber v. Burlington Northern, Inc.*, 472 U.S. 1, 6-7 (1985); *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 476 (1977). *See, e.g.*, API at 28 (stating that 'manipulative' and 'deceptive,' as found in SEA Section 10(b), are generally understood to denote conduct that is deliberately intended to deceive); ISDA at 7-8 (arguing that through Section 10(b), ''Congress intended to prohibit only knowing or intentional misconduct''); CFDR at 13 (arguing that Section 10(b) does not embrace a lesser standard than specific intent).

[125] *See, e.g.*, API at 27 (urging the Commission to adopt a specific intent standard); CAPP at 3 (stating ''that intent or state of mind should be made an essential element of prohibited conduct''); ISDA at 7 (urging the Commission to require specific intent); CFDR at 7 (''Manipulation should require proof of intentionally or recklessly deceptive conduct.''); SIGMA at 3 (stating that any Section 811 rule ''must have a strict scienter requirement''); Muris at 11 (''In any manipulation rule, the Commission should require specific intent . . . .''); PMAA at 4 (encouraging the Commission to include a scienter requirement). *But see, e.g.*, NPGA at 4-5 (arguing that the rule should not include a scienter requirement).

[126] *See, e.g.*, SIGMA at 6 (''[T]he Commission's authority rests on identical language to that of [Section] 10(b) . . . .''); API at 17 (arguing that Section 811's prohibitive language is derived from Section 10(b)); CFDR at 3 (''[T]he language of Section 811 is effectively identical to the anti-manipulation proscriptions found in Section 10(b) . . . .'').

[127] *Tellabs, Inc.*, 127 S.Ct. at 2507 (*quoting Ernst & Ernst*, 425 U.S. at 193-194 & n.12); *accord e.g.*, API at 2, 28-29.

[128] Moreover, the legislative materials cited above support the view that when Congress enacted Section 811, it chose this language in order to encourage the Commission to incorporate the scienter requirement into any rule promulgated under Section 811. *See, e.g.*, SIGMA at 4 (''As it regards [Section] 811 of EISA, Congress plainly chose language that it has previously used in the context of the securities laws, knowing that the Court implies such usage to connote a strict scienter requirement.''); ISDA at 7 (''In enacting Section 811 . . . Congress used the same language . . . that it has used in other contexts and that courts consistently have interpreted to require scienter . . . .''); API at 17-18 (arguing that Congress made a ''conscious decision to model Section 811'' on the precedents of Section 10(b) and the EPAct 2005).

[129] Some commenters note that, although a recklessness standard makes sense in the highly regulated securities markets characterized by fiduciary duties imposed on brokers and issuers and by a variety of disclosure obligations, it should not suffice to satisfy the scienter requirement with respect to transactions in physical commodities markets such as petroleum wholesale markets that lack similar disclosure obligations and fiduciary duties. *See, e.g.* API at 30 (''Importing a 'recklessness' standard from the highly regulated securities markets into unregulated petroleum wholesale markets would create new market uncertainty.''); ISDA at 9 (stating that a recklessness standard ''is not appropriate in the wholesale, physical Petroleum Products markets . . . .''). *See also, e.g.*, SIGMA at 5 (arguing that allowing recklessness to satisfy the scienter requirement of Section 811 would ''[make] the rule an open ended invitation to litigate any grievance'').

[130] *Tellabs, Inc.,* 127 S. Ct. at 2507 n.3 (*citing Ernst & Ernst*, 425 U.S. at 194 n.12); *Ottman v. Hunger Orthopedic Group, Inc.,* 353 F.3d 338, 343

Indeed, the Courts of Appeals have adopted a number of different formulations as to precisely what constitutes recklessness. Thus, for example, the Court of Appeals for the Seventh Circuit has defined reckless conduct as a

> highly unreasonable [act or] omission, involving not merely simple, or even inexcusable negligence, but an extreme departure from the standards of ordinary care, and which presents a danger of misleading buyers or sellers that is either known to the defendant or is so obvious that the actor must have been aware of it.[131]

More recently, the Court of Appeals for the District of Columbia Circuit has relied upon *Sundstrand Corp.* to conclude that establishing recklessness requires evidence from which it can be reasonably inferred that the violator both acted with an extreme departure from standards of ordinary care and either knew or must have known that its conduct created a danger of misleading buyers or sellers.[132] The Commission believes that a recklessness standard as articulated by the Seventh and District of Columbia Circuits would be adequate to establish scienter for any future violation.

3. The third element is that a person engage in conduct ''in connection with'' the purchase or sale of a covered commodity at wholesale

Finally, under the third element, the Commission would need to show a nexus between the manipulative conduct and the purchase or sale of crude oil, gasoline, or petroleum distillates at wholesale. Guided by Supreme Court precedent in the securities area, the Commission interprets the phrase ''in connection with'' as requiring fraudulent conduct to coincide with a purchase or sale of crude oil, gasoline, or petroleum distillates at wholesale.[133] At the same time, the Commission does not interpret the ''in connection with'' requirement so broadly as to turn every common law fraud that happens to touch a purchase or sale of a covered or uncovered petroleum product into a rule violation.[134] Specifically, the proposed Rule would reach manipulative conduct that extends beyond the defined terms if that conduct directly or indirectly impacts wholesale prices for the covered products.

In response to the ANPR, some commenters urge the Commission not to apply the ''in connection with'' requirement to specific types of conduct. For example, CAPP suggests that the Commission not construe ''in connection with'' to cover importing crude oil,[135] while API argues that the Commission not construe ''in connection with'' to refer to supply decisions.[136] Other commenters take the position that the Commission should interpret ''in connection with'' to exempt transactions not within the Commission's jurisdiction, specifically commodity trading, because those transactions, they assert, are within the exclusive jurisdiction of the CFTC.[137]

The Commission disagrees. The Commission may enforce the proposed Rule if the conduct directly or indirectly affects a covered wholesale petroleum transaction within the Commissions's jurisdiction — in this matter, a purchase or sale of crude oil, gasoline, or petroleum distillates. Therefore, any conduct that is done in connection with the wholesale purchase or sale of a covered or uncovered product — including importing covered or uncovered products and making supply decisions related to covered or uncovered products — could be subject to the proposed Rule.

4. A showing of price effects is not an element of a cause of action

The Commission does not intend to require proof of effects as an element of a cause of action. First, a plain reading of EISA does not require such proof. Section 811 prohibits the ''use or employment'' of any manipulative or deceptive device or contrivance.[138] The proposed Rule would be violated at the stage when the actor uses or employs a manipulative or deceptive device or contrivance — whether or not those actions can be shown to result in discernible price effects. Nothing in the statute or proposed Rule suggests that manipulative or deceptive conduct must result in identifiable price effects before such conduct is culpable.[139]

Second, there is no economic justification for fraud or deception in an exchange economy. Thus, harm to the market can be inferred. Fraudulent behavior interferes with market signals, reduces transparency in the market, and casts into doubt the very information that allows markets to function properly.[140] There is no need to determine separately whether there is evidence of harm; therefore, requiring proof of price effects is unnecessary.[141]

Third, the Commission believes that requiring a showing of price effects raises an unnecessary risk of regulatory error. Prices of commodity products such as petroleum are inherently volatile and are a function of many factors.[142] The Commission's

(4th Cir. 2003) (collecting Court of Appeals cases). Note, however, the Supreme Court has reserved the question whether reckless behavior is, in fact, sufficient for civil liability under SEA Section 10(b) and Rule 10b-5. *See Tellabs. Inc.*, 127 S. Ct. at 2507 n.3.

[131] *Sundstrand Corp. v. Sun Chemical Corp.*, 553 F. 2d 1033, 1045 (7th Cir. 1977), *cert. denied*, 434 U.S. 875 (1977) (*quoting Franke v. Midwestern Oklahoma Development Authority*, CCH Fed. Sec. L. Rep. [*] 95,786 at 90,850 (W.D. Okl. 1976)).

[132] *SEC v. Steadman*, 967 F.2d 636, 641-42 (D.C. Cir. 1992) (*citingSundstrand Corp.*, 553 F.2d at 1045).

[133] 42 U.S.C. 17301. *See SEC v. Zanford*, 535 U.S. 813, 820 (2002); *Superintendent of Ins. of State of N.Y. v. Bankers Life & Cas. Co.*, 404 U.S. 6, 12-13 (1971) (holding that the ''in connection with'' requirement was met because the plaintiff had ''suffered an injury as a result of deceptive practices touching its sale of securities.''). *See also Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 547 U.S. 71, 85 (2006) (''Moreover, when this court *has* sought to give meaning to the phrase ['in connection with'] in the context of [Section] 10(b) and Rule 10b-5, it has espoused a broad interpretation.'').

[134] *See Zanford*, 535 U.S. at 820.

[135] CAPP at 4. Other commenters raise questions that relate more to wholesale purchase and sale transactions. *See, e.g.* API at 26-27 (asserting that Section 811 should not apply to over-the-counter derivatives contracts); Hess at 10-11 (arguing that futures and over-the-counter markets should not be regulated by the Commission); ISDA at 5 (stating that a Commission market manipulation rule should not apply to futures transactions); PMAA at 4-5 (arguing that regulations should not apply to ''participants or activities'' that occur below the rack).

[136] API at 25 (asserting that ''Section 811 . . . should not apply to supply decisions that are unconnected to [wholesale petroleum transactions]''). API lists various supply decisions it does not believe should be covered under the ''in connection with'' requirement, including: ''refining decisions, facility maintenance and upgrades, [and] the management of inventory levels.'' API at 25-26.

[137] MFA at 6-12; CFDR at 6 n.4; Hess at 12 n.10; CFTC at 1-2; API at 3, 26-27; ISDA at 5 n.9. These comments are addressed above in Section II.B.

[138] The enabling statute is clear: ''It is unlawful . . . to use or employ . . . any manipulative or deceptive device or contrivance.'' 42 U.S.C. 17301.

[139] Not requiring proof of effects as an element is consistent with precedent established under SEC Rule 10b-5. *See generally United States v. Smith*, 155 F.3d 1051, 1063 (9th Cir. 1988); *see also SEC v. Fehn*, 97 F.3d 1276, 1289 (9th Cir. 1996).

[140] *See United States v. Hall*, 48 F. Supp. 2d 386, 387 (S.D.N.Y. 1999) (''Whether the price of a stock is 'artificial' does not turn on whether the stock is trading above or below its 'true worth.' Rather, the trading price of a stock is determined by available information and market forces, and a stock is trading at an 'artificial level' when it is trading at a level above what market forces would otherwise dictate.''). *See also* CAPP 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 at 1 (''Price manipulation has a corrosive effect on the proper functioning of any market.'').

[141] While the Commission does not intend to require discernible price effects as an element of a rule violation, it will, nevertheless, consider the extent of any price effects or other harm resulting from the market manipulation in assessing a civil penalty.

[142] *See, e.g.*, API at 53 (stating that the artificial price concept is difficult to apply to petroleum

Continued

experience in investigating petroleum pricing anomalies demonstrates the difficulty of identifying price changes that result directly from any specific act or conduct.[143]

Finally, the Commission believes that the scienter requirement, in addition to proof of an overt act, should provide sufficient safeguards against overbreadth.[144] Consequently, the Commission believes the proposed Rule addresses commenters' concerns that, absent an effects requirement, any rule would be overbroad and interfere with pricing signals.[145] The Commission seeks comment on the foregoing, including in particular whether its articulation of the appropriate elements of a cause of action under the Rule furthers the goals of EISA and the proposed Rule.

F. Section 317.4: Preemption

Section 815(c) of EISA states that ''[n]othing in this subtitle preempts any State law.''[146] To give effect to that provision, Section 317.4 of the proposed Rule contains a standard preemption provision, making clear that the Commission does not intend to preempt the laws of any state or local government, except to the extent of any conflict. Section 317.4 also explains that there is no conflict between federal and state and local law, and therefore no preemption, if such state or local law affords equal or greater protection from the manipulative conduct prohibited by the proposed Rule.[147]

G. Section 317.5: Severability

Section 317.5 of the proposed Rule contains a standard severability provision. This provision makes clear that, if any part of the Rule is held invalid by a court, the remainder of the Rule will still be in effect.[148]

H. Invitation to Comment and Advance Notice of Workshop

All persons are hereby given notice of the opportunity to submit written data, views, facts, and arguments addressing the issues raised in this NPRM. All comments should be filed as prescribed in the **ADDRESSES** Section above, and must be received by September 18, 2008. In addition, the Commission anticipates that it may be advantageous to hold a public workshop to discuss in greater detail the written comments submitted by the public in response to the NPRM, and, in particular, any areas of significant controversy or divergent opinion that may arise from the comments. In order to be eligible to participate in a workshop, should one be held, a person must submit a comment in response to this NPRM. If it is determined that a workshop is necessary, details about the event will be announced in a press release and be available at (*http://www.ftc.gov/ftc/oilgas/index.html*).

I. Communications by Outside Parties to the Commissioners or Their Advisors

Written communications and summaries or transcripts of oral communications respecting the merits of this proceeding from any outside party to any Commissioner or Commissioner's advisor will be placed on the public record.[149]

J. Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 (''RFA'')[150] generally requires a description and analysis of proposed and final rules that will have significant economic impact on a substantial number of small entities. The RFA requires an agency to provide an Initial Regulatory Flexibility Analysis (''IRFA'')[151] with a proposed Rule and a Final Regulatory Flexibility Analysis (''FRFA'')[152] with the final rule, if any. The Commission is not required to make such analyses if a rule would not have such an effect.[153]

Although the scope of the proposed Rule may reach a substantial number of small entities as defined in the RFA, the Commission does not believe that the proposed Rule will have a significant economic impact on those businesses.[154] The Commission specifically requested comments on the economic impact of a proposed Rule and received none.[155] Given that there are no reporting requirements, document or data retention provisions, or any other affirmative duties imposed, it is unlikely that the proposed Rule imposes costs to comply beyond standard costs associated with ensuring that behavior and statements are not manipulative or deceptive. Therefore, the Commission believes that the proposed Rule, if finalized, will not have a significant economic impact on a substantial number of small entities. Notwithstanding this belief, the Commission provides a full IRFA analysis to aid in its solicitation for comments on this topic.

1. Description of the reasons that action by the agency is being considered

Section 811 grants the Commission the authority to promulgate a rule that ''is necessary or appropriate in the public interest or for the protection of United States citizens.''[156] As discussed above, the Commission believes that promulgating the proposed Rule is appropriate to prevent manipulative practices affecting wholesale markets for petroleum products and the Commission has tailored its proposed Rule specifically to reach manipulative behavior that likely impacts those commodities described in Section 811.

2. Succinct statement of the objectives of, and the legal basis for, the proposed Rule

The legal basis of the proposed Rule is Section 811 of EISA, which makes illegal manipulative and deceptive conduct in the purchase or sale of petroleum products at wholesale in

markets because petroleum markets, in contrast to futures markets, use many non-standardized contracts); ISDA at 15-16 (stating that the artificial price standard ''has proven to be very difficult to understand and apply in practice'').

[143] The practical difficulty in discerning accurately what constitutes an artificial price is discussed by the ABA. ABA at 7 (''[D]etermining what supply allocations and price levels would most benefit consumers over the long run would be impossible for the FTC or any regulator in this complex industry.''); *see also* IER at 4 (arguing that regulators should not second-guess the decisions of market participants in the petroleum industry because it could lead to ''an inefficient amount of risk-taking among producers.''); Muris at 8 (''Judgments about the 'right' mix of sales and distribution are beyond the capacity of any individual or organization to make accurately. That, of course, is why our economy relies on markets to make such decisions, and on the profit motive to guide the behavior of individual firms.'').

[144] Proof of an overt manipulative or deceptive act together with proof of requisite intent provide sufficient safeguards against both regulatory overreach and judicial error.

[145] *See* Flint Hills at 19 (stating that a market economy relies on prices and profit motive to allocate resources efficiently; thus, regulators must allow market participants to respond to market signals when making production and product allocation decisions without ''fear of being second guessed''); Muris at 9 (''One way to reduce the risk of errors is to require a showing of (1) an effect on price . . . .''); API at 31 (''Applying Section 811 to conduct that does not cause a material deviation in market prices would unduly expand the FTC's regulatory oversight and would likely harm consumer welfare in the long run by chilling competitive market behavior, thereby potentially increasing prices.'').

[146] 42 U.S.C. 17305.

[147] *See, e.g.*, Disclosure Requirements and Prohibitions Concerning Franchising, 16 CFR 436.10(b); Disclosure Requirements and Prohibitions Concerning Business Opportunities, 16 CFR 437 n.2.

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

[149] *See* 16 CFR 1.26(b)(5).

[150] 5 U.S.C. 601-612.

[151] 5 U.S.C. 603.

[152] 5 U.S.C. 604.

[153] 5 U.S.C. 605.

[154] 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 that is not dominant in its field of operation. 15 U.S.C. 632.

[155] 73 FR at 25624.

[156] 42 U.S.C. 17301.

contravention of rules, if any, that the Commission may promulgate. The proposed Rule is intended to define the conduct that the law proscribes. If adopted, such rule will supplement the Commission's existing antitrust and consumer protection law enforcement tools.

3. Description of, and where feasible, estimate of the number of small entities to which the proposed Rule will apply

The proposed Rule applies to entities engaging in the purchase or sale of crude oil, gasoline, and petroleum distillates. These potentially include petroleum refiners, blenders, wholesalers and dealers (including terminal operators that sell covered commodities). Although many of these entities are large international and domestic corporations, the Commission believes that a number of these covered entities may fall into the category of small entities.[157] According to the SBA size standards, and utilizing SBA source data, the Commission estimates that between approximately 1700 and 5200 covered entities would be classified as ''small entities.''[158]

The scope of the proposed Rule could be broader depending on whether illegal manipulative conduct impacts covered commodities directly or other commodities with the effect of impacting the covered commodities contemplated by the proposed Rule. The Commission seeks comments on whether the proposed Rule may reach other small entities and what economic impact, if any, the proposed Rule would have on those entities.

4. Projected reporting, record-keeping, and other compliance requirements, including an estimate of the classes of small entities that will be subject to the requirement and the type of professional skills necessary for preparation of the report or record

The Commission does not propose, and the proposed Rule does not contain, any requirement that covered entities create, retain, submit, or disclose any information. Accordingly, the proposed Rule will impose no new record-keeping or related data retention and maintenance or disclosure requirements on any covered entity, including small entities. The Commission has not identified additional costs necessary to comply with the proposed Rule beyond existing costs associated with behaving in a nondeceptive, truthful manner. The Commission seeks comments on whether the proposed Rule imposes costs on any covered entities including a description of specific costs and estimates of the magnitude of those costs.

5. Other duplicative, overlapping, or conflicting federal rules

As discussed previously, other federal agencies have regulatory authority to prohibit in whole or in part manipulative and deceptive practices involving petroleum products. The SEC has authority to stop manipulative and deceptive practices involving the securities and securities offerings of companies involved in the petroleum industry. The CFTC also has authority to bring an action against any person who is manipulating or attempting to manipulate the petroleum futures markets.[159]

As explained in Section II.B, above, the proposed Rule is not intended to impose contradictory requirements on regulated entities in the futures markets or otherwise. To the extent, if any, that the proposed Rule's requirements could duplicate requirements already established by other agencies for such markets, the proposed Rule should not impose any additional compliance costs. Although the Commission acknowledges that different agencies could simultaneously initiate enforcement action with respect to the same activities, the Commission has had a longstanding practice of coordinating its enforcement efforts with agencies that have overlapping jurisdiction.[160] The Commission expects to continue that practice here, as feasible and appropriate, to ensure fairness to regulated entities and to conserve enforcement resources and maximize agency efficiency.[161] However, the Commission is requesting comment on the extent to which other federal standards on manipulation may duplicate, satisfy, or inform the proposed Rule's requirements. In addition, the Commission seeks comment and information about any statutes or rules that may conflict with the proposed requirements, as well as any other state, local, or industry rules or policies that require covered entities to implement practices that comport with the requirements of the proposed Rule.

[157] Directly covered entities under this proposed Rule are classified as small businesses under the Small Business Size Standards component of the North American Industry Classification System (''NAICS'') if they are: petroleum refiners (NAICS code 324110) with no more than 1,500 employees nor greater than 125,000 barrels per calendar day Operable Atmospheric Crude Oil Distillation capacity; petroleum bulk stations and terminals (NAICS code 424710) with no more than 100 employees; or petroleum and petroleum products merchant wholesalers (except bulk stations and terminals (NAICS code 424720) with no more than 100 employees. *See* U.S. Small Business Administration, Table of Small Business Size Standards Matched to North American Industry Classification System Codes (Mar. 11, 2008), *available at* (*http://www.sba.gov/idc/groups/public/documents/sba_homepage/serv_sstd_tablepdf.pdf*).

[158] The SBA publication that provides data on number of firms and number of employees by firm does not provide sufficient precision to gauge accurately the number of small business that may be impacted by the proposed Rule. The data are provided in increments of 1-4 employees, fewer than 20 employees and fewer than 500 employees. Small Business Administration, Employer Firms, & Employment by Employment Size of Firm by NAICS Codes, 2005, *available at* (*http://www.sba.gov/advo/research/us05_n6.pdf*). Thus for the 177 petroleum refiners listed, 139 show that they have less than 500 employees. Although the Commission is unaware of more than 5 refiners with less than 125,000 barrels of crude distillation capacity, the data may be kept by refinery, rather than refiner. Similar problems exist for the bulk terminal and bulk wholesale categories listed above, in which the relevant small business cut off is greater than 100 employees. Thus, the range of ''small'' entities appears unreliable and the Commission seeks comment or information providing better data.

[159] Commenters such as MFA specifically argue that the proposed Rule should have a safe harbor provision or other explicit exemption for the futures markets in order to avoid an overlap with the CFTC's jurisdiction under Section 2 of the CEA. MFA at 5. According to commenters, including the CFTC, such an overlap would create potentially duplicative or inconsistent regulatory requirements, thus undermining uniform regulatory scheme that Congress sought to establish for the futures markets under the CEA. *See, e.g.*, CFTC at 1-2; API at 14, 16, 27; Flint Hills at 12; Hess at 12 n.10; NPGA at 2 (''A flawed regulatory scheme may result in reporting requirements being duplicative, standards and definitions of proscribed behavior being inconsistent . . . .''); MFA at 13-14 (arguing that any proposed rule should not reach futures trading activities regulated by the CFTC). Several other commenters express concern that even if the Commission could avoid inconsistent regulatory requirements, market participants would still be unfairly burdened by duplicative enforcement. *See* Flint Hills at 14; Hess at 12; NPGA at 2.

[160] One commenter warned that poor coordination between the Commission and other agencies could lead to a situation wherein ''multiple agencies may pursue certain potential violations, while other violations are left unchecked because each oversight agency expects or desires another to take the appropriate action.'' NPGA at 2. To prevent such pitfalls of regulatory overlap, NPGA encouraged the issuance of an Executive Order that clearly draws lines of jurisdiction among agencies. *Id.* at 3.

[161] *See* Section II.B (and footnotes therein) for a discussion of concerns raised by commenters about potentially duplicative or inconsistent regulatory requirements.

6. Description of any significant alternatives to the proposed Rule that would accomplish the stated objectives of applicable statutes and that minimize any significant economic impact of the proposed Rule on small entities, including alternatives considered, such as: (1) establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) clarification, consolidation, or simplification of compliance and reporting requirements under the rule for such small entities; and (3) any exemption from coverage of the rule, or any part thereof, for such small entities

The proposed Rule is narrowly tailored to reduce compliance burdens on covered entities, regardless of size. In formulating the proposed Rule, the Commission has taken several significant steps to minimize potential burdens. Most significantly, the proposed Rule focuses on preventing manipulation and deception in wholesale petroleum markets. The Commission has declined to include specific conduct or duty requirements, such as a duty to supply product or a duty to provide access to pipelines and terminals. In addition, the proposed Rule makes clear that covered entities need not disclose price, volume, and other data to the market. Finally, the proposed Rule contains no record-keeping requirement.

While the Commission believes that the proposed Rule imposes no unique compliance costs, it nonetheless requests comment on this issue, in particular, whether the proposed Rule's prohibited practices impose a significant impact upon a substantial number of small entities, and what modifications to the Rule the Commission should consider to minimize the burden on small entities.

7. Questions for comment to assist regulatory flexibility analysis

The Commission requests commenters to provide information as to the potential scope and economic impact of the proposed Rule so that the Commission may better assess the economic impact of the language of any final rule if it determines to promulgate such rule. Specifically, the Commission requests comment on:

a. the number and type of small entities affected by the proposed Rule;

b. any or all of the provisions in the proposed Rule with regard to: (i) the impact of the provision(s) (including benefits and costs to implement and comply with the Rule or Rule provision), if any; (ii) what alternatives, if any, the Commission should consider, as well as the costs and benefits of those alternatives, paying specific attention to the effect of the proposed Rule on small entities;

c. ways in which the proposed Rule could be modified to reduce any costs or burdens on small entities, including whether and how technological developments could further reduce the costs of implementing and complying with the proposed Rule for small entities;

d. any information quantifying the economic costs and benefits of the proposed Rule on the entities covered, including small entities; and

e. the identity of any relevant federal, state, or local rules that may duplicate, overlap, or conflict with the proposed Rule.

K. Paperwork Reduction Act

The Commission does not contemplate requiring any entity covered by the Rule to create, retain, or submit any data. Accordingly, the proposed Rule does not include any new information collection requirements under the provisions of the Paperwork Reduction Act of 1995 (''PRA'').[162]

In the ANPR, the Commission solicited comment on whether covered entities should report market data, such as cost and volume data for wholesale transactions.[163] In response, one commenter notes that Section 812 already addresses the making of false reports and should not be construed as giving the Commission authority to impose new reporting requirements.[164]

The Commission has determined that a record retention or submission requirement is not necessary or appropriate at this time. However, the Commission's experience with any final rule that may be adopted under Section 811 or pursuant to its investigative and enforcement role under Section 812 may suggest a particular need to require firms to create or maintain particular information.[165] If such a need arises, the Commission may, in the future, adopt such rules as necessary or appropriate in the public interest or for the protection of United States citizens.

L. Request for Comments

The Commission seeks comment on various aspects of the proposed Rule. Without limiting the scope of issues on which it seeks comment, the Commission is particularly interested in receiving comments on the questions that follow. In responding to these questions, include detailed, factual supporting information whenever possible.

1. General Questions for Comment

Please provide comment on each proposed aspect of the proposed Rule. Regarding each proposed provision commented on, please include answers to the following questions.

a. What is the effect (including any benefits and costs), if any, on consumers?

b. What is the impact (including any benefits and costs), if any, on individual firms that must comply with the proposed Rule?

c. What is the impact (including any benefits and costs), if any, on industry?

d. What changes, if any, should be made to the proposed Rule to eliminate any unnecessary cost to industry or consumers?

e. How would the proposed Rule affect small business entities with respect to costs, profitability, competitiveness, and employment?

2. Questions on Proposed Specific Provisions

Rulemaking Standard

a. Is the Commission's determination that the proposed Rule meets the rulemaking standard — that the rule is ''necessary or appropriate in the public interest or for the protection of United States citizens'' — correct? In what way is the proposed Rule necessary or appropriate? In what way does the proposed Rule fail to be necessary or appropriate?

Section 317.1 — Scope

b. The Commission did not provide for safe harbors or exemptions from the

---

[162] 44 U.S.C. 3501-3521. Under the PRA, federal agencies must obtain approval from OMB for each collection of information they conduct or sponsor. ''Collection of information'' means agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. 44 U.S.C. 3502(3).

[163] 73 FR at 25622.

[164] ISDA at 16 (''Neither Section 811 nor Section 812 of the EISA authorizes the Commission to impose new reporting requirements.''). *See, e.g.*, CFDR at 16 (''The Commission should not promulgate a rule that purports to impose disclosure obligations on market participants where no disclosure obligations otherwise exist under current law.''); API at 52. *But see, e.g.*, PMAA at 8-9 (stating that the Commission has authority under Section 811 to impose new reporting requirements); NPGA at 3 (''The authority to mandate the maintenance and submission of [information regarding wholesale petroleum transactions] is inherent in the EISA prohibitions against manipulative activities in Section 811 and the reporting of false information to Federal authorities in Section 812.'').

[165] Platts at 3 (taking no position on reporting to government agencies, but ''strongly endors[ing] any efforts to make more data available on an equal basis to all market participants'').

proposed Rule. Should there be safe harbors or exemptions? If so, what should they be? To what should they apply; that is, what types of acts or practices should constitute a safe harbor? Why should that be so? What types of acts or practices should be exempt? Why should that be so?

Section 317.2 — Definitions

c. Do the proposed definitions adequately describe the scope of the proposed Rule's coverage? If not, how should they be modified? Are the proposed definitions accurate? Are there alternative definitions that the Commission should consider? Should additional terms be defined, and, if so, how? What would be the costs and benefits of each suggested definition?

Section 317.3 — Prohibited Practices

d. The proposed Rule uses SEC Rule 10b-5 as a model. Will the Rule 10b-5 model function properly with respect to wholesale petroleum markets? If not, why not? What alternative approach could be used? If an alternative approach or model could be used here, what would be the costs and benefits of using an alternative approach or model?

e. The proposed Rule targets practices that act as a fraud or deceit. Has the Commission adequately delineated such practices? If not, why not? Is there a list of practices that should be covered by the proposed Rule? If so, what are they and why should they be included? Are there practices that should be excluded from the proposed Rule? If so, what are they and why should they be excluded?

f. Has the proposed Rule sufficiently laid out any affirmative duties or other obligations upon entities covered under the proposed Rule? If not, why not?

g. Section 317.3(a) of the proposed Rule prohibits the use or employment of any ''device, scheme, or artifice to defraud.'' Is this language sufficiently broad enough to enable the Commission to police all forms of fraud and manipulation that affect wholesale petroleum markets? If not, why not? How could the proposed Rule be modified to ensure that all forms of devices, schemes, or artifices to defraud are covered?

h. Section 317.3(b) of the proposed Rule prohibits covered entities from misrepresenting, and in some instances from omitting, material information in wholesale petroleum markets. Is this prohibition adequate to enable the Commission to deter and punish persons who intentionally provide false or misleading information to government agencies, third-party reporting services, or the public through corporate announcements? Why or why not? Does the proposed Rule need to be modified in anyway to better address any misrepresentations or omissions, and if so, what should those modifications be?

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

j. Section 317.3(b) prohibits omissions of material fact that are necessary to ensure that a previously made statement is not misleading. Will this provision address the harms that may occur in the reporting of information in the wholesale petroleum industry? If not, why not and how could the proposed Rule be modified to better address such harms?

k. Section 317.3(c) of the proposed Rule prohibits any act, practice, or course of business that ''operates or would operate as a fraud or deceit.'' Will this sub-section be useful to the FTC as a ''catch-all'' provision that captures fraud on wholesale petroleum markets? If not, why not? Is this provision, in light of the inclusion of the more specific anti-fraud provision in proposed Rule Section 317.3(a)? If not, why not?

l. Does the Rule's prohibition on manipulative or deceptive conduct promote well-functioning market processes ''in connection with the purchase or sale of crude oil, gasoline, or petroleum distillates at wholesale''? If so, why not?

m. Does the proposed Rule have sound bases in economic policy for prohibiting manipulative and deceptive conduct? Why or why not?

n. Do additional factual predicates exist to support a basis for the proposed Rule to fill a gap in Commission jurisdiction under Section 5 of the FTC Act or to support extending Commission authority beyond the scope of Section 5 of the FTC Act? If so, describe such factual predicates.

o. Should the Commission consider any affirmative defenses to rule violations? If so, what affirmative defenses should the Commission consider and how can those defenses be justified?

p. Is the proposed Rule's basis for requiring a showing of scienter as an element of proof sound? Should a scienter requirement be part of the text of Section 317.3 of the proposed Rule? Is the Commission's tentative determination that both intentional and reckless conduct may satisfy the scienter requirement appropriate? Why or why not?

q. The Commission tentatively has concluded that the ''in connection with'' language in the proposed Rule would reach manipulative conduct that extends beyond the defined terms (*e.g.*, crude oil, gasoline, petroleum distillates) if that conduct directly or indirectly impacts wholesale prices for the covered products. What would be the advantage (disadvantage) of this approach and why?

r. Should the proposed Rule be available to challenge ''attempted manipulation,'' defined as uncompleted fraudulent or deceptive conduct? Are there advantages to this approach and why? Are there disadvantages to this approach and why? Are there examples of ''attempted manipulation'' that should be covered by the proposed Rule? If so, what are they and why should they be covered?

s. The Commission tentatively has concluded that liability should not require proof of price effects. What would be the advantage (disadvantage) of requiring proof of price effects?

t. The Commission tentatively has determined that a record retention or submission requirement is not necessary or appropriate at this time. Are there records that the Commission should, in fact, require companies to retain or submit? If so, what types of records should be retained or submitted and why?

Section 317.4 — Preemption

u. The Commission has determined that the proposed Rule should not preempt the laws of any state or local government, except to the extent that any such law conflicts with this proposed Rule. What impact is this approach likely to have upon the industry? Individual companies? Consumers?

Regulatory Flexibility Act

v. Is the Commission estimate that between approximately 1700 and 5200 ''small entities'' will be covered by the proposed Rule accurate? Why or why not?

w. The proposed Rule does not contain any requirement that covered entities create, retain, submit, or disclose any information. Is the Commission correct in its determination that, accordingly, the proposed Rule will impose no record-keeping or related data retention and maintenance or disclosure requirements on any covered entity, including small entities? Why or why not?

x. Identify any statutes or rules that may conflict with the proposed Rule requirements, as well as any other state,

local, or industry rules or policies that require covered entities to implement practices that comport with the requirements of the proposed Rule.

y. Do the prohibited practices in the proposed Rule impose a significant impact upon a substantial number of small entities? If so, what modifications to the proposed Rule should the Commission consider to minimize the burden on small entities?

List of Subjects in 16 CFR Part 317

Trade practices.

■ Accordingly, for the reasons set forth in the preamble, the Commission proposes to amend Title 16, Chapter 1, Subchapter C of the Code of Federal Regulations by adding Part 317 to read as follows:

PART 317—PROHIBITION OF ENERGY MARKET MANIPULATION RULE

Sec.
317.1 Scope.
317.2 Definitions.
317.3 Prohibited practices.
317.4 Preemption.
317.5 Severability.

Authority: 42 U.S.C. 17301-17305; 15 U.S.C. 41-58.

§ 317.1 Scope.

This part implements Subtitle B of Title VIII of The Energy Independence and Security Act of 2007 (''EISA''), Pub. L. 110-140, 121 Stat. 1723 (December 19, 2007), *codified at* 42 U.S.C. 17301-17305. This rule applies to any person over which the Federal Trade Commission has jurisdiction under the Federal Trade Commission Act, 15 U.S.C. 41 *et seq.*

§ 317.2 Definitions.

The following definitions shall apply throughout this rule:

(a) *Crude oil* means the mixture of hydrocarbons that exist:

(1) in liquid phase in natural underground reservoirs and which remain liquid at atmospheric pressure after passing through separating facilities, or

(2) as shale oil or tar sands requiring further processing for sale as a refinery feedstock.

(b) *Gasoline* means

(1) finished gasoline, including, but not limited to, conventional, reformulated, and oxygenated blends, and

(2) conventional and reformulated gasoline blendstock for oxygenate blending.

(c) *Person* means any individual, group, unincorporated association, limited or general partnership, corporation, or other business entity.

(d) *Petroleum distillates* means

(1) jet fuels, including, but not limited to, all commercial and military specification jet fuels, and

(2) diesel fuels and fuel oils, including, but not limited to, No. 1, No. 2, and No. 4 diesel fuel, and No. 1, No. 2, and No. 4 fuel oil.

(e) *Wholesale* means purchases or sales at the terminal rack level or upstream of the terminal rack level. Transactions conducted at wholesale do not include retail gasoline sales to consumers.

§ 317.3 Prohibited practices.

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.

§ 317.4 Preemption.

The Federal Trade Commission does not intend, through the promulgation of this Rule, to preempt the laws of any state or local government, except to the extent that any such law conflicts with this Rule. A law is not in conflict with this Rule if it affords equal or greater protection from the use or employment, directly or indirectly, of any deceptive or manipulative device or contrivance, in connection with the purchase or sale of crude oil, gasoline, or petroleum distillates at wholesale.

§ 317.5 Severability.

The provisions of this Rule are separate and severable from one another. If any provision is stayed or determined to be invalid, it is the Commission's intention that the remaining provisions shall continue in effect.

By direction of the Commission.

Donald S. Clark,

Secretary.

Note: The following attachment will not appear in the Code of Federal Regulations.

Attachment A

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 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'')
Harold Ducote (''Ducote'')
Deep River Group, Inc. (''DRG'')
Mary Dunaway (''Dunaway'')
Econ One Research, Inc. (''Econ One'')
Kevin Egan (''Egan'')
DJ Ericson (''Ericson'')
Mark Fish (''Fish'')
Flint Hills Resources (''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'')
Charles Hamel (''Hamel'')
Chris Harris (''Harris'')
Thomas Herndon (''Herndon'')
Johnny Herring (''Herring'')
Hess Corporation (''Hess'')
David Hill (''Hill'')
Hopper (''Hopper'')
Sharon Hudecek (''Hudecek'')
Intercontinental Exchange, 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'')
Managed Funds Association; Futures Industries Association; New York Mercantile Exchange; and CME Group Inc. (''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 Parker (''Parker'')
Pamela Parzynski (''Parzynski'')
Brook Paschkes (''Paschkes'')
Brijesh Patel (''Patel'')
Stefanie Patsiavos (''Patsiavos'')
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'')
Douglas Willis (''Willis'')

[FR Doc. E8–19154 Filed 8–18–08; 8:45 am]
BILLING CODE 6750–01–S

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

29 CFR Parts 1910, 1915, 1917, 1918 and 1926

[Docket No. OSHA–2008–0031]

RIN 1218–AC42

Clarification of Remedy For Violation of Requirements To Provide Personal Protective Equipment and Train Employees

AGENCY: Occupational Safety and Health Administration (OSHA), U.S. Department of Labor.

ACTION: Proposed rule.

SUMMARY: In this rulemaking, OSHA is proposing to amend its regulations to add language clarifying that noncompliance with the personal protective equipment (PPE) and training requirements in safety and health standards in these parts may expose the employer to liability on a per-employee basis. The amendments consist of new paragraphs added to the introductory sections of the listed parts and changes to the language of some existing respirator and training requirements. This action, which is in accord with OSHA's longstanding position, is proposed in response to recent decisions of the Occupational Safety and Health Review Commission indicating that differences in wording among the various PPE and training provisions in OSHA safety and health standards affect the Agency's ability to treat an employer's failure to provide PPE or training to each covered employee as a separate violation. The amendments add no new compliance obligations. Employers are not required to provide any new type of PPE or training, to provide PPE or training to any employee not already covered by the existing requirements, or to provide PPE or training in a different manner than that already required. The amendments simply clarify the remedy for violations of these requirements.

DATES: *Written comments:* Comments must be submitted (postmarked, sent or received) by September 18, 2008.

Hearing Requests: Any request for a hearing must also be submitted by September 18, 2008. See **ADDRESSES** section below for special procedures for submitting hearing requests.

ADDRESSES: *Written comments:* You may submit comments, identified by docket number OSHA–2008–0031, or regulatory information number (RIN) 1290–AA23, by any of the following methods:

Electronically: You may submit comments and attachments electronically at *http://www.regulations.gov,* which is the Federal eRulemaking Portal. Follow the instructions on-line for making electronic submissions.

Fax: If your comments, including attachments, do not exceed 10 pages, you may fax them to the OSHA Docket Office at (202) 693–1648.

Mail, hand delivery, express mail, messenger or courier service: You must submit three copies of your comments and attachments to the OSHA Docket Office, Docket Number OSHA–2008–0031, U.S. Department of Labor, Room N–2625, 200 Constitution Avenue, NW., Washington, DC 20210; telephone (202) 693–2350 (OSHA's TTY number is (877) 889–5627). Deliveries (hand, express mail, messenger and courier service) are accepted during the Department of Labor's and Docket Office's normal business hours, 8:15 a.m.–4:45 p.m., e.t.

Hearing Requests: A hearing request may only be submitted by one of the following methods: Electronically, fax, express mail, hand delivery, messenger or courier service. OSHA will not consider hearing requests sent by regular mail.

Instructions: All submissions must include the docket number [OSHA–2008–0031] or the regulatory information number (RIN) 1290–AA23, for this rulemaking. All comments, including any personal information you provide, are placed in the public without change and may be made available online at *http://www.regulations.gov.* Therefore, OSHA cautions you about submitting personal information such as Social Security numbers and birthdates. For further information on submitting comments, plus additional information on the