Federal Register

Wednesday,
August 12, 2009

# Part III

# Federal Trade Commission

**16 CFR Part 317**

**Prohibitions on Market Manipulation; Final Rule**

**FEDERAL TRADE COMMISSION**

**16 CFR Part 317**

**[Project No. P082900]**

**RIN 3084–AB12**

## Prohibitions on Market Manipulation

**AGENCY:** Federal Trade Commission.

**ACTION:** Final Rule.

**SUMMARY:** In this document, the Federal Trade Commission (''Commission'' or ''FTC'') issues its Statement of Basis and Purpose (''SBP'') and final Rule, pursuant to Section 811 of Subtitle B of Title VIII of The Energy Independence and Security Act of 2007 (''EISA'').[1] The final Rule prohibits any person, directly or indirectly, in connection with the purchase or sale of crude oil, gasoline, or petroleum distillates at wholesale, from knowingly engaging in any act, practice, or course of business – including the making of any untrue statement of material fact – that operates or would operate as a fraud or deceit upon any person, or intentionally failing to state a material fact that under the circumstances renders a statement made by such person misleading, provided that such omission distorts or is likely to distort market conditions for any such product.

**EFFECTIVE DATE:** November 4, 2009.

**ADDRESSES:** Requests for copies of the final Rule and the SBP should be sent to: Public Records Branch, Room 130, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, DC 20580. The complete record of this proceeding is also available at that address. Relevant portions of the proceeding, including the final Rule and the SBP, are available at (*www.ftc.gov*).

**FOR FURTHER INFORMATION CONTACT:** Patricia V. Galvan, Deputy Assistant Director, Bureau of Competition, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, DC 20580, (202) 326-3772.

**SUPPLEMENTARY INFORMATION:**

## Statement of Basis and Purpose

### I. Background

EISA became law on December 19, 2007.[2] Subtitle B of Title VIII of EISA targets market manipulation in connection with the purchase or sale of crude oil, gasoline, or petroleum distillates at wholesale, and the reporting of 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.''[3]

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.''[4]

Subtitle B also contains three additional sections that address, respectively, enforcement of the Subtitle (Section 813),[5] penalties for violations of Section 812 or any FTC rule promulgated pursuant to Section 811 (Section 814),[6] and the interplay between Subtitle B and existing laws (Section 815).[7]

After considering the rulemaking record in this proceeding, the Commission adopts the final Rule pursuant to its authority under Section 811. The final Rule prohibits any person, directly or indirectly, in connection with the purchase or sale of crude oil, gasoline, or petroleum distillates at wholesale, from (a) knowingly engaging in any act, practice, or course of business – including the making of any untrue statement of material fact – that operates or would operate as a fraud or deceit upon any person, or (b) intentionally failing to state a material fact that under the circumstances renders a statement made by such person misleading, provided that such omission distorts or is likely to distort market conditions for any such product.[8]

### II. The Rulemaking Proceeding

The rulemaking proceeding[9] began with the publication of an Advance Notice of Proposed Rulemaking (''ANPR'') on May 7, 2008.[10] In the ANPR, the Commission solicited comments on whether it should promulgate a rule under Section 811, and, if so, the appropriate scope and content of such a rule.[11] In response to the ANPR, the Commission received 155 comments from interested parties.[12]

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

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

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

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

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

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

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

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

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

[10] 73 FR 25614.

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

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

Commenters expressed differing views regarding the desirability of and the appropriate legal basis for any such rule.[13] They also proposed a variety of models upon which to base a market manipulation rule, including those used by other federal agencies pursuant to each agency's respective market manipulation authority,[14] such as the Securities and Exchange Commission (''SEC''),[15] the Federal Energy Regulatory Commission (''FERC''),[16] and the Commodity Futures Trading Commission (''CFTC'').[17]

After reviewing the ANPR comments, on August 19, 2008, the Commission published a Notice of Proposed Rulemaking (''NPRM'')[18] setting forth the text of a proposed Rule modeled on SEC Rule 10b-5 and inviting written comments on issues raised by the proposed Rule.[19] The NPRM described the basis for and scope of the proposed Rule; definitions of terms in the Rule; conduct prohibited by the Rule; and the elements of a cause of action under the Rule. In response to the NPRM, the Commission received 34 comments from interested parties.[20] On November 6, 2008, Commission staff held a one-day public workshop on the proposed Rule.[21] Commenters and workshop participants presented views concerning several key issues relating to the proposed Rule, particularly regarding the application of a SEC Rule 10b-5 model to wholesale petroleum markets and the relevance of securities law to the petroleum industry.[22]

The Commission published a Revised Notice of Proposed Rulemaking (''RNPRM'') setting forth a revised proposed Rule on April 22, 2009,[23] and describing certain modifications to the initially proposed Rule and the basis for the modifications. As with the initially proposed Rule, the Commission based the revised proposed Rule on the anti-fraud model of SEC Rule 10b-5, but modified the revised proposed Rule to accommodate differences between securities markets and wholesale petroleum markets. The RNPRM also set forth questions and alternative rule language designed to elicit further views from interested parties. In response to the RNPRM, the Commission received 17 comments from interested parties, including a consumer advocacy group, a United States Senator, an academic, a federal agency, industry members, energy news and price reporting organizations, and trade and bar associations.[24]

The Commission has reviewed the entire record in this proceeding, including comments submitted in response to the RNPRM. Based on this review, as well as its extensive petroleum industry law enforcement experience, the Commission hereby adopts a final Rule that is virtually identical to the revised proposed Rule. The Commission's analysis of certain commenter proposals and its basis for adopting each of the final Rule's provisions are detailed below.

## III. Legal Basis for the Rule

Section 811 of EISA provides the legal basis for the final Rule. Section 811 prohibits ''any person'' from ''directly or indirectly'' using or employing ''any manipulative or deceptive device or contrivance'' – in connection with the purchase or sale of crude oil, gasoline, or petroleum distillates at wholesale – that violates a rule or regulation that the Commission ''may prescribe as necessary or appropriate in the public interest or for the protection of United States citizens.''[25] In enacting Section 811, Congress specifically authorized the Commission to determine whether a rule prohibiting manipulative conduct in wholesale petroleum markets would be appropriate and in the public interest. As the Commission explained in the NPRM in this proceeding:

> [T]he 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.'' The use of the disjunctive ''or'' in the first clause of this phrase indicates that the Commission would be within its [authority] to promulgate a rule 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.'' 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.''[26]

The Commission has determined that the final Rule – which defines for market participants the Section 811 statutory prohibition against using or employing ''any manipulative or deceptive device or contrivance'' – is appropriate and in the public interest. The prices of petroleum products significantly affect the daily lives of American consumers and the daily operations of American businesses.[27]

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

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

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

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

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

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

[18] 73 FR 48317.

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

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

[21] Attachment C contains a list of participants in the workshop. The discussion topics for the workshop included the use of SEC Rule 10b-5 as a model for an FTC market manipulation rule; the proper scienter standard for a rule; the appropriate reach of a rule; the type of conduct that would violate a rule; and the desirability of including market or price effects as an element of a rule violation. Information relating to the workshop, including a program, transcript, and archived webcast, is available at: (*http://www.ftc.gov/bcp/workshops/marketmanipulation/index.shtml*).

[22] Section IV.A. of the Revised Notice of Proposed Rulemaking (''RNPRM'') provides an overview of NPRM commenters' and workshop participants' views regarding the proposed Rule. *See* 74 FR at 18308-10.

[23] 74 FR 18304.

[24] Attachment A contains a list of commenters who submitted comments on the RNPRM, together with the abbreviations used to identify each commenter referenced in this SBP. All commenter references are to those comments submitted in response to the RNPRM, unless otherwise noted.

[25] 42 U.S.C. 17301. Section 811 states:

> It is unlawful for any person, directly or indirectly, to use or employ, in connection with the purchase or sale of crude oil[,] gasoline[,] or petroleum distillates at wholesale, any manipulative or deceptive device or contrivance, in contravention of such rules and regulations as the Federal Trade Commission may prescribe as necessary or appropriate in the public interest or for the protection of United States citizens.

[26] 73 FR at 48320-21.

[27] ''Perhaps no other industry's performance is so visibly and deeply felt.'' FTC Bureau of Economics, The Petroleum Industry: Mergers, Structural

Continued

Because fraudulent or deceptive conduct within wholesale petroleum markets injects false information into the market process, it distorts market data and thus undermines the ability of consumers and businesses to make purchase and sales decisions congruent with their economic objectives.[28] As a consequence, decision-making risks and attendant costs increase, and economic efficiency declines in the overall economy. Fraudulent or deceptive conduct within wholesale petroleum markets thus can have wide ranging ramifications throughout the United States economy.[29] For these reasons, the Commission has determined to issue the final Rule.[30]

Well-established statutory, judicial, and regulatory constructs and principles – and the language of Section 811 itself – strongly support the final Rule. As the Commission noted in the ANPR, the Section 811 prohibition of the use or employment of any ''manipulative or deceptive device or contrivance'' is virtually identical to the prohibition in Section 10(b) of the Securities Exchange Act of 1934 (''SEA'').[31] Specifically, SEA Section 10(b) prohibits the use or employment of:

> any *manipulative or deceptive device or contrivance* in contravention of such rules as the [SEC] may prescribe as necessary or appropriate in the public interest or for the protection of investors.[32]

Relying upon SEA Section 10(b),[33] the SEC promulgated its anti-fraud rule, Rule 10b-5, making it unlawful for any person:

(a) To 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 which operates or would operate as a fraud or deceit upon any person. . . .

in connection with the purchase or sale of any security.[34]

In examining SEA Section 10(b) and SEC Rule 10b-5, the Supreme Court has stated that the statute, as enforced through the rule, prohibits ''intentional or willful conduct *designed to deceive or defraud* investors by controlling or artificially affecting the price of securities.''[35]

The FERC relied upon a statutory framework similar to the securities laws to promulgate largely identical rules prohibiting natural gas market manipulation and electric energy market manipulation.[36] The Energy Policy Act of 2005 amended the Natural Gas Act and the Federal Power Act to prohibit precisely the same type of conduct as SEA Section 10(b); that is, the use or employment of ''any manipulative or deceptive device or contrivance (as those terms are used in [SEA Section 10(b)] . . .)'' in natural gas and electricity markets.[37]

Similar statutory and regulatory frameworks prohibit the use of manipulative practices in other parts of the economy. The Commodity Exchange Act (''CEA'') is intended, among other things, ''to deter and prevent price manipulation or any other disruptions to market integrity . . . .''[38] The CEA provides that the CFTC possesses jurisdiction for ''transactions involving contracts of sale of a commodity for future delivery, traded or executed on a contract market . . . or derivatives transaction execution facility . . . or any other board of trade, exchange, or market . . . .''[39] It further provides for CFTC anti-manipulation authority over cash and physical transactions, as well as certain derivatives transactions relating to securities.[40]

The SEC, the FERC, and the CFTC all have taken action against market manipulation pursuant to the authorities described above. For example, the CFTC has initiated law enforcement actions against defendants for submitting false statements to private reporting services, government agencies, and the news media, and for engaging in trading practices that give the false appearance of trading activity.[41] The FERC similarly has found

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

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

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

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

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

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

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

> any person in the sale of securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly –
>
> (1) to employ any device, scheme or artifice to defraud, or
>
> (2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> (3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

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

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

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

[36] *See* FERC, *Prohibition of Energy Market Manipulation*, 71 FR 4244, 4246 (Jan. 26, 2006) (final anti-manipulation Rule).

[37] Section 4A of the Natural Gas Act, 15 U.S.C. 717c-1; Section 222 of the Federal Power Act, 16 U.S.C. 824v.

[38] 7 U.S.C. 5(b); *accord Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 372 n.50 (1982).

[39] 7 U.S.C. 2(a)(1)(A).

[40] 7 U.S.C. 2(a)(1)(A), (C)-(D).

[41] *See, e.g., In the Matter of CMS Mktg. Servs. & Trading Co.*, Comm. Fut. L. Rep. (CCH) ¶29,634 (C.F.T.C. Nov. 25, 2003) (finding liability for the submission of false information to private reporting services); *see also Wilson v. CFTC*, 322 F.3d 555, 560-61 (8th Cir. 2003) (affirming the CFTC's order

evidence of practices such as false reporting to price index publishers.[42] In addition, the SEC has pursued law enforcement actions against actors that have disseminated false information to the market, and against actors that have engaged in conduct creating the false appearance of trading activity.[43]

When Congress authorized the FTC to prohibit the use or employment of manipulative or deceptive devices or contrivances, it empowered the Commission to rely upon the foregoing statutory, judicial, and regulatory principles to promulgate its Rule.[44] The final Rule, based at least in part on SEC Rule 10b-5, will prohibit practices that inject false information into transactions. The final Rule thereby helps to protect the integrity of the price discovery process in wholesale petroleum markets. Moreover, the final Rule will prevent the same types of fraudulent or deceptive practices that the SEC, the CFTC, and the FERC have pursued in the markets they respectively regulate and will strike at the core of what EISA explicitly proscribes – market manipulation.[45]

This conclusion finds support in the rulemaking record. Throughout the proceeding, most commenters supported the FTC's proposal to promulgate a market manipulation rule,[46] and most RNPRM commenters that addressed the issue opined that the revised proposed Rule would be appropriate and in the public interest.[47] The Commission has determined, therefore, that the final Rule – which at its most fundamental level prohibits fraudulent or deceptive conduct – is appropriate and in the public interest.

## IV. Discussion of the Final Rule

### *A. Overview*

After reviewing the full rulemaking record developed in this proceeding, the Commission has concluded that promulgating a final Rule that is virtually identical to the revised proposed Rule best reflects congressional intent while accommodating the specific characteristics of wholesale petroleum markets. The final Rule therefore differs from the revised proposed Rule only as a consequence of two clarifying changes.[48] In the RNPRM, the Commission tentatively determined to modify the proscriptions of the initially proposed Rule – which were nearly identical to SEC Rule 10b-5 – in order to account for differences between wholesale petroleum markets and securities markets.[49] The Commission has now concluded that the revised proposed Rule, promulgated as the final Rule, would prevent manipulative conduct in wholesale petroleum markets while limiting attendant costs, a primary concern for many industry commenters.

In tailoring the final Rule, the Commission has accounted for Section 811's direction that the final Rule be an anti-fraud rule guided by the principles of SEC Rule 10b-5 and relevant precedent. These principles focus on the protection of market integrity.[50] The rulemaking record reflects support for an anti-fraud standard.[51] Although the conduct prohibition in Section 811 is identical to language found in SEA Section 10(b),[52] the inclusion of the

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

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

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

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

[45] 73 FR at 48322.

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

[47] As with prior comments submitted in this proceeding, most RNPRM commenters directed their statements to the application of a Section 811 rule, rather than to whether the revised proposed Rule met Section 811's rulemaking standard. *See also* 74 FR at 18308 n.40 (noting that most NPRM commenters focused their comments on the application of the proposed Rule). *See, e.g.*, CAPP at 1-2 (opining that the modifications to the revised proposed Rule – including, in particular, the adoption of an express scienter standard and the inclusion of market conditions language in the omissions section – ensured that the Rule ''would serve the public interest''); CFA at 4 (stating that the revised proposed Rule ''promotes the public interest and is perfectly consistent with the legislative language''); PMAA at 3 (noting that the revisions to the revised proposed Rule are ''appropriate''); *see also* ATAA at 2-3 (''applaud[ing] the Commission's decision to exercise its rulemaking authority,'' arguing that ''[m]arket manipulation, fraud, and deceptive practices distort the market, inflate prices, and inure to the detriment of the entire economy''). *But see* API at 2, 4-5 (disagreeing that a Section 811 rule would be appropriate because, in its view, a weighing of ''likely benefits and costs supports a decision not to promulgate any rule at this time'').

[48] In final Rule Section 317.3(b), the Commission has substituted the phrase ''is likely'' for the word ''tends'' in revised proposed Rule Section 317.3(b). *See* Section IV.D.3.b. below for further discussion. The Commission also has modified the definition of ''knowingly.'' *See* Section IV.C.3. below for further discussion.

[49] *See* 74 FR at 18310.

[50] *See United States v. Russo*, 74 F.3d 1383, 1391 (2d Cir. 1996) (''[F]rauds which 'mislead[] the general public as to the market value of securities' and 'affect the integrity of the securities markets' . . . fall well within [Rule 10b-5].'' (quoting *In re Ames Dep't Stores, Inc. Stock Litig.*, 991 F.2d 953, 966 (2d Cir. 1993))) (citation omitted); *see also Superintendent of Ins. of N.Y. v. Bankers Life & Cas. Co.*, 404 U.S. 6, 12 (1971) (stating that '''preserving the integrity of securities markets''' is one of the purposes of Section 10(b) (quoting *Superintendent of Ins. of N.Y. v. Bankers Life & Cas. Co.*, 430 F.2d 355, 261 (2d Cir. 1970))).

[51] *See, e.g.*, API at 29 (''The proper objective of any rule issued under Section 811 is to cover deceptive conduct . . . .'' ); CAPP at 2 (''Manipulative conduct that makes use of false information in market transactions does not constitute routine or acceptable commercial behavior, and is reasonably within the scope of prohibited conduct.'' ); CFDR (Mills), Tr. at 38-39 (''From my point of view, fraud is a good demarcation for any antimanipulation rule, because it provides a basis by which people can govern themselves and know with some understanding of what kind of conduct is going to violate a rule or not.'' ); PMAA (Bassman), Tr. at 47 (''[U]sing fraud . . . is very clear, because none of the people operating in this market operate without the benefit of legal counsel. Any legal counsel understands the concept of fraud, and fraud does belong here.'' ); NPRA, NPRM, at 2 (''NPRA endorses the FTC's determination that implementation of the EISA should be accomplished through a rule against fraud and deception that harms the competitive functioning of wholesale petroleum markets and, ultimately, consumers.'' ).

[52] *See* 15 U.S.C. 78j(b). As noted above, the anti-manipulation authority granted to the FERC also contains the identical conduct prohibition, and the statute granting that authority explicitly directed

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

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

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

### *B. Section 317.1: Scope*

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

The only comments received in response to the RNPRM with respect to the scope of a final rule concerned pipelines and futures markets, and contained essentially the same arguments the commenters had made in previous comments.[58] The Commission rejects the latest arguments, and reiterates that the scope of the final Rule is coextensive with the reach of the FTC Act.

With respect to pipelines, as the Commission stated in the RNPRM, not all pipelines necessarily fall outside the coverage of the FTC Act. Certain pipeline companies or their activities may fall outside the coverage of the FTC Act to the extent that they are acting as common carriers. However, pipeline companies and their owners or affiliates often are involved in multiple aspects of the petroleum industry – including the purchase or sale of petroleum products, and the provision of transportation services – and they may engage in conduct in connection with wholesale petroleum markets covered by EISA. The Commission has therefore determined that it must assess on a case-by-case basis whether any particular person – or any conduct at issue – falls outside the scope of the final Rule, and/

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

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

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

[55] 74 FR at 18316.

[56] *See* 74 FR at 18316.

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

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

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

or whether the conduct at issue falls under the ''in connection with'' language in the final Rule, which is discussed below in Section IV.D.1.b.

For similar reasons, although the Commission recognizes the CFTC's jurisdiction ''with respect to accounts, agreements . . . and transactions involving contracts of sale of a commodity for future delivery,''[59] the Commission declines to adopt a blanket safe harbor for futures markets activities. Nonetheless, consistent with its longstanding practice of coordinating its enforcement efforts with other federal or state law enforcement agencies where it has overlapping or complementary jurisdiction – as stated in the NPRM and the RNPRM – the Commission intends to work cooperatively with the CFTC to execute the Commission's objective to prevent fraud or deceit in wholesale petroleum markets.[60]

*C. Section 317.2: Definitions*

The final Rule defines six terms: ''crude oil,'' ''gasoline,'' ''knowingly,'' ''person,'' ''petroleum distillates,'' and ''wholesale.'' The only change to the definitions set forth in the revised proposed Rule is a non-substantive change to the definition of ''knowingly.'' These definitions establish the scope of the final Rule's coverage and provide guidance as to how the Commission intends to enforce the Rule. Only a few commenters addressed the definitions proposed in the RNPRM, and most of them focused on the definition of ''knowingly.'' These comments, together with the Commission's analysis of the definitions included in the final Rule, are discussed below.

1. Section 317.2(a): ''Crude Oil''

Section 317.2(a) of the revised proposed Rule defined ''crude oil'' as ''the mixture of hydrocarbons that exists: (1) in liquid phase in natural underground reservoirs and that remains 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.''[61] No commenters addressed this definition in response to the RNPRM.

Thus, Section 317.2(a) of the final Rule retains, without modification, the definition of ''crude oil'' in the revised proposed Rule. Consistent with its position in the NPRM and RNPRM, the Commission intends for the definition to include liquid crude oil and any hydrocarbon form that can be processed into a refinery feedstock, but to exclude natural gas, natural gas liquids, or non-crude refinery feedstocks.[62]

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

Section 317.2(b) of the revised proposed Rule defined ''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.''[63] Only one commenter, IPMA, addressed this definition, arguing for the inclusion of renewable fuels such as ethanol and other oxygenates.[64]

Section 317.2(b) of the final Rule retains, without modification, the definition of ''gasoline'' in the revised proposed Rule. As the Commission stated in the RNPRM, it ''intends to capture those commodities regularly traded as finished gasoline products or as gasoline products requiring only oxygenate blending to be finished, under this definition.''[65] The Commission declines to extend the definition of ''gasoline'' to include products that are not listed in Section 811 – such as renewable fuels (*e.g.*, ethanol) and blending components (*e.g.*, alkylate and reformate). Nonetheless, the Commission concludes that it may apply the final Rule to conduct implicating those non-covered products if appropriate under the ''in connection with'' language of the final Rule, as discussed below in Section IV.D.1.b. As the Commission noted in the RNPRM, using the ''in connection with'' language provides the Commission ''with sufficient flexibility to protect wholesale petroleum markets from manipulation without expanding the reach of a Section 811 rule to cover products not identified in the statute.''[66]

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

Section 317.2(c) of the revised proposed Rule defined ''knowingly'' to mean ''with actual or constructive knowledge such that the person knew or must have known that his or her conduct was fraudulent or deceptive.''[67] The revised proposed Rule thus expressly provided that a person must engage in the proscribed conduct ''knowingly'' in order to violate Section 317.3(a); that is, that a person must ''knowingly'' engage in fraudulent or deceptive conduct.[68]

Although one commenter noted that the proposed definition clarified that ''inadvertent mistakes – caused perhaps by the disorderly nature of markets – would not be actionable as manipulation,''[69] other commenters addressed a different point. These commenters urged the Commission to delete the phrase ''with actual or constructive knowledge'' from the definition, in order to avoid confusion about its interpretation.[70]

The Commission has determined to adopt this recommendation. Thus, final Rule Section 317.2(c) defines ''knowingly'' to mean ''that the person knew or must have known that his or her conduct was fraudulent or deceptive.'' The Commission emphasizes, however, that this modification in the definition of ''knowingly'' does not change its meaning.

For purposes of enforcement of final Rule Section 317.3(a), the Commission has determined that a showing of extreme recklessness is, at a minimum, necessary to prove the scienter element. In this regard, the Commission adopts, in part, the ''extreme recklessness'' standard established by the United States Court of Appeals for the Seventh Circuit.[71] Though the Circuits may differ on the application of extreme recklessness,[72] almost all of them have

[59] 7 U.S.C. 2(a)(1)(A).

[60] 74 FR at 18310-12; 73 FR at 48323-25. Several commenters supported the Commission's intention to work cooperatively with other agencies in exercising its Section 811 authority. CFTC at 2; MFA at 4; ISDA at 3; *see also* 74 FR at 18311 n.82.

[61] 74 FR at 18312.

[62] 74 FR at 18312; 73 FR at 48325.

[63] 74 FR at 18312 (adopting the initially proposed Rule's definition of ''gasoline'').

[64] *See* IPMA at 4 (arguing that the final Rule should include non-petroleum based commodities, such as ethanol and other oxygenates, in its definition of ''gasoline'').

[65] 74 FR at 18312.

[66] 74 FR at 18312.

[67] 74 FR at 18312.

[68] *See* 74 FR at 18305, 18312.

[69] Argus at 2.

[70] ISDA contended that ''[t]he commonly understood meaning of 'knew or must have known' is to have actual or constructive knowledge,'' and that ''[i]ncluding duplicative language in the definition could have unintended effects.'' ISDA at 11. CFDR also supported deleting the phrase, but for a different reason; CFDR argued that the legal concept of ''constructive knowledge'' is inconsistent with a '''knew or must have known' scienter standard'' because '''[c]onstructive knowledge' . . . often is applied to hold a person accountable for information that he or she 'should have known,' even if he or she did not.'' CFDR at 3.

[71] In an opinion by Judge Posner, the Court of Appeals for the Seventh Circuit recently reaffirmed the *Sundstrand* extreme recklessness standard. *SEC v. Lyttle*, 538 F.3d 601, 603 (7th Cir. 2008).

[72] *See* 73 FR at 48329; 74 FR at 18318. 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 precise formulation of recklessness.'' *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 319 n.3 (2007) (citing *Ernst & Ernst*, 425 U.S. at 194 n.12); *Ottmann v. Hunger Orthopedic Group, Inc.*, 353 F.3d 338, 343 (4th Cir. 2003) (collecting Court of

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now adopted this standard.[73] Similarly, the Commission has concluded that the standard should apply to the final Rule, and the Commission believes that it is appropriate because it provides for both effective rule enforcement and clarity to market participants.

The ''extreme recklessness'' standard articulated by the Seventh Circuit requires a showing that an actor knew or must have known that his conduct created a danger of misleading buyers or sellers.[74] The Seventh Circuit has stated that this showing can be made with respect to securities fraud by establishing that the actor's conduct constitutes ''an extreme departure from the standards of ordinary care . . . to the extent that the danger [of misleading buyers or sellers] was either known to the defendant or so obvious that the defendant must have been aware of it.''[75] However, whereas standards of ordinary care are well developed in the context of securities markets, they are less well defined in the context of wholesale petroleum markets. For this reason, the Commission has concluded that a showing of a departure from ''ordinary care'' is not required to establish scienter under final Rule Section 317.3(a). The Commission therefore has determined that, for purposes of final Rule Section 317.3(a), proving scienter will require showing only that a person either knew or must have known that his or her conduct created a danger of misleading buyers or sellers.

This definition of ''knowingly'' gives petroleum industry participants the appropriate guidance as to the level of scienter required to establish a final Rule Section 317.3(a) violation. The Commission further discusses the application of the ''knowingly'' standard in Section IV.D.2.a. below.

4. Section 317.2(d): ''Person''

Section 317.2(d) of the revised proposed Rule defined the term ''person'' to mean: ''any individual, group, unincorporated association, limited or general partnership, corporation, or other business entity.''[76] No commenters addressed this definition in response to the RNPRM. As stated in the RNPRM, the Commission believes that ''this definition is consistent with the jurisdictional reach of the FTC Act, as well as with prior usage in other FTC rules.''[77] Therefore, Section 317.2(d) of the final Rule retains the revised proposed definition of ''person'' without modification.

5. Section 317.2(e): ''Petroleum Distillates''

Section 317.2(e) of the revised proposed Rule defined ''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.''[78] No commenters addressed this definition in response to the RNPRM.

The Commission has determined to include in final Rule Section 317.2(e), without modification, the definition of ''petroleum distillates'' in revised proposed Rule Section 317.2(e). As stated in the NPRM and the RNPRM, this definition includes ''finished fuel products, other than 'gasoline,' produced at a refinery or blended in tank at a terminal.''[79] As the Commission explained in the RNPRM, the definition of ''petroleum distillates'' also includes middle distillate refinery fuel streams, and thus encompasses all product streams above heavy fuel oils – up to and including lighter products such as on-road diesel, heating oil, and kerosene-based jet fuels – but does not extend to heavy fuel oils.[80] Consistent with the RNPRM, the Commission has also determined that the definition of ''petroleum distillates'' does not extend to renewable fuels such as biodiesel.[81] The Commission addresses the intended application of the final Rule to conduct implicating non-covered products, such as renewable fuels, in its discussion of the ''in connection with'' language in Section IV.D.1.b. below.

6. Section 317.2(f): ''Wholesale''

Section 317.2(f) of the revised proposed Rule defined the term ''wholesale'' to mean: ''(1) all purchases or sales of crude oil or jet fuel; and (2) all purchases or sales of gasoline or petroleum distillates (other than jet fuel) at the terminal rack level or upstream of the terminal rack level.''[82] As stated in the RNPRM, the Commission intended the definition of ''wholesale'' to include all bulk sales of crude oil and jet fuel (even when not for resale) and all terminal rack sales,[83] but not to extend to retail sales of gasoline, diesel fuels, or fuel oils to consumers.[84]

Two commenters, PMAA and Greenberger, supported the inclusion of sales at the terminal rack level in the definition.[85] SIGMA, by contrast, renewed its opposition to including such transactions, arguing in part that rack prices are ''unlikely to alter overall price levels in the markets served out of a terminal or terminal cluster'' and that ''there are no reported instances of price manipulation practices at the rack terminal level.''[86]

The Commission is not persuaded that there is little or no potential for market manipulation at or below the terminal rack level. As the Commission stated in the RNPRM, ''prohibited conduct may in fact occur at the terminal rack level'' and ''[s]uch a determination requires analysis on a case-by-case basis.''[87] Moreover, terminal rack sales are ''wholesale'' transactions as that term is commonly defined, and excluding them from the definition of ''wholesale'' would therefore place the final Rule at odds with the express language of EISA, which addresses manipulative conduct in wholesale markets. The Commission has consequently determined to retain in final Rule Section 317.2(f), without modification, the definition of

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

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

[74] *Sundstrand Corp. v. Sun Chem. Corp.*, 553 F.2d 1033, 1045 (7th Cir.), *cert. denied*, 434 U.S. 875 (1977) (quoting *Franke v. Midwestern Okla. Dev. Auth.*, 428 F. Supp. 719, 725 (W.D. Okla. 1976)). The Court of Appeals for the District of Columbia Circuit relied upon *Sundstrand* to establish the ''extreme recklessness'' scienter standard applicable to SEC Rule 10b-5. *See SEC v. Steadman*, 967 F.2d 636, 641-42 (D.C. Cir. 1992) (adopting *Sundstrand's* extreme recklessness standard).

[75] *SEC v. Lyttle*, 538 F.3d at 603-04, *quoting Makor Issues & Rights, Ltd. v. Tellabs Inc.*, 513 F.3d 702, 704 (7th Cir. 2008).

[76] 74 FR at 18313 (adopting the initially proposed Rule's definition of ''person'').

[77] 74 FR at 18313; *see, e.g.*, Telemarketing Sales Rule, 16 CFR 310.2(v); Disclosure Requirements and Prohibitions Concerning Franchising, 16 CFR 436.1(n).

[78] 74 FR at 18313 (adopting the initially proposed Rule's definition of ''petroleum distillates'').

[79] 74 FR at 18313; 73 FR at 48325.

[80] 74 FR at 18313.

[81] *See* 74 FR at 18313.

[82] 74 FR at 18314.

[83] 74 FR at 18314.

[84] 74 FR at 18314; *see also* 73 FR at 48326.

[85] PMAA at 2 (agreeing with the Commission's position on rack sales); Greenberger at 3 (supporting the RNPRM's definition of ''wholesale'' that includes rack transactions).

[86] SIGMA at 2 (''[Rack] prices are set by the supplier's view of the market and are not normally fixed by reference to other suppliers' prices.'' ).

[87] 74 FR at 18313-14.

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

*D. Section 317.3: Prohibited Practices*

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

It shall be unlawful for any person, directly or indirectly, in connection with the purchase or sale of crude oil, gasoline, or petroleum distillates at wholesale, to:

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

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

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

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

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

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

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

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

[89] The initially proposed Rule stated:

It shall be unlawful for any person, directly or indirectly, in connection with the purchase or sale of crude oil, gasoline, or petroleum distillates at wholesale,

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

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

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

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

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

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

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

[93] *See* 73 FR at 48332.

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

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Many commenters urged, however, additional modifications to Section 317.3. For example, a few commenters recommended that the Commission broaden the scope of the revised proposed Rule by applying the extreme recklessness standard to Section 317.3(b) – as well as to Section 317.3(a)[95] – and by eliminating the market conditions proviso in Section 317.3(b).[96] Other commenters, by contrast, recommended that the Commission narrow the revised proposed Rule by: (1) adopting a single specific intent standard and applying it to both parts of Section 317.3;[97] (2) applying either a specific market effect requirement or a market conditions proviso to both parts of Section 317.3;[98] and (3) eliminating the prohibition on material omissions.[99] Some of these commenters believed that the alternative rule language would better address their concerns.[100]

The Commission has considered commenters' concerns carefully, and has determined not to effect further changes to the scope of the revised proposed Rule. The Commission has concluded that narrowing the Rule, as suggested by some commenters, would unnecessarily encumber its ability to reach conduct that likely constitutes market manipulation, contrary to the objectives of Section 811, and that the modifications to the initially proposed Rule (which was nearly identical to SEC Rule 10b-5) appropriately tailor the final Rule to reflect the characteristics of wholesale market transactions. Additionally, the Commission has concluded that broadening the rule to reach other types of conduct, as suggested by some commenters, would be inconsistent with the statutory language authorizing the Commission to prohibit market manipulation pursuant to the framework of SEC Rule 10b-5, an anti-fraud rule.

The broad prohibition in final Rule Section 317.3(a) permits the Commission to reach all types of fraudulent or deceptive conduct likely to harm wholesale petroleum markets. The extreme recklessness standard in Section 317.3(a) appropriately focuses that paragraph on conduct that presents an obvious risk of misleading buyers or sellers, and ensures that this provision does not reach inadvertent mistakes, which could have had the unintended effect of curtailing beneficial market activity. The Commission believes that the design of the separate and more limited prohibition of Section 317.3(b) – a prohibition on statements that are misleading as a result of an omission of a material fact – addresses commenters' concerns about the difficulty of distinguishing between benign and harmful omissions. The Commission believes that this objective is achieved by the greater evidentiary burden imposed by Section 317.3(b) of the final Rule – a higher scienter requirement and a market conditions proviso.

The Commission therefore issues final Rule Section 317.3 in a form virtually identical to Section 317.3 in the revised proposed Rule. In so doing, the Commission has specifically tailored each paragraph of final Rule Section 317.3 to bring about an appropriate balance between effective prohibition of undesirable conduct and avoidance of unintended chilling of desirable economic activity.[101] A more detailed discussion of the final Rule's conduct provisions and the Commission's response to commenters is set forth below.

1. Preamble Language

a. ''Directly or Indirectly''

The phrase ''directly or indirectly'' – which originates in Section 811 of EISA[102] and is also included in the preamble to final Rule Section 317.3 – delineates the level of involvement necessary to establish liability under the final Rule. In particular, it means that the final Rule imposes liability not only upon any person who directly engages in manipulation but also upon any person who does so indirectly.

One commenter, CFA, opined that Congress included the phrase ''directly or indirectly'' in part to support a recklessness standard for a Section 811 rule.[103] The Commission disagrees with this reading of the statute. Rather, the Commission has determined that ''directly or indirectly'' describes the level of involvement necessary to establish liability under the final Rule, not any particular scienter standard. Thus, consistent with its position in the RNPRM, the Commission has determined that the phrase ''directly or indirectly'' in the final Rule should ''be interpreted and applied to prevent a person from engaging in the prohibited conduct, either alone or through others.''[104]

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

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

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

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

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

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

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

[101] *See* 74 FR at 18308.

[102] 42 U.S.C. 17301 (''It is unlawful for any person, *directly or indirectly*, to use or employ . . . .'' (emphasis added)).

[103] CFA at 4-5 (''By including the phrase directly or indirectly, making no mention of intentionality or effect, and citing only the public interest, the Congress clearly invited the [FTC] to. . . reject the inclusion of a finding of intent in order to find unlawful conduct.'' ). *See* Sections IV.D.2.a. and IV.D.3.a. for a discussion of the scienter requirements in the final Rule.

[104] 74 FR at 18317.

b. ''In Connection With''

Section 811 authorizes the Commission to prohibit manipulative conduct undertaken ''in connection with'' the purchase or sale of crude oil, gasoline, or petroleum distillates at wholesale.[105] Thus, the final Rule reaches market manipulation that occurs in the wholesale purchase or sale of products covered by Section 811 (and defined in the final Rule) – and ''in connection with'' such purchases or sales – provided that there is a sufficient nexus between the prohibited conduct and the markets for these products.[106]

In response to the RNPRM, two commenters discussed the ''in connection with'' language. Senator Cantwell urged the Commission to interpret the phrase ''broadly . . . to prevent and deter any manipulative conduct,'' including supply and operational decisions, ''that could impact wholesale petroleum markets.''[107] IPMA supported the Commission's tentative determination to reach ethanol and other blending products through the ''in connection with'' language.[108]

As it stated in the RNPRM, the Commission believes that Congress intended that it construe the phrase ''in connection with'' broadly.[109] Such an interpretation is consistent with precedent from securities law interpreting the same phrase in SEC Rule 10b-5,[110] and will enable the Commission to give full effect to the statutory language of Section 811, which is identical to SEA Section 10(b). In this respect, the Commission disagrees with commenters that the ''in connection with'' language should never reach supply or operational decisions. Instead, the language can reach those decisions whenever there is a sufficient nexus between the conduct at issue and the purchase or sale of crude oil, gasoline, or petroleum distillates.[111]

With respect to product coverage, as detailed in the RNPRM, the Commission intends to reach products – such as renewable fuels (*e.g.*, ethanol or biodiesel) or blending components (*e.g.*, alkylate or reformate) – that are not specifically identified in Section 811 only if there is a sufficient nexus between conduct involving those products and wholesale petroleum markets for covered products.[112] Renewable fuels and blending components are integral to the overall supply of finished motor fuels. Thus, manipulating purchases or sales of these products can have the requisite nexus with wholesale petroleum markets.

By contrast, the Commission does not intend to apply the final Rule to commodities whose predominant use is in non-petroleum products, or to commodities that are inputs for ethanol, such as corn and sugar. The connection between these commodities and wholesale petroleum markets would likely be too attenuated to satisfy the ''in connection with'' requirement of Section 811. Thus, the Commission will determine on a case-by-case basis whether supply or operational decisions – or conduct in renewable fuels markets (or markets for other non-covered products) – are ''in connection with'' wholesale petroleum transactions.[113]

2. Section 317.3(a): General Anti-Fraud Provision

Final Rule Section 317.3(a) is the same as revised proposed Section 317.3(a). Specifically, final Rule Section 317.3(a) is a general anti-fraud provision that prohibits any person from knowingly engaging in conduct – including the making of false statements of material fact – that operates or would operate as a fraud or deceit on any person. Final Rule Section 317.3(a) thus prohibits fraudulent or deceptive conduct that not only serves no legitimate purpose, but can be expected to impair the efficient functioning of wholesale petroleum markets.[114] Specific examples of conduct that would violate Section 317.3(a) include false public announcements of planned pricing or output decisions; false statistical or data reporting; false statements made in the context of bilateral or multilateral communications that result in the dissemination of the false information to the broader market;[115] and fraudulent or deceptive conduct such as wash sales.

The overall record in this proceeding reflects widespread support for a market manipulation rule that prohibits overt fraud or deceit.[116] Comments submitted in response to the RNPRM add to this support.[117] Several commenters, however, raised concerns regarding the scope of revised proposed Section 317.3(a). For example, some commenters recommended that the Commission modify the paragraph to require the specific intent to commit fraud or deceit – or a specific intent to manipulate a market – as an element of proof.[118] These commenters also urged the Commission to add a market conditions proviso to Section 317.3(a), because in their view, such a proviso was needed to ensure that the provision prohibited market manipulation.[119]

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

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

[107] Senator Cantwell at 2-3.

[108] IPMA at 4.

[109] *See* 74 FR at 18317-18.

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

[111] The Commission emphasizes that it does not intend to regulate or otherwise second-guess market participants' legitimate supply and operational decision-making, contrary to the assertion of some commenters. *See* API, NPRM, at 30-32 (urging the Commission not to interpret the ''in connection with'' language as reaching upstream conduct and statements, including operational and supply decisions); NPRA, NPRM, at 33 (arguing that ''any possibility of liability under an FTC rule for [supply or operational] decisions could seriously distort refiners' decision making and disrupt competitive activity in petroleum markets'').

[112] *See* 74 FR at 18317-18.

[113] A further safeguard against regulatory overreach respecting supply or operational decisions is that a violation of the final Rule also requires that the requisite scienter standard be demonstrated. The requirement that this element be proved clarifies that the final Rule does not reach conduct arising out of an error or miscalculation, either because the actor did not knowingly engage in fraudulent or deceptive conduct, or because the actor did not intentionally mislead by omitting material facts from statements.

[114] 74 FR at 18318.

[115] The Commission generally does not intend to reach bilateral negotiations as a matter of course. Fraud or deception arising out of such negotiations may be more appropriately treated under state law. This position is consistent with that of the FERC in interpreting similar market manipulation authority. *See* 71 FR at 4251-52 (stating that ''absent a tariff requirement or [FERC] directive,'' the FERC ''generally will not apply [its] final [anti-manipulation] rule to bilateral contract negotiations'').

[116] *See* prior Notices for further discussion of commenters who support an anti-fraud rule. 74 FR at 18308 & n.47; 73 FR at 48319 & n.28.

[117] *See, e.g.*, Sutherland at 3 (supporting ''a prohibition against intentional false statements or a prohibition against intentional fraudulent conduct''); API at 29 (''The proper objective of any rule issued under Section 811 is to cover deceptive conduct . . . .'' ); ATAA at 3 (''ATA[A] hopes that if the FTC adopts the revised proposed rule, it will apply and enforce that rule consistent with the broad anti-fraud mandate of the EISA.'' ); CAPP at 2 (''Manipulative conduct that makes use of false information in market transactions does not constitute routine or acceptable commercial behavior, and is reasonably within the scope of prohibited conduct.'' ).

[118] *See, e.g.*, ISDA at 6 (''Any rule that the Commission enacts should require proof that a market participant specifically intended to engage in a fraudulent or deceptive practice . . . .'' ); CFDR at 2 (arguing that a Section 811 rule ''must require that a person act with an intent to corrupt market pricing''); Sutherland, NPRM, at 5 (urging the Commission to require a showing ''that the defendant specifically intended to manipulate the market'').

[119] *See, e.g.*, API at 34 (arguing that including such a proviso would ''focus[] the rule on the sort of conduct Congress sought to address: acts and practices that manipulate a market''); ISDA at 3

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The Commission has considered these issues and concerns, but has determined that final Rule Section 317.3(a) should be identical to revised proposed Rule Section 317.3(a) so that it broadly prohibits all types of fraudulent or deceptive conduct likely to harm wholesale petroleum markets. The Commission has thus retained the ''knowingly'' scienter standard in final Rule Section 317.3(a) and has chosen not to require a showing that prohibited conduct adversely affect market conditions. This determination comports with the Commission conclusion that there is no economic justification for overt fraud or deception, a view about which there is no dispute in the rulemaking record. The Commission has determined that these choices also provide sufficient protection against capturing legitimate business conduct – and against reaching mistakes – because affirmative misstatements are not easily confused with benign conduct.

The Commission also has determined that final Rule Section 317.3(a) should not reach material omissions because they are covered by Section 317.3(b). Although the Commission opined in the RNPRM that ''any omission that is part of a fraudulent or deceptive act, practice, or course of business would violate Section 317.3(a),''[120] the Commission now has concluded that the better course is to subject unlawful omissions only to enforcement under final Rule Section 317.3(b). To do otherwise would introduce unnecessary confusion, and could potentially limit voluntary disclosures beneficial to market transparency. Thus, conduct covered by Section 317.3(a) does not include misleading statements resulting from material omissions covered by final Rule Section 317.3(b).

a. A Person Must Knowingly Engage in Conduct That Operates or Would Operate as a Fraud or Deceit

Section 317.3(a) of the revised proposed Rule provided that a person must engage in the proscribed conduct ''knowingly'' in order to violate the provision. In the RNPRM, the Commission tentatively defined the term ''knowingly'' to be coextensive with the extreme recklessness standard.[121] Thus, the Commission stated in the RNPRM that extreme recklessness would satisfy the intent requirement in revised proposed Section 317.3(a).[122]

Several commenters urged the Commission to adopt a single, higher ''specific intent'' standard for the final Rule.[123] Other commenters, by contrast, contended that an extreme recklessness standard would be appropriate and consistent with congressional intent.[124] For example, CFA argued that the proposed extreme recklessness standard would be ''more appropriate to protect the public'' because it ''require[d] the [market] participants to exercise some self-control and to self-regulate their behavior.''[125]

After considering these views, the Commission believes that, because final Rule Section 317.3(a) prohibits overt fraudulent or deceptive acts – which can have no beneficial effect in any setting – the extreme recklessness standard embodied in the term ''knowingly'' is appropriate.[126] A higher ''specific intent to manipulate the market'' standard could, in principle, permit harmful conduct to escape coverage under the final Rule, simply because the actor did not intend to manipulate the market. The Commission has concluded that such a regulatory gap is unacceptable. The Commission also has concluded that requiring a showing of extreme recklessness, rather than ordinary recklessness or negligence, provides sufficient assurance that final Rule Section 317.3(a) does not capture inadvertent conduct or mere mistakes.[127]

Thus, to violate final Rule Section 317.3(a), a person must engage in the proscribed conduct ''knowing'' that it is fraudulent or deceptive. For example, a trader's state of mind must encompass more than just carrying out the ministerial function of transmitting false information to a price reporting service. Rather, there must be evidence that the trader knew or must have known that the information transmitted was false.[128]

As discussed above in Section IV.C.3., the Commission has adopted, in part, the ''extreme recklessness'' standard set out by the United States Court of Appeals for the Seventh Circuit.[129] The Commission has determined that establishing a violation of final Rule Section 317.3(a) requires, at a minimum, evidence that the defendant's conduct presents a danger of misleading buyers or sellers that is either known to the

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

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

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

122 74 FR at 18318.

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

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

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

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

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

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

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

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

b. Materiality Standard

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

The Commission notes that the element of materiality limits the coverage of the final Rule. Consistent with securities law, the Commission intends that it not be sufficient simply to show that any particular person would have found any particular piece of information of interest,[132] or to show that any particular person would have acted differently but for the particular piece of information at issue.[133] Rather, the assessment requires a factual inquiry into whether the statement, omission, or datum at issue is of a character that would significantly affect the decision-making process of a reasonable market participant because it alters the mix of available information. This assessment, in turn, depends upon the specific circumstances surrounding the particular statement or omission.

Guided by securities law precedent, the Commission intends to determine on a case-by-case basis whether a statement (or omission) is material. In this regard, the Commission views false or deceptive statements as material whenever they are of a character likely to be significant to participants in the broader market. Examples might include false representations to the government about a company's current inventory or refinery operating status, or false representations about the price or volumes of past transactions to a private price reporting service.

c. Other Language in Section 317.3(a)

Final Rule Section 317.3(a) – like the initially proposed Rule and the revised proposed Rule – prohibits misrepresentations of fact because such misrepresentations clearly constitute fraudulent or deceptive conduct.[134] As detailed in the RNPRM, many commenters and workshop participants agreed that such conduct harms the marketplace and should be prohibited.[135] Prohibiting misrepresentations of material fact is further supported by the enforcement approach of other agencies. Final Rule Section 317.3(a) thus continues to include the phrase ''the making of any untrue statement of material fact'' in order to make this prohibition clear.

A few commenters mistakenly believed that the phrase ''operates or would operate as a fraud or deceit'' found in Section 317.3(a) would obviate the scienter requirement for that provision.[136] The Commission disagrees with this interpretation. The Commission notes, for example, that SEC Rule 10b-5 contains an identical phrase, and the Supreme Court has interpreted Rule 10b-5 as requiring proof of scienter.[137] Thus, the Commission has determined not to alter the phrase ''operates or would operate as a fraud'' for purposes of final Rule Section 317.3(a). In keeping the phrase, moreover, the Commission intends that Section 317.3(a) reach conduct that defrauds or deceives another person or that could have the capacity to do so.

3. Section 317.3(b): Omission of Material Information Provision

Final Rule Section 317.3(b), like revised proposed Rule Section 317.3(b), prohibits fraudulent or deceptive statements that are misleading as a result of the intentional omission of material facts, where that omission distorts or is likely to distort market conditions for a covered product.[138] Thus, material omissions from a statement that is otherwise literally true may, under the circumstances present at the time the statement is made, render that statement misleading.[139] The Commission therefore has determined that prohibiting intentional omissions of material facts that distort or are likely to distort market conditions is consistent with both the objectives of EISA and the Commission's larger mandate to protect consumers.[140]

The record contains comments from both those who supported and those who objected to a specific omissions provision.[141] Those objecting argued

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

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

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

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

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

[135] 74 FR at 18320.

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

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

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

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

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

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

Continued

that the Section 317.3(b) prohibition on omissions would lead firms to adopt compliance programs that curtail voluntary disclosures, thereby ''denying markets the benefits of the information that is readily disclosed today.''[142] Some commenters also questioned whether a specific omissions prohibition would be ''efficacious'' given the absence of any existing disclosure obligations in wholesale petroleum markets.[143] Still other commenters stated that revised proposed Section 317.3(b) was superior to the initially proposed Rule because the revisions enhanced the Rule's clarity regarding the coverage of material omissions.[144]

After reviewing the record, the Commission has decided to retain a separate prohibition on material omissions because this conduct may serve as a vehicle to manipulate wholesale petroleum markets even in the absence of affirmative disclosure requirements. In promulgating final Rule Section 317.3(b), the Commission has accommodated both Section 811's injunction against market manipulation and commenters' concerns that a separate omissions provision might discourage voluntary disclosures that increase beneficial market transparency. The Commission has achieved this accommodation by crafting the Section 317.3(b) prohibition of material omissions so that it differs from the Section 317.3(a) prohibition on overt fraud or deceit in two significant ways.

First, Section 317.3(b) contains a stricter scienter standard than does Section 317.3(a). Specifically, establishing a final Rule Section 317.3(b) violation requires showing that the alleged violator ''intentionally fail[ed] to state a material fact that under the circumstances render[ed] a statement made by such person misleading.'' This scienter standard requires that the alleged violator intend to mislead by means of a material omission rather than simply being aware of the potential risk posed by his or her conduct; that is, the actor must have intentionally omitted information from a statement with the further intent to make the statement misleading.

Second, final Rule Section 317.3(b) contains a limiting proviso not found in final Rule Section 317.3(a). The proviso requires that the wrongful conduct at issue distort or be likely to distort market conditions. The limiting proviso provides businesses with the assurance that omissions occurring in the context of routine business activity are not actionable unless they otherwise undermine market participants' ability to rely on the integrity of market data.

Final Rule Section 317.3(b) – like final Rule Section 317.3(a) – also does not impose an affirmative duty to disclose information or a duty to correct or update information.[145] Rather, Section 317.3(b) applies only if a covered entity voluntarily provides information – or is compelled to provide information by statute, order, or regulation – but then intentionally fails to disclose a material fact that makes the information misleading. Section 317.3(b) therefore does not require businesses to provide commercially sensitive information to any other person absent a pre-existing legal obligation to do so.[146] Similarly, it is not a violation of final Rule Section 317.3(b) to withhold market intelligence that a company gathered about market conditions.[147] The failure to provide such information would not establish a violation of this provision, even if the counter-party in a commercial negotiation would have acted differently if such information had been revealed. In addition, the Commission does not generally intend that Section 317.3(b) reach routine bilateral commercial negotiations, which are unlikely to inject false information into the market process.[148]

a. Scienter Standard: A Person Must Intentionally Make a Misleading Statement By Intentionally Omitting Material Information

As noted, Section 317.3(b)'s scienter standard requires that a person must have intentionally omitted information from a statement with the further intent to make the statement misleading. Significantly, this standard does not require a showing that the actor intended to manipulate a wholesale petroleum market or otherwise intended to have an impact on the larger market. It requires only that the actor intended to make a statement misleading by means of an intentional omission of material fact. The Commission has determined to apply the scienter requirement both to the omission of a material fact and to the making of a misleading statement.[149]

Several commenters expressed general support for the Commission's decision to adopt an ''intentional'' standard for Section 317.3(b).[150] Some

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

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

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

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

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

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

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

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

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

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

commenters further urged the Commission to elevate the standard to a ''specific intent to manipulate the market'' because, in their view, it would better delineate limits on the conduct reached by the Rule.[151] The Commission has determined not to do so because intentional misleading statements can be of a character that undermines market participants' overall trust in the integrity of market data, regardless of whether an actor had a specific intent to have that effect or to benefit from it. The Commission believes, furthermore, that the ''intentional'' standard provides market participants and their counsel with as much clarity as practicable regarding the evidentiary burden necessary to establish this element of a Section 317.3(b) violation. Because a violation of Section 317.3(b) requires proof of intentional conduct, it does not reach inadvertent conduct or mere mistakes.

b. The Omission of Material Information Must Distort or Be Likely to Distort Market Conditions within a Wholesale Market for a Covered Product

Under the revised proposed Rule, a statement made intentionally misleading by reason of the intentional omission of a material fact would violate the Rule only if its dissemination ''distorts or tends to distort market conditions'' respecting any covered product. Final Rule Section 317.3(b) retains this limiting market conditions language, except that the Commission has determined to replace the phrase ''tends to distort'' with the phrase ''is likely to distort.'' The Commission has effected this modification in order to eliminate the possibility of confusion, by clarifying that final Rule Section 317.3(b) focuses upon those material omissions that are likely to distort market conditions. Thus, establishing a violation of final Rule Section 317.3(b) expressly requires proof that a material omission ''distorts or is likely to distort market conditions'' for a covered product.[152]

Commenters presented various views on the desirability of a market conditions proviso.[153] ISDA opined that ''the distorts or tends to distort requirement . . . will benefit markets . . . because it should remove from the ambit of the rule, private and other conversations and conduct that do not distort or tend to distort markets and with which the Commission should not be concerned.''[154] Other commenters, however, including ISDA, continued to argue that establishing a rule violation should require proof of an actual price effect.[155] CFDR argued that the proposed market conditions proviso was an ''imprecise and poor substitute for effects on market pricing,'' and that a market manipulation rule should reach conduct that ''corrupt[s] the integrity of market pricing.''[156] Senator Cantwell opposed the proviso, arguing that such language would unnecessarily limit the Commission's ability to ''hold[] accountable those who employ any manipulative 'device or contrivance' in wholesale oil and petroleum markets.''[157]

The Commission has concluded that the limiting proviso advances the effective implementation of Section 811 in an important way. It ensures that Section 317.3(b) prohibits only those material omissions that can be expected to manipulate a wholesale petroleum market. In so doing, it gives market participants the certainty that statements containing material omissions will not be challenged if they do not adversely threaten the reliability of data in a broader wholesale petroleum market.

Significantly, however, by the proviso's own terms, establishing a final Rule Section 317.3(b) violation does not require proof of a specific price effect. Rather, the phrase ''distorts or is likely to distort market conditions'' speaks only to the ability of market participants to rely on the integrity of market data in making purchase and sales decisions. Misleading statements of the kind that distort or are likely to distort market data taint the integrity of the market process.[158]

In this regard, the core principle embodied in the proviso centers around the character and the likely market reach of the false or misleading information that is injected into the market by means of misleading statements. Specifically, establishing a violation of final Rule Section 317.3(b) requires showing that the character and likely market reach of such false or misleading information is likely to make market data less reliable. This evidentiary burden is lower than proving a specific price effect or any other specific effect on a market metric.

Focusing Section 317.3(b) enforcement on conduct that inherently threatens market integrity because it is conduct that distorts or is likely to distort market conditions, thus, achieves the objectives of Section 811 while limiting interference with legitimate business activity. For example, proof that a person intentionally reported price information to a private data reporting company that is in the business of providing price reports to the marketplace – and that the person intentionally omitted material facts that the reporting company required to be reported – would satisfy the market conditions proviso. Similarly, intentionally omitting material information in statements in order to mislead government officials during a national emergency would violate Section 317.3(b) because such conduct can be expected to threaten the integrity of the data within the market at large and on which market participants rely.

*But see, e.g.*, Greenberger at 3 (stating that the addition of ''intentionally'' to Section 317.3(b) ''unnecessarily inhibit[ed] the FTC from exercising its authority to protect the public from market manipulation . . . .'' ).

[151] *See, e.g.*, CFDR at 4-5 (''[P]roof of intent to corrupt the integrity of market pricing processes or an intent otherwise to cause false, fictitious and artificial market prices must be a necessary element of any anti-manipulation rule.'' ); API at 3 (arguing that specific intent ''is necessary to limit the rule to the market-distorting conduct that Congress intended to address in Section 811'').

[152] The edit is consistent with the views of one commenter. *See* API at 38 (arguing that the concept of ''tendency'' may lead to unintended interpretations).

[153] One commenter, ATAA, expressed general support for the market conditions proviso, but ultimately preferred the proposed Rule as articulated in the NPRM, which does not contain a market conditions proviso or similar limiting language. ATAA at 1, 5.

[154] ISDA at 13-14.

[155] *See, e.g.*, API at 34 (preferring a required showing of market effects); ISDA at 9 (''The Commission should require proof of market effect to find a violation of the rule because public policy only should be concerned with fraudulent activity that actually affects market prices and, therefore, presumably harms wholesale petroleum products markets.'' ); *see also* Sutherland at 4 (encouraging the Commission to require that prohibited behavior impact the market).

[156] CFDR at 5; *see also* API at 38 (''Tends to distort' is an imprecise term, subject to expansive interpretations imposing liability even on omissions that, in the circumstances, had no real chance of affecting a covered market or consumers.'' ).

[157] Senator Cantwell at 4. Commenters also expressed support for the Commission decision to reject market or price effects requirements. *See* Senator Cantwell at 3-4; CFA at 6; Greenberger at 3.

[158] As discussed earlier in Section III., markets absorb all available information – good or bad – and continually adjust price signals and other market data to any new information. When economic actors can presume that the data of the market have not been artificially manipulated, they are able to rely on the data to make decisions that they believe will advance their individual economic objectives. Participants can no longer trust that the data of the market reflect underlying market fundamentals. The proviso contained in final Rule Section 317.3(b) thus focuses enforcement of that provision on conduct that inherently threatens confidence in the market's integrity. When material omissions are of the character that can be expected to distort observable market data, those decisions are perforce riskier and the efficiency of the market process is reduced. Market participants and the public are less able to trust the underlying integrity of the market process.

c. Materiality

Section 317.3(b) of the final Rule prohibits the omission of a ''material fact.'' The standard for materiality for Section 317.3(b) is the same as that for Section 317.3(a), which is discussed above in Section IV.D.2.b. Thus, a fact is material if there is a substantial likelihood that a reasonable market participant would consider it important in making a decision to transact, because the material fact significantly alters the total mix of information available.[159] The Commission has concluded that limiting the reach of final Rule Section 317.3(b) to an omission of a ''material fact'' provides market participants with clarity as to the type of omission that is covered by Section 317.3(b).

*E. Section 317.4: Preemption*

Section 815(c) of EISA states that ''[n]othing in this subtitle preempts any State law.''[160] Consequently, Section 317.4 of the final Rule contains a standard preemption provision used in other FTC rules, making it clear that the Commission does not intend to preempt the laws of any state or local government, except to the extent of any conflict.[161] This approach is consistent with the position stated in the RNPRM, where the Commission explained that there is no conflict, and therefore no preemption, if state or local law affords equal or greater protection from the manipulative conduct prohibited by the revised proposed Rule.[162]

No commenters addressed preemption of state law. Accordingly, the final Rule adopts the preemption provision proposed in the RNPRM.[163]

*F. Section 317.5: Severability*

Section 317.5 of the final Rule contains a standard severability provision used in other FTC rules.[164] This provision makes clear that if any part of the Rule is held invalid by a court, the rest of the Rule will remain in effect. The Commission received no comments on this issue. Accordingly, the Commission adopts without alteration the severability provision proposed in the RNPRM.[165]

*G. Regulatory Flexibility Act*

The Regulatory Flexibility Act of 1980 (''RFA'')[166] generally requires a description and analysis of proposed and final rules that will have a significant economic impact on a substantial number of small entities. Specifically, the RFA requires an agency to provide an Initial Regulatory Flexibility Analysis (''IRFA'')[167] with a proposed Rule and a Final Regulatory Flexibility Analysis (''FRFA'')[168] with a final rule, if any. The Commission is not required to do such analyses if a rule would not have such an economic effect.[169]

Although the scope of the final Rule may reach a substantial number of small entities as defined in the RFA, the Commission does not believe that the Rule will have a significant economic impact on those businesses.[170] The Commission specifically requested comments on the economic impact of the revised proposed Rule and received none.[171] Given that there are no reporting requirements, document or data retention provisions, or any other affirmative duties imposed, it is unlikely that the final Rule imposes costs to comply beyond standard costs associated with ensuring that behavior and statements are not fraudulent or deceptive. Therefore, the Commission believes that the final Rule will not have a significant economic impact on a substantial number of small entities. Notwithstanding this belief, the Commission has prepared a FRFA, as set forth below.

1. Need for and Objectives of the Final Rule

Section 811 grants the Commission the authority to promulgate a rule that is ''necessaryor appropriate in the public interest or for the protection of United States citizens.''[172] As discussed above, the Commission believes that promulgating the final Rule is appropriate to prevent manipulative practices affecting wholesale markets for petroleum products, and the Commission has tailored the Rule specifically to reach manipulative behavior that likely impacts those commodities described in Section 811. The final Rule supplements the Commission's existing antitrust and consumer protection law enforcement tools.

2. Significant Issues Raised by the Public Comment, Summary of the Agency's Assessment of these Issues, and Changes, if any, Made in Response to Such Comments

The Commission received 155 comments in response to its ANPR, 34 comments in response to its NPRM, and 17 comments in response to its RNPRM. Further, the Commission staff sought additional comment by holding a one-day public workshop to discuss the issues arising from the comments. The comments and the workshop transcript are part of the rulemaking record and are available at the Commission's website.[173]

Based on the record in this proceeding, the Commission has concluded that the final Rule should be a broad, anti-fraud rule guided by the principles of SEC Rule 10b-5. Like the initially proposed Rule and the revised proposed Rule, the final Rule broadly prohibits fraudulent or deceptive conduct. However, in response to commenters' concerns, the Commission has modified the final Rule in three ways to clarify the type of conduct that would violate the Rule and to mitigate chilling of legitimate conduct.

First, the final Rule, like the revised proposed Rule, consolidates the initially proposed Rule's three-part conduct prohibition into a two-part conduct prohibition that ''more clearly and precisely denote[s] the unlawful conduct [the Rule] prohibits.''[174] Second, each paragraph of the conduct prohibition in the final Rule contains an explicit and tailored scienter standard. The different scienter standards address concerns raised by commenters that the initially proposed Rule, which had only

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

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

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

[162] 74 FR at 18323.

[163] *See* 74 FR at 18323.

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

[165] 74 FR at 18323.

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

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

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

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

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

[171] Although no commenters addressed whether the revised proposed Rule would have an economic impact on small entities, some commenters contended that the revised proposed Rule would be costly and burdensome to the industry. None of these commenters submitted data for the Commission to analyze any such economic impact of the Rule. *See, e.g.*, API at 8 (adhering to the revised proposed Rule will force participants to enact burdensome compliance procedures raising industry costs and restricting efficient and procompetitive conduct); SIGMA at 2 (including rack sales in the definition of ''wholesale'' will impose significant compliance requirements on the gasoline marketing industry).

[172] 42 U.S.C. 17301.

[173] *See* (*http://www.ftc.gov./ftc/oilgas/rules.htm*).

[174] 74 FR at 18316.

a single, scienter standard, would have unacceptably chilled legitimate conduct.[175] Third, one paragraph of the final Rule, the omissions paragraph, contains a market conditions proviso that will limit the paragraph to only those omissions that can be expected to result in manipulative conduct harmful to consumers without interfering with legitimate business conduct.

3. Description and Estimate of Number of Small Entities Subject to the Final Rule Or Explanation Why no Estimate is Available

The final Rule applies to entities engaging in the purchase or sale of crude oil, gasoline, or 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 be small entities.[176] According to the SBA size standards, and utilizing SBA source data, the Commission estimates that between approximately 1,700 and 5,200 covered entities would be classified as small entities.[177]

4. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements of the Final Rule, Including an Estimate of the Classes of Small Entities that Will Be Subject to the Rule and the Type of Professional Skills that Will Be Necessary to Comply

The final Rule does not contain any requirement that covered entities create, retain, submit, or disclose any information. Accordingly, the Rule will impose no recordkeeping or related data retention and maintenance or disclosure requirements on any covered entity, including small entities.[178] Given that there are no reporting requirements, document or data retention provisions, or any other affirmative duties imposed, it is unlikely that the final Rule imposes costs to comply beyond standard costs (or skills) associated with ensuring that behavior and statements are not fraudulent or deceptive.

5. Steps the Agency Has Taken to Minimize Any Significant Economic Impact on Small Entities, Consistent With the Stated Objectives of the Applicable Statutes, Including the Factual, Policy, and Legal Reasons for Selecting the Alternative(s) Finally Adopted, and Why Each of the Significant Alternatives, if Any, Was Rejected

The final Rule is narrowly tailored to reduce compliance burdens on covered entities, regardless of size. In formulating the Rule, the Commission has taken several significant steps to minimize potential burdens. As an initial matter, the Rule contains no recordkeeping or disclosure obligations. The 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. The Rule also clarifies that covered entities need not disclose price, volume, or other data to the market.

*H. Paperwork Reduction Act*

The final Rule does not impose any new information collection requirements under the provisions of the Paperwork Reduction Act of 1995 (''PRA'').[179]

**List of Subjects in 16 CFR Part 317**

■ Accordingly, for the reasons set forth in the preamble, the Commission amends Title 16, Chapter I, 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 any mixture of hydrocarbons that exists:

(1) In liquid phase in natural underground reservoirs and that remains 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) *Knowingly* means that the person knew or must have known that his or her conduct was fraudulent or deceptive.

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

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[175] *See id.*

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

[177] The SBA publication providing data on the number of firms and number of employees by firm does not provide sufficient precision to gauge the number of small businesses that may be impacted by the final Rule accurately. The data are provided in increments of 0-4 employees, fewer than 20 employees, and fewer than 500 employees. SBA, Employer Firms, & Employment by Employment Size of Firm by NAICS Codes, 2006, *available at* (*http://www.sba.gov/advo/research/us06_n6.pdf*). Thus, for the 228 petroleum refiners listed, 188 show that they have less than 500 employees. Although the Commission is unaware of more than five 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. Although the Commission sought additional comment on the number of small entities covered by the revised proposed Rule, it received none. Accordingly, the small business data set forth in this FRFA are the best estimates available to the Commission at this time.

[178] Final Rule Section 317.3(b) applies only if a covered entity voluntarily provides information – or is compelled to provide information by statute, order, or regulation – but then intentionally fails to disclose a material fact that makes the information misleading. *See* Section IV.D.3 above.

[179] 44 U.S.C. 3501-3521. Under the PRA, federal agencies must obtain approval from the Office of Management and Budget (''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)(A).

(e) *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.

(f) *Wholesale* means:

(1) All purchases or sales of crude oil or jet fuel; and

(2) All purchases or sales of gasoline or petroleum distillates (other than jet fuel) at the terminal rack or upstream of the terminal rack level.

**§ 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, to:

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

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

**§ 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 prohibited practices set forth in § 317.3.

**§ 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, Commissioner Kovacic dissenting.

**Donald S. Clark**

*Secretary*

**Note:** The following text will not be codified in Title 16 of the Code of Federal Regulations.

**Statement of Chairman Jon Leibowitz**

When Congress passed the Energy Independence and Security Act of 2007, it authorized the Commission to develop a rule to prevent manipulation in wholesale energy markets.[1] The goal of Congress was for the Commission to detect and prevent market manipulation that might lead to higher gas prices for consumers. After a thorough and intensive process, the Commission has started to do just that. The rule issued by the Commission today is a broad anti-fraud measure that will help us prohibit conduct that harms consumers but that may not violate antitrust laws.

We are going to use this authority as aggressively as possible to stop market manipulation that drives up prices at the pump.

Trade associations representing the oil industry have voiced concern about the new rule. They argue that it will chill business conduct in the service of stopping something that they don't believe is happening in the first place. These industry advocates have proposed several specific changes that would weaken the rule – requiring a higher scienter standard under the general liability provision, requiring an explicit market distortion element for the entire rule, and entirely eliminating liability for omissions.[2]

I am fundamentally opposed to these proposals. They would effectively neuter the rule and, as my colleague Commissioner Rosch notes in his concurring statement, they would undermine Congressional intent. For example, the proposed changes would make it harder – if not impossible – to prosecute those who manipulate the market by intentionally omitting critical information from their communications, even when those omissions distort market conditions and raise gasoline prices for all Americans. Such omissions can be every bit as deceptive as any other type of fraudulent conduct, so it is crucial that we have the ability to prevent and prosecute them. A rule that does not allow us to go after such conduct would limit our ability to protect consumers.

The rule as proposed already takes into account legitimate industry concerns. In fact, we responded directly to those concerns by modifying the more expansive proposal in the draft rule we released last summer, originally based on the Securities and Exchange Commission rule 10b-5, to accommodate industry worries.[3] The current rule, as modified, strikes the right balance; it gives the Commission the authority to stop fraudulent conduct in energy markets but does not undermine appropriate business activity.

It is only the fact that gas prices were over four dollars per gallon a year ago that keeps us from thinking that prices are too high today. If we water down this rule as suggested by the industry, it would hinder our ability to stop manipulation of wholesale petroleum markets. That would undermine the intent of Congress, and undermine the efforts of the Commission to protect consumers and do our job.

**Dissenting Statement of Commissioner William E. Kovacic**

Since early 2008, a task force of the staff of the Federal Trade Commission (FTC) has devoted extraordinary care, skill, and effort to the development of a rule to implement Title VIII of The Energy Independence and Security Act of 2007.[1] Their performance on this project – from the early research on the possible content of a rule through the public consultations and drafting of options for the Commission's consideration – is a model of superb public administration. I thank and congratulate them.

I disagree with the choices taken by the Commission today in promulgating a Final Rule. In connection with wholesale transactions involving ''crude oil, gasoline, or petroleum distillates,'' Section 317.3(a) of the Commission's Final Rule makes it illegal to ''Knowingly engage in any act, practice, or course of business . . . that operates or would operate as a fraud or deceit'' on any person.[2] Section 317.3(b) of the Final Rule makes it illegal for a party ''[i]ntentionally'' to ''fail to state a material fact'' where ''such omission distorts or is likely to distort market conditions . . . .''[3] Compared to Paragraph 3(a), Paragraph 3(b) imposes a more demanding scienter requirement. To violate Paragraph 3(b), the person must act ''intentionally'' rather than ''knowingly,'' a state of mind that exists when the person ''knew or must have known that his or her conduct was

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

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

[3] *See, e.g., id.* at 1 (''In particular, API and NPRA welcome the Commission's recognition that wholesale petroleum markets differ significantly from securities markets and the Commission's efforts to tailor the proposed rule to reflect those differences.'' ).

[1] 42 U.S.C. §§ 17301-17305.

[2] Prohibitions on Market Manipulation, Statement of Basis and Purpose and Final Rule (to be codified at 16 C.F.R. § 317.3(a)).

[3] *Id.* (to be codified at 16 C.F.R. § 317.3(b)).

fraudulent or deceptive.''[4] Paragraph 3(b) also contains the requirement, missing in Paragraph 3(a), that the behavior ''distort market conditions.''

I dissent from the Commission's promulgation of the Final Rule. To my mind, a minimally acceptable rule would have departed from the Commission's Final Rule in two major respects. First, it would have incorporated into Paragraph 3(a) the requirements that the conduct be intentional and either actually or likely distorts market conditions. Second, the rule would not have contained a separate command dealing with omissions, thus deleting Paragraph 3(b) of the Commission's Final Rule.[5] As it stands, I cannot say that the Final Rule is in the public interest.[6]

When implemented, the Final Rule will cover a vast number of routine transactions – literally thousands daily – in petroleum products. These transactions are the indispensable means by which gasoline, diesel fuel, and jet fuel move from refineries to end users. Society has an immense stake in avoiding unnecessary disruption to these undertakings. Violations of the Commission's Final Rule are punishable with civil penalties of $1 million per violation, and each day on which the misconduct continues is treated as a separate offense.[7]

By reason of the drafting choices described above, the Commission has taken inadequate precautions to ensure that the aims of the underlying legislation are attained without imposing social costs that swamp the benefits Congress sought to achieve. Because the Final Rule's requirements are unlikely to proscribe only genuinely harmful conduct, there is a serious danger that it will impede routine contracting that is benign or procompetitive and thereby make Americans worse off by damaging the flow of commerce in petroleum products. The Commission's extensive work since the 1960s in reviewing petroleum industry mergers and allegations of anticompetitive conduct ought to have made the agency more attentive to these considerations. The FTC's previous inquiries have determined that price fluctuations for petroleum products result principally from market forces: prices decline when supply rises or demand falls.[8] This experience does not gainsay the potential harm that consumers *could* suffer from manipulation of market prices. It does suggest, however, that the contributions of a rule against market manipulation for petroleum products to the solution of the nation's larger energy problems are likely to be small. At the same time, the breadth of the substantive commands of the Commission's Final Rule, its applicability to an expansive range of routine contracting, and the severity of the penalties for violations create serious possibilities for deterring suppliers from participating in transactions that pose no threat to consumers. By incorporating the scienter and market distortion elements of Paragraph 3(b) into Paragraph 3(a), the Commission could have minimized these hazards. It unfortunately chose not to do so.

The inclusion in the Final Rule of the omissions provision, Paragraph 3(b), is a second regrettable decision. A proscription on certain acts, practices, or courses of business, alone is sufficiently broad to capture fraudulent omissions. Because the Final Rule is modeled on SEC Rule 10b-5, a separate and distinct omissions prohibition could invite subsequent interpretations that the Final Rule requires affirmative disclosures. Although the Commission explains in the Statement of Basis and Purpose that accompanies the Final Rule that it does not interpret Paragraph 3(b) as requiring an affirmative duty to disclose,[9] it is likely that other adjudicators will be called on to interpret the Final Rule. These adjudicators may not reach the same conclusion as the Commission, especially to the extent that the Final Rule becomes the subject of litigation in state courts under state consumer protection laws.[10]

In light of this substantial liability risk, the omissions component may well force the many firms that engage in legitimate transactions with their competitors on a daily basis to choose between two problematic paths of conduct: one way to avoid a potentially wrongful omission is to disclose more private information to your rival; a second approach is to limit investments in acquiring potentially relevant marketplace information and to reduce the number of encounters that could be examined through the lens of the Commission's Final Rule. Neither alternative is good for consumers. Excessive disclosure of private information among competitors threatens competition and is precisely the type of conduct that the FTC investigates and challenges under the antitrust laws. A competition agency should not be in the business of telling rivals to give each other more information about their business operations. A decision to gather less marketplace information or to engage in fewer transactions promises to translate into higher prices that may not accurately reflect underlying supply and demand conditions.

Last, the Commission's Final Rule has the capacity to deflect needed attention away from root causes of the country's energy problems and to divert effort away from the pursuit of effective solutions. For example, there is a legitimate debate to be had about whether gasoline prices adequately reflect external costs, such as those associated with environmental damage, national security, or traffic congestion. We also might usefully debate the proper mix of increased domestic oil production, nuclear power, or renewable energy sources to enhance energy security. By focusing valuable attention on measures that have little capacity to address these and other fundamental issues, the Commission's Final Rule may serve to relax the urgency that the nation ought to feel to devise approaches that truly come to grips with the larger dimensions of the energy problem.

**Concurring Statement of Commissioner J. Thomas Rosch**

I concur in the form of the Oil Price Manipulation Rule that the Commission has adopted. In doing so, however, I want to make it clear that I agree with Commissioner Kovacic's misgivings. The ''conduct'' prong of the Rule does

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

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

[6] *See* 42 U.S.C. § 17301 (permitting the Commission to adopt a rule to implement the Energy Independence and Security Act if it finds such a rule to be in the ''public interest'').

[7] 42 U.S.C. § 17304.

[8] *See* Federal Trade Commission, Investigation of Gasoline Price Manipulation and Post-Katrina Gas Price Increases (2006), *at* (*http://www.ftc.gov/reports/060518PublicGasolinePricesInvestigationReportFinal.pdf*); Federal Trade Commission, Gasoline Price Changes: The Dynamic of Supply, Demand, and Competition (2005), *at* (*http://www.ftc.gov/reports/gasprices05/050705gaspricesrpt.pdf*).

[9] *See* Statement of Basis and Purpose and Final Rule at 33 n.92 (''Consistent with its position in the NPRM and the RNPRM, the Commission currently does not expect to impose specific conduct or duty requirements such as . . . a duty to disclose, or a duty to update or correct information.'' ).

[10] Some states model their consumer protection laws on the FTC Act, and some allow private causes of action under these laws. Because the Energy Independence and Security Act provides that a violation of the Act ''shall be treated as an unfair or deceptive act or practice proscribed under a rule issued under Section 18(a)(1)(B) of the [FTC Act],'' 42 U.S.C. § 17303, it is not unreasonable to assume that the Final Rule may provide a cause of action under some state consumer protection laws.

not require proof of an exercise of market power having an adverse impact on the market as a whole, as is normally required in challenges to conduct under the Sherman Act. Further, it is not clear that the state of mind that must be proved establishes a sufficient limiting principle. On the other hand, although the ''omissions'' prong of the Rule does arguably require proof that the omission adversely impacts the market as a whole, like Rule 10b-5 it does not require proof of the state of mind that the ''conduct'' prong requires and hence may not establish a sufficiently limiting principle either. The net result is that the Rule may chill oil companies from, among other things, voluntarily providing their data to independent data-reporting firms, as they do now, for fear that they may be held liable for an inadvertent omission. That would be unfortunate because at least in some circumstances, having abundant data of that sort can be pro-competitive. *See United States v. United States Gypsum Co.*, 438 U.S. 422 (1978); *see also* U.S. Dep't of Justice and Federal Trade Comm'n, *Statement of Antitrust Enforcement Policy in Health Care*, Statement 6 (''Provider Participation in Exchanges of Price and Cost Information'') (August 1996), *available at* (*http://www.usdoj.gov/atr/public/guidelines/0000.pdf*). It would be especially unfortunate if the Rule were interpreted or applied so as to permit follow-on private actions.

All of this said, however, Congress apparently intended that the Commission fashion a Rule that goes beyond the Sherman Act and that resembles SEC Rule 10b-5. *See* Federal Trade Commission, Prohibitions on Market Manipulation in Subtitle B of Title VIII of the Energy Independence and Security Act of 2007, at 14 n.44 (July 28, 2009).[1] I believe that we must adhere to the Congressional intent in this regard. In exercising prosecutorial discretion, however, I, for one, intend to keep these misgivings in mind.

**Federal Register**

**Attachment A**

**RNPRM Commenters**

Association of Oil Pipe Lines (''AOPL'')
American Petroleum Institute and the National Petrochemical and Refiners Association (''API'')
Argus Media Inc. (''Argus'')
Air Transport Association of America, Inc. (''ATAA'')
Maria Cantwell, United States Senator, State of Washington (''Senator Cantwell'')
Canadian Association of Petroleum Producers (''CAPP'')
Consumer Federation of America, Mark Cooper, Director of Research (''CFA'')
New York City Bar Association Committee on Futures & Derivatives Regulation (''CFDR'')
U. S. Commodity Futures Trading Commission, Terry S. Arbit, General Counsel (''CFTC'')
Michael Greenberger (''Greenberger'')
Illinois Petroleum Marketers Association (''IPMA'')
International Swaps and Derivatives Association, Inc. (''ISDA'')
Futures Industry Association, CME Group, Managed Funds Association, Intercontinental Exchange, Inc., National Futures Association (''MFA'')
Platts (''Platts'')
Petroleum Marketers Association of America (''PMAA'')
Society of Independent Gasoline Marketers of America (''SIGMA'')
Sutherland Asbill & Brennan LLP (''Sutherland'')

**Federal Register**

**Attachment B**

**NPRM Commenters**

Association of Oil Pipe Lines (''AOPL'')
American Petroleum Institute (''API'')
Argus Media Inc. (''Argus'')
American Trucking Associations, Inc. (''ATA'')
Air Transport Association of America, Inc. (''ATAA'')
Andrew Boxer, Ellis Boxer & Blake (''Boxer'')
Sharon Brown-Hruska, National Economic Research Associates, Inc. (''Brown-Hruska'')
California Attorney General, Edmund G. Brown Jr. (''CA AG'')
Canadian Association of Petroleum Producers (''CAPP'')
Consumer Federation of America, Mark Cooper, Director of Research (''CFA1''; ''CFA2'')
New York City Bar Association, Committee on Futures & Derivatives Regulation (''CFDR'')
U. S. Commodity Futures Trading Commission, Terry S. Arbit, General Counsel(''CFTC (Arbit)'')
U. S. Commodity Futures Trading Commission, Bart Chilton, Commissioner (''CFTC (Chilton)'')
John Q. Public (''Consumer'')
Flint Hills Resources, LP (''Flint Hills'')
Winfried Fruehauf, National Bank Financial (''Fruehauf'')
James D. Hamilton, University of California, San Diego (''Hamilton'')
Illinois Petroleum Marketers Association (''IPMA'')
International Swaps and Derivatives Association, Inc. (''ISDA'')
Futures Industry Association, CME Group, Managed Funds Association, Intercontinental Exchange, Inc., National Futures Association (''MFA'')
Michigan Petroleum Association/ Michigan Association of Convenience Stores (''MPA'')
Mississippi Attorney General, Jim Hood (''MS AG'')
Lisa Murkowski, United State Senator, State of Alaska (''Murkowski'')
Timothy J. Muris and J. Howard Beales, III (''Muris'')
Navajo Nation, Resolute Natural Resources Company, and Navajo Nation Oil and Gas Company (''Navajo Nation'')
Nebraska Petroleum Marketers & Convenience Store Association (''NPCA'')
National Petrochemical and Refiners Association (''NPRA'')
Craig Pirrong, The University of Houston: Bauer College of Business (''Pirrong'')
Plains All American Pipeline, L.P. (''Plains'')
Platts (''Platts'')
Petroleum Marketers Association of America (''PMAA'')
Society of Independent Gasoline Marketers of America (''SIGMA'')
Sutherland Asbill & Brennan LLP (''Sutherland'')
David J. Van Susteren, Fulbright & Jaworski LLP (''Van Susteren'')

**Federal Register**

**Attachment C**

**Workshop Participants**

American Bar Association Section of Antitrust Law's Fuel & Energy Industry Committee (''ABA Energy''): Bruce McDonald, Jones Day LLP
Association of Oil Pipe Lines (''AOPL''): Linda G. Stuntz, Stuntz, Davis & Staffier, PC
American Petroleum Institute (''API''): Jonathan Gimblett, Covington & Burling LLP

[1] In addition to the text of Section 811, which reflects congressional intent that the Commission look to SEC Rule 10b-5 in crafting a market manipulation rule, I also find the statements of Sen. Cantwell (the bill's sponsor) which are consistent with this text persuasive. *See* 151 Cong. Rec. S10238 (daily ed. Sept. 20, 2005) (statement of Sen. Cantwell introducing S. 1735, a bill to Improve the Federal Trade Commission's Ability to Protect Consumers from Price-Gouging During Energy Emergencies, which was reintroduced in the 110th Congress as S.1263); *New Haven Bd. of Educ. v. Bell*, 465 U.S. 512, 526-27 (1982) (''Although the statements of one legislator made during debate may not be controlling, Senator Bayh's remarks, as those of the sponsor of the language ultimately enacted'' – in a context where ''no committee report discusses the provisions'' – ''are an authoritative guide to the statute's construction.'' ).

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Argus Media Inc. (''Argus''): Dan Massey
Consumer Federation of America (''CFA''): Mark Cooper
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Navajo Nation Oil and Gas Corporation (''Navajo Nation''): Perry Shirley
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Society of Independent Gasoline Marketers of America (''SIGMA''): R. Timothy Columbus, Steptoe & Johnson LLP
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**Federal Register**

**Attachment D**

**ANPR Commenters**

American Bar Association/Section of Antitrust Law (''ABA'')
Association of Oil Pipe Lines (''AOPL'')
American Petroleum Institute and the National Petrochemical and Refiners Association (''API'')
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Bezdek Associates, Engineers PLLC (''Bezdek'')
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Dan Clifton (''Clifton'')
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Jerry Davidson (''Davidson'')
Don Deresz (''Deresz'')
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Penny Donaly (''Donaly2'')
Penny Donaly (''Donaly3'')
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Mark Fish (''Fish'')
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Bob Frain (''Frain'')
Joseph Fusco ( ''Fusco'' )
Tricia Glidewell (''Glidewell'')
Robert Gould (''Gould'')
James Green (''Green'')
Michael Greenberger (''Greenberger'')
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Hagan (''Hagan'')
Toni Hagan (''Toni'')
Charles Hamel (''Hamel'')
Chris Harris (''Harris'')
Thomas Herndon (''Herndon'')
Johnny Herring (''Herring'')
Hess Corporation (''Hess'')
David Hill (''Hill'')
Hopper (''Hopper'')
Sharon Hudecek (''Hudecek'')
IntercontinentalExchange, Inc. (''ICE'')
Institute for Energy Research (''IER'')
Independent Lubricant Manufacturers Association (''ILMA'')
Illinois Petroleum Marketers Association (''IPMA'')
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Loucks (''Loucks'')
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Bret Morris (''Morris'')
Theresa Morris-Ramos (''Morris-Ramos'')
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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'')
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Louis Vera (''Vera'')
Thomas Walker (''Walker'')
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Watson (''Watson'')
Gary Watson (''G. Watson'')
Joseph Weaver (''Weaver'')
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[FR Doc. E9–19257 Filed 8–11–09: 8:45 am]
**BILLING CODE 6750–01–S**