



May 20, 2009

VIA ELECTRONIC MAIL:

<https://secure.commentworks.com/ftc-marketmanipulationNPRM/>

Attention: Donald S. Clark, Secretary
Federal Trade Commission
Office of the Secretary
Room H-135 (Annex G)
600 Pennsylvania Avenue, NW
Washington, DC 20580

Re: Market Manipulation Rulemaking, PO82900

Dear Mr. Clark:

The Futures Industry Association, Managed Funds Association, CME Group, Inc., Intercontinental Exchange, Inc., and National Futures Association (collectively, the "Futures Group") file this comment letter on the Part 317 rules proposed by the Federal Trade Commission ("Commission") and entitled "Prohibition of Energy Market Manipulation Rule." 74 Fed. Reg. 18304, 18327 (April 22, 2009). In two prior comment letters, the Futures Group endorsed the adoption by the Commission of new anti-manipulation protections for non-futures, wholesale markets in crude oil and gasoline. We also focused our comments on the possible application of the Commission's new rules to commodities, conduct and trading already subject to manipulation and fraud proscriptions under the Commodity Exchange Act. The Futures Group greatly appreciates the willingness of the Commission and its staff to consider carefully our prior comments and, in some instances, to modify its proposal in response to our comments.

From the Futures Group's perspective, however, the Commission's proposal continues to fail to recognize the statutory exclusive jurisdiction of the Commodity Futures Trading Commission ("CFTC") over futures trading in crude oil, gasoline and petroleum distillates. As a result, as written the Commission's proposal is not in accordance with the exclusive jurisdiction provision of the Commodity Exchange Act ("CEA"), 7 U.S.C. § 2(a)(1) (A), and would impose

conflicting fraud standards on futures market professionals and participants contrary to the expressed intent of Congress when it enacted the CEA's exclusive jurisdiction provision in 1974. The Futures Group requests that the Commission correct these legal deficiencies before issuing its final rules.

CFTC Exclusive Jurisdiction

The Commission's discussion of the CFTC's exclusive jurisdiction in the Federal Register notice confirms the need for a safe harbor for futures market participants operating within the CFTC's exclusive jurisdiction. While explaining that the comment letters filed by the CFTC, the Futures Group and others had highlighted the scope, history and purpose of the CEA's exclusive jurisdiction provision, the Commission wrote that it "recognizes the CFTC's jurisdiction 'with respect to accounts, agreements ... and transactions involving contracts of sale of a commodity for future delivery.'" 74 Fed. Reg. at 18311. We respectfully note that the Commission has omitted a key word from the Commission's reference to 7 U.S.C. § 2(a)(1)(A). Congress did not grant the CFTC mere "jurisdiction;" Congress made sure in 7 U.S.C. § 2(a)(1)(A) the CFTC's jurisdiction over exchange trading in futures and related activities would be "exclusive." By omitting the key word in the CFTC's statutory authority, the Commission implicitly acknowledged the weakness of its legal position, if it still intends to have its proposed Part 317 rules apply to futures trading.¹

The Futures Group again asks the Commission to adopt a safe harbor from its proposed Part 317 rules for futures market activities. The safe harbor would only remove from the Commission's Part 317 rules those market participants that engage in conduct or activities solely in connection with futures trading. If a market participant only trades futures, the safe harbor would make the Commission's new rule inapplicable to that futures trading activity. In this regard, the safe harbor would apply even if the market participant's futures trading allegedly had an impact on cash or other non-futures market oil or gasoline prices. Consistent with the congressionally-acknowledged, price discovery function that futures markets perform, futures prices are supposed to be relied upon by those engaged in cash or forward market business activities. When Congress created the CFTC in 1974, Congress fully appreciated the reach of the futures markets' price discovery effects and still decided to grant exclusive regulatory jurisdiction to the CFTC.² The requested safe harbor would comport with that congressional decision.

The Futures Group's requested safe harbor would not apply where a market participant engaged in activities outside the futures markets for crude oil, gasoline or petroleum distillates, whether that conduct occurred in conjunction with futures trading or independent of such trading. When a market participant's alleged misconduct involves conduct or activities in cash or other

¹ If the Commission does not intend to apply its Part 317 rules to conduct that involves only futures trading, our requested safe harbor would effectuate that intention.

² See S. Rep. No. 93-1131, 93d Cong. 2d Sess. 6, 12 (1974) (while granting exclusive jurisdiction to "make clear that ... the Commission's jurisdiction, where applicable, supersedes State as well as Federal agencies," the Committee recognized "[t]rading in futures provides not only the market of today, but of months ahead, and affords guidance to buyers and sellers of agricultural commodities in planning ahead, and in financing and marketing commodities from one season to another.")

non-futures crude oil and gasoline markets, as well as futures trading, the Futures Group would expect the Commission and the CFTC to coordinate their respective investigatory and enforcement activities, as the Commission suggests. 74 Fed. Reg at 18311 (“the Commission intends to work cooperatively with the CFTC in furtherance of the Commission’s duty to prevent fraud in wholesale petroleum markets”).

The Commission’s April Federal Register notice declined “to adopt a blanket safe harbor for futures market activities[,]” “[a]t this time.” 74 Fed. Reg. at 18311. Respectfully, the Futures Group believes this is exactly the time to adopt the requested safe harbor for futures trading activities within the CFTC’s exclusive jurisdiction. In that way, the Commission would effectuate Congress’ intent that futures exchanges, futures professionals and futures market participants would know their trading and related activities would be subject exclusively to the comprehensive regulatory and enforcement regime found in the CEA and CFTC regulations. At the same time, the Commission would still be able to exercise its enforcement jurisdiction in areas outside the CEA’s exclusive jurisdiction provision for futures markets.

Fraud Standards

We understand that the Commission intends its new fraud rules in Part 317 to complement, not contradict, the CEA’s anti-fraud provisions and other prohibitions. As we discussed in our October 17, 2008, comment letter, however, if the Commission applies its Part 317 rules to futures trading activities, those rules would conflict with and contradict at least Section 4b of the CEA, 7 U.S.C. § 6b, as recently amended by Public Law No. 110-246, 122 Stat. 2194-95 (2008). (Our October 17, 2008, comment letter is attached and our discussion of this issue is found at pp. 14-17 of that letter.) Section 4b is the over-arching anti-fraud provision for futures market activities set forth in the CEA.

In summary and without restating every aspect of our prior comment, the anti-fraud prohibitions in Section 4b have been calibrated by Congress to apply special intent standards to intermediaries acting for their customers in futures markets and not to apply where one trader defrauds other traders because self-regulating exchange markets already handle that misconduct subject to Commission oversight. The Proposed Part 317 rules would conflict with these limitations. In addition, Congress in 2008 enacted special provisions to remove the possibility that futures market participants would generally have an affirmative obligation to disclose material non-public market information. 122 Stat. 2195. Section 4b does require affirmative disclosures only where necessary to make any statements already made “not misleading in any material respect.” It is not clear from the prohibitions in proposed Rule 317.3 whether its provisions would apply in the same manner or whether they would differ. Of course, the requested safe harbor would make that concern moot, as only Section 4b of the CEA would apply to those engaged in only futures trading activities.

In short, the CEA provides a comprehensive anti-fraud and anti-manipulation system for futures markets, including prohibiting false reports that affect or tend to affect commodity prices (7 U.S.C. § 13(a)(2)). Inevitably, the Commission’s Part 317 rules would conflict with those CEA provisions leading to the potential for uncertain, duplicative or conflicting federal regulatory standards for futures market participants, the very problem the CEA’s exclusive jurisdiction provision was enacted to prevent. These conflicts illustrate and underscore the need for the Commission to adopt the safe harbor we have requested.

Conclusion

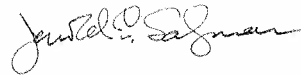
The Futures Group opposes fraud and manipulation in any market. We appreciate the effort the Commission and its staff have devoted to achieving the goal of an effective prohibition on fraudulent conduct in wholesale markets for crude oil, gasoline and petroleum distillates. We also recognize that the Commission and the CFTC have limited resources available to police the markets within their jurisdiction. In our view, these resource limitations only make more compelling the arguments for respecting the congressional grant of exclusive CFTC jurisdiction over futures trading and for enhanced cooperation by the Commission and the CFTC where their jurisdiction overlaps.

The safe harbor we have requested would comply with the CEA, serve the public interest and lead to more effective law enforcement for energy markets. We thank the Commission for its consideration and look forward to working with the Commission as it moves forward to implement the antifraud provisions it decides to adopt.

Sincerely,

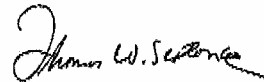


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Attachment

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