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Mr. Donald S. Clark
Secretary
Federal Trade Commission
Market Manipulation Rulemaking
Room H-135 (Annex G)
600 Pennsylvania Avenue, N.W.
Washington, DC 20580

**Re: Market Manipulation Rulemaking, P082900
Prohibitions on Market Manipulation and False Information
in Subtitle B of the Energy Independence and Security Act of 2007**

Dear Mr. Clark:

The Committee on Futures and Derivatives Regulation (the "Committee") of the New York City Bar Association (the "Association") is pleased to provide comments on the Commission's above-referenced advance notice of proposed rulemaking concerning the manner in which the Committee should carry out its rulemaking responsibilities under Section 811 of Subtitle B of Title VIII of the Energy Independence and Security Act of 2007 ("EISA").

The Association is an organization of over 22,000 lawyers. Most of its members practice in the New York City area. However, the Association also has members in nearly every state and over 50 countries. The Committee consists of attorneys knowledgeable in the regulation of futures contracts and other derivative instruments and experienced in the representation of futures industry participants and registrants. It has a history of publishing reports analyzing regulatory issues critical to the futures industry and related activities. The Committee's interest in the proposed rulemaking arises from its potential effect on participants in cash, forward, and derivatives markets. The Committee appreciates the opportunity to comment.

The Committee commends the Commission for its detailed and thoughtful notice of proposed rulemaking ("Notice"). The Notice catalogs an extensive array of complex and consequential factual, legal and regulatory concerns at issue in establishing anti-manipulation standards for crude oil, gasoline and petroleum distillates markets. Although each of the many points raised in the Notice deserves careful investigation and analysis, the Committee's comments will focus on issues concerning legal principles of due process and fairness that will be crucial to protecting the public interest in maintaining well-functioning markets. Specifically, this comment will address:

1. The need for the Commission to adopt an anti-manipulation standard that is clear and easily understood and complied with by market participants;
2. The need to adopt a standard that advances the development of one universal definition of price manipulation for the wholesale crude oil, gasoline and petroleum distillates markets; and
3. The need for a rule that does not, either expressly or impliedly, create or alter existing obligations among market participants.

A. Summary of the Terms of a Proposed Anti-Manipulation Rule

EISA Section 811 makes it unlawful

"for any person, directly or indirectly, to use or employ, in connection with the purchase or sale of crude oil[,] gasoline or petroleum distillates at wholesale, any manipulative or deceptive device or contrivance, in contravention of such rules and regulations as the Federal Trade Commission may prescribe as necessary

or appropriate in the public interest or for the protection of United States citizens.”¹

With the enactment of EISA, purchasers and sellers of wholesale crude oil, gasoline and petroleum distillates markets are now conceivably subject to the anti-manipulation prohibitions of four different statutes – Section 811 of EISA, Section 9(a)(2) of the Commodity Exchange Act (“CEA”), Section 4A of the Natural Gas Act (“NGA”), and Section 222 of the Federal Power Act (“FPA”). The Notice recognizes that the language of Section 811 is effectively identical to the anti-manipulation proscriptions found in Section 10(b) (and, we note, Section 14(e)) of the Securities Exchange Act of 1934, as amended (“Exchange Act”).² The administration and civil enforcement of EISA, the CEA, the NGA and the FPA is reposed in three different federal agencies, namely, the Commission, the Commodity Futures Trading Commission (“CFTC”) and the Federal Energy Regulatory Commission (“FERC”).³ In addition, the criminal enforcement of the CEA, NGA and FPA provisions is reposed in the Department of Justice.

¹ The Committee believes that Section 811’s reference to the commodities “at wholesale” reflects a congressional intent that the statute cover transactions in the commercial cash and forward markets for crude oil, gasoline and petroleum distillates transactions and is intended to exclude from its reach retail markets and CFTC-regulated futures markets for those products.

² Section 14(e) is a tender offer antifraud provision enacted in 1968 as part of the Williams Act that, as relevant here, contains the same proscriptions found in Section 10(b).

³ Although wholesale crude oil, gasoline and petroleum distillates markets are not within the FERC’s regulatory jurisdiction, FERC has interpreted its anti-manipulation enforcement powers to reach any manipulation of any market that affects pricing in the interstate natural gas and power markets that FERC regulates. Accordingly, pursuant to FERC’s interpretation of its anti-manipulation authority, to the extent a manipulation of prices in wholesale crude oil, gasoline and petroleum distillates markets affects the FERC-regulated natural gas and power markets, a manipulator could be subject to FERC enforcement action.

CEA Section 2(a)(1) reposes in the CFTC exclusive jurisdiction with respect to accounts, agreements and transactions in commodity futures and options traded on CFTC-regulated exchanges. The CFTC’s anti-manipulation enforcement authority has never been questioned as it applies to those accounts, agreements and transactions. The CFTC, however, also has interpreted the CEA to authorize it to bring civil enforcement actions for the violation of CEA Section 9(a)(2)’s criminal anti-manipulation prohibitions with respect to all other commodity markets as well, including cash markets,

The Notice's survey of the different legal requirements of the anti-manipulation statutes and underlying rules reflects that it is impossible to adopt a rule that is identical to the anti-manipulation standards of the other relevant statutes, but that should not be the Commission's objective in any event. Rather, the objective in advancing the public interest should be the adoption of a rule that is tailored to meet the needs of the particular wholesale crude oil, gasoline and petroleum distillates markets while being compatible with the essential anti-manipulation principles of the other relevant statutes.

The Committee believes that this objective is best met by a rule that is targeted to prohibit deceitful conduct specifically intended to subvert or disable the integrity of the market price-setting processes and mechanisms in order to cause false or fictitious non-market prices and/or transactions. The essential elements of an offense should include: (a) intentional or reckless deception of market participants, undertaken (b) with a specific intent to subvert or disable a market price-setting process or mechanism in order to cause false or fictitious non-market prices and/or transactions and (c) with the ability to cause false or fictitious non-market prices and/or transactions; and (d) the causing of false or fictitious non-market prices and/or transactions. **[c would be important to an "impossibility defense – e.g. purposely falsely reporting one small inconsequential trade that could never materially affect an index – that might be grounds for false reporting but not manipulation. d is needed to prove actual manipulation. If you prove b in virtually all circumstances you'll be able to prove a, but a is needed to prevent the rationalization that aggressive trading alone with an intent to impact price or acquiring a large forward contract position alone would be deemed conduct specifically intended to subvert market processes.]** Such a rule would be compatible with the essential objectives of the various securities and commodities law anti-manipulation standards.

B. The Anti-Manipulation Rule Must Have a Clear Legal Standard that Provides Fair Notice of the Prohibited Conduct to All Market Participants

The public interest and the protection of U.S. citizens – the primary concerns of Section 811 of EISA – are best served by the adoption of a clear legal standard for market manipulation

forward markets, and over-the-counter financial derivatives markets. Accordingly, the CFTC would consider its anti-manipulation enforcement authority to reach to purchases and sales of crude oil, gasoline and petroleum distillates at wholesale.

that will allow market participants to conduct their business with a clear understanding of the relevant legal boundaries. As described below, the Committee believes that a comprehensive and clear rule for market manipulation is achievable. A vague legal standard not only may be unconstitutional as a matter of law but also can undermine a well-functioning market. Vague legal standards resulting in legal uncertainty and unreasonably indeterminable legal risks (1) diminish liquidity by driving producers and end-users to use non-U.S. markets instead, (2) adversely impact competition, (3) cause unnecessarily higher costs for market participants and downstream consumers as market participants adopt inefficient and uneconomical practices simply to avoid such risks, and (4) lay the groundwork for arbitrary enforcement and the undesirable unintended consequences that are sure to flow from it.

Achievement of a clear legal anti-manipulation standard requires distinguishing between a general anti-manipulation rule and its legal cousins, market management and structure rules. The two types of rules are often confused in the public discourse about commodity pricing, such as the erroneous equating of "excessive speculation" and market manipulation. The focused purpose of an anti-manipulation rule should be to prohibit conduct specifically intended to disable the market price-setting processes and mechanisms and deceive market participants in order to cause false or fictitious, non-market prices, and/or transactions. Examples of such manipulation would include corrupting prices by purposely disseminating material price information known to be false, secretly disabling the proper functioning of trading facilities, or secretly colluding with other market participants to effect wash sales or rig prices.

An objective, focused rule intended to protect the integrity of market processes is distinguishable from proactive market management and structure rules (*e.g.*, rules establishing price caps, limits on speculative positions, disclosure obligations, licensing requirements, time limits on market transactions, and financial prerequisites for market participation). Their general purpose is to manage or regulate market economics – *i.e.*, to perfect market competition, efficiency, and fair valuations and to prevent unnecessary and inefficient market constraints, congestion and turmoil. Their violation conceivably also could involve a violation of an anti-manipulation rule, but not necessarily. Adopting a broad, but vague anti-manipulation rule with the intent that it could be broad enough also to serve as an economic management tool would contravene the public interest for the reasons mentioned above.

