but cannot be used without a modification. The petitioner cites an effort to mitigate primary water stress corrosion cracking (PWSCC) in Alloy 82/182 welds after an ASME Code case was approved by the NRC for use in the appropriate regulatory guide for weld overlay of stainless steel material but not for austenitic nickel-based material that was subject to potential PWSCC. The petitioner states that this issue resulted in licensees having to perform a ''work-a-round'' by requesting usage of some ASME Code cases with modifications. The petitioner has concluded that use of ASME Code cases with modifications cannot be performed under § 50.55a(a)(3).

The petitioner describes the ''work-a-round'' that is accepted by the NRC is for an applicant or licensee to propose an alternative to the governing ASME Code requirements, such as using ASME Code Section XI requirements, instead of requesting usage of an ASME Code case with a change or modification. The petitioner states that the NRC allows this type of alternative under § 50.55a(a)(3) because the provisions of § 50.55a(g) govern use of ASME Code Section XI. The petitioner states that, if the need for an alternative is urgent, the only choice an applicant or licensee has is to perform the ''work-a-round'' described above that the petitioner states has been done routinely. The petitioner has concluded that the NRC has determined that no mechanism for evaluating a licensee's proposal to an existing NRC approved voluntary alternative is allowed by § 50.55a(a)(3) because it would be ''providing an alternative to an alternative.''

The petitioner has proposed draft rulemaking text to address these issues. The petitioner states that his proposed amendments to § 50.55a will clarify this regulation to correct administrative issues associated with alternatives to ASME Code cases when an urgent issue arises that cannot be solved under the current regulatory provisions.

III. NRC Review of the Petition

The NRC reviewed the issues raised by the petitioner and determined the following:

- Code cases often provide alternatives that have technical merit and, in many instances, are incorporated into future ASME Code editions.
- The ASME Code case process itself constitutes a method of how a licensee can seek to obtain ASME approval for a variation of a previously-approved code case. § 50.55a(a)(3) currently provides specific approaches for obtaining NRC approval of alternatives to ASME Code provisions. Inasmuch as ASME Code cases are analogous to ASME Code provisions, it is not unreasonable to provide an analogous regulatory approach for obtaining NRC approval of alternatives to ASME Code cases.

For these reasons, the NRC has determined that the issues raised in this petition should be considered in the NRC's Common Prioritization of Rulemaking process. The NRC uses this process to determine which rulemaking actions to pursue based on available resources and how the actions maintain safety, ensure security of nuclear facilities and materials, increase effectiveness, and maintain openness with stakeholders. Members of the public can track the progress of the issues raised in the petition as they go through the rulemaking process via the ''NRC Regulatory Agenda: Semiannual Report (NUREG–0936),'' or online at *http://www.regulations.gov;* search on rulemaking docket ID NRC–2007–0018. The changes requested in the petition may or may not be incorporated into 10 CFR 50.55a exactly as requested. With this action, PRM–50–89 is considered resolved and administratively closed.

Dated at Rockville, Maryland, this 3rd day of April 2009.

For the Nuclear Regulatory Commission.

R.W. Borchardt,

Executive Director for Operations.

[FR Doc. E9–9197 Filed 4–21–09; 8:45 am]

BILLING CODE P

FEDERAL TRADE COMMISSION

16 CFR Part 317

[Project No. P082900]

RIN 3084-AB12

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

AGENCY: Federal Trade Commission.

ACTION: Revised notice of proposed rulemaking; request for public comment.

SUMMARY: Pursuant to Section 811 of Subtitle B of Title VIII of The Energy Independence and Security Act of 2007 (''EISA''),[1] the Federal Trade Commission (''Commission'' or ''FTC'') is issuing a Revised Notice of Proposed Rulemaking (''RNPRM''). The revised proposed Rule in this RNPRM would prohibit 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 tends to distort market conditions for any such product. Violations of the revised proposed Rule, if such Rule is adopted, would require proof by a preponderance of the evidence. Anyone violating an FTC rule promulgated under Section 811 of EISA, such as this revised proposed Rule would be if adopted, may face civil penalties of up to $1 million per violation per day, in addition to any relief available to the Commission under the Federal Trade Commission Act (''FTC Act'').[2] The Commission invites written comments on issues raised by the revised proposed Rule and seeks answers to the specific questions set forth in Section IV.I. of this RNPRM.

DATES: Written comments must be received by May 20, 2009. The Commission does not contemplate any extensions of this comment period.

ADDRESSES: Interested parties are invited to submit written comments electronically or in paper form. Comments should refer to ''Market Manipulation Rulemaking, P082900'' to facilitate the organization of comments. Please note that your comment—including your name and your state—will be placed on the public record of this proceeding, including on the publicly accessible FTC website, at (*http://www.ftc.gov/os/publiccomments.shtm*).

Because comments will be made public, they should not include any sensitive personal information, such as an individual's Social Security Number; date of birth; driver's license number or other state identification number or foreign country equivalent; passport number; financial account number; or credit or debit card number. Comments also should not include any sensitive health information, such as medical records or other individually identifiable health information. In addition, comments should not include any ''[t]rade secret or any commercial or financial information which is obtained from any person and which is privileged or confidential,'' as provided in Section 6(f) of the FTC Act, 15 U.S.C. 46(f), and FTC Rule 4.10(a)(2), 16 CFR 4.10(a)(2).

[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] 15 U.S.C. 41-58.

Comments containing material for which confidential treatment is requested must be filed in paper form, must be clearly labeled ''Confidential,'' and must comply with FTC Rule 4.9(c), 16 CFR 4.9(c).[3]

Because paper mail in the Washington area, and specifically to the FTC, is subject to delay due to heightened security screening, please consider submitting your comments in electronic form. Comments filed in electronic form should be submitted by using the following weblink: (*https://secure.commentworks.com/ftc-marketmanipulationRNPRM*), (and following the instructions on the web-based form). To ensure that the Commission considers an electronic comment, you must file it on the web-based form at the weblink (*https://secure.commentworks.com/ftc-marketmanipulationRNPRM*). If this RNPRM appears at (*http://www.regulations.gov/search/index.jsp*), you may also file an electronic comment through that website. The Commission will consider all comments that regulations.gov forwards to it. You may also visit the FTC website at (*http://www.ftc.gov/opa/2009/04/rnprm.shtm*) to read the RNPRM and the news release describing it.

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

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

FOR FURTHER INFORMATION CONTACT: 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:

I. Background

EISA became law on December 19, 2007.[4] 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.''[5]

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.''[6]

Subtitle B also contains three additional sections that address, respectively, enforcement of the Subtitle (Section 813),[7] penalties for violations of Section 812 or any FTC rule published pursuant to Section 811 (Section 814),[8] and the interplay between Subtitle B and existing laws (Section 815).[9]

The revised proposed Rule in this RNPRM retains the anti-fraud approach of the initial proposed Rule published by the Commission in a Notice of Proposed Rulemaking (''NPRM'') on August 19, 2008.[10] The revised proposed Rule would achieve the anti-manipulation objectives of Section 811 by prohibiting 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 tends to distort market conditions for any such product.[11]

[3] *See also* FTC Rule 4.2(d), 16 CFR 4.2(d). The comment must be accompanied by an explicit request for confidential treatment, including the factual and legal basis for the request, and must identify the specific portions of the comment to be withheld from the public record. The request will be granted or denied by the Commission's General Counsel, consistent with applicable law and the public interest. *See* FTC Rule 4.9(c), 16 CFR 4.9(c).

[4] 42 U.S.C. 17001-17386.

[5] 42 U.S.C. 17301.

[6] 42 U.S.C. 17302.

[7] 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 [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.

[8] 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.

[9] 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.

[10] 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 (Aug. 19, 2008). The NPRM was preceded by the publication for comment of an Advance Notice of Proposed Rulemaking (''ANPR''). FTC, *Prohibitions On Market Manipulation and False Information in Subtitle B of The Energy Independence and Security Act of 2007*, 73 FR 25614 (May 7, 2008).

[11] As the Commission stated in the ANPR and the NPRM, 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 presumably a non-substantive, typographical error; therefore, the

Continued

The Commission believes additional public comment on the revised proposed Rule will assist in evaluating the desirability and contours of any final rule. The Commission requests that comments focus on changes between the initially proposed Rule and the revised proposed Rule. The Commission also invites written responses to, and comments on, the questions and alternative rule language posed in Section IV.I. Because the public has already had the opportunity to comment on many of the concepts contained in this revised proposed Rule—through both written comments and workshop presentations and participation—the Commission believes that a 30-day comment period is appropriate, and requests for extension of the comment period are unlikely to be granted.

II. The Rulemaking Proceeding

The rulemaking proceeding began with the publication of an ANPR on May 7, 2008.[12] In the ANPR, the Commission solicited comments on whether it should publish a rule under Section 811, and, if so, the appropriate scope and content of such a rule.[13] In response to the ANPR, the Commission received 155 comments from interested parties.[14] Commenters expressed differing views regarding the desirability of, and appropriate legal basis for, any such rule. Commenters also proposed a variety of models upon which to base a market manipulation rule, including those used by other federal agencies, such as the Securities and Exchange Commission (''SEC''),[15] the Federal Energy Regulatory Commission (''FERC''),[16] and the Commodity Futures Trading Commission (''CFTC''),[17] pursuant to each agency's respective market manipulation authority.

After reviewing the ANPR comments, on August 19, 2008, the Commission published an NPRM, setting forth the text of a proposed Rule and inviting written comments on issues raised by the proposed Rule.[18] 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. The NPRM also set forth questions designed to elicit further information from interested parties. In response to a petition from a major trade association,[19] the Commission extended the deadline for submission of comments on the NPRM from September 18, 2008 to October 17, 2008.[20]

In response to the NPRM, the Commission received 34 comments from interested parties, including consumers, a consumer advocacy group, academics, a federal agency, state government agencies, a Member of Congress, industry members, and trade and bar associations.[21] On November 6, 2008, Commission staff held a one-day public workshop on the proposed Rule.[22] Commenters and workshop participants provided valuable feedback on several key issues relating to the proposed Rule, particularly regarding the application of a rule based on SEC Rule 10b-5 and the relevance of legal precedent under securities law to the petroleum industry. An overview of the major issues reflected in the comments and at the workshop follows.

Many commenters expressed general support for an anti-fraud rule, noting that fraud provides a ''good demarcation'' for a market manipulation rule and would provide the necessary guidance to market participants.[23] Although a few commenters affirmatively supported the Commission's proposed Rule, as articulated in the NPRM,[24] the majority of commenters raised concerns about the scope and application of the proposed Rule. Many commenters thought that the proposed Rule, as drafted, created a substantial risk of reaching and chilling legitimate conduct undertaken in the ordinary course of business.[25]

To remedy perceived shortcomings in the proposed Rule, some commenters suggested modifications, including: (1) rejecting SEC Rule 10b-5 as a model for an FTC rule,[26] and (2) making other

Commission reads all parts of both sections to cover all three types of products: crude oil, gasoline, and petroleum distillates. *See* 73 FR at 25621 n.59; 73 FR at 48320 n.40.

[12] 73 FR 25614. Rulemaking documents can be found at (*http://www.ftc.gov/ftc/oilgas/rules.htm*).

[13] 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/index.shtm*).

[14] Attachment C contains a list of commenters who submitted comments on the ANPR, together with the abbreviations used to identify each commenter referenced in this RNPRM. Electronic versions of the comments can be found at (*http://www.ftc.gov/os/comments/marketmanipulation/index.shtm*).

[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] 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*).

[20] 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).

[21] Attachment A contains a list of commenters who responded to the NPRM, together with the abbreviations used to identify each commenter. In calculating the number of comments submitted in response to the NPRM, the Commission treated the multiple filings from Argus, CFA, CFDR, ISDA, and NPRA as a single comment for each commenter.

[22] Attachment B contains a list of participants in the workshop, together with the abbreviations used to identify each workshop participant. 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, can be found at (*http://www.ftc.gov/bcp/workshops/marketmanipulation/index.shtml*).

[23] CFDR (Mills), Tr. at 38; *see, e.g.*, API at 8-9 (''[S]upport[ing] the Commission's initial determination that the scope of the rule should be 'narrowly tailored to address fraudulent practices.'" (quoting 73 FR at 48320)); NPRA at 2 (stating that a rule should target fraudulent and deceptive practices); PMAA (Bassman), Tr. at 46-47 (explaining that, in general, fraud is an appropriate basis for a Section 811 rule); ATAA at 11 (expressing support for the Commission's decision to propose an anti-fraud rule); *see also* ISDA (Velie), Tr. at 40 (expressing support for an anti-fraud rule if it is coupled with specific intent); ABA Energy (McDonald), Tr. at 246 (urging the Commission to focus a rule on deceptive conduct).

[24] *See, e.g.*, MS AG at 3 (''[T]he scope of the proposed Rule is well tailored to ensure that it will address . . . concerns without deterring desirable market practices that could ultimately benefit consumers.''); PMAA at 3 (''The proposed rule allows regulated entities to understand both its intent and how it will be applied . . . .''); CA AG at 2 (expressing support for the FTC's proposed Rule).

[25] *See, e.g.*, Flint Hills at 3 (''[T]he breadth of the proposed rule would create a significant amount of uncertainty as to what conduct may be captured by the Rule, and could apply to completely legitimate conduct . . . .''); API at 9 (arguing that the proposed Rule ''would create substantial legal uncertainty for market participants'' that will ''deter[] firms from engaging in legitimate activity''); Sutherland at 2 (stating that the proposed Rule ''is considerably more intrusive of legitimate business behavior than is necessary''); Plains at 3 (''Given the general nature of the proposed rule and the uncertainties that will exist with respect to its scope and applicability, the imposition of liability without any finding of an effect on the market . . . will restrict legitimate market activity . . . .''); NPRA at 3 (stating that ''the proposed Rule falls far short of the Commission's goal'' of prohibiting '''manipulative and deceptive conduct *without discouraging pro-competitive or otherwise desirable market practices*''' (quoting 73 FR at 48323)) (emphasis added by commenter).

[26] *See, e.g.*, Sutherland at 4 (''We believe that the Commission is mistaken in proposing to adopt the [SEC Rule] 10b-5 anti-fraud model . . . .''); API at 11 (arguing against borrowing, without modification, the language and precedent of Rule 10b-5); ISDA at 6 (stating that ''[s]ecurities precedent does not provide a helpful framework'' for creating a Section 811 rule); NPRA at 2 (stating that an SEC-based rule

changes in the text of the proposed Rule.[27] Commenters also offered recommendations regarding the elements of proof the Commission should require in order to establish a rule violation. Specifically, the commenters discussed: (1) whether a showing of recklessness should be sufficient to establish the requisite level of scienter required by a rule;[28] (2) whether a showing of price effects should be required in order to prove a rule violation;[29] and (3) whether prohibiting statements that are misleading because they omit material facts is appropriate for a rule that applies to wholesale petroleum markets.[30]

Commenters also presented varying views regarding the proper reach of an FTC market manipulation rule.[31] A few commenters believed that the proposed Rule should reach conduct other than fraud, and these commenters suggested that the Commission should modify the focus of the proposed Rule[32] or amend it to reach specific types of conduct.[33] Most argued that an FTC market manipulation rule should not reach activity in futures markets.[34] Several offered views as to whether an FTC rule should reach pipelines[35] or renewable fuels, including ethanol.[36] The Commission has considered these comments and, where appropriate, has revised the initial proposed Rule to address these concerns.

III. Basis for the Rule

Section 811 of EISA provides the legal basis for any petroleum market manipulation rule. Section 811

is ''not an appropriate or workable model for an FTC market manipulation rule that applies to wholesale petroleum markets''); Plains at 2 (''The types of protective rules and doctrines that may be appropriate for the securities markets . . . cannot simply be applied without modification to the petroleum markets.'').

[27] *See, e.g.*, NPRA at 17, 31 (recommending modifications to the proposed Rule's text and also suggesting alternative rule language); Navajo Nation at 7-9 (urging that the Commission define the term ''manipulative'' in the proposed Rule); API at 11 (requesting that the Commission modify the text of the proposed Rule to account for differences between wholesale petroleum and securities markets).

[28] Many commenters urged the Commission to require a showing of specific intent instead of recklessness to prove a violation of an FTC rule. *See, e.g.*, CFDR at 4 (recommending that an FTC rule require a ''[specific] intent to cause a false, fictitious and artificial impact on market prices or market activity''); ISDA at 3-4 (urging the Commission to require proof of specific intent rather than recklessness); NPRA at 18 (stating that a recklessness standard is not appropriate for wholesale petroleum markets); Sutherland at 5 (encouraging the Commission to require specific intent rather than recklessness); Muris at 11 (recommending that the Commission require proof of specific intent); *see also* Argus at 2 (stating that ''a specific intent requirement would encourage those who already provide market data to index publishers to continue to do so''); API at 16 (stating that the proposed Rule's recklessness standard ''is not sufficient . . . to 'ensure that the proposed Rule does not chill competitive behavior''' (citing 73 FR at 48328)). *But see, e.g.*, SIGMA at 2 (stating that the association is content with the scienter requirement that the FTC has adopted in its proposed Rule); MS AG at 3 (stating that ''both intentional and reckless conduct should be covered by the scienter requirement''); CAPP at 1 (commending the Commission's proposed scienter requirement, which is designed to avoid chilling legitimate business behavior); ATAA at 12 (expressing support for the FTC's proposed scienter requirement); PMAA at 3-4 (stating that the Commission's proposed elements of proof provide ''needed clarity''); CA AG at 2-3 (supporting the scienter standard proposed in the NPRM).

[29] Many commenters supported the showing of price effects as an element of a cause of action under an FTC market manipulation rule. *See, e.g.*, Van Susteren at 2 (''The lack of a requirement of a showing of price effects to establish culpability leaves the rule overbroad and risks inconsistent or unwarranted enforcement efforts by the Commission.''); ISDA at 3-4 (asking that the Commission require proof of price effects); Muris at 2 (encouraging the Commission to adopt an effects requirement); *see also* Plains at 3 (urging the Commission to make clear that only conduct that has a ''manipulative effect on the relevant market'' will be actionable); API at 34 (recommending that the Commission require ''proof that a party's deceptive or fraudulent conduct caused market conditions to deviate materially from the conditions that would have existed but for that conduct''); Sutherland at 6 (urging the FTC to ''require that market manipulation actually impact the market''). *But see, e.g.*, MS AG at 3 (asserting ''that proof of price effects should not be required to establish a violation''); ATAA at 12 (supporting the FTC's decision not to require proof of price effects); IPMA at 4 (''[A]gree[ing] that the proposed Rule should not require proof of an identifiable price effect.''); CA AG at 3 (expressing support for the Commission's decision not to include an effects requirement).

[30] Several commenters argued that, although the proposed Rule's omissions language may be appropriate in securities markets, differences exist between securities and wholesale petroleum markets that make such language inapplicable to the latter. *See, e.g.*, API at 25 (stating that unlike wholesale petroleum markets, securities markets are ''are governed by detailed disclosure obligations designed to protect unsophisticated investors''); Muris at 2 (urging the FTC to ''avoid importing broad disclosure requirements from highly regulated markets that simply have no place in wholesale petroleum markets''); NPRA at 4 (arguing that the full disclosure rationale underlying SEC Rule 10b-5 does not fit wholesale petroleum markets); Plains at 3 (stating that in the crude oil markets, unlike securities markets, ''there is no presumption that one market participant owes any duties to its counterparties that would require disclosure of any information'').

[31] *See, e.g.*, Boxer at 1 (advocating for a rule to reach ''oil traded on the [NYMEX] and ICE exchanges''); API at 22-23 (''[T]he Commission should, at a minimum, provide a safe harbor for statements or omissions that are not made in connection with 'reporting . . . to government agencies, to third-party reporting services, and to the public through corporate announcements,' at least absent concrete evidence that such statements or omissions were part of a broader scheme to manipulate a market.'' (citing 73 FR at 48326)); Platts at 8 (asking that the Commission adopt a safe harbor to alleviate concerns that the Commission could capture inadvertent errors under an FTC rule); *see also* Argus at 3 (''The FTC should also refrain from mandating any particular methodological approach for the assessment of spot markets in petroleum.'').

[32] *See, e.g.*, Pirrong at 2 (asserting that the proposed Rule's focus on fraud and deceit is misguided and contending that market power is the biggest threat to efficiently functioning petroleum markets); CFA2 at 19 (urging the Commission to take ''vigorous action to reign in the speculative bubble'' in energy commodities markets); Consumer (urging the Commission to address excessive speculation in commodities markets); Navajo Nation at 3 (expressing concern that the proposed Rule may fall short in addressing manipulative conduct).

[33] *See, e.g.*, NPCA at 1; MPA at 2; IPMA at 3-4 (requesting that the Commission treat an oil company's decision to sell only gasoline pre-blended with ethanol at the terminal rack as a potentially manipulative practice); Murkowski at 1 (recommending that the Commission use its authority to address anti-competitive conduct in circumstances in which ''a single company gains exclusive control of energy-related infrastructure . . . for moving domestic crude to a consuming market'').

[34] *See, e.g.*, CFTC (Arbit) at 1 (urging the Commission to ''incorporate an exception from its rule for commodity futures and options trading activity on regulated futures exchanges''); CFTC (Chilton) at 2; CFDR at 8 (asking that the Commission refrain from encroaching on the CFTC's exclusive jurisdiction over futures transactions); Brown-Hruska at 8-9 (''[I]t is my hope that the Commission will narrow the focus of the rule tightly upon manipulative and deceptive conduct in the wholesale petroleum markets [to avoid overlap with the CFTC].''); ISDA at 14 (''[T]he Commission should clarify that it will refer to the CFTC any manipulative activity that it becomes aware of that does not directly involve a wholesale, physical petroleum products transaction.''); MFA at 2 (recommending that the Commission adopt a safe harbor for futures markets activities); Sutherland at 2 (urging the Commission to reconsider its decision to reach futures markets activities under any Section 811 rule). *But see, e.g.*, Pirrong at 8 (noting that objections that ''FTC actions against manipulation will interfere with the [CFTC's] jurisdiction over commodity market manipulation . . . are moot, because Congress has decided otherwise''); CA AG at 3 (''EISA . . . provide[s] the FTC with the power to monitor for and prevent fraud and deceit in the commodity futures market, insofar as it affects oil and gas futures.''); CFA2 at 19 (urging the Commission to take ''vigorous action to reign in the speculative bubble and return the futures markets to their proper role to improve the functioning of physical commodity markets'').

[35] ATAA at 4-5 (asserting that the FTC properly concluded that oil pipelines are subject to the proposed Rule); IPMA at 4 (''We agree that Commission jurisdiction should extend to pipelines.''). *But see* AOPL at 1 (urging the Commission to revise its proposed Rule ''to clarify that it does not apply to interstate common carrier oil pipelines regulated by the [FERC] under the Interstate Commerce Act ('ICA')'').

[36] *See, e.g.*, ATA at 3 (urging the Commission to ''expand the scope of [the proposed Rule] to include alternative and renewable energy markets''); IPMA at 4 (agreeing that ''manipulation of non-petroleum based commodities such as ethanol'' that affect the price of gasoline should be ''subject to Commission enforcement''); NPRA (Drevna), Tr. at 221-22 (agreeing that the Commission should reach blending components that are inputs to gasoline or diesel); SIGMA (Columbus), Tr. at 222-23 (agreeing that mandated alternative fuels and components should be covered under a rule). *But see* MFA at 3 (asking that the Commission exclude from the Rule's coverage ethanol and commodities that may be used in the process of making ethanol ''that are the subject of futures and options trading'').

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.''[37]

The Commission has carefully considered concerns raised by commenters about the propriety of a rule.[38] Most of the commenters who addressed the rulemaking standard agreed generally that a Section 811 rule would be necessary or appropriate, and that it would be in the public interest to combat fraud in wholesale petroleum markets.[39] A few commenters, however, specifically questioned the necessity or appropriateness of the proposed Rule.[40] Sutherland, for example, argued that the proposed Rule failed to ''balance the Congressional directive for regulatory oversight with the goal of allowing economic efficiency,'' and was ''more intrusive of legitimate business behavior than is necessary.''[41] NPRA stated that the proposed Rule's reliance on SEC Rule 10b-5 and related legal precedent as a model would create confusion and potentially discourage procompetitive activity, and, thus, would be neither necessary nor appropriate in the public interest.[42]

As stated in the NPRM, Section 811 of EISA targets manipulative or deceptive conduct in wholesale petroleum markets. In enacting this provision, Congress specifically authorized the Commission to determine whether a rule would be appropriate and in the public interest. Based upon its experience and perspective from several decades of protecting consumers and analyzing competition in petroleum markets, the Commission believes that it is both appropriate and in the public interest to publish a revised proposed rule prohibiting fraudulent and deceptive conduct in wholesale petroleum markets that serves no legitimate purpose.

To achieve these objectives, the revised proposed Rule defines, for market participants, the Section 811 statutory prohibition of the use or employment of any ''manipulative or deceptive device or contrivance.''[43] Like the initially proposed Rule, the revised proposed Rule would prohibit conduct that injects false information into market transactions. However, the revised proposed Rule more precisely identifies the conduct prohibited, and thus achieves a more appropriate balance between consumer protection interests and compliance burdens.[44] Consequently, the Commission believes that it is both appropriate and in the public interest to publish the revised proposed Rule.

IV. Discussion of the Revised Proposed Rule

A. The Revised Proposed Rule is an Anti-Fraud Rule

The Commission stated in the NPRM that its proposed Rule was modeled on the SEC's broad, anti-fraud Rule 10b-5.[45] The Commission further stated that it intended to rely on only relevant SEC precedent in applying its rule.[46] Although some commenters supported this approach, others raised concerns about basing a rule on SEC Rule 10b-5. The revised proposed Rule retains the anti-fraud concept of SEC Rule 10b-5, but it is further tailored to wholesale petroleum markets. The following discussion addresses the use of SEC Rule 10b-5 as a model, and provides Commission responses to commenter concerns about this approach. The Commission invites written comments on the revised proposed Rule, particularly regarding the modifications made to the initially proposed Rule, and responses to the questions in Section IV.I.

Many commenters expressed general support for an anti-fraud rule, contending that a fraud standard would provide necessary guidance to market participants.[47] A few commenters specifically endorsed the proposed Rule as articulated in the NPRM, without modification.[48] Some commenters also

[37] 42 U.S.C. 17301; *see also* 73 FR at 48320.

[38] Some commenters opined on the meaning of the language ''in the public interest or for the protection of United States citizens'' in the ANPR. *See, e.g.*, CFDR, ANPR, at 4-5 (''The public interest and the protection of U.S. citizens . . . are best served by the adoption of a clear legal standard for market manipulation that will allow market participants to conduct their business with a clear understanding of the relevant legal boundaries.''); MFA, ANPR, at 17 (''FTC rules that purport to overlap with CFTC exclusive jurisdiction would not serve the public interest.''); Flint Hills, ANPR, at 17-18 (stating that the statutory language—''in the public interest''—reflects Congress' intention that the Commission draw upon its long experience in articulating ''the public interest'' under its other statutes).

[39] *See, e.g.*, ATAA at 3 (noting that the proposed Rule is necessary to guard against conduct that undermines the integrity of petroleum markets); MS AG 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.''); IPMA 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* PMAA at 2 (stating that the proposed Rule fulfilled ''the Commission's intention to, 'prohibit manipulative and deceptive conduct without discouraging pro-competitive or otherwise desirable market practices''' (quoting 73 FR at 48323)); ATA at 2 (supporting the proposed Rule ''as an additional tool to help preserve the integrity of vital energy markets'').

[40] Most commenters directed their comments to the application of the Rule, rather than to whether the proposed Rule met the rulemaking standard articulated in Section 811.

[41] Sutherland at 2.

[42] NPRA at 15-16; *see also* API at 1 (arguing that a rule is unnecessary because ''repeated FTC investigations have found no evidence of significant harmful or illegal conduct [in petroleum markets]'').

[43] 42 U.S.C. 17301.

[44] Several commenters expressed concern that a lack of clarity about the type of conduct covered by the proposed Rule could chill legitimate conduct, owing to potentially significant monetary penalties that might be imposed for any violation. *See, e.g.*, API at 9-10 n.12 (''[V]iolations of a market manipulation rule would expose market participants to substantial monetary penalties. This significantly increases the risk of chilling desirable practices as companies seek to minimize the risk of liability.''); Muris at 2 (arguing that the necessary generality of the proposed Rule, ''[c]oupled with the extraordinarily high penalties . . . creates the risk of chilling legitimate business decisions''); NPRA at 3 (arguing that the harsh penalties associated with a Section 811 rule and the uncertainty created by the proposed application of SEC precedent, ''would prompt corporate compliance systems that would impair the procompetitive and cost-efficient functioning of wholesale petroleum markets'').

[45] 73 FR at 48322.

[46] 73 FR at 48322 (stating that the Commission ''[was] not invoking the entire body of SEC law in this rulemaking, but rather the anti-fraud provisions of SEC Rule 10b-5'').

[47] *See, e.g.*, 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.''); API (Long), Tr. at 33 (stating that ''in general, fraud is a useful limiting concept''); 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.''); ATAA at 11 (stating that the ''proposed rule properly contains a broad anti-fraud provision''); ABA Energy (McDonald), Tr. at 246 (urging the Commission to ''focus on deceptive conduct that hinders the operations of markets by misleading participants''); *see also* ISDA (Velie), Tr. at 40 (''[W]e think fraud is a good standard, as long as it's coupled with specific intent to manipulate a market.''); Flint Hills (Hallock), Tr. at 46 (''I think it's important to keep a focus, though, on the aim of the fraud, and the aim of the fraud that I believe that the agency has been looking for is fraud upon a market . . . .''); NPRA 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.'').

[48] *See, e.g.*, MS AG at 2 (''The proposed Rule will benefit consumers significantly because market manipulation can artificially inflate prices of petroleum products and cause consumers to pay

agreed with the Commission's decision to model the proposed Rule after SEC Rule 10b-5.[49] For example, SIGMA argued that a SEC Rule 10b-5 model would ''ensure[] consumer protection while affording business owners a wealth of certainty with respect to their market practices.''[50] A few commenters expressly embraced the Commission's decision to use the legal precedent under SEC Rule 10b-5 for guidance in interpreting a Section 811 rule.[51]

Other commenters expressed concern about the Commission's reliance on SEC Rule 10b-5 language and its legal precedent.[52] Generally, these commenters argued that the legal precedent developed under SEC Rule 10b-5 cannot be divorced from the language of Rule 10b-5 itself.[53] They contended that securities markets are characterized by legal relationships of trust and an emphasis on full disclosure which do not exist in wholesale petroleum markets.[54] These commenters argued that relying upon SEC Rule 10b-5 legal precedent therefore would create confusion and uncertainty as to what conduct would violate the proposed Rule.[55] Some commenters asserted that, as a result, the proposed Rule potentially would chill legitimate business conduct, and that its uncertain scope would make it difficult for companies to create effective programs for compliance with the Rule.[56]

Many commenters offered modifications to the proposed Rule intended to adapt it to wholesale petroleum markets.[57] Commenters who urged the Commission to diverge from SEC Rule 10b-5 legal precedent suggested revising the proposed Rule to include express language requiring both a showing of specific intent—to satisfy the scienter requirement[58]—and a showing of price effects.[59] Some commenters recommended that the Commission draw instead upon legal precedent construing the CEA.[60] Others argued that an anti-fraud manipulation rule would not go far enough, or that it should reach different types of conduct.[61] One commenter, for example, suggested that the rule should target the exercise of market power intended to benefit a derivatives

more for essential goods, such as gasoline.''); PMAA at 2 (stating that the proposed Rule prohibits manipulative and deceptive conduct without chilling pro-competitive behavior); CA AG at 2 (expressing support for the FTC's proposed Rule).

[49] *See, e.g.*, SIGMA at 2 (expressing support for the Commission's decision to base its proposed Rule on Rule 10b-5); ATAA at 11 (''[ATAA] supports the proposed rule's use of SEC Rule 10b-5 as the model for a rule designed to proscribe market manipulation.''); *see also* PMAA at 2 (supporting the Commission's decision not to ''slavishly follow[]'' the Rule 10b-5 model); Boxer at 1 (''I think it's [great] to have Rule 10b-5 essentially extended to the oil traded on the [NYMEX] and ICE exchanges . . . .'').

[50] SIGMA at 2.

[51] *See, e.g.*, CFDR at 2 (''The Commission . . . rightly looks to securities law precedents for guidance in shaping the legal standards and jurisprudence under EISA.''); ATAA at 11 (''[Rule 10b-5] provides the FTC with a well-developed framework to follow.'').

[52] As a threshold matter, some of these commenters disagreed with the Commission's tentative determination in the NPRM that the language of Section 811 indicated that the FTC should model a Section 811 rule after Rule 10b-5, arguing that if this had truly been the intent of Congress, it would have included an explicit directive in the statute similar to the directive in the FERC's anti-manipulation authority. *See* 15 U.S.C. 717c-1; 16 U.S.C. 824v; FERC, *Prohibition of Energy Market Manipulation*, 71 FR 4244, 4246 (Jan. 26, 2006). *See, e.g.*, NPRA at 15-16 (stating that the language of Section 811 does not require that the Commission model an FTC rule after SEC Rule 10b-5); API at 12 (''The language of Section 811 thus authorizes the Commission to take a different approach than the [FERC] . . . .''); ISDA at 6 (stating that, unlike the FERC's market manipulation statute, Section 811 does not contain express language directing it to rely on securities precedent).

[53] *See, e.g.*, API at 15 (''The Rule 10b-5 regulatory regime is deeply intertwined with the disclosure obligations imposed by Section 10(b) and other provisions of the SEA, the scope of which, in turn, are highly dependent on the fiduciary duties and obligations that exist between various market participants.''); *see also* ISDA at 7 (stating that disclosure requirements are ''[i]nterwoven and inextricably part of securities regulation'').

[54] *See, e.g.*, NPRA at 4, 7 (arguing that due to the absence of fiduciary and other duties and disclosure obligations in wholesale petroleum markets, it would be ''bad public policy to apply [Rule 10b-5] to purchasers or sellers in wholesale petroleum markets''); ISDA at 7 (stating that in the absence of legal trust relationships, it is unclear if Rule 10b-5 principles are applicable to wholesale petroleum markets); Pirrong Tr. at 36 (stating that a Rule 10b-5 case raises ''issues related to fiduciary duty that are inherent in the securities laws, but which are not really appropriate or really that relevant in a commodities context''); API at 25 (arguing that unlike wholesale petroleum markets, the securities marketplace is a regulated industry ''governed by detailed disclosure obligations designed to protect unsophisticated investors''); Plains at 3 (stating that in crude oil markets, unlike securities markets, ''there is no presumption that one market participant owes any duties to its counterparties that would require disclosure of any information'').

[55] *See, e.g.*, API at 9 (applying Rule 10b-5 precedent ''without any modification . . . would create confusion and chill pro-competitive behavior''); NPRA at 16 (''[A] blanket transfer of the language and precedent of Rule 10b-5 from securities markets to wholesale petroleum markets would likely create significant confusion and discourage procompetitive activity.'').

[56] *See, e.g.*, Flint Hills at 5 (stating that the proposed Rule does not ''provide practical, clear, articulate guidance to its staff, traders and others dealing on [its] behalf'' as to prohibited conduct); API at 8 (stating that the benefits of an FTC rule are outweighed by ''potentially significant compliance costs'' and the risk of ''interfer[ing] with the efficient functioning of petroleum markets and deter[ring] procompetitive, welfare-enhancing behavior''); NPRA at 3 (''[A]s drafted, the language of the proposed rule instead would prompt corporate compliance systems that would impair the procompetitive and cost-efficient functioning of wholesale petroleum markets.''); *see also* ISDA at 9 (''Under the proposed Rule, market participants are likely to be concerned that their competitive trading strategies or inadvertent miscalculations may later be misconstrued by regulators . . . .'').

[57] API and NPRA suggested that the Commission retain the elements of a violation but not the language of the proposed Rule, or at least modify the language of the proposed Rule to clarify its application. API at 15-16; NPRA at 16-17 (stating that the elements of SEC Rule 10b-5 detached from securities precedent and with modifications are a ''better starting point'' for a rule rather than the specific language of Rule 10b-5); *see also* API at 12 (''The language of Section 811 thus authorizes the Commission . . . to modify the Rule 10b-5 regime in light of its extensive experience with the petroleum industry.''); ISDA at 6 (stating that, unlike the FERC's market manipulation statute, Section 811 does not contain express language directing it to rely on securities precedent).

[58] Some commenters recommended that the Commission adopt the CEA's specific intent standard. *See, e.g.*, ISDA at 10-11 (stating that the CEA's intent requirement is better suited for commodities markets than the FTC's proposed scienter requirement); API at 21-22 (advocating for a specific intent standard similar to that of the CEA); *see also* NPRA at 32 (stating that the proposed Rule should require specific intent in order to harmonize the proposed Rule with the CFTC's market manipulation authority); CFDR at 7 (stating that a specific intent standard ''would substantially help to harmonize the legal standard between the Commission's rule and the CFTC's interpretation of the CEA'').

[59] *See, e.g.*, ISDA at 3-4 (asking that the Commission require proof of price effects); Plains at 3 (urging the Commission to make clear that only conduct that has a ''manipulative effect on the relevant market'' will be actionable); API at 34 (recommending that the Commission require ''proof that a party's deceptive or fraudulent conduct caused market conditions to deviate materially from the conditions that would have existed but for that conduct'').

[60] A few commenters asserted that the standards applied to commodities markets, including futures commodities markets, under the CEA are more applicable to petroleum markets than is securities legal precedent. *See, e.g.*, ISDA at 11 (stating that CEA ''precedent is much more analogous to the markets the EISA seeks to protect''); API at 15 (urging the Commission to ''draw on relevant commodities law precedents in addition to elements of Rule 10b-5''); *see also* Brown-Hruska at 4 (''[T]he mission of the Commission is more analogous to that of the commodities market regulator, the CFTC, which has the responsibility to ensure that the prices derived from and used by futures markets are fair and free from fraud and manipulation.''). *See generally* Pirrong at 5 (recommending that the Commission follow a modified CEA price manipulation model). *But see* NPRA (DeSanti), Tr. at 251 (''I want to be explicit that the NPRA does not support using [a] CEA model here.'').

[61] *See, e.g.*, Navajo Nation (Piccone), Tr. at 37-38 (arguing that a rule should address nonfraudulent, manipulative acts such as a refiner denying producers access to other markets); Navajo Nation at 3 (seeking confirmation that an FTC rule ''will be applied to prohibit all manipulative conduct that artificially distorts wholesale petroleum markets or undermines incentives to find and develop reserves of domestic crude oil''); *see also* CFA (Cooper), Tr. at 160 (stating that fraud is too narrow a focus and the proposed Rule also should cover market power issues); CFA2 at 8 (urging the FTC to ''identify and attack the broad range of practices and structural conditions that can and have been moving prices in the markets'').

position.[62] Other commenters specifically urged the Commission to prohibit refiners and suppliers from refusing to sell unblended gasoline to distributors.[63]

Based on the rulemaking record developed thus far, as well as its extensive experience with the petroleum industry, the Commission believes that modifying the proscriptions of the initially proposed Rule will better focus it on wholesale petroleum markets, which differ significantly from securities markets. As explained in the ANPR and the NPRM, the conduct prohibition in Section 811 is identical to language found in SEA Section 10(b), which prohibits the use of any ''manipulative or deceptive device or contrivance.''[64] The Commission believes that this language directs the agency to be guided by SEC Rule 10b-5,[65] a broad anti-fraud rule.[66] However, the inclusion of the language ''as necessary or appropriate'' in Section 811 further directs the Commission to use its expertise to tailor the rule in a manner appropriate for wholesale petroleum markets.[67]

The Commission has modified the initially proposed Rule after considering comments provided during the public comment period and at the public workshop. The modifications should clarify the requirements imposed by the revised proposed Rule for market participants. The Commission recognizes that, in the absence of a more extensive regulatory scheme, the omissions provision in Section 317.3 of the initially proposed Rule could discourage legitimate business conduct in wholesale petroleum markets that benefits consumers. Therefore, the Commission has consolidated the three subsections of Section 317.3 into two subsections, and has added language both to sharpen its focus on fraudulent and deceptive conduct and to reduce potential adverse effects on legitimate business conduct. Specifically, the Commission has added an explicit scienter standard for each subsection of Section 317.3, and has added language to the omissions provision now contained in Section 317.3(b) to ensure that it prohibits only the omission of material facts that is both misleading under the circumstances and distorts or tends to distort market conditions for the covered products.

The Commission has retained the general anti-fraud prohibition contained in Section 317.3(c) of the initially proposed Rule in revised proposed Section 317.3(a). Thus, revised proposed Section 317.3(a) would prohibit any person from knowingly engaging in conduct—including making any untrue statement of material fact—that operates or would operate as a fraud or deceit on any person. Revised proposed Section 317.3(a) would not prohibit omissions of material facts. Such omissions would instead be covered by revised proposed Section 317.3(b), which would prohibit any person from intentionally failing to state a material fact which both makes a given statement misleading under the circumstances and distorts or tends to distort market conditions for a covered product. These modifications are intended to eliminate redundancy and more precisely define the conduct that revised proposed Rule Section 317.3 would prohibit; that is, fraudulent or deceptive conduct that injects false information into wholesale petroleum market transactions.

The Commission believes that this framework best reflects both congressional intent and the nature of the markets covered by the revised proposed Rule. The Commission recognizes, however, that this approach may be too narrow to prevent all manipulative conduct. The Commission therefore does not foreclose the possibility of extending the scope of any final rule in the future if new information or enforcement experience warrant such modifications.

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.*[68] 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'' currently subject to the Commission's jurisdiction—that is, any individual, group, unincorporated association, limited or general partnership, corporation, or other business entity—would be covered by the revised proposed Rule. Conversely, any ''person'' not subject to Commission jurisdiction under the FTC Act would also not be subject to Commission jurisdiction under the revised proposed Rule.

In response to the NPRM, some commenters asked the Commission to clarify the jurisdictional scope of any final rule. With respect to pipelines, one commenter, AOPL, asserted that ''interstate common carrier oil pipelines regulated by the FERC under the ICA are exempt from Commission jurisdiction'' and should be excluded from the coverage of any FTC rule.[69] AOPL

[62] Pirrong at 2-5 & n.2 (defining ''derivatives'' to include ''exchange-traded futures contracts, and options on futures, and forward and options contracts traded in the over-the-counter . . . market'').

[63] MPA at 2 & n.1 (noting that MPA's members share the experiences described by IPMA and TOMA in their ANPR comments and IPMA in its NPRM comment, and that distributors and retailers can often obtain more competitive prices if they buy unblended gas separately from ethanol, which they then add to the gasoline before selling it at retail); *see also* NPCA at 1; IPMA at 2-3. MPA also recommended that the Commission reach the aforementioned conduct, which has ''an adverse effect on competition'' under an FTC rule. MPA at 2. The Commission does not intend to focus on anti-competitive conduct in its application of the final Rule, which remains the province of antitrust law. The approach is consistent with Section 815 of EISA. *See* 42 U.S.C. 17305(b); *see also* ABA Energy (McDonald), Tr. at 244 (arguing that the final Rule should not reach conduct that is already covered by the antitrust laws, such as the unilateral exercise of market power).

[64] *See* 73 FR at 25619; 73 FR at 48322. The anti-manipulation authority granted to the FERC also contains the identical conduct prohibition, and the statute granting that authority explicitly directed 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.

[65] 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 (''[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. U.S.*, 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 National Treasury Employees Union, et al. v. Chertoff*, 452 F.3d 839, 858 (D.C. Cir. 2006) (stating that ''there is a presumption that Congress uses the same term consistently in different statutes'').

[66] *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 Rule 10b-5); *U.S. 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].'') (citations omitted); *In re Ames Dep't Stores, Inc. Stock Litig.*, 991 F.2d 953, 966 (2d Cir. 1993) (stating that frauds affecting the integrity of securities markets fall under Rule 10b-5).

[67] To do otherwise would violate a canon of statutory construction. *See TRW, Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (''It is 'a cardinal principle of statutory construction' that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'") (citations omitted).

[68] 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).

[69] AOPL at 1 & n.3 (urging the Commission to clarify that it will not apply a Section 811 rule to reach common carrier oil pipelines, defining ''oil pipelines'' to include crude oil and petroleum products pipelines).

further suggested that the Commission provide a ''safe harbor protecting oil pipelines against any culpability under the rule so long as they are acting in accordance with the ICA and FERC regulation of oil pipelines pursuant to the ICA.''[70] In support of this position, AOPL argued that the FERC already regulates pipelines extensively[71] and that the potential for manipulation of commodities prices by oil pipelines is small.[72] Another commenter, ATAA, opposed any safe harbors or exemptions for pipelines in order to give full effect to the purpose of EISA.[73] According to ATAA, it is important for the Commission to police this area because ''it is far from clear that FERC's jurisdiction extends to price manipulation,'' and because the ''FERC has never pursued 'price manipulation' claims'' against oil pipelines.[74]

In response, the Commission notes that not all pipelines necessarily fall outside the coverage of the FTC Act.[75] 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 are often 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.

FERC regulation of pipelines would be an insufficient basis upon which to exempt pipeline companies if they engage in prohibited conduct in connection with the wholesale purchase or sale of crude oil, gasoline, or petroleum distillates. The Commission therefore must assess on a case-by-case basis whether any particular ''person'' as defined in the revised proposed Rule—or any conduct at issue—may fall outside the scope of the revised proposed Rule, and/or whether the conduct at issue falls under the ''in connection with'' language in the revised proposed Rule, which is discussed below.

Some commenters argued that any final rule should not extend to fraud in futures markets, as the Commission had proposed. Many of these commenters observed that the CFTC has exclusive jurisdiction pursuant to Section 2(a)(1)(A) of the CEA,[76] and that the Commission should therefore grant a safe harbor for futures markets activities.[77] These commenters argued in particular that Congress granted the CFTC exclusive jurisdiction over futures markets in order to create uniform rules and to avoid applying inconsistent legal standards to futures markets.[78] They further argued that if an FTC rule applied to futures trading, market participants could face duplicative and possibly inconsistent enforcement by multiple agencies based on the same conduct.[79] One commenter maintained that if the Commission declined to adopt a safe harbor, the Commission should harmonize any final rule with the elements of a cause of action for price manipulation under the CEA, which are not part of the statutory provision.[80]

At this time, the Commission does not intend to adopt a blanket safe harbor for futures market activities. Nonetheless, the Commission recognizes the CFTC's jurisdiction ''with respect to accounts, agreements . . . and transactions involving contracts of sale of a commodity for future delivery.''[81] 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, the Commission intends to work cooperatively with the CFTC in furtherance of the Commission's duty to prevent fraud in wholesale petroleum markets.[82]

[70] AOPL at 14.

[71] AOPL asserted that comprehensive regulation of oil pipelines by the FERC makes regulation by the FTC under any final rule ''neither necessary nor appropriate in the public interest or for the protection of U.S. citizens.'' AOPL at 11.

[72] AOPL at 11-12 (contending that ''there is little or no potential for manipulation of oil commodities prices on the part of oil pipelines'' because regulations and competition limit pipeline companies' ability to engage in anticompetitive conduct).

[73] ATAA at 4 (arguing that the Commission should reach manipulative conduct relating to oil pipelines in order to give full effect to EISA); *see also* Navajo Nation (Piccone), Tr. at 37-38 (arguing that Congress gave the FTC new authority to combat anti-competitive practices, including practices by pipelines); IPMA at 4 (''We agree that Commission jurisdiction should extend to pipelines.'').

[74] ATAA at 5 (asserting that the FERC ''exercises what at best can be described as 'light-handed' regulation of oil pipelines and [it] has never pursued 'price manipulation' claims at all''); *see also* Navajo Nation (Hollis), Tr. at 239 (explaining the FERC's limited authority over oil pipelines).

[75] Under the Clayton Act, the Commission has the power and authority to regulate mergers and acquisitions of pipelines. *See* Clayton Act, Sections 7 and 11, 15 U.S.C. 18, 21.

[76] Section 2 of the CEA states that ''[t]he [CFTC] shall have exclusive jurisdiction . . . with respect to accounts, agreements . . . and transactions involving contracts of sale of a commodity for future delivery . . . traded or executed on a contract market designated . . . pursuant to [S]ection 7 or 7a of this title'' of the CEA. 7 U.S.C. 2(a)(1)(A).

[77] *See, e.g.*, CFTC (Arbit) at 1 (''We again urge the FTC to incorporate an exception from its rule for commodity futures and options trading activity on regulated futures exchanges, which is subject to the CFTC's exclusive jurisdiction granted by the [CEA].''); CFTC (Chilton) at 2 (''I urge the FTC to incorporate an exception for futures trading subject to the exclusive jurisdiction of the CEA.''); MFA at 2 (urging the Commission on behalf of futures associations and exchanges to grant a safe harbor for futures and options trading). *But see* CA AG at 3-4 (advocating against application of safe harbors designed specifically to avoid overlap with the CFTC's regulatory jurisdiction and warning of potential jurisdictional limitations created by ''shackling the FTC with the restrictions placed upon CFTC authority''); ATAA at 4 (''[T]he rule proscribes 'manipulation or deceptive conduct' in a narrow and straightforward manner that does not 'improperly intrude upon the jurisdiction of the CFTC or any other agency.'''); Pirrong at 8 (noting that in giving the FTC market manipulation authority, Congress has in some respects rendered moot any questions of the FTC's interference with the CFTC's jurisdiction); CFA2 at 19-20 (urging the Commission to reach conduct in futures markets).

[78] *See, e.g.*, MFA at 3 (''Congress designed the CFTC's exclusive jurisdiction to make absolutely certain that the provisions of the CEA . . . would be the sole legal standards applicable to futures trading.''); CFTC (Arbit) at 3 (stating that Congress granted the CFTC exclusive jurisdiction over futures trading to avoid applying inconsistent standards to futures markets); *see also* CFDR at 9 (stating that it seems illogical to apply a rule specifically intended to govern activities in the commodities markets to futures markets); CFTC (Chilton) at 1 (stating that applying a Section 811 rule to futures markets ''would seriously undermine the Congressional grant of exclusive jurisdiction in the CEA, and impair the CFTC's ability to effectively oversee futures activity''); *see also* Sutherland at 2 (asserting that the proposed Rule ''impinges upon the [CFTC's] exclusive jurisdiction with respect to the futures and other purely financial markets'').

[79] *See, e.g.*, Sutherland at 2 (''The proposed rule creates a duplicative and potentially highly burdensome enforcement regime.''); CME (Dow), Tr. at 29 (explaining that application of an FTC rule to futures markets is a ''recipe for disaster . . . because it results in overlapping regulatory regimes by multiple regulators''); MFA at 3 (arguing that the legislative history and the language of CEA's exclusive jurisdiction provision demonstrates that Congress believed that applying conflicting or duplicative regulations to futures markets would ''impair the operations of U.S. futures markets''); Brown-Hruska at 8-9 (recommending that the Commission narrow the focus of the rule to manipulative and deceptive conduct in wholesale petroleum markets to avoid regulatory overlap ''that would give rise to legal uncertainty in the exchange-traded and over-the-counter derivative markets'').

[80] MFA at 3 (urging the Commission ''to avoid having [the Rule's] provisions contradict and conflict with CEA legal requirements'' by requiring specific intent and a showing of price effects as elements of an offense).

[81] 7 U.S.C. 2(a)(1)(A).

[82] This position is consistent with the views of commenters who urged the FTC to work with the CFTC where appropriate, including the CFTC itself. *See, e.g.*, CFTC (Arbit) at 3 (''[T]he CFTC looks forward to working in close cooperation with the FTC to efficiently prosecute illegal activity in the petroleum industry where our agencies share jurisdiction.''); Sutherland at 4 (''[C]ooperative arrangements in place between the FTC and CFTC . . . can be tailored to allow each agency to pursue the compliance matters within its greatest competence—the physical markets in the case of the FTC and the financial markets in the case of the CFTC.''); MFA at 9 (urging the Commission and the CFTC to coordinate enforcement in areas outside the CEA's exclusive jurisdiction provision for futures markets).

Finally, some commenters voiced the concern that if the Commission relies upon the text and judicial construction of SEC Rule 10b-5 language and securities law precedent, courts would be more inclined to find an implied private right of action under any final rule.[83] Commenters urged the Commission to clarify that any final rule would not create or imply a private right of action.[84] In response, the Commission notes that EISA does not expressly create a private right of action.[85] Whether a private right of action might be implied, however, is a question of legislative intent for Congress or the courts, not the Commission, to resolve.

C. Section 317.2: Definitions

The revised proposed Rule provides definitions for six terms: ''crude oil,'' ''gasoline,'' ''knowingly,'' ''person,'' ''petroleum distillates,'' and ''wholesale.'' Five of these terms were defined in the initial NPRM, and the definitions of those five terms herein remain largely the same as those in the initially proposed Rule.[86] In addition, the revised proposed Rule now includes a definition of the term ''knowingly.'' These definitions establish the scope of the revised proposed Rule's coverage and provide guidance as to the Commission's intended enforcement of the Rule.

Several commenters addressed the definitions proposed in the initial NPRM, and some of them also suggested additional definitions. These comments, together with the Commission analysis of the definitions that are included in the revised proposed Rule, are discussed below.

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

Section 317.2(a) of the initially proposed Rule defined ''crude oil'' to mean: ''the mixture of hydrocarbons that exist: (1) in liquid phase in natural underground reservoirs and which remain liquid at atmospheric pressure after passing through separating facilities, or (2) as shale oil or tar sands requiring further processing for sale as a refinery feedstock.''[87] As explained in the NPRM, the Commission intended 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.''[88]

Two commenters, PMAA and Navajo Nation, supported the proposed definition of ''crude oil,''[89] and no commenter provided a basis for changing it. Section 317.2(a) of the revised proposed Rule thus retains the substantive definition of ''crude oil'' in the initially proposed Rule. However, the definition in the revised proposed Rule has three non-substantive modifications.[90] Section 317.2(a) of the revised proposed Rule therefore defines ''crude oil'' as ''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.''

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

Section 317.2(b) of the initially 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.''[91] Three commenters generally supported the proposed definition.[92]

Several commenters offered views on whether ethanol or renewable fuels should be included as covered products under any final rule. Some of them expressed general support for including ethanol or renewable fuels.[93] One commenter specifically opposed including ethanol in the definition of ''gasoline.''[94]

Section 317.2(b) of the revised proposed Rule retains, without modification, the definition of ''gasoline'' in the initially proposed Rule. Consistent with its position in the NPRM, the Commission 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.[95]

The Commission tentatively has determined not to treat products not listed in Section 811—such as renewable fuels (*e.g.*, ethanol) and blending components (*e.g.*, alkylate and reformate)—as separate covered products under its definition of ''gasoline.'' The Commission may nonetheless apply the revised proposed Rule to conduct implicating non-covered commodities if appropriate under the ''in connection with'' language in the revised proposed Rule, as discussed below in Section IV.D.2.a.2. This approach would provide the Commission with sufficient flexibility to achieve the statutory goal of protecting wholesale petroleum markets from manipulation without expanding the reach of a Section 811 rule to cover products not identified in the statute.

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

Section 317.2(c) of the revised proposed Rule defines ''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.'' This definition has been added to provide guidance as to the level of scienter required to establish a violation of the general anti-fraud provision contained in revised proposed Rule Section 317.3(a). Consistent with the position the Commission adopted in the NPRM, the definition of ''knowingly'' derives from the extreme recklessness standard articulated by the Seventh Circuit and the District of Columbia Circuit Courts of Appeals in decisions delineating the appropriate scienter

[83] *See, e.g.*, NPRA at 15 (''The greater the emphasis on SEC authorities as a source of the Commission's Rule, the greater the likelihood that courts would follow the SEC model to imply a private right of action under EISA as well.''); Flint Hills at 4 (noting that the closer the Commission adheres to a SEC Rule 10b-5 model, the more difficult it will be to design a compliance program to preclude third-party litigation).

[84] *See, e.g.*, Sutherland at 7 (''[The Commission] should make clear that neither EISA nor the proposed Rule creates any private right of action.''); Plains at 1 (''We urge the Commission to make it clear that its proposed rule does not create any private right of action and that the rule may be enforced only by the Commission itself.''); API at 10 (''The Commission should make clear in any final Rule that it does not create a private right of action.'').

[85] *See* API at 10 (agreeing that ''Congress did not expressly provide for a private right of action in Section 811'').

[86] 73 FR at 48325-26.

[87] 73 FR at 48325.

[88] 73 FR at 48325.

[89] PMAA at 3 (''The definition[] of 'crude oil' . . . seem[s] appropriate.''); Navajo Nation at 7 (adopting the FTC's proposed definition of ''crude oil'' in its recommended rule text).

[90] The word ''exist'' in the definition has been replaced with the word ''exists''; the phrase ''the mixture'' has been changed to ''any mixture''; and in the first part of the definition, the phrase ''which remain'' has been changed to ''that remains.''

[91] 73 FR at 48325.

[92] PMAA at 3 (''The definition[] of . . . 'gasoline' . . . seem[s] appropriate.''); IPMA at 4 (agreeing with the Commission's proposed definition of ''gasoline''); Navajo Nation at 7 (adopting the FTC's proposed definition of ''gasoline'' in its recommended rule text).

[93] *See, e.g.*, ATA at 1 (encouraging the Commission to include renewable fuels markets in the proposed Rule's reach); PMAA at 3 (stating that the Commission should reach the manipulation of ethanol under the rule); *see also* IPMA at 4 (''[A]gree[ing] with the language that manipulation of non-petroleum based commodities such as ethanol and other oxygenates that directly or indirectly affect the price of gasoline should be subject to Commission enforcement under the proposed Rule.'').

[94] MFA at 12 (requesting that the Commission ''delete its reference to 'ethanol' as a subset of 'gasoline'').

[95] *See* 73 FR at 48325.

standard under SEC Rule 10b-5.[96] The Commission discusses in further detail the intended application of the term ''knowingly'' in Section IV.D.2.b.1. below.

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

Section 317.2(c) of the initially proposed Rule defined the term ''person'' to mean: ''any individual, group, unincorporated association, limited or general partnership, corporation, or other business entity.''[97] PMAA and Navajo Nation were the only commenters to address this definition, and both agreed that the definition is appropriate.[98] The Commission believes that this definition is consistent with the jurisdictional reach of the FTC Act,[99] as well as with prior usage in other FTC rules.[100] Therefore, the initially proposed definition of ''person'' is retained without modification and set forth in Section 317.2(d) of the revised proposed Rule.

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

Section 317.2(d) of the initially 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.''[101] The initially proposed Rule also defined ''petroleum distillates'' to include ''finished fuel products, other than 'gasoline,' produced at a refinery or blended in tank at a terminal.''[102] Two commenters supported the proposed definition of ''petroleum distillates,''[103] while another asked whether the definition of ''petroleum distillates'' included heavy fuel oils (*e.g.*, No. 5 and No. 6 fuel oils).[104] Another commenter argued that any final rule should reach biodiesel and other renewable fuels.[105]

The definition of ''petroleum distillates'' now in revised proposed Rule Section 317.2(e) remains unchanged from the initially proposed Rule. The Commission clarifies that the term ''petroleum distillates'' 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. The definition, therefore, does not include heavy fuel oils.

As discussed in the definition of ''gasoline,'' the Commission tentatively has determined not to extend the definition of ''petroleum distillates'' to include renewable fuels, such as biodiesel. To do so would expand the reach of the revised proposed Rule beyond the products—''crude oil[,] gasoline or petroleum distillates''—expressly specified in Section 811 of EISA. The Commission further addresses the intended application of the revised proposed Rule to conduct implicating non-covered products, such as renewable fuels, in its discussion of the ''in connection with'' language in Section IV.D.2.a.2. below.

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

Section 317.2 (e) of the initially proposed Rule defined the term ''wholesale'' to mean ''purchases or sales at the terminal rack level or upstream of the terminal rack level. Transactions conducted at wholesale do not include retail gasoline sales to consumers.''[106] A few commenters generally agreed with the Commission's proposed definition,[107] and two commenters, MS AG and PMAA, expressly supported including sales at the terminal rack level.[108] PMAA asserted that manipulation at the rack level would directly affect ''the thousands of PMAA members whose trucks load at these terminal racks tens of thousand times each day.''[109]

Other commenters, however, opposed including transactions at or downstream of the terminal rack level, and they proposed revising the definition of ''wholesale'' to limit its meaning to purchases or sales of product in ''bulk'' quantities.[110] A few commenters argued that, although the term by definition included rack sales, public policy considerations supported limiting its scope. These commenters contended that ''rack pricing decisions are qualitatively different from those that arise in market-based bulk transactions,''[111] and that rack pricing practices were unlikely to affect overall price levels in markets served by a terminal or group of terminals.[112] They further argued that applying the Rule to rack transactions ''could jeopardize the ability of wholesale suppliers to respond to market conditions,'' and would also impose significant compliance burdens on the industry.[113]

The Commission finds the arguments advocating the exclusion of rack sales from the definition of ''wholesale'' to be unpersuasive, and at this time tentatively has determined not to limit the definition to bulk volume sales. As the Commission stated in the NPRM, and as some commenters conceded, terminal rack sales are ''wholesale'' transactions as that term is commonly defined.[114] Excluding rack sales from the definition would place the revised proposed Rule at odds with the express language of EISA, which directs the Commission to prohibit manipulative conduct in wholesale markets. Moreover, prohibited conduct may in fact occur at the terminal rack level in connection with wholesale petroleum transactions, to the detriment of consumers. Such a determination requires analysis on a case-by-case

[96] 73 FR at 48329 (citing *SEC v. Steadman*, 967 F.2d 6436, 641-42 (D.C. Cir. 1992)); *see also Sundstrand Corp. v. Sun Chemical Corp.*, 553 F.2d 1033, 1045 (7th Cir. 1977), *cert. denied*, 434 U.S. 875 (1977).

[97] 73 FR at 48325.

[98] PMAA at 3 (''The definition[] of . . . 'person' . . . seem[s] appropriate.''); Navajo Nation at 8 (adopting the FTC's proposed definition of ''person'' in its recommended rule text).

[99] *See* 73 FR at 48325.

[100] *See, e.g.*, Telemarketing Sales Rule, 16 CFR 310.2(v); Disclosure Requirements and Prohibitions Concerning Franchising, 16 CFR 436.1(n).

[101] 73 FR at 48325.

[102] 73 FR at 48325.

[103] PMAA at 3 (''The definition[] of . . . 'petroleum distillates' . . . seem[s] appropriate.''); Navajo Nation at 8 (adopting the FTC's proposed definition of ''petroleum distillates'' in its recommended rule text).

[104] Sutherland at 7.

[105] ATA at 3.

[106] 73 FR at 48326.

[107] *See, e.g.*, Navajo Nation at 8 (adopting the FTC's proposed definition of ''wholesale'' in its recommended rule text); PMAA at 3 (''PMAA is in agreement with the Commission's definition of 'wholesale' . . . .'').

[108] MS AG at 3; PMAA at 3; *see also* IPMA at 4 (agreeing that '''wholesale' means purchases at the terminal rack or upstream of the terminal rack''); Platts (Kingston), Tr. at 154 (stating that ''[w]hen I hear wholesale, I tend to think of [it] as rack'').

[109] PMAA at 3.

[110] API and NPRA, for example, suggested that the Commission limit the term ''wholesale'' to ''bulk purchases or sales in contract quantities of 20,000 barrels or more, delivered or received via pipeline, marine transport or rail, at or near a location for which a price publication firm publishes a reference price.'' API at 30; NPRA at 30-31, *see also* SIGMA at 3 (suggesting that the Commission define ''wholesale'' to include only ''transactions involving quantities of product equal to or greater than the minimum pipeline tenders or barge volumes via which a terminal or terminal cluster receives supplies'').

[111] API at 29; NPRA at 30.

[112] SIGMA at 2 (contending that although ''[p]articular pricing practices at the rack level may have an impact on a particular supplier's customers,'' such practices would likely not ''alter overall price levels in the markets served out of a terminal or terminal cluster''); *see also* API at 30; NPRA at 30 n.46 (''Wholesale rack prices are limited to a relatively small geographic area.'').

[113] Additionally, API and NPRA argued that the Commission already has a price monitoring program for terminal rack pricing in place and it has not identified a ''problem at the wholesale rack level that would suggest a regulatory remedy is required.'' API at 29-30; NPRA at 30.

[114] 73 FR at 48326; *see* NPRA at 30; API at 29-30 (stating that its reasons for excluding practices at the terminal rack level and below ''from the scope of the Rule are not definitional, but rather based on public policy'').

basis. Furthermore, the inclusion in the revised proposed Rule of an explicit scienter requirement limiting the reach of the Rule to ''knowing'' or ''intentional'' conduct should assuage commenter concerns about reaching rack transactions. Thus, the revised proposed Rule covers terminal rack sales.

The Commission has, however, modified the proposed definition of ''wholesale'' in recognition of the differences that may exist in the patterns of distribution for crude oil, gasoline, and petroleum distillates.[115] As the Commission noted in the NPRM, the term ''wholesale'' may encompass one or both of the following concepts: (1) the sale of large quantities of product, and (2) the sale of a product for anticipated resale.[116] With regard to the sale of products listed in Section 811, the Commission recognizes that crude oil is sold in bulk quantities independent of terminal racks. Similarly, large quantities of jet fuel are often sold directly to airlines at airports independent of any terminal rack. Therefore, the Commission is revising the proposed definition of ''wholesale'' to address these differences, clarifying that all bulk sales of crude oil and jet fuel—even when not for resale—are encompassed by the revised proposed definition.

Specifically, Section 317.2(f) of the revised proposed Rule defines ''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.'' As modified, this revised definition would not extend to retail sales of gasoline, diesel fuels, or fuel oils to consumers;[117] therefore, the language in the originally proposed definition excluding such sales is now redundant and has been deleted.[118]

7. Other Suggested Definitions

A few commenters suggested adding definitions to any final rule to clarify its scope and operation.[119] Specifically, several commenters proposed definitions for the terms ''manipulative or deceptive device or contrivance,'' a phrase included in the text of Section 811.[120] One commenter recommended that an FTC rule include a broad definition of the terms ''manipulative or deceptive device, scheme or contrivance'' that encompasses ''manipulative conduct that artificially distorts wholesale petroleum markets or undermines incentives to find and develop reserves of domestic crude oil.''[121] Borrowing language from the NPRM, another commenter urged the Commission to define a ''manipulative or deceptive act'' as an act that ''injects materially false or deceptive information into the marketplace.''[122] One commenter proposed that any rule, regardless of scope, should define ''manipulation [as] an act that is deceptive, that causes an effect on market prices, and [that] is intended by the actor to have such a result.''[123]

As described in greater detail in the discussion of Section 317.3 below, the Commission believes that the conduct prohibition in the revised proposed Rule would give meaning to the term ''manipulative or deceptive devices or contrivances'' found in Section 811, obviating the need for an additional definition in the Rule itself. Moreover, modifications to the proposed Rule's language clarify the type of conduct that the revised proposed Rule would prohibit, providing better guidance to market participants about its scope. Consistent with its position in the NPRM, the Commission intends to focus on fraudulent and deceptive conduct that injects false information into market transactions.[124] At this time, the Commission believes that it remains unnecessary to define either ''manipulative or deceptive device or contrivance'' or ''manipulative or deceptive act.''

D. Section 317.3: Prohibited Practices

1. Initial Proposed Rule

Section 317.3 of the initially proposed Rule contained three subparts (a) - (c), which respectively would have made it unlawful for any person:

(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.[125]

The NPRM discussed the scope and application of each subpart and articulated the elements of a cause of action under the proposed Rule. Commenters responded to the NPRM by discussing both the language of the proposed Rule and its proposed elements. Several industry commenters addressed the conduct provisions contained in proposed Section 317.3(a)-(c). Some commenters believed that the conduct provisions were generally appropriate,[126] and some expressed specific support for individual subparts. For example, PMAA advised that it would support the language used in proposed Section 317.3(a), as long as the proposed Rule also contained a scienter requirement.[127] ATAA also supported proposed Section 317.3(c), noting that ''[t]his flexible standard is exactly the sort of general prohibition of illegality that the FTC has successfully enforced over its almost 100 year history.''[128] In addition, some commenters agreed with

[115] One commenter stated that the Commission's proposed definition ''leaves uncertainty as to the status of retail transactions that involve large end users.'' Sutherland at 7.

[116] A common definition of ''wholesale'' is '''the sale of goods *in quantity*, as to retailers or jobbers, *for resale*.''' *See* 73 FR at 48326 (citing (*http://dictionary.reference.com/browse/wholesale*)) (emphasis added).

[117] *See* SIGMA at 1 (agreeing that any Section 811 rule should not apply to retail gasoline sales); NPRA at 29; API at 30.

[118] The definition of ''wholesale'' in the NPRM had stated that ''[t]ransactions conducted at wholesale do not include retail gasoline sales to consumers.'' 73 FR at 48326.

[119] *See generally* Van Susteren at 1 (noting that EISA provided neither a definition for ''market manipulation'' nor the specific elements that constitute a Section 811 violation).

[120] One commenter suggested using SEC Rule 10b-5 language to define this term. IPMA at 3-4 (contending ''that the [SEA] and SEC Rule 10b-5 definition of 'manipulative device or contrivance' as 'employ[ing] any device, scheme, or artifice to defraud' is appropriate in this case'').

[121] Navajo Nation at 3. Specifically, Navajo Nation recommended the following definition for ''manipulative device, scheme or contrivance'' be added: ''[C]onduct without substantial efficiency justification that is intended to artificially stimulate, depress or distort market prices or that foreseeably could artificially stimulate, depress, or distort market prices.'' *Id* at 8.

[122] NPRA at 28 (agreeing ''fundamental[ly]'' with the FTC's definition of ''manipulative or deceptive act'' in the NPRM). NPRA suggested that the FTC further define the type of information injected into the market, by specifying that the information must be about important aspects of supply or demand. *Id.* at 21.

[123] Muris at 2; *see also* ISDA at 10 (stating that CEA legal precedent has defined ''manipulative'' as '''an intentional exaction of a price determined by forces other than supply and demand''' (quoting *Frey v. CFTC*, 931 F.2d 1171, 1175 (7th Cir. 1991)). *But see* NPRA (DeSanti), Tr. at 250-51 (arguing against the use of the CFTC's definition of ''market manipulation'').

[124] *See* Section IV.A. for a discussion of the Rule as an anti-fraud rule.

[125] 73 FR at 48326 (proposing language nearly identical to that employed in SEC Rule 10b-5); *see also* 17 CFR 240.10b-5.

[126] *See, e.g.*, CA AG at 2 (agreeing with the conduct provisions of the proposed Rule); MS AG at 2 (endorsing the Commission's proposed Rule); ATA at 2 (stating that the proposed Rule properly prohibits manipulation); *see also* SIGMA at 2 (''In particular, the Commission's decision to base its rule on Section 10b-5 of the [SEA] properly ensures consumer protection while affording business owners a wealth of certainty with respect to their market practices.'').

[127] PMAA at 3.

[128] ATAA at 12.

including general, rather than specific, conduct prohibitions in the proposed Rule.[129]

Most industry commenters, however, argued that a perceived lack of specificity about the conduct the proposed Rule would prohibit would lead to adverse consequences, such as a reduction in voluntary information disclosures by industry participants, and a reduction in the number of new participants entering the marketplace.[130] For example, NPRA opposed the use of the phrase ''device, scheme, or artifice to defraud'' in proposed Section 317.3(a),[131] arguing that the proposed Rule should ''identify more precisely the types of conduct that the FTC may target as market manipulation . . . to avoid the unintended chilling of procompetitive conduct.''[132] Commenters also expressed concerns about applying proposed Section 317.3(c) to wholesale petroleum markets.[133] One commenter argued that subpart (c) should only cover conduct that has an effect on the market, rather than on any individual person.[134]

With respect to subpart (b) of the initially proposed Rule, commenters have generally supported its prohibition of untrue statements of material fact.[135] Thus, in response to the ANPR, several commenters generally agreed that a rule should ban untrue statements because they interfere with well-functioning markets.[136] Similarly, in response to the NPRM, many commenters and workshop participants agreed that the proposed Rule should prohibit materially false statements, provided that such statements affected the marketplace.[137]

By contrast, although one commenter endorsed the proposed Section 317.3(b) prohibition of misleading statements through the omission of material facts,[138] nearly all the other commenters who addressed proposed Section 317.3(b) opposed it. Commenters argued that prohibiting such omissions would not make sense in petroleum markets, because participants in wholesale petroleum markets—unlike securities market participants—have no legal obligation to disclose certain information to counter parties.[139] They also argued that basing liability upon the failure to disclose material facts in wholesale petroleum markets would create confusion[140] and chill legitimate business conduct.[141] These commenters

[129] *See, e.g.*, Sutherland at 2 (''We welcome the Commission's decision not to propose specific conduct obligations or other affirmative duties that superimpose government norms for the rules of the marketplace.''); ATA at 2 n.3 (''We support the FTC's attempt to preserve flexibility by issuing general conduct prohibitions so as to allow for adaptation to changing market conditions and to avoid a 'laundry list of specifically proscribed conduct [that] could quickly become out of date.''' (quoting 73 FR at 48322-23)); ATAA at 11 (''[T]he proposed rule properly contains a broad anti-fraud provision.''); *see also* Platts at 9 (''Platts generally agrees with a non-prescriptive approach for entities' participation in price formation processes.''). Although they did not endorse a ''laundry list'' approach, a few other commenters sought to ensure that a rule would proscribe specific conduct as manipulative under a rule. *See* NPCA at 1; MPA at 2; IPMA at 3-4 (requesting that the Commission treat an oil company's decision to sell only gasoline pre-blended with ethanol at the terminal rack as a potentially manipulative practice).

[130] *See, e.g.*, API at 9-10, 26 (arguing that the proposed Rule was overly broad and would prompt market participants to adopt compliance programs that restrict voluntary disclosures); ISDA at 9 (arguing that market liquidity, particularly in times of greater market stress, would be adversely affected if ambiguous rule provisions artificially constrain ''critical market activities'' or dissuade potential market participants from entering the market); NPRA at 3 (''Market participants believe they will need to implement conservative compliance systems due to the uncertainty created by the Commission's proposal to apply SEC precedent to enforcement of the Rule . . . .''); Flint Hills at 3 (noting with approval the concerns raised by NPRA that the ''breadth of the proposed rule would create a significant amount of uncertainty as to what conduct may be captured by the Rule''); Plains at 3 (''Given . . . the uncertainties that will exist with respect to the [proposed Rule's] scope and applicability, the imposition of liability without any finding of an effect on the market or third parties will restrict legitimate market activity . . . .'').

[131] NPRA at 15-17 (arguing that the three elements of proof required for the proposed Rule, rather than the specific language of SEC Rule 10b-5, provide a better starting point for the development of an FTC rule).

[132] NPRA at 31. NPRA further recommended that the Commission add the language ''manipulative or deceptive'' to modify the phrase ''device, scheme, or artifice to defraud'' in proposed Section 317.3(a). *Id.* at 32.

[133] *See, e.g.*, ISDA at 8 (noting that ''[w]hile this clause may be reasonably clear in the securities context in which it has been applied, it is not clear to ISDA's members what this would require of commercial participants in physical, wholesale petroleum markets'').

[134] *See* MFA (Young), Tr. at 45 (arguing that the language ''any person'' in proposed Section 317.3(c) is overreaching); NPRA at 31.

[135] *See, e.g.*, Flint Hills at 3-4 (''[I]nstructing employees not to knowingly lie to their purchasers about supply conditions in order to drive up market prices draws a bright line that can be clearly communicated and audited without the need to limit legitimate conduct.'').

[136] Several ANPR commenters noted that reporting false information to private reporting services and to government agencies can be troublesome because market participants rely on information from private reporting services and government agencies to conduct business transactions. *See, e.g.*, API, ANPR, at 50 (stating that firms rely on private reporting services to understand industry trends and as a basis for contract pricing and that providing false or misleading information to these services ''could be problematic''); Plains, ANPR, at 4 (urging the Commission to prohibit the dissemination of false or misleading information made with the intent to defraud); PMAA, ANPR, at 7 (stating that because its members rely on private and government data reports, the Commission should publish a rule that ensures the accuracy of this data); Muris at 10 (''Deliberate false reports of transaction details to influence a price index should be a violation of a manipulation rule.'').

[137] *See, e.g.*, ISDA (Velie), Tr. at 41-42, 58 (agreeing that the Commission should focus on lies and other false statements if made with the specific intent to manipulate the market); MFA (Young), Tr. at 45 (agreeing that the dissemination of outright lies that cause an artificial market price should be prohibited); CFDR (Mills), Tr. at 48-49 (urging the Commission to only target false statements that act as a fraud on the marketplace rather than those made in bilateral negotiations between counterparties); API at 9 (suggesting that the Rule be limited to ''intentionally deceptive or fraudulent statements or acts designed to manipulate a wholesale petroleum market''); PMAA at 3; *see also* ATA at 2 (stating that the Commission should go after ''[d]eceptive or manipulative practices . . . used to disseminate false information or omit material information that causes market participants to perceive a change in the supply or demand''); ATAA at 2 (''The FTC's efforts in preventing market manipulation and the providing of false information are an important part of addressing the nation's and the airline industry's energy crisis.''); CFA (Cooper), Tr. at 56-57 (contending that the Commission should reach all false statements under the Rule, regardless of context, that have a potential to affect the market).

[138] *See* PMAA at 3 (approving of the use of established securities law precedent regarding false material facts and omissions of material fact).

[139] *See, e.g.*, NPRA at 7 (stating that, unlike securities markets, wholesale petroleum market participants do not have ''a duty to disclose to a counterparty the types of material, nonpublic information about [their] own compan[ies] with which Rule 10b-5 is concerned''); ISDA at 7 (noting that unlike securities markets, wholesale petroleum markets are not characterized by relationships that give rise to duties to disclose); API at 25 (''Permitting courts to base liability on failure to disclose facts . . . may make sense in the highly regulated securities industry, in which regulated parties often have access to material non-public information about the issuer that may affect the true value of the security, and therefore are governed by detailed disclosure obligations designed to protect unsophisticated investors.''); *see also* CFDR (Mills), Tr. at 129 (stating that in the securities arena, courts rely on the existence of fiduciary and other relationships to impose an affirmative duty on market participants to provide more information, and in the absence of such a relationship, participants do not have a duty to provide additional information).

[140] Commenters also asserted that to the extent disclosures are required for market participants to comply with an FTC rule, there may be conflicts with other laws. *See, e.g.*, NPRA at 10 (''It would be inconsistent with established antitrust law for a market manipulation rule to have the perverse effect of requiring competitors to disclose to each other a wide range of competitively sensitive information . . . .''); Flint Hills (Hallock), Tr. at 126 (stating that ''there can arise situations where . . . information exchanges [are] being encouraged [by the proposed Rule], whereas the antitrust laws would greatly discourage those sorts of information exchanges''); AOPL (Stuntz), Tr. at 176-77 (contending that if the Rule is applied to oil pipelines, the omissions requirement would conflict with the ICA).

[141] *See, e.g.*, API at 26 (''By reducing the amount of information in the marketplace, the omissions standard set forth in the NPRM could have a serious and harmful impact on the efficiency of petroleum markets.''); CAPP at 2 (stating that the omissions language is likely to have a chilling effect because it is ambiguous in its application); Flint Hills at 3-4 (agreeing that the omissions provision is ambiguous in its application and would present compliance difficulties); NPRA at 33 (suggesting

Continued

asserted that the proposed Rule therefore would discourage companies from disclosing information voluntarily—in order to avoid liability for material omissions—and, as a consequence, would reduce the flow of information in petroleum markets and interfere with market efficiency and functions.[142]

2. Revised Proposed Rule

Section 317.3 sets forth the conduct prohibited by the revised proposed 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 fail to state a material fact that under the circumstances renders a statement made by such person misleading, provided that such omission distorts or tends to distort market conditions for any such product.[143]

The revised proposed Rule would broadly prohibit fraudulent or deceptive conduct, which may take various forms, including the intentional omission of material information. The modifications to the conduct provisions in the initially proposed Rule are intended to clarify the type of conduct that likely would violate the Rule. First, the Commission has consolidated the conduct prohibitions language in Section 317.3 of the initially proposed Rule to more clearly and precisely denote the unlawful conduct it prohibits. Second, to address the concern that the proposed Rule would chill legitimate conduct, the revised proposed Rule explicitly sets forth a scienter standard for each of the two conduct provisions.[144] Third, while the revised proposed Rule would also prohibit material omissions, the Commission has modified the prohibition to address specific concerns about the risk of deterring voluntary disclosures of information, by requiring a showing that the omission at issue distorts or tends to distort market conditions. With these modifications, the Commission believes the revised proposed Rule would serve the public interest by appropriately prohibiting manipulative conduct that injects false information into market transactions, without unnecessarily burdening legitimate business practices.

Specifically, Section 317.3(a) of the revised proposed Rule would prohibit 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 revised proposed Rule—with extreme recklessness. Revised proposed Rule Section 317.3(b) separately would prohibit statements that are misleading because they both intentionally omit material facts and threaten the integrity of wholesale petroleum markets. In particular, Section 317.3(b) requires a showing that the alleged violator intends to mislead by ''intentionally'' omitting material facts from statements where they are needed in order to render such statements not misleading. The intent requirement and the proviso that the omission threaten the integrity of a petroleum market are intended to address many commenters' concerns that the omissions provision in initially proposed Rule Section 317.3(b) would have chilled legitimate business conduct by failing to focus more precisely on prohibiting fraudulent and deceptive conduct likely to harm wholesale petroleum markets.

The Commission does not intend the revised proposed Rule to prohibit inadvertent mistakes, unintended conduct, or legitimate conduct undertaken in the ordinary course of business.[145] The revised proposed Rule also would not impose any recordkeeping requirements.[146] In short, the revised proposed Rule would prohibit fraudulent or deceptive conduct in wholesale petroleum markets without unduly impeding beneficial market behavior.

The following section discusses the modifications in Section 317.3 and relevant comments. The RNPRM first discusses the meaning of the following phrases embedded in the preamble: ''directly or indirectly'' and ''in connection with.'' It then reviews the two conduct provisions, including in particular the scienter standard, prohibited conduct, and other concepts that are pertinent to each provision. The Commission seeks comments on the specific formulation of revised proposed Rule Section 317.3, and in particular on whether the Rule would effectively prohibit fraudulent and deceptive behavior in wholesale petroleum markets without unduly burdening legitimate business conduct.

a. Preamble Language

(1) ''Directly or Indirectly''

In the NPRM, the Commission stated that ''[m]anipulative or deceptive conduct involving non-petroleum based commodities that directly or indirectly affect[s] the price of gasoline . . . may be the subject of Commission enforcement under the proposed Rule.'' One commenter, MFA, questioned the

deletion of the omissions language because failing to do so ''would tend to chill procompetitive information disclosures due to a fear of liability for having made an incomplete or insufficiently caveated, not to mention simply mistaken, statement''); *see* also Muris at 12 (''[I]t is particularly important that the Commission identify with clarity omissions of information that would be actionable under the rule.'').

[142] *See, e.g.*, Brown-Hruska at 7 (stating that unlike securities markets, ''[a] prohibition that may result in the prosecution of omissions discourages the collection and profitable use of market information in decisions regarding supply, transactions, and pricing [in commodities and physical petroleum markets] and could harm market efficiency and impair market function''); Flint Hills at 4 (stating that if the Rule covers omissions it will be difficult to design a compliance program that does not restrict legitimate conduct); NPRA at 13-14 (explaining that if the Commission prohibits omissions under the Rule, companies will instruct their employees to reveal less information in order to avoid potential liability). Commenters were also concerned that entities would use the omissions provisions to bring vexatious litigation. *See, e.g.*, Flint Hills at 4 (stating that in-house counsels would advise their clients to ''reveal as little information as possible'' to avoid third-party challenges based on omissions and unintentional misstatements); NPRA at 10-11 (expressing concern that a '''full disclosure' rule would distort [a company's] decisions about whether to disclose information that may be incomplete'' due to its fear of counterparty litigation); Brown-Hruska at 8 (warning that an overbroad interpretation of the term ''misleading'' in Section 317.3(b) ''is likely to give rise to *ex post* opportunistic behavior on the part of counterparties who did not possess the allegedly omitted information and are unhappy with the deal they struck'') (emphasis in original); *see also* API at 24 (stating that the proposed Rule leaves ''open the possibility of liability arising from 'incomplete' disclosures'').

[143] This provision of the revised proposed Rule, therefore, sets forth conduct that would be manipulative or deceptive, pursuant to Section 811.

[144] As the Commission noted in the ANPR and the NPRM, ''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.'' Specifically, intent need not be shown 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 Business Council, Inc.*, 423 F.3d 627, 635 (7th Cir. 2005); *FTC v. Freecom Communications, Inc.*, 401 F.3d 1192, 1202 (10th Cir. 2005); *FTC v. Amy Travel Serv., Inc.*, 875 F.2d 564, 573-74 (7th Cir. 1989). 73 FR at 25619 n.55; 73 FR at 48322 n.61.

[145] Consistent with its position in the NPRM, 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 revised proposed Rule would not require covered entities to disclose price, volume, and other data to individual market participants, or the market at large, beyond any obligation that may already exist. *See* 73 FR at 48326-27.

[146] *See* 73 FR at 48332.

correct interpretation of the phrase ''directly or indirectly,'' used in the preamble to Section 317.3 of the proposed Rule. MFA argued that Section 811 of EISA ''does not authorize the Commission to prohibit any misconduct that directly or indirectly affects wholesale gasoline prices.''[147] Rather, according to MFA, ''[t]he phrase 'directly or indirectly' modifies 'use or employ' in Section 811, nothing more or less.''[148]

The Commission intends that the phrase ''directly or indirectly''—which originates in Section 811 of EISA[149] and is also included in revised Section 317.3—delineates the level of involvement necessary to establish personal liability under the revised proposed Rule. In particular, it means that the revised proposed Rule will impose liability not only upon any person who directly engages in manipulation, but also against any person who does so indirectly. Thus, the Commission intends that the phrase ''directly or indirectly'' in the revised proposed Rule be interpreted and applied to prevent a person from engaging in the prohibited conduct, either alone or through others.

(2) ''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. In the NPRM, the Commission proposed to construe the phrase ''in connection with'' broadly, consistent with SEC legal precedent interpreting this language.[150] The Commission continues to believe that the Rule should reach market manipulation that occurs in the wholesale purchase or sale of products covered by Section 811 (and defined in the revised proposed 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.[151]

The rulemaking record reflects commenter concerns about how the Commission might use the ''in connection with'' language to reach specific conduct or non-covered products. In particular, some commenters expressed concerns about whether the language might reach supply and operational decisions. API asserted that the SEC's broad interpretation of ''in connection with''—arising from the fact that the SEA was enacted ''to respond to the massive economic crisis of 1929 . . .''—was inappropriate for the petroleum industry.[152] Commenters also urged the Commission to limit any rule it publishes to statements or acts pertaining to ''specific wholesale petroleum transactions,'' and not to cover upstream statements or conduct, including supply or operational decisions.[153] Otherwise, these commenters argued, an FTC rule would result in the Commission regulating those activities,[154] thereby creating a substantial risk of disrupting pro-competitive activity in petroleum markets.[155]

The Commission disagrees with the notion that the ''in connection with'' language should never reach supply or operational decisions,[156] where there is a sufficient nexus between the conduct at issue and the purchase or sale of crude oil, gasoline, or petroleum distillates. The Commission emphasizes that this interpretation of the phrase ''in connection with'' would not require the Commission to regulate or otherwise second-guess market participants' legitimate supply and operational decision-making. The scienter standard clarifies in particular that the revised proposed Rule would not apply to conduct that appears in hindsight to have been simply an error or miscalculation, either because the actor did not knowingly engage in fraudulent or deceptive conduct, or because he or she did not intentionally mislead by omitting material facts from covered statements. Rather, the Commission would determine on a case-by-case basis whether to reach supply and operational decisions or any other type of conduct that is ''in connection with'' the markets for covered products.

In addition, commenters raised concerns regarding the Commission's interpretation of the phrase ''in connection with'' with respect to products that are not listed in Section 811. Several commenters supported the Commission proposal to reach purchases and sales of non-covered products, such as renewable fuels and blending components, under the Rule.[157] For example, one commenter argued that renewable fuels—such as ethanol and biodiesel—are growing in significance as a result of federal and state government mandates to reduce dependence on foreign oil.[158] Another commenter, however, opposed extending the Rule to include ethanol, as well as sugar, corn, and other commodities that are inputs into ethanol.[159] This commenter argued that the language of Section 811 does not specifically list non-petroleum based commodities, and that the Commission is not authorized to reach them.[160]

The Commission intends to reach products—such as renewable fuels (*e.g.*, ethanol or biodiesel) or blending components (*e.g.*, alkylate or

[147] MFA at 10.

[148] MFA at 11. MFA further argues that because ethanol is subject to futures trading and, thus, is ''a statutory 'commodity' under the CEA,'' ethanol is subject to the exclusive jurisdiction of the CFTC and should be exempt from any FTC market manipulation rule. *Id.* This argument is addressed above in Section IV.B.

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

[150] In the NPRM, the Commission relied upon guidance from the Supreme Court decision in *Zandford* to conclude that the ''in connection with'' requirement is satisfied where fraudulent conduct coincides ''with a purchase or sale of crude oil, gasoline, or petroleum distillates at wholesale.'' 73 FR at 48329 (citing *SEC v. Zandford*, 535 U.S. 813, 820 (2002)).

[151] *See Zandford*, 535 U.S. 813.

[152] API at 27-28 (citing *Zandford*, 535 U.S. at 819).

[153] API at 30-32; NPRA at 33 (stating that the Commission should not interpret the ''in connection with'' language as reaching upstream conduct and statements, including operational and supply decisions); *see also* CFDR (Mills), Tr. at 218-19 (asserting that supply decisions without misleading statements do not otherwise rise to the level of a fraud).

[154] API also recommended that the Commission, ''at a minimum, make clear in the final Rule that a firm's ability to provide an objective business justification for the challenged supply decision should provide an affirmative defense to liability under the Rule.'' API at 32.

[155] *See, e.g.*, NPRA at 33 (arguing that by reaching supply decisions under a rule, the Commission ''could seriously distort refiners' decision making and disrupt competitive activity in petroleum markets''); API (Long), Tr. at 214-15 (contending that the FTC's oversight of ordinary supply and operational decisions ''could have devastating effects on the market'').

[156] 73 FR at 48329; *Zandford*, 535 U.S. at 820.

[157] ATA at 3; IPMA at 4 (agreeing that manipulation of ethanol and other oxygenates should be covered where changes in ethanol prices directly or indirectly affect wholesale gasoline prices); MPA at 2; NPCA at 1; NPRA (Drevna), Tr. at 221-22 (contending that the Commission should ''absolutely'' consider blending components); SIGMA (Columbus), Tr. at 222-23 (agreeing that a rule should reach ''[a]nything that's mandated as a component'').

[158] ATA asserted that the Commission's effort to address manipulation of energy markets will be incomplete if the Commission failed to address manipulation in markets for alternative fuels. ATA at 3; *see also* IPMA at 1-2 (stating that increasingly, ethanol or other oxygenates have been added to gasoline because of environmental concerns or other reasons); SIGMA (Columbus), Tr. at 224 (''I assure you [that] ethanol is a mandated component in [gasoline] . . . .'').

[159] MFA at 11-12; MFA (Young), Tr. at 224 (arguing that Congress did not intend for corn and sugar—subcomponent parts—to be covered under the Rule).

[160] MFA contended that SEC precedent, upon which the Commission relies, has never used the ''in connection with'' requirement to reach collateral markets that may affect securities. Rather, MFA argues, the SEC has focused on securities markets. MFA at 10-11.

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. Renewable fuels and blending components are integral to the overall supply of finished motor fuels; thus, manipulating purchases or sales of these products may have the requisite nexus with wholesale petroleum markets.[161] Under the revised proposed Rule, the Commission would determine on a case-by-case basis whether conduct in a market for a non-covered product is ''in connection with'' wholesale petroleum transactions.

After reviewing the existing rulemaking record, the Commission clarifies that it does not plan to apply its revised proposed 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.

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

Revised proposed Section 317.3(a) is a general anti-fraud provision, prohibiting 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. While the Rule initially proposed enumerated prohibited conduct in three separate subsections, revised proposed Section 317.3(a) now addresses prohibited conduct in a single provision that subsumes the remaining subsections, except for omissions of material facts, which are separately addressed by revised proposed Section 317.3(b).[162] Revised proposed Section 317.3(a) is substantially similar to Section 317.3(c)—and now also includes the prohibition on false statements previously contained in Section 317.3(b)—of the initial proposed Rule. In short, Section 317.3(a) prohibits market participants from lying in connection with wholesale petroleum transactions.

As revised, Section 317.3(a) would prohibit fraudulent or deceptive conduct that not only serves no legitimate purpose, but could also impair the efficient functioning of wholesale petroleum markets. Specific examples include (1) false public announcements of planned pricing or output decisions; (2) false statistical or data reporting; and (3) false statements in the context of bilateral or multilateral communications with any market participant or other person—who may serve as a conduit for the dissemination of the information, or who might act on the information—such as traders, suppliers, brokers, or agents; federal, state, or local governments; and government or private publishers.[163] Section 317.3(a) would also prohibit individual transactions or courses of business that constitute fraudulent or deceptive conduct, such as wash sales, that are intended to disguise the actual liquidity or price of a particular asset or market for that asset.[164]

(1) A Person Must ''Knowingly'' Engage in Conduct That Operates or Would Operate as a Fraud or Deceit

As noted above, the Commission has modified the text of the revised proposed Rule to articulate explicitly the scienter standards which respectively apply to revised proposed Rule Section 317.3(a) and Section 317.3(b).[165] In particular, the Commission has retained the scienter standard of extreme recklessness in the initially proposed Rule for revised proposed Rule Section 317.3(a). Section 317.3(a) of the revised proposed Rule now expressly provides that a person must engage in the proscribed conduct ''knowingly'' in order to violate subpart (a) of the Rule, and the term ''knowingly'' has been defined in the Rule to be coextensive with the extreme recklessness standard.[166] Thus, consistent with its position in the NPRM, the intent requirement in revised proposed Section 317.3(a) would be satisfied by showing that the defendant acted with extreme recklessness; that is, specifically, that the violator both acted with an extreme departure from standards of ordinary care in the petroleum industry and either knew or must have known that his or her conduct created a danger of misleading buyers or sellers.[167] The revised proposed Rule, including Section 317.3(a) of the Rule, would not extend to inadvertent conduct or mere mistakes.[168]

As a threshold matter, nearly every commenter who addressed the issue supported requiring some level of intent.[169] However, most commenters

[161] *See* NPRA (Drevna), Tr. at 225 (''[I]f you're going to let potentially 35 percent of the market out of the [regulation], what's the point?'').

[162] The Commission believes that, by treating omissions separately, market participants can more readily understand when alleged conduct violates revised proposed Rule Section 317.3(a).

[163] *See, e.g.*, *SEC v. Rana Research, Inc.*, 8 F.3d 1358 (9th Cir. 1993) (seeking permanent injunctive relief alleging that 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);*In the Matter of CMS Mktg. Serv. & 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 CFTC v. Delay*, 2006 WL 3359076 (D. Neb. Nov. 17, 2006) (holding that the CFTC failed to prove that defendant knowingly delivered any false and misleading reports to the USDA on cattle sales under a charge of manipulation and attempted manipulation of the feeder cattle futures markets).

[164] *See, e.g.*, *SEC v. U.S. Envtl., Inc.*, 155 F.3d 107 (2d Cir. 1998) (finding that the SEC's complaint sufficiently alleged that the defendant manipulated the market for a stock in violation of SEC Rule 10b-5 by engaging in wash sales and other deceptive conduct); *In the Matter of Michael Batterman*, 46 S.E.C. 304 (1976) (finding by consent that the defendant engaged in wash sales in violation of the securities laws); *Wilson v. CFTC*, 322 F.3d 555 (8th Cir. 2003) (affirming the CFTC's order finding that the defendant engaged in wash sales and imposing sanctions).

[165] This represents a change from the initially proposed Rule, which, like SEC Rule 10b-5, lacked any specific reference to scienter in the rule text. In the NPRM, the Commission proposed to require scienter as one of three required elements of proof. 73 FR at 48328. The other proposed required elements were: (1) a showing of a manipulative or deceptive act; and (2) a showing that the conduct was undertaken ''in connection with'' the purchase or sale of a covered commodity at wholesale. 73 FR at 48327-29.

[166] *See* Section IV.C.3. for a definition of the term ''knowingly.'' For purposes of the Rule, the Commission has chosen the term ''knowingly'' to denote extreme recklessness.

[167] Recognizing that ''the Courts of Appeals have adopted a number of different formulations as to precisely what constitutes reckless,'' the Commission proposed in the initial NPRM the recklessness standard articulated by the Seventh and District of Columbia Circuits. 73 FR at 48329 & n.131. *See Sundstrand Corp. v. Sun Chemical Corp.*, 553 F.2d 1033, 1045 (7th Cir. 1977) (defining reckless conduct as a '''highly unreasonable omission, involving not merely simple, or even inexcusable negligence, but an extreme departure from the standards of ordinary care, and which presents a danger of misleading buyers or sellers that is either known to the defendant or is so obvious that the actor must have been aware of it''' (citing *Franke v. Midwestern Oklahoma Development Authority*, CCH Fed. Sec. L. Rep. ¶ 95,786, at 90,850 (W.D. Okl. 1976)); *SEC v. Steadman*, 967 F.2d 636, 641-42 (D.C. Cir. 1992) (adopting *Sundstrand's* recklessness standard).

[168] As the Commission noted in the NPRM, FERC adopted a similar approach in its interpretation of its rule, noting that ''[t]he final rule is not intended to regulate negligent practices or corporate mismanagement, but rather to deter or punish fraud in wholesale energy markets.'' 73 FR 48328 n. 123 (quoting 71 FR at 4245-4246).

[169] *See, e.g.*, NPRA at 19-20 (suggesting that a specific intent requirement be incorporated into the text of any rule); CAPP at 1 (supporting a scienter requirement); API at 3 (''API supports the Commission's proposal to make scienter a requirement of any rule adopted under Section 811.''); CA AG at 2-3 (supporting a scienter requirement); CFDR at 3 (''Relevant legal authorities characterize market manipulation as a species of fraud that connotes fraudulent conduct specifically intended to corrupt the integrity of market pricing processes through rigged prices or fictitious trading . . . .''); Muris at 2 (observing that the statutory

opposed permitting a showing of recklessness to satisfy the scienter requirement.[170] They first contended that while recklessness may be an appropriate standard to employ in regulated securities markets—where many of the covered parties are in a fiduciary relationship with their clients—it is inappropriate in petroleum markets, where business relationships are generally unregulated and where parties generally owe no fiduciary duties to each other.[171] Second, commenters worried that courts grappling with cases brought under the proposed Rule might apply the lowest standard of recklessness because of the variety of meanings associated with the term in different legal contexts.[172] These commenters argued that requiring only a showing of recklessness—coupled with what they characterized as a vague NPRM prohibition of ''manipulation''—would permit the prohibition of some neutral or procompetitive conduct, and introduce uncertainty as to the conduct covered by a final rule.[173] Third, commenters argued that, if market participants were subject to liability under the proposed Rule for reckless conduct, they might choose to remain silent—in order to avoid liability for misstating or omitting a material fact—and thus reduce the volume of information available for price discovery in petroleum markets.[174]

Many of these commenters urged the Commission to adopt the higher scienter standard of specific intent, and to include this requirement in the language of any final rule.[175] In their view, a specific intent standard is necessary to protect petroleum market participants who act reasonably and in good faith. By contrast, CA AG supported the proposed recklessness standard, maintaining that requiring a showing of specific intent would preclude challenges to ''reckless conduct even if it had extremely detrimental effects.''[176]

The Commission continues to believe that an extreme recklessness standard is appropriate for the general anti-fraud provision in revised proposed Section 317.3(a). The scienter standard included in revised proposed Section 317.3(a) is consistent with analogous judicial interpretations of the statutory scienter requirement for SEC Rule 10b-5.[177] Recognizing that the Courts of Appeals have adopted several formulations as to precisely what constitutes recklessness, the Commission has defined the term ''knowingly'' to conform to the recklessness standard articulated by the Seventh and District of Columbia Circuits.[178] Thus, establishing

language and legislative history of EISA point to the SEC, the FERC, and the CFTC as relevant regulatory models, ''all of which require proof of scienter''); PMAA at 3-4 (supporting a scienter requirement). *But see* Navajo Nation at 5 n.5 (asserting that a scienter requirement makes the proposed Rule burdensome).

[170] *See, e.g.*, ISDA (Velie), Tr. At 12-13 (''[W]e would ask the Commission to reconsider its use of a recklessness standard.''); Flint Hills (Hallock), Tr. at 83 (''The recklessness standard is one that gives us great pause in terms of trying to create internal compliance policies.''); Sutherland at 5 (''Whatever the appropriateness of [the recklessness] standard in the SEC context . . . drawing inferences of misconduct based on imputed knowledge rather than actual intent is not a sound regulatory exercise when applied to the prevention of market manipulation in the commodity markets . . . .''); *see also* Pirrong Tr. at 114-15 (asserting that a recklessness standard could capture certain conduct that should not be captured, and that would not be captured by a specific intent standard); Brown-Hruska at 8 (''In order to encourage pro-competitive behavior, it is important that the standard for liability should be no less than specific intent . . . .'').

[171] *See, e.g.*, API at 4 (''Although a recklessness standard may be appropriate in the highly regulated securities context, with its fiduciary duties and strict disclosure requirements, it is not suited to wholesale petroleum markets.''); NPRA at 18-19 (explaining that ''[t]he application of a 'recklessness' standard may make sense in a securities context where parties owe each other fiduciary duties or are in other relationships of trust or confidence,'' but not in wholesale petroleum markets, in which clear standards of care do not exist between sophisticated market participants); Sutherland at 5 (stating that the recklessness standard may be appropriate for securities markets but not for commodity markets ''where buyers and sellers do not owe one another fiduciary duties''); Plains at 2-3 (explaining that the recklessness standard in the NPRM is inapplicable to wholesale petroleum markets where ''there is no presumption that one market participant owes any duties to its counterparties''); ISDA at 4 (''Because the prohibitions of SEC Rule 10b-5 are derived from statutory duties that do not exist in the wholesale commodities markets, many market participants cannot determine what behavior (other than false or misleading statements) may be prohibited . . . .'').

[172] *See, e.g.*, API at 3 (asserting that recklessness is a ''more malleable standard''); CFDR (Mills), Tr. at 92-95 (asserting that recklessness would create uncertainty as to how the law would be applied).

[173] *See, e.g.*, Plains at 3 (''[G]iven the distinctions between the securities markets and the crude oil markets, a recklessness standard will be ineffective in preventing or prosecuting actual fraud and will lead only to uncertainty and confusion as to the type of conduct that is prohibited.''); NPRA at 19 (''The application of a 'recklessness' standard in [the wholesale petroleum market] context would create confusion and concern about how to control and monitor the thousands of wholesale petroleum transactions that take place every day . . . .''); API at 16-17 (''Incorporation of a recklessness standard into the proposed Rule therefore would require market participants to guard against the possibility that the Commission (or courts) would base liability on conduct that falls far short of intentional wrongdoing.''); ISDA at 4 (stating that a recklessness standard would create uncertainty); *see also* Plains at 3 (explaining that the proposed Rule's lack of manipulative effect requirement, ''when coupled with a 'recklessness' standard . . . could render unlawful an unintentional act with no consequences''). *But see* SIGMA at 2 (''[T]he Commission's decision to base its rule on Section 10b-5 of the [SEA] properly ensures consumer protection while affording business owners a wealth of certainty with respect to their market practices.'').

[174] *See, e.g.*, API (Long), Tr. at 111 (asserting that a recklessness standard would discourage voluntary price reporting thus leading to ''information starved'' markets); Brown-Hruska at 8 (''A standard that allows liability for mere recklessness further discourages disclosure of information . . . .''); Flint Hills (Hallock), Tr. at 83-84 (asserting that a recklessness standard would result in entities limiting exchanges of information and reporting to governmental agencies); CFDR (Mills), Tr. at 93-95 (asserting that a recklessness standard would increase the likelihood for companies to withhold information needed for price discovery); *see also* Argus at 2 (''Absent a specific intent requirement, less transactional data will reach the index publisher, less data will enter the price formation process, and an increased chance of distortion in the indices produced may result.''). *See generally* Platts (urging the Commission not to discourage market activities that aid in price discovery).

[175] *See, e.g.*, API (Long), Tr. at 20 (supporting a specific intent standard); Argus at 2 (supporting a specific intent requirement); Brown-Hruska at 8 (''[I]t is important that the standard for liability should be no less than specific intent to manipulate market prices.''); CFDR at 6-7 (asserting that a specific intent standard would help to harmonize the legal standards employed by the FTC and CFTC, promoting ''fairness and reduc[ing] regulatory and legal uncertainty''); Flint Hills (Hallock), Tr. at 174 (advocating for specific intent as an element of the Rule); ISDA at 3-4 (encouraging the Commission to require proof of specific intent); Muris at 13 (urging the Commission to require ''evidence of specific intent to manipulate the price''); Sutherland at 4-5 (urging the Commission ''to require proof of specific intent''); NPRA at 17-18 (''[Specific intent] would give specific guidance to industry and provide FTC staff with objective evidence to which it can look to prove market manipulation. . . .'').

[176] CA AG at 2-3; *see also* CFA (Cooper), Tr. at 24-25 (arguing that the recklessness standard protects consumer); MS AG at 3 (supporting a recklessness standard); CAPP at 1 (asserting that by tying the scienter standard to SEC precedent, the Commission would afford market participants a measure of certainty); SIGMA at 2 (supporting the proposed Rule's scienter requirement); PMAA at 3 (supporting the proposed Rule's scienter requirement).

[177] Addressing the language of SEC Rule 10b-5, the Supreme Court held that an intent requirement is ''strongly suggest[ed]'' where statutory language prohibits a ''manipulative or deceptive'' ''device or contrivance.'' *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 197 (1976). The prohibitions language in Section 10(b) of the SEA is nearly identical to that in Section 811 of EISA. *See* 42 U.S.C. 17301; 17 C.F.R. 240.10b-5. As the Commission noted in the initial NPRM, most appellate courts that have considered the issue have concluded that extreme recklessness can satisfy *Ernst's* requirement of ''intentional or wilful'' conduct for the purposes of SEA 10(b) and Rule 10b-5. *See* 73 FR at 48328 & n.130 and the cases cited therein.

[178] The Court of Appeals for the Seventh Circuit has defined reckless conduct as a ''highly unreasonable [act or] omission, involving not merely simple, or even inexcusable negligence, but an extreme departure from the standards of ordinary care, and which presents a danger of misleading buyers or sellers that is either known to the defendant or is so obvious that the actor must have been aware of it.'' *Sundstrand Corp. v. Sun Chemical Corp.*, 553 F. 2d 1033, 1045 (7th Cir. 1977), *cert. denied*, 434 U.S. 875 (1977) (quoting *Franke v. Midwestern Oklahoma Development Authority*, CCH Fed. Sec. L. Rep. ¶ 95,786 at 90,850 (W.D. Okl. 1976)). The Court of Appeals for the District of Columbia Circuit relied upon *Sundstrand Corp.* to establish the ''extreme recklessness'' scienter standard applicable to SEC Rule 10b-5. *See*

Continued

recklessness requires evidence from which it can reasonably be inferred that the violator both acted with an extreme departure from standards of ordinary care (using a reasonable market participant standard) and either knew or must have known that its conduct created a danger of misleading buyers or sellers. Although the Commission recognizes that wholesale petroleum markets are not characterized by the same degree of regulation as the securities markets, the Commission believes that the obligation on market participants not to engage in any fraudulent or deceptive act, practice, or course of business in an extremely reckless manner— regardless of other defined duties that may exist in other, more extensive regulated markets—is clear.

Articulating the required intent standard in the text of revised proposed Rule Section 317.3(a) should provide greater certainty to the business community as to the application of any final rule, making it less likely to inadvertently chill beneficial conduct. Moreover, the revised proposed Rule would not reach inadvertent conduct or mere mistakes. Thus, the Commission does not believe that prohibiting fraudulent or deceptive conduct is likely to reduce voluntary reporting and disclosures.[179] As there is no legitimate basis for engaging in conduct that would operate as a fraud or deceit upon any person, the Commission tentatively concludes that requiring a showing of ''knowing'' conduct is the appropriate scienter standard for revised proposed Rule Section 317.3(a).

(2) Materiality Standard

Section 317.3(a) of the revised proposed Rule prohibits conduct that operates or would operate as a fraud or deceit, specifically ''including the making of any untrue statement of material fact.'' The NPRM set forth a standard for materiality under the proposed Rule, providing that, ''[c]onsistent with securities law, a fact is material if there is a substantial likelihood that a reasonable market participant would consider it in making its decision to transact because the material fact significantly alters the total mix of information available.''[180] NPRA was the only commenter to address the concept of materiality specifically, and it recommended defining the term ''material fact'' to clarify that only facts that a reasonable market participant would consider *important* in making a decision to transact are material.[181] The Commission agrees and anticipates using a materiality standard that focuses on a fact that a reasonable market participant would consider important in making a decision to transact because such information significantly alters the total mix of information available.[182]

(3) Other Language in Section 317.3(a)

As discussed above, revised proposed Rule Section 317.3(a), like the proposed Rule, prohibits misrepresentations of fact because such misrepresentations are a clear example of fraudulent or deceptive conduct. The Commission has therefore added the phrase ''the making of any untrue statement of material fact'' in revised proposed Section 317.3(a) to make this prohibition clear.[183] Many commenters and workshop participants agreed that such conduct harms the marketplace and should be prohibited. Prohibiting misrepresentations of material fact is further supported by the enforcement approach of other agencies; thus, for example, the CFTC challenges and seeks to prohibit such misrepresentations in commodities markets.[184]

The Commission received comments on the meaning of the phrase ''would operate as a fraud or deceit.''[185] The Commission clarifies that the phrase ''would operate as a fraud'' means only that the revised proposed Rule prohibits conduct that would defraud or deceive another person, whether or not the impact of the prohibited conduct had yet been manifested.[186]

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

Revised proposed Rule Section 317.3(b) addresses fraudulent or deceptive statements that are misleading as a result of the intentional omission of material facts, where that omission distorts or tends to distort market conditions for a covered product. Specifically, revised proposed Section 317.3(b) would make it unlawful for any person to ''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 tends to distort market conditions for any such product.'' 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.[187] Thus, the Commission believes that prohibiting intentional omissions of material facts that distort or tend to distort market conditions is consistent with the intent of EISA and with the Commission's larger mandate to protect consumers and to preserve competition.[188]

SEC v. Steadman, 967 F.2d 636, 641-42 (D.C. Cir. 1992) (citing *Sundstrand Corp.*, 553 F.2d at 1045); 73 FR at 48329.

[179] Although the Commission never stated that the initially proposed Rule would reach such conduct, comments as well as discussion at the public workshop revealed significant confusion on this point.

[180] 73 FR at 48326.

[181] NPRA at 28-29 (citing *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 450 (1976)). NPRA also recommends that the rule ''specify that the materially false or deceptive information must be about important aspects of supply or demand.'' NPRA at 20-21. This change, NPRA argues, would provide useful compliance guidance to industry, without being ''overly restrictive, because many types of information may involve important aspects of supply or demand.'' NPRA at 21.

[182] *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)).

[183] The NPRM noted that this provision of the proposed Rule would 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 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.

[184] *See, e.g., In the Matter of CMS Mktg. Serv. & 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 CFTC v. Delay*, 2006 WL 3359076 (D. Neb. Nov. 17, 2006) (holding that the CFTC failed to prove that defendant knowingly delivered any false and misleading reports to the USDA on cattle sales under a charge of manipulation and attempted manipulation of the feeder cattle futures markets); *SEC v. Rana Research, Inc.*, 8 F.3d 1358 (9th Cir. 1993) (seeking permanent injunctive relief alleging that 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).

[185] In the NPRM, the Commission also sought to clarify that the language ''operates as a fraud'' did not negate the requirement, present in securities law precedent, that a showing of scienter was necessary to prove a violation of this subsection. 73 FR at 48327.

[186] 73 FR at 48327.

[187] *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.'').

[188] In addition, any omission that is part of a fraudulent or deceptive act, practice, or course of business would violate revised proposed Section 317.3(a). *See, e.g., In the Matter of A.J. White & Co.*, File No. 8-11962, 1975 SEC LEXIS 2564, at *61-63 (Jan. 21, 1975) (finding defendants liable under SEC Rule 10b-5 for, *inter alia*, engaging in a course of conduct that operated as a fraud on purchasers of a stock offering by means of untrue statements and material omissions). This is consistent with the more general principle that any otherwise lawful act, if part of an unlawful course of business, nevertheless may be actionable. *See Illinois ex rel. Madigan v. Telemarketing Assocs., Inc.*, 538 U.S.

The Commission has modified this component of Section 317.3(b) of the initially proposed Rule to address concerns raised by commenters about that section's breadth of coverage, and its potential to chill pro-competitive or pro-consumer behavior.[189] Many commenters argued that while the omissions prohibition language of SEC Rule 10b-5 may be appropriate in securities markets, it is not appropriate in wholesale petroleum markets, owing to fundamental differences between the markets.[190] Cognizant of these concerns, revised proposed Rule Section 317.3(b) now includes an express scienter requirement that limits its reach to intentional conduct. The provision also now requires a showing that the omission at issue ''distorts or tends to distort market conditions for any [covered] product.'' Thus, Section 317.3(b) would prohibit intentionally omitted information that would mislead other market participants, public officials, or the market at large, such as material omissions made in statements to officials during a national emergency.

Revised proposed Rule Section 317.3(b) would not, however, impose an affirmative duty to disclose information. Rather, the provision would apply if ''a covered entity voluntarily provides information—or is compelled to provide information by statute, order, or regulation—but then fails to disclose a material fact, thereby making the information provided misleading.''[191] This is consistent with legal precedent establishing that once an entity has decided to speak, it must do so truthfully and accurately, and it may have to provide additional information to ensure that previously provided information is truthful.[192] Some commenters argued that the Commission should clarify that a rule will not require them to release commercially sensitive information, such as information regarding supply availability.[193] For example, Muris urged the Commission not to reach ''pure omissions'' under the Rule, which ''arise when a seller is silent 'in circumstances that do not give any particular meaning to his silence.'''[194] The Commission does not intend, under the revised proposed Rule, either to prohibit dealings undertaken in the ordinary course of business that are not intended to defraud or to deceive, or to impose disclosure obligations on market participants unless the omission of material fact is made with the intent to deceive and those omissions are of the type that distort or tend to distort market conditions.

The Commission seeks additional comment and information on this issue, including responses to specific questions set forth in Section IV.I. of this Notice, to enable it to determine whether the alterations to the omissions provision are sufficiently tailored to prohibit conduct that threatens the integrity of wholesale petroleum markets without imposing unnecessarily high compliance costs on industry participants.

(1) Scienter Standard: A Person Must ''Intentionally'' Mislead By Omitting Material Information

Sections 317.3(b) of the revised proposed Rule expressly provides that a person must engage in the proscribed conduct ''intentionally'' in order to violate the Rule. The Commission tentatively has modified the scienter standard for the omissions provision in this manner to address commenter concerns that, in the absence of industry regulatory obligations, an FTC rule might reduce voluntary reporting and disclosures, and to clarify that this provision would not reach inadvertent conduct or mere mistakes.[195] To that end, establishing a violation of revised proposed Rule Section 317.3(b) would require establishing that the actor in question intended to mislead by making a statement that omitted material facts. This approach represents a different scienter standard than the showing of extreme recklessness required to establish a violation of revised proposed Rule Section 317.3(a). This standard is also different than the specific intent standard proposed by some commenters. In particular, this approach should not be read to require a showing that the person intended to influence market conditions. Rather, proving a violation of revised proposed Rule Section 317.3(b) would require proof that the alleged violator intended to mislead—regardless of whether he or she specifically intended to affect market prices (*e.g.*, specific intent)—and regardless of whether the conduct was likely to succeed in defrauding or deceiving the target.[196] Conversely, conduct that is the product of reckless or negligent behavior would not violate revised proposed Rule Section 317.3(b).

This formulation of the scienter requirement should eliminate concern about which of the various judicial interpretations of the ''recklessness'' standard under securities law would have applied to the omissions provision in the proposed Rule. The Commission recognizes commenter concerns that the initially proposed omissions provision would have imposed on wholesale market participants the obligation to know whether a person would likely be defrauded or deceived by the conduct at issue, which could be difficult. At the same time, using the word ''intentionally'' in combination with the specific conduct prohibition language in revised proposed Rule Section 317.3(b) simplifies the evidentiary burden required to prove a violation, thereby reducing the potential for judicial confusion and clarifying the compliance standard for market participants. The Commission may consider and rely upon both direct and circumstantial evidence of the intent to mislead by a material omission to establish that an alleged violator possessed the requisite level of intent.

600, 606 (2003) (upholding a fraud claim when the facts presented a lawful ''nondisclosure [of information] accompanied by intentionally misleading statements designed to deceive the listener'').

[189] Section 317.3(b) of the initially proposed Rule would have made it unlawful for any person 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.''

[190] *See, e.g.*, API at 25 (stating that unlike wholesale petroleum markets, securities markets are ''are governed by detailed disclosure obligations designed to protect unsophisticated investors''); Muris at 2 (urging the FTC to ''avoid importing broad disclosure requirements from highly regulated markets that simply have no place in wholesale petroleum markets''); NPRA at 4 (arguing that the full disclosure rationale underlying SEC Rule 10b-5 does not fit wholesale petroleum markets); Plains at 3 (stating that in the crude oil markets, unlike securities markets, ''there is no presumption that one market participant owes any duties to its counterparties that would require disclosure of any information'').

[191] 73 FR at 48327.

[192] *See City of Monroe Employees Retirement System v. Bridgestone Corp.*, 399 F.3d 651, 670 (6th Cir. 2005) (stating that companies are generally under no obligations to disclose their expectations for the future to the public; however if a company chooses to volunteer such information, '''courts may conclude that the company was obliged to disclose additional material facts . . . to the extent that the volunteered disclosure was misleading''') (quoting *Helwig v. Vencor, Inc.*, 251 F.3d 540, 564 (6th Cir. 2001) (en banc)); *see also Plotkin v. IP AXESS Inc.*, 407 F.3d 690 (5th Cir. 2005) (finding that material omissions from a company's press release rendered that press release misleading regardless of the existence of a fiduciary or other legal relationship).

[193] *See, e.g.*, API (Long), Tr. at 180; NPRA at 11-12.

[194] Muris at 12 (quoting *In re Int'l Harvester*, 104 F.T.C. 949, 1059 (1984)).

[195] Although the Commission never stated that the initially proposed Rule would reach such conduct, comments as well as discussion at the public workshop revealed significant confusion on this point.

[196] However, Section 317.3(b) separately requires that an intentional, material omission be of the kind that distorts or tends to distort market conditions for any such product. *See* Section IV.D.2.c.2. below.

(2) The Omission of Material Information Must Distort or Tend to Distort Market Conditions For a Covered Product

The Commission has added limiting language to the omissions provision in revised proposed Rule Section 317.3(b), so that a statement made misleading by reason of the intentional omission of a material fact violates the provision only if it ''distorts or tends to distort market conditions'' for any covered product.[197] The Commission recognizes that identifying statements that are unambiguously misleading by dint of a material omission may be difficult in wholesale petroleum markets and create uncertainty within the business community about the Rule's application. Thus, an unbounded omissions provision could have an unintended chilling effect on normal business activity, and it could unnecessarily raise the costs of carrying out normal business activity in order to avoid potential litigation risks. Thus, in addition to modifying the scienter standard to require a showing of intentional conduct, the Commission believes that Section 317.3(b) should focus on misleading statements that are of sufficient import or scope to distort or tend to distort the market conditions that guide market participants' decision-making.[198] This will enable the Commission to direct its enforcement efforts against those instances of misconduct that are most likely to injure the integrity of market prices.

This approach comports with the weight of commenter responses to the initially proposed omissions provision. In this regard, many commenters recommended that the Commission ''require that market manipulation actually impact the market.''[199] These commenters argued that if the rule did not focus on conduct harmful to the market—as manifested by a price or other market effect—it would potentially chill legitimate business conduct.[200] In particular, they claimed that the rule would reach conduct arising from routine commercial transactions such as bilateral contract negotiations unlikely to harm the market.[201] One commenter suggested that an effect on market prices would be relevant in determining whether a rule violation occurred.[202]

In the initial NPRM, the Commission rejected requiring a demonstration of market or price effects in order to prove a rule violation, and some commenters supported that approach.[203] CA AG, for example, agreed with the Commission's conclusion that there is no economic justification for fraudulent or deceptive conduct, and that harm to wholesale petroleum markets can properly be inferred from such conduct without more.[204] Furthermore, MS AG and CA AG agreed that a price effects requirement would make it difficult to prove a rule violation even where effects had occurred, potentially encumbering law enforcement efforts.[205] These commenters therefore supported the Commission's initial decision not to include a price effects requirement.

The Commission continues to believe that a showing of price effects should not be required to establish a rule violation[206] because there is no economic justification for fraudulent or deceptive conduct in any market.[207] Requiring a showing of price effects—and imposing the concomitant additional evidentiary burden upon the Commission—would introduce an unnecessary risk that conduct detrimental to the integrity of the market would escape successful challenge.[208]

Requiring a showing that a particular omission ''distorts or tends to distort market conditions'' to establish a violation of Section 317.3(b) should not be read as requiring that the FTC show that the market has actually been distorted.[209] This language is rather

[197] This proviso is similar to the anti-manipulation provision of the CEA, which prohibits the communication of ''false or misleading or knowingly inaccurate reports concerning . . . market information or conditions that *affect or tend to affect the price of any commodity in interstate commerce* . . . .'' 7 U.S.C. 13(a)(2) (emphasis added). The Commission does not intend, however, to adopt the elements of proof that are required for a finding of liability under the CEA under the revised proposed Rule.

[198] Markets continually absorb new information and adjust price signals to that new information. Intentionally injecting false information into that process leads to distorted signals.

[199] Sutherland at 6; *see also* API at 34 (recommending that the Commission require ''proof that a party's deceptive or fraudulent conduct caused market conditions to deviate materially from the conditions that would have existed but for that conduct''); Plains at 3.

[200] Many commenters disagreed with the Commission's proposal in the initial NPRM not to require a showing of price effects to establish a rule violation. *See, e.g.*, Van Susteren at 2 (''The lack of a requirement of a showing of price effects to establish culpability leaves the rule overbroad and risks inconsistent or unwarranted enforcement efforts by the Commission.''); ISDA at 3-4 (asking that the Commission require proof of price effects); Pirrong Tr. at 205 (''I think it would be beneficial to market participants to have [a price effects] standard in [a rule].''); *see also* Plains at 3 (urging the Commission to make clear that only conduct that has a ''manipulative effect on the relevant market'' will be actionable). Other commenters were concerned that if the Rule failed to focus on conduct harmful to the market, it would have a chilling effect on businesses. *See, e.g.*, API at 33 (''Applying Section 811 to conduct that does not cause a material deviation in market prices . . . would likely harm consumer welfare . . . by chilling competitive market behavior . . . .''); ISDA at 3-4 (arguing for a price effects requirement by explaining that ''a Rule that is overbroad, imprecise, or both likely will chill legitimate commercial behavior'').

[201] *See, e.g.*, API at 33 (''Unless the FTC requires an appropriate connection between challenged conduct and a material deviation in *market* prices, it runs the risk of having to police every routine commercial dispute as a potential violation of Section 811.''); ISDA at 13 (''[A]s a sound policy matter, conduct that actually harms markets is the only conduct with which the Commission should be concerned and to which it should devote its limited public resources.''); *see also* API (Long), Tr. at 220 (suggesting the Commission consider a safe harbor for statements or omissions not made in connection with corporate announcements, or reports to government agencies or private reporting services); *cf.* NPRA at 22 (stating that the Commission's Rule ''should concentrate on whether the defendant intended to 'defraud' the market, not just one other individual'').

[202] For example, CFDR explained that, in instances where the Commission is investigating multiple players, a movement in market prices as a result of conduct by one of the alleged wrongdoers can be probative in determining whether that player possessed the requisite intent or ''whether other market participants were in fact deceived by the alleged misconduct.'' CFDR at 7. Accordingly, CFDR asked that the Commission determine the ''relevance and importance'' of a price effect requirement on a case-by-case basis. *Id.*

[203] IPMA at 4; ATAA at 12; MS AG at 3; CA AG at 3; *see also* USDOJ, ANPR, at 1 (''Certainly, there should be no requirement that one succeed in moving prices . . . the only requirement should be an attempt to do so . . . whether successful or not.'').

[204] CA AG at 3; *see* 73 FR at 48329-30.

[205] CA AG at 3; MS AG at 3 (arguing that price effects could be ''extremely difficult to prove'' therefore chilling enforcement of ''obvious violations''). Specifically, CA AG noted that prior California gas pricing investigations demonstrated that it is nearly impossible to link a particular act to a corresponding direct effect on price because too many variables affect price. CA AG at 3.

[206] This approach is also consistent with that taken by the FERC in their market manipulation rulemaking proceedings. *See* 71 FR at 4244. Manipulative conduct can harm the marketplace even without a prolonged price effect by impeding the efficiency of the market equilibration process and potentially introducing distrust as to the integrity of the process. *See* 73 FR at 48329 (noting that ''[f]raudulent behavior interferes with market signals, reduces transparency in the market, and casts into doubt the very information that allows markets to function properly'').

[207] The Commission believes that reading a price effect requirement into EISA is not only unsupported by the text of the Act, but also inconsistent with its aim to curb fraudulent or deceptive conduct in wholesale petroleum markets. *See* 42 U.S.C 17301; *see also* 73 FR at 48329 n.138 (noting that ''[t]he enabling statute is clear: 'It is unlawful . . . to use or employ . . . any manipulative or deceptive device or contrivance'''').

[208] Overcoming the practical problems associated with identifying and proving a specific price effect from fraudulent or deceptive conduct in wholesale petroleum markets may not be possible in many, if not most, cases. *See* 73 FR at 48329-30 (''The Commission's experience in investigating petroleum pricing anomalies demonstrates the difficulty of identifying price changes that result directly from any specific act or conduct.'').

[209] In response to CFDR's argument that the presence or absence of market effects can inform the question of whether a violation occurred, the Commission notes that nothing in the RNPRM or the revised proposed Rule prevents it from

intended only to help strike an appropriate balance between achieving enforcement goals and avoiding unintended chilling effects on normal business activity. The provision therefore focuses only on those statements made misleading by reason of the omission of a material fact that threaten the integrity of wholesale petroleum markets—and thus carry the greatest risk of injury to those markets—without unduly encumbering enforcement.[210] The tendency to distort market conditions for wholesale petroleum products may be properly inferred from the conduct itself, without separate and additional proof of a tendency to distort market conditions. For example, proof that an actor 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 actor intentionally omitted material facts which the reporting company required to be reported—would satisfy the market conditions proviso.[211] The Commission believes that the limiting proviso will also help avoid unwarranted regulatory burdens on industry by clarifying the scope of Section 317.3(b).[212]

This proviso also should not be read as requiring the Commission to demonstrate a direct relationship between the conduct and an effect on price, as suggested by many commenters,[213] or a quantifiable effect on prices or market conditions. Moreover, it is not the Commission's intent that the proviso require a demonstration of the presence of market power or a reduction in competition—within a relevant antitrust product and geographic market—as these concepts are defined by antitrust legal precedent.

The Commission specifically seeks additional comment and information on this issue, including responses to specific questions set forth in Section IV.I. of this Notice. If, after reviewing additional comments on the RNPRM, the Commission should find that its tentative decision to include a market conditions proviso—or its tentative decision not to include a required showing of price effects—impedes optimal enforcement efforts, the Commission will revisit the issue.

(3) Materiality

Revised proposed Rule Section 317.3(b) prohibits the omission of a ''material fact.'' The standard for materiality is addressed above in Section IV.D.2.b.2., and that standard also applies to subpart (b). Thus, for purposes of the omissions provision, 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.[214]

E. Section 317.4: Preemption

Section 815(c) of EISA states that ''[n]othing in this subtitle preempts any State law.''[215] Consequently, Section 317.4 of the revised proposed Rule contains a standard preemption provision used in other FTC rules, making clear that the Commission does not intend to preempt the laws of any state or local government, except to the extent of any conflict.[216] This is consistent with the position stated in the NPRM, 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 proposed Rule.''[217]

Few commenters addressed preemption of state law. One commenter, MS AG, agreed that EISA does not preempt state law and urged the Commission not to do so.[218] Two commenters agreed that the language of the proposed Rule does not appear to preempt state law.[219] Accordingly, the revised proposed Rule includes the preemption provision proposed in the NPRM.[220]

F. Section 317.5: Severability

Section 317.5 of the revised proposed Rule contains a standard severability provision. This provision makes clear that if any part of the Rule is held invalid by a court, the rest of the Rule will remain in effect.[221] The Commission received no comments on this issue. Accordingly, the Commission retains without change the severability provision proposed in the NPRM.[222]

G. Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 (''RFA'')[223] requires a description and analysis of proposed and final rules that will have significant economic impact on a substantial number of small entities. The RFA requires an agency to provide an Initial Regulatory Flexibility Analysis (''IRFA'')[224] with the proposed Rule and a Final Regulatory Flexibility Analysis (''FRFA'')[225] with the final Rule, if any. The Commission is not required to make such analyses if a rule

considering market effects if the evidence on this issue is clear enough to be useful. *See* CFDR at 7.

[210] Conduct that distorts or tends to distort market conditions would be any conduct that arises from the intentional distortion of the market information upon which the price discovery process in wholesale petroleum markets depend.

[211] In this regard, the revised proposed Rule would be consistent with CEA precedent that, in determining whether a false report would affect or tend to affect the price of a commodity, courts and the CFTC have generally assumed that a false report of price or volume information to a source widely used by market participants would affect or tend to affect market conditions. *See CFTC v. Bradley*, 408 F. Supp. 2d 1214 (N.D. Okla. 2005) (denying defendant's motion to dismiss when complaint alleged defendants reported fictitious trades to private reporting services); *In the Matter of Dynegy Mktg. & Trade*, Comm. Fut. L. Rep. (CCH) ¶ 29,262 (C.F.T.C. Dec. 18, 2002) (finding liability for false reporting of trading price and volume information to private reporting services); *In the Matter of CMS Mktg. Serv. & Trading Co.*, Comm. Fut. L. Rep. (CCH) ¶ 29,634 (C.F.T.C. Nov. 25, 2003) (finding liability for false information submitted to private reporting services). Further, the Commission believes that proof that an actor falsely reported the operational status of a refinery, terminal, or pipeline, and did so through the intentional omission of material information, such conduct would also allow an inference that the conduct tended to distort market conditions.

[212] As an example of this approach, if an actor intentionally omits information material to the marketplace, establishing a Rule violation would require showing only that the stated information (*i.e.*, the misleading statement) pertains to any process by which prices are discovered and adjusted. Markets continually absorb new information and adjust price signals to reflect that new information. A variety of information can affect the process including, *e.g.*, information about operational activity of refineries, transportation disruptions, product inventory levels, and product prices.

[213] *See, e.g.*, Van Susteren at 2; ISDA at 13; Sutherland at 6; API at 32.

[214] This standard conforms to the approach the Commission followed in the NPRM with respect to materiality; that is, ''[c]onsistent with securities law, a fact is material if there is a substantial likelihood that a reasonable market participant would consider it in making its decision to transact because the material fact significantly alters the total mix of information available.'' 73 FR at 48326.

[215] 42 U.S.C. 17305.

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

[217] 73 FR at 48330.

[218] MS AG at 3 (''[MS AG] agrees that the EISA does not preempt state law and the proposed Rule should not.'').

[219] Sutherland at 7 (''The proposed Rule includes language indicating the Commission's view that the new regulatory regime does not preempt state law.''); SIGMA at 3 (''The Commission has chosen not to include any language in the NPRM that would preempt applicable state law in the area of market manipulation.''); *see also* SIGMA at 3 (''SIGMA recommends that the Commission adopt hortatory language in its preamble to the NPRM that urges state attorneys general and other law enforcement officials to use its final rule as a guide to 'market manipulation' cases.''); SIGMA (Columbus), Tr. at 186 (asserting that state attorneys general may chose to enforce Section 811 of EISA).

[220] *See* 73 FR 48330, 48334.

[221] Examples of FTC rules containing similar severability provisions: Telemarketing Sales Rule, 16 CFR 310.9; Used Motor Vehicle Trade Regulation Rule, 16 CFR 455.7.

[222] 73 FR at 48330, 48334.

[223] 5 U.S.C. 601-612.

[224] 5 U.S.C. 603.

[225] 5 U.S.C. 604.

would not have such an economic effect.[226]

Although the scope of the Rule may reach a substantial number of small entities as defined in the RFA, the Commission believes that the revised proposed Rule would not have a significant economic impact on those businesses.[227] In the initial NPRM, the Commission specifically requested comments on the economic impact of the initial proposed Rule and received none.[228] Given that the revised proposed Rule does not impose any reporting or disclosure requirements, document or data retention requirements, or any other specific conduct requirements, it is unlikely that the revised proposed Rule will impose costs to comply beyond the standard costs associated with ensuring that acts, practices, and courses of conduct are not fraudulent or deceptive. Therefore, the Commission believes that the revised proposed Rule, if finalized, would not have a significant economic impact on a substantial number of small entities. Notwithstanding this belief, the Commission provides a full IRFA analysis to aid in its solicitation for additional comments on this topic.

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

Section 811 grants the Commission the authority to publish a rule that is ''necessary or appropriate in the public interest or for the protection of United States citizens.''[229] As discussed above, the Commission believes that promulgating the revised proposed Rule is appropriate to prevent fraudulent or deceptive conduct in connection with wholesale petroleum markets for commodities listed in Section 811, and the Commission has tailored the revised proposed Rule specifically to reach such conduct.

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

The legal basis of the revised proposed Rule is Section 811 of EISA, which prohibits fraudulent or deceptive conduct in the wholesale purchase or sale of petroleum products in contravention of rules, if any, that the Commission may publish. The revised proposed Rule is intended to define the conduct that the law proscribes.

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

The revised proposed Rule applies to persons, including business entities, engaging in the wholesale purchase or sale of crude oil, gasoline, and petroleum distillates. These potentially include petroleum refiners, blenders, wholesalers, and dealers (including terminal operators that sell covered commodities). Although many of these entities are large international and domestic corporations, the Commission believes that a number of these covered entities may fall into the category of small entities.[230] According to the Small Business Administration (''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.''[231]

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

The Commission does not propose, and the revised proposed Rule does not contain, any requirement that covered entities create, retain, submit, or disclose any information. Accordingly, the revised proposed Rule would impose no recordkeeping or related data retention and maintenance or disclosure requirements on any covered entity, including small entities. Given that the revised proposed Rule does not impose any reporting requirements,[232] it is unlikely that the revised proposed Rule would impose costs to comply beyond standard costs (or skills) associated with ensuring that conduct is not fraudulent or deceptive.

5. Identification of other duplicative, overlapping, or conflicting federal rules

As discussed previously, other federal agencies have regulatory authority to prohibit in whole or in part fraudulent or deceptive conduct involving petroleum products. The SEC has authority to stop fraudulent and deceptive conduct involving the securities and securities offerings of companies involved in the petroleum industry. Additionally, the CFTC has authority to bring an action against any person who is manipulating or attempting to manipulate energy commodities.

As explained in Section IV.B. above, the Commission does not intend for the revised proposed Rule to impose contradictory requirements on regulated entities in the futures markets or otherwise. To the extent, if any, that the revised proposed Rule's requirements could duplicate requirements already established by other agencies for such markets, the revised proposed Rule should not impose any additional compliance costs. The Commission is requesting comment on the extent to which other federal standards concerning fraud and deception may duplicate, satisfy, or inform the revised proposed Rule's requirements. In addition, the Commission seeks comment and information about any statutes or rules that may conflict with the revised proposed Rule's requirements, as well as any state, local, or industry rules or policies that require covered entities to implement practices

[226] 5 U.S.C. 605.

[227] 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 revised proposed Rule defines a ''person'' as ''any individual, group, unincorporated association, limited or general partnership, corporation, or other business entity.''

[228] *See* 73 FR at 48332.

[229] 42 U.S.C. 17301.

[230] Directly covered entities under this revised proposed 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 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* 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*).

[231] 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 revised proposed Rule accurately. The data is provided in increments of 0-4 employees, fewer than 20 employees and fewer than 500 employees. Small Business Administration, Employer Firms, & Employment by Employment Size of Firm by NAICS Codes, 2006, *available at* (*http://www.sba.gov/advo/research/us06_n6.pdf*). Thus for the 228 petroleum refiners listed, 185 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 initial proposed Rule, it received none. Accordingly, the small business data set forth in this IRFA are the best estimates available to the Commission at this time. Nonetheless, the Commission continues to seek comment or information providing better data.

[232] *See* 73 FR at 48332.

that comport with the requirements of the Rule.

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

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

While the Commission believes that the revised proposed Rule imposes no unique compliance costs, it nonetheless requests comment on this issue, including in particular on whether the revised proposed Rule's prohibitions would have a significant impact upon a substantial number of small entities, and what modifications, if any, to the revised proposed Rule the Commission should consider to minimize further the burden on small entities.

H. Paperwork Reduction Act

The Commission does not contemplate requiring any entity covered by the revised proposed Rule to create, retain, submit, or disclose any data. Accordingly, the revised proposed Rule does not include any new information collection requirements under the provisions of the Paperwork Reduction Act of 1995 (''PRA'').[233] However, the Commission's experience with any final rule that may be adopted under Section 811 or pursuant to its investigative and enforcement role under Section 812 may suggest a particular need to require firms to create or maintain particular information. If such a need arises, the Commission may, in the future, adopt such rules as necessary or appropriate in the public interest or for the protection of United States citizens, and will accordingly notify and submit appropriate information to OMB, where required under PRA.[234]

I. Request for Comments

The Commission seeks comment on various aspects of the revised proposed Rule. The Commission is particularly interested in receiving comments on the questions that follow. In responding to these questions, include detailed, factual supporting information whenever possible.

1. General Questions for Comment

a. Does the revised proposed Rule strike an appropriate balance between protecting consumers from petroleum market manipulation and limiting attendant costs to industry such as the chilling of legitimate business conduct and compliance burdens? In considering whether an appropriate balance is stuck discuss:

(1) the merits or flaws with having a different standard of scienter for Section 317.3(a) from Section 317.3(b);

(2) the merits or flaws of eliminating Section 317.3(b) and consolidating the Rule into a single anti-fraud prohibition as set out by Section 317.3(a);

(3) the merits or flaws of eliminating Section 317.3(b) and consolidating the Rule to a single anti-fraud prohibition as set out by Section 317.3(a), but with a scienter requirement of ''intentionally engage'' rather than ''knowingly engage;''

(4) the merits or flaws of eliminating Section 317.3(b) and consolidating the Rule to a single anti-fraud prohibition as set out by Section 317.3(a), but adding a proviso that the challenged act, practice, or course of business distort or tend to distort market conditions; discuss the consequences of adding this proviso under both scienter alternatives of ''intentionally'' and ''knowingly.''

b. Do the conduct provisions in revised proposed Rule Section 317.3 provide sufficient clarity and precision in articulating prohibited conduct? Why or why not? If not, how could the Rule be modified to achieve those goals? Would a rule limited to Section 317.3(a) improve clarity and precision without impairing the basis for issuing a rule or the goal of preventing market manipulation to the benefit of consumers? Explain.

c. Does revised proposed Rule Section 317.3 prohibit the injection of false information into market transactions? If not, how could the provision be revised to achieve that goal? Explain.

d. Does a prohibition on the injection of false information into market transactions protect the integrity of such markets? Why or why not?

e. Should a market manipulation rule reach fraudulent or deceptive conduct that does not distort or tend to distort market conditions? Why or why not? (Note: As explained in the discussion above respecting Section 317.3(b), the Commission does not intend that a requirement that the challenged conduct distort or tend to distort market conditions mean that a specific price or other market effect be an element to be demonstrated to prove a rule violation.)

f. Discuss the benefits and costs of alternatives to promulgating the revised proposed Rule, including the following: (i) declining to issue a final rule; (ii) promulgating a final rule that mirrors the initially proposed Rule; or (iii) promulgating a final rule that solely prohibits false statements.

2. Questions on Specific Provisions

a. As drafted, does Section 317.3(a) provide sufficient clarity and precision as to the contours of prohibited conduct? Explain.

b. Is it appropriate that the rule prohibit acts, practices, and courses of business that operate or would operate as a fraud or deceit on any person? Discuss the merit or lack of merit of prohibiting fraudulent or deceptive conduct. In so discussing, explain:

(1) whether Section 811 of EISA authorizes the Commission to publish a

[233] 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).

[234] In the ANPR, the Commission solicited comment on whether covered entities should report market data, such as cost and volume data for wholesale transactions. 73 FR at 25622. In response, one commenter noted that Section 812 already addresses the making of false reports and should not be construed as giving the Commission authority to impose new reporting requirements. ISDA, ANPR, at 16 (''Neither Section 811 nor Section 812 of the EISA authorizes the Commission to impose new reporting requirements.''); *see also* CFDR, ANPR, at 16 (''The Commission should not promulgate a rule that purports to impose disclosure obligations on market participants where no disclosure obligations otherwise exist under current law.''). *But see, e.g.*, PMAA, ANPR, at 8-9 (stating that the Commission has authority under Section 811 to impose new reporting requirements); NPGA, ANPR, at 3 (''The authority to mandate the maintenance and submission of [information regarding wholesale petroleum transactions] is inherent in the EISA prohibitions against manipulative activities in Section 811 and the reporting of false information to Federal authorities in Section 812.'').

rule that prohibits *all* acts, practices, or courses of conduct that operate or would operate as a fraud or deceit on any person, including, *e.g.*, common law fraud in which injury may not extend beyond the individual parties or otherwise impair the integrity of wholesale petroleum markets at large;

(2) whether, as a policy matter, Section 317.3(a) should prohibit *all* acts, practices, or courses of conduct that operate or would operate as a fraud or deceit on any person, including, *e.g.*, common law fraud in which injury may not extend beyond the individual parties or otherwise impair the integrity of wholesale petroleum markets at large; if not, discuss how the reach of the provision should be bounded, including, *e.g.*, the merits of a proviso that the challenged conduct distort or tend to distort market conditions.

c. Discuss the merits or flaws of the Section 317.3(a) scienter standard that the challenged person ''knowingly'' act. In the context of wholesale petroleum markets and in comparison to the tentative ''knowingly engage'' standard, how would an alternative ''intentionally engage'' standard affect the ability of the Commission to protect consumers from deleterious market manipulation? What differences, if any, are there between the two alternative standards respecting the ability of firms to comply with Section 317.3(a), including the costs of compliance?

d. As explained in the discussion of revised proposed Rule Section 317.3(b), the Commission proposes that the Rule prohibit omissions of material fact—specifically, omissions of material facts that are necessary to ensure that a previously made statement is not misleading, provided that the informative content of the misleading statement distorts or tends to distort market conditions for any such product. What are the costs and benefits of this provision?

e. Describe acts, practices, or courses of conduct, if any, that would threaten the integrity of wholesale petroleum markets that could not be reached by Section 317.3(a) but could be reached by Section 317.3(b). If such conduct exists, what is its incidence? In comparison to conduct injurious to the integrity of wholesale petroleum markets reached by Section 317.3(a), does the potential injury from conduct reached by Section 317.3(b) justify its likely enforcement and compliance costs? Explain.

f. Does the inclusion of the explicit scienter requirement in revised proposed Rule Section 317.3(b) adequately reduce any danger of a chilling effect on the flow of information essential to the functioning of, and transparency in, wholesale petroleum markets? Why or why not?

g. Does the inclusion of the explicit scienter requirement—*intentionally fail*—in revised proposed Rule Section 317.3(b) sufficiently reduce the danger of a chilling effect on benign or desirable business activity within wholesale petroleum markets? Why or why not?

h. What forms of information, if any, should market participants be required to disclose in order to promote the functioning and integrity of wholesale petroleum markets? Explain. Under what circumstances, if any, would the failure to provide such information render otherwise truthful statements misleading?

i. To what extent would any danger of a chilling effect on benign or desirable business activity depend upon the existence (or lack thereof) of mandatory disclosure obligations in the petroleum industry? Explain.

j. If the merits of Section 317.3(b) as currently proposed outweigh any flaws or dangers, should it be expanded to require that a person update or correct information if circumstances change? How, if at all, would such an expansion alter the cost/benefit calculus? Explain.

k. What, if any, danger arises if the scienter standard in revised proposed Rule Section 317.3(b) were changed to ''knowingly fail''? Explain.

l. Is it clear that the ''intentionally'' scienter standard in revised proposed Rule Section 317.3(b) means that the Commission need only show that a violator intends to engage in fraudulent or deceptive conduct—without regard to the violator's intent to affect market conditions or knowledge of the probable consequences of such conduct? Why or why not? If not, how could the scienter language be revised to limit the evidentiary burden to requiring only a showing that the fraudulent or deceptive conduct was intentional?

m. What types of evidence might be sufficient to demonstrate the proposed scienter standard in revised proposed Rule Section 317.3(b)? Explain. What types of evidence might be sufficient to demonstrate the proposed scienter standard in revised proposed Rule Section 317.3(a)? Discuss with particular emphasis on how, if at all, the evidentiary requirements to prove scienter differ between Section 317.3(b) and Section 317.3(a).

n. Is it clear that the ''intentionally fail'' scienter standard in revised proposed Rule Section 317.3(b) is neither a recklessness standard nor a specific intent standard? If not, how could the scienter language be revised to make that clear? Explain.

o. As explained in the discussion of revised proposed Rule Section 317.3(b), the prohibitions language of Section 811 of EISA is nearly identical to Section 10(b) of the SEA from which Rule 10b-5 derives. Notwithstanding this similarity, does the statutory language in Section 811—''as necessary or appropriate''—provide a sufficient basis for tailoring the scienter requirement of a FTC market manipulation rule to address wholesale petroleum markets? Explain.

p. Intent need not be demonstrated to prove that an act or practice is deceptive or unfair in violation of Section 5 of the FTC Act. Does the presence of explicit scienter requirements in revised proposed Rule Section 317.3 create risk of judicial confusion regarding the differing elements of proof for an FTC market manipulation rule and for Section 5 of the FTC Act respecting unfair or deceptive practices? Explain.

q. Does the Section 317.3(b) proviso that a misleading statement distort or tend to distort market conditions for any covered product sufficiently ensure that the Rule strikes an appropriate balance between protecting consumers from petroleum market manipulation and limiting the costs to industry attendant with achieving that protection? Would adding the proviso to Section 317.3(a) achieve a better balance between protecting consumers and attendant industry costs in the enforcement of that provision of the Rule? Explain.

r. Does the Section 317.3(b) proviso that a misleading statement distort or tend to distort market conditions for any covered product unduly limit the Commission's ability to prohibit misleading statements that threaten the integrity of wholesale petroleum markets? Why or why not? If not, how could the provision be revised to achieve that goal? Explain. Were the proviso added to Section 317.3(a), would the Commission's ability to protect the integrity of wholesale petroleum markets be impaired? Explain.

s. Is it clear that the Section 317.3(b) proviso that a misleading statement distort or tend to distort market conditions for any covered product is not intended to create a price or market effects element of proof? *I.e.*, is it clear from the language of Section 317.3(b) that in order to establish a Rule violation, the Commission need not prove any specific price or market effect? If not, how can the Rule be revised to make that point clear? Discuss.

t. What types of evidence might be sufficient to demonstrate that a misleading statement distorts or tends to

distort market conditions for any covered wholesale petroleum product? For example, should it be sufficient simply to show that the informative content of a misleading statement is of the type typically absorbed by the market and incorporated into market prices? Explain.

u. Is it clear that a violation of revised proposed Rule Section 317.3 does not require that the violator possess market power—and need not have reduced competition—in a relevant antitrust market, as these concepts are defined by antitrust legal precedent? Why or why not? If not, how could the language be revised to make clear that neither a showing of market power nor a reduction in competition is an element of proof?

v. Consider the following alternative rule language:

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 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.

* The phrase ''with the intent'' shall mean that the alleged violator intended to mislead—regardless of whether he or she specifically intended to affect market prices (*e.g.*, specific intent), or knew or must have known of the probable consequences of such conduct—and regardless of whether the conduct was likely to succeed in defrauding or deceiving the target.

Would this alternative language better achieve (or would it not better achieve) the goals of Section 811 of EISA than the revised proposed Rule discussed in this Notice. Explain. Discuss the merits or flaws, if any, of this alternative language?

w. Hypothetical questions:

(1) Company ABC reports a trade to the XYZ Price Service, a service that collects transactional data and uses the data to set a benchmark price that the industry uses to negotiate spot purchases of refined product. XYZ procedures, which are well known throughout the industry, require reporting companies to identify transactions below a specified volume to limit the impact of transactions with inconsequential volumes on the benchmark price. The volume of ABC's trade is below the specified volume, but:

(a) ABC inadvertently omits that information.

(b) ABC establishes procedures to ensure that persons reporting transactions know to identify transactions below the specified amount but the individual reporting this transaction fails to follow those procedures.

(c) ABC intentionally omits the information identifying the trade.

(2) Trader A receives a request from RST Refinery for crude oil of a particular grade, specifying that it prefers not to buy crude from the country of Cepo for political reasons. Trader A is unable to find the kind of crude RST requires except in Cepo. Trader A:

(a) Sells the crude from Cepo to RST without disclosing that it is from Cepo.

(b) Sells the crude to RST and represents that it is from the country of West Friendly, knowing that it is from Cepo.

(c) Does not know and does not ask where the crude is from and sells it to RST without representing its origin.

Applying (1) the revised proposed rule language appearing in this Notice and (2) the alternative rule language appearing above in Question 2v. to the facts provided in these hypothetical examples, discuss differences, if any, in the outcome of an enforcement action. Which result would be more desirable and why? Also speak to the effectiveness and ability of each rule version to reach any harmful manipulative conduct contained in the fact pattern, the relative burdens on the Commission to enforce the rule successfully, and the relative risks of enforcement error.

3. Regulatory Flexibility Act

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

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

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

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

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

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

List of Subjects in 16 CFR Part 317

Trade practices.

■ Accordingly, for the reasons set forth in the preamble, the Commission proposes to amend Title 16, Chapter 1, Subchapter C of the Code of Federal Regulations to add a new part 317 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 with actual or constructive knowledge such 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.

(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 tends 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.

Donald S. Clark,

Secretary.

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

Federal Register

Attachment A

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 B

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

American Petroleum Institute (''API''): Robert A. Long, Jr., Covington & Burling LLP

Argus Media Inc. (''Argus''): Dan Massey

Consumer Federation of America (''CFA''): Mark Cooper

New York City Bar Association, Committee on Futures & Derivatives Regulation (''CFDR''): Charles R. Mills, K&L Gates

CME Group (''CME''): De'Ana Dow

Flint Hills Resources, LP (''Flint Hills''): Alan Hallock

International Swaps and Derivatives Association, Inc. (''ISDA''):

Athena Y. Velie, McDermott, Will & Emery LLP

Futures Industry Association, CME Group, Managed Funds Association, Intercontinental Exchange, Inc., National Futures Association (''MFA''):

Mark D. Young, Kirkland & Ellis LLP

Resolute Natural Resources Company (''Navajo Nation''): James Piccone

Navajo Nation Oil and Gas Corporation (''Navajo Nation''): Perry Shirley

National Petrochemical and Refiners Asssociation (''NPRA''):

Susan S. DeSanti, Sonnenschein Nath & Rosenthal LLP

National Petrochemical and Refiners Association (''NPRA''): Charles T. Drevna

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Platts (''Platts''): John Kingston

Petroleum Marketers Association of America (''PMAA''):

Robert Bassman, Bassman, Mitchell & Alfano, Chtd.

Society of Independent Gasoline Marketers of America (''SIGMA''): James D. Barnette,

Steptoe & Johnson LLP
Society of Independent Gasoline Marketers of America (''SIGMA''): R. Timothy Columbus, Steptoe & Johnson LLP
David J. Van Susteren, Fulbright & Jaworski LLP (''Van Susteren'')

Federal Register
Attachment C
ANPR Commenters

American Bar Association/Section of Antitrust Law (''ABA'')
Association of Oil Pipe Lines (''AOPL'')
American Petroleum Institute and the National Petrochemical and Refiners Association (''API'')
Patrick Barrett (''Barrett'')
Lawrence Barton (''Barton'')
Dave Beedle (''Beedle'')
Stanley Bergkamp (''Bergkamp'')
Louis Berman (''Berman'')
Bezdek Associates, Engineers PLLC (''Bezdek'')
Katherine Bibish (''Bibish'')
John Booke (''Booke'')
Bradley (''Bradley'')
Jeremy Bradley (''J. Bradley'')
Charles Bradt (''Bradt'')
Wendell Branham (''Branham'')
Lorraine Bremer (''Bremer'')
Gloria Briscolino (''Briscolino'')
Rick Brownstein (''Brownstein'')
Byrum (''Byrum'')
Canadian Association of Petroleum Producers (''CAPP'')
Jeff Carlson (''Carlson'')
Jacquelynne Catania (''Catania'')
Marie Cathey (''Cathey'')
New York City Bar, Association Committee on Futures & Derivatives Regulation (''CFDR'')
U.S. Commodities Futures Trading Commission (''CFTC'')
Manuel Chavez (''Chavez'')
Michael Chudzik (''Chudzik'')
D. Church (''Church'')
Earl Clemons (''Clemons'')
Dan Clifton (''Clifton'')
Kim Cruz (''Cruz'')
Jerry Davidson (''Davidson'')
Don Deresz (''Deresz'')
Charlene Dermond (''Dermond'')
Kimberly DiPenta (''DiPenta'')
Penny Donaly (''Donaly1'')
Penny Donaly (''Donaly2'')
Penny Donaly (''Donaly3'')
Penny Donaly (''Donaly4'')
Deep River Group, Inc. (''DRG'')
Harold Ducote (''Ducote'')
Mary Dunaway (''Dunaway'')
Econ One Research, Inc. (''Econ One'')
Terri Edelson (''Edelson'')
Kevin Egan (''Egan'')
DJ Ericson (''Ericson'')
Mark Fish (''Fish'')
Flint Hills Resources, LP (''Flint Hills'')
Bob Frain (''Frain'')
Joseph Fusco (''Fusco'')
Tricia Glidewell (''Glidewell'')
Robert Gould (''Gould'')
James Green (''Green'')
Michael Greenberger (''Greenberger'')
Christine Gregoire, Governor, State of Washington (''Gregoire'')
Hagan (''Hagan'')
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'')
International Swaps and Derivatives Association, Inc. (''ISDA'')
Micki Jay (''Jay'')
Kenneth Jensen (''Jensen'')
Paul Johnson (''Johnson'')
Tacie Jones (''Jones'')
Joy (''Joy'')
John Kaercher (''Kaercher'')
Kas Kas (''Kas'')
Kipp (''Kipp'')
Paola Kipp (''P. Kipp'')
Jerry LeCompte (''LeCompte'')
Kurt Lennert (''Lennert'')
Loucks (''Loucks'')
Robert Love (''Love'')
R. Matthews (''Matthews'')
Catherine May (''May'')
Mike Mazur (''Mazur'')
Sean McGill (''McGill'')
Kathy Meadows (''Meadows'')
Futures Industry Association, CME Group, Managed Funds Association, IntercontinentalExchange, National Futures Association (''MFA'')
Bret Morris (''Morris'')
Theresa Morris-Ramos (''Morris-Ramos'')
Scott Morosini (''Morosini'')
Timothy J. Muris and J. Howard Beales, III (''Muris'')
Navajo Nation Resolute Natural Resources Company and Navajo Nation Oil and Gas Company (''Navajo Nation'')
Laurie Nenortas (''Nenortas'')
James Nichols (''Nichols'')
Virgil Noffsinger (''Noffsinger'')
Noga (''Noga'')
Richard Nordland (''Nordland'')
National Propane Gas Association (''NPGA'')
Kerry O'Shea, (''O'Shea'')
Jeffery Parker (''Parker'')
Pamela Parzynski (''Parzynski'')
Brook Paschkes (''Paschkes'')
Brijesh Patel (''Patel'')
Stefanie Patsiavos (''Patsiavos'')
P D (''PD'')
Guillermo Pereira (''Pereira'')
James Persinger (''Persinger'')
Mary Phillips (''Phillips'')
Plains All American Pipeline, LLP (''Plains'')
Platts (''Platts'')
Betty Pike (''Pike'')
Petroleum Marketers Association of America (''PMAA'')
Joel Poston (''Poston'')
Radzicki (''Radzicki'')
Gary Reinecke (''Reinecke'')
Steve Roberson (''Roberson'')
Shawn Roberts (''Roberts'')
Linda Rooney (''Rooney'')
Mel Rubinstein (''Rubinstein'')
secret (''secret'')
Joel Sharkey (''Sharkey'')
Society of Independent Gasoline Marketers of America (''SIGMA'')
Daryl Simon (''Simon'')
David Smith (''D. Smith'')
Donald Smith (''Do. Smith'')
Mary Smith (''M. Smith'')
Donna Spader (''Spader'')
Stabila (''Stabila'')
Alan Stark (''A. Stark'')
Gary Stark (''G. Stark'')
Robert Stevenson (''Stevenson'')
Ryan Stine (''Stine'')
Maurice Strickland (''Strickland'')
Sutherland, Asbill, and Brennan, LLP (''Sutherland'')
L.D. Tanner (''Tanner'')
Dennis Tapalaga (''Tapalaga'')
Tennessee Oil Marketers Association (''TOMA'')
Theisen (''Theisen'')
Greg Turner (''Turner'')
U.S. citizen (''U.S. citizen'')
U.S. Department of Justice, Criminal Fraud Section (''USDOJ'')
Jeff Van Hecke (''Van Hecke'')
Louis Vera (''Vera'')
Thomas Walker (''Walker'')
Victoria Warner (''Warner'')
Lisa Wathen (''Wathen'')
Watson (''Watson'')
Gary Watson (''G. Watson'')
Joseph Weaver (''Weaver'')
Webb (''Webb'')
Vaughn Weming (''Weming'')
Douglas Willis (''Willis'')

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