

**Prohibitions On Market Manipulation in Subtitle B of Title VIII of  
The Energy Independence and Security Act of 2007, Project No. P082900  
Summary of Communications Pursuant to Commission Rule 1.26(b)(5)**

Donald S. Clark  
Secretary  
May 14, 2009

## MEMORANDUM

To: Don Clark  
From: Robert Davis  
Re: Market Manipulation Rulemaking Comments – Please place on the public record  
Date: November 20, 2008

On November 18, Commissioner Leibowitz spoke with Mark Cooper of the Consumer Federation of America. Commissioner Leibowitz asked Dr. Cooper whether regulation the SEC Act or the Commodities Futures Act was the better model for current market manipulation rulemaking. Dr. Cooper stated that while the SEC Act was the correct model for FERC, he thought our authority was broader. He also noted that although our authority was not broad enough to get at excessive speculation, he would have preferred a rule that did. He also noted that he agreed with the Commission's use of a recklessness rather than specific intent standard.



UNITED STATES OF AMERICA  
**FEDERAL TRADE COMMISSION**  
WASHINGTON, D.C. 20580

Laurel A. Price  
Attorney Advisor to Commissioner Harbour

Direct Dial

## Memorandum

To: Market Manipulation File

From: Laurel A. Price  
Attorney Advisor to Commissioner Harbour

Date: December 22, 2008

On Friday afternoon, I returned a phone call to Marc Schildkraut, counsel to Argus Media, a petroleum data compiler. Mr. Schildkraut said his client would like to have a meeting with the Commissioner to make her aware of the potential consequences that might occur if a particular form of market manipulation rule were adopted. Mr. Schildkraut explained that his client depends on the willingness of petroleum dealers to provide it with the data that it compiles and markets. He further told me that his client was recently advised by a firm which supplies data to Argus that it would no longer provide data to Argus if the FTC adopts a market manipulation rule with a "recklessness" conduct standard. Argus wants to make the Commissioner aware of its concerns regarding what might happen to the business if a significant number of its other data suppliers were to react in a similar fashion. I asked if Argus had included this information in its public comments. Mr. Schildkraut advised me that he had only recently been retained and would have to check on that. He told me his client could be available for a meeting on January 5-6, or 14-15.

I told him that I would convey his request to the Commissioner, and get back to him with her response. I also advised him that she had recently declined a similar meeting request related to this rulemaking.

Federal Trade Commission  
Market Manipulation Rulemaking

Report on Meeting with Argus Media Group  
January 5, 2009

The meeting began at 3:33pm and concluded at 4:12pm.

Argus Media Group provided a description of its services, products, and other offerings. Their representatives then explained their concerns in relation to the Rulemaking, noting first that Argus' incentives are aligned with the Commission's – noting their desires for transparency in the marketplace and the eradication of manipulative practices, among other goals. Specifically, Argus is concerned that the proposed rule's operative "intent" standard, will work to deter companies from providing Argus with sales data that is central to Argus' mission. Companies, Argus argues, will fear that even an inadvertent and/or good faith error in the submission of sales data will open them up to liability under the proposed Rulemaking's standards relating to disclosure obligations. This reduction in information flow, according to Argus, will have a net negative impact on the oil markets and consequently consumers. Because providing data to Argus does not necessarily directly benefit the large oil companies, Argus believes these large companies will cease providing the data rather than risk any exposure. In fact, one major oil company has ceased providing sales data to Argus and credited the Rulemaking as at least a partial, if not full, motivation for that change. Argus' first hope is that the Commission will adopt a rule with a specific intent standard. Barring that, however, as the Federal Energy Regulatory Commission did in relation to natural gas markets, Argus argued that a safe harbor provision exempting good faith/inadvertent disclosures from liability is appropriate instead.

Attendees:

Chairman William E. Kovacic, Federal Trade Commission  
Adrian Binks, Chairman, Argus Media Group  
Euan Craik, Chief Executive, Argus Media Group  
Dan Massey, U.S. President, Argus Media Group  
Marc Schildkraut, Howrey LLP  
Anthony Mansfield, McDermott Will & Emery LLP  
Andrea Agathoklis, James Mongoven, and Marianne Watts, Federal Trade Commission

## Memorandum

To: Market Manipulation File

From: Laurel A. Price  
Attorney Advisor to Commissioner Harbour

Date: January 9, 2009

Subject: Meeting with Representatives of Argus Media Group

On the afternoon of January 5, 2009, Robert Davis, Attorney Advisor to Commissioner Leibowitz, and I met with the following representatives of Argus Media Group:

Adrian Binks, Chief Executive, Argus Media Group  
Euan Craik, Chief Executive Officer, Argus Media, Inc.  
Daniel C. Massey, President, Argus Media, Inc.  
Anthony M. Mansfield, Esquire, McDermott, Will & Emery  
Marc G. Schildkraut, Esquire, Howery LLP

In advance of the meeting, we were provided with copies of Mr. Massey's letter of September 10, 2008, to the FTC's Office of the Secretary, and an unsigned document titled, "Argus Media Comments to the Federal Trade Commission On Market Manipulation Rulemaking P082900, November 18, 2008." Copies of those documents are included as attachments.

Argus is a data reporting organization. It collects transactional data regarding wholesale petroleum products transactions from a wide variety of market participants, and then aggregates and reports that data to its subscribers. Reporting services, such as Argus, were claimed to create transactional transparency in petroleum markets, and that such transparency is procompetitive.

We were advised that Argus was concerned that the “recklessness” standard of conduct in the Commission’s proposed rule might have the unintended effect of eliminating transactional transparency from petroleum wholesale markets, which would, in turn, make such markets less rather than more competitive. The loss of transparency would occur, according to Argus, because market participants would not be able to provide adequate guidance to their employees on the proper standard of data reporting conduct. As a consequence, such firms would become unwilling to report data to firms such as Argus. In support of this claim, Argus offered two forms of proof.

The first involved the notice provided to Argus by a major domestic oil company that, effective as of the first of this year, it would no longer provide transactional data to Argus because the Commission’s proposed use of a “recklessness” standard created an unacceptable degree of liability exposure for inadvertent omissions from data reports.

Additionally, Argus advised that the Federal Energy Regulatory Commission (FERC) adopted a similar rule a couple of years ago for the energy markets it regulates. Firms stopped reporting data, and the energy indices began failing. In order to correct the problem, FERC had to adopt a safe harbor provision for data filed by a trader’s back office, as distinct from its trading offices. Argus also pointed out that the FERC solution to this problem might not work for wholesale petroleum markets without significant modification—many wholesale petroleum traders are small and do not have back offices to do the reporting. Argus also claimed that it took FERC’s markets a year and a half to correct after FERC amended its rules to add the safe harbor. Argus’s proposed solution for this problem would be for the Commission either to the “recklessness” standard or to create an appropriate safe harbor defense that would eliminate the possibility of liability for inadvertent filing errors.

Argus also noted that the Commodities Futures Trading Commission rule did not include the “recklessness” standard, and its markets had not experienced any of the types of difficulties encountered by FERC.

Federal Trade Commission  
Market Manipulation Rulemaking

Report on Meeting with Argus Media Group  
January 14, 2009

The meeting began at 2:00pm and concluded at 2:40pm.

Marc Shildkraut explained that the purpose of the meeting was to talk about the recklessness standard. Argus Media Group first provided a description of its services, products, and other offerings. Argus then explained that it is extremely important to their business that the data they publish is good and accurate. Argus stated that large oil companies have told them that they will not provide the necessary data if the FTC's proposed rule includes a recklessness standard. One large oil company has already ceased providing data to Argus, though it has said it will resume if the FTC's rule does not include a recklessness standard and there is a safe harbor for the receipt of the type of data they provide Argus. That company told Argus that a recklessness standard poses too much prosecution risk for them; it makes it not worth providing the data. That company's cessation of data provision has already damaged the quality of Argus's published reports.

Argus stated that they don't mind the use of a recklessness standard in a situation where the core activity at issue for the business is trading – there companies would be more willing to take the risk a recklessness standard would entail. But in Argus's situation where the provision of data is voluntary, companies will not be willing to take the risk. Argus is dependent on voluntary submission of data by companies.

Argus pointed out that FERC has a safe harbor for submission of transactional data to the trade press. Argus explained that before FERC added the safe harbor, the natural gas market was severely effected by the use of FERC's recklessness standard – firms ceased providing data to the trade press, and that created market volatility in the physical natural gas and futures markets. Argus explained that it took the market 18 months to re-adjust.

Argus explained that they are not just concerned with protecting their business, they believe that it is no one's interest for the FTC's market manipulation rule to include a recklessness standard. They also explained that small traders will be hurt the most from the effect of a recklessness standard, because they have the least data available to them without Argus's publications.

Argus explained that the best option would be for the FTC to eliminate the recklessness standard, as the CFTC has done. An alternative would be to create a safe harbor (as FERC did).

Attendees:

Commissioner J. Thomas Rosch  
Euan Craik, Chief Executive, Argus Media Group  
Dan Massey, U.S. President, Argus Media Group

Anthony Mansfield, McDermott Will & Emery LLP  
Marc G. Schildkraut, Howrey LLP  
Holly Vedova, Patricia Galvan, and Marianne Watts, Federal Trade Commission

**Federal Trade Commission  
Market Manipulation Rulemaking**

**March 2009 Conversation between Chairman  
Leibowitz and Senator Cantwell**

In early March 2009, Chairman Leibowitz spoke briefly via telephone with Senator Maria Cantwell to discuss the Commission's ongoing rulemaking proceeding involving market manipulation in wholesale petroleum markets. The conversation addressed the proposed rule, the revised proposed rule, the standard of proof required under the rule and the Senator's interest in having an opportunity to comment on the revised proposed rule.

## **Federal Trade Commission**

### **Market Manipulation Rulemaking**

#### **March 24, 2009, Follow-up Conversation with Legislative Assistant to Senator Maria Cantwell**

On March 24, 2009, Kim Vandecar in the Office of Congressional Relations and Marianne Watts in the Office of the General Counsel had a follow-up telephone conversation with Amit Ronen, Legislative Assistant to Senator Maria Cantwell, seeking clarification of an issue discussed in an earlier telephone conversation between the Senator and Chairman Leibowitz. The previous conversation between the Senator and the Chairman involved the ongoing rulemaking proceeding for market manipulation in the petroleum industry. A summary of that previous conversation has been reduced to writing and placed on the public record for the rulemaking proceeding. This March 24th telephone conversation is a follow-up to the previous conversation between the Senator and the Chairman. In particular, the Chairman had asked FTC staff to call Senator Cantwell's legislative assistant to inquire about the Senator's use of the term "standard of proof" in their previous conversation.