



January 3, 2011

VIA ELECTRONIC SUBMISSION

Mr. David A. Stawick
Secretary
U.S. Commodity Futures Trading Commission
1155 21st Street, NW
Washington, DC 20581

Re: Prohibition of Market Manipulation: RIN Number 3038-AD27

Dear Mr. Stawick:

On November 3, 2010, the U.S. Commodity Futures Trading Commission (the "Commission" or "CFTC") issued a Notice of Proposed Rulemaking regarding the Prohibition of Market Manipulation ("Manipulation Rulemaking") in the Federal Register,¹ as required under Section 753 of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act").² The Commission invited interested persons to submit comments on all aspects of the proposed rules on or before January 3, 2011. Argus Media Inc. ("Argus") hereby submits comments on the Manipulation Rulemaking.

Argus supports the important goal of preventing manipulative behavior in CFTC jurisdictional markets which underlies the Manipulation Rulemaking. Nonetheless, absent clarification from the Commission, Argus believes that the proposed rules may unnecessarily chill the voluntary submission of transaction related data by market participants to compilers of price indices. This, in turn, may hinder the Dodd-Frank Act's goal of increased transparency. It may also negatively impact the robustness of swap contract pricing, which often is tied to index prices like those compiled by Argus. To avoid this outcome, Argus respectfully requests that the Commission:

- clarify the recklessness standard in the context of the false price reporting provision; and
- confirm that the concepts embedded in the safe harbor provision for good faith mistakes in CEA Section 6(c)(1)(C) apply with equal force to Section 9(a)(2) of the same.

¹ *Prohibition of Market Manipulation*, 75 Fed. Reg. 67,657 (Nov. 3, 2010) (to be codified at 17 C.F.R. Part 180).

² Pub. L. No. 111-203 (2010) (to be codified as an amendment to the Commodity Exchange Act ("CEA") in 7 U.S.C. ch. 1).

These suggested steps will instill market confidence and enhance transparency in the markets that the Commission regulates.

I. Description of Argus and its Interest in Manipulation Rulemaking

Argus is a leading independent provider of price information, market data and business intelligence for the global, physical petroleum, natural gas, electricity, emissions, biofuels and coal industries. Argus is incorporated in the United States as Argus Media Inc., a Delaware corporation, which is a wholly owned subsidiary of Argus Media Ltd., established in 1970.

Headquartered in London, Argus has major offices in Washington, D.C., Houston, New Jersey, Moscow, Singapore, Tokyo and Beijing. Argus is owned by its employees and by the family of its founder. Argus staff adhere to a strict ethics policy that forbids them from dealing in energy and commodities or in the stock of energy or commodities companies.

Argus shares the Commission's concern that the knowing submission of knowingly false or misleading or incomplete information to companies that compile price indices may distort published prices and therefore affect market conditions and ultimately harm consumers. Reflecting this concern, Argus previously participated in anti-manipulation rulemakings initiated by other federal agencies, including the Federal Trade Commission ("FTC"). To combat this potential problem, Argus follows internal procedures intended to identify inaccurate or omitted information, routinely contacts submitting companies for clarifications, and excludes transaction data from the price formation process that does not meet Argus' publicly available and objective standards. Although not an absolute check, Argus believes that it is able to discover the vast majority of inadvertent errors, omissions, and inaccuracies and mitigate their impact on published prices. Argus' success in upholding these standards and the overall integrity of its process is why Argus believes companies use its prices.³

II. Manipulation Rulemaking

The proposed rules implement the CFTC's new anti-manipulation authority under Section 753 of the Dodd-Frank Act. Section 753 amends Section 6(c) of the CEA to prohibit fraud-based manipulation schemes.⁴ Amended Section 6(c) includes a special provision for manipulation by false reporting,⁵ along with a companion safe harbor for good faith mistakes.⁶

³ In the fall of 2009, Saudi Aramco, the state-owned national oil company of Saudi Arabia, began using the Argus Sour Crude Index to price oil for sale to U.S. customers. We believe that the decision to link one of the benchmark crude oil streams to an Argus index validates the effectiveness of our process.

⁴ Dodd-Frank Act, Section 753 (to be codified at CEA Section 6(c)).

⁵ *Id.* (to be codified at CEA Section 6(c)(1)(A)) ("Unlawful manipulation for purposes of this paragraph shall include, but not be limited to, delivering, or causing to be delivered for transmission through the mails or interstate commerce, by any means of communication whatsoever, a false or misleading or inaccurate report concerning crop or market information or conditions that affect or tend to affect the price of any commodity in interstate commerce, knowing, or acting in reckless disregard of the fact that such report is false, misleading or inaccurate.").

Nothing in the amended Section 6(c) affects the applicability of Section 9(a)(2) of the CEA.⁷ Section 753 also creates Section 6(c)(3) of the CEA, which prohibits other price manipulation.⁸

The Manipulation Rulemaking proposes two rules under Section 753: the first rule, entitled “Prohibition Against Manipulation”, prohibits intentional or reckless conduct that defrauds or deceives market participants.⁹ According to the CFTC, this rule is intended to be similar to the anti-manipulation rules promulgated by the Federal Energy Regulatory Commission and the FTC. The proposed rule broadly prohibits: (1) any manipulative device, scheme, or artifice to defraud; (2) any untrue or misleading statements of material fact or material omissions; (3) any practices that would operate as a fraud or deceit on any person; and (4) any misleading or inaccurate reports concerning crop or market information or conditions that affect the price of any commodity in interstate commerce, when done intentionally or recklessly in connection with a CFTC jurisdictional transaction.¹⁰ The rule covers perfected and attempted fraud-based manipulation.¹¹

The second proposed rule, entitled “Other Manipulation”, mirrors the text of new CEA Section 6(c)(3) to prohibit price manipulation and attempted price manipulation, including every effort artificially to influence the price of a commodity, commodity futures contract, or swap.¹²

III. Comments to Manipulation Rulemaking

A. The Commission should clarify the recklessness standard in the context of the false price reporting provision.

As Argus has previously pointed out, compilers of price indices are wholly dependant on market participants’ voluntary submission of transaction data and other market information such as bids and offers in order to generate price indices. Anything that potentially discourages market participants from submitting accurate and fulsome information about transactions—and the transparency that results from this process—should be avoided whenever practicable and appropriate. Based on past experience, Argus believes that uncertainty about the distinction between lawful and unlawful price reporting will deter voluntary submission of such transaction data.¹³ For this reason, Argus applauds Congress’ decision expressly to carve out “good faith

⁶ *Id.* (to be codified at CEA Section 6(c)(1)(C)) (“Mistakenly transmitting, in good faith, false or misleading or inaccurate information to a price reporting service would not be sufficient to violate subsection (c)(1)(A).”).

⁷ *Id.* (to be codified at CEA Section 6(c)(1)(B)).

⁸ *Id.* (to be codified at CEA Section 6(c)(3)).

⁹ 75 Fed. Reg. at 67,662 (to be codified at 17 C.F.R. Part 180.1).

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.* (to be codified at 17 C.F.R. Part 180.2).

¹³ During the FTC Market Manipulation rulemaking process, one major U.S. energy company decided to cease reporting to price-reporting agencies because of the uncertainty of prosecution embedded in the rule.

mistakes” from the ambit of false reporting. However, absent clear guidance from the Commission regarding the standard to be applied, the applicability of the good faith mistake safe harbor provision remains unclear. By definition, conduct that falls within the scope of recklessness cannot also constitute a good faith mistake. Arguably, then, the more expansively the Commission construes recklessness in its case-by-case analysis, the more limited will be the scope of the good faith mistake safe harbor provision. This uncertainty discourages participation in the price reporting process and, in turn, undermines transparency in the markets.

In interpreting the scienter requirement, the Commission indicated that it would use Securities and Exchange Commission (“SEC”) precedent as a guide.¹⁴ Most circuit courts applying the SEC’s anti-manipulation rule have adopted an “extreme recklessness” standard.¹⁵ “Extreme recklessness” generally involves “an extreme departure from the standards of ordinary care . . . 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.”¹⁶ Similarly, the FTC has adopted an extreme recklessness standard in its anti-manipulation rule.¹⁷ While the Commission’s stated intention to use SEC precedent as a guide may suggest that it intends to apply a heightened standard of recklessness, the Commission’s further statement that case law applying Exchange Act Section 10(b) will not control gives rise to doubt. Argus encourages the Commission, at the very least, to confirm the standard of recklessness it proposes to apply.

Argus believes that the Commission should also provide the markets with *specific* examples of conduct that may be implicated under the proposed rules. Argus is not asking the CFTC to list specific activities that will be deemed reckless. Rather, Argus asks that the Commission clarify that certain types of conduct are *not* reckless for purposes of the false price reporting provision. Through its experience as a price index compiler, Argus has observed a number of different circumstances where a market participant has provided inaccurate market information with no manipulative intent involved. For example, “fat finger” typographical errors are somewhat common in such a data intensive environment. Similarly, entities sometimes make

¹⁴ *Id.* (“Moreover, the Commission proposes that judicial precedent interpreting and applying Exchange Act section 10(b) and SEC Rule 10b-5 in the context of the securities markets should guide, but not control, application of the scienter standard under subsection 6(c)(1) and the Commission’s implementing rule.”).

¹⁵ See, e.g., *SEC v. Lytle*, 538 F.3d 60, 6031(7th Cir. 2008); *Phillips v. LCI Int’l, Inc.*, 190 F.3d 609, 621 (4th Cir. 1999); *SEC v. Steadman*, 967 F.2d 636, 641 (D.C. Cir. 1992); *Hollinger v. Titan Capital Corp.*, 914 F.2d 1564, 1569 (9th Cir. 1990) (en banc); *Hackbert v. Holmes*, 675 F.2d 1114, 1118 (10th Cir. 1982); *Broad v. Rockwell*, 642 F.2d 929, 961 (5th Cir. 1981) (en banc); *McLean v. Alexander*, 599 F.2d 1190, 1197 (3d Cir. 1979); *Mansbach v. Prescott, Ball, & Turben*, 598 F.2d 1017, 1025 (6th Cir. 1979); see also *Greebel v. FTP Software*, 194 F.3d 185, 198 (1st Cir. 1999); *Camp v. Dema*, 948 F.2d 455, 461 (8th Cir. 1991).

¹⁶ *Dolphin and Bradbury, Inc. v. SEC*, 512 F.3d 634, 639 (D.C. Cir. 2008) (quoting *SEC v. Steadman*, 967 F.2d 636, 641 (D.C. Cir. 1992)).

¹⁷ See *Prohibitions on Market Manipulation*, 74 Fed. Reg. 40,686, at 40,693 (Aug. 12, 2009) (“Accordingly, final Rule Section 317.3(a) prohibits any conduct that operates or would operate as a fraud or a deceit, provided that the alleged violator engaged in the prohibited conduct knowingly; that is – as defined in the final Rule – with extreme recklessness.”).

honest mistakes in transposing numbers from their records. Additionally, entities have on occasion provided incomplete data without knowing that the relevant data set was incomplete. Good faith mistakes similar to these examples should not be covered by the CFTC's false price reporting provision, and, the Commission should affirmatively declare that these types of conduct are not reckless, and instead fall within the good faith mistake safe harbor provision.¹⁸

Uncertainty regarding the recklessness standard, particularly as applied to the false price reporting provision, likely will have a chilling effect, discouraging companies from submitting transaction information to the trade press. If market participants perceive—whether warranted or not—that their inadvertent reporting of inaccurate or misleading information to price index compilers will be measured against an ordinary (not heightened) recklessness standard under the false price reporting provision, they may conclude that it is not worth the risk to provide this market data to index compilers. This outcome would contravene the Commission's goal of promoting transparency in jurisdictional markets by causing less representative published prices.

Less robust price indices could also undermine the robustness of swap contract pricing. Currently, a significant number of swap contracts are tied to Argus indices. For example, CME ClearPort lists over fifty swap contracts that are tied to one of Argus' price indices.¹⁹ Other swap contracts are linked to index prices compiled by other companies. Uncertainty regarding the recklessness standard may chill voluntary price reporting. This could lead to a less representative price index compilation process, negatively impacting swap contracts that are indexed to these less fulsome price indices. Thus, in addition to impacting the physical markets, the lack of certainty regarding the recklessness standard could adversely affect the swaps markets regulated by the Dodd-Frank Act.

B. The Commission should expressly acknowledge that the concepts embedded in the safe harbor provision for good faith mistakes in Section 6(c)(1)(C) apply with equal force to Section 9(a)(2) of the CEA.

Amended Section 6(c) states that “[n]othing in this section shall affect, or be construed to affect, the applicability of Commodity Exchange Act section 9(a)(2).”²⁰ Over the last eight years, the Commission has actively pursued allegations of false reporting for the purpose of manipulating index prices, charging participants with violations of CEA Section 9(a)(2). Section 9(a)(2) provides that it shall be a violation of the CEA for any person “knowingly to deliver or cause to be delivered . . . false or misleading or knowingly inaccurate reports concerning . . . market information . . . that affect or tend to affect the price of any commodity in interstate

¹⁸ See Dodd-Frank Act, Section 753 (CEA Section 6(c)(1)(C)) (“Mistakenly transmitting, in good faith, false or misleading or inaccurate information to a price reporting service would not be sufficient to violate subsection (c)(1)(A).”).

¹⁹ See CME ClearPort Product Slate, available at <http://www.cmegroup.com/trading/otc/index.html> (last visited Dec. 30, 2010).

²⁰ 75 Fed. Reg. at 67,661 (to be codified at 17 C.F.R. 180.1(c)).

commerce.”²¹ Unlike CEA Section 6(c), Section 9(a)(2) does not include an express safe harbor provision for good faith mistakes.

It is Argus’ understanding that Commission Staff take the position that a safe harbor provision is not necessary under Section 9(a)(2) because Section 9(a)(2) has been interpreted to require specific intent. Under this interpretation, if an entity specifically intended to report false or misleading market information, then the relevant conduct could not have been a good faith mistake. Conversely, if an entity did not specifically intend to report false or misleading market information, then there can be no violation under Section 9(a)(2). For this reason, Section 9(a)(2) does not contain an explicit good faith mistake safe harbor provision because of the specific intent standard.

The subtlety of this distinction between specific intent and good faith mistakes will likely be lost on market participants, particularly in an area of the law as charged as market manipulation. Given these two seemingly disparate provisions, and given that the Manipulation Rulemaking expressly recognizes that Section 9(a)(2) remains applicable to prohibit market manipulation, market participants may simply address this uncertainty by avoiding those situations that give rise to the issue, *i.e.* price reporting.

Argus believes that there is tremendous value to stating publicly that which may seem obvious to the Commission. An affirmative statement that both Section 6(c)(1)(C) and Section 9(a)(2) as applied to price reporting do not cover good faith mistakes would instill confidence in the markets. Indeed, the FTC recognized the benefit to making such a statement in its anti-manipulation rule, expressly stating that the rule “does not cover inadvertent mistakes, unintended conduct, or legitimate conduct undertaken in the ordinary course of business.”²² According to the FTC, such a limitation “further helps to avoid impeding beneficial business.”²³

Absent a similar affirmative statement by the Commission that the safe harbor provision for good faith mistakes in Section 6(c)(1)(C) will apply uniformly throughout the CEA, market participants may respond to this uncertainty simply by not volunteering information to price index compilers. As noted above, this chilling effect would be counterproductive to the Commission’s efforts to prevent distortion of market prices, as it would result in less transparency due to the inhibited flow of price information. Furthermore, any decrease in voluntary price reporting could negatively affect the swaps markets, given the number of swap contracts that are tied to price indices like those compiled by Argus. Therefore, similar to the FTC, the Commission should explicitly declare that its anti-manipulation rules related to false price reporting—including both Section 6(c) and Section 9(a)(2)—do not cover good faith mistakes.

²¹ 7 U.S.C. § 13(a)(2) (2006).

²² See *Prohibitions on Market Manipulation*, 74 Fed. Reg. 40,686, at 40,693 (Aug. 12, 2009).

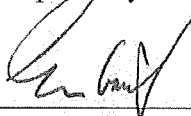
²³ *Id.*

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IV. Conclusion

Argus appreciates the opportunity to provide the Commission with its perspective on the Manipulation Rulemaking. Argus welcomes the opportunity to discuss these issues further with the Commission and its Staff.

Respectfully submitted,



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