



January 3, 2011

Commodity Futures Trading Commission
David A. Stawick, Secretary
Three Lafayette Centre
1155 21st St. NW
Washington, DC 20581

Re: Prohibition of Market Manipulation, RIN 3038-AD27

Platts, the energy information division of The McGraw-Hill Companies, Inc., submits these comments for consideration by the Commodity Futures Trading Commission (the "Commission") in its Notice of Proposed Rulemaking on implementation of anti-manipulation authority in Section 753 of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank").

I. Statement of Platts' interest

Platts is a global leader in price discovery in the oil, natural gas, electricity, coal, uranium, petrochemical and metals industries across more than 150 countries from more than a dozen offices worldwide. Founded in 1888, The McGraw-Hill Companies is a leading global publisher in the financial services, education and business information markets through leading brands such as Standard & Poor's, McGraw-Hill Education and J.D. Power and Associates.

Platts specializes in providing price discovery in the physical commodities markets. Effective price discovery in physical energy markets depends on the willingness of companies to recognize the collective good of engaging in price formation through the voluntary and transparent reporting of trade data, including bids, offers and actual transactions, to publishers of price assessments such as Platts. This market information is not just the lifeblood that brings efficiency to trade in markets; it is also essential to the processes that Platts and other publishers perform in generating price assessments of the physical commodity that are reflective of market value. Consequently, Platts urges regulators to exercise care to avoid creating disincentives to market data gathering and information dissemination.

Platts has participated in proceedings at other agencies in which similar issues have been raised, including the Federal Energy Regulatory Commission's 2003 Policy Statement on Natural Gas and Electric Price Indices and the Federal Trade Commission's 2009 rule implementing prohibitions on market manipulation and false information promulgated in the Energy Independence and Security Act of 2007.

II. Overview of Platts' comments

Platts commends Congress and the Commission for recognizing the integral role that price reporting agencies play in U.S. commodity markets. The Dodd-Frank provision on "good faith mistakes" in reporting to publishers such as Platts should help provide companies reassurance that inadvertent errors in submissions will not trigger a finding of market manipulation. The avoidance of any disincentive to reporting to publishers, in turn, will contribute to a robust process of price formation that benefits all participants in energy markets.

As the Commission implements the Dodd-Frank provisions on market manipulation, Platts encourages it to recognize that price formation takes place in varying ways in energy commodity markets. The "good faith" provision should be interpreted broadly enough to accommodate those variations across markets.

III. The Commission's proposed rule

Section 753 of the Dodd-Frank Act amends Section 6(c) of the Commodity Exchange Act to enhance the Commission's anti-manipulation authority. New subsection 6(c)(1) prohibits fraud-based manipulative schemes. New subsection 6(c)(1)(A) is a "special provision for manipulation by false reporting." It states that unlawful manipulation includes "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." Importantly, however, new Section 6(c)(1)(C) provides that "good faith mistakes" in the transmission of "false or misleading or inaccurate information to a price reporting service would not be sufficient to violate subsection (c)(1)(A)."

The Commission proposes to incorporate Section 753 into its regulations with a new 17 CFR Part 180. Section 180.1(a)(4) incorporates the provision above, stating that "Notwithstanding the foregoing, no violation of this section shall exist where the person mistakenly transmits, in good faith, false or misleading information to a price reporting service."

IV. Platts' comments on the proposed rule

Platts submits that the “good faith” exception proposed to be incorporated into the Commission’s regulations is an important safeguard that will help ensure a robust flow of market information to price reporting agencies such as Platts. Platts bases this belief in part on the actions taken by other agencies in the past several years.

The “good faith” concept has its origin in the Federal Energy Regulatory Commission’s (“FERC”) Policy Statement on Natural Gas and Electric Price Indices, adopted in July 2003 (PL03-3). At the time, investigations of alleged attempts to manipulate price indices had “led some market participants to curtail their reporting, resulting in a decline in the number of trades voluntarily reported to index developers” (Policy Statement at 3). The Commission noted that at a June 24, 2003, conference, parties expressed concern that “the Commission could take action against companies that make a mistake when reporting price data to index developers. Many parties commented on the need for regulatory certainty and urged the Commission to adopt a safe harbor approach to good faith reporting” (Policy Statement at 8). In July 11, 2003, comments, Platts urged FERC to implement a safe harbor provision.

In the July 24, 2003, Policy Statement, the Commission included the safe harbor policy, stating that for data providers that followed specified standards, “[t]he Commission does not intend to prosecute and/or penalize parties for inadvertent errors in reporting, nor will it refer such issues to other agencies having jurisdiction. Companies adhering to these guidelines ... should be able to report all relevant trade data with confidence” (Policy Statement at 13).

While this Commission did not formally adopt FERC’s Policy Statement, the chairmen of the CFTC and FERC issued a joint statement on July 23, 2003, in which they said they “wish to make absolutely clear” that neither agency “has or will bring false reporting cases against energy market participants where the false report is inadvertent or based solely on human error. ... We look forward to increased reporting of transaction data by energy market participants as this will promote price discovery and the efficient operation of these markets. We will continue to monitor progress in this important endeavor.”

FERC’s Policy Statement had the intended effect. In November 2004, the agency reported that “[t]he record shows a steady increase in the number of companies reporting their transactions, and a substantial improvement in the systems by which prices are reported” (PL03-3-005 at 9).

In 2005, Congress addressed the role that price reporting agencies play. In the Energy Policy Act of 2005 (Public Law 109-58), Congress directed FERC to facilitate price transparency in U.S. natural gas markets. Section 316 of the law instructed that in doing so, FERC “shall consider the degree of price transparency provided by existing price publishers and providers of trade processing services, and shall rely on such publishers and services to the maximum extent possible.”

Continuing to address wholesale natural gas and electricity markets, FERC in January 2006 issued a rule governing manipulation in those markets (18 CFR Part 1c). Like the Commission's proposal, the FERC rule is based on the model of the Securities and Exchange Commission's Rule 10b-5. Of particular note, the FERC manipulation rule, Order 670, clarified that the new regulations did not supersede the 2003 Policy Statement on price reporting. FERC reiterated that "[w]e continue to encourage market participants to contribute to price formation and to utilize the guidelines of the Policy Statement when reporting pricing information. We also note that if an inadvertent error occurs, it would not involve the scienter needed for application of the Final Rule" (Order 670 at 55).

Congress next took up potential energy market manipulation in the Energy Independence and Security Act of 2007. Under that law, the Federal Trade Commission ("FTC") in August 2009 adopted a final rule on manipulation of petroleum markets (16 CFR Part 317). Platts played an active role in that proceeding, and in October 17, 2008, comments, urged the FTC that a safe harbor along the lines of the FERC Policy Statement "would go a long way toward providing market entities the assurance they need that continued participation in price formation processes would not expose them to regulatory risk for inadvertent errors" (Platts comments at 5). Other parties, including the American Petroleum Institute, National Petroleum and Refiners Association and International Swaps and Derivatives Association, also urged the FTC to adopt a safe harbor for provision of information to price reporting agencies.

In its final rule, the FTC did not adopt a specific safe harbor provision. However, the agency made clear that the manipulation rule "does not cover inadvertent mistakes, unintended conduct, or legitimate conduct undertaken in the ordinary course of business" (74 Federal Register at 40693). The rule noted that to commit a violation, a person must engage in the proscribed conduct "knowing" that it is fraudulent or deceptive. "For example, a trader's state of mind must encompass more than just carrying out the ministerial function of transmitting false information to a price reporting service. Rather, there must be evidence that the trader knew or must have known that the information transmitted was false" (74 FR at 40696).

Even at that, one member of the FTC worried about the possible impact of the rule. In a concurrence, Commissioner J. Thomas Rosch stated that the rule "may chill oil companies from, among other things, voluntarily providing their data to independent data reporting firms, as they do now, for fear that they may be held liable for an inadvertent omission" (74 FR at 40704).

In summary, market confidence is a crucial component in price formation processes, and confidence can be weakened if perceived regulatory risk provides a disincentive to companies' participation in those processes. Platts submits that proposed Section 180.1(a)(4), providing that "good faith" mistakes would not trigger a finding of manipulation, should help maintain that market confidence and is consistent with prior actions by other regulatory agencies.

As the Commission considers the practical application of proposed Section 180.1(a)(4), Platts notes that price assessment techniques vary by market. As one of the leading independent publishers for assessments in U.S. and global markets including oil, natural gas, electricity, metals and petrochemicals, Platts endeavors to employ methodologies and data gathering practices appropriate to the specifics of each market. The keystones to Platts' price assessments in all markets are transparent processes and public methodologies. All Platts price discovery is based on several common principles, including structured and consistent methodologies; thorough data verification processes; transparency toward the market; transparency to company risk control and compliance departments; independence and impartiality; and regular compliance review of Platts' market editors. In all markets, Platts actively seeks broad participation and cultivates detailed information.

The characteristics of individual markets, however, play a factor in assessment approaches. For example, all Platts U.S. crude oil and refined petroleum product assessments are based on a market-on-close methodology in which bids and offers are submitted. In other markets, such as U.S. natural gas, Platts uses a price survey in which it collects thousands of consummated transactions each day and produces indices based largely on a volume-weighted average.

The language in the Dodd-Frank Act and proposed Section 180.1(a)(4) centers on the transmission of information to a price reporting service. In the interest of clarity, Platts will provide some brief examples of its data collection techniques to ensure that the Commission and interested parties are familiar with different approaches.

In highly commoditized U.S. natural gas and electricity markets, the mid or back offices of companies provide detailed, transaction-specific data directly to Platts using electronic delivery. The main variable in transacting is generally the location at which the gas is delivered, since other elements of the gas package are standardized. The company must certify in writing that it is making a good faith effort to report completely and accurately and that it has staff assigned to respond to questions concerning data submittals. The entity also is obligated to make reasonable efforts to inform Platts in the case of any errors or omissions. These measures are consistent with the FERC Policy Statement on price reporting.

In the petroleum market, however, transactions are far fewer and often are non-standardized. Physical oil markets are highly complex, requiring "normalization" techniques to reconcile disparate volumes, quality and logistical characteristics – all of which have an effect on market value. Unlike daily U.S. gas trading, which is compressed into a few morning hours to allow for transportation scheduling, oil transactions may take place throughout the workday.

To address these oil market characteristics, Platts has developed its market-on-close methodology (MOC) to yield a price assessment reflective of market value at the close of the trading day, commonly referred to as the MOC window. Bids and offers are made public and in real time. Companies are named and are expected to perform on any stated

position in the MOC process. Bids and offers are expected to be firm and open to the market at large. Companies can submit trading positions to Platts in multiple ways, including telephone, instant messaging and the electronic e-Window system. Platts transmits those positions to the subscribers of its real-time petroleum service, Platts Global Alert, making the market information available on a real-time basis to anyone with a subscription. At the end of the assessment period, Platts' market editors analyze the accumulated data in order to derive a time-specific assessment of market value. With the identities of all participants in the assessment process revealed in the MOC window, any interested party can monitor the price formation.

In other, less highly evolved markets such as some metal commodities, Platts may use telephone surveys of industry participants to collect bids, offers and transactions to form its assessments.

Platts believes that while specific data collection techniques may vary among markets, the "good faith" provision embodied in proposed Section 180.1(a)(4) would apply to the reporting of price data in each instance. Platts encourages the Commission to interpret the reporting or transmission of data to a price reporting service sufficiently broadly to recognize these differences in the operation of energy and metals markets. Moreover, Platts assumes that the safe harbor provision set forth in Section 180.1(a)(4) is intended to apply to all the prohibitions enumerated in Section 180.1(a) and Section 180.2. The Commission may wish to clarify this point in furtherance of the sound policy reflected in the safe harbor.

V. Conclusion

Platts supports the proposed rule on "good faith" mistakes in transmitting information to a price reporting service as an appropriate means of ensuring that companies are not dissuaded from reporting prices by the fear that an inadvertent error could lead to prosecution. The proposed measure is consistent with actions by other U.S. regulatory agencies and should help protect robust participation in price formation processes.

Respectfully submitted,

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