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January 3, 2011

***VIA Electronic Mail***

Mr. David Stawick  
Secretary of the Commission  
Commodity Futures Trading Commission  
Three Lafayette Centre  
1155 21<sup>st</sup> Street, N.W.  
Washington, DC 20581

**RE: Notice of Proposed Rulemaking On Prohibition of Market Manipulation  
RIN No. 3038-AD2**

Dear Mr. Stawick:

Commodity Markets Council (“CMC”), on behalf of its many members, welcomes the invitation to submit the following comments to the Commodity Futures Trading Commission (“CFTC” or “Commission”) Notice of Proposed Rulemaking (“NOPR”) on prohibition of market manipulation.

The CMC and its members are long-standing proponents of integrity and transparency in U.S. futures markets. The competitive strength and viability of our markets and their ability to serve the price discovery and risk management needs of their users, is directly dependent on these principles. Without public confidence in adherence to these values, there can be no effective and efficient marketplace.

It is equally important market participation does not become the unintended victim of overly broad and ill-conceived efforts to promote market integrity. The CFTC’s mission is two pronged. The Commission is tasked with protecting market users and the public from fraud, manipulation and abusive practices, while at the same time, fostering open, competitive and financially sound markets. Poorly crafted legislative language designed to protect against fraud or deception may risk grave harm to the markets and fail to provide real protection for its participants. Absent well-defined rules tailored to the unique characteristics of the futures market, more harm than good may be done.

CMC is a trade association bringing together exchanges and their industry counterparts. The activities of our members represent the complete spectrum of commercial users of all futures markets including energy and agriculture. Specifically, our industry member firms are regular users of the Chicago Board of Trade, Chicago Mercantile Exchange, ICE Futures US, Kansas City Board of Trade, Minneapolis Grain Exchange and the New York Mercantile Exchange. CMC is uniquely positioned to provide the consensus views of commercial and end users of derivatives. Our comments represent the collective view of CMC members.

The businesses of all our member firms depend upon the efficient and competitive functioning of the risk management products traded on U.S. futures exchanges. Through the Commission’s diligent oversight efforts that have fostered Exchange innovation and technology adoption, we have seen the commodity markets grow and prosper. They have become deeper and more liquid, narrowing bid/ask spreads and improving hedging effectiveness and price discovery. Meanwhile, liquidity, technology, clearing quality, price and customer service have driven market selection. All of these developments serve the interests of the trade as well as the public.

Section 753(c)(1) seeks to proscribe fraud-based manipulative conduct. On its face, the provision borrows heavily from the experiences and language of securities' law regulation. Clear differences between the securities and futures markets render this approach dubious at best. The analogue of an issuer with fiduciary obligations is simply not present in the futures world. Insider trading rules have only a limited application in futures markets, and are usually restricted to exchange or government personnel and information. Duties of disclosure flowing from fiduciary relationships have no parallel in futures markets. The effort to borrow the experiences and rules of one market and apply them to another that exists for different purposes and that functions in a different manner is inappropriate. CMC believes it will lead only to confusion and disruption.

#### **A. The Scierter Requirement**

At a minimum, CMC encourages the CFTC to set extreme recklessness, not mere recklessness or negligence, as the scierter standard under the proposed rule. Announcing the proposed scierter standard "...will be tailored to the facts and circumstances of each case", as the NOPR does, provides no guidance at all. If there is any place for application of the securities' law paradigm, it is found in its judicial precedent interpreting the intent-based scierter requirement under SEC Rule 10b-5.

#### **B. The Need For Clarity**

The language of Section 753 is extremely broad. It needs precise regulatory definition so market users will have adequate notice of what conduct is prohibited. The "I know it when I see it" approach is both constitutionally suspect under the due process clause and fails as a regulatory guidepost.

For example, the proscribed conduct in Section 753(a) mandates that it must be "in connection with any swap or contract of sale of any commodity in interstate commerce...." The "in connection with" language is distinctly different than parallel language in other anti-fraud statutes or rules. In other similar rules, the wrongful conduct must occur in connection with "the purchase or sale" of the product being regulated.

As currently proposed, the Commission explains the "in connection with" nexus would be satisfied "...whenever misstatements or other relevant conduct are made in a manner reasonably calculated to influence market participants." CMC believes this guidance is far too broad to provide any meaningful direction. Moreover, we are concerned it is so broad that it may even capture casual statements about general conditions affecting markets, such as observations about weather, crop yields, or interest rate volatility. We urge the Commission to clarify its rule does not reach such conduct and that "in connection with" must be tied to a specific market transaction (i.e., the purchase or sale of a swap or a futures contract).

#### **C. The Price Manipulation Test**

Pursuant to its general authority under Section 8(a)(5) of the Commodity Exchange Act ("CEA"), the Commission also is proposing a rule under the new Section 6(c)(3) of the CEA. The proposal merely repeats the language of Section 753(c)(3) making it "unlawful for any person to manipulate or attempt to manipulate the price of any swap or any commodity in interstate commerce or for future delivery on or subject to the rules of any registered entity."

The CMC supports the Commission's reaffirmed commitment to the four-part test for price manipulation. It is consistent with established legal precedent with which market participants are familiar. *In Re Di Placido*, 2008WL4831204 (CFTC 208), aff'd in pertinent part, *Di Placido v. Commodity Futures Trading Comm*, 364 Fed Appx. 657, 2009 WL 3326624 (2d Cir. 2009). Since *Placido* is good law, CMC recommends the Commission clarify Section 6(c)(3) does not confer any additional enforcement authority.

Also, the CFTC's statement that the "conclusion that prices [are] affected by a factor not consistent with normal forces of supply and demand will often follow inescapably from proof of actions of the alleged manipulator" is a misreading of judicial precedent like *Di Placido*. The Commission should make clear the proposed rule does not

create a presumption that a price is artificial merely because one or more isolated transactions are deemed uneconomic without proof of a specific intent to move prices. There are a variety of valid commercial reasons for engaging in transactions that may appear on the surface to lack economic rationale, but which are not intended to move prices, e.g., hedging during the closing period. These trading activities should be distinguished from the egregious conduct present in Di Placido and similar cases. The Commission's effort to avoid its burden of proof of "artificial price" with the "inescapable conclusion" approach should be disavowed.

The CMC thanks the Commission for the opportunity to present its views on this most important subject. If you have any questions or would like to discuss further, please do not hesitate to contact me via email at [christine.cochran@commoditymkts.org](mailto:christine.cochran@commoditymkts.org) or via phone at (202) 842-0400 – ext. 101. Thank you in anticipation of your attention to these comments.

Regards,



Christine M. Cochran  
President