

Federal Energy Regulatory Commission
Legal Authorities: Amaranth Show Cause
IN07-26-000

The Anti-Manipulation Rule: The Commission's Anti-Manipulation Rule, section 1c.1 of the Commission's regulations, implements section 315 of EAct 2005,¹ and prohibits:

any entity, directly or indirectly, in connection with the purchase or sale of natural gas . . . subject to the jurisdiction of the Commission . . . [from using] . . . any device, scheme, or artifice to defraud [or from engaging in] any act, practice, or course of business that operates or would operate as a fraud or deceit . . . on any person.²

In adopting this rule, the Commission issued Order No. 670 and clarified the following elements of a manipulation claim: "an entity: (1) . . . engages in any act, practice, or course of business that operates or would operate as a fraud or deceit upon any entity; (2) with the requisite *scienter*; (3) in connection with the purchase or sale of natural gas . . . subject to the jurisdiction of the Commission."³ This case presents the first exercise of this new anti-manipulation authority.

The Anti-Manipulation Rule is an intentionally broad proscription against all kinds of deception, manipulation, deceit and fraud.⁴ In Order No. 670, we explained that fraud is defined generally to include "any action, transaction, or conspiracy for the purpose of impairing, obstructing or defeating a well-functioning market."⁵

The Anti-Manipulation Rule applies whether or not the manipulator's principal or exclusive purpose is the manipulation of physical natural gas sales. A transaction would be covered if "in committing fraud, the entity . . . intended to affect, or have acted recklessly to affect, a jurisdictional transaction." (Order No. 670, FERC Stats. & Regs. 31,202 at P 22). This case concerns the important nexus between the wholesale interstate natural gas markets subject to the Commission's jurisdiction and the New York Mercantile Exchange (NYMEX) Natural Gas Futures Contract (the NG Futures Contract). In recent years, many market participants in the physical natural gas markets have used the NG Futures Contract as a significant benchmark for prices in physical natural gas. In this case, manipulation of Commission-jurisdictional prices

¹ EAct 2005 § 315 (2005) (codified at 15 U.S.C. 717c-1).

² 18 C.F.R. § 1c.1 (2006).

³ *Prohibition of Energy Market Manipulation*, Order No. 670, 71 Fed. Reg. 4244 (Jan. 26, 2006), FERC Stats. & Regs. ¶ 31,202, at P 49 (2006) (Order No. 670).

⁴ Order No. 670, FERC Stats. & Regs. ¶ 31,202 at P 50.

⁵ *Id.* (citing *Dennis v. United States*, 384 U.S. 855, 861 (1966) (noting that fraud within the meaning of a statute need not be confined to the common law definition of fraud: any false statement, misrepresentation or deceit)).

resulted from manipulation of the NG Futures Contract.

Coordinate Jurisdiction with CFTC: The Commission does not have jurisdiction directly to regulate trading in the NG Futures Contract that does not affect Commission jurisdictional markets; that is the province of the Commodity Futures Trading Commission (CFTC). However, the law makes plain that the jurisdiction of the two agencies is to be complementary.⁶ Congress directed in EAct 2005 that the two Commissions execute a Memorandum of Understanding (MOU) to coordinate investigations pertaining to markets within the respective jurisdiction of each agency.⁷ On October 12, 2005, the Commission and the CFTC entered into the MOU⁸ and pursuant to its provisions the staffs of the two agencies have worked closely together for more than a year to coordinate discovery and the proceedings in this case.

Remedial Authority: the remedies available for these violations include civil penalties and disgorgement of profits.⁹

- **Civil Penalties:** In this case, Amaranth entered orders resulting in 219 separate, multi-contract executions of orders reported as “fills” in open outcry pit trading in order to sell its futures in the three settlement periods.¹⁰ Each of these executions of orders was a violation.
- **Penalty factors:** In determining the appropriate size of a civil penalty for a given violation, the Commission was mandated by Congress to consider the seriousness of a violation and the remedial actions, if any, taken by a violator in response to a violation.¹¹ These factors were more specifically described in the Commission’s *Enforcement Policy Statement*.¹² The Commission applies those factors to the facts of every case in order to arrive at an appropriate civil penalty amount.

⁶ CEA, 7 U.S.C. § 2(a)(1)(A) (2000) (providing that CFTC “exclusive” jurisdiction is not to be read to interfere with separate jurisdiction granted to other federal agencies).

⁷ EAct 2005 §§ 316, 1281 (codified at 15 U.S.C. §§ 717t-2(c)(1) (2005) and 16 U.S.C. §824t(c)(1) (2005)).

⁸ See Memorandum of Understanding Between the Federal Energy Regulatory Commission (FERC) and the Commodity Futures Trading Commission (CFTC) Regarding Information Sharing and Treatment of Proprietary Trading and Other Information, executed October 12, 2005.

⁹ EAct 2005 § 314(b) (2005) (codified at 15 U.S.C. 717t-1).

¹⁰ NYMEX_00001, NYMEX_00003-04 (NYMEX NG Futures Contract trade data).

¹¹ EAct 2005 § 314(b) (2005) (codified at 15 U.S.C. 717t-1(c)).

¹² *Enforcement of Statutes, Orders, Rules, and Regulations*, 113 FERC ¶ 61,068 (2005) (*Enforcement Policy Statement*).

- The seriousness factors are: (1) What harm was caused by a violation? (2) Was a violation the result of manipulation, deceit, or artifice? (3) Was the action willful, reckless, or deliberately indifferent to the results? (4) Was it part of a broader scheme? (5) Is it a repeat offense or does the company have a history of violations? (6) Was the wrongdoing related to actions by senior management? (7) How did the wrongdoing come to light? (8) What effect would potential penalties have on the financial viability of the company?
- The remedial action factors are: (1) internal compliance, (2) self-reporting, and (3) cooperation. We analyze these factors by two groupings of Respondents: the Amaranth Entities and the individual traders.
- **Disgorgement:** Unlike civil penalties, the Commission does not approach the assessment and ordering of disgorgement of unjust profits as a discretionary matter.¹³ Except in rare circumstances not present here, any unjust profits earned from the violations must be disgorged in their entirety.

¹³ *Enforcement Policy Statement*, 113 FERC ¶ 61,068 at PP 19, 23, 25 (2005) (“[A]t a minimum a company involved in wrongdoing must disgorge any unjust profits resulting from the wrongdoing.”).