Takeoff Minimums, an effective date at least 30 days after publication is provided.

Further, the SIAPs and/or Weather Takeoff Minimums contained in this amendment are based on the criteria contained in the U.S. Standard for Terminal Instrument Procedures (TERPS). In developing these SIAPs and/or Weather Takeoff Minimums, the TERPS criteria were applied to the conditions existing or anticipated at the affected airports. Because of the close and immediate relationship between these SIAPs and/or Weather Takeoff Minimums and safety in air commerce, I find that notice and public procedure before adopting these SIAPs and/or Weather Takeoff Minimums are impracticable and contrary to the public interest and, where applicable, that good cause exists for making some SIAPs and/or Weather Takeoff Minimums effective in less than 30 days.

**Conclusion**

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore—(1) Is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. For the same reason, the FAA certifies that this amendment will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

**List of Subjects in 14 CFR Part 97**

Air Traffic Control, Airports, Incorporation by reference, and Navigation (Air).

Issued in Washington, DC on January 13, 2006.

**James J. Ballough,**

*Director, Flight Standards Service.*

**Adoption of the Amendment**

■ Accordingly, pursuant to the authority delegated to me, under Title 14, Code of Federal Regulations, part 97 (14 CFR part 97) is amended by establishing, amending, suspending, or revoking Standard Instrument Approach Procedures and Weather Takeoff Minimums effective at 0901 UTC on the dates specified, as follows:

## PART 97—STANDARD INSTRUMENT APPROACH PROCEDURES

■ 1. The authority citation for part 97 continues to read as follows:

**Authority:** 49 U.S.C. 106(g), 40103, 40106, 40113, 40114, 40120, 44502, 44514, 44701, 44719, 44721–44722.

■ 2. Part 97 is amended to read as follows:

** * * Effective 16 February 2006*

Chicago, IL, Chicago Midway Intl, RNAV (RNP) Y RWY 13C, Orig
Chicago, IL, Chicago Midway Intl, RNAV (RNP) Y RWY 22L, Orig
Kansas City, MO, Charles B. Wheeler Downtown, RNAV (GPS) RWY 3, Orig
Kansas City, MO, Charles B. Wheeler Downtown, RNAV (GPS) RWY 21, Orig
Kansas City, MO, Charles B. Wheeler Downtown, ILS OR LOC RWY 3, Amdt 2
Kansas City, MO, Charles B. Wheeler Downtown, VOR RWY 3, Amdt 17
Kansas City, MO, Charles B. Wheeler Downtown, VOR RWY 21, Amdt 13
Allentown, PA, Lehigh Valley International, ILS OR LOC/DME RWY 24, Orig
Allentown, PA, Lehigh Valley International, LOC BC RWY 24, Amdt 20A, CANCELLED
Lancaster, PA, Lancaster, ILS OR LOC RWY 8, Orig
Lancaster, PA, Lancaster, LOC RWY 8, Orig, CANCELLED

** * * Effective 13 April 2006*

Peru, IL, Illinois Valley Rgnl-Walter A. Duncan Field, RNAV (GPS) RWY 18, Orig
Peru, IL, Illinois Valley Rgnl-Walter A. Duncan Field, RNAV (GPS) RWY 36, Orig
Peru, IL, Illinois Valley Rgnl-Walter A. Duncan Field, LOC RWY 36, Amdt 3
Peru, IL, Illinois Valley Rgnl-Walter A. Duncan Field, Takeoff Minimums and Textual Departure Procedure, Orig
Greensburg, IN, Greensburg-Decatur County, RNAV (GPS) RWY 36, Orig
Greensburg, IN, Greensburg-Decatur County, VOR-A, Amdt 2B
Dickinson, ND, Dickinson-Theodore Roosevelt Regional, VOR-A, Amdt 6
Minot, ND, Minot Intl, RNAV (GPS) RWY 13, Amdt 1
Minot, ND, Minot Intl, RNAV (GPS) RWY 31, Amdt 1
Minot, ND, Minot Intl, ILS OR LOC RWY 31, Amdt 10
Minot, ND, Minot Intl, LOC/DME BC RWY 13, Amdt 8
Minot, ND, Minot Intl, Takeoff Minimums and Textual Departure Procedures, Amdt 3

The FAA published Amendments in Docket No. 30471 Amdt No. 3146 to Part 97 of the Federal Aviation Regulations (Vol 70, FR No. 247, page 76395, dated December 27, 2005) Under Section 97.29 effective 16 February 2006, which is hereby corrected to read as follows:

Ballinger, TX, Bruce Field, RNAV (GPS) RWY 35, Orig
Ballinger, TX, Bruce Field, GPS RWY 35, Orig, CANCELLED

The procedures were incorrectly published in TL 06–02 as follows

Ballinger, TX, Ballinger Field, RNAV (GPS) RWY 35, Orig
Ballinger, TX, Ballinger Field, GPS RWY 35, Orig, CANCELLED

[FR Doc. 06–739 Filed 1–25–06; 8:45 am]

BILLING CODE 4910–13–P

## SECURITIES AND EXCHANGE COMMISSION

### 17 CFR Part 240

### Trusts

*CFR Correction*

In Title 17 of the Code of Federal Regulations, Part 240 to end, on page 421, in § 240.16a–8 paragraphs (a)(1)(i), (ii), (A), and (B) are removed.

[FR Doc. 06–55503 Filed 1–25–06; 8:45 am]

BILLING CODE 1505–01–D

## SECURITIES AND EXCHANGE COMMISSION

### 17 CFR Part 240

### Schedule 14A—Information Required in Proxy Statement

*CFR Correction*

In Title 17 of the Code of Federal Regulations, part 240 to end, revised as of April 1, 2005, on page 216, in § 240.14a–101, Item 10, paragraph (c) and Instruction 1 to paragraph (c), is moved to the second column before the undesignated heading *Instructions*.

[FR Doc. 06–55504 Filed 1–25–06; 8:45 am]

BILLING CODE 1505–01–D

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

### 18 CFR Part 1c

**[Docket No. RM06–3–000; Order No. 670]**

### Prohibition of Energy Market Manipulation

Issued January 19, 2006.

**AGENCY:** Federal Energy Regulatory Commission.

**ACTION:** Final rule.

**SUMMARY:** In this Final Rule, pursuant to Title III, Subtitle B, and Title XII, Subtitle G of the Energy Policy Act of 2005, the Federal Energy Regulatory Commission (Commission) is amending its regulations to implement new section 4A of the Natural Gas Act and new section 222 of the Federal Power

Act, prohibiting the employment of manipulative or deceptive devices or contrivances.

**DATES:** Effective Date: January 26, 2006.

**FOR FURTHER INFORMATION CONTACT:** Mark Higgins, Office of Market Oversight and Investigations, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. (202) 502–8273. *Mark.Higgins@ferc.gov.*

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**SUPPLEMENTARY INFORMATION:**

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Before Commissioners: Joseph T. Kelliher, Chairman; Nora Mead Brownell, and Suedeen G. Kelly.

## I. Introduction

1. On October 20, 2005, the Commission issued a Notice of Proposed Rulemaking (NOPR) to prohibit energy market manipulation.[1] Pursuant to section 4A of the Natural Gas Act (NGA)[2] and section 222 of the Federal Power Act (FPA),[3] as added to the statutes by the Energy Policy Act of 2005 (EPAct 2005),[4] the Commission proposed to add a Part 159 under Subchapter E and a Part 47 under Subchapter B to Title 18 of the *Code of Federal Regulations.* Under the proposed regulations, it would be

[1] Prohibition of Energy Market Manipulation, 113 FERC ¶ 61,067 (2005); 70 FR 61930, October 27, 2005.

[2] 15 U.S.C. 717 *et al.* (2000).

[3] 16 U.S.C. 791a *et al.* (2000).

[4] Energy Policy Act of 2005, Pub. L. No. 109–58, 119 Stat. 594 (2005), 315 and 1283, respectively.

unlawful for any entity, directly or indirectly, in connection with the purchase or sale of natural gas or the purchase or sale of transportation services subject to the jurisdiction of the Commission, or in connection with the purchase or sale of electric energy or the purchase or sale of transmission services subject to the jurisdiction of the Commission, (1) to use or employ any device, scheme, or artifice to defraud, (2) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or (3) to engage in any act, practice, or course of business that operates or would operate as a fraud or deceit upon any person.

2. In the NOPR, the Commission stated that sections 315 and 1283 of EPAct 2005 ''apply to the conduct of 'any entity,' not just jurisdictional market-based rate sellers, natural gas pipelines, or holders of blanket certificate authority,'' and ''includes not only regulated utilities but also governmental utilities and other market participants.'' [5] Furthermore, we stated in the NOPR that sections 1c.1(a)(1)–(3) and 1c.2(a)(1)–(3) of the proposed regulations were patterned after the Securities and Exchange Commission's (SEC) Rule 10b–5,[6] and were ''intended to be interpreted consistent with analogous SEC precedent that is appropriate under the circumstances.'' [7] Sections 1c.1(b) and 1c.2(b) of the proposed regulations stated that nothing in these provisions should be construed to create a private right of action. The Commission further noted, however, that sections 1c.1(b) and 1c.2(b) were not intended to take away any other right that may otherwise exist.

3. Thirty parties filed comments and nine parties filed reply comments.[8] In response to the comments, and as discussed more fully below, the Commission, among other things: clarifies the scope of application of the final rule; addresses comments pertaining to disclosure and sections 1c.1(a)(2)–(3) and 1c.2(a)(2)–(3) of the final rule; discusses the elements of a violation of the final rule; notes the relationship of the final rule to the Market Behavior Rules [9]; and deals with a number of implementation issues, such as the applicable statute of limitations, affirmative defenses and safe harbor provisions, and procedural matters.

4. For the most part, the Commission finds it unnecessary to change the wording of the proposed regulatory text, except in one respect: substituting ''entity'' for ''person'' in sections 1c.1(a)(3) and 1c.2(a)(3) of the final rule. However, we do provide certain clarifications requested by several commenters. In addition, we find that some of the recommendations made by commenters are more appropriately addressed in the proceeding initiated in Docket No. RM06–5–000, proposing to repeal the codes of conduct for unbundled sales service and for persons holding blanket marketing certificates, and in Docket No. EL06–16–000, proposing to repeal the Market Behavior Rules, which are currently included in all public utility sellers' market-based rate tariffs and authorizations.[10]

5. Without a rule prohibiting manipulative or deceptive conduct, the language of EPAct 2005 sections 315 and 1283 does not, by itself, make any particular act unlawful. As a result, this final rule serves as the implementing provision designed to prohibit manipulation and fraud in the markets the Commission is charged with regulating. The final rule is not intended to regulate negligent practices or corporate mismanagement, but rather to deter or punish fraud in wholesale energy markets. In addition, to ease references to the final rule, we have determined to place the new regulations in a new Part 1c of the Commission's general regulations, rather than separately in new Parts 159 and 47 as proposed in the NOPR. The regulatory text of proposed sections 159.1 and 47.1 as identified herein will be new sections 1c.1 and 1c.2, respectively.

## II. Background

6. On August 8, 2005, EPAct 2005 became law. Sections 315 and 1283 of EPAct 2005, amending the NGA and the FPA, respectively, are virtually identical, and prohibit the use or employment of manipulative or deceptive devices or contrivances in connection with the purchase or sale of natural gas, electric energy, or transportation or transmission services subject to the jurisdiction of the Commission. These anti-manipulation sections of EPAct 2005 closely track the prohibited conduct language in section 10(b) of the Securities Exchange Act of 1934,[11] and specifically dictate that the terms ''manipulative or deceptive device or contrivance'' are to be used ''as those terms are used in section 10(b) of the Securities Exchange Act of 1934.''

7. The SEC adopted Rule 10b–5,[12] which implemented section 10(b) of the Exchange Act. Since their promulgation, a significant body of legal precedent concerning section 10(b) of the Exchange Act and Rule 10b–5 has developed. Consistent with the mandate that certain aspects of the Commission's new authority be exercised in a manner consistent with section 10(b) of the Exchange Act, consistent with Congress' modeling sections 315 and 1283 of EPAct 2005 on section 10(b) of the Exchange Act, and as proposed in the NOPR, the Commission has modeled the final rule on Rule 10b–5. This approach will benefit entities subject to the new rule because there is a substantial body of precedent applying the comparable language of Rule 10b–5. In the course of responding to various comments, we will discuss the appropriate application of analogous securities law precedent that will inform the interpretation of the final rule in the context of the NGA and FPA.

## III. Discussion

8. The 30 initial comments and nine reply comments on the NOPR are from a diverse group of industry stakeholders. Overwhelmingly, commenters are supportive of our efforts to implement well-developed, clear and fair rules aimed at eliminating the potential for fraud in wholesale energy transactions. The comments identify a number of issues: (1) The scope of application of the Final Rule; (2) the usefulness of securities law precedents to the energy industry; (3) the disclosure implications of the Final Rule; (4) the elements that comprise a violation of the Final Rule; (5) how the Final Rule will interact with the Market Behavior Rules; and (6) a variety of procedural matters, including the appropriate

[5] NOPR at 70 FR 61931.

[6] 17 CFR 240.10b–5 (2005).

[7] NOPR at 70 FR 61931. As explained in P 5, supra, the regulations proposed to be placed in new sections 159.1 and 47.1 will be new sections 1c.1 and 1c.2, respectively.

[8] Entities filing intervening and reply comments are listed in the Appendix to this final rule. The abbreviations for such commenters are noted in the Appendix. The Commission has accepted and considered all comments filed, including late-filed comments.

[9] *Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations*, 105 FERC ¶ 61,218 (2003), *reh'g denied*, 107 FERC ¶ 61,175 (2004); Order No. 644, *Amendment to Blanket Sales Certificates*, 68 FR 66323 (2003), FERC Stats. & Regs. ¶ 31,153 (2003), *reh'g denied*, 107 FERC ¶ 61,174 (2004). The Market Behavior Rules are currently on appeal. *Cinergy Marketing & Trading, L.P.* v. *FERC*, Nos. 04–1168 *et al.* (DC Cir., appeal filed April 28, 2004).

[10] Amendments to Codes of Conduct for Unbundled Sales Service and for Persons Holding Blanket Marketing Certificates, 70 FR 72090 (2005), 113 FERC ¶ 61,189 (2005); Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations, 70 FR 71484 (2005), 113 FERC ¶ 61,190 (2005).

[11] Securities Exchange Act of 1934, 15 U.S.C. 78j(b) (2000) (Exchange Act).

[12] 17 CFR 240.10b–5 (2005).

statute of limitations to apply to the Final Rule. These issues and others that were raised in comments are addressed in the sections that follow.

*A. Scope of Application of Regulations*

1. Comments

9. Several commenters express views on the appropriate scope of the proposed anti-manipulation regulations.[13] Commenters ask the Commission to clarify the meaning of ''any entity'' and ''subject to the jurisdiction of the Commission'' as these statutory terms apply to the proposed regulations. For example, the Midwest ISO supports broad application of the proposed regulations to any entity as opposed to ''limiting the application of the regulations to FERC jurisdictional parties.'' [14] Likewise, NASUCA reads the proposed regulations as applying to all entities, ''not just jurisdictional market-based rate sellers, natural gas pipelines, or holders of blanket certificate authority.'' [15] AGA asks the Commission to clarify that ''any entity'' means that the proposed regulations extend beyond Order No. 644 regulation of jurisdictional market-based rate sellers, natural gas pipelines, or holders of blanket certificate authority. This is necessary, AGA asserts, to ensure the rules will have the ''intended effective impact on the market place for natural gas sales.'' [16]

10. Two commenters specifically address whether the proposed regulations apply to ''first sales'' [17] of natural gas. APGA, noting that first sales represent a substantial part of the wholesale natural gas market, argues that the phrase ''subject to the jurisdiction of the Commission'' in NGA section 4A must be read to apply only to ''the purchase or sale of transportation services'' and not to the preceding clause ''purchase or sale of natural gas.'' [18] SUEZ, however, argues that ''subject to the jurisdiction of the Commission'' applies to purchases and sales as well as to transportation services. SUEZ maintains that ''any entity'' does not include entities engaged in non-jurisdictional transactions such as first sales, sales of LNG, or retail sales, but is intended only to bring certain governmental entities otherwise excluded from FPA jurisdiction under the umbrella of the proposed regulations.[19]

11. APPA and NARUC also urge the Commission to construe the phrase ''subject to the Commission's jurisdiction'' to modify both the purchase or sale of electric energy and the purchase or sale of transmission services. By doing so, APPA and NARUC argue, the Commission will make clear the regulation does not apply to retail sales or purchases and thus will avoid overlap with state and local jurisdiction.[20] In reply comments, Cinergy argues that regardless of the parsing of the statutory language, the manipulation authority falls within the existing scope of the FPA and NGA, and that nothing in the scope of these statutes suggests that retail sales are in any way subject to the Commission's authority.[21] Likewise, EEI argues that the FPA is limited to wholesale markets, and that matters subject to state regulation are excluded from the reach of the Commission.[22]

12. NGSA asserts that EPAct 2005 does not open the door to regulation of non-jurisdictional sales even if they are subject to the anti-manipulation rules. NGSA acknowledges that the statutory provisions expand the Commission's authority to prevent market manipulation, but cautions that nothing in the statute grants the Commission any rate or certificate jurisdiction over deregulated first sales of natural gas.[23]

13. Other commenters address the meaning of ''any entity'' in the context of FPA sections 201(f) and 211A. PG&E argues that it is crucial that the Commission's authority to prohibit manipulation extend to all entities involved in the market. Noting the specific reference to entities described in FPA section 201(f), PG&E states that the proposed regulations should apply to all municipalities and other governmental agencies.[24] EEI also states that the proposed regulations must reach entities described in FPA section 201(f), including unregulated transmitting utilities under FPA section 211A. This is so, EEI argues, because the authority to require comparable open access transmission under FPA section 211A makes all transmission service provided by FPA section 201(f) entities subject to the jurisdiction of the Commission and thus subject to the proposed anti-manipulation rules.[25] APPA responds that under section 211A(c) certain entities are not subject to the transmission service requirements (those selling less than 4,000,000 MWhs per year, or that do not own facilities necessary to operate an interconnected transmission system, or that meet other criteria that the Commission may adopt in the future). These entities, APPA argues, are not subject to the jurisdiction of the Commission and thus not subject to the proposed regulations.[26] NRECA goes further, asserting that while FPA section 201(f) governmental entities are ''potentially'' subject to the proposed anti-manipulation regulations, the regulations can only apply to transactions that are otherwise subject to the Commission's jurisdiction. Thus, NRECA argues that neither party to a retail sale, to transmission service in intrastate commerce, or to a sale of electricity or transmission service by a FPA section 201(f) entity are subject to the proposed regulations.[27]

14. AOPL seeks clarification that ''subject to the jurisdiction of the Commission'' does not mean the Commission would subject oil pipelines to claims of market manipulation in connection with transportation and transmission services subject to the Commission's jurisdiction under the Interstate Commerce Act (ICA).[28]

15. Finally, Cinergy asks that the text of the proposed regulations be modified to make explicit that the regulations pertain only to market manipulation, noting that SEC Rule 10b–5 applies to a wide range of activities beyond market manipulation.[29]

2. Commission Determination

16. As an initial matter, this Final Rule does not, and is not intended to, expand the types of transactions subject to the Commission's jurisdiction under the FPA, NGA, NGPA, or ICA. As now explained, however, the new regulations do apply to ''any entity'' as that is the scope of the final rule as directed by sections 315 and 1283 of EPAct 2005. If

[13] *See, e.g.,* AGA at 4–5; APGA at 10; APPA at 3–4; AOPL at 2; BP at 1–2; Cinergy at 8; EEI at 25–26; Indicated Market Participants at 8; Midwest ISO at 4; NARUC Reply at 3–5; SCANA at 3; SUEZ at 6–11.

[14] Midwest ISO at 4.

[15] NASUCA at 3.

[16] AGA at 4.

[17] ''First sales'' are certain wholesale sales of natural gas removed from the Commission's jurisdiction by the Natural Gas Policy Act of 1978 (NGPA) and the Wellhead Decontrol Act of 1989. Accordingly, the only sales of natural gas that the Commission currently has jurisdiction to regulate are sales for resale of domestic gas by pipelines, local distribution companies (LDCs), or their affiliates so long as they do not produce the gas that they sell, and sales for resale of natural gas previously purchased and sold by an interstate pipeline, LDC or retail customer. *See Dan Diego Gas and Electric Company,* 101 FERC ¶ 61,161 at P 10 (2002); *Reporting of Natural Gas Sales to the California Market,* 96 FERC & 61,119 at 61,463, *reh'g denied,* 97 FERC ¶ 61,029 (2001).

[18] APGA at 3–10.

[19] SUEZ at 10, referring to FPA section 201(f) entities.

[20] APPA at 4; NARUC Reply at 3.5.

[21] Cinergy Reply at 2–4.

[22] EEI Reply at 6.

[23] NGSA at 3.

[24] PG&E at 6.

[25] EEI at 25.

[26] APPA Reply at 5–6.

[27] NRECA Reply at 2–5.

[28] AOPL at 1–3.

[29] Cinergy at 8.

any entity engages in manipulation and the conduct is found to be ''in connection with'' a jurisdictional transaction, the entity is subject to the Commission's anti-manipulation authority. Absent such nexus to a jurisdictional transaction, however, fraud and manipulation in a non-jurisdictional transaction (such as a first or retail sale) is not subject to the new regulations.

17. NGA section 4A and FPA section 222 make it unlawful for ''any entity'' to use a manipulative or deceptive device or contrivance ''in connection with'' the purchase or sale of natural gas or electric energy or the purchase or sale of transportation or transmission services ''subject to the jurisdiction of the Commission.'' [30] The answer to the scope of application of the final rule lies in a reasonable reading of these terms in relation to each other.

18. ''Any entity'' is a deliberately inclusive term. Congress could have used the existing defined terms in the NGA and FPA of ''person,'' ''natural-gas company,'' or ''electric utility,'' but instead chose to use a broader term without providing a specific definition.[31] Thus, the Commission interprets ''any entity'' to include any person or form of organization, regardless of its legal status, function or activities.[32]

19. The second aspect of the analysis focuses on the transaction involved. A transaction under NGA section 4A is ''the purchase or sale of natural gas or the purchase or sale of transportation services subject to the jurisdiction of the Commission.'' A transaction under FPA section 222 is ''the purchase or sale of electric energy or the purchase or sale of transmission services subject to the jurisdiction of the Commission.'' The critical issue is whether the limiting phrase of ''subject to the jurisdiction of the Commission'' applies to both preceding phrases, that is, (1) the purchase or sale of the energy commodity and (2) transportation services or transmission services, or just to the transportation or transmission services. APGA argues that the ''rule of the last antecedent'' means that it should only modify the last phrase, that is, transportation services or transmission services. But in the absence of definitive punctuation or other clearer expression of intent to limit the jurisdiction requirement only to transportation or transmission, the Commission must look for the meaning which is the most reasonable under the circumstances.[33]

20. The Commission concludes that the phrase ''subject to the jurisdiction of the Commission'' should be read as modifying both preceding phrases, that is, ''the purchase or sale'' as well as ''transportation services'' (NGA) and ''transmission services'' (FPA). Had Congress intended to expand the Commission's jurisdiction so significantly as to give it anti-manipulation authority over such transactions as first sales of imported natural gas, intrastate sales of electric energy, retail sales of electric energy or energy sales by governmental entities, we believe it would have done so explicitly.[34] Further, in light of the close link between transportation or transmission services and natural gas and electric commodity sales, we do not believe that Congress would have expanded the Commission's authority to cover all natural gas and electric commodity sales but not all gas transportation and electric transmission. Accordingly, we conclude that the most reasonable interpretation is that Congress did not expand the Commission's traditional NGA and FPA subject matter jurisdiction in sections 315 or 1283 of EPAct, but rather gave the Commission broad jurisdiction over the entities that engage in certain conduct affecting our subject matter jurisdiction.

21. Third, the phrase ''in connection with'' must be given meaning. APGA says that interpreting ''subject to the jurisdiction of the Commission'' as applying to sales effectively would exclude producers and marketers from the reach of the final rule as these are the dominant sellers of natural gas in wholesale markets. APGA argues this interpretation implies that enactment of NGA section 4A serves no purpose, as it does not increase the Commission's reach beyond the rules already promulgated by Order No. 644.[35] This is not the case, however. As discussed below, any entity may be subject to the final rule if its fraudulent or manipulative conduct is ''in connection with'' a purchase or sale of natural gas, electric energy, transportation service, or transmission service that is subject to the Commission's jurisdiction.[36] Thus,

[30] The text of EPAct 2005 section 315, adding section 4A to the NGA, is:

It shall be unlawful for any entity, directly or indirectly, to use or employ, in connection with the purchase or sale of natural gas or the purchase or sale of transportation services subject to the jurisdiction of the Commission, any manipulative or deceptive device or contrivance (as those terms are used in section 10(b) of the Securities Exchange Act of 1934 (15 U.S.C. 78j(b))) in contravention of such rules and regulations as the Commission may prescribe as necessary in the public interest or for the protection of natural gas ratepayers. Nothing in this section shall be construed to create a private right of action.

The corresponding text of EPAct 2005 section 1283, adding section 222 to the FPA, is:

(a) **In general**.—It shall be unlawful for any entity (including an entity described in section 201(f)), directly or indirectly, to use or employ, in connection with the purchase or sale of electric energy or the purchase or sale of transmission services subject to the jurisdiction of the Commission, any manipulative or deceptive device or contrivance (as those terms are used in section 10(b) of the Securities Exchange Act of 1934 (15 U.S.C. 78j(b))), in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of electric ratepayers.

(b) **No Private Right of Action**.—Nothing in this section shall be construed to create a private right of action.

[31] *See* NGA sections 2(1) and 2(6); FPA sections 3(4) and 3(22). Congress did note that entities described in FPA section 201(f) are included in the meaning of entity. *See* FPA section 222(a).

[32] Because many entities that are engaged in wholesale natural gas or electricity transactions or in interstate transportation or transmission services, engage in both jurisdictional and non-jurisdictional transactions, it is not enough to say, as SUEZ suggests, that entities engaging in non-jurisdictional transactions are not covered.

[33] APGA at 4 (*citing 2a N. Singer, Sutherland on Statutory Construction* § 47:33 at 369 (6th rev. ed. 2000) and *Barnhart* v. *Thomas,* 540 U.S. 20, 26 (1993)). The general rule is that a qualifying phrase will normally apply to the provision or clause immediately preceding it. However, ''where the sense of the entire act requires that a qualifying word or phrase apply to several preceding * * * sections, the word or phrase will not be restricted to its immediate antecedent.'' *Sutherland* § 47:33 at 372. The case referred to by APGA also notes that the rule is ''not an absolute'' and ''can assuredly be overcome by other indicia of meaning.'' *Barnhart* v. *Thomas,* 540 U.S. at 26.

[34] Transactions not subject to the Commission's jurisdiction include first sales, sales of imported natural gas, sales of imported LNG, sales and transportation by NGA section 1(b)–(d) entities (*i.e.*, activities including production and gathering, local distribution, ''Hinshaw'' pipelines, and vehicular natural gas), or by NGA section 7(f) companies, retail sales of electric energy, sales of electric energy in intrastate commerce, sales of electric energy by governmental entities and certain electric power cooperatives, and certain interstate transmission by governmental entities.

[35] APGA at 6–8. APGA also points to EPAct 2005 section 318, which adds a new section (d) to NGA section 20. Section 20(d) authorizes the Commission to seek a court order barring an individual found to have engaged in manipulation from future energy transactions; there is a similar new provision in FPA section 314(d). Here, APGA argues, Congress used subparts to separate sales from transportation service, and applied the ''subject to the jurisdiction of the Commission'' only to the latter. This is not dispositive. First, this is a separate section of the statute. Second, the use of subparts does not conclusively mean that ''subject to the jurisdiction of the Commission'' cannot also modify the first subpart. Third, the reading APGA urges still presents the troublesome prospect that parties could assert that the anti-manipulation authority now applies to retail sales or other transactions otherwise expressly excluded from the Commission's jurisdiction.

[36] AEP urges that the final rule identify the modalities through which an entity is prohibited from manipulating a market, noting that SEC Rule 10b–5 specifies that fraud or manipulation must involve the ''use of any means or instrumentality of interstate commerce or of the mails, of any facility of any national securities exchange.'' AEP at 2. This is not necessary, as manipulation must

the third aspect of the analysis is to consider whether the fraud is ''in connection with'' a jurisdictional transaction.

22. Section 10(b)'s ''in connection with'' requirement has been construed broadly by the Supreme Court to encompass many circumstances where securities transactions ''coincide'' with the overall scheme to defraud.[37] However, the Supreme Court was careful to state that section 10(b) ''must not be construed so broadly as to convert every common law fraud that happens to involve securities into a violation'' of section 10(b) and Rule 10b–5.[38] Guided by this precedent, the Commission views the ''in connection with'' element in the energy context as encompassing situations in which there is a nexus between the fraudulent conduct of an entity and a jurisdictional transaction. We note that, unlike the SEC, which has broad jurisdiction over securities transactions, our jurisdiction is limited to certain wholesale transactions that remain within the ambit of the NGA, NGPA, and FPA. At the same time, energy markets are made up of both jurisdictional and non-jurisdictional transactions. We do not intend to construe the Final Rule so broadly as to convert every common-law fraud that happens to touch a jurisdictional transaction into a violation of the final rule. Rather, in committing fraud, the entity must have intended to affect, or have acted recklessly to affect, a jurisdictional transaction.[39] For example, any entity engaging in a non-jurisdictional transaction through a Commission-regulated RTO/ISO market, that acts with intent or with recklessness to affect the single price auction clearing price (which sets the price of both non-jurisdictional and jurisdictional transactions), would be engaging in fraudulent conduct in connection with a jurisdictional transaction and, therefore, would be in violation of the final rule.

23. Turning to the comments that address the applicability of the proposed regulations to FPA sections 201(f) and 211A,[40] here too the focus must be on the transaction and the entity's conduct to determine whether a violation of the final rule occurred. Again, the Commission emphasizes that if *any* entity engages in fraudulent conduct and that conduct is in connection with a jurisdictional transaction, then the final rule is applicable to that entity. It is, therefore, not necessary for the Commission to determine in this context how sections 201(f) and 211A are to be applied generally.[41]

24. With respect to the request by AOPL for clarification on whether ''subject to the jurisdiction of the Commission'' would cause oil pipelines to be subject to claims of market manipulation in connection with transportation services subject to the Commission's jurisdiction under the ICA, the Commission points out that EPAct 2005 did not amend the ICA to include anti-manipulation provisions, and therefore we do not read the authority granted under the NGA and FPA to proscribe and penalize fraud or deceit as applying to oil pipeline transportation under the ICA.

25. As to Cinergy's request that the text of the final rule be modified to make explicit that the regulations apply only to market manipulation, we decline to do so. Cinergy's request would unduly narrow the broad authority Congress granted in EPAct 2005. The language of EPAct 2005 sections 315 and 1283 is modeled after section 10(b) of the Exchange Act, which has been interpreted as a broad anti-fraud ''catch-all clause.''[42] SEC Rule 10b–5, on which the final rule is patterned, does not expressly limit itself to manipulation, but uses terms such as ''device, scheme, or artifice to defraud'' and ''fraud or deceit.''[43] We will retain similar language in our final rule, which will permit the Commission to police all forms of fraud and manipulation that affect natural gas and electric energy transactions and activities the Commission is charged with protecting.

*B. General Applicability of Securities Law Concepts*

1. Comments

26. Commenters are divided as to whether we should model the proposed anti-manipulation regulations after SEC Rule 10b–5. Ameren, Cinergy, EPSA, Indicated Market Participants, EEI, LG&E, NGSA, PNM and Xcel argue that adoption of a rule patterned on SEC Rule 10b–5 is problematic because the securities model is one of disclosure, designed in large part to protect novice investors by eliminating disparities in access to information, whereas the purpose of the FPA and NGA is to ensure ''just and reasonable'' rates in wholesale energy markets. Many of the commenters also argue that the participants in energy markets are largely sophisticated, and unlike less-sophisticated participants in the securities markets, do not need the protections of a disclosure regime.[44]

27. AGA comments that it is unclear how the SEC's model of disclosure will apply to natural gas market transactions, and ISDA and PNM argue that the Commission should refrain from a wholesale adoption of SEC case law as such an action would create uncertainty as to the duties, standards and obligations owed by market participants because of the different regulatory frameworks for energy and securities markets.[45] EPSA, PG&E and SUEZ call for further study and tailoring of Rule 10b–5 to the energy industry because of the differences between the operations of the securities markets and the energy markets.[46] FirstEnergy argues that the

be in connection with jurisdictional transactions which, by definitions in NGA section 1(b) and FPA section 201(b), are in interstate commerce.

[37] *SEC* v. *Zandford*, 535 U.S. 813, 825 (2002) (''[T]he SEC complaint describes a fraudulent scheme in which the securities transaction and breaches of fiduciary duty coincide. Those breaches were therefore 'in connection with' securities sales within the meaning of [section] 10(b).''). *See also Superintendent of Insurance* v. *Bankers Life & Casualty Co.*, 404 U.S. 6, 12–13 (1971) (previously the Supreme Court had stated that the requirement was met when there was an ''injury as a result of deceptive practices touching [the] sale of securities''); *Head* v. *Head*, 759 F.2d 1172, 1175 (4th Cir. 1985) (the nexus must be more than a *de minimis* ''touch,'' yet is applied flexibly where there is fraud affecting securities transactions).

[38] *SEC* v. *Zandford*, 535 U.S. at 820.

[39] See PP 52–53 *infra* for a discussion of the intent required for a violation of the final rule.

[40] *See, e.g.*, APPA Reply at 5–6; EEI at 25; PG&E at 6; NRECA Reply at 2–5.

[41] Section 211A permits the Commission to issue regulations to implement the provisions of FPA section 211A. At this time, the Commission has not proposed such regulations, but has included this issue in the Notice of Inquiry issued in *Preventing Undue Discrimination and Preference in Transmission Service*, 70 FR 55796 (2005), FERC Stats. & Regs. ¶ 35,553 (2005). Full delineation of the scope of FPA section 211A should be developed through that proceeding, not in the context of the anti-manipulation regulations.

[42] *See Aaron* v. *SEC*, 446 U.S. 680, 690 (1980); *see also Schreiber* v. *Burlington Northern, Inc.*, 472 U.S. 1, 6–7 (1985) (describing section 10(b) as a ''general prohibition of practices * * * artificially affecting market activity in order to mislead investors * * *.''); *Affiliated Ute Citizens of Utah* v. *United States*, 406 U.S. 128, 151–53 (1972) (noting that the repeated use of the word ''any'' in section 10(b) and SEC Rule 10b–5 denotes a congressional intent to have the provisions apply to a wide range of practices).

[43] 17 CFR 240.10b–5 (2005). SEC Rule 10b–5 is titled ''Employment of manipulative and deceptive devices.''

[44] Ameren at 3–4; Cinergy at 6–7; EPSA at 5–8; Indicated Market Participants at 10–13; EEI at 6–8; LG&E at 3–7; NGSA at 4–5; PNM Reply at 4–5; Xcel at 3–6.

[45] AGA at 4; ISDA at 3–5; PNM Reply at 4–6. But not everyone dismisses the importance of the regulations to sophisticated parties. APPA shares SCE's observation that the degree of ''protection'' implied by relative levels of counterparty sophistication must not be overstated, noting that even sophisticated market participants may need protection against market manipulations. APPA Reply at 3–4; SCE at 3–4.

[46] EPSA at 11; PG&E at 12; SUEZ at 14.

rules proposed in the NOPR are vague and overly broad.[47]

28. On the other hand, APGA, NARUC, NASCUA, NJBPU, and the States support the Commission's decision to model the proposed regulations on SEC Rule 10b–5.[48] APPA, NARUC and NJBPU argue that Rule 10b–5 case law will provide useful guidance as the Commission develops its own body of precedent to follow.[49] TDUS argues that the Commission's proposed rule prohibiting market manipulation plainly implements, in a straightforward manner, the express intent of EPAct 2005.[50] TDUS finds the arguments of Ameren and Xcel unpersuasive because parties as sophisticated as they purport to be ought to have no problem complying with a straightforward prohibition against making fraudulent representations in their transactions.[51] TDUS also argues that the level of sophistication of the parties to a bilateral negotiation is irrelevant because the Commission's anti-manipulation rules are not to protect the contracting parties from each other, but to protect the consumers who rely on the market for their energy supplies.[52]

29. APPA and INGAA support the Commission's reliance on section 10(b) of the Exchange Act and SEC Rule 10b–5, and the case law interpreting the statute and rule, as providing guidance to the Commission in administering its new EPAct 2005 anti-manipulation authority.[53] APPA and INGAA also recommend that the Commission take into account pertinent differences between the regulatory regimes of the Exchange Act and the NGA and NGPA, and depart from securities law precedent when industry structure and common sense so dictate.[54]

2. Commission Determination

30. As a general matter, the Commission does not believe that modeling the Final Rule on SEC Rule 10b–5 is problematic or will create uncertainty. This is not to say that commenters did not raise valid concerns about how securities precedent will be applied in the energy industry context. We intend to adapt analogous securities precedents as appropriate to specific facts, circumstances, and situations that arise in the energy industry. This is consistent with Congress' modeling of EPAct 2005 sections 315 and 1283 on section 10(b) of the Exchange Act and explicit references to section 10(b) in EPAct 2005 sections 315 and 1283, and will provide a level of substantial certainty with respect to how the regulations will operate that the Commission is not typically able to provide where a preexisting body of law and precedent is not readily available. The Commission likewise finds that modeling the final rule on SEC Rule 10b–5 provides clarity to affected parties similar to the clarity provided by Congress. Thus, the Commission rejects FirstEnergy's argument that the proposed regulations are vague and overly broad. As previously stated, the Final Rule is modeled on SEC Rule 10b–5, which is not vague or overly broad.[55]

31. The Commission rejects EPSA's, PG&E's and SUEZ's calls for further study and tailoring of Rule 10b–5 to the industry the Commission regulates. Further study and tailoring would not improve the final rule or industry understanding of its scope and applicability. While the Commission generally agrees with commenters that a wholesale overlay of the securities laws onto energy markets is overly simplistic, we also believe it would be illogical to simply ignore decades of useful guidance that securities law precedent can offer, especially considering that Congress deliberately modeled EPAct 2005 sections 315 and 1283 on section 10(b) of the Exchange Act. Therefore, the Commission intends to recognize, on a case-by-case basis, that the roles of the Commission and the SEC are not identical in determining whether it is appropriate to adopt securities precedents to specific energy industry facts, circumstances, or situations.[56]

32. The Commission recognizes that the SEC does not have a duty to assure that the price of a security is just and reasonable, and that our duty is not to protect purchasers through a regime of disclosure. Despite these differences in mission, however, wholesale natural gas and power markets, like securities markets, are susceptible to fraud and market manipulation, regardless of the level of sophistication of the market participants. Therefore, it is appropriate to model the final rule on SEC Rule 10b–5 in an effort to prevent (and where appropriate remedy) fraud and manipulation affecting the markets the Commission is entrusted to protect, while providing a level of certainty to market participants that is beyond that which the Commission would be otherwise required to provide. However, as discussed below, we provide several of the clarifications requested by the commenters to address the differences between the SEC's regulation of securities markets and our regulation of markets for natural gas and electricity.

*C. Disclosure*

33. Several commenters expressed concern over what they consider to be disclosure implications of the proposed regulations.[57] In particular, commenters focused on two disclosure-related areas: Whether the proposed anti-manipulation regulations create a new duty of disclosure; and whether sections 1c.1(a)(2) and 1c.2(a)(2), and particularly the references to ''omissions of material fact,'' impose an undue burden on bilateral, arm's-length negotiations.

1. Duty of Disclosure

a. Comments

34. Commenters' view is that the proposed regulations should not create an affirmative duty to disclose strategic or proprietary information not otherwise required under the FPA, NGA, or Commission orders, rules, or regulations.[58] Ameren argues that there is no evidence in EPAct 2005 that Congress intended to impose a general obligation of disclosure in the energy markets.[59] Ameren and LG&E provide examples of a company purchasing power as a result of a forced outage, and question whether, under the regulations, a party would have to disclose information detrimental to its bargaining position.[60] AEP expresses similar concern that the regulations should not require companies to disclose trade secrets, sensitive information, or forward looking information developed by the company.[61] AEP argues that the proposed rules be clarified to

[47] FirstEnergy at 4–6.

[48] APGA at 4–5; NARUC at 4–5; NASCUA at 2–3; NJBPU at 2–3; States at 2. APGA, NARUC, and the States argue that modeling the final rule on SEC Rule 10b–5 is consistent with the express congressional dictates of EPAct 2005.

[49] APPA Reply at 1–2; NARUC at 5; NJPBU at 3.

[50] TDUS at 2–3.

[51] *Id.* at 3.

[52] *Id.* at 3–4.

[53] APPA Reply at 1–3; INGAA at 7.

[54] APPA Reply at 1; INGAA at 5.

[55] *See, e.g., United States* v. *Persky*, 520 F.2d 283 (2d Cir. 1975); *accord Todd & Co.* v. *SEC*, 557 F.2d 1008, 1013 (3d Cir. 1977).

[56] For example, as explained in paragraph 36 *supra*, the Commission is not adopting the disclosure regime of the SEC, and as explained in paragraphs 52–53 *infra*, the element of scienter will apply in the Final Rule just as it applies to SEC Rule 10b–5.

[57] *See, e.g.*, Ameren at 4–6; AGA at 4; AEP at 2; Cinergy at 8–9; Indicated Market Participants at 10–13, 23–28; EEI at 14–16; EPSA at 5–11; FirstEnergy at 10–13; ISDA at 3–8; INGAA at 5–7, 10; LG&E at 9; NGSA at 2, 5–6; PG&E at 7; Progress at 2–4; SCE at 3–4; SUEZ at 12–14; Xcel at 2, 4–6.

[58] *See, e.g.*, Ameren at 4; EEI at 16; Indicated Market Participants at 27.

[59] Ameren at 4.

[60] *Id.* at 5; LG&E at 8.

[61] AEP at 2.

encompass only those instances where there is an affirmative duty to disclose, such as a Commission-imposed disclosure or reporting requirement.[62] EPSA and Progress argue that the regulations should be clarified so as not to result in broad disclosure obligations that would be incompatible with the arm's-length transactions that the Commission oversees.[63] Similarly, INGAA and EEI argue that the regulations should be revised to delete or limit any affirmative obligation to disclose information to a counterparty, or to educate another party in bilateral negotiations.[64] In support of its argument, INGAA cites SEC Regulation D, which exempts certain securities offerings from the registration and disclosure requirements of the securities laws because the investors in such offerings are sophisticated.[65] NGSA also states that the Commission should clarify that it does not intend to incorporate by reference the disclosure obligations applicable to issuers of securities.[66]

b. Commission Determination

35. The Commission declines to modify the proposed regulations in this final rule. To avoid uncertainty, however, we clarify that the final rule creates no new affirmative duty of disclosure. Commenters are mistaken to the extent they believe section 10(b) of the Exchange Act or SEC Rule 10b–5 imposes an independent affirmative obligation to disclose. Well-settled case law interpreting section 10(b) and Rule 10b–5 makes clear that section 10(b) and Rule 10b–5 do not, by themselves, create an affirmative duty to disclose absent a relationship of trust and confidence (*i.e.*, a fiduciary relationship) or some other duty imposed elsewhere in the securities laws.[67] Therefore, in the arm's-length, bilateral negotiations that are typical in wholesale energy markets, absent some tariff requirement or Commission directive mandating disclosure, the final rule imposes no new affirmative duty of disclosure.

36. As there is no new affirmative duty of disclosure under the final rule, commenters' concern over the disclosure implications of the proposed regulations is misplaced. The final rule operates within the regulatory framework of the FPA and NGA; the Commission is not adopting the disclosure provisions of the securities laws[68] or the purpose of the securities laws, which is ''to protect investors by promoting full disclosure of information thought necessary to informed investment decisions.''[69] Rather, the final rule, like section 10(b) of the Exchange Act and SEC Rule 10b–5, is an anti-fraud provision, not a disclosure provision.[70] Nothing in the final rule requires disclosure of sensitive information that would only function to weaken an entity's bargaining position in arm's-length, bilateral negotiations. Absent a tariff requirement or Commission directive mandating disclosure, there is no violation of the final rule simply because an entity chooses not to disclose all non-public information in its possession.[71]

37. Similarly, the Commission clarifies that nothing in the final rule changes the Commission's precedent on contract law. Private contracts are fundamental to the functioning of the energy industry, and the Commission expects parties to continue to rely on the contracts they enter into. The Commission expects parties to continue to resolve most contract disputes, including those based on claims of fraud in the inducement, without the involvement of the Commission, relying on State and Federal courts to apply contract law as appropriate.

2. Sections 1c.1(a)(2) and 1c.2(a)(2) and Omissions of Material Fact

a. Comments

38. Commenters are divided as to whether the Commission should modify or delete sections 1c.1(a)(2) and 1c.2(a)(2) of the final rule, particularly with regard to sections 1c.1(a)(2) and 1c.2(a)(2)'s references to omissions.[72] Ameren, Cinergy, and Indicated Market Participants argue that sections 1c.1(a)(2) and 1c.2(a)(2) should not be adopted because the definition of market manipulation should not include any general duty to disclose.[73] More specifically, EEI and EPSA argue that reference in sections 1c.1(a)(2) and 1c.2(a)(2) to ''omissions of material fact'' should be deleted as it would require market participants to disclose sensitive information that would not otherwise be exchanged among wholesale energy market participants engaged in bilateral negotiations, which could result in harm to the market participant's bargaining position.[74] EEI also argues that sections 1c.1(a)(2) and 1c.2(a)(2) should be modified to incorporate a knowledge and intent standard.[75]

39. FirstEnergy argues that sections 1c.1(a)(2) and 1c.2(a)(2) are overly broad, and unnecessary to protect electric ratepayers because participants in wholesale power sales transactions are sophisticated and have the ability to evaluate the veracity of any information that may be conveyed by other participants.[76] Indicated Market Participants argue that since the disclosure concepts of the securities laws are not generally applicable to electric and gas markets, sections 1c.1(a)(2) and 1c.2(a)(2) should be deleted.[77] Likewise, Xcel argues that there is no need to require SEC-like disclosure in wholesale energy markets, and it argues that the Commission should modify or delete sections 1c.1(a)(2) and 1c.2(a)(2).[78] While not asking for a change in the regulations, INGAA requests that we clarify that ''mere puffery'' is not actionable under the regulations.[79]

40. On the other hand, APGA, PNM and TDUS support the inclusion of

[62] *Id.* at 3.

[63] EPSA at 1; Progress at 2–4.

[64] INGAA at 7; EEI at 16. *See also* ISDA Supplemental Reply at 2.

[65] INGAA at 5.

[66] NGSA at 2, 5–6.

[67] *See Basic Inc.* v. *Levinson*, 485 U.S. 224, 239, n.17 (1988) (''Silence, absent a duty to disclose, is not misleading under Rule 10b–5.'') *citing Chiarella* v. *United States*, 445 U.S. 222, 234 (1980) (''* * * a duty to disclose under [section] 10(b) does not arise from the mere possession of nonpublic market information. [T]he duty to disclose arises when [there exists] a relationship of trust and confidence * * * .''); *see also Gross* v. *Summa Four*, 93 F.3d 987, 992 (1st Cir. 1996) (citing *Chiarella*, the court holds that ''[b]y itself * * * Rule 10b–5[] does not create an affirmative duty of disclosure. Indeed, a corporation does not commit securities fraud merely by failing to disclose all nonpublic material information in its possession.''); *accord Castellano* v. *Young & Rubicam, Inc.*, 257 F.3d 171, 179 (2d Cir. 2002); *Ackerman* v. *Schwartz*, 947 F.2d 841, 848 (7th Cir. 1991).

[68] *See, e.g.*, 15 U.S.C. 78m (2000).

[69] *SEC* v. *Ralston Purina Co.*, 346 U.S. 119, 123–5 (1953).

[70] *See, e.g., International Brotherhood of Teamsters* v. *Daniel*, 439 U.S. 551, 565 n.18 (1979) (distinguishing between the disclosure and antifraud provisions of the securities laws, the court states that a waiver from disclosure requirements because an investor is sophisticated does ''not provide shelter from the criminal anti-fraud protection of Rule 10b–5 or other civil anti-fraud provisions); *Sonnenfeld* v. *City of Denver*, 100 F.3d 744, 746 n.1 (10th Cir. 1996) (noting that securities exempted from regulatory burdens are still subject to civil fraud causes of action).

[71] *See supra* note 67.

[72] Sections 1c.1(a)(2) and 1c.2(a)(2) read: ''to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading * * * .''

[73] Ameren at 6; Cinergy at 8; Indicated Market Participants at 28.

[74] EEI at 16; EPSA at 8.

[75] EEI at 16.

[76] FirstEnergy at 11.

[77] Indicated Market Participants at 27–28.

[78] Xcel at 2, 4–6.

[79] INGAA at 9.

sections 1c.1(a)(2) and 1c.2(a)(2) without modification.[80] APGA urges the Commission to reject calls for the deletion or modification of sections 1c.1(a)(2) and 1c.2(a)(2) because the vast bulk of natural gas sales are not negotiated by sophisticated market participants, but are determined by price indices that rely on full and accurate reporting.[81] PNM supports the inclusion of sections 1c.1(a)(2) and 1c.2(a)(2) noting that there may be rare instances where an omission of material fact amounts to market manipulation, but also notes that the Commission should make clear that the sections create no new duty of disclosure.[82]

b. Commission Determination

41. The Commission rejects proposals to modify or delete sections 1c.1(a)(2) and 1c.2(a)(2) of the regulations. As just discussed, the final rule does not create an affirmative duty to disclose beyond any existing requirements. It is important to note, however, that where an entity voluntarily provides information or where the entity is required by a tariff or a Commission statute, order, rule or regulation to provide information, and the entity then misrepresents or omits a material fact such that the information provided is materially misleading, there can be a violation of the final rule if all of the other elements of a violation are present.[83] This does not mean, however, that a material misrepresentation or omission that affects only negotiations between two sophisticated parties will necessarily result in an enforcement action by the Commission. Instead, the Commission will decide whether to pursue enforcement action in such a situation on a case-by-case basis, with due consideration of whether such material misrepresentations or omissions occur in or have an effect on jurisdictional transactions. Absent such an effect, as we noted earlier, we generally will not apply the final rule to bilateral contract negotiations.

42. With respect to other comments related to the application of specific securities law precedent, as discussed earlier, the Commission intends, on a case-by-case basis, to be guided by analogous securities law precedent that is appropriate under the specific facts, circumstances, and situations in the energy industry. For example, even if some duty to provide information exists, the Commission agrees with INGAA that ''mere puffery'' is not violation of sections 1c.1(a)(2) and 1c.2(a)(2).[84]

*D. Sections 1c.1(a)(3) and 1c.2(a)(3) and Intent*

1. Comments

43. Some commenters suggested the Commission delete sections 1c.1(a)(3) and 1c.2(a)(3) of the proposed regulations or revise them explicitly to include the element of intent. For example, Ameren argues that sections 1c.1(a)(3) and 1c.2(a)(3) are unnecessary in light of sections 1c.1(a)(1) and 1c.2(a)(1).[85] EEI argues that sections 1c.1(a)(3) and 1c.2(a)(3) should be deleted because the ''operates as a fraud'' language could prohibit any deceptive act regardless of whether scienter is present.[86] Alternatively, EEI and FirstEnergy suggest that sections 1c.1(a)(3) and 1c.2(a)(3) be revised. EEI urges that sections 1c.1(a)(3) and 1c.2(a)(3) include elements of knowledge and intent; FirstEnergy also asks that the phrase ''or would operate'' be removed so it would be clear that actions not intended to defraud from being subject to the regulations.[87]

44. In contrast, TDUS argues that the Commission should reject attempts to modify or delete sections 1c.1(a)(3) and 1c.2(a)(3) noting that SEC Rule 10b–5 has remained intact since 1951, and no court or SEC action has resulted in any change to Rule 10b–5.[88] APGA also opposes modification or deletion of sections 1c.1(a)(3) and 1c.2(a)(3), arguing that intent is already an element of a violation of the proposed regulations, and any elimination of sections 1c.1(a)(3) and 1c.2(a)(3) could create uncertainty by distinguishing the final rule from SEC Rule 10b–5 so as to render analogous securities law precedent inapplicable.[89]

2. Commission Determination

45. The Commission rejects proposals to modify or delete sections 1c.1(a)(3) and 1c.2(a)(3) beyond the substitution of ''entity'' in place of ''person'' as discussed below in paragraph 76. Sections 1c.1(a)(3) and 1c.2(a)(3) are necessary; and as discussed below, there can be no violation of the final rule, or any of its sections, absent a showing of the requisite scienter. SEC Rule 10b–5 has an analogous section that has remained unchanged since it was adopted in 1942, and there is abundant securities law precedent that highlights the ongoing relevance of that section.[90] Therefore, as the final rule is modeled on SEC Rule 10b–5 and the Commission intends to be guided, on a case-by-case basis, by analogous securities law precedent that is appropriate under the facts, circumstances, and situations presented in the energy industry, it is prudent to retain sections 1c.1(a)(3) and 1c.2(a)(3) without modification.

*E. Elements of a Manipulation Claim*

1. Comments

46. Several commenters asked the Commission to clarify the elements of manipulation under the Final Rule.[91] INGAA recommends that the Commission explicitly reference the essential elements of the SEC's Rule 10b–5 cause of action that have been developed in the case law and provide greater guidance as to their application in the context of the natural gas markets.[92] Specifically, INGAA argues the Commission should clarify the definition of materiality, the requirement of scienter, the requirement of deception, the existence of a pre-existing duty to speak in a nondisclosure case, the absence of liability for mere puffery and other limitations.[93] Indicated Market Participants and NGSA state that the Commission should set forth the following as elements of a manipulation claim: Misrepresentation or omission of

[80] APGA at 5; PNM at 9; TDUS at 3–4.

[81] APGA at 5.

[82] PNM at 9. As discussed above in paragraph 28, TDUS argues that no dilution or alteration of the proposed rules is warranted, regardless of the sophistication of the parties to a transaction. TDUS at 3–4.

[83] These include the requisite scienter, discussed *infra*, and the conduct being in connection with a jurisdictional purchase or sale or jurisdictional transportation or transmission, discussed *supra*.

[84] *See In re Advanta Corp. Sec. Litig.*, 180 F.3d 525, 538 (3rd Cir. 1999) (noting that general expressions of optimism for the future are immaterial and not actionable); *Eisenstadt* v. *Centel Corp.*, 113 F.3d 738, 745 (7th Cir. 1997) (''*Everybody* knows that someone trying to sell something is going to look and talk on the bright side. You don't sell a product by bad-mouthing it. And everybody knows that auctions can be disappointing.'') (emphasis in original); *Raab* v. *General Physics Corp.*, 4 F.3d 286, 287 (4th Cir. 1996) (holding that predictions of future business prospects were not specific guarantees necessary to make them material within the meaning of section 10b); *see also In re Northern Telecom Ltd. Securities Litig.*, 116 F. Supp. 2d 446, 466 (S.D.N.Y 2000) (stating that under section 10b and Rule 10b–5, actionable statements must be sufficiently ''concrete'' or ''specific'' to be material, as opposed to ''single, vague statement[s] that are essentially mere puffery'').

[85] Ameren at 6–7.

[86] EEI at 13–14.

[87] *Id.* 14; FirstEnergy at 15.

[88] TDUS Reply at 8–9.

[89] APGA Reply at 5.

[90] One measure of the paragraph's importance is the frequency of use. There are numerous cases citing the ''operate as a fraud'' language of SEC Rule 10b–5, which suggest that it is not nugatory as EEI argues in its comments. *See, e.g., SEC* v. *Zandford*, 535 U.S. at 819; *SEC* v. *George*, 426 F.3d 786, 792 (2005).

[91] *See, e.g.*, Ameren at 6–7; AEP at 3; Cinergy at 7–8; Indicated Market Participants at 9–10, 18; EEI at 12–14; FirstEnergy at 7–10; INGAA at 7–11; LG&E at 3; NGSA at 2, 5–8; NiSource at 3, 5–8; Progress at 2–3; SCE at 4.

[92] INGAA at 7–8.

[93] *Id.* at 11.

a material fact; scienter, causation, reliance, and damages.[94]

47. EEI seeks clarification that fraud is a required element of the final rule and its sections.[95] AEP and EEI suggest that the Commission should explicitly identify the intent standard based on the scienter standard used in section 10(b), which is satisfied by a showing of recklessness.[96] EEI seeks clarification that liability under the market manipulation rule requires a showing of ''extreme recklessness'' or ''egregious disregard.'' [97] Progress believes that the final rule should be revised to exclude ''indirectly'' from sections 1c.1(a) and 1c.2(a), and if the Commission is unwilling to do so, it should explicitly incorporate an intent standard.[98] In contrast, TDUS argues that the Commission should not modify the regulations to incorporate a specific standard of intent into the final rule.[99]

2. Commission Determination

48. The Commission generally agrees that clarification of the elements of a violation under the final rule would reduce regulatory uncertainty and thereby assure greater compliance. It is unnecessary, however, to modify the text of the final rule. Rather, we will clarify the general requirements of a violation, guided by applicable securities law precedent, specifically the precedent setting out the elements the SEC must prove when it brings an enforcement action, as INGAA noted in its comments.[100] In enforcement actions under Rule 10b–5, the SEC must show that the defendant: (1) Made a material misrepresentation or a material omission as to which he had a duty to speak, or used a fraudulent device; (2) with scienter; and (3) in connection with the purchase or sale of securities.[101] The SEC does not need to show reliance, loss causation or damages because ''the Commission's duty is to enforce the remedial and preventive terms of the statute in the public interest, and not merely to police those whose plain violations have already caused demonstrable loss or injury.'' [102]

49. These elements offer useful guidance as to how the Commission will apply the final rule. The Commission will act in cases where an entity: (1) Uses a fraudulent device, scheme or artifice, or makes a material misrepresentation or a material omission as to which there is a duty to speak under a Commission-filed tariff, Commission order, rule or regulation, or 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 or electric energy or transportation of natural gas or transmission of electric energy subject to the jurisdiction of the Commission. In the paragraphs that follow, the Commission offers clarification on each element.

50. The final rule prohibits the use or employment of any device, scheme, or artifice to defraud. The Commission defines fraud generally, that is, to include any action, transaction, or conspiracy for the purpose of impairing, obstructing or defeating a well-functioning market.[103] Fraud is a question of fact that is to be determined by all the circumstances of a case.

51. If there is a duty to disclose under a Commission-filed tariff or Commission directive, material misrepresentations and, under certain conditions, material omissions, may violate the final rule. Guided by securities law precedent, the Commission finds that a fact is material if there is a substantial likelihood that a reasonable market participant would consider it in making its decision to transact because the material fact significantly altered the total mix of information available.[104] Of course, not every fact about a transaction is material and, therefore, the materiality of a misrepresented or omitted fact will be determined on a case-by-case basis.[105]

52. The Commission rejects as unnecessary commenters' requests to incorporate a specific intent standard into the final rule. Congress directed that the terms ''manipulative or deceptive device or contrivance'' as they appear in sections 1283 and 315 of EPAct 2005 be interpreted in accordance with section 10(b) of the Exchange Act. According to the Supreme Court, ''[t]he words 'manipulative or deceptive' used in conjunction with 'device or contrivance' strongly suggest that § 10 (b) was intended to proscribe knowing or intentional misconduct * * * conduct designed to deceive or defraud investors by controlling or artificially affecting the price of securities.'' [106] Based on the foregoing, any violation of the final rule requires a showing of scienter.[107]

53. Commenters sought clarification on whether recklessness satisfies the scienter element. The Supreme Court has not addressed whether recklessness satisfies the scienter requirement it read into section 10(b),[108] but the Courts of

[94] Indicated Market Participants at 18; NGSA at 2, 5–7.

[95] EEI at 4.

[96] *Id.* at 12; AEP at 3.

[97] EEI at 12.

[98] Progress at 2–3.

[99] TDUS at 5.

[100] INGAA at 10–11. *See, e.g., SEC* v. *Monarch Funding Corp.*, 192 F.3d 295, 308 (2d Cir. 1999) (setting out the elements of an enforcement action under SEC Rule 10b–5). We reject the comments of Indicated Market Participants and NGSA, which set forth the elements of a private right of action under section 10(b) and Rule 10b–5. While cases arising in the context of private litigation may be instructive on certain points, the elements needed for a private right of action are not the same as those required for administrative enforcement applicable here.

[101] *SEC* v. *Monarch Funding Corp.*, 192 F.3d at 308.

[102] *See, e.g., SEC* v. *Credit Bancorp, Ltd.*, 195 F. Supp. 2d 475, 491 (S.D.N.Y. 2002) *quoting Berko* v. *SEC*, 316 F.2d 137, 143 (2d Cir. 1963) *citing SEC* v. *North American Research & Dev. Corp.*, 424 F.2d 63, 84 (2d Cir. 1970) (reliance not an element of a Rule 10b–5 claim in the context of an SEC proceeding). Similarly, in a criminal prosecution for securities fraud, the government need not demonstrate specific reliance by the investor in a securities fraud prosecution. *See United States* v. *Ashdown*, 509 F.2d 793, 799 (5th Cir. 1975). However, the government must show ''impact of the scheme on the investor.'' *See United States* v. *Schaefer*, 299 F.2d 625, 629 (7th Cir. 1962). While reliance, loss causation and damages are not necessary for a violation of the final rule, these elements will inform the Commission's assessment of any disgorgement or civil penalties that may be appropriate under the circumstances.

[103] *See e.g., 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).

[104] *TSC Industries, Inc.* v. *Northway, Inc.*, 426 U.S. 438 (1976) sets forth the ''total mix'' or ''substantial likelihood'' test of materiality: a substantial likelihood that the disclosure of the omitted fact would have been viewed by a reasonable investor as having significantly altered the total mix of information made available. *Accord Basic, Inc.* v. *Levinson*, 485 U.S. 224, 231–2 (1988).

[105] Based on securities law precedent, the relevant time period for determining materiality is at the time of the statement or omission, and not in hindsight. *See Ganino* v. *Citizens Utils. Co.*, 228 F.3d 154, 165 (2d Cir. 2000).

[106] *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 197 (1976) (*Hochfelder*); *accord Aaron* v. *SEC*, 446 U.S. 680, 690 (1980) (*Aaron*).

[107] *See Aaron*, 446 U.S. at 690, 705 (stating that the words ''manipulative,'' ''device,'' and ''contrivance'' whether given ''their commonly accepted meaning or read as terms of art'' clearly refers to ''knowing or intentional misconduct.'' In addition, the Court said that ''Section 10(b) is described as a catchall provision, but what it catches must be fraud.''); *Hochfelder*, 425 U.S. at 199 (noting that the words ''manipulative,'' ''device,'' and ''contrivance'' are ''terms that make unmistakable a congressional intent to proscribe a type of conduct quite different from negligence''). Despite section 10(b)'s use of the disjunctive ''or'' in ''manipulative or deceptive device or contrivance,'' the Supreme Court has concluded that both require ''misrepresentation.''

[108] *Hochfelder*, 425 U.S. at 194 n.12 (''In certain areas of the law recklessness is considered to be a form of intentional conduct for purposes of imposing liability for some act. We need not address here the question whether, in some circumstances, reckless behavior is sufficient for civil liability under [section] 10(b) and Rule 10b–5.''). Although the scienter requirement was first read into section 10(b) in the context of a private right of action, in *Aaron* the Supreme Court decided

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Appeals that have addressed the issue agree that recklessness satisfies the section 10(b) scienter requirement.[109] Similarly, the Commission concludes that recklessness satisfies the scienter element of the final rule.

54. For our discussion of the ''in connection with'' requirement, see paragraphs 21 and 22, *supra*.

*F. Interplay With Market Behavior Rules*

1. Comments

55. Several commenters raise concerns over the interplay between the proposed regulations and the Market Behavior Rules.[110] Some commenters advocate that the Commission retain Market Behavior Rules, either as they are currently written or with modification.[111] Several industry commenters request deletion of the foreseeability standard and ''legitimate business purpose'' criteria of Market Behavior Rule 2, and incorporation of the scienter standard of the proposed regulations. Certain commenters also find the specific prohibitions of Market Behavior Rules 2(a) (wash trades), 2(b) (false information), 2(c) (artificial congestion/relief), and 2(d) (collusion) useful because those rules offer guidance and specificity about the prohibition of certain defined transactions.

56. APPA argues that the Commission should deal with the future of the Market Behavior Rules in the Commission's separate FPA 206 proceeding and not as part of this proceeding.[112] PNM, in contrast, contends that adopting rules based on SEC Rule 10b–5 will be confusing, and instead urges the Commission to amend the existing Market Behavior Rules to incorporate the terms of EPAct 2005 sections 315 and 1283, and not adopt the proposed regulations.[113]

57. EEI urges the Commission to retain the time limits and specific acts set forth in the Market Behavior Rules, and to state that compliance with the behavior rules guidelines constitutes compliance with the new rules.[114] Similarly, EEI argues that whatever the interaction between the Market Behavior Rules and the Final Rule, the Commission should clarify that there will be no ''double jeopardy.''[115]

2. Commission Determination

58. Both Market Behavior Rules 2 and 3[116] and this final rule prohibit fraud and manipulative conduct. The Market Behavior Rules are still in effect, although the Commission has indicated in the Market Behavior Rules proceeding (Docket Nos. EL06–16–000 and RM06–5–000) that the Market Behavior Rules may be revised or repealed after the anti-manipulation regulations are made effective.[117] If they are repealed, the Commission intends to have a smooth transition from the Market Behavior Rules to the final rule on manipulation, and there will be no gap in our prohibition of manipulation as we complete the transition.

59. As stated in the NOPR, the Commission will not seek duplicative sanctions for the same conduct in the event that conduct violates both the Market Behavior Rules and this final rule.[118] With respect to the specific prohibitions of Market Behavior Rule 2 (wash trades, transactions predicated on submitting false information, transactions creating and relieving artificial congestion, and collusion for the purpose of market manipulation), these are examples of prohibited manipulation, all of which are manipulative or deceptive devices or contrivances, and are therefore prohibited activities under this Final Rule, subject to punitive and remedial action.[119] Further, as discussed further below, the specific provision set forth in the Market Behavior Rules for actions taken in conformity with the Commission-approved market rules adopted by an ISO or RTO identify behaviors that are presumptively not fraudulent and hence would not be violations of this final rule.

60. The issue of applying the time limits set forth in the Market Behavior Rules to this final rule will be dealt with below.

*G. Statute of Limitations*

1. Comments

61. Some commenters urged the Commission to adopt an explicit statute of limitations period for the proposed rules.[120] For example, NiSource cites the Sarbanes-Oxley Act in support of its argument that the Commission require actions under the final rule be commenced within two years of discovery of a violation, but in no event more than five years after occurrence of a violation.[121] AEP cites a private rights of action under SEC Rule 10b–5 in support of its argument for three-year limitations period, and EEI argues the Commission should follow the five-year statute of limitations contained in 28 U.S.C. 2462 and adopt the 90-day provision of the Market Behavior Rules to require that an action must be filed within 90 days after the end of the calendar quarter in which the alleged violation of the final rule occurred or, if later, 90 days after the complainant knew or should have known that the alleged violation of the final rule occurred.[122]

2. Commission Determination

62. There is no explicit statute of limitations set forth in NGA section 4A or in FPA section 222, and no statute of

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that a showing of scienter is also required in SEC civil enforcement actions arising under section 10(b). *Aaron*, 446 U.S. at 695.

[109] Courts of appeal are in general agreement that that recklessness in some form satisfies the scienter requirement of SEC Rule 10b–5. For example, motive and opportunity to commit fraud or conscious behavior sufficient to raise a strong inference of recklessness is sufficient in the Second, Third, and Eighth Circuits. *See, e.g., Florida State Board of Administration* v. *Green Tree Fin. Corp.*, 270 F.3d 645 (8th Cir. 2001); *Novak* v. *Kasaks*, 216 F.3d 300 (2d Cir. 2000); *In re Advanta Corp. Securities Litig.*, 180 F.3d 525 (3d Cir. 1999). The First, Fifth, Sixth, Tenth and Eleventh Circuits apply a ''severely reckless'' or action with ''conscious disregard'' of the problem or risk standard. *See, e.g., Nathenson* v. *Zonagen, Inc.*, 267 F.3d 400 (5th Cir. 2001); *City of Philadelphia* v. *Fleming Companies, Inc.*, 264 F.3d 1245 (10th Cir. 2001); *Grebel* v. *FTP Software, Inc.*, 194 F.3d 185 (1st Cir. 1999); *In re Comshare, Inc. Securities Litig.*, 183 F.3d 543 (6th Cir. 1999); *Bryant* v. *Avardo Brands, Inc.*, 187 F.3d 1271 (11th Cir. 1999). In the Ninth Circuit, a plaintiff must plead ''in great detail facts that constitute strong circumstantial evidence of deliberately reckless or conscious misconduct.'' *See, e.g., In re Silicon Graphics Securities Litig.*, 183 F.3d 970 (9th Cir. 1999) (adopting the definition of recklessness as it appears in *Sundstrand Corp.* v. *Sun Chemical Corp.*, 553 F.2d 1033 (7th Cir. 1977), *cert. denied*, 434 U.S. 875 (1977)).

[110] *See, e.g.*, Ameren at 8–9; AGA at 5; Cinergy at 5, 9; EEI at 17–19; LG&E at 9; NARUC at 6; NASUCA at 4–5 (arguing for an expansion of the Market Behavior Rules to reach all market participants); PG&E at 4, 12–13; APPA Reply at 5; PNM Reply at 7–8; EEI Reply at 4–6.

[111] We note that, as a result of the timing of the comment due date in this proceeding, these comments were filed the same day as the Commission issued its orders proposing repeal of the Market Behavior Rules. *See Amendments to Codes of Conduct for Unbundled Sales Service and for Persons Holding Blanket Marketing Certificates*, 113 FERC ¶ 61,189 (2005); *Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations*, 113 FERC ¶ 61,190 (2005).

[112] APPA Reply at 5.

[113] PNM Reply at 7–8.

[114] EEI Reply at 4–6.

[115] EEI at 21.

[116] The following analysis with regard to the Market Behavior Rules also applies to sections 284.288(a) and 284.403(a) of the Commission's codes of conduct with respect to certain sales of natural gas. 18 CFR 284.288(a) and 284.403(a) (2005).

[117] *See Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations*, 70 FR 71484 (2005), 113 FERC ¶ 61,190 at P 13 (2005); *Amendments to Codes of Conduct for Unbundled Sales Service and for Persons Holding Blanket Marketing Certificates*, 70 FR 72090 (2005), 113 FERC ¶ 61,189 at P 11 (2005).

[118] *See Prohibition of Energy Market Manipulation*, 113 FERC ¶ 61,067 at P 15 (2005).

[119] *See* 113 FERC ¶ 61,190 at P 18 (2005); 113 FERC ¶ 61,189 at P 15 (2005).

[120] *See, e.g.*, AEP at 3; EEI at 19–21; NGSA at 2, 5, 8; NiSource at 9.

[121] NiSource at 3.

[122] AEP at 3; EEI at 19–20.

limitations of general applicability appears in the NGA or FPA. The Commission declines to designate a statute of limitations or otherwise adopt an arbitrary time limitation on complaints or enforcement actions that may arise under NGA section 4A and FPA section 222. We note, however, that when a statutory provision under which civil penalties may be imposed lacks its own statute of limitations, the general statute of limitations for collection of civil penalties, 28 U.S.C. 2462, applies.[123] Section 2462 in 28 U.S.C. imposes a five-year limitations period on any ''action, suit, or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise.''[124]

63. The Commission, therefore, rejects AEP's call for a three-year limitations period because that period applies only in the context of private rights of action under the securities laws, not to SEC enforcement actions. For the same reason, we reject NiSource's argument that a limitations period under the Sarbanes-Oxley Act should apply to actions we may bring under our enforcement authority, and EEI's request that the Commission apply to the final rule the 90-day action limitation of the existing Market Behavior Rules. We will exercise prosecutorial discretion in determining whether to pursue an alleged violation based on all the facts presented, including the time elapsed since the violation is alleged to have occurred, and will adhere to the five-year statute of limitations where we seek civil penalties.

*H. Safe Harbors and Affirmative Defenses*

1. Comments

64. Several commenters suggest that the Commission make explicit in the language of proposed regulations certain safe harbors. For example, they argue that the following should be deemed acceptable behavior: Actions or transactions taken at the direction of an RTO or ISO (similar to the affirmative defense in Market Behavior Rule 2), compliance with Midwest ISO's market monitoring program, actions or transactions with a ''legitimate business purpose,'' and legitimate hedging activity.[125]

65. Some commenters urge the Commission to provide specific examples of what would or would not constitute market manipulation.[126] NiSource argues that aiding and abetting, as opposed to primary violations, and actions taken pursuant to Commission-approved tariffs, state law, and Supreme Court precedent, as well as minor errors, would not violate the proposed rules.[127] Furthermore, some commenters request a mechanism for obtaining guidance on whether proposed conduct violates the anti-manipulation rules through a procedure similar to the SEC's No-Action Letter process.[128]

2. Commission Determination

66. The Commission will address issues relating to the Market Behavior Rules, and the affirmative defenses or safe harbors therein, in the FPA section 206 proceeding and NGA NOPR related to the Market Behavior Rules in Docket Nos. EL06–16–000 and RM06–5–000. As noted in that proceeding, it is the Commission's intent to have a smooth transition to the new anti-manipulation regulations but not to leave gaps between the adoption of the final rule and any repeal or revision of the Market Behavior Rules.

67. In all events, however, it is not necessary to change the wording of the final rule. The availability of safe harbor presumptions of compliance and affirmative defenses will be the same as is currently the case under the Market Behavior Rules. Thus, if a market participant undertakes an action or transaction that is explicitly contemplated in Commission-approved rules and regulations, we will presume that the market participant is not in violation of the final rule. If a market participant undertakes an action or transaction at the direction of an ISO or RTO that is not approved by the Commission, the market participant can assert this as a defense for the action taken.

*I. Procedures for Handling Manipulation Claims*

1. Comments

68. Some commenters seek clarification on how claims of market manipulation will be processed by the Commission. PG&E asks for procedures that will permit involvement of affected market participants in manipulation complaints, including intervention and full participation by affected parties, and availability of all remedies, including disgorgement or returning consumers to the condition they would have been in, absent manipulation. Doing so, PG&E asserts, would provide due process for those damaged by manipulation and would assure that the Commission considers all relevant factors in resolving the complaint.[129] Cinergy, on the other hand, states that it expects that complaints would be filed pursuant to NGA section 5 or FPA section 206, and that the Commission should incorporate in the final rule procedural requirements for filing complaints. Cinergy also seeks clarification on whether the Commission intends to apply the proposed regulations retroactively in any manner.[130] At the same time, however, Cinergy also argues that the Commission should explicitly urge parties first to take concerns and potential complaints to the Office of Market Oversight and Investigations Enforcement Hotline (Hotline). This, Cinergy explains, would permit entities accused of manipulation to present facts and evidence without suffering the potential harm within industry and the investment community that could result from an accusation of manipulation, and could lead to faster settlement resolutions of manipulation claims.[131]

69. EEI and INGAA also urge the Commission to address the formal process and procedures to be used in resolving manipulation complaints, including the burden of proof.[132] INGAA and ISDA suggest the Commission adopt a ''Wells submission'' process like that of the SEC in which an entity[133] is given, at the end of an investigation, notice of the proposed charges and enforcement action that staff intends to recommend to the SEC, and an opportunity to submit a written statement and

[123] *See, e.g., United States* v. *Godbout-Bandal*, 232 F.3d 637, 639 (8th Cir. 2000).

[124] 28 U.S.C. 2462 (2000). The five-year limitation runs ''from the date the claim first accrued.'' *Id.* We intend that any administrative action for violation of the final rule be commenced within five years of the date of the fraudulent or deceptive conduct.

[125] *See, e.g.,* AEP at 2; AGA at 5–6 (advocating a safe harbor for ''inadvertent'' errors); Ameren at 7; DTE at 2–4; INGAA at 11; LG&E at 3; NGSA at 2, 5, 8–9 (seeking clarification that the proposed regulations do not modify or supersede the Commission's policy statement on price reporting or the related safe harbor provisions of that policy); NiSource at 7; and SCANA at 3–4.

[126] *See, e.g.,* SCANA at 3–5 (arguing for an explicit safe harbor for hedging transactions, and that any violation of the ''shipper must have title'' rule is a *per se* violation); NiSource at 7; and Indicated Market Participants at 20–22 (requesting specific guidance, including a non-exclusive list, of what would and would not be considered manipulative conduct, to aid in internal training and compliance programs).

[127] NiSource at 6–9.

[128] *See, e.g.,* First Energy at 15–16; INGAA at 11.

[129] PG&E at 14–15.

[130] Cinergy at 10.

[131] *Id.* at 10–12.

[132] EEI at 19–21; INGAA at 13.

[133] The ''Wells submission'' process is set forth in SEC regulations, 17 CFR 202.5(c) (2005).

materials to refute staff's recommendation.[134]

2. Commission Determination

70. Congress enacted the statutory prohibitions on market manipulation as separate sections of the NGA and FPA, giving the Commission anti-manipulation authority that is independent of other provisions of the NGA and FPA, including NGA section 5 and FPA section 206. Accordingly, the Commission rejects Cinergy's suggestion that complaints alleging manipulation necessarily would rely on NGA section 5 or FPA section 206.[135] As to the procedures to be followed when a complaint alleging manipulation is filed, the Commission will process the filing under the procedures currently set forth in Rule 206 of the Rules of Practice and Procedure.[136] The Commission rejects as unnecessary EEI's, INGAA's, and Cinergy's suggestions that we incorporate procedures into the final rule. The requirements for filing complaints are set out in Rule 206, and the process for handling complaints, including the allocation of the burden of proof, is well-defined through Commission case law. There is no need for a special or separate set of procedures for complaints arising from our new anti-manipulation authority.

71. Cinergy states that the industry needs to understand if there is to be any retroactive application of the final rule. The regulations adopted herein will become effective upon publication in the **Federal Register**. There can be no violation of the final rule until it is effective. The Market Behavior Rules, however, have been in effect since December 2003, and will remain in effect pending the outcome of the separate Docket Nos. EL06–16–000 and RM06–5–000 proceedings.

72. To the extent Cinergy suggests that no retroactive remedies should be used, the Commission reiterates that a complaint that alleges market manipulation will proceed under NGA section 4A or FPA section 222, utilizing the procedural rules and mechanisms generally applicable to NGA and FPA proceedings. We reject any suggestion that the Commission cannot remedy manipulative conduct after it has occurred, such as by ordering the disgorgement of profits and/or imposing a civil penalty. Congress did not limit the Commission's jurisdiction under NGA section 4A or FPA section 222 to prospective conduct and associated remedies only. How the Commission addresses market manipulation will depend on the facts presented, but we have significant discretion to shape equitable remedies that achieve the purpose of Congress' enactment of anti-manipulation provisions.[137] In devising a remedy, the Commission will exercise discretion to arrive at an appropriate remedy [138] and will explore all equitable considerations and practical consequences of our action pursuant to our statutory delegation.[139]

73. The Commission also declines to accept Cinergy's suggestion that we explicitly urge parties first to bring concerns and potential complaints to the Hotline.[140] Aggrieved entities should be free to choose the approach best suited to their circumstances, and if an entity so chooses, the Hotline (or other informal contact with the Commission's staff) is available for such matters.

74. Turning to INGAA's suggestion that the Commission adopt what is referred to as a ''Wells submission'' to permit entities under investigation to submit material to refute staff findings and recommendations prior to Commission action, we find that no new process need be adopted here. The Commission already has a regulation in place that provides a company under investigation with an opportunity to present its views,[141] and staff's existing practice is to present the company's views to the Commission as part of any report or recommendation made by staff following an investigation.

*J. Miscellaneous Issues*

1. Use of ''Entity'' in place of ''Person'' in sections 1c.1(a)(3) and 1c.2(a)(3)

a. Comments

75. Two commenters express concern with the use of ''person'' in proposed sections 47.1(a)(3) and 159.1(a)(3) and urge the Commission to substitute ''entity'' for ''person.'' [142] Specifically, APPA points out that under proposed section 47.1(a)(3), it is unlawful ''to engage in any act, practice, or course of business that operates or would operate as a fraud or deceit upon any *person*'' (emphasis added) and that the definition of ''person'' under the FPA excludes municipalities. Thus, according to APPA, an entity that practices a ''fraud or deceit'' on a municipality could argue that proposed section 47.1(a)(3) does not apply because the victim is not a ''person'' under the FPA.[143] APGA makes a similar argument with respect to proposed section 159.1(a)(3).[144]

b. Commission Determination

76. The Commission agrees with these commenters. It would be unfair and unintended to prohibit fraudulent or manipulative behavior by any entity, including municipalities, but then not cover fraud or deceit when it is perpetrated against a municipality. Accordingly, the Commission will substitute the word ''entity'' for ''person'' in sections 1c.1(a)(3) and 1c.2(a)(3) of the final rule.[145]

2. Impact of New Regulations on the Policy Statement on Natural Gas and Electric Price Indices

a. Comments

77. NGSA requests that the Commission clarify that the new regulations do not modify or supersede the Commission's Policy Statement on Natural Gas and Electric Price Indices.[146]

b. Commission Determination

78. The Commission clarifies that the new regulations are not intended to modify or supersede the Commission's Policy Statement on Natural Gas and

[134] INGAA at 12; ISDA Reply at 5.

[135] Even if a complaint were to involve NGA section 5 or FPA section 206 in some manner, that does not mean that the Commission would be limited only to prospective remedies, as Cinergy seems to suggest. Certain violations are susceptible of remedies from the time the violation occurred. *See, e.g., Consolidated Gas Transmission Corp.,* 771 F.2d 1536 (D.C. Cir. 1985) (retroactive remedy available under NGA section 16).

[136] 18 CFR 385.206 (2005).

[137] ''[T]he Commission has broad authority to fashion equitable remedies in a variety of settings.'' *Columbia Gas Transmission Corp.* v. *FERC*, 750 F.2d 105, 109 (DC Cir. 1984) and cases cited therein. The courts have noted that ''the breadth of agency discretion is, if anything, at zenith when the action assailed relates primarily * * * to the fashioning of policies, remedies, and sanctions * * * to arrive at maximum effectuation of Congressional objectives.'' *Niagara Mohawk Corp.* v. *FPC*, 379 F.2d 153, 159 (DC Cir. 1967).

[138] *Gulf Oil Corp.* v. *FPC*, 536 F.2d 588 (3rd Cir. 1977), *cert. denied*, 434 U.S. 1062 (1978), *reh'g denied*, 435 U.S. 981 (1978).

[139] *FPC* v. *Tennessee Gas Transmission Co.*, 371 U.S. 145 (1962); *Continental Oil Co.* v. *FPC*, 378 F.2d 510 (5th Cir. 1967).

[140] *See* 18 CFR 1b.21 (2005)

[141] *See* 18 CFR 1b.18 (2005).

[142] *See* APGA at 10–11; APPA at 2–4.

[143] APPA at 2–3.

[144] APGA at 10.

[145] As noted, the final rule will appear in 18 CFR 1c.1 and 1c.2 of the Commission's Rules of General Applicability, and the language change will be in 18 CFR 1c.1(a)(3) and 1c.2(a)(3).

[146] NGSA at 8–9. *See Policy Statement on Natural Gas and Electric Price Indices*, 104 FERC § 61,121 (2003) (explaining the conditions under which the Commission will give industry participants safe harbor protection for good faith reporting of transactions data to entities that develop price indices).

Electric Price Indices. That Policy Statement provided guidance on how market participants should report price transaction information to price index developers, and stated that if the Policy Statement guidelines are followed, participants would not be penalized for inadvertent errors. We 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.

3. Special Pleading

a. Comments

79. AEP argues that the Commission should discourage general allegations of fraud by requiring parties that bring an action under the proposed rule to plead with ''sufficient particularity'' by addressing eight items.[147] Other commenters, however, argue that the Commission should not adopt special pleading requirements beyond its notice provisions and existing complaint procedures.[148]

b. Commission Determination

80. Commenters' concerns regarding special pleading requirements are clearly covered by Rule 206 of the Commission's Rules of Practice and Procedure, which contains detailed requirements as to the specificity required by parties filing complaints with the Commission. For instance, under Rule 206(b)(1)–(2), a complaint must ''clearly identify the action or inaction which is alleged to violate applicable statutory or regulatory requirements,'' and must ''explain how the action violates statutory or regulatory requirements.'' [149] Similarly, in Order No. 663, the Commission sets forth the requirement that issues must be listed with specificity in a separate section entitled ''Statement of Issues.'' [150]

## IV. Regulatory Flexibility Act Certification

81. The Regulatory Flexibility Act of 1980 [151] generally requires a description and analysis of a final rule that will have significant economic impact on a substantial number of small entities.[152] The Commission is not required to make such analyses if a rule would not have such an effect.

82. The Commission concludes that this final rule would not have such an impact on small entities. This final rule prohibits all entities, including small entities, from employing manipulative or deceptive devices or contrivances in connection with energy markets subject to the Commission's jurisdiction, and therefore may cause entities, including potentially small entities, to increase costs in order to comply. This prohibition, however, will improve market transparency to the economic benefit of all entities, including small entities. Therefore, the Commission certifies that this final rule will not have a significant economic impact on a substantial number of small entities. Therefore, no regulatory flexibility analysis is required.

## V. Information Collection Statement

83. This final rule implements the existing requirements as set forth in sections 315 and 1283 of EPAct 2005 and does not include new information requirements under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

## VI. Environmental Statement

84. The Commission is required to prepare an Environmental Assessment or an Environmental Impact Statement for any action that may have a significant adverse effect on the human environment.[153] The Commission has categorically excluded certain actions from this requirement as not having a significant effect on the human environment. Included in the exclusion are rules that are clarifying, corrective, or procedural or that do not substantially change the effect of the regulations being amended.[154] Thus, we affirm the finding we made in the NOPR that this final rule is procedural in nature and therefore falls under this exception; consequently, no environmental consideration would be necessary.

## VII. Document Availability

85. In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the Internet through the Commission's Home Page (*http://www.ferc.gov*) and in the Commission's Public Reference Room during normal business hours (8:30 a.m. to 5 p.m. Eastern time) at 888 First Street, NE., Room 2A, Washington, DC 20426.

86. From the Commission's Home Page on the Internet, this information is available in the eLibrary. The full text of this document is available on eLibrary both in PDF and Microsoft Word format for viewing, printing, and/or downloading. To access this document in eLibrary, type the docket number excluding the last three digits of this document in the docket number field.

87. User assistance is available for eLibrary and the Commission's Web site during normal business hours. For assistance, please contact Online Support at 1–866–208–3676 (toll free) or 202–502–6652 (e-mail at *FERCOnlineSupport@FERC.gov*), or the Public Reference Room at 202–502–8371, TTY 202–502–8659 (e-mail at *public.referenceroom@ferc.gov*).

## VIII. Effective Date and Congressional Notification

88. This final rule will take effect upon publication in the **Federal Register**. The Commission has determined, with the concurrence of the Administrator of the Office of Information and Regulatory Affairs of the Office of Management and Budget, that this rule is not a major rule within

[147] AEP at 3–4. The eight items are: (1) What identifiable acts or omissions occurred, what representations were made and why they were not accurate but constituted a scheme or device to defraud; (2) when and where each act occurred; (3) who participated, that is, how each entity is related to the case; (4) what specific documents contained what specific misrepresentations or material omissions; (5) how a party relied on the other party's actions; (6) whether the necessary element of scienter was present; (7) when the purchase, sale, or transmission of electric energy or natural gas occurred; and (8) what the offending party gained as a result of the fraud.

[148] *See, e.g.*, TDUS Reply at 9.

[149] *See Wisconsin Department of Natural Resources* v. *Wisconsin River Power Company*, 101 FERC § 61,108 at P 5 (2002) (rejecting complaint). *See also Union Electric Company, d/b/a AmerenUE*, 93 FERC § 61,158 at 61,529 (2000) (denying a request for a hearing, citing Rule 206(b)(1), (2), and (8), and stating that ''[t]he Commission's rules require a complaint not only to identify clearly the action that is alleged to violate applicable statutory standards or regulatory requirements, but to explain *how* the action violates those standards or requirements, and to include all documents in the complainant's possession that support the facts in the complaint'').

[150] *See Revision of Rules of Practice and Procedure Regarding Issue Identification*, 70 FR 55723 (2005), FERC Stats. & Regs. § 31,193 (2005).

[151] 5 U.S.C. 601–612 (2000).

[152] The RFA definition of ''small entity'' refers to the definition provided in the Small Business Act, which defines a ''small business concern'' as a business which is independently owned and operated and which is not dominant in its field of operation. 15 U.S.C. 632 (2000). The Small Business Size Standards component of the North American Industry Classification System defines a small electric utility as one that, including its affiliates, is primarily engaged in the generation, transmission, and/or distribution of electric energy for sale and whose total electric output for the preceding fiscal years did not exceed 4 million MWh. 13 CFR 121.201 (Section 22, Utilities, North American Industry Classification System, NAICS) (2004).

[153] *Regulations Implementing the National Environmental Policy Act*, Order No. 486, 52 FR 47897 (1987), FERC Stats. & Regs. § 30,783 (1987).

[154] 18 CFR 380.4(a)(2)(ii) (2005).

the meaning of section 251 of the Small Business Regulatory Enforcement Fairness Act of 1996.[155] The Commission will submit the final rule to both houses of Congress and the Government Accountability Office.[156]

89. A non-major rule goes into effect ''as otherwise provided by law after submission to Congress.''[157] The effective date may be sooner if the agency ''for good cause'' finds that ''notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.''[158] The Administrative Procedure Act (APA)[159] requires rulemakings to be published in the **Federal Register**. The APA generally mandates that publication or service of a substantive rule not be made less than 30 days before its effective date. This waiting period is not required, however, if the agency finds ''good cause'' for waiving the 30 day waiting period.[160]

90. The Commission finds that ''good cause'' exists that makes further notice and public procedure impracticable, unnecessary, or contrary to the public interest. The Commission has balanced the necessity for immediate implementation of this final rule against the principles of fundamental fairness which require that all affected persons be afforded reasonable time to prepare for the effective date of this ruling. The Commission is of the view that the persistent high energy prices in the wake of severe damage to the United States energy infrastructure from the hurricanes of 2005, together with the potential for severe price events in the event of cold winter weather during the winter months of 2006, may present opportunities for energy price manipulation. It would be contrary to the public interest to delay regulations that implement Congressional intent to prohibit manipulation in energy markets. Immediate adoption of the final rule will protect natural gas and electricity markets from manipulative conduct. Moreover, the public has had an opportunity to comment on the proposed rules, and the final rule being adopted is substantively the same as the rule that was proposed. Finally, the conduct proscribed by the final rule is similar to the conduct already proscribed by the Market Behavior Rules. Market participants should not have difficulty preparing to comply with a rule that bars manipulation in energy markets, particularly since many such participants are currently subject to the existing Market Behavior Rule provisions prohibiting manipulation. This final rule, therefore, will be made effective upon publication in the **Federal Register**.

[155] 5 U.S.C. 804(2) (2000).
[156] 5 U.S.C. 801(a)(1)(A) (2000).
[157] 5 U.S.C. 801(a)(4) (2000).
[158] 5 U.S.C. 808(2) (2000).
[159] 5 U.S.C. 551, *et seq.* (2000).
[160] 5 U.S.C. 553(d)(3) (2000).

**List of Subjects in 18 CFR Part 1c**

Electric utilities, Natural gas.

By the Commission.

**Magalie R. Salas,**

*Secretary.*

■ In consideration of the foregoing, under the authority of EPAct 2005, the Commission amends Chapter I, Title 18, *Code of Federal Regulations,* by adding Part 1c to read as follows:

## PART 1c—PROHIBITION OF ENERGY MARKET MANIPULATION

Sec.
1c.1 Prohibition of natural gas market manipulation.
1c.2 Prohibition of electric energy market manipulation.

**Authority:** 15 U.S.C. 717–717z; 16 U.S.C. 791–825r, 2601–2645; 42 U.S.C. 7101–7352.

### § 1c.1 Prohibition of natural gas market manipulation.

(a) It shall be unlawful for any entity, directly or indirectly, in connection with the purchase or sale of natural gas or the purchase or sale of transportation services subject to the jurisdiction of the Commission,

(1) To use or employ any device, scheme, or artifice to defraud,

(2) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) To engage in any act, practice, or course of business that operates or would operate as a fraud or deceit upon any entity.

(b) Nothing in this section shall be construed to create a private right of action.

### § 1c.2 Prohibition of electric energy market manipulation.

(a) It shall be unlawful for any entity, directly or indirectly, in connection with the purchase or sale of electric energy or the purchase or sale of transmission services subject to the jurisdiction of the Commission,

(1) To use or employ any device, scheme, or artifice to defraud,

(2) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) To engage in any act, practice, or course of business that operates or would operate as a fraud or deceit upon any entity.

(b) Nothing in this section shall be construed to create a private right of action.

**Note:** The following Appendix will not be published in the Code of Federal Regulations.

## Appendix—List of Parties Filing Comments and Reply Comments and Acronyms

Ameren Services Co. (Ameren)
American Electric Power Service Corporation (AEP)
American Gas Association (AGA)
American Public Gas Association (APGA) * *
American Public Power Association (APPA) * *
Association of Oil Pipelines (AOPL)
BP Energy Co. (BP)
Cinergy Services, Inc. (Cinergy) * *
Constellation Energy Group, Inc., DTE Energy Company and Sempra Energy (Indicated Market Participants)
DTE Energy Company (DTE)
Edison Electric Institute (EEI) * *
Electric Power Supply Association (EPSA)
FirstEnergy Service Co. (FirstEnergy)
International Swaps and Derivatives Association, Inc. (ISDA) * *
Interstate Natural Gas Association of America (INGAA)
LG&E Energy LLC (LG&E)
Midwest Independent Transmission System Operator, Inc. (Midwest ISO)
Missouri Public Service Commission
National Association of Regulatory Utility Commissioners (NARUC) * *
National Association of State Utility Consumer Advocates (NASUCA)
National Rural Electric Cooperative Association (NRECA) *
Natural Gas Supply Association (NGSA)
New Jersey Board of Public Utilities (NJBPU)
NiSource, Inc. (NiSource)
Pacific Gas and Electric Co. (PG&E)
PNM Resources, Inc. (PNM) *
Progress Energy Inc. (Progress)
SCANA Energy Marketing, Inc. (SCANA)
Southern California Edison Company (SCE)
States of Illinois, Iowa, Minnesota, Missouri and Wisconsin (States)
SUEZ Energy North America, Inc. (SUEZ)
Transmission Dependent Utility Systems (TDUS) *
Xcel Energy Services Inc. (Xcel)

* Entities filing reply comments only.
* * Entities filing reply comments in addition to initial comments.

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