

**Concurring Statement of Commissioner J. Thomas Rosch
Crude Oil Price Manipulation Rule Making, Project No. P082900**

I concur in the form of the Oil Price Manipulation Rule that the Commission has adopted. In doing so, however, I want to make it clear that I agree with Commissioner Kovacic's misgivings. The "conduct" prong of the Rule does not require proof of an exercise of market power having an adverse impact on the market as a whole, as is normally required in challenges to conduct under the Sherman Act. Further, it is not clear that the state of mind that must be proved establishes a sufficient limiting principle. On the other hand, although the "omissions" prong of the Rule does arguably require proof that the omission adversely impacts the market as a whole, like Rule 10b-5 it does not require proof of the state of mind that the "conduct" prong requires and hence may not establish a sufficiently limiting principle either. The net result is that the Rule may chill oil companies from, among other things, voluntarily providing their data to independent data-reporting firms, as they do now, for fear that they may be held liable for an inadvertent omission. That would be unfortunate because at least in some circumstances, having abundant data of that sort can be pro-competitive. *See United States v. United States Gypsum Co.*, 438 U.S. 422 (1978); *see also* U.S. Dep't of Justice and Federal Trade Comm'n, *Statement of Antitrust Enforcement Policy in Health Care*, Statement 6 ("Provider Participation in Exchanges of Price and Cost Information") (August 1996), *available at* <http://www.usdoj.gov/atr/public/guidelines/0000.pdf>. It would be especially unfortunate if the Rule were interpreted or applied so as to permit follow-on private actions.

All of this said, however, Congress apparently intended that the Commission fashion a Rule that goes beyond the Sherman Act and that resembles SEC Rule 10b-5. *See* Federal Trade Commission, Prohibitions on Market Manipulation in Subtitle B of Title VIII of the Energy Independence and Security Act of 2007, at 14 n.44 (July 28, 2009).¹ I believe that we must adhere to the Congressional intent in this regard. In exercising prosecutorial discretion, however, I, for one, intend to keep these misgivings in mind.

¹ In addition to the text of Section 811, which reflects congressional intent that the Commission look to SEC Rule 10b-5 in crafting a market manipulation rule, I also find the statements of Sen. Cantwell (the bill's sponsor) which are consistent with this text persuasive. *See* 151 Cong. Rec. S10238 (daily ed. Sept. 20, 2005) (statement of Sen. Cantwell introducing S. 1735, a bill to Improve the Federal Trade Commission's Ability to Protect Consumers from Price-Gouging During Energy Emergencies, which was reintroduced in the 110th Congress as S.1263); *New Haven Bd. of Educ. v. Bell*, 465 U.S. 512, 526-27 (1982) ("Although the statements of one legislator made during debate may not be controlling, Senator Bayh's remarks, as those of the sponsor of the language ultimately enacted" – in a context where "no committee report discusses the provisions" – "are an authoritative guide to the statute's construction.").