

Dissenting Statement of Commissioner Scott D. O'Malia
In the Matter of ConAgra Trade Group, Inc.

I dissent from the Commission's acceptance of this offer of settlement and entry of the Order in this matter because I believe that the Order sends the wrong message about what is acceptable behavior in the markets we oversee. In my opinion, this case is better pursued as an attempted manipulation. Instead, the Commission today votes to accept ConAgra Trade Group, Inc.'s ("ConAgra") offer of \$12 million and the implementation and maintenance of a compliance program to settle the Commission's inquiry resulting from their activity in January 2008 alleged to have caused a non-bona fide price in violation of Section 4c(a)(2)(B) of the Commodity Exchange Act.

I have reviewed this case with extraordinary interest. The crude oil markets are vital to our nation's economy and can affect all American households. I share my fellow Commissioners' dedication that all markets we oversee, especially the vital energy markets, are free from abuse and manipulation. In order to do our job we need to ensure the Commission is effectively communicating the behavior that is not acceptable in these crucial markets. We need to appropriately punish those who violate the law. The sanction imposed in any settlement is part of the overall communication to the public about what the Commission considers to be the gravity of the violation.

The acts alleged to have been committed by ConAgra are stated on pages 2 and 3 of the Order. Some details of the irresponsible behavior are included relating to ConAgra's efforts to be the first trade at the \$100 level in the crude oil contract traded on the NYMEX in January of 2008.

The Commodity Exchange Act provides enforcement tools to condemn and deter truly disruptive practices (made even stronger with the recent passage of the Dodd-Frank Wall Street Reform Act and Consumer Protection Act) and provides powerful authorities and penalties with respect to manipulation and attempts to manipulate. The Commission has made clear that "sanctions in enforcement proceedings are imposed 'to further the Act's remedial policies and to deter others in the industry from committing similar violations.'" In the Matter of Michael Staryk, 2004 WL 1657544 (CFTC July 23, 2004), citing In re Volume Investors Corp., [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶25,234 at 38,679 (CFTC Feb. 10, 1992). Determining the level of gravity of the offense is the first step to setting an appropriate penalty and is the only factor mentioned specifically mentioned in Section 6(e)(1) of the Commodity Exchange Act. The Commission has rejected a formulaic approach to determining gravity in assessing a penalty and has considered the following factors: the relationship of the violations to the regulatory purposes of the Act, respondents' state of mind, the scope and frequency of the wrongdoing, respondents' post-violation conduct, and the financial consequences flowing from respondents' wrongdoing. In the Matter of Howard Miller, 2004 WL 1637297 (CFTC July 23, 2004). In light of this, the settlement is a failure to use the powerful authorities and penalties in the Commodity Exchange Act.

While the Commission has agreed to settle a charge of a non-bona fide price for an extremely high settlement amount as compared to other disruptive trading practice settlements, I would have preferred the Commission vote to pursue a case for attempted manipulation. Shoehorning the facts alleged in the Order into a disruptive trading practice charge and coupling that with a large dollar amount fails to send the appropriate message to the marketplace--that manipulative behavior will not be tolerated. To avoid litigation and in the interest of both parties to save resources, an attempted manipulation case might have settled for an amount closer to \$12 million. But I cannot support a settlement for an amount of money with no relationship at all to the gravity of the facts and the violations alleged to have occurred in the Order. Today's vote is not effective in its market message. The settlement provides no guidance on why the described activity constitutes such a severe violation of the Commodity Exchange Act as to warrant a historic settlement level.