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October 17, 2008

Mr. Donald S. Clark
Secretary
U.S. Federal Trade Commission
Room H-135 (Annex G)
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Re: *In the Matter of: Prohibitions on Market Manipulation and False Information in Subtitle B of Title VIII of the Energy Independence and Security Act of 2007* - Project No. P082900 (RIN 3084-AB12)

Dear Mr. Clark:

Enclosed please find the Comments of The Air Transport Association of America, Inc. with respect to the Federal Trade Commission's Notice of Proposed Rulemaking regarding market manipulation under section 811 of the Energy Independence and Security Act of 2007.

Sincerely,

Richard E. Powers, Jr.

Counsel for The Air Transport Association of America, Inc.

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

In the Matter of	)	
	)	
Prohibitions on Market Manipulation and False Information in Subtitle B of Title VIII of the Energy Independence and Security Act of 2007	)	Project No. P082900 (RIN 3084-AB12)

COMMENTS OF THE AIR TRANSPORT ASSOCIATION OF AMERICA, INC.

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UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

In the Matter of	)	
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Prohibitions on Market Manipulation and	)	Project No. P082900
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the Energy Independence and Security Act	)	
of 2007	)	

COMMENTS OF THE AIR TRANSPORT ASSOCIATION OF AMERICA, INC.

The Air Transport Association of America, Inc. ("ATA") commends the Federal Trade Commission ("FTC") for proposing a rule to address market manipulation in connection with the wholesale purchase or sale of crude oil, gasoline, or petroleum distillates.[1] ATA agrees that such a rule is necessary, appropriate and in the public interest. Moreover, ATA submits that the FTC should act promptly to issue a final rule in this proceeding.

I. ATA's INTEREST

ATA is the nation's oldest and largest airline trade association and its members account for more than 90 percent of the passenger and cargo traffic carried by U.S. airlines.[2] Since its founding in 1936, ATA has played a major role in the regulatory arena by encouraging governmental policy decisions that foster a financially stable

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1 *Federal Trade Commission,* 16 CFR Part 317: Prohibitions On Market Manipulation and False Information in Subtitle B of Title VIII of the Energy Independence and Security Act of 2007, 73 FR 48317-48335 (Aug. 19, 2008) (hereinafter "NPRM") (page references herein are to the Federal Register).

2 ATA serves as the principal trade and service organization of the major air carriers – both passenger and cargo – in North America. ATA members include: ABX Air, Alaska Airlines, American Airlines North American, ASTAR Air Cargo, Atlas Air, Continental Airlines, Delta Air Lines, Evergreen International Airlines, FedEx Corp., Hawaiian Airlines, JetBlue Airways, Midwest Airlines, Northwest Airlines, Southwest Airlines, United Airlines, UPS Airlines and US Airways; associate members include: Air Canada, Air Jamaica and Mexicana.

U.S. airline industry capable of meeting the nation's travel and shipping needs while withstanding the inherently cyclical nature of this industry.

The U.S. airline industry continues to face many challenges in returning to financial stability. Primary among those challenges is the high cost of jet fuel. In 2008, crude oil and jet fuel prices have reached all-time highs with significant negative ramifications for air service. U.S. airlines are projected to spend $61 billion on fuel this year, $20 billion more than in 2007 – an increase equivalent to the compensation and benefits of tens of thousands of airline workers or the acquisition of more than 200 new jets. Indeed, this past summer jet fuel became the single largest cost item for many airlines, representing 25 percent to 30 percent of industry-wide operating expenses. At estimated 2008 jet-fuel consumption levels, every $1 increase per barrel adds $430 million in expenses. Because airlines consume the fuel they purchase and cannot easily pass on that cost in what is a highly competitive marketplace with a price sensitive customer base, they are impacted by even the smallest price increases. For ATA members, every penny spent on jet fuel truly counts. It is for this reason that airlines, both on their own and through ATA, have become active in various administrative and regulatory proceedings relating to petroleum markets and prices.

The FTC's efforts in preventing market manipulation and the providing of false information are an important part of addressing the nation's and the airline industry's energy crisis.

II. SPECIFIC COMMENTS

1. The rule is necessary, appropriate and in the public interest.

ATA supports the FTC's determination that the proposed rule is appropriate to the extent that it prohibits fraud, manipulation and deceptive conduct in petroleum markets. NPRM at 48320-21. The proposed rule thus implements the expressly stated objective of Section 811 of Subtitle B of the Energy Independence and Security Act of 2007 ("EISA").[3]

ATA also submits that the rule is necessary. ATA supports the FTC's critical determination that a rule which guards "against conduct that undermines the integrity of the petroleum markets would be in the public interest." NPRM at 48321.

Even the energy industry commenters recognize the negative effects of fraud and deceit. NPRM at 48321, n.47. And, as the FTC recognized, this "may in fact harm the market to the detriment of market participants and consumers." NPRM at 48321. As discussed above, these actions harm the airline industry to the extent they increase fuel prices because in this context the industry is a consumer. Fraudulent conduct not only hurts the airline industry, but ripples throughout the entire economy because of the central role the industry plays:

> Our country's vastness and its economy depend upon commercial aviation as the backbone of national and international commerce... Global trade undergirds America's strength and allows the United States to project its economic power. In my opinion, the commercial aviation industry [is] a crucial component of America's economic strength. This has been true for decades, and will remain true into the foreseeable future.

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3 42 U.S.C. § 17301 ("It is unlawful for any person, directly or indirectly, to use or employ, in connection with the purchase or sale of crude oil gasoline or petroleum distillates at wholesale, any manipulative or deceptive device or contrivance. . .").

Michael Wynne, Former Secretary, U.S. Air Force, Aero Club of Wash., DC (May 22, 2008)

Thus, considering the impacts on the airline industry and the U.S. economy as a whole, the FTC's actions are properly focused on protecting consumers and preserving the competitiveness of the petroleum markets. The proposed rule is necessary, appropriate and in the public interest.

2. The Scope of the Rule is Appropriate Without Any Safe Harbor Provision or Exemption.

ATA submits that the scope of the rule appropriately reflects the provisions of EISA. ATA further agrees with the FTC that safe harbor provisions or other exemptions are not warranted. Rather, the rule proscribes "manipulation or deceptive conduct" in a narrow and straightforward manner that does not "improperly intrude upon the jurisdiction of the CFTC or any other agency." NPRM at 48324.

As further support for the scope of the rule, ATA submits that many industry comments in favor of limiting its applicability to the energy markets have depicted the structure of energy market regulation by other agencies, including the Federal Energy Regulatory Commission ("FERC"), in a way that is incomplete at best, and at worst misleading. One oil pipeline association went so far as to assert that common carriers subject to the Interstate Commerce Act ("ICA") are exempt from the FTC's jurisdiction under the Federal Trade Commission Act ("FTC Act").[4] The Commission properly rejected this specious argument and found that oil pipelines would be subject to the proposed rule. NPRM at 48323; 15 U.S.C. § 45(a)(2).

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[4] Comments of the Association of Oil Pipe Lines ("AOPL"), dated June 23, 2008, at 1 and 20 ("Congress has given primary regulatory responsibility for interstate common carrier oil pipelines to the FERC, and has specifically exempted interstate oil pipelines from the Commission's jurisdiction under the FTC Act and the EISA").

Certain energy industry trade associations and companies also argued that FERC has "extensive authority" and "jurisdiction" over oil pipelines.[5] They further argued that oil pipelines are "subject to extensive regulation by FERC and state agencies" and that FERC or other agency jurisdiction may overlap in whole or in part.[6]

ATA supports the proposed rule's rejection of these arguments, in order to give full effect to the provision of EISA. NPRM at 48324. As noted, FERC's authority with respect to "price manipulation in such markets [*i.e.,* petroleum markets] is not exclusive." *Id.* at n.92. In fact, it is far from clear that FERC's jurisdiction extends to price manipulation. The ICA, as amended by the Energy Policy Act of 2005 ("EPAct"), does not reference "price manipulation" at all and FERC's jurisdiction over oil pipelines is limited. More importantly, FERC exercises what at best can be described as "light-handed" regulation of oil pipelines[7] and FERC has never pursued "price manipulation" claims at all. Rather, FERC's focus has been primarily in determining whether rates are just and reasonable on a cost-of-service basis. That is a far cry from proscribing fraudulent market manipulation of the underlying oil and petroleum product prices.

A brief review of the ICA and FERC's regulations thereunder illustrates and confirms these points. The ICA gives FERC the authority to regulate the transportation rates and practices of oil pipelines. The Hepburn Act of 1906 began the regulation of

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5 Letter of Plains All American ("Plains"), dated June 23, 2008, at 1 ("FERC has extensive authority over oil pipelines and the adoption of an anti-manipulation provision. . . .by [the FTC] creates a risk of conflicting and inconsistent standards"); Comments of the American Petroleum Institute and the National Association of Petrochemical and Refiners Association ("API"), dated June 23, 2008, at n.26 ("Any FTC rule that was construed as reaching oil pipelines would, in addition, duplicate FERC regulation, given the jurisdiction that agency already exercises over the oil pipeline industry.").

6 Comments of AOPL at 12 ('the rates, charges, rules, practices and other aspects of transportation service offered by common carrier oil pipelines are subject to extensive regulation by FERC and state regulatory agencies").

7 *See* Opinion No. 154, *Williams Pipe Line Co.,* 21 FERC ¶ 61,260 at 61,586 (1982).

interstate oil pipelines, making them common carriers and subject to, among other things, rate regulation.[8] The Hepburn Act was an amendment to the then existing Interstate Commerce Act ("ICA") which, until 1906, had focused primarily on railroad and telegraph company regulation. The responsibility for regulating oil pipeline rates resided with the Interstate Commerce Commission ("ICC") from 1906 until 1977 when the Department of Energy Organization Act ("DOEAct") was enacted.[9] Pursuant to the DOEAct, jurisdiction over oil pipelines was transferred from the ICC to the newly created FERC. 49 U.S.C. §§ 7155, 7172(b). Regulation of oil pipelines is governed by the version of the ICA as it stood on October 1, 1977, the date of the enactment of the DOE Act.[10] This version can be found only as an appendix to the 1989 edition of Title 49 of the United States Code (cited as 49 App. U.S.C. § 1, *et seq.* (1988)). The 1977 version of the ICA has been reproduced and made available on the FERC website.

The requirements and limitations of the ICA were set forth succinctly by the Chairman of the FERC in his September 3, 2008 testimony before the Subcommittee on Energy and Water Development of the Committee on Appropriations of the United States Senate.

> The ICA applies to the transportation of oil and oil products, *i.e.*, crude oil and petroleum products, from one state to any other state, from any place in the United States to a foreign country, and from a foreign country to any place in the United States (but only insofar as such transportation takes place within the United States). Because oil pipelines are common carriers, the ICA requires that they provide transportation upon reasonable request. This means,

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8 Pub. L. No. 59-337, 34 Stat. 584.

9 Pub. L. No. 95-91, 91 Stat. 565 (1977); 42 U.S.C. § 7101 *et seq.*

10 In the Revised Interstate Commerce Act, Pub. L. No. 95-473, 92 Stat. 1337 (1978), Congress recodified the ICA, *see* 49 U.S.C. §§ 10101 *et seq.* (1988), but provided that regulation of oil pipelines remained governed by the ICA as it existed on October 1, 1977. *Id.* at § 4(c), 92 Stat. 1470 (1978).

> for example, that an oil pipeline operating at full capacity must prorate that capacity among current shippers to make capacity available for a new shipper requesting transportation service from the pipeline. In prorationing, the Commission cannot legally give preferential treatment to domestic oil producers over foreign sources.
>
> The ICA requires that all charges for oil pipeline transportation must be just and reasonable. Oil pipelines must file tariffs showing all their rates and charges and can make changes to those rates and charges only after 30 days' notice to the Commission and the public. On its own motion or in response to a protest, the Commission can suspend tariff filings for up to seven months and institute investigations into their lawfulness; at the end of the suspension period, the proposed tariffs can go into effect subject to refund. The Commission can also investigate the lawfulness of oil pipeline rates and practices and prescribe changes upon complaint or its own initiative.
>
> Some matters the ICA **does** not confer jurisdiction over are the siting and construction of oil pipelines (authority rests with states and local jurisdictions), mergers and acquisitions, abandonment of service, and safety (authority rests with the Department of Transportation's Pipeline and Hazardous Materials Safety Administration).

Testimony of the Honorable Joseph T. Kelliher, Chairman of the Federal Energy Regulatory Commission, Before the Subcommittee on Energy and Water Development, Committee on Appropriations, United States Senate, September 3, 2008 (emphasis in original). The focus of FERC's jurisdiction is clear and limited. It was not designed to address anticompetitive conduct in the energy market that exists today and that is the subject of the proposed rule.

In Title XVIII of the Energy Policy Act of 1992 ("EPAct"), Congress directed FERC to establish a "simplified and generally applicable ratemaking methodology for oil pipelines." 42 U.S.C. § 7172 note (1994). In response to EPAct, FERC established rulemakings that culminated in Order No. 561, which adopted rate methodologies for oil

pipelines rate changes; Order No. 571 which established filing requirements for cost-of-service information that pipelines must include with cost-of-service filings; and Order No. 572, which established filing requirements for pipelines proposing market based rates. These rate making methodologies became effective on January 1, 1995, and were affirmed by the U.S. Court of Appeals for the D.C. Circuit in 1999. *Association of Oil Pipe Lines v. FERC*, 83 F. 3rd 1424 (D.C. Cir. 1996). At no time since has FERC, on its own motion, ever started any investigation of oil pipeline rates or practices. Rather, FERC has turned over enforcement of oil pipeline rates and practices to oil pipeline shippers and consumers such as the airlines, requiring them to file complaints in order to enforce the ICA's requirements for just and reasonable rates. Indeed, the position of the pipelines before this agency on appropriate allocation of jurisdiction verges on disingenuous since, among other things, in the rulemakings implementing EPAct, the oil pipeline association took the position that it was the intent of Congress in EPAct *to prohibit all investigations initiated by FERC staff*. While the FERC itself did not quite go this far, it turned responsibility for challenging oil pipeline rates and practices over to oil pipeline shippers and the consuming public:

> Upon consideration of this issue, and the comments received, the Commission has determined that it will not promulgate an explicit bar to Commission-initiated rate investigations. As explained in the next section, the Commission is eliminating the Oil Pipeline Board. The Board has exercised delegated authority to suspend oil pipeline tariff filings. With the Board's elimination, that authority will now reside exclusively with the Commission. It will not be delegated at this time.
>
> The decision not to adopt an absolute bar is premised primarily upon the Commission's responsibilities under the ICA, in particular, its obligation to ensure that pipeline rates are just and reasonable. The Commission believes that it would be inconsistent with these

> responsibilities to rule out in all cases the possibility of an agency-initiated rate investigation.
>
> Nonetheless, while the Commission believes it is advisable to retain the authority to investigate a rate on its own motion, it should make clear that it does not contemplate invoking such authority except in the most unusual circumstances. The policy of streamlining and expediting the regulation of oil pipelines, as reflected in the Act of 1992, supports the notion of relying primarily upon the affected parties to bring challenges to rates.

Order No. 561, Revisions to Oil Pipeline Regulations Pursuant to the Energy Policy Act of 1992, FERC Stats. & Regs. [Regs. Preambles, 1991-1996], ¶30,985 (1993) at 30,967.

As noted, since these rulemakings, FERC has not instituted a single investigation into oil pipeline rates and practices on its own motion. Indeed, FERC has even failed to act on requests by ATA and other shippers that oil pipelines be required to provide "reliable and complete financial data" so that the consuming community can ensure that oil pipelines charge just, reasonable and non-discriminatory rates. In particular, on February 15, 2007, FERC issued a Notice of Inquiry into FERC Financial Forms ("NOI"), FERC Docket No. RM07-9-000, on the need for changes or revisions to the Commission's reporting requirements for oil pipelines. ATA and others submitted comments pointing out the need for additional disclosure and transparency so that shippers can police oil pipeline rates and practices, given that FERC has abdicated this responsibility. *See, e.g.,* Comments of Air Transport Association of America, Inc., dated March 28, 2007 (FERC Docket No. RM07-9-000); Reply Comments of the Air Transport Association of America, Inc., dated April 27, 2007 (FERC Docket No. RM07-9-000). To date, FERC has taken no further action on this matter. This inaction is inexplicable, especially given the fact that FERC's own records have shown hundreds of millions of

dollars in "excess profits" or "overrecoveries" by oil pipelines over many years. *Id.* FERC's inaction does, however, prove beyond doubt that FERC does not exercise "extensive regulation" over oil pipelines.

One other red-herring interjected by IntercontinentalExchange, Inc. ("ICE") deserves brief note. In its comments, ICE indicated that FERC and the CFTC have a memorandum of understanding ("MOU") outlining their cooperation in regulating energy markets. The suggestion is made that somehow this covers crude oil, gasoline and petroleum distillate markets. Letter from ICE, dated June 23, 2008, at 2. However, the referenced MOU, as well as the referenced *Amaranth* proceedings, deal with natural gas markets and not crude oil, gasoline or petroleum distillate markets. Memorandum of Understanding between the Federal Energy Regulatory Commission ("FERC") and The Commodity Futures Trading Commission ("CFTC") regarding Sharing and Treatment of Proprietary Trading and Other Information, dated October 12, 2005; *see also Amaranth Advisors L.L.C., et al.* 124 FERC ¶ 61,060 (July 17, 2008) (involving a regulation that prohibits natural gas market manipulation in connection with the sale or purchase of natural gas or transportation services).

The *Amaranth* decisions at FERC arose under the EPAct of 2005, which amended the Natural Gas Act and the Federal Power Act, respectively, to prohibit the same type of conduct proscribed by Section 10(b) of the Securities and Exchange Act of 1934 ("Exchange Act") and Rule 10b-5 promulgated thereunder, 17 C.F.R. § 240.10b-5 ("Rule 10b-5"). EPAct of 2005 did not amend the ICA, nor did it have anything to do with the crude oil, gasoline and petroleum markets or the regulation thereof. The

prohibition on market manipulation of natural gas prices is no doubt helpful to consumers. Unfortunately for ATA members, airplanes do not run on natural gas.

3. SEC Rule 10b-5 is the Appropriate Regulatory Model to Use and the Proposed Rule Appropriately Proscribes the Prohibited Practices.

ATA supports the proposed rule's use of SEC Rule 10b-5 as the model for a rule designed to proscribe market manipulation. As noted in the proposed rule, this provides the FTC with a well-developed framework to follow. NPRM at 48322. ATA also supports the proposed rule's listing of prohibited practices and the three general elements of a cause of action under the proposed rule. NPRM at 48326-30.

With respect to the SEC 10b-5 model, the proposed rule appropriately uses the anti-fraud provisions of this rule. In this manner, the proposed rule focuses on conduct that is manipulative and deceptive while at the same time leaving the market free from unnecessary regulatory constraints.

With respect to prohibited practices, the proposed rule properly contains a broad anti-fraud provision. ATA also agrees with the decision not to exclude certain specific conduct or decisions from its coverage. The basic argument for excluding certain activities is that it is too difficult or too complex to regulate.[11] First, the FTC's Bureau of Competition and Bureau of Economics "have significant industry experience, both from enforcing antitrust laws and from conducting research and industry analysis"[12] and the fact that the market is complex cannot serve as the basis for failing to implement Section 811 of EISA. Second, particular practices or activities would not be regulated

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11 *See, e.g.*, API at 47 (supply decision not to intended to be covered); Comments of Flint Hills Resources, undated, at 19 (supply decisions difficult to regulate); Plains at 2-3 (crude oil market is very complex and the Commission should not regulate).

12 Federal Trade Commission, *Investigation of Gasoline Price Manipulation and Post Katrina Gasoline Price Increases* (Spring 2006).

under the rule, but rather certain manipulative and deceptive conduct is proscribed. In this connection, ATA also supports prohibiting any act, practice or course of business that "operates or would operate as a fraud or deceit." NPRM at 48327. This flexible standard is exactly the sort of general prohibition of illegality that the FTC has successfully enforced over its almost 100 year history.

Finally, ATA supports the proposed rule's three elements required for showing a violation. In particular, for a violation the proposed rule requires a showing of 1) manipulative or deceptive conduct, 2) with scienter, and 3) in connection with the sale of crude oil, gasoline, or petroleum distillates at wholesale. NPRM at 48327-29. ATA also supports the decision not to require proof of price effects as an element of a cause of action. *Id.* at 48329-30. This is a high standard that generally corresponds with the showing required in enforcement activities under SEC Rule 10b-5. Maintaining this standard should eliminate the concern that many commenters expressed that the rule would interfere with operations in the marketplace. It should ultimately be the purpose of the rule to ensure that the prices are set by the marketplace, not by agreements among sellers or by manipulation or deceptive conduct. This is the origin of the *per se* rule against price fixing, which condemns horizontal price-related agreements among competitors as perversions of the market – and does not allow them to offer defenses on the grounds that the prices they anticompetitively fixed were somehow "reasonable." In this way, the FTC can achieve the objective of EISA, namely to prevent fraud, manipulation and deceptive conduct in connection with the purchase or sale of crude oil, gasoline, or petroleum distillates at wholesale, and reporting of false or misleading information related to the wholesale price of these products, while ensuring a

competitive wholesale market that is not subject to unnecessary regulation. The goal should be to ensure that consumers are offered competitive market prices free from market distortions that accompany manipulative or deceptive conduct.

III. CONCLUSION

ATA requests that these comments be considered and that the Commission act promptly to issue a final rule. Ensuring the integrity of our energy markets is of paramount importance at this time.

Respectfully submitted,

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