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VIA HAND DELIVERY

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

Re: Market Manipulation Rulemaking, P082900

Dear Mr. Secretary:

Please find below the comments of Society of Independent Gasoline Marketers of America ("SIGMA") with respect to the Federal Trade Commission's ("FTC's") Notice of Proposed Rulemaking ("NPRM") regarding market manipulation under section 811 of the Energy Independence and Security Act of 2007 ("EISA").

SIGMA/Request for Panel Membership at Workshop

SIGMA is a leading national trade association representing approximately 275 independent chain retailers and marketers of motor fuel. SIGMA members represent significant diversity within the industry. While 92 percent are involved in gasoline retailing, 66 percent are involved in wholesaling, 36 percent transport product, 25 percent have bulk plant operations, and 15 percent operate terminals. Member retail outlets come in many forms including travel plazas, traditional "gas stations," convenience stores with gas pumps, cardlocks, and unattended public fueling locations. Some members sell gasoline over the Internet, many are involved in fleet cards, and a few are leaders in the mobile refueling movement. Thus, although the Commission correctly notes that any rule under section 811 shall not apply to retail sales of gasoline, SIGMA members have significant interests in the outcome of this proceeding.

Accordingly, SIGMA requests that it be afforded a panelist at the FTC's planned workshop concerning the NPRM on November 6, 2008. The panelist will be either a SIGMA member or counsel to SIGMA with significant expertise in the motor fuel industry. We will be happy to provide additional biographical or other information upon request.

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Overview

SIGMA congratulates the Commission on dramatically improving its May 1, 2008, Advanced Notice of Proposed Rulemaking (“ANPR”) in a number of areas. SIGMA commented on the ANPR on June 23, 2008, and hereby incorporates those comments into this letter.

Scienter

SIGMA appreciates the Commission’s NPRM view on what constitutes “market manipulation.” In its comments on the ANPR, SIGMA commented extensively on the need for a strict scienter requirement, which in SIGMA’s view the Commission has now adopted (*e.g.*, “the Commission intends to prohibit manipulative and deceptive conduct without discouraging pro-competitive or otherwise desirable market practices.” 73 Fed. Reg. 48,323 (Aug. 19, 2008)). In particular, the Commission’s decision to base its rule on Section 10b-5 of the Securities and Exchange Act properly ensures consumer protection while affording business owners a wealth of certainty with respect to their market practices. SIGMA understands proposed Part 317.3 to require actual fraud in the marketplace to constitute a violation of its rule and the Energy Independence and Security Act (“EISA”).

Definition of “Wholesale”

SIGMA appreciates that Congress gave it very little, if any, guidance in defining exactly what a “wholesale” purchase or sale of gasoline or petroleum distillates is. That legislative ambiguity is unfortunate because of the complexity of the petroleum marketplace. It is therefore extremely important that the FTC recognize that complexity and define “wholesale” in a manner that ensures no unintended consequences.

SIGMA believes that including rack level sales within this definition is inappropriate.

The purpose of the legislation which the FTC seeks to implement in this rulemaking is to prohibit “market manipulation,” not to regulate particular pricing practices at the last level before retail sales. Particular pricing practices at the rack level may have an impact on a particular supplier’s customer but is unlikely to alter overall price levels in the markets served out of a terminal or terminal cluster. Transactions capable of generating the decorative effects which this legislation seeks to prohibit take place “above” the rack in the “bulk” markets.

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Consequently, SIGMA suggests that the FTC limit its definition of “wholesale” transactions for these purposes to transactions involving quantities of product equal to or greater than the minimum pipeline tenders or barge volumes via which a terminal or terminal cluster receives supplies. Adopting this suggestion will allow the FTC to achieve its statutory mandate without immersing itself in transactions which are best and most appropriately regulated by other legislation enforced by the FTC.

Preemption

The Commission has chosen not to include any language in the NPRM that would preempt applicable state law in the area of market manipulation. Unfortunately, gasoline marketers are under constant attack from state attorneys general about their pricing policies. Whatever the motivations behind these attacks, they have rarely led to adjudicated final judgments against marketers – simply because politics do not trump common-sense laws on what constitutes “manipulation.” SIGMA recommends that the Commission adopt hortatory language in its preamble to the NPRM that urges state attorneys general and other law enforcement officials to use its final rule as a guide to “market manipulation” cases.

SIGMA greatly appreciates the opportunity to comment on the NPRM. We are anxious to play a productive role in this process, and look forward to working with the Commission to promote consumer friendly, abundant motor fuel supplies in the United States.

Sincerely,

James D. Barnette, Esq.
Counsel to SIGMA