

**UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION**

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

**COMMENTS OF THE AIR TRANSPORT
ASSOCIATION OF AMERICA, INC.**

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The Air Transport Association of America, Inc. (“ATA”) appreciates the opportunity to comment on the revised proposed 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. However, while ATA understands the FTC’s desire to more precisely define prohibited conduct in the revised proposed rule, ATA prefers the rule originally proposed on August 19, 2008, as more in keeping with the broad statutory mandate under which it is being promulgated.

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.

¹ *Federal Trade Commission*, 16 CFR Part 317: Prohibitions On Market Manipulation in Subtitle B of Title VIII of the Energy Independence and Security Act of 2007, 74 FR 18304-18329 (Apr. 22, 2009) (hereinafter "RNPRM") (page references herein are to the Federal Register).

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

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

ATA's position with respect to the revised proposed rule has not changed from its position with respect to the original proposal, and ATA reaffirms the comments it submitted in that docket. As ATA asserted in its comments on the original proposed rule, it is of vital importance not only to the airline industry, but for the economy as a whole, that the integrity of the wholesale petroleum market be preserved. Market manipulation, fraud, and deceptive practices distort the market, inflate prices, and inure

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.

to the detriment of the entire economy. ATA therefore applauds the Commission's decision to exercise its rulemaking authority under the Energy Independence and Security Act (the "Act" or "EISA") to develop a rule designed to prevent such abuses.

As the FTC notes in the RNPRM, Section 811 of the Act, which the proposed rule is intended to implement, prohibits "any person" from "directly or indirectly": (1) using or employing "any manipulative or deceptive device or contrivance," (2) "in connection with the purchase or sale of crude oil gasoline or petroleum distillates at wholesale," (3) that violates a rule or regulation that the FTC "may prescribe as necessary or appropriate in the public interest or for the protection of United States citizens."³

This language intentionally establishes a broad mandate ("any" person; "directly or indirectly"; "any" manipulative or deceptive device or contrivance), and it is remedial in nature. Moreover, Section 811 is in Subtitle B of the Act, which specifically addresses market manipulation. On the other hand, nothing in either Section 811 or Subtitle B suggests the FTC should consider limiting or competing concerns in its implementing regulations. Accordingly, under well established canons of statutory construction, Section 811 should be construed broadly to effectuate its purpose. While ATA appreciates the FTC's desire to clarify the application of the rule in light of the comments it has received, ATA hopes that if the FTC adopts the revised proposed rule, it will apply and enforce that rule consistent with the broad anti-fraud mandate of the EISA.

Moreover, although the market has changed and oil prices have decreased

³ 74 Fed.Reg. 18305, quoting 42 U.S.C. 17301.

considerably since the FTC promulgated the original proposed rule, the basis for the rule remains sound. Record-high fuel prices only serve to magnify the effects of market manipulation and increase the impact of the additional increase in fuel costs such manipulation can cause. The current decline in oil prices should not be used to justify putting off needed reforms. It is better to have the mechanisms for preventing market manipulation in place than to hurriedly implement them when the economy is contending with the impacts of an energy crisis.

ATA particularly supports the FTC's decision not to implement a safe harbor provision with respect to oil pipelines in the revised proposed rule. RNPRM at 18311. As explained in ATA's comments on the original proposed rule, FERC's authority with respect to price manipulation in wholesale petroleum markets is at best limited, and may not exist at all. The Interstate Commerce Act ("ICA"), as amended by the Energy Policy Act of 2005 ("EPAAct"), 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 pipelines⁴ and FERC has never pursued "price manipulation" claims at all. Rather, FERC's focus has been primarily in determining whether transportation rates are just and reasonable on a cost-of-service basis. That is a far cry from proscribing fraudulent market manipulation of the oil and petroleum product prices. In this respect, the RNPRM properly noted that "pipeline companies and their owners or affiliates are often involved in multiple aspects of the petroleum industry." RNPRM at 18311. And, these others operations, including in particular the sale of petroleum products and the provision of related

⁴ See Opinion No. 154, *Williams Pipe Line Co.*, 21 FERC ¶ 61,260 at 61,586 (1982).

marketing or non FERC-jurisdictional activities, while not covered by the ICA, may include “conduct in connection with the wholesale purchase or sale of crude oil, gasoline, or petroleum distillates” that is covered by the EISA. *Id.*

As evidence of FERC’s lack of attention to oil pipeline oversight, 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 transportation rates. The FTC’s proposed rule, therefore, fills an important regulatory gap.

As to other matters, if the FTC retains the regulatory formulation in the RNPRM, ATA supports the revised rule’s definition of knowledge. We also support the FTC’s conclusion that a showing of price effect should not be required to establish a rule violation, RNPRM at 18322-23, in particular the statement that “[t]he tendency to distort market conditions for wholesale petroleum products may be properly inferred from the conduct itself, without separate and additional proof of a tendency to distort market conditions.” RNPRM at 18323. Finally, ATA agrees with the FTC’s decision to continue to use SEC Rule 10b-5 as a model for the concept behind the anti-fraud provisions of the revised proposed rule.

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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