



National PROPANE GAS Association

1150 17th St NW, Suite 310
Washington, DC 20036
Tel: 202.466.7200
Fax: 202.466.7205

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Federal Trade Commission
Market Manipulation Rulemaking
P.O. Box 2846
Fairfax, VA 22301-0846

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The purpose of this letter is to provide the National Propane Gas Association (NPGA) response to the Federal Trade Commission’s (FTC, Commission) request for public comment on the agency’s Advanced Notice of Proposed Rulemaking (ANPRM) titled “Prohibitions on Market Manipulation and False Information in Subtitle B of the Energy Independence and Security Act of 2007.” The ANPRM was published in the May 7, 2008 *Federal Register* and seeks to obtain input on how the FTC should fulfill its regulatory responsibilities under Section 811 of the Energy Independence and Security Act (EISA) of 2007. Section 811 focuses on the wholesale markets of crude oil, gasoline and petroleum distillates.

NPGA is the national trade association of the propane gas industry with a membership of about 3,500 companies, including 39 affiliated state and regional associations representing members in all 50 states. Although the single largest group of NPGA members is retail marketers of propane gas, the membership also includes propane producers, transporters and wholesalers, as well as manufacturers and distributors of associated equipment, containers, tanks and appliances.

BACKGROUND

Propane is a global commodity that is used around the world in a variety of applications. In the United States, propane gas is used in residential and commercial installations, in agriculture, in industrial processing, and as a clean air alternative engine fuel for both over-the-road vehicles and nonroad engines such as those used in forklifts.

To understand the industry’s interest in this subject, it is helpful to understand that propane is derived from two sources, crude oil refining and natural gas processing. As such, propane prices typically track the price of both crude oil and natural gas, particularly crude oil since it competes mostly with other crude oil-based fuels. Therefore, with both of these commodities trading at or near record levels, the corresponding impact on the propane market is substantial.

From a broader perspective, it is important to recognize that crude oil and petroleum distillate markets are critical elements of the U.S. economy. It is vitally important to maintain confidence in the legitimacy and fairness of these markets both for consumers and for market participants.

The rapid increase in price levels and volatility recently and the flood of speculative investment in commodities raise concerns regarding potential manipulation and the need for stronger regulatory oversight. In an effort to seek profits, though, speculators also bear a measure of risk and provide liquidity needed to facilitate commercial activities. Also, certain types of speculation may inherently act as a means of correcting distorted pricing in the market.

The fundamental challenge for the FTC in fashioning an effective regulatory framework is to strike a reasonable balance between limiting manipulation and allowing appropriate speculation. Such a balance is paramount to the members of NPGA because they stand to suffer both from failure to constrain manipulation of petroleum markets and from ill-conceived regulation that unnecessarily constrains speculative activity.

With the need for balance in mind, NPGA offers comments directed to three issues raised in the Federal Trade Commission's ANPRM: (i) overlap of regulatory jurisdiction; (ii) market transparency; and (iii) approach to market manipulation. Each of these is discussed briefly below.

Overlap of Regulatory Jurisdiction

In Section IV, Subsection H of the ANPRM, the FTC is seeking input on the impact of possible overlapping agency jurisdiction. This is a major concern for NPGA as effective regulation often involves real burdens on those impacted, even where the regulatory framework is deemed efficient. However, where agency jurisdictions overlap, efficiency will obviously suffer.

A flawed regulatory scheme may result in reporting requirements being duplicative, standards and definitions of proscribed behavior being inconsistent, and penalties being cumulative and ultimately excessive. Since even justifiable regulatory costs and requirements can discourage legitimate market activities, it is imperative to avoid unnecessary and excessive regulation. Moreover, regulatory ambiguity increases costs and risk and discourages market participation from all segments.

Overlapping jurisdictions can lead to a "worst of all worlds" situation in which multiple agencies may pursue certain potential violations, while other violations are left unchecked because each oversight agency expects or desires another to take the appropriate action. The result may be that easy cases get attention while the difficult, perhaps more significant matters, go unaddressed.

Unfortunately, in the area of petroleum wholesale markets, the potential for regulatory overlap is quite high. Both the Commodity Futures Trading Commission (CFTC) and the FTC are involved in the oversight of physical commodity markets, and the CFTC, like the FTC, is under pressure to strengthen its regulatory activities.

{It should be noted that the 2008 Farm Bill recently passed into law strengthened the CFTC's oversight over futures markets. In particular, it strengthens the CFTC authority over retail foreign currency transactions. It also extends CFTC's principles-based oversight to exempt commercial markets (ECMs) that trade significant price contracts, and it increases criminal and civil penalties for market manipulation.}

A reality today is that various market participants and potential stakeholders may favor one agency over another depending upon their interests in the level of oversight sought. They may also have perceptions about which agency might be more aggressive or effective. Nevertheless, the fact remains that unnecessary regulation is harmful to the economy as a whole.

To address the matter of regulatory overlap, NPGA requests that every effort be made to reach an early resolution of the jurisdictional boundaries relevant to those agencies with oversight responsibility for crude oil and petroleum distillate markets. Moreover, NPGA believes that the issuance of an Executive Order is the best approach to accomplishing this. Such an action would clearly draw the lines of jurisdiction among agencies and avoid pitfalls such as differing agency responses to the same issue, or conversely, no response by any agency. The sooner the issue of regulatory overlap can be resolved, the better.

Market Transparency

In Section IV of the ANPRM, Subsection I, the Commission seeks comments upon its authority to require covered persons to maintain and submit information regarding wholesale transactions. The authority to mandate the maintenance and submission of such information is inherent in the EISA prohibitions against manipulative activities in Section 811 and the reporting of false information to Federal authorities in Section 812.

As a basic principle, market transparency promotes competition, the preservation of which is the ultimate objective of any FTC effort. Market monitoring is a key element in any realistic program to prevent or to detect and remedy manipulative activities. Today's commodity markets are quite volatile and involve many transactions on a daily basis. Consequently, the impacts from manipulation can mount rapidly with myriad, complex follow-on consequences.

For these reasons, measures have been instituted in other markets to limit impacts. The Federal Energy Regulatory Commission (FERC), for example, has approved Automatic Mitigation Procedures that constrain prices in centralized power markets when certain conditions are met. Similarly, NYMEX halts trading in futures contracts if price movements exceed specified limits.

Only with close observation of wholesale petroleum markets could any regulator be positioned to detect and deal with manipulation quickly enough to prevent widespread distortions that limit the practical effectiveness of remedial measures.

As the ANPR recognizes, data on wholesale transactions and markets at all levels of trade are frequently unavailable or difficult to develop. There is no central clearing place for transactions as there is with organized exchanges. Waiting to collect information on an *ex post* basis through traditional discovery processes would undercut enforcement efforts in several ways. First, this would leave the regulator essentially blind on a current basis with only the limited information that could be obtained through commercial data services. This information, of course, does not provide transaction-specific information. Second, formal discovery procedures are time-consuming, contentious (particularly where third parties are involved), and costly. Finally, it is extremely difficult to get consistently reported information over time that can be used for systematic analysis.

The FTC should determine what information it would need to ensure that market transparency is maximized. Reporting of this sort could become burdensome, and therefore, specific data requirements, periodicity, and reporting formats should be determined through a formal process and not arbitrarily determined.

While this is a subject that merits further consideration by the FTC, NPGA believes in the importance of market transparency while maintaining the concept of market liquidity that likewise avoids unintended consequences.

Approach to Market Manipulation

The FTC seeks to address the issue of how to approach market manipulation and addresses it from various perspectives in the ANPRM. The statutory language of EISA Section 811 has been interpreted in various contexts to require *scienter*, or willful intent, as an element of manipulation. The FTC's foundation grant of authority, Federal Trade Commission Act, however, does not have a similar requirement in establishing unfair or deceptive practices subject to FTC enforcement actions.

NPGA urges the FTC to view its mandate broadly. Rather than focusing efforts on proving intent, its objective instead should be deterring and remedying practices that cause distortions in the markets.

It should be noted that analyses of markets and the concept of market manipulation almost always reflect the fact that “proof of intent” continues to be a primary obstacle in enforcement actions. Futile attempts by FTC to shoulder an impossible burden of proof, such as one based on “intent,” will ultimately waste the Commission’s resources and contribute little to the efficiency of the markets or to the wellbeing of consumers. For these reasons, NPGA supports a focus by the Commission on practices that are not a reaction to market forces.

Further, the FTC likely has no intent to regulate prices for crude oil and petroleum distillates to ensure that they are “just and reasonable,” as, for example, the FERC would do. However, it is not unreasonable for the FTC to investigate and potentially sanction specific behavior or practices that do not appear to be a reaction to market forces.

In conclusion, NPGA believes that overlap of regulatory jurisdiction should be addressed through the issuance of an Executive Order. We also believe that the focus of FTC’s efforts with regard to collection of wholesale market data should be one that ensures market transparency. Lastly, the FTC should approach the concept of market manipulation in a broad sense by focusing on practices that are not a reaction to market forces.

Thank you for the opportunity to comment on this ANPRM. Feel free to contact us if you have any questions.

Sincerely,

Michael A. Caldarera
Vice-President, Regulatory and Technical Services