

Before the
FEDERAL TRADE COMMISSION
Washington, D.C.

In the Matter of)
)
Market Manipulation Rulemaking)
)

Project No. PO82900

COMMENTS OF FLINT HILLS RESOURCES, LP

Thomas Leary
Mary Anne Mason
Hogan & Hartson, LLP
555 13th St. NW
Washington, DC 20004
(202) 637-5600

We are pleased to submit these comments on behalf of Flint Hills Resources, LP (“FHR”) in response to the Notice of Proposed Rulemaking for Prohibitions on Market Manipulation and False Information in Subtitle B of the Energy Independence and Security Act of 2007.¹ FHR previously submitted comments in response to the Commission’s Advanced Notice of Proposed Rulemaking, and hereby incorporates those comments by reference.

I. THE INTEREST OF FLINT HILLS RESOURCES IN THIS PROCEEDING

FHR is an independent refining and chemicals company. The company produces an array of petroleum products, including gasoline, jet fuel, diesel, and heating oil, among others. FHR distributes refined petroleum products at wholesale to a variety of markets in the United States. As an industry participant and entity that will have to comply with a final FTC rule, FHR has analyzed how the proposed rule could affect its business operations. In particular, the company has considered, at length, how it would comply with the draft rule.

II. THE PROPOSED RULE WILL IMPOSE UNNECESSARILY BURDENSOME COMPLIANCE COSTS ON INDUSTRY PARTICIPANTS

FHR is a member of the National Petrochemical and Refiners Association (“NPRO”) and has had an opportunity to review the comments submitted by NPRO. FHR shares the concerns expressed in those comments, and incorporates those comments in their entirety by reference. As a company that will have to comply with a final rule, and that faces alterations to its business practices to ensure such compliance, FHR believes that it is important to elaborate on the compliance implications of the NPRM.

¹ Federal Trade Commission, *Prohibitions on Market Manipulation and False Information in Subtitle B of the Energy Independence and Security Act of 2007*, 73 Fed. Reg. 48317 (August 19, 2008) [hereinafter “NPRM”].

NPRA's comments articulately describe the risks and unintended consequences that could flow from an application of the Rule 10b-5 framework that the Commission proposed in its NPRM. As described in detail in those comments, the breadth of the proposed rule would create a significant amount of uncertainty as to what conduct may be captured by the Rule, and could apply to completely legitimate conduct, as illustrated in the hypothetical scenarios that NPRA posed. Thus, if the FTC decides to make the Rule final in its current form, FHR would be charged with the task of creating a compliance system where the underlying rules are uncertain.

The guiding principle underlying FHR's compliance philosophy is referred to within the company as "10,000 percent compliance." This phrase describes the company's goal that 100 percent of its employees comply with the law 100 percent of the time. Achieving this goal necessarily starts with a commitment to fully understand the expectations set out in the particular law or regulation in question. The next step in achieving 10,000 percent compliance is designing training and procedural controls that allow all employees to meet the expectations of the law or regulation at all times. Throughout this process it is important to recognize that it is the company's policy to conduct its operations well within the limits of a law, not to test its boundaries. Although the company does assert its views in the rulemaking process, once a rule or regulation is adopted, FHR's position regarding its inherent substantive merits is no longer of paramount concern – compliance becomes the company's focus.

Without the modifications suggested in the NPRA's comments that clarify the scope and intent of the FTC's proposed Rule, it will be difficult to provide employees with the type of specific guidance needed for 10,000 percent compliance without limiting otherwise legitimate, beneficial commercial conduct. For example, instructing employees not to knowingly lie to their purchasers about supply conditions in order to drive up market prices draws a bright line that can

be clearly communicated and audited without the need to limit legitimate conduct. On the other hand, if the Rule covers unintentional misstatements or omissions, including those that may be inconsequential to the purpose to avoid conduct that manipulates markets, bright lines to guide commercial conduct become difficult to draw without restricting legitimate conduct that is part of ordinary interactions among market participants.

The challenge of crafting a compliance rule is more complex to the extent there is a risk of private rights of action. As noted in the NPRA comments, private enforcement actions pursuant to Rule 10b-5 are much more prevalent than SEC-initiated actions, and the range of conduct that is challenged by third-parties can be much less predictable than the range of actions pursued by the government. Therefore, the closer an FTC Rule adheres to the Rule 10b-5 model, the more difficult it will be for FHR to design training and procedures that do not in part prohibit legitimate, beneficial conduct. As a prophylactic matter, the result could be a compliance rule that advised clients to reveal as little information as possible in their commercial dealings – i.e., a “do not disclose anything” rule. This would protect against mistakes, but at a significant cost to commercial relationships and the efficiency of business operations. This approach would be justified to avoid alleged Rule violations that involve unintentional misstatements or omissions. The alternative would require employees and in-house counsel to conduct an unrealistic degree of due diligence concerning available information before making a wide variety of statements. In the normal bargaining process, there is not adequate time for business representatives or in-house lawyers to accomplish these objectives and still conduct business in a timely manner that meets the needs of customers and consumers.

In practical terms, and with the current proposed rule in mind, this would mean that for any area of uncertainty, FHR would err on the side of caution, and advise against some conduct


that may be entirely legitimate. The impact is that FHR would have less interaction with its counterparties, transactions could become more automated, and individual employees would have less discretion – and less understanding of customers’ requirements. The effect would be even more acute in times of disruption, when information may be less reliable – but more desired – than usual. In such a case, companies may be even more hesitant to speak.

FHR can not overstate the importance of this issue. It is critical that FHR know with some level of comfort what the rules are *ex ante*, and be able to provide practical, clear, articulate guidance to its staff, traders and others dealing on its behalf. It is equally important that the FTC’s Rule be tailored so that such guidance does not have unintended and deleterious effects. Unfortunately, the language of the current version of the rule and the NPRM’s reliance on the Rule 10b-5 framework and standards, does not provide this necessary guidance.

For these, and the other reasons discussed in NPRA’s comments, FHR urges the FTC to appropriately tailor the proposed rule and provide additional guidance regarding its scope as suggested in the comments submitted by the NPRA.

Respectfully submitted,

Alan Hallock
Flint Hills Resources, LP
4111 East 37th Street N.
Wichita, Kansas 67220
(316) 828-5629

Thomas  Veary
Mary Anne Mason
Hogan & Hartson LLP
Columbia Square
555 Thirteenth St., N.W.
(202) 637-5600