

**FEDERAL TRADE COMMISSION
16 CFR Part 317
[Project No. P082900]**

**Prohibitions on Market Manipulation and False Information in Subtitle B
of Title VIII of The Energy Independence and Security Act of 2007**

Notice of proposed rulemaking; request for public comment.

**COMMENTS OF THE NAVAJO NATION,
RESOLUTE NATURAL RESOURCES COMPANY, AND
NAVAJO NATION OIL AND GAS COMPANY**

Submitted
October 17, 2008

Before the
FEDERAL TRADE COMMISSION
Washington, D.C.

In the Matter of

Market Manipulation Rulemaking, No. P082900

I. INTRODUCTORY STATEMENT

The Navajo Nation,¹ Resolute Natural Resources Company and its affiliate companies (“Resolute”), and Navajo Nation Oil and Gas Company (“NNOG”)² (collectively, the “Navajo Commentators”) are pleased to submit these written comments in response to the Notice of Proposed Rulemaking, “Prohibitions on Market Manipulation and False Information in Subtitle B of Title VIII of the Energy Independence and Security Act of 2007” (“NPR”), 73 Fed. Reg. 48317, issued on August 13, 2008.

Section 811 of Subtitle B of the Energy Independence and Security Act of 2007, Pub. L. 110-140, 121 Stat. 1723 (Dec. 19, 2007), tit. VII, subtit. B, *to be codified at* 42 U.S.C. §§ 17301-05 (“EISA”), makes it unlawful for:

Any person, directly or indirectly, to use or employ, in connection with the purchase or sale of crude oil . . . , any manipulative *or* deceptive device or contrivance, in contravention of such rules and regulations as the Federal Trade Commission may prescribe as necessary or appropriate in the public interest or for the protection of the United States.

(Emphasis added.) Violations of Federal Trade Commission (the “FTC” or the “Commission”) rules developed to implement this provision of the EISA are to be treated as “unfair or deceptive acts or practices” under section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45.

¹ The Navajo Nation is a federally recognized Indian Nation. *See Kerr-McGee Corp. v. Navajo Tribe of Indians*, 471 U.S. 195 (1985).

² NNOG is a federal corporation organized under section 17 of the Indian Reorganization Act, 25 U.S.C. § 477, and wholly owned by the Navajo Nation.

In response to this legislation, the Commission has proposed a rule (“the Proposed Rule”) that, according to its title, prohibits “energy market manipulation” in wholesale petroleum markets. The NPR invites public comment on issues raised by the Proposed Rule and seeks answers to certain questions posed in the NPR. The Navajo Commentators previously submitted extensive comments on June 23, 2008, which included a specific proposal for a rule in response to the Commission’s Advance Notice of Proposed Rulemaking, and those comments are incorporated herein by reference.

The Navajo Commentators appreciate the Commission’s proposal to partially implement Section 811 by banning certain fraudulent practices. However, if the Proposed Rule is interpreted or applied too narrowly, it will fall far short of addressing all of the concerns of Congress expressed in Section 811, and the NPR does not clearly indicate what the Commission’s intentions are in this respect. On the one hand, the NPR says that the Proposed Rule is “narrowly tailored to address fraudulent practices,” 73 Fed. Reg. at 48320, but, on the other hand, the door is left open for the Commission to apply the Proposed Rule to other conduct. *See id.* at 48322 n. 63 (“The determination to prohibit manipulative and deceptive conduct under the proposed Rule does not preclude the Commission from finding that other conduct violates EISA and any other applicable laws or rules that the Commission enforces.”)

Accordingly, the Navajo Commentators urge the Commission to clarify that the Proposed Rule is not intended to be interpreted and applied so narrowly that it fails to carry out the full scope of the Congressional intent. This can be accomplished by confirming that the Proposed Rule will be applied to prohibit all manipulative conduct that artificially distorts wholesale petroleum markets or undermines incentives to find and develop reserves of domestic crude oil.

II. DISCUSSION

The starting point for implementing Section 811 is to examine its text and the purpose of the legislation. Section 811 expressly grants the Commission authority to prohibit the use of any manipulative *or* deceptive device or contrivance in connection with the purchase or sale of crude oil at wholesale. The purpose of this important legislation was to arm the FTC with *new* tools to combat all forms of price manipulation in crude oil and gasoline markets, particularly in light of the Commission's conclusions in previous reports to Congress that manipulative conduct in these markets is not unlawful under existing law.³ Senator Maria Cantwell, the author of Section 811, has linked the need for this rulemaking with the Commission's recognition, in its report on its investigation of gasoline prices after Hurricane Katrina, of "the possibility that the petroleum industry could manipulate prices by reducing production, distribution, or inventories." See April 8, 2008 letter from Senator Maria Cantwell to Federal Trade Commission. She also stressed that Section 811 provides "urgently needed *new* anti-manipulation authority." *Id.* (emphasis added).

The text of the Proposed Rule is entirely silent on the use of *manipulation* and instead focuses on fraudulent and misleading practices. If the FTC's enforcement policy is limited to this approach, it will not implement Congress' intent to ensure aggressive oversight against "the possibility that the petroleum industry can manipulate prices by reducing production, distribution, or inventories or increasing margins" through manipulative conduct.⁴ In other words, the Proposed Rule appears to do little more than duplicate authority the Commission

³ See, e.g., FTC, *Report on Spring/Summer 2006 Nationwide Gasoline Price Increases* at 1, n.2 (Aug. 2007), "'Price manipulation' is not a defined legal or economic term. As used in the Commission's May 2006 report, the term 'price manipulation' included (1) all transactions and practices that are prohibited by the antitrust laws (including the Federal Trade Commission Act) and (2) all other transactions and practices, irrespective of their legality under the antitrust laws, that tend to increase prices relative to costs and to reduce output."

⁴ See Letter to Honorable William E. Kovacic from Speaker of the House Nancy Pelosi, House Majority Leader Steny Hoyer, House Majority Whip James E. Clyburn, Chairman, Democratic Caucus Rahm Emanuel, Chairman, Energy and Commerce Committee John Dingell, Chairman, Oversight and Government Reform Henry Waxman and Chairman, Select Committee on Energy Independence and Global Warming Ed Markey, April 25, 2008.

already possesses under Section 5 of the FTC Act to prevent unfair and deceptive acts and practices.⁵

Although fraud or deception must be proven to establish a violation of Rule 10(b)(5), adopted pursuant to Section 10(b) of the Securities Exchange Act, it does not follow that such concepts should be incorporated into the Proposed Rule without modification to take account of issues that arise in crude oil and other wholesale petroleum markets that could affect the supply of product to consumers at competitive prices. The crude oil and petroleum markets are very different from securities markets. Fraud and deception are the principal means by which securities markets are manipulated, given the unequal knowledge of corporate managers and unsophisticated outside investors. Manipulation of crude oil and petroleum markets, however, can occur when participants in the market openly engage in conduct intended to manipulate market prices or market conditions, or that foreseeably could result in such manipulation, or withhold output or supplies that could be produced at a cost less than the market price. *See, e.g., FTC, Investigation of Gasoline Price Manipulation and Post-Katrina Gasoline Price Increases* at ii and 3 n. 3 (Spring 2006). Such manipulation can occur without fraud, as for example when a refiner can manipulate crude oil prices by denying producers access to other markets.

The failure to address manipulative conduct in the Proposed Rule could be remedied by revising the text. The Navajo Commentators' proposal for revising the Proposed Rule in this regard is attached. Alternatively, the Navajo Commentators believe that this omission also could

⁵ In fact, the Proposed Rule, if limited in this fashion, would actually represent a step backward, from an enforcement perspective, because it imposes a burdensome scienter requirement. Under existing Section 5 law, the Commission has the ability to prevent deceptive acts and practices without regard to intent. *See, e.g., Removation Int'l Corp. v. FTC*, 884 F.2d 1489, 1495 (1st Cir. 1989) ("The FTC need not prove a willful, knowing or deliberate act in order to prove a violation of 15 U.S.C. § 45"); *FTC v. World Travel Vacation Brokers, Inc.*, 861 F.2d 1020, 1029 (7th Cir. 1988) ("To be actionable under Section 5, these misrepresentations or practices need not be made with an intent to deceive"); *Chrysler Corp. v. FTC*, 561 F.2d 357, 363 n.5 (D.C. Cir. 1977) ("intent to deceive is not a required element for a section 5 violation"). It obviously makes no sense that, at a time of national crisis, Congress would adopt remedial legislation that is actually weaker than a statute that has been on the books since the 1930s – particularly when the new statutory language expressly refers to manipulative *or* deceptive conduct.

be resolved by adding language to the Statement of Basis and Purpose (or at some other appropriate location in the final rule) to express the Commission's intention to reach manipulative conduct that obstructs the flow of supplies to U.S. markets in response to competitive market forces. The Navajo Commentators respectfully suggest that the following language would accomplish this purpose:

While this rule does not mandate specific conduct obligations, the Commission notes that it will consider the totality of facts and circumstances related to allegations that supply has been withheld or access denied to any relevant market. To the extent such activities are demonstrated to have been done with the requisite scienter, they would violate this rule. Specifically, any intentional conduct done in connection with the wholesale purchase, sale, or transportation of crude oil, gasoline, or petroleum distillates that obstructs or impairs the flow of crude oil, gasoline or petroleum distillates in response to market signals or that undermines market incentives to explore for and develop reserves of domestic crude oil may constitute manipulative conduct subject to the rule.

The addition of this explanatory language would give participants in petroleum markets valuable guidance and would enable the Commission to exercise the full range of authority contemplated by Congress in enacting EISA to combat crude oil and gasoline price manipulation. We submit that a revision of this nature is necessary to ensure the free flow of crude oil and gasoline supplies, unrestrained by any form of manipulative conduct, at a time when Americans face a worldwide economic crisis and inflated prices at the pump.

Thank you for your consideration of these comments. We also filed on October 6, 2008 a request to participate on the panel in the Market Manipulation Rulemaking Workshop scheduled for November 6, 2008 and look forward to the opportunity to present additional comments at that time.

NAVAJO COMMENTATORS' SUGGESTED REVISION TO PROPOSED
MARKET MANIPULATION RULE
(Suggested revisions underscored)

PART 317 – PROHIBITION OF ENERGY MARKET MANIPULATION RULE

Sec.

317.1 Scope.

317.2 Definitions.

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Authority: 42 U.S.C. 17301-17305; 15 U.S.C. 41-58.

§317.1 Scope.

This part implements Subtitle B of Title VIII of The Energy Independence and Security Act of 2007 (“EISA”), Pub. L. 110-140, 121 Stat. 1723 (December 19, 2007), *codified at* 42 U.S.C. 17301-17305. This rule applies to any person over which the Federal Trade Commission has jurisdiction under the Federal Trade Commission Act, 15 U.S.C. 41 *et seq.*

§ 317.2 Definitions.

The following definitions shall apply throughout this rule:

- (a) *Crude oil* means the mixture of hydrocarbons that exist: (1) in liquid phase in natural underground reservoirs and which remain liquid at atmospheric pressure after passing through separating facilities, or (2) as shale oil or tar sands requiring further processing for sale as a refinery feedstock.
- (b) *Gasoline* means (1) finished gasoline, including, but not limited to, conventional, reformulated, and oxygenated blends, and (2) conventional and reformulated gasoline blendstock for oxygenate blending.

- (c) Manipulative device, scheme or contrivance means conduct without substantial efficiency justification that is intended to artificially stimulate, depress or distort market prices or that foreseeably could artificially stimulate, depress, or distort market prices.
- (d) *Person* means any individual, group, unincorporated association, limited or general partnership, corporation, or other business entity.
- (e) *Petroleum distillates* means (1) jet fuels, including, but not limited to, all commercial and military specification jet fuels, and (2) diesel fuels and fuel oils, including, but not limited to, No. 1, No. 2, and No. 4 diesel fuel, and No. 1, No. 2, and No. 4 fuel oil.
- (f) *Wholesale* means purchases or sales at the terminal rack level or upstream of the terminal rack level. Transactions conducted at wholesale do not include retail gasoline sales to consumers.

§ 317.3 Prohibited practices.

It shall be unlawful for any person, directly or indirectly, in connection with the purchase or sale of crude oil, gasoline, or petroleum distillates at wholesale,

- (a) To use or employ any manipulative device, scheme or contrivance,
- (b) To use or employ any device, scheme, or artifice to defraud,
- (c) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
- (d) To engage in any act, practice, or course of business that operates or would operate as a fraud or deceit upon any person.

§ 317.4 Preemption.

The Federal Trade Commission does not intend, through the promulgation of this Rule, to preempt the laws of any state or local government, except to the extent that any such law conflicts with this Rule. A law is not in conflict with this Rule if it affords equal or greater protection from the use or employment, directly or indirectly, of any deceptive or manipulative device or contrivance, in connection with the purchase or sale of crude oil, gasoline, or petroleum distillates at wholesale.

§ 317.5 Severability.

The provisions of this Rule are separate and severable from one another. If any provision is stayed or determined to be invalid, it is the Commission's intention that the remaining provisions shall continue in effect.

By direction of the Commission.

Donald S. Clark
Secretary