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May 19, 2009

**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”) Revised Notice of Proposed Rulemaking (“RNPRM”) regarding market manipulation under section 811 of the Energy Independence and Security Act of 2007 (“EISA”).

**Background**

SIGMA is a leading national trade association representing approximately 270 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.

SIGMA congratulates the Commission on dramatically improving its May 1, 2008, Advanced Notice of Proposed Rulemaking (“ANPR”) and its August 19, 2008, Notice of Proposed Rulemaking (“NPRM”) in a number of areas. SIGMA commented on the ANPR on June 23, 2008, and on the NPRM on October 17, 2008, and hereby incorporates those comments into this letter.

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### **Definition of “Wholesale”**

SIGMA agrees that the modified definition of “wholesale” in the RNPRM should “not extend to retail sales of gasoline, diesel fuels, or fuel oils to consumers.”<sup>1</sup> However, the RNPRM covers rack level sales within the definition of “wholesale,” which SIGMA believes is inappropriate. SIGMA urges the FTC to adopt a definition for the term “wholesale” as used in Section 811 that covers only bulk transactions in the pipeline, tank or marine market, and does not include rack level transactions. By including rack sales in the definition of “wholesale,” the FTC will unduly burden legitimate business conduct and impose significant compliance requirements on the gasoline marketing industry. It is therefore extremely important that the FTC define “wholesale” in a manner that ensures no unintended consequences.

An individual company’s wholesale rack pricing practices are unlikely to affect overall price levels in the markets served by a terminal or group of terminals. First, rack prices are limited to a relatively small geographic area. Any attempt to move the market, to the detriment of consumers’ interests, would be futile since there is ready market competition from other sellers in the same market and adjacent markets. Second, rack prices are generally set by an individual rack supplier and apply to a variety of different purchasers for a particular product. These prices are set by the supplier’s view of the market and are not normally fixed by reference to other suppliers’ prices. Particular pricing practices at the rack level may have an impact on a particular supplier’s customer but are unlikely to alter overall price levels in the markets served out of a terminal or terminal cluster. Third, any attempt by an individual supplier to act in concert with others to affect the market price of petroleum is already regulated under the Sherman Act<sup>2</sup> and other applicable law.

The purpose of EISA’s provision is to prohibit “market manipulation,” not to regulate particular pricing practices at the last level before retail sales. Transactions capable of having the effects which the legislation seeks to prohibit take place “above” the rack in the “bulk” markets. Therefore, there is little, if any, potential for market-manipulation at or below the terminal level. To date, there are no reported instances of price manipulation practices at the rack terminal level. The FTC can adequately prohibit manipulative market conduct in the wholesale markets, as required by the EISA, while excluding terminal rack sales from the purview of its final rule.

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<sup>1</sup> *Federal Trade Commission, 16 CFR Part 317: Prohibitions on Market Manipulation and False Information in Subtitle B of the Energy Independence and Security Act of 2007*, 74 Fed. Reg. 18304, 18314 (April 22, 2009).

<sup>2</sup> The Sherman Antitrust Act, 26 Stat. 209, 15 U.S.C. §1 et seq. (1890).

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Consequently, SIGMA recommends 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 change 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.

SIGMA greatly appreciates the opportunity to comment on the RNPRM. 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