



UNIVERSITY OF MARYLAND
SCHOOL OF LAW

May 20, 2009

Mr. Donald S. Clark
Federal Trade Commission
Office of the Secretary
Room H-135 (Annex G)
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Re: Market Manipulation Rulemaking P082900

Dear Mr. Clark:

In response to the request for comments within the Federal Trade Commission's Revised Notice of Proposed Rulemaking (RNPR) concerning "Prohibitions on Market Manipulation in Subtitle B of Title VIII of the Energy Independence and Security Act of 2007," I incorporate by reference my June 6 2008 comment to the Commission on its Advanced Notice of Proposed Rulemaking, as well as related testimony I attached to that letter, which was delivered to the United States Senate Committee on Commerce, Science, and Transportation on June 3, 2008 at its hearing entitled, "Energy Market Manipulation and Federal Enforcement Regimes."¹

When the Commission's rule was originally proposed in August 2008, the price of crude oil was approximately \$116 a barrel, having dropped from an all-time high of \$147 in mid-July. In February 2009, the price dropped to \$34 a barrel. The deflation of that price bubble can only be explained by a series of temporary or tentative actions from the end of May 2008 through September 2008 by both Houses of Congress and relevant independent agencies constraining excessive speculation in these markets, including the August 2008 proposed rule of this Commission, which suggested a "get tough" enforcement program surveilling unnecessary and harmful speculative activity.

The price of crude oil is surging once again. It is now hovering around \$60 per barrel. Consumers and analysts are now quite concerned that there will soon be another energy price bubble weighing down an already oppressive economic recession. Recent commentary suggests once again that market fundamentals do not explain the newly surging prices in the crude oil

¹Comment Re: Market Manipulation Rulemaking, P082900, and Testimony before the Senate Committee on Commerce, Science, and Transportation Re: Energy Market Manipulation and Federal Enforcement Regimes, available at http://www.michaelgreenberger.com/files/June_3_2008_testimony.pdf.

markets.² It is now time to put in place permanent regulatory regimes, especially those which are now on the statute books, to fight any manipulative excesses in these markets.

As my prior comment and testimony states, I urged and continue to urge the FTC to work quickly to promulgate a rule that will bring stability to the crude oil markets. Not only does the FTC have an explicit Congressional mandate to investigate manipulation causing price distortions in the wholesale petroleum markets, it should do so under the broad and flexible rule proposed by the Commission in August 2008, *not* the Revised Proposed rule. The Proposed Rule was properly drafted with respect to questions of agency jurisdiction and maintained a proper balance between marketplace concerns and consumer protections. For this reason, the Commission should favor the Proposed Rule. The Revised Proposed Rule is a weakening of administrative power and defies the clear mandate given by Congress to the FTC through the Energy Independence and Security Act of 2007 (“EISA”).

As I stated in my June 3 2008 Senate testimony, the FTC has an express legislative mandate to investigate manipulation that affects prices in the wholesale petroleum markets from EISA, an act modeled on the 2005 legislation that granted FERC similar authority in the natural gas markets. Congress clearly intended the FTC to have power in this area that would not be blocked by the CFTC, as evidenced by Congress’ forceful bipartisan admonishment when CFTC attempted to block FERC from regulating natural gas markets.³ Furthermore, as I stated in that testimony, the FTC must adopt the SEC’s definition of manipulation. The tools given to the FTC through EISA are important to determine whether consumers are paying an unnecessary premium on crude oil prices because of market manipulation. Therefore, it is terribly important that the FTC fulfill the mandate of the 2007 EISA.

The Commission can best fulfill this mandate with the August 2008 Proposed Rule, which is a broader rule that confers lawful authority on the FTC, granted to it by EISA, to monitor and prosecute market manipulation. Industry commentators who suggest that such a rule will chill the ordinary course of business on the grounds that the proposed consequences will stifle the collection and dissemination of pro-competitive information are disingenuous. Rather, the manipulation and fraud the FTC’s rule seeks to prevent is systemic market manipulation on the part of those whose behavior has through neglectful enforcement and narrowly tailored rules gone wholly unmonitored. This kind of manipulation is so far out of bounds of normal business practices that it is disingenuous to urge lax policies that would allow harmful manipulation in the name of normal business practices. The purpose of EISA is to generate aggressive enforcement activity and broaden the rules governing investigations of actions that have no economic purpose other than to fatten the balance sheets of large firms to the substantial detriment of the average American consumer.

² Javier Blas, “Recovery in Oil Prices Ignores Fundamentals,” THE PENINSULA, May 20, 2009, http://www.thepeninsulaqatar.com/Display_news.asp?section=Business_News&subsection=market+news&month=May2009&file=Business_News200905201050.xml.

³ Rep. Joe Barton, Subcommittee on Oversight & Investigations, Statements during the Energy Speculation: Is Greater Regulation Necessary to Stop Price Manipulation? (Dec. 12, 2007). See also Senator Maria Cantwell’s May 20, 2009 Comment letter re: Market Manipulation Rulemaking P082900.

Under the Proposed Rule,⁴ Section 3.173(b) simply holds industry participants accountable for their omitted or untrue statements about the markets in question. The requirement that the omitted or untrue statement must be “material” in the context that the statement arises sufficiently tailors the language of the proposed rule to provide adequate protection to industry participants. That language does not subject industry participants to potential liability for careless errors relating to meaningless or minor facts; it only creates the possibility of liability for “material” offenses aimed at gross malpractices such as manipulating or defrauding the markets. Similarly, the Proposed Rule’s catch-all anti-fraud provision in 317.3(c), far from having a “chilling effect” on the ordinary course of business, simply allows the FTC to monitor and prosecute manipulation and fraud where it finds it. The Revised Proposed Rule’s abandonment of the general catch-all anti-fraud provision in what was 317.3(c) makes it more difficult to fight manipulation and fraud and to protect the American consumer from unnecessarily high crude oil prices by imposing unnecessary additional evidentiary burdens on the FTC in fulfilling its statutory mandate. These additional conditions will lead to the failure of the Commission’s ability to fully satisfy Congress’ express intent in passing EISA.

Likewise, the addition of scienter to the Revised Proposed Rule⁵ in the form of “knowingly” and “intentionally” to sections (a) and (b) respectively, unnecessarily inhibits the FTC from exercising its authority to protect the public from market manipulation by making the evidentiary requirements more onerous under the revised rule. The revision from a standard of recklessness to extreme recklessness is unnecessary and does not comport with long-standing that recklessness is the requisite standard for fraud in financial cases.⁶ Congress obviously believed it actionable when it made clear that it is enough that an actor is or has engaged in acts of fraud or deceit to subject them to the jurisdiction of the FTC. If the Commission is interested in using scienter as a mechanism for limiting the reach of the original proposed Rule, at a minimum, these elements should be incorporated as a rebuttable presumption. The burden of proof should be shifted to the alleged actor to demonstrate that these elements were not present. Otherwise, the Commission should revert to the original Rule and eliminate the additional elements of scienter.

Although I strongly urge the Commission to promulgate the rule as originally proposed in August 2008, I commend the Commission for retaining, at a minimum, several aspects of the Proposed Rule, in spite of industry objections, by recognizing that these elements are mandated by Congress. These include:

- Retaining the original definition of “wholesale” to include rack transactions.
- Not requiring specific intent in omissions, as set forth in 317.3(b).
- Not offering an overly broad safe harbor from the FTC’s statutorily mandated jurisdiction.
- Not requiring a market effects test for omissions scienter in 317.3(b).
- Recognizing and using 10b(5)-like powers and jurisdiction.

⁴ Prohibitions on Market Manipulation and False Information in Subtitle B of Title VIII of the Energy Independence and Security Act of 2007, 73 Fed. Reg. 48317, 48334 Aug. 19, 2008.

⁵ Prohibitions on Market Manipulation and False Information in Subtitle B of Title VIII of the Energy Independence and Security Act of 2007, 74 Fed. Reg. 18304, 18328 Apr. 22, 2009.


⁶ Jerry W. Markham, *Commodities Regulation: Fraud, Manipulation & Other Claims* § 3.7 (West 2006) (concluding after substantial case analysis that “courts simply adopt a ‘reckless’ standard to establish knowledge of fraud).

The economy is experiencing the worst economic crisis since the Great Depression. The only bright spot over the last few months has been that the energy bubble of the first half of 2008 had burst before the full effect of the present meltdown had been experienced. Job losses are now massive. If the country experiences an unnecessary resurgence in crude oil prices, the present recession will worsen and we may in fact find ourselves falling into a spiraling depression which will last for years.⁷ The FTC has been given important and substantial express authority to ensure that crude oil prices are consistent with market fundamentals. If the FTC falters in carrying out its statutory mandate, the American consumer will experience suffering unknown since the early 1930's. This is no time for cutting corners.

I encourage the FTC to fulfill the Congressional intent and immediately commence proceedings to promulgate an aggressive final rule aimed at eliminating price manipulation in petroleum markets. This rule should be based on its construction in the Proposed Rule and *not* the Revised Rule, which is a much less effective regulatory tool, and whose main supporters are those firms which have benefited from inflationary commodity price bubbles while the average American is at, or brought to the brink of, unremitting economic disaster.

Thank you.

Sincerely,


Michael Greenberger
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⁷ Jad Mouawad, *Oil Prices Close Above \$60, a Six-Month High*, NY TIMES, May 20, 2009, available at http://www.nytimes.com/2009/05/21/business/21oil.html?_r=1&emc=eta1.
