

Federal Trade Commission Prohibits Petroleum Market Manipulation

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On August 6, the Federal Trade Commission (FTC) issued a Final Rule prohibiting market manipulation in the petroleum industry. Under the terms of the Final Rule, persons that engage in fraud or deceit in wholesale petroleum markets *or* omit material information that is likely to distort petroleum markets are subject to significant civil penalties. In issuing the Final Rule, the FTC joins the Federal Energy Regulatory Commission and the Commodity Futures Trading Commission in regulating market manipulation in the energy industry.

The issuance of the Final Rule concludes a two-year process that was authorized by Title VIII of the Energy Independence and Security Act (EISA) of 2007. Under EISA, the FTC is authorized to issue any rule or regulation that prohibits any person from engaging in manipulative or deceptive behavior in connection with the purchase or sale of crude oil, gasoline, or petroleum distillates at wholesale. Accordingly, the FTC's Final Order prohibits any person from (a) knowingly engaging in any act that operates as a fraud or deceit upon any person; and (b) intentionally failing to state a material fact that renders a statement made by that person misleading if the omission distorts or is likely to distort market conditions. In practice, paragraph (i) of the Final Rule prohibits fraudulent or deceptive overt conduct while paragraph (ii) of the Final Rule prohibits material omissions that are likely to distort market conditions.

The Final Rule is applicable to any "person." As defined in the Final Rule, a "person" includes any individual, group, unincorporated association, partnership, corporation, or other business entity. Similarly, the Final Rule is applicable to the purchase or sale of crude oil, gasoline, and petroleum distillates, as defined in the Final Rule. Persons that are found in violation of the Final Rule are subject to civil penalties up to \$1 million per day as well as any additional penalties authorized by the Federal Trade Commission Act.

The FTC approved the final rule by a 3-to-1 vote. FTC Chairman Jon Leibowitz issued a separate statement expressing his support for the Final Rule, and Commissioner J. Thomas Rosch issued a concurring statement expressing his support for the form of the order. Commissioner William E. Kovacic, however, issued a dissenting statement.

In his dissent, Commissioner Kovacic disapproved of three aspects of the Final Rule. First, Commissioner Kovacic would have required actions under paragraph (i) to be intentional rather than knowing. Such an action would have the effect of imposing a higher scienter requirement prior to imposing liability. Second, Commissioner Kovacic would have required actions under paragraph (i) to

either actually distort or be likely to distort market conditions. Such a requirement would be similar to that imposed in paragraph (ii) and, in Commissioner's Kovacic's view, would preclude liability for acts that create no effect on market conditions. Third, Commissioner Kovacic disapproved of the creation of paragraph (ii) in its entirety. In Commissioner Kovacic's view, the inclusion of paragraph (ii) forces entities to either disclose more private information to competitors or limit investments in acquiring relevant market information.

The Final Rule will become effective **November 4, 2009**. Additional information, including the guidance document, may be obtained on the FTC's website at <http://www.ftc.gov>.

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