

REPORT OF THE FEDERAL TRADE COMMISSION ON ACTIVITIES IN THE OIL AND NATURAL GAS INDUSTRIES

REPORTING P

¹ Explanatory Statement for Division D, Title V, Omnibus Appropriations Act, 2009, Pub. L. No. 111-8 (House Appropriations Committee Print at 983, available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_house_committee_prints&docid=f:47494d.pdf) As the Commission noted in previous reports to the Appropriations Committees, because this is a public report, it is drafted to exclude sensitive data of ongoing investigations, which the Commission is prohibited by law from revealing.

² Additional offices in the Bureau of Competition that have participated in oil and gas matters during the second half of 2009 include the Office of the Director, the Mergers II division, the Division of Anticompetitive Practices, the Division of Compliance, the Division of Technology and Information Management, the Office of Policy and Coordination, the Division

Economics also bore major responsibility for conducting competition analysis of pricing and other competitive issues in the petroleum and natural gas industries. Other staff involved in oil and natural gas matters during the second half of 2009 came from the Commission's Office of the General Counsel, Office of Congressional Relations, the Commissioners' offices, the Bureau of Consumer Protection, and other FTC organizations.

The most widely noted FTC activity in the oil and natural gas sector during the second half of 2009 arose from the market manipulation rulemaking proceeding involving wholesale transactions in crude oil, gasoline, and petroleum distillates. As noted in the Commission's last semiannual report, Section 811 of the Energy Independence and Security Act of 2007 ("EISA"), Pub. L. No. 110-140, authorized the Commission to address the potential use or employment of "any manipulative or deceptive device or contrivance" "in connection with the purchase or sale of crude oil, gasoline or petroleum distillates at wholesale." Following an intensive suite of activities during 2008 and the first half of 2009,³ the Commission announced its Final Rule against wholesale market manipulation in these products on August 6, 2009 (and published the Rule in the Federal Register on August 12). The Market Manipulation Rule went into effect on November 4, 2009.

Shortly after the Rule took effect, the FTC staff published a "Guide to Complying with Petroleum Market Manipulation Regulations." I

of Operations, and the Office of Premerger Notification.

³ Highlights of the Commission's work in preparation for issuance of the final Market Manipulation Rule included the issuance in May 2008 of an Advance Notice of Proposed Rulemaking ("ANPR"), including a request for public comment on a range of issues and questions; the receipt of 155 comments on the ANPR from a wide spectrum of consumer groups, businesses, academic experts, and other informed sources; the issuance in August 2008 of a Notice of Proposed Rulemaking ("NPRM") that set forth the text of a proposed rule on petroleum market manipulation and invited further public comment; the receipt of 34 comments on the NPRM; a day-long public workshop on November 6, 2008, that featured more than 15 outside panelists representing diverse interests and views and considered such issues as the use of Securities and Exchange Commission Rule 10b-5 as a model for an FTC rule, the appropriate reach of an FTC market manipulation rule, and whether to include market or price effects as an element of a cause of action under a FTC rule; the publication in April 2009 of a Revised Notice of Proposed Rulemaking ("RNPRM"), seeking public comment on a revised version of the proposed rule; and the evaluation of 17 public comments received in response to the RNPRM.

⁴ See http://www.ftc.gov/os/2009/08/082900mmr_finalrule.pdf for the Federal Register notice containing the final Rule.

Rule separately bans . . . [the] intentional failure to state material fact when the omission (1) makes . . . [a] statement misleading and (2) distorts or is likely to distort market conditions for any product covered by the Rule.” EISA provides the FTC with authority to recover substantial civil penalties (and secure other forms of relief) against violators of the Market Manipulation Rule.⁵

The Commission has established a process to monitor compliance with the Market Manipulation Rule and target potential Rule violations. The compliance guide provides addresses –including an email address⁶ – to which the public may send complaints of possible Rule violations, and staff in the Bureau of Competition’s Office of Policy and Coordination are tracking all incoming complaints and inquiries concerning the Rule. Complaints that evidence a serious possibility of a Rule violation are referred to FTC litigation staff who specialize in maintaining competition in energy industries. Complaints that concern activity in futures markets are shared with the Commodity Futures Trading Commission (CFTC) through the FTC’s working relationship with that agency, to ensure that consumers are protected against fraud and deception in whatever form they take.⁷

The Commission’s work in the oil and natural gas sector also involves the analysis of mergers and acquisitions. Since July 1, 2009, the FTC has received 100 reports of potential violations of the Market Manipulation Rule.

⁵ See <http://www.ftc.gov/os/2009/11/091113mmrguide.pdf> for the compliance guide.

⁶ The email address is mmr@ftc.gov. This address may also be used to report suspected violations of Section 812 of EISA, which (in the words of the compliance guide) “makes it unlawful for you to report false or misleading information related to the wholesale price of crude oil, gasoline, or petroleum distillates to a federal department or agency if (1) you are legally required to report the information, (2) you knew, or reasonably should have known, that the information was false or misleading, and (3) you intended for the false or misleading information to affect the integrity of the data compiled by the department or agency for statistical or analytical purposes with respect to the market for crude oil, gasoline, or petroleum distillates.”

⁷ Of course, FTC litigators and economists also continue to monitor prices and other activity in petroleum markets, as described in more detail below.

⁸ The Commission’s activities involving oil and natural gas also have included the examination of possible anticompetitive conduct by firms in those industries, including an investigation of conduct in the propane business.

Some of the Commission's inquiries concerning gasoline prices have involved close cooperation between the FTC staff and a number of state attorney general offices. For example, the FTC staff continues to coordinate with the staff of one state attorney general concerning gasoline prices in a particular part of a state. In addition, the Commission – in conjunction with the U.S. Department of Justice and the National Association of Attorneys General – held a two-day workshop in November for law enforcement officials to discuss key competition issues in the natural gas, electric power, and renewable energy industries.

⁹ See <http://www.ftc.gov/opa/2009/07/cash4dunkers.shtm>.

¹⁰ See day wo/op

¹² The Commission's 2009 ethanol report available at <http://www.ftc.gov/os/2009/12/091201ethanolreport.pdf>, concluded that the dynamics of the industry in 2009 – including a continuing “industry trend toward less concentration,” an increase in ethanol production capacity, potential entry by new firms, and the availability of ethanol imports – “make it extremely unlikely that a single ethanol producer or marketer or a small group of such firms could wield sufficient market power to successfully engage in pricefixing or other anticompetitive behavior.”

A number of reports prepared by the FTC or its staff that predate the period covered by the current report to Congress also demonstrate the Commission's commitment to delving deeply into key competition and consumer issues in the energy sector and sharing its expertise with Congress.