

ENERGY ALERT

FTC ISSUES COMPLIANCE GUIDE FOR PETROLEUM MARKET MANIPULATION REGULATIONS

On November 13, 2009, the U.S. Federal Trade Commission (FTC) issued a “Guide to Complying with Petroleum Market Manipulation Regulations” (“Compliance Guide”). The regulations themselves became effective on November 4, 2009. The Compliance Guide and the regulations are both available on the [FTC’s Web site](#).

The Compliance Guide adds little to the mix of information about how the agency intends to enforce the regulations and, instead, confirms many of the statements made by the FTC in its [Notice of Final Rulemaking](#). In this respect, the guidance provides a certain amount of reassurance to market participants, but a fuller understanding of what the regulations mean in practice will have to await actual enforcement efforts by the agency and the response of market players.

As described in our [August 6, 2009 alert](#), the Petroleum Market Manipulation Regulations outlaw “knowing” acts, practices or courses of business, including false statements of material fact, that operate or would operate as a fraud or deceit. The regulations also forbid the “intentional” failure to state a material fact that, under the circumstances, makes another statement misleading, if the omission “distorts or is likely to distort” market conditions for a covered product.

In its compliance guide, the FTC confirms, among other things, that—

- liability for affirmative acts can be established based on “extreme recklessness,” i.e., creating a serious risk that conduct would be fraudulent or deceptive

- liability for an omission requires an intention to defraud or deceive
- omissions are only actionable if they are likely to make market information less reliable
- materiality of an omission is to be judged objectively, based on a “reasonable market participant” standard.

On the flip side, the Commission confirms that—

- the regulations do not reach “mistakes, unintended conduct, or legitimate conduct undertaken in the ordinary course of business”
- the Commission does not intend to “second-guess legitimate supply and operational decisions”
- the Commission does not intend to set output or prices for covered products
- the Commission “generally” does not intend to reach bilateral negotiations where there is no broader dissemination of information; but, misleading statements made during bilateral negotiations can still be illegal in some circumstances, e.g., in a thinly traded market where a trade takes place and is reported, so that the misleading information affects market prices
- the regulations do not impose a duty to disclose market intelligence to counterparties in bilateral negotiations
- uncompleted acts will not trigger liability
- the regulations impose no new operational or record-keeping requirements, nor do they generally require disclosure of any information.

Among the more useful aspects of the compliance guide is a short list of examples of conduct prohibited by the rule. In particular, the agency identifies the following as illegal under the regulations regardless of actual market impact—

- false or misleading public announcements of planned pricing or output decisions
- false or misleading statements to federal, state or local governments about current inventory or refinery operating status

- false or misleading representations about the price or volumes of past transactions to a private price reporting service
- fraudulent or deceptive transactions designed to disguise the actual liquidity or price of a particular asset or market for that asset
- intentionally omitting from a report material information, such as the operational status of a refinery, terminal or pipeline, that makes the report false or misleading
- intentionally omitting material information about refinery production from statements to mislead others during an emergency.

The FTC also notes—

- although the FTC Act and, consequently, the market manipulation regulations, do not apply to common carrier operations, oil pipeline companies may face liability if they engage in conduct in connection with the purchase or sale of covered products
- liability can be imposed for indirect, as well as direct, fraudulent or deceptive conduct, so liability cannot be avoided by using a conduit for dissemination of false information
- manipulative conduct with respect to a noncovered product, for example, ethanol, violates the regulations if it has “a sufficient nexus” with a covered product; making false statements about ethanol supply might subject a person to liability, since manipulation of ethanol prices may affect wholesale gasoline transactions
- conduct does not actually have to be part of a wholesale transaction for a covered product to be actionable, so long as there is a sufficient nexus with transactions in covered product; e.g. false announcements about upcoming refinery shutdowns will be actionable even though such an announcement directly affects only futures markets, because it may induce other firms to build inventory and, thereby, affect wholesale markets
- there is no safe harbor for futures market activities, but the FTC will coordinate with the Commodity Futures Trading Commission (CFTC) where there is overlapping jurisdiction

- “[f]alse or misleading announcements about supply or inventory by refiners are especially likely to affect transactions for covered products and are likely to be material.”

Many questions remain about how the FTC will enforce the Petroleum Market Manipulation Regulations, and we will continue to monitor developments in this area.

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