



FEDERAL TRADE COMMISSION

16 CFR Part 317

[RIN 3084-AB57]

Prohibition of Energy Market Manipulation Rule Review

AGENCY: Federal Trade Commission.

ACTION: Confirmation of rule.

SUMMARY: The Federal Trade Commission (“Commission”) has completed its regulatory review of its Prohibition of Energy Market Manipulation Rule implementing Section 811 of Subtitle B of Title VIII of the Energy Independence and Security Act of 2007. This regulatory review is part of the Commission’s periodic review of all its regulations and guides. The Commission has determined to retain the Rule in its present form.

DATES: This action is effective [INSERT DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

ADDRESSES: Relevant portions of the record of this proceeding, including this document, are available at <https://www.ftc.gov>.

FOR FURTHER INFORMATION CONTACT: Peter Richman (202-326-2563), Assistant Director, Mergers III, Bureau of Competition, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, D.C. 20580.

SUPPLEMENTARY INFORMATION:

I. Introduction

The Commission reviews its rules and guides periodically to seek information about their benefits and costs, as well as their regulatory and economic impact. This information assists the Commission in identifying rules and guides that warrant modification or rescission.

Pursuant to this process, on June 5, 2020, the Commission initiated a regulatory rule review by publishing a document in the Federal Register requesting public comment (“Request”) on the Prohibition of Energy Market Manipulation Rule (“Rule”).¹ The Commission sought comment on standard regulatory review questions such as whether the Rule continues to serve a useful purpose; the costs and benefits of the Rule for consumers and businesses; and what effects, if any, technological or economic changes have had on the Rule. In addition to generally requesting comments recommending modifications to the Rule, the Commission also invited comment regarding two specific issues. First, the Commission requested comment identifying any evidence § 317.3 of the Rule does not reach behavior that falls within the scope of acts prohibited by its authorizing statute, 42 U.S.C. 17301, and violates the antitrust or consumer protection laws. Second, the Commission invited comment with respect to the definition of “knowingly” in § 317.2(c) of the Rule, its possible limitations, and the appropriateness of a modification of the definition to capture acts, practices, or courses of business a person “knew or *should* have known” were fraudulent or deceptive.

After considering the comments and evidence, the Commission has determined to retain the Rule without modification.

II. Background

The Rule, authorized by the Energy Independence and Security Act of 2007 (“EISA”),² prohibits market manipulation in connection with the purchase or sale of crude oil or petroleum products. The Rule prohibits fraudulent or deceptive conduct (including making false or misleading statements of material fact) in connection with wholesale purchases or sales of crude oil, gasoline, or petroleum distillates. The Rule separately bans the intentional failure to state a material fact when the omission (1) makes the statement misleading and (2) distorts or is likely to distort market conditions

¹ *Federal Trade Commission: Rule Review; Request for Public Comment*, 85 FR 34548 (June 5, 2020).

² 42 U.S.C. 17301-17305.

for any product covered by the Rule. The Commission issued the Rule on August 6, 2009, with an effective date of November 4, 2009.

III. Regulatory Review Comment and Analysis

The Commission received one substantive comment, submitted by Eversheds Sutherland (US) LLP (“ESUS”). ESUS recommends the Commission rescind the Rule. The comment addresses whether there is a continuing need for the Rule and its benefits and costs, but not any of the other questions in the Request. This rule review summarizes the comment and explains the Commission’s decision to retain the Rule in its current form.

ESUS recommends the Commission rescind the Rule partly because the Commodity Futures Trading Commission (“CFTC”) has the legal authority and the ability to regulate market manipulation of wholesale petroleum markets.³ This overlap in regulatory authority is by design.⁴ It is intended to facilitate cooperation and ensure comprehensive enforcement that enhances regulatory certainty for businesses and consumers, a point the CFTC made in 2011 in response to a similar comment during the CFTC’s rulemaking process.⁵ The Commission stated its intent to cooperate with other agencies, including the CFTC, when adopting the Rule in 2009,⁶ and memorialized that commitment in a 2011 Memorandum of Understanding with the CFTC. Under the

³ Comment of Eversheds Sutherland (US) LLP at 3-5 (Sep. 3, 2020), available at <https://beta.regulations.gov/comment/FTC-2020-0047-0003>.

⁴ *Federal Trade Commission: Prohibitions on Market Manipulation; Final Rule*, 74 FR at 40690, n.58 (Aug. 12, 2009) (citing Comment of Senator Maria Cantwell at 2); *see also* Comment of Senator Cantwell at 2 (“Congress, however, specifically intended for the Commission to exercise this new authority by working cooperatively and in tandem with the CFTC to prevent and deter any manipulative activity, including in the futures markets, which would affect wholesale petroleum markets.”). ESUS identifies the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (“Dodd-Frank”) as a source of legal authority for the CFTC to regulate market manipulation of wholesale petroleum markets. The Commission notes that Senator Cantwell, who sponsored the EISA provision authorizing the Rule, also helped lead the effort to pass the Dodd-Frank provision to which ESUS refers. *Federal Trade Commission: Prohibitions on Market Manipulation; Final Rule*, 74 FR at 40704 (Aug. 12, 2009); *Commodity Futures Trading Commission: Prohibition on the Employment, or Attempted Employment, of Manipulative and Deceptive Devices and Prohibition on Price Manipulation; Final Rule*, 76 FR at 41410 (July 14, 2011).

⁵ *Commodity Futures Trading Commission: Prohibition on the Employment, or Attempted Employment, of Manipulative and Deceptive Devices and Prohibition on Price Manipulation; Final Rule*, 76 FR at 41409 (July 14, 2011).

⁶ *Federal Trade Commission: Prohibitions on Market Manipulation; Final Rule*, 74 FR at 40691 (Aug. 12, 2009).

Memorandum of Understanding, the Commission and the CFTC continue to cooperate on “issues of common regulatory interest, particularly as such interest relates to market manipulation, [to] foster fair competition and promote the integrity of the markets, including petroleum markets.”⁷

ESUS also asserts that rescinding the Rule eliminates the risk market participants will incur penalties from both the Commission and the CFTC for the same act of market manipulation.⁸ This risk has never materialized.

ESUS also asserts the Rule imposes compliance costs on market participants and diverts Commission resources away from enforcement of consumer protection and antitrust laws.⁹ With respect to compliance costs on market participants, the Commission notes the Rule does not require any affirmative compliance efforts such as recordkeeping or disclosure of information; rather, the Rule requires only that market participants refrain from fraudulent and deceptive statements or behavior.¹⁰ As ESUS points out, the CFTC’s broader authority to regulate market manipulation includes prohibiting the conduct the Commission’s Rule prohibits.¹¹ Maintaining compliance programs to avoid violating these substantially similar requirements does not lead to additive compliance costs. As a result, and given the absence of any additional substantiation of compliance costs associated with the Rule, the Commission concludes the Rule continues to impose minimal costs on businesses.

Finally, after consideration, and given the benefits to consumers relative to the costs associated with Rule enforcement, the Commission declines to adopt ESUS’

⁷ Federal Trade Commission, *Memorandum of Understanding Between the Commodity Futures Trading Commission and the Federal Trade Commission Regarding Information Sharing in Areas of Common Regulatory Interest*, at 1 ¶ 3 (Apr. 12, 2011), available at <https://www.ftc.gov/policy/cooperation-agreements/commodity-futures-trading-commission-federal-trade-commission>.

⁸ Comment of Eversheds Sutherland (US) LLP at 8 (Sep. 3, 2020), available at <https://beta.regulations.gov/comment/FTC-2020-0047-0003>.

⁹ *Id.* at 9.

¹⁰ *Federal Trade Commission: Prohibitions on Market Manipulation; Final Rule*, 74 FR at 40701 (Aug. 12, 2009).

¹¹ Comment of Eversheds Sutherland (US) LLP at 6, 9 (Sep. 3, 2020), available at <https://beta.regulations.gov/comment/FTC-2020-0047-0003>.

position that rescinding the Rule “would allow the FTC to rededicate limited internal resources to its core consumer protection and antitrust missions.”¹²

IV. Conclusion

After considering the comment and the evidence, the Commission concludes (1) there is a continuing need for the Rule; (2) the Rule benefits consumers and businesses; (3) the Rule does not impose substantial economic burdens; and (4) the benefits outweigh the minimal costs the Rule imposes. Accordingly, the Commission has determined to retain the current Rule and is terminating this review.

By direction of the Commission.

April J. Tabor,

Secretary.

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¹² *Id.*