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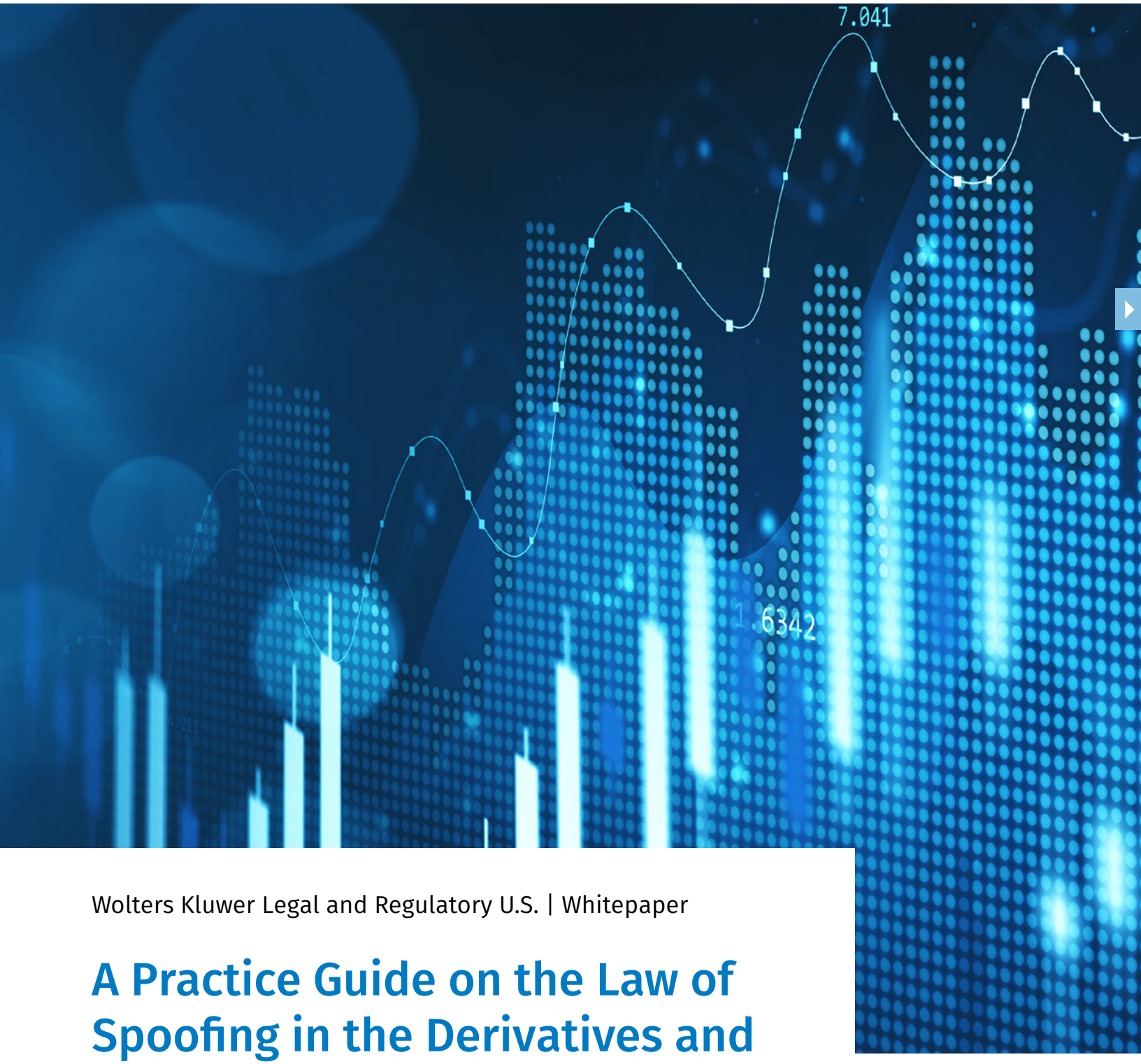

Wolters Kluwer Legal and Regulatory U.S. | Whitepaper

A Practice Guide on the Law of Spoofing in the Derivatives and Securities Markets

May 2021

By James Cavoli, with Kayla Giampaolo and Emily Clarke, Milbank LLP

Detailed Table of Contents

White Paper

May 2021

Highlights

- Comprehensive analysis of spoofing enforcement actions and private litigation over the past ten years
- Detailed review of the statutory framework used to combat spoofing and in-depth discussion of important case law developments in recent years
- Examination of key factual issues that should be addressed when defending against spoofing allegations

Inside

A Practice Guide on the Law of Spoofing in the Derivatives and Securities Markets

I. Introduction

Milbank LLP's White-Collar Defense and Investigations Group is pleased to present this Practice Guide on the Law of Spoofing in the U.S. Derivatives and Securities Markets (the "Guide").[1]

It has been nearly ten years since the anti-spoofing provision of the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") took effect.[2] In this Guide, we explain the nature of spoofing conduct, the various statutes used to combat this form of price manipulation, and the sanctions and remedies available to government enforcers and private plaintiffs. We also provide a comprehensive review of enforcement activity and private lawsuits over the past ten years, survey notable case law developments, and examine key factual questions and issues of proof that all practitioners should keep in mind when defending allegations or conducting an internal investigation related to spoofing. The Guide is organized as follows:

- Section II is an executive summary focused on general enforcement activities, the federal government's recent charging behavior, and key takeaways for the targets of spoofing claims and those defending them;
- Section III describes the paradigmatic conduct that constitutes spoofing;
- In Section IV we discuss the government's increased anti-spoofing enforcement efforts in recent years and present key data points, including the number and nature of the spoofing cases that have been brought since 2011, the dispositions of those cases, the prevalence of parallel criminal and civil enforcement actions, and the sanctions imposed;
- In Sections V and VI we address the various statutes that have been used to combat spoofing in the commodities and derivatives markets (mainly futures), both before and after Dodd-Frank, which, among other things, amended portions of the Commodities Exchange Act, 7 U.S.C. § 1, *et seq.* (the "CEA"), to provide additional anti-spoofing enforcement tools;
- Section VII covers the relevant statutes and case law related to spoofing in the securities markets;

1 For further details on Milbank LLP's White-Collar Defense and Investigations Group, please go to: https://www.milbank.com/en/practices/areas/litigation-and-arbitration/white-collar.html. *See also* page 103 for a list of key contacts at Milbank.

2 *See* Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank"), Pub. L. No. 111-203, § 747, 124 Stat. 1376, 1739 (2010).

By James Cavoli, with Kayla Giampaolo and Emily Clarke, Milbank LLP

- Section VIII addresses private rights of action in the spoofing arena;
- Section IX discusses the key legal issues that have arisen in spoofing cases and recurring factual questions that should be addressed in most cases; and
- Finally, in Section X, we provide a comprehensive summary of most, if not all, spoofing enforcement actions by the federal government since 2011, as well as enforcement activities by self-regulatory bodies and lawsuits filed by private plaintiffs. The spoofing actions brought by the U.S. Department of Justice ("DOJ"), the Commodity Futures Trading Commission ("CFTC"), and the Securities and Exchange Commission ("SEC")—and key information related to each such action—are also set out in chart form in Appendices A, B and C, respectively.

II. Executive Summary

"Spoofing" is generally understood to be a sequence of actions by which a trader places and quickly cancels an order to buy or sell that was never intended to be executed, usually in an attempt to create the appearance of increased supply or demand in order to move prices.

Regulators in the U.S. have long asserted that spoofing (regardless of whether that term was used) undermines the integrity of markets. That said, prior to 2011, there was relatively limited policing of this type of price manipulation. The rise of high-speed automated trading systems,[3] however, caused increased scrutiny of spoofing behavior and prompted new legislation to strengthen the CFTC's and DOJ's ability to address it. In particular, in 2010, Dodd-Frank became the first statute to specifically define spoofing and outlaw it by name in relation to the trading of commodities and derivatives. Enforcement activity increased following 2011, when the pertinent Dodd-Frank provisions became effective, first gradually and then at a faster pace. The uptick in spoofing enforcement, in turn, resulted in a more developed body of law that will inform how such cases are won or lost going forward.

A. Criminal Enforcement

The DOJ's efforts to combat spoofing through criminal prosecution spiked starting in 2018, with a focus on trading and order behavior in the futures markets. Although the DOJ frequently proceeded under the CEA's specific anti-spoofing provision created by Dodd-Frank, it has also charged spoofing as commodities and wire fraud under Title 18 of the United States Code, and price manipulation in violation of the CEA's general anti-manipulation provision that pre-dated Dodd-Frank. More recently, the DOJ charged spoofing as a violation of the bank fraud statute and the Racketeer Influenced and Corrupt Organizations Act ("RICO"), tactics that we discuss in greater detail below.

Somewhat ironically, the DOJ never charged spoofing as a violation of a Title 18 statute prior to Dodd-Frank. It was not until Congress had provided prosecutors with a specific tool to combat such conduct—the CEA's anti-spoofing provision—that the DOJ started to charge spoofing as a violation of *other* criminal statutes, some that have been on the books for over 60 years. These charging decisions appear to have been driven, at least in part, by statute of limitations concerns.

Increased criminal enforcement activity has occasioned important legal developments. For example, after significant challenges by defendants, courts affirmed the DOJ's view that spoofing can constitute a "scheme to defraud" under certain Title 18 statutes, such as the commodities and wire fraud statutes, and thus need not be charged under the CEA's specific anti-spoofing provision. Notwithstanding the fact that a spoof order may be "true" in the sense that it is executable and subject to actual market risk for the time that it is open, courts have held that spoofing is an implied misrepresentation of true supply and demand that renders market prices less accurate, and thus falls within the ambit of a "scheme to defraud." These decisions have important implications going forward. To mention one: violations of the specific anti-spoofing provision are subject to a

3 *See, e.g.,* Felix Salmon & Jon Stokes, *Algorithms Take Control of Wall Street,* WIRED (Dec. 27, 2010), https://www.wired.com/2010/12/ff-ai-flashtrading/ ("Over the past decade, algorithmic trading has overtaken the industry. From the single desk of a startup hedge fund to the gilded halls of Goldman Sachs, computer code is now responsible for most of the activity on Wall Street. (By some estimates, computer-aided high-frequency trading now accounts for about 70 percent of total trade volume.)").

five-year statute of limitations and 10-year maximum term of imprisonment, but spoofing charged as wire fraud affecting a financial institution, or as bank fraud, doubles the limitations period to 10 years, enabling the government to reach significantly more dated conduct, and carries a 30-year maximum sentence.

In addition, courts have rejected challenges to the CEA's anti-spoofing provision as unconstitutionally vague, finding that the statutory definition of spoofing—"bidding or offering with the intent to cancel the bid or offer before execution"—is sufficiently definite such that "ordinary people" can understand the conduct that is prohibited. In this same vein, courts have rejected the notion that the statutory definition will result in arbitrary enforcement by prosecutors, holding that the specific intent requirement set out in the above-quoted language adequately restricts a prosecutor in terms of who he or she can charge. These same constitutional challenges have been advanced, and rejected, in cases where spoofing was prosecuted as wire fraud. Open questions remain, however. For example, the CEA's anti-spoofing provision prohibits spoofing as well as activity that is "of the character" of spoofing, but never defines or explains what it means for behavior to be "of the character" of spoofing. Although many spoofing cases have been filed and several legal issues have been litigated, no court has made any legal pronouncement regarding the statute's outer boundaries, which remain unclear.

A total of 20 individuals have been criminally prosecuted for spoofing in relation to futures contracts since Dodd-Frank's anti-spoofing provision became effective in 2011, with the vast majority being charged in or after 2018. Eleven of them were found guilty (eight by plea and three at trial), two were exonerated, one is a fugitive, and six are at various stages of pretrial proceedings. During the same period, the DOJ proceeded criminally against five organizations for spoofing in relation to futures contracts, resulting in four deferred prosecution agreements ("DPAs") and one non-prosecution agreement ("NPA").[4]

Unlike futures and other derivatives, there is no specific anti-spoofing statute that applies to securities. Federal prosecutors combat securities spoofing using certain provisions of the Securities Exchange Act of 1934 (the "Exchange Act") and the Securities Act of 1933 (the "Securities Act") that prohibit fraud and manipulation in connection with the purchase and sale of securities. The DOJ has been less active with respect to securities spoofing. Since 2011, the DOJ has charged only four individuals (with securities fraud) for spoofing in relation to securities. Two pled guilty and have been sentenced, and the charges against the other two are pending. During that same time, the DOJ charged only one organization (with wire fraud) for securities spoofing (in connection with U.S. Treasury notes and bonds).

B. Civil Enforcement

Like the DOJ, the CFTC has devoted significant resources in recent years to combating spoofing, mostly in relation to futures contracts. Since 2011, the CFTC has brought 61 civil enforcement cases against a total of 79 defendants/respondents—36 were individuals and 43 were organizations. Of those 79 defendants/respondents, 70 settled their cases short of trial. Proceedings are pending against the remaining nine.

The CFTC has relied upon various provisions of the CEA and related regulations in its enforcement actions. For conduct that occurred on or after July 15, 2011, nearly all defendants/respondents were charged under the CEA's specific anti-spoofing provision. In addition, many were charged under the newer securities-style anti-deception provision of the CEA, as well as the CEA's anti-manipulation provision that pre-dated Dodd-Frank.

Since 2011, the SEC has brought 13 securities spoofing cases against a total of 56 defendants/respondents—44 were individuals and 12 were organizations. Of the 56 defendants/respondents, three were found liable after trial, 27 settled their matters prior to trial, and the proceedings against the remaining 26 are pending. Like the DOJ, the SEC typically relies on the anti-fraud provisions of the

4 The summary case statistics presented herein are based on an exhaustive review of publicly available information from numerous sources. We believe that the statistics are accurate, but note that information regarding certain cases may not be public and human error is always a risk notwithstanding one's best efforts, particularly when compiling such a large amount of information.

Securities Act and the Exchange Act in combatting spoofing by way of civil enforcement. The SEC has also charged spoofing as a violation of the anti-manipulation provision of the Exchange Act.

C. Private Actions

There has also been an increase in the number of private lawsuits for alleged derivatives spoofing in recent years.

Since 2015, 36 private actions were filed (most of them purported class actions that have been consolidated) seeking damages under the CEA for alleged spoofing in relation to futures contracts. Thirty of these actions were pending at the time this Guide was published. As to the remaining six, five were dismissed and one went to arbitration. In contrast, we identified only one private lawsuit where plaintiffs seek damages under the Exchange Act for alleged spoofing in relation to securities. That action is currently pending.

D. Key Takeaways

Of the spoofing defendants that went to trial in recent years, some were convicted, some were exonerated, and some were the subject of split verdicts, suggesting that juries may struggle in distinguishing between legitimate trading behavior and nefarious manipulation. Complicated market dynamics and trading practices will continue to present meaningful challenges for DOJ prosecutors, civil enforcement lawyers, and counsel for private plaintiffs.

As a practical matter, to prevail on a claim of spoofing—whether brought under the CEA's anti-spoofing provision, the CEA's more general anti-manipulation provisions, or Title 18 statutes that prohibit "schemes to defraud"—it must be established that a trader placed and then canceled his order never intending to execute it. That intent is often challenging to prove because there are many legitimate reasons to cancel orders after placing them—in fact, in some markets, cancelling orders prior to execution is the rule rather than the exception. Accordingly, it is frequently difficult to distinguish between good-faith trading and improper manipulation, the key question in all spoofing matters.

As in most cases, when defending spoofing allegations or conducting an internal investigation to determine whether such conduct occurred, it is critical to gather, review and analyze communications contemporaneous to the conduct at issue. In recent cases, the DOJ has relied on chats and emails as evidence of spoofing and/or an awareness that the alleged conduct was improper or even unlawful. Of course, in the absence of such communications, it is more difficult for the government to carry its burden and targets have more freedom to advance legitimate explanations for their behavior.

In the absence of "smoking gun" evidence in the form of contemporaneous communications, the outcome of most cases will turn on the trading and bid/offer behavior of the individual in question, and the broader context for that behavior. It is thus imperative to gather the relevant order and transaction data, as well as contemporaneous market data (if available), and carefully analyze the specific trading sequences that the government or private plaintiffs claim to be problematic. It is also important to go beyond those sequences and evaluate broader order and trading patterns of the trader under investigation, his or her practices and trading strategies and, in appropriate cases, the needs of his or her customers. Experienced counsel and experts with in-depth knowledge of the markets, financial products, and the trading of those products will be an indispensable part of any robust analysis of the relevant trading and bid/offer data. Retaining a computer software expert may also be necessary if it is suspected that high-frequency algorithmic trading programs were used to spoof.

While each case is unique, certain common factual issues and/or data points—discussed in more detail in Section IX, below—should be explored and analyzed in most spoofing cases, many of which bear on the target's intent. For example, if high-frequency trading is involved, it is important to evaluate the programming of the algorithms themselves in order to gain a full understanding of how they operate and their end purpose. In addition, and depending on availability, the relevant trading and order data should be mined to explore, among other things: (1) the size of the alleged spoof orders relative to the size of the allegedly genuine orders; (2) the length of time between the placement and cancellation of the alleged spoof orders; (3) depending on the

market, the relative placement of the alleged spoof orders in the order book; (4) the number of alleged spoof orders in a given sequence; and (5) the alleged spoofer's order-to-trade-ratio relative to others in the same market. A close analysis of a given order sequence may also reveal that the targeted trader was not even aware of an alleged spoof order—for example, where a pre-programmed automated system placed and then cancelled the order without the knowledge of the human trader. It is also important to explore alternative explanations as to why a challenged order was cancelled, as there are many legitimate reasons for doing so.

III. Overview of Spoofing Conduct

Spoofing is generally understood as a sequence in which a trader places and quickly cancels a buy or sell order that he or she never intended to execute. Such an order can cause prices to move up or down, because it alters the apparent level of supply or demand, and many traders base trading strategy on their perception of supply and demand at various price levels. For example, certain market participants (including those using high-frequency trading algorithms) may quickly buy when buy orders outnumber sell orders and quickly sell when sell orders outnumber buy orders. A trader may place a large "spoof" order—that he intends to cancel before execution—on the opposite side of the market from a previously-placed smaller, so-called "genuine" order with the purpose of taking advantage of distortions that the large order may produce in the market.[5] One common theory of spoofing is that by placing a large order a trader signals increased market supply or demand, rendering it more likely that his or her smaller opposite-side order will be executed at a more favorable price (that is, at a price higher or lower than prevailing market prices at the time that the order sequence was initiated by the spoofer). In this scenario, the goal is to execute the smaller order and cancel the large order before execution.

Closely related to spoofing is "layering," which is best understood as a specific form of spoofing. With layering, a trader places a series of non-bona fide orders increasingly far from the prevailing best price (that is, orders to sell at increasingly higher prices than the prevailing lowest asking price, or orders to buy at increasingly lower prices than the prevailing highest bid price) with the purpose of giving the false appearance of market depth. A series of sell orders above the prevailing offer level may give the appearance that the price is going to fall, thus causing others in the market to lower their offers, and allowing the trader to buy a security or futures contract at a lower price than would have otherwise been possible.

IV. Increased Government Enforcement in Recent Years

Price manipulation, including what we now call "spoofing," has long been the subject of civil enforcement actions by both the SEC (securities) and CFTC (commodities and derivatives). While the statutory landscape regarding the manipulation of securities prices has remained relatively static for decades, in 2010 Dodd-Frank ushered in major changes for spoofing conduct connected to bid and offer activity for commodities and derivatives.

Dodd-Frank was the first piece of legislation to specifically define spoofing and outlaw it by name, adding a specific anti-spoofing provision to the CEA, effective July 16, 2011.[6] The CEA's anti-spoofing provision applies to all bid and offer activity on all products traded on all registered entities, including designated contract markets for the trading of futures and options contracts on an underlying commodity, index or instrument, and swaps execution facilities for the trading and execution

5 For a description of the mechanics of spoofing, *see, e.g.*, Matt Levine, *Why is Spoofing Bad?*, Bloomberg Opinion (Apr. 22, 2015), http://www.bloomberg.com/opinion/articles/2015-04-22/why-is-spoofing-bad-; Matt Levine, *Prosecutors Catch a Spoofing Panther*, Bloomberg Opinion (Oct. 2, 2014), http://www.bloomberg.com/opinion/articles/2014-10-02/ prosecutors-catch-a-spoofing-panther. *See also* Bradley Hope, *As 'Spoof' Trading Persists, Regulators Clamp Down*, Wall St. J. (Feb. 22, 2015).

6 *See* 7 U.S.C. § 6c(a)(5)(C).

of swaps.[7] Dodd-Frank also added a new provision to the CEA—which was modeled after § 10(b) of the Exchange Act—that prohibits the use of any manipulative or deceptive device or contrivance in connection with any swap, or any contract to sell a commodity in interstate commerce or for future delivery on a registered entity, effective as of August 15, 2011.[8] In addition, the legislation modified the language of a more general anti-manipulation provision that existed in the CEA prior to Dodd-Frank.

A. Criminal Enforcement by the DOJ

1. Commodities Futures

The DOJ can bring criminal prosecutions against a defendant who "knowingly" violates the CEA's anti-spoofing provision, as well as other relevant CEA provisions.[9] The DOJ was relatively inactive in this space during the six years immediately following Dodd-Frank: a total of four individuals were criminally charged for spoofing in relation to futures contracts from 2011 to 2017. In October 2014, Michael Coscia—then the owner of Panther Energy Trading LLC, a high frequency trading company based in New Jersey—was the first person to be indicted under the CEA's anti-spoofing provision.[10] Coscia was also the first defendant to go to trial on charges under that provision, which ended with a conviction on all counts in early November 2015. After sentencing, the lead trial prosecutor stated that *Coscia* was "'just the tip of the iceberg,'"[11] but a total of only three other individuals were prosecuted for spoofing in relation to futures contracts in the three-year period from 2015-2017.[12]

Still, the verdict in *Coscia* emboldened prosecutors, and the DOJ's public enforcement efforts increased dramatically starting in early 2018, with 16 individuals criminally charged for spoofing in relation to futures contracts in the two-year period 2018-2019, in part the result of "an initiative to investigate and prosecute 'spoofing' in commodities futures markets" led by what was then known as the Securities & Financial Fraud Unit of the DOJ's Fraud Section based in Washington, D.C. (since renamed the Market Integrity and Major Fraud Unit).[13] In total, 20 individuals have been criminally prosecuted in 15 separate cases for futures spoofing since Dodd-Frank. Of the 20,

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7 *See* CFTC, *Antidisruptive Practices Authority*, 78 Fed. Reg. 31890, 31896 (May 28, 2013). Under the CEA, the term "registered entity" means "(A) a board of trade designated as a contract market under section 7 of this title; (B) a derivatives clearing organization registered under section 7a-1 of this title; (C) a board of trade designated as a contract market under section 7b-1 of this title; (D) a swap execution facility under section 7b-3 of this title; (E) a swap data repository registered under section 24a of this title; and (F) with respect to a contract that the Commission determines is a significant price discovery contract, any electronic trading facility on which the contract is executed or traded." 7 U.S.C. § 1a (CEA Definitions).

8 *See* CEA § 6(c)(1), 7 U.S.C. § 9(1) (2012).

9 *See* 7 U.SC. § 13(a)(2).

10 *United States v. Coscia*, No. 14-Cr-00551 (N.D. Ill. Oct. 1, 2014) (indictment filed).

11 Greg Trotter, *Trader Michael Coscia 1st in nation to be sentenced under 'anti-spoofing' law*, Chicago Tribune (July 13, 2016), https://www.chicagotribune.com/business/ct-spoofing-trial-sentencing-0714-biz-20160713-story.html.

12 *See United States v. Flotron,* No. 17-Cr-00220 (D. Conn. Sept. 26, 2017) (indictment filed; superseding indictment filed on Jan. 30, 2018); *United States v. Liew*, No. 17-Cr-00001 (N.D. Ill Jan. 3, 2017) (criminal complaint filed; information filed on May 24, 2017); *United States v. Sarao*, No. 15-Cr-00075 (N.D. Ill. Feb. 11, 2015) (criminal complaint filed; information filed on Sept. 2, 2015).

13 DOJ, Fraud Section Year in Review 2018 17 (Jan. 18, 2019). In addition to Coscia and the defendants listed in note 12, *see United States v. Smith*, No. 19-Cr-669 (N.D. Ill. Aug. 22, 2019) (indictment filed; superseding indictment filed on Nov. 14, 2019); *United States v. Trunz*, No. 19-Cr-00375 (E.D.N.Y. Aug. 20, 2019) (information filed); *United States v. Flaum*, No. 19-Cr-338 (E.D.N.Y. July 25, 2019) (information filed); *United States v. Edmonds*, No. 18-Cr-239 (D. Conn. Oct. 9, 2018) (information filed); *United States v. Gandhi*, No. 18-Cr-609 (S.D. Tex. Oct. 11, 2018) (information filed); *United States v. Mohan*, No. 418-Cr-00610 (S.D. Tex. Oct. 11, 2018) (information filed); *United States v. Mao*, No. 18-Cr-00606 (S.D. Tex. Oct. 10, 2018) (indictment filed); *United States v. Thakkar*, No. 18-Cr-00036 (N.D. Ill. Feb. 14, 2018) (indictment filed); *United States v. Vorley*, No. 18-Cr-00035 (N.D. Ill. Jan. 19, 2018) (complaint filed; indictment filed July 24, 2018); *United States v. Bases*, No. 18-Cr-00048, (N.D. Ill. Jan. 25, 2018) (complaint filed; indicted on July 18, 2018); *United States v. Zhao*, No. 28-Cr-00024 (N.D. Ill. Jan. 11, 2018 (complaint filed; information filed on Dec. 18, 2018).

eight pled guilty (often agreeing to cooperate with the government);[14] five went to trial (three were convicted and two were exonerated);[15] one is a fugitive;[16] and six have pled not guilty and are at various stages of pretrial proceedings.[17] The CFTC brought parallel civil enforcement proceedings against 15 of the 20 individuals who were criminally charged.

Of the eight individuals who pled guilty, only two have been sentenced and both received time-served sentences (one for 120 days and the other for 302 days).[18] Of the three defendants convicted at trial, only one, Coscia, has been sentenced (he received three years' imprisonment and two years of supervised release).[19] None of the three sentenced defendants were assessed criminal fines, but one was required to forfeit $12.9 million in criminal proceeds and pay a $25.7 million civil money penalty in a parallel CFTC action.[20] Another was required to pay a $1.4 civil million money penalty, also in a parallel CFTC action.[21] The CFTC's action against the third individual remains pending.

The DOJ has used various statutes to prosecute alleged spoofing in relation to the trading of futures contracts, including, in order of frequency:

- Spoofing, in violation of CEA §§ 4c(a)(5)(C) and 9(a)(2), 7 U.S.C. §§ 6c(a)(5)(C) and 13(a)(2), and/or conspiring to commit spoofing, in violation of 18 U.S.C. § 371;
- Commodities fraud, in violation of 18 U.S.C. § 1348, and/or conspiring to commit commodities fraud, in violation of 18 U.S.C. § 1349;
- Wire fraud, or wire fraud affecting a financial institution, in violation of 18 U.S.C. § 1343, or conspiring to commit wire fraud, in violation of 18 U.S.C. § 1349;
- Actual and/or attempted price manipulation, in violation of CEA § 9(a)(2), 7 U.S.C. § 13(a)(2), or conspiring to manipulate futures prices, in violation of 18 U.S.C. § 371;
- Bank fraud, in violation of 18 U.S.C. § 1344; and
- RICO conspiracy, in violation of 18 U.S.C. § 1962(d).

Since 2011, criminal prosecutors have taken formal action against five organizations for spoofing in relation to futures contracts.

- Most recently, in September 2020, the DOJ entered into a three-year DPA with JPMorgan Chase & Co. to resolve spoofing allegations in relation to precious metals futures traded on the New York Mercantile Exchange ("NYMEX") and Commodity Exchange, Inc. ("COMEX"), and Treasury futures traded on the Chicago Board of Trade ("CBOT"). Among other things, JPMorgan agreed to pay $920.2 million in monetary sanctions—the largest money penalty to date for spoofing—and to cooperate with the DOJ going forward (a portion of the sanctions resulted from spoofing in relation to Treasury

14 Defendants Flaum, Trunz, Gandhi, Mohan, Edmonds, Sarao, Zhao and Liew pled guilty.

15 As noted, Coscia was convicted in 2015. Andre Flotron was acquitted by a Connecticut jury in May 2018. Jitesh Thakkar was fully exonerated as a result of the district court's judgement of acquittal on one count and the government's decision to dismiss the remaining charges with prejudice after a hung jury. Most recently, Vorley and Chanu were convicted (though not on all counts) of wire fraud in connection with spoofing in relation to precious metals futures. *See* Section X.A., below.

16 The only docket entries in *United States v. Mao*, No. 18-Cr-00606 (S.D. Tex.), indicate that Mao, a Chinese national, was indicted on Oct. 10, 2018, at which time a bench warrant for his arrest was issued.

17 Defendants Smith, Nowak, Ruffo, Jordan, Bases and Pacilio pled not guilty and are litigating their cases.

18 *See United States v. Sarao*, No. 15-Cr-00075 (N.D. Ill. Sept. 2, 2015); *United States v. Zhao*, No. 18-Cr-00024 (N.D. Ill. Dec. 18, 2018).

19 *See* Judgment in a Criminal Case, *United States v. Coscia*, No. 14-Cr-00551 (N.D. Ill. July 14, 2016), ECF No. 159.

20 *See* Judgment in a Criminal Case, *United States v. Sarao*, No. 15-Cr-00075 (N.D. Ill. Jan. 29, 2020), ECF No. 119; Consent Order of Permanent Injunction, Civil Monetary Penalty, and Other Equitable Relief Against Navinder Singh Sarao, *CFTC v. Nav Sarao Futures Ltd. PLC*, No. 15-Cv-03398 (N.D. Ill. Nov. 14, 2016), ECF No. 77.

21 Consent Order, *In re Panther Energy Trading LLC*, CFTC No. 13-26 (July 22, 2013).

notes, which are securities, *see* below).[22]

- A month earlier, in August 2020, the Bank of Nova Scotia ("BNS") entered into a DPA, also with a three-year term, to resolve allegations of wire fraud predicated on alleged spoofing by four former traders who traded precious metals futures on NYMEX and COMEX. Among other things, BNS agreed to pay just over $60 million and to cooperate with the DOJ during the three-year term of the DPA.
- In January 2020, the DOJ entered into a three-year DPA with Propex Derivatives Pty Ltd ("Propex") based on spoof orders by a former employee in connection with E-mini S&P 500 futures contracts traded on the Chicago Mercantile Exchange ("CME"). To resolve the matter, Propex paid $1 million and agreed to cooperate with the DOJ's ongoing investigations, among other things.
- In November 2019, the DOJ entered into a three-year DPA with Tower Research Capital LLC in connection with spoofing by former employees in relation to E-Mini futures contracts traded on the CME and CBOT.[23] Tower agreed to pay $67.5 million and to cooperate with ongoing investigations.
- Finally, in June 2019, the DOJ and Merrill Lynch Commodities, Inc. entered into a NPA to resolve alleged spoofing by former employees in relation to precious metals futures contracts traded on the COMEX. Merrill Lynch agreed to pay $25 million and cooperate with the DOJ, among other things.

Accordingly, the criminal monetary sanctions levied against organizations ranged from $1 million to 920.2 million, with an average of approximately $214.8 million per organization and a median of $60.5 million. The CFTC brought and settled parallel civil enforcement proceedings against all five of the corporate defendants listed above.

2. Securities

Since 2011, the DOJ has criminally prosecuted four individuals in three cases for spoofing in relation to securities traded on U.S.-based stock exchanges.[24] The charges in those cases included one or more of the following: (1) conspiracy to commit securities fraud, in violation of 18 U.S.C. §§ 371 and/or 1349; (2) securities fraud, in violation of 18 U.S.C. § 1348; and (3) securities fraud, in violation of § 10(b) of the Exchange Act, 15 U.S.C. § 78j(b), and Rule 10b-5,17 C.F.R. § 240.10b-5. Two of the four individual defendants pled guilty and were sentenced—one was sentenced to five years' probation and a $10,000 fine,[25] and the other was sentenced to 18 months' imprisonment and one year of supervised release.[26] The criminal charges against the remaining two defendants are pending. The SEC brought parallel civil enforcement cases against all four individuals who were criminally charged.

As noted, the DOJ also proceeded against JPMorgan for spoofing in relation to U.S. Treasury notes and bonds traded in the secondary cash

22 Unless otherwise noted, the "monetary sanction" figure set forth in this Guide for a given criminal or civil case is the aggregate of any money penalties, disgorgement, restitution or other victim compensation, and/or forfeiture in that case. More specific breakdowns of these numbers, by case, can be found in Appendices A, B, and C. In the case of parallel criminal and civil proceedings we present the total sanction for the criminal action and the total sanction for the civil action, and have not apportioned monetary sanctions amongst criminal and civil enforcement agencies where there is overlap. This is important because, in some parallel proceedings, the sanctions imposed by different enforcement authorities are not additive (either in whole or in part) because payments in the criminal case are credited as payments in the parallel civil enforcement proceeding or vice versa. For example, in the September 2020 DPA with JPMorgan, the DOJ agreed that: (a) any criminal money penalty would be offset by the amount of any payment by the company pursuant to a parallel order and settlement between JPMorgan and the CFTC; and (b) the criminal disgorgement amount would be offset by the $10 million disgorgement payment made by JPMorgan in the parallel civil action brought by the SEC.

23 An E-mini futures contract is an electronically traded futures contract that is a fraction of the value of a standard futures contract. E-mini futures contracts are predominately traded on the CME.

24 *See United States v. Wang*, No. 19-Cr-6485 (D. Mass. Oct. 14, 2019) (complaint filed); *United States v. Taub*, No. 16-Cr- 8190 (D.N.J. Feb. 21, 2018) (indictment filed); *United States v. Milrud*, No. 15-Cr-455 (D.N.J. Sept. 1, 2015) (information filed).

25 *See* Judgment in a Criminal Case, *United States v. Milrud*, No. 15-Cr-00455 (D.N.J. Apr. 24, 2020), ECF No. 45.

26 *See* Judgment in a Criminal Case, *United States v. Taub*, No. 18-Cr-00079 (D.N.J. Dec. 22, 2020), ECF No. 61.

market, and that matter was resolved pursuant to the September 2020 DPA described above. The SEC brought and settled a parallel civil enforcement action against JPMorgan based upon the same conduct.

Appendix A is a summary chart that provides key information regarding the 23 criminal spoofing cases (derivatives and securities combined) that the DOJ has commenced since 2011.

B. CFTC Civil Enforcement

The CFTC—which is responsible for civil enforcement of the CEA—has also been very active in spoofing enforcement in recent years. Since 2011, the CFTC has brought 61 cases against a total of 79 defendants/respondents.[27] Of the 61 cases, 51 were administrative proceedings and ten were filed in federal district court. Of the 79 defendants/respondents, 36 were individuals and 43 were organizations.

Of the 79 defendants/respondents charged by the CFTC, 70 settled their cases short of trial, and 63 of the 70 did so on a neither-admit-nor-deny basis.[28] Charges were pending against the remaining respondents/defendants at the time that this Guide was published. Some of the CFTC's civil enforcement actions are stayed pending the outcome of parallel criminal cases.

The monetary sanctions levied against organizations ranged from $73,600 to $920.2 million, with an average of approximately $31.0 million per organization and a median of $1.5 million.[29] The monetary sanctions for individuals ranged from $100,000 to $38.6 million, with an average of approximately $2.4 million per individual and a median of $425,000.[30]

The CFTC has relied upon various provisions of the CEA and related regulations in its spoofing enforcement actions. For conduct that occurred on or after July 15, 2011, nearly all defendants/respondents were charged with spoofing, in violation of CEA § 4c(a)(5)(C), 7 U.S.C. § 6c(a)(5)(C). Fewer, but still a substantial number, were charged with one or more of the following statutory violations, typically in addition to spoofing:

- Using, or attempting to use, a manipulative or deceptive device or contrivance in connection with any swap, or in connection with any contract for the sale of any commodity in interstate commerce, or for future delivery on a registered entity, in violation of CEA § 6(c)(1), 7 U.S.C. § 9(1), and CFTC Rule 180.1, 17 C.F.R. § 180.1;
- Attempted and/or actual manipulation of the price of a swap, commodity and/or futures contract, in violation of CEA § 6(c)(3), 7 U.S.C. § 9(3) and CFTC Rule 180.2, 17 C.F.R. § 180.2; and

27 Some of the parties are relief defendants, *i.e.*, a person or entity that received ill-gotten funds or assets as a result of the improper acts of other defendants.

28 Some organizational defendants neither admitted nor denied the facts and conclusions set forth in the relevant CFTC consent order, except to the extent already admitted in a parallel criminal DPA. We count these as admissions.

29 *See* note 22, above, regarding sanctions imposed in parallel criminal and civil proceedings. Note that our approach to calculating the average and median does not account for joint and several liability. To determine the average for a given category (individuals or organizations), we simply totaled the monetary sanctions and divided by the number of defendants/respondents in the category. Likewise, to determine the mean, we ordered the relevant datapoints (sanction amounts for each defendant/respondent) within a category and identified the middle datapoint (in the case of an even number of data points, we identified the average between the middle two). We did not adjust for the fact that, in a given case, one or more organizations and/or individuals may be jointly and severally liable for the same conduct and may have actually paid an outsized amount relative to its co-defendant/respondent. Also note that, in 2012, the CFTC initiated and settled claims against UBS in relation to wide ranging conduct designed to manipulate LIBOR, some of which involved false bids and offers on cash traders designed to manipulate cash rates. Among other things, UBS paid $700 million to settle the LIBOR matter with the CFTC. While we include this case in our comprehensive outline of CFTC spoofing cases, *see* Section X.B., it is not included in the above averages since the $700 million largely addressed conduct other than spoofing.

30 The average money sanction against individuals is skewed higher due to the settlement with a single individual, Navinder Sarao, who was ordered to pay a $25.7 million civil money penalty and $12.8 million in disgorgement as part of his settlement with the CFTC (note that the trading company wholly owned by Sarao was jointly and severally liable for this amount). Also note that monetary sanctions have not yet been imposed in a handful of settled CFTC cases against individuals, typically where the individual is still cooperating with the CFTC's ongoing investigations, and thus are not included in the statistics presented.

- Actual and/or attempted manipulation of the price of any commodity in interstate commerce, or for future delivery on a registered entity, or any swap, in violation of CEA § 9(a)(2), 7 U.S.C. § 13(a)(2).

For pre-Dodd-Frank conduct, the CFTC typically charged violations of the pre-Dodd-Frank versions of CEA §§ 4c(a)(2), 6(c) and (d), and 9(a)(2), 7 U.S.C. §§ 9, 13(a)(2), and 13b (2009), which outlaw actual and attempted price manipulation.[31]

Appendix B is a summary chart that provides key information regarding the 63 spoofing cases that the CFTC has brought since 2011.

C. SEC Civil Enforcement

Our research indicates that, since 2011, the SEC has commenced 13 cases against a total of 56 defendants/respondents for alleged spoofing in relation to securities.[32] Of these 13 actions, eight were administrative in nature and five were filed in federal district court. Of the 56 defendants/respondents, 44 were individuals and 12 were organizations.[33] Three of the defendants/respondents were found liable after trial, and 27 settled their matters prior to trial (19 of the 27 who settled did so on a neither admit nor deny basis). The proceedings against the remaining 26 defendants/respondents are pending. The monetary sanctions levied against organizations ranged from $250,000 to $35 million, with an average of approximately $4.46 million per organization and a median of $876,842. The penalties extracted from individuals ranged from $75,000 to $17.1 million, with an average of approximately $2.14 million per individual and a median of $417,608.[34]

The primary statutes invoked by the SEC in combatting securities spoofing include: (1) fraud and deception in connection with the offer or sale of a security, in violation of § 17(a) of the Securities Act, 15 U.S.C. § 77q; (2) fraud and deception in connection with the purchase or sale of a security, in violation of § 10(b) of the Exchange Act, 15 U.S.C. § 77j(b), and Rule 10b-5, 17 C.F.R. § 240.10b5; and (3) manipulation of the price of a security, in violation of § 9(a)(2) of the Exchange Act, 15 U.S.C. § 78i(a)(2).[35]

Appendix C is a summary chart that provides key information regarding the 13 spoofing cases that the SEC has brought since 2011.[36]

V. Spoofing Law in the Commodities and Derivatives Markets Before Dodd-Frank

Federal government agencies targeted spoofing even before Dodd-Frank. For conduct in the commodities futures markets, the CFTC and DOJ could rely on CEA provisions that generically prohibited manipulative practices.

A. CEA Sections 6(c) and 9(a)(2)

Before Dodd-Frank, CEA § 6(c) authorized the CFTC to bring an administrative enforcement action against traders who, among other things, "manipulat[ed] or attempt[ed] to manipulate . . .

31 On occasion, the CFTC has also alleged, in the context of spoofing conduct, violations of 7 U.S.C. § 9(2), which prohibits the making of false and/or misleading reports to the CFTC, violations of a CFTC registrant's duty of "diligent supervision" under CFTC Regulation 166.3, 17 C.F.R. § 166.3, and violations of minimum requirements for a registrant's risk management program and/or risk limits, in violation of CFTC Regulations 1.11 and 1.731, *id.* §§ 1.11 and 1.731.

32 Again, some of the parties are relief defendants.

33 Since 2001, the SEC has commenced a total of 22 enforcement actions against 71 defendants/respondents (59 individuals and 12 organizations) based, at least in part, on spoofing conduct. *See* Appendix C.

34 *See* note 29, above (explaining approach to determining the average and median).

35 On occasion, the SEC has also charged the following violations in connection spoofing conduct: (1) failure to supervise, in violation of 15 U.S.C. § 78o; (2) failure to file suspicious activity reports and maintain proper records, in violation of 17 C.F.R. § 17a-8; and (3) failure to implement proper controls, in violation of the market access rule, SEC Rule 15c3-5, 17 C.F.R. § 240.15c3-5.

36 Appendix C also includes nine additional spoofing cases brought by the SEC during the period 2001 to 2010.

the market price" of commodities or commodities futures contracts. 7 U.S.C. § 9 (2009).[37] Dodd-Frank made significant changes to § 6(c), as discussed in Section VI., below. In addition, CEA § 9(a)(2)—a criminal prohibition the substance of which was also civilly enforceable by the CFTC[38]—made it unlawful, prior to Dodd-Frank, to "manipulate or attempt to manipulate the price" of commodities or commodities futures contracts. 7 U.S.C. § 13(a)(2) (2009).

Pre-Dodd-Frank, it was difficult for the CFTC to prove manipulation when it was put to the test—which is reportedly what led to the inclusion in the legislation of a specific prohibition on spoofing (and other specified practices).[39] Between the CFTC's creation in 1975 and the passage of Dodd-Frank in 2010, the agency is believed to have successfully litigated only one contested market manipulation case to final judgment: *In the Matter of Anthony J. DiPlacido*, CFTC No. 01-23, 2008 WL 4831204 (Nov. 5, 2008), which was affirmed as to liability by *DiPlacido v. CFTC*, 364 Fed. App'x 657 (2d Cir. 2009).[40]

To prove manipulation under the CEA prior to Dodd-Frank, the government was required to establish that: (1) the accused had the ability to influence market prices; (2) he or she specifically intended to do so; (3) artificial prices existed; and (4) the accused caused the artificial prices.[41] To prove attempted manipulation under the CEA, the Government had to show that a trader had "an intent to affect the market price of a commodity and [engaged in] some overt act in furtherance of that intent."[42]

B. Section 4c(a)(2)(B) of the CEA

In addition, the CFTC used § 4c(a)(2)(B) of the CEA, 7 U.S.C. § 6c(a)(2)(B), to target pre-Dodd-Frank conduct that consisted of entering non-bona fide orders.[43]

Section 4c(a)(2)(B) makes it unlawful under certain circumstances to offer to enter into, to enter into, or to confirm, a futures "transaction" that causes a price to be reported, registered, or recorded that is not true and bonafide. *See* CEA § 4c(a)(2)(B), 7 U.S.C. § 6c(a)(2)(B) (2012). It is not clear, however, that an unexecuted order—the core conduct associated with spoofing—counts as a "transaction" under § 4c(a)(2)(B).[44] Section 4c(a)(2)(B) is still available, but the CFTC has not relied on it in spoofing-related cases where the relevant conduct occurred after Dodd-Frank took effect.

C. Other Criminal Statutes

The DOJ also had the ability—prior to Dodd-Frank—to pursue criminal spoofing cases under various Title 18 statutes, including the wire fraud statute, 18 U.S.C. § 1343, and the commodities fraud statute, 18 U.S.C. § 1348.[45] To our knowledge, however, the DOJ never did so.

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37 Section 6(c) also authorized an administrative action against any person that "willfully made any false or misleading statement of a material fact in any registration application or any report filed with the" CFTC, or "willfully omitted to state in any such application or report any material fact which is required to be stated therein . . . ." *See* 7 U.S.C. § 9 (2009).

38 *See* CEA § 6c, 7 U.S.C. § 13a-1 (2009).

39 Matthew Leising, *Market Cops Got Power To Pursue Spoofers After Years of Failure*, Bloomberg (May 14, 2015), http://www.bloomberg.com/news/articles/2015-05-14/market-cops-got-power-to-pursue-spoofers-after-years-of-failure.

40 *See, e.g.*, Matthew F. Kluchenek & Jacob L. Kahn, *Deterring Disruption in the Derivatives Markets*, 3 Harv. Bus. L. Rev. Online 120, 126 (2013), http://www.hblr.org/?p=3159; *see also* Jerry W. Markham, *Manipulation of Commodity Futures Prices – The Unprosecutable Crime*, 8 Yale J. Reg. 281 (1991), https://digitalcommons.law.yale.edu/yjreg/vol8/iss2/2/.

41 *See, e.g.*, *In re Amaranth Natural Gas Commodities Litig.*, 730 F.3d 170, 173 (2d Cir. 2013); *DiPlacido v. C.F.T.C.*, 364 F. App'x 657, 661 (2d Cir. 2009).

42 *C.F.T.C. v. Bradley*, 408 F. Supp. 2d 1214, 1219 (N.D. Okla. 2005).

43 *See, e.g.*, *In re Gelber Group*, CFTC No. 13-15 (Feb. 8, 2013); *In re Bunge Global Markets*, CFTC No. 11-10 (Mar. 22, 2011).

44 *See* Kluchenek & Kahn, *supra* note 40 at 131.

45 Prior to the 2009 passage of the Fraud Enforcement and Recovery Act, Pub. L. No. 111-21, 123 Stat. 1617 (2009), 18 U.S.C. § 1348 prohibited only securities fraud. It now prohibits both securities fraud and commodities fraud. *See* 18 U.S.C. § 1348 (2012).

VI. Spoofing Law in the Commodities and Derivatives Markets After Dodd-Frank

Dodd-Frank amended the CEA in several ways relevant to spoofing.

A. The CEA's Specific Anti-Spoofing Provision

CEA § 4c(a)(5)(C), 7 U.S.C. § 6c(a)(5), explicitly forbids spoofing and two other specified "disruptive practices." Specifically, the anti-spoofing provision prohibits "any trading, practice, or conduct on or subject to the rules of a registered entity that . . . is, is of the character of, or is commonly known to the trade as, 'spoofing' (bidding or offering with the intent to cancel the bid or offer before execution)." 7 U.S.C. § 6c(a)(5)(C) (2012).[46]

1. CFTC Guidance on the Anti-Spoofing Provision

According to guidance released by the CFTC in May 2013 (the "2013 Guidance"), the spoofing prohibition applies to activity on all registered trading facilities, including in pre-open periods and during exchange-controlled trading halts. It does not, however, cover block trades, bilaterally negotiated swap transactions, exchanges for related positions, or non-executable market communications such as requests for quotes. It applies regardless of a trading platform's order book functionality.[47] The 2013 Guidance further provides that:

- The CFTC "does not interpret reckless trading, practices, or conduct as constituting a 'spoofing' violation," nor does it interpret the prohibition as "reaching accidental or negligent trading, practices, or conduct." Rather, the agency must prove that the trader *specifically intended* to cancel his or her bid before execution.[48] That said, it need not prove that the trader intended to move the market.[49]
- A "spoofing violation will not occur when the person's intent when cancelling a bid or offer before execution was to cancel such bid or offer as part of a legitimate, good-faith attempt to consummate a trade." A partial fill may, but will not necessarily, qualify as spoofing. The CFTC promised, in distinguishing between spoofing and legitimate activity, to evaluate "the market context, the person's pattern of trading activity (including fill characteristics), and other relevant facts and circumstances."[50]
- The anti-spoofing prohibitions in CEA § 4c(a)(5) are "distinct statutory provisions from the anti-manipulation provisions in [new CEA § 6(c)]; the Commission does not interpret the CEA § 4c(a)(5) violations as including any manipulative intent requirement."[51] This point was presumably made to distinguish CEA § 4c(a)(5) from the CEA's general anti-manipulation provisions.
- A violation of the anti-spoofing provision does not "requir[e] a pattern of activity"; rather, "even a single instance of trading activity" can be a violation if it is coupled with the prohibited intent.[52]
- As "with other intent-based violations," the CFTC intends to discern intent from "all of the facts and circumstances of each particular case, including a person's trading practices and patterns."[53] As a practical matter, the CFTC will seek direct evidence from contemporaneous communications (*e.g.*, emails, instant messages) as well as algorithmic code to the extent relevant. The CFTC will also look for circumstantial evidence in the trading data—the number of orders submitted, duration of the orders before cancellation, relationship between cancelled and executed orders, and so on.[54]

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46 The other two unlawful practices are engaging "in any trading, practice, or conduct on or subject to the rules of a registered entity" that "violates bids or offers; [or] . . . demonstrates intentional or reckless disregard for the orderly execution of transactions during the closing period . . . ." *Id.*, § 6c(a)(5)(A) and (B).

47 *See* CFTC, *Antidisruptive Practices Authority*, 78 Fed. Reg. 31890, 31892, 31896 (May 28, 2013).

48 *Id.* at 31896 & n.74; *see also United States v. Coscia*, 866 F.3d 782, 795 (7th Cir. 2017) ("Spoofing . . . requires[] an intent to cancel the order *at the time it was placed*.") (emphasis in original).

49 *See* CFTC, *Antidisruptive Practices Authority*, 78 Fed. Reg. at 31892 (May 28, 2013).

50 *Id.* at 31896.

51 *Id.* at 31892.

52 *Id.* at 31896.

53 *Id.*

54 *See id.*

Finally, the CFTC provided "four non-exclusive examples of possible situations" that may amount to spoofing. Most of the spoofing cases that the DOJ and CFTC have pursued belong in the third and/or fourth categories:

- "Submitting or cancelling bids or offers to overload the quotation system of a registered entity";
- "Submitting or cancelling bids or offers to delay another person's execution of trades";
- "Submitting or cancelling multiple bids or offers to create an appearance of false market depth"; and
- "Submitting or cancelling bids or offers with intent to create artificial price movements upwards or downwards."[55]

2. Administrative and Civil Proceedings and Related Remedies

The CFTC can bring administrative proceedings or district court actions for alleged violations of the CEA's specific anti-spoofing provision. Section 6c of the CEA, 7 U.S.C. § 13a-1, authorizes the CFTC to bring actions in federal court for violations of the CEA, related regulations, and/or CFTC orders. Sections 6(c), 6(d), and 8a of the CEA, 7 U.S.C. §§ 9, 13b, 12a, authorize various administrative proceedings.

A person who is found liable for spoofing in an administrative proceeding can be barred from trading on an exchange, have his or her CFTC registration suspended or revoked, and be forced to pay a monetary penalty and restitution. The penalty may not exceed the greater of $140,000 or triple the monetary gain to the person for each violation.[56] A violator may also be ordered to cease and desist unlawful conduct.[57]

A person found civilly liable for spoofing in a district court proceeding can be subject to an injunction, and forced to pay disgorgement, restitution, and/or a civil monetary penalty. Any penalty may not exceed the greater of $100,000 or triple the monetary gain to the person for each violation.[58]

3. Statute of Limitations

Under 28 U.S.C. § 2462, the statute of limitations for administrative and district court enforcement actions by the CFTC seeking a "civil fine, penalty, or forfeiture" is five years.[59]

Depending on the specifics, a request for disgorgement by the CFTC is likely subject to the same five-year limitations period, since the Supreme Court has held that disgorgement is often tantamount to a penalty, and thus governed by § 2462.[60] The case law is less clear as to whether an enforcement action seeking an injunction is punitive and thus governed by § 2462's limitations period.[61]

4. Criminal Actions under the Anti-Spoofing Provision

The DOJ can pursue criminal charges against a defendant who "knowingly" violates the CEA's specific anti-spoofing provision.[62] If convicted, a

55 *Id.*

56 7 U.S.C. § 9(10)(C)(i). After adjusting for inflation, the maximum statutory penalty amount is $170,129 for violations occurring on November 2, 2015 or later. 17 C.F.R. § 143.8 (2021).

57 *See* CEA §§ 6(c)(4), 6(c)(10), 6(d), 7 U.S.C. §§ 9(4), 9(10), 13b (2012).

58 *See* CEA § 6c, 7 U.S.C. § 13a-1. After adjusting for inflation, the maximum statutory penalty amount is $187,432. 17 C.F.R. § 143.8 (2021).

59 Section 2462 provides, in relevant part, that "an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon." *See also*, *e.g.*, *C.F.T.C. v. Reisinger*, 2013 WL 3791691 (N.D. Ill., July 18, 2013); *C.F.T.C. v. American Bullion Exchange Amex Corp.*, 2011 WL 13134933 (N.D. Cal., March 11, 2011).

60 *See Kokesh v. S.E.C.*, 137 S. Ct. 1635 (2017) (holding that the five-year limitations period set forth in § 2462 applies because "[d]isgorgement, as it is applied in SEC enforcement proceedings, operates as a penalty under § 2462.").

61 *See, e.g., S.E.C. v. Gentile*, 939 F.3d 549, 562 (3d Cir. 2019) (collecting cases and comparing differing approaches and outcomes; holding that the securities laws do not permit issuance of "punitive" injunctions, so § 2462 does not apply to a "properly" issued injunction, which does not penalize, but rather protects against future harm).

62 *See* CEA § 9(a)(2), 7 U.S.C. § 13(a)(2).

defendant faces up to a $1 million fine and ten years in prison per count.[63]

Alleged criminal violations of the anti-spoofing statute are governed by the five-year limitations period set forth in 18 U.S.C. § 3282, the "catchall" statute of limitations for federal crimes.

B. The Anti-Deception/Manipulation Provision of the CEA

Dodd-Frank also added a securities-style anti-deception/anti-manipulation provision, which is in addition to § 6(c)'s pre-existing anti-manipulation prohibition.[64]

1. Section 6(c)(1) of the CEA

Under CEA § 6(c)(1), it is "unlawful for any person, directly or indirectly, to use or employ, or attempt to use or employ, in connection with any swap, or a contract of sale of any commodity in interstate commerce, or for future delivery on or subject to the rules of any registered entity, any manipulative or deceptive device or contrivance, in contravention of such rules and regulations as the Commission shall promulgate . . . ." 7 U.S.C. § 9(1) (2012). This provision was modeled on § 10(b) of the Exchange Act, but with an added prohibition on attempt (which does not exist in § 10(b)).

2. CFTC Rule 180.1

To implement CEA § 6(c)(1), the CFTC promulgated Rule 180.1, 17 C.F.R. § 180.1, which prohibits material misstatements and fraudulent or manipulative conduct in connection with swaps, futures and commodities. The language of Rule 180.1 was consciously modeled on, and closely tracks, SEC Rule 10b-5 (again, with an added prohibition on attempt).[65]

The CFTC has stated that it "will be guided, but not controlled, by the substantial body of judicial precedent applying the comparable language of SEC Rule 10b-5."[66] Indeed, courts have routinely relied upon case law under § 10(b) of the Exchange Act and Rule 10b-5 to construe CEA § 6(c)(1) and Rule 180.1, though the full extent of cross-over remains to be seen.[67]

At the same time, Congress and the CFTC sought to separate the securities-style deception and manipulation prohibitions in § 6(c)(1) and Rule 180.1, on the one hand, from the CEA's pre-existing anti-manipulation provisions and related case law, on the other. Section 6(c)(1)(B) of the CEA and Rule

63 *Id.*

64 *See* Dodd-Frank, Pub. L. No. 111-203, § 741(b)(3), 124 Stat. 1376, 1731 (2010).

65 *See* CFTC, *Prohibition on the Employment, or Attempted Employment, of Manipulative and Deceptive Devices*, 76 Fed. Reg. 41398 (July 14, 2011) ("Rules 180.1 and 180.2 Adopting Release"). Rule 180.1 provides, in relevant part, that:

(a) It shall be unlawful for any person, directly or indirectly, in connection with any swap, or contract of sale of any commodity in interstate commerce, or contract for future delivery on or subject to the rules of any registered entity, to intentionally or recklessly:
1) Use or employ, or attempt to use or employ, any manipulative device, scheme, or artifice to defraud;
2) Make, or attempt to make, any untrue or misleading statement of a material fact or to omit to state a material fact necessary in order to make the statements made not untrue or misleading;
3) Engage, or attempt to engage, in any act, practice, or course of business, which operates or would operate as a fraud or deceit upon any person; or,
4) Deliver or cause to be delivered, or attempt to deliver or cause to be delivered, for transmission through the mails or interstate commerce, by any means of communication whatsoever, a false or misleading or inaccurate report concerning crop or market information or conditions that affect or tend to affect the price of any commodity in interstate commerce, knowing, or acting in reckless disregard of the fact that such report is false, misleading or inaccurate. Notwithstanding the foregoing, no violation of this subsection shall exist where the person mistakenly transmits, in good faith, false or misleading or inaccurate information to a price reporting service.

66 Rules 180.1 and 180.2 Adopting Release, 76 Fed. Reg. at 41399.

67 *See, e.g.*, *CFTC v. Monex Credit Co.*, 931 F.3d 976, 976 (9th Cir. 2019) ("We presume that by copying § 10(b)'s language and pasting it in the CEA, Congress adopted § 10(b)'s judicial interpretations as well."); *C.F.T.C. v. Kraft Foods Grp. Inc.*, No. 15 C 2881, 2015 WL 9259885, at *7 (N.D. Ill. Dec. 18, 2015) (rejecting CFTC's claim that a market manipulation case for alleged violation of Rule 180.1 need not be pleaded with the particularity required of fraud claims under Fed. R. Civ. Proc. 9(b), and relying heavily on the U.S. Supreme Court precedent holding that the "nearly identical" language of Exchange Act Section 10(b) and Rule 10b-5 "prohibit[] only fraudulent conduct.").

180.1(c) each provide that "nothing in [CEA § 6(c)] shall affect, or be construed to affect, the applicability of [CEA § 9(a)(2), 7 U.S.C. § 13(a)(2) (2012)]," one of the original anti-manipulation provisions. *See* Section VI.E., below (discussing CEA § 9(a)(2)).

By its terms, CFTC Rule 180.1 prohibits "intentional[]" as well as "reckless[]" conduct. In its adopting release, the CFTC stated that "[c]onsistent with long-standing precedent under the commodities and securities laws, the [CFTC] defines recklessness as an act or omission that departs so far from the standards of ordinary care that it is very difficult to believe the actor was not aware of what he or she was doing."[68] That said, the CFTC's blanket application of a recklessness standard to all conduct prohibited by Rule 180.1 may conflict with prior precedent under § 10(b) of the Exchange Act, on which § 6(c)(1) of the CEA was specifically modeled. Like § 10(b), new § 6(c)(1) prohibits "manipulative *or* deceptive" devices and contrivances—logically read to prohibit two classes of misconduct.[69] Various cases prior to Dodd-Frank applied a scienter of recklessness to securities claims based on deception, but a higher standard—specific intent to impact the price of a security—in cases involving alleged securities manipulation undertaken *via* otherwise bona fide open market transactions.[70] Thus, the CFTC's rule making (as reflected in Rule 180.1) may conflict with Congress's intent in enacting § 6(c)(1), since, "where Congress borrows terms of art it . . . presumably knows and adopts the cluster of ideas that were attached to each borrowed word."[71]

In addition, § 6(c)(1) and Rule 180.1 contain a type of prohibition not present in the Exchange Act and Rule 10b-5: they classify as unlawful manipulation for purposes of CEA § 6(c)(1) "delivering, or causing to be delivered . . . a false or misleading or inaccurate report concerning . . . market information or conditions that affect or tend to affect the price of any commodity in interstate commerce," with knowledge or reckless disregard of the report's being false, misleading, or inaccurate.[72]

C. The CEA's Updated Anti-Manipulation Provision

1. Section 6(c)(3) of the CEA and CFTC Rule 180.2

CEA § 6(c)(3) makes it "unlawful for any person, directly or indirectly, to manipulate or attempt to manipulate the price of" a swap, commodity, or future. 7 U.S.C. § 9(3). This provision stems from a prohibition contained in § 6(c) prior to Dodd-Frank. Rule 180.2, which was promulgated by the CFTC in 2011, tracks CEA § 6(c)(3) almost verbatim.[73]

2. CFTC Guidance

According to the CFTC, CEA § 6(c)(3) and Rule 180.2 incorporate the old four-part price manipulation test from cases that arose under pre-Dodd-Frank §§ 6(c) and 9(a)(2).[74] In other words, under this provision, the government still must establish the four traditional elements explained above in Section V.A.

In adopting Rule 180.2, the CFTC made sure to clarify that, unlike with Rule 180.1, a violation of Rule 180.2 requires that a person "act with the requisite specific intent"—in other words,

68 Rules 180.1 and 180.2 Adopting Release, 76 Fed. Reg. at 41404 (internal quotation marks and citations omitted).

69 *See Monex Credit Co.*, 931 F.3d at 976 ("We conclude that § 6(c)(1)'s language is unambiguous. Authorizing claims against '[m]anipulative or deceptive' conduct means what it says: the CFTC may sue for fraudulently deceptive activity, regardless of whether it was also manipulative."); *see also Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 177 (1994) ("[W]e again conclude that [Section 10(b)] prohibits only the making of a material misstatement (or omission) or the commission of a manipulative act.").

70 *See, e.g.*, *Markowski v. S.E.C.*, 274 F.3d 525, 528 (D.C. Cir. 2001) (noting that, absent "fictitious transactions," liability for manipulation under § 10(b) depends "entirely on whether the investor's *intent was . . . solely to affect the price of the security.*") (emphasis added; citations omitted).

71 *Morissette v. United States*, 342 U.S. 246, 263 (1952).

72 CEA § 6(c)(1)(A), 7 U.S.C. § 9(1)(A) (2012); 17 C.F.R. § 180.1(a)(4).

73 *See* Rules 180.1 and 180.2 Adopting Release, 76 Fed. Reg. at 41398; 17 C.F.R. § 180.2 ("It shall be unlawful for any person, directly or indirectly, to manipulate or attempt to manipulate the price of any swap, or of any commodity in interstate commerce, or for future delivery on or subject to the rules of any registered entity.").

74 Rules 180.1 and 180.2 Adopting Release, 76 Fed. Reg. at 41407.

recklessness is not enough for traditional price manipulation.[75] Since Dodd-Frank, the CFTC has rarely charged violations of CEA § 6(c)(3), and only in uncontested matters when it did.[76] This is likely due to the fact that other applicable provisions of the CEA have lower intent requirements.

CEA § 6(c)(3), unlike its predecessor in old CEA § 6(c) and the similar provision in CEA § 9(a)(2), contains the words "directly or indirectly," potentially making CEA § 6(c)(3) further-reaching than CEA § 9(a)(2), which is discussed below in Section VI.E.

D. Enforcement of CEA §§ 6(c)(1) and (3)

Like the anti-spoofing provision, CEA §§ 6(c)(1) and (3) can be enforced civilly by the CFTC or criminally by the DOJ.

1. CFTC Enforcement, Remedies and Statute of Limitations

The CFTC can pursue claims in administrative actions or actions in federal district court for alleged violations of CEA § 6(c).[77]

A defendant who is found liable for manipulation or attempted manipulation in an administrative proceeding can be barred from trading on an exchange, have his or her CFTC registration suspended or revoked, and be forced to pay a penalty and restitution. The penalty for manipulation may not exceed the greater of $1,000,000 or triple the monetary gain to the person for each violation (a much higher maximum compared to violations of the specific anti-spoofing provision).[78] A violator may also be ordered to cease and desist all unlawful conduct.[79]

A defendant who is found liable for manipulation or attempted manipulation in district court can be subject to an injunction, and forced to pay disgorgement, restitution, and a penalty. The maximum penalty is the same as that set forth immediately above with respect to administrative proceedings.[80]

Like the anti-spoofing law, a five-year limitations period applies to civil and administrative enforcement actions brought by the CFTC under CEA § 6(c).[81]

2. DOJ Enforcement, Penalties and Statute of Limitations

The DOJ can pursue criminal prosecutions for "knowing" violations of CEA § 6(c).[82] If convicted under CEA § 6(c), an individual defendant faces a statutory maximum $1 million fine and ten years' imprisonment per count.[83]

Criminal prosecutions under CEA § 6(c) are governed by the five-year, catchall limitations period set out in 18 U.S.C. § 3282.

E. The CEA's Original Anti-Manipulation Provision

The CEA's other anti-manipulation provision, § 9(a)(2), was not modified by Dodd-Frank, and provides, in relevant part, that "[i]t shall be a

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75 *Id.*

76 *See In re Deutsche Bank AG*, CFTC No. 18-06 (2019); *In re Liew*, CFTC No. 17-14 (2017); *C.F.T.C. v. Nav Sarao Futures Ltd. PLC*, No. 15-Cv-03398 (N.D. Ill. 2015) (discussed in Section X.B., below).

77 For simplicity, this section presupposes that all violations of §§ 6(c)(1) and 6(c)(3) would be classified as "manipulation" (or attempted manipulation) subject to the heightened penalty regime. However, it may be that there is conduct (such as a pure material misstatement, with no attempt to manipulate prices, *see* 17 C.F.R. § 180.1(a)(2), that would violate § 6(c)(1) and Rule 180, but would not properly qualify as "manipulation" for purposes of the enhanced penalty provisions.

78 *See* 7 U.S.C. § 9(10)(C)(ii). After adjusting for inflation, the maximum statutory penalty amount is $1,227,202. 17 C.F.R. § 143.8 (2021).

79 *See* CEA §§ 6(c)(4), 6(c)(10), 6(d), 7 U.S.C. §§ 9(4), 9(10), 13b.

80 *See* 7 U.S.C. § 13a-1(d)(1)(B).

81 *See* 28 U.S.C. § 2462; Section VI.A., above (discussing limitations with respect to different types of remedies).

82 *See* CEA § 9(a)(2), 7 U.S.C. § 13(a)(2). § 9(a)(2) of the CEA, provides, in relevant part, that "[i]t shall be a felony . . . for [a]ny person . . . knowingly to violate the provisions of § 6 . . . of this title," among others. 7 U.S.C. § 13(a)(2). "A person acts knowingly if he realizes what he is doing and is aware of the nature of his conduct, and does not act through ignorance, mistake, or accident." Pattern Criminal Jury Instructions of the Seventh Circuit, Instruction 4.10 (2012).

83 *See* 7 U.S.C. § 13(a)(2).

felony . . . for [a]ny person to manipulate or attempt manipulate the price of any commodity in interstate commerce, or for future delivery on or subject to the rules of any registered entity, or of any swap . . . ." 7 U.S.C. § 13(a)(2).

As noted above, to prove manipulation under CEA § 9(a)(2), the government must show that: (1) the accused had the ability to influence market prices; (2) he or she specifically intended to do so; (3) artificial prices existed; and (4) the accused caused the artificial prices. In 2018, then District Court Judge Richard Sullivan (now a Judge on the Second Circuit Court of Appeals) clarified that the intent standard for manipulation and attempted manipulation under § 9(a)(2) is a specific intent to create an artificial price and not merely an intent to affect price.[84]

1. CFTC Enforcement, Remedies and Statute of Limitations

The CFTC can bring an administrative proceeding or a federal district court action to enforce CEA § 9(a)(2). A violation of this provision subjects a person to the same remedies noted above with respect to §§ 6(c)(1) and 6(c)(3).[85] A five-year limitations period applies to civil and administrative enforcement actions brought by the CFTC under CEA § 9(a)(2).[86]

2. DOJ Enforcement, Penalties and Statute of Limitations

In addition, the DOJ can bring criminal charges under CEA § 9(a)(2). The same four-part test that applies in civil cases applies in criminal cases as well.[87] If convicted, an individual defendant can be required to pay up to $1 million in fines and serve up to ten years in prison per count.[88] (Dodd-Frank upped the maximum fine, which had been $500,000.[89])

Criminal prosecutions under CEA § 9(a)(2) are also governed by the five-year, catchall limitations period set out in 18 U.S.C. § 3282.

F. General "Scheme to Defraud" and other Criminal Statutes

Despite the ability to do so, the DOJ never prosecuted spoofing related to commodities futures under the wire[90] or commodities fraud[91] statutes prior to Dodd-Frank. Somewhat ironically, since enactment of Dodd-Frank—which provided the DOJ with a stand-alone statute specifically designed to combat spoofing—the DOJ has not infrequently prosecuted spoofing under the wire and commodities fraud statutes (in some cases with no specific charge under the anti-spoofing provision).[92] Recently, the DOJ also prosecuted spoofing and related conduct as a violation of the bank fraud statute, 18 U.S.C. § 1344, and the RICO conspiracy statute, 18 U.S.C. § 1962(d).[93]

Wire and mail fraud carry a five-year statute of limitations under 18 U.S.C. § 3282, unless the fraud "affects" a financial institution, in which case the limitations period is ten years pursuant to 18 U.S.C. § 3293(2).[94] The statute of limitations for commodities fraud is six years,[95] and RICO allegations are subject to the five-year limitations

84 *See C.F.T.C. v. Wilson and DRW Investments, LLC*, 2018 WL 6322024, *14-20 (S.D.N.Y. Nov. 30, 2018).
85 CEA § 6(c)(10)(C)(ii), 7 U.S.C. § 9(10)(C)(ii); CEA § 6c(d)(1)(B), 7 U.S.C. § 13a1(d)(1)(B).
86 *See* 28 U.S.C. § 2462; Section VI.A., above.
87 *See, e.g., United States v. Reliant Energy Servs.*, 420 F. Supp. 2d 1043, 1056 (N.D. Cal. 2006).
88 *See* 7 U.S.C. § 13(a)(2).
89 *Compare* 7 U.S.C. § 13(a)(2) (2009) *with* 7 U.S.C. § 13(a)(2) (2012).
90 *See* 18 U.S.C. § 1343.
91 *See* 18 U.S.C. § 1348.
92 *See, e.g., United States v. Bases*, No. 18-Cr-00048 (N.D. Ill.); *United States v. Vorley,* No. 18-Cr-00035 (N.D. Ill.).
93 *See United States v. Smith,* No. 19-Cr-669 (N.D. Ill.).
94 Section 3293(2) extends to ten years the statute of limitations for wire fraud offenses (including conspiracy to commit wire fraud) "if the offense affects a financial institution." 18 U.S.C. § 3293(2). "[T]he verb 'to affect' expresses a broad and open-ended range of influences," *United States v. SKW Metals & Alloys, Inc.*, 195 F.3d 83, 90 (2d Cir.1999), and § 3293(2) is not limited to circumstances where "the financial institution is the object of fraud." *United States v. Bouyea*, 152 F.3d 192, 195 (2d Cir.1998) (quotation marks omitted). Section 3293(2) "broadly applies to any act of wire fraud that affects a financial institution," provided the effect of the fraud is "sufficiently direct." *Id.* (quotation marks omitted).
95 *See* 18 U.S.C. § 3301(b).

period set forth in § 3282, regardless of whether the conduct "affects" a financial institution. With respect to RICO, it is generally held that a prosecution is timely so long as the defendant committed one predicate act (that forms part of the pattern for which he or she is being prosecuted) within five years of indictment.[96]

Mail and wire fraud are punishable by imprisonment of not more than 20 years and a fine of not more than $250,000 ($500,000 for organizations), or a fine of not more than $1 million and imprisonment for not more than 30 years if a victim is a financial institution.[97] Bank fraud is punishable by imprisonment of not more than 30 years and a fine of not more than $1 million. The statutory maximum for commodities fraud is 25 years' imprisonment,[98] and a $250,000 fine.[99] RICO violations are punishable by imprisonment of not more than 20 years and a fine of not more than $25,000 (not more than $500,000 for organizations).[100]

G. Enforcement by Futures Exchanges

In the wake of Dodd-Frank, the futures exchanges adopted rules that specifically prohibit spoofing as a supplement to their preexisting prohibitions on manipulative and dishonest practices.

CME Group Rule 575—which took effect in September 2014 and was adopted by the CME, CBOT, COMEX, and NYMEX—prohibits "Disruptive Practices" and provides in part: "All orders must be entered for the purpose of executing bona fide transactions. . . . No person shall enter or cause to be entered an order with the intent, at the time of order entry, to cancel the order before execution or to modify the order to avoid execution."[101]

For its part, ICE Futures U.S. ("ICE") Rule 4.02(l) makes it a violation to "engage in any . . . manipulative or disruptive trading practices prohibited by the [CEA] or by [CFTC regulation], including . . . entering an order or market message . . . with . . . [t]he intent to cancel the order before execution, or modify the order to avoid execution."[102]

Under CME Rule 575 and ICE Rule 4.02(l), entering an order either with intent to cancel it before execution, or with "reckless disregard" for the order's adverse impact on the market, may be enough to constitute a violation.

Spoofing cases that have been brought by the various futures exchanges are collected and summarized in Section X.G., below.

VII. Spoofing Law in the Securities Markets

Unlike the CEA, the securities statutes do not prohibit spoofing specifically. As such, law enforcement has taken aim at spoofing related to securities under general anti-fraud and anti-manipulation statutes.

Securities spoofing actions can be pursued in civil enforcement actions by the SEC (either administrative proceedings or district court actions) and in criminal prosecutions by the DOJ. Such cases typically proceed under § 10(b) of Exchange Act, 15 U.S.C. § 78j (including Rule 10b-5, 17 C.F.R. § 210.10b-5) and § 17(a) of the Securities Act, 15 U.S.C. § 77q(a).

A. Section 10(b) of the Exchange Act and Section 17(a) of the Securities Act

Section 10(b) of the Exchange Act prohibits "manipulative or deceptive device[s] or contrivance[s]" in violation of SEC rules such as Rule 10b-5. The Supreme Court has said that "manipulation" is "'virtually a term of art when used in connection with securities markets. The term refers generally to practices, such as wash sales, matched

96 *See United States v. Darden*, 70 F.3d 1507, 1525 (8th Cir. 1995).

97 18 U.S.C. §§ 1341, 1343.

98 18 U.S.C. §§ 1348, 3571.

99 18 U.S.C. § 3571.

100 18 U.S.C. §§ 1963(a), 3571. The maximum fine for both individuals and organizations convicted of wire, mail, or bank fraud, or a RICO violation may be increased to twice the amount of gain or loss associated with the offense. *Id.* § 3571(d).

101 *See also* CME Rules 432.B.2., 432.H., 432.Q., 432.T. (general prohibitions on dishonest and manipulative conduct, and conduct inconsistent with just and equitable principles of trade).

102 *See also* ICE Rules 4.02(a), 4.04 (general prohibitions on price manipulation and conduct inconsistent with just and equitable principles of trade).

orders, or rigged prices, that are intended to mislead investors by artificially affecting market activity,"[103] and "connotes intentional or willful conduct designed to deceive or defraud investors by controlling or artificially affecting the price of securities."[104]

The Second Circuit has elaborated: It must be shown that "an alleged manipulator engaged in market activity aimed at deceiving investors as to how other market participants have valued a security. The gravamen of manipulation is deception of investors into believing that prices at which they purchase and sell securities are determined by the natural interplay of supply and demand, not rigged by manipulators. In identifying activity that is outside the natural interplay of supply and demand, courts generally ask whether a transaction sends a false pricing signal to the market."[105] More specifically, one court has observed that a securities trader engages in spoofing when she "creates a false appearance of market activity by entering multiple non-*bona-fide* orders on one side of the market, at generally increasing (or decreasing) prices, in order to move the stock's price in a direction where the trader intends to induce others to buy (or sell) at a price altered by the non-*bona fide* orders."[106]

To the extent that spoofing can be characterized as artificially affecting the price of a security, sending a false pricing signal, or deceiving market participants about the natural interplay of supply and demand, it can also amount to a violation of §10(b) and Rule 10b-5.[107] The same is true with respect to § 17(a) of the Securities Act, since the elements are essentially the same. With one exception, all of the SEC's modern spoofing cases that have come to a conclusion were settled without having been tested in litigation. The sole case to go to trial, *SEC v. Lek Securities Corp. et al.*, Case No. 17-Cv-1789 (D.N.J.), ended in a finding of liability in November 2019. *Lek Securities* and all other modern SEC spoofing cases are discussed below in Section X.C.

B. Section 9(a)(2) of the Exchange Act

Securities spoofing cases have also involved allegations that the conduct at issue violated Exchange Act § 9(a)(2), 15 U.S.C. § 78i(a)(2).

Among other things, in its current form,[108] Exchange Act § 9(a)(2) makes it unlawful "[t]o effect . . . a series of transactions . . . creating actual or apparent active trading in [a security], or raising or depressing the price [of a security], for the purpose of inducing the purchase or sale of such security by others."

This provision, which appears in the Exchange Act section on "Manipulation of Security Prices," was likely designed to target practices like wash sales, in which consummated trades are used to mislead other market participants. The SEC apparently takes the position that in spoofing cases, cancelled—that is to say, unconsummated—orders can be a "transaction" that "creat[es] actual or apparent active trading."[109]

C. Civil Enforcement by the SEC, Remedies and Statute of Limitations

Civil money penalties can be imposed on a respondent found liable in an administrative proceeding for violating Exchange Act §§ 9(a)(2) and 10(b), 15 U.S.C. §§ 78u-2 (a)(2) and 78u3. For each unlawful act or omission, the maximum penalty ranges from $5,000 (or $50,000 for a company) to $100,000 (or $500,000 for a company), depending on the level of intent and impact on actual or

103 *Santa Fe Indus. v. Green*, 430 U.S. 462, 476 (1977) (citation omitted).

104 *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 199 (1976).

105 *Wilson v. Merrill Lynch & Co.*, 671 F.3d 120, 130 (2011) (citations and internal quotation marks omitted); *see also GFL Advantage Fund, Ltd. v. Colkitt*, 272 F.3d 189, 205 (3d Cir. 2001) (concluding that a "Section 10(b) plaintiff [must] establish that the alleged manipulator injected 'inaccurate information' into the market or created a false impression of market activity.").

106 *In re Biremis Corp.*, EA Release No. 68456, at *2 (Dec. 18, 2012).

107 *See S.E.C. v. Frohling*, 851 F.3d 132, 136 (2d Cir. 2016); *S.E.C. v. Monarch Funding Corp.*, 192 F.3d 295, 308 (2d Cir. 1999).

108 15 U.S.C. § 78i(a)(2). Before Dodd Frank, this provision applied only to securities registered on a national securities exchange, and to security-based swap agreements. 15 U.S.C. § 78i (2009). The amended version applies to "any security other than a government security" as well as to security-based swap agreements.

109 *See In re Biremis Corp.*, EA Release No. 68456, at *10-11 (Dec. 18, 2012), discussed in Section X.C., below. The SEC has also accused broker-dealers whose accounts were used by others who engaged in spoofing or layering of violating the Market Access Rule (SEC Rule 15c3-5, 17 C.F.R. § 240.15c3-5) and other supervisory requirements.

potential victims.[110] Administrative remedies may also include cease and desist orders (temporary and permanent), accountings and disgorgement, and orders barring certain persons from serving as an officer or director of an issuer of registered securities.[111]

A defendant who is found civilly liable in federal district court can be subject to a maximum monetary penalty ranging from a maximum of (1) $5,000 (or $50,000 for a company) or the gross amount of pecuniary gain from the violation to (2) $100,000 (or $500,000 for a company), or the gross amount of pecuniary gain from the violation, whichever is greater.[112]

Civil and administrative actions brought by the SEC for the enforcement of any civil fine, penalty, or forfeiture must be commenced within five years from the date when the claim first accrued.[113]

District courts, upon a proper showing by the SEC, also have the power to prohibit persons who violated §10(b) from serving as officers or directors of an issuer of registered securities, and to grant "any equitable relief that may be appropriate or necessary for the benefit of investors," among other things.[114] In 2017, in *SEC v. Kokesh*, the Supreme Court held that SEC claims for disgorgement were subject to a five-year statute of limitations, rejecting the near universal consensus that disgorgement claims were not subject to any limitations period, and explicitly reserved judgment on whether disgorgement even qualified as a form of equitable relief.[115] Three years later, in *Liu v. SEC*, the Supreme Court concluded that a district court has authority to award disgorgement as a form of equitable relief, but that such may be justified only when it derives from, and conforms with, a traditional equitable remedy, such as an accounting for profits or equitable lien. The Court also suggested that disgorgement may not be permitted except for the limited purpose of restoring funds to harmed investors, noting that disgorgement "must do more than simply benefit the public at large by virtue of depriving a wrongdoer of ill-gotten gains" and that "the Government has pointed to no analogous common-law remedy permitting a wrongdoer's profits to be withheld from a victim indefinitely without being disbursed to known victims."[116]

On January 1, 2021, Congress enacted the National Defense Authorization Act for Fiscal Year 2021 (the "NDA Act"). Overturning parts of *Lui*, the NDA Act amends § 21(d) of the Exchange Act, 15 U.S.C. § 78u(d)(5), to grant district courts explicit authority to "require disgorgement . . . of any unjust enrichment by the person who received such unjust enrichment as a result of" of a violation of the securities laws.[117] This provision effectively creates a cause of action for disgorgement that is distinct from other equitable causes of action and not necessarily subject to the same limitations as traditional equitable remedies. It also seems to make clear that district courts are not restricted to awarding disgorgement only "when appropriate or necessary for the benefit of investors" and may do so even when such relief is not required in order to compensate victims but simply to avoid unjust enrichment. Overturning parts of *Kokesh*, the NDA Act subjects the SEC's newly created cause of action for disgorgement to a ten-year statute of limitations if the claim arises from a violation of any provision of the securities laws requiring scienter—including § 10(b) of the Exchange Act, 15 U.S.C. § 78j(b)—and otherwise subjects the cause of action to a five-year limitation period. The Act also creates a ten-year limitation period for any other claim for an equitable remedy, including an injunction, bar, suspension, or cease and desist order.

Notably, the NDA Act does *not* alter the five-year period applicable to SEC claims for a money penalty. Nor does it alter the 5-year period generally applicable to disgorgement and money penalty claims brought by the CFTC.

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110 *See* 15 U.S.C. § 78u-2(b).
111 *See id.* § 78u3.
112 *See* 15 U.S.C. § 78u(d)(3) (describing three tiers of penalties).
113 *See* 28 U.S.C. § 2462.
114 *Id.* §§ 78u(d)(2) and (5).
115 137 S. Ct. 1635, at 1642 and n. 3 (2017).
116 140 S. Ct. 1936, at 1940, 1948 (2020).
117 National Defense Authorization Act § 6501(a)(1)(B), (a)(3) (to be codified at 15 U.S.C. §78u(d)(3)(A)(ii), (d)(7)).

D. Criminal Enforcement by the DOJ, Penalties and Statute of Limitations

The DOJ can pursue criminal prosecutions for "willful" violations of Exchange Act §§ 9(a)(2) and 10(b) (and Rule 10b-5).[118] If convicted, an individual defendant faces a statutory maximum $5 million fine and 20 years in prison per count; a corporate defendant faces a maximum fine of $25 million per count.[119] Criminal actions under the Exchange Act are governed by a six-year statute of limitations.[120]

The DOJ can also prosecute securities spoofing under the securities and commodities fraud statute, 18 U.S.C. § 1348, which carries a per-count maximum penalty for individuals of 25 years in prison and/or a maximum fine of $250,000, or twice the gross gain or twice the gross loss arising from the offense, whichever is greater. For an organization, the maximum per-count fine is $500,000, or twice the gross gain or twice the gross loss arising from the offense, whichever is greater. As noted above, the limitations period for charges under § 1348 is five years.

E. Enforcement by FINRA

The Financial Industry Regulatory Authority ("FINRA") can also bring enforcement actions against individuals and entities that engage in securities spoofing.

The legal framework in these actions is typically premised on alleged violations of just and equitable principles of trade (FINRA Rule 2010 / NASD Rule 2110), market access deficiencies (Exchange Act § 15(c)(3), 15 U.S.C. § 78o, and Rule 15c3-5 thereunder), and/or supervisory failures (FINRA Rule 3110 / NASD Rule 3010).

FINRA Rule 2010 (which replaced NASD Rule 2110), provides that "[a] member, in the conduct of its business, shall observe high standards of commercial honor and just and equitable principles of trade." Rule 2010 is essentially a "catch all" provision that can be used to enforce unethical broker or brokerage firm conduct that might not be a direct violation of any other FINRA rule.

Exchange Act Rule 15c3-5, 17 C.F.R. § 240,15c3-5, is designed to "enhance market integrity and investor protection in the securities markets. . . ."[121] The rule "requires a broker-dealer with market access, or that provides a customer . . . or any other person with access to an Exchange or [alternative trading system]. . . , to establish, document, and maintain a system of risk management controls and supervisory procedures reasonably designed to manage the financial, regulatory, and other risks, such as legal and operational risks, related to market access."[122]

FINRA Rule 3110 (which replaced NASD Rule 3010), provides that "[e]ach member shall establish and maintain a system to supervise the activities of each associated person that is reasonably designed to achieve compliance with applicable securities laws and regulations, and with applicable FINRA rules," and details the means by which such compliance is to be achieved, including written procedures, internal inspections, and transaction review and investigations.

According to the SEC, FINRA proceedings are not subject to any statute of limitations.[123] There are "no bright lines about the impact of the length of a delay in filing a complaint on the fairness of [FINRA] disciplinary proceedings": The standard is one of "overall fairness" measured by whether the "respondent's ability to mount an adequate defense had been prejudiced by the delay in his proceedings."[124]

Securities spoofing cases brought by FINRA are collected and summarized in Section X.F., below.

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118 *See* Exchange Act § 32(a), 15 U.S.C. § 78ff(a). Willfulness requires "'a realization on the defendant's part that he was doing a wrongful act' under the securities laws ... in a situation where 'the knowingly wrongful act involved a significant risk of effecting the violation that has occurred.'" *United States v. Cassese*, 428 F.3d 92, 98 (2d Cir. 2005) (quoting *United States v. Peltz*, 433 F.2d 48, 55 (2d Cir. 1970)).

119 *See id.* The DOJ can also prosecute "willful" violations of Securities Act § 17(a). *See* Securities Act § 24, 15 U.S.C. § 77x. If convicted, a court can impose a maximum fine of $10,000 and five years' imprisonment, per count. *Id.*

120 *See* 18 U.S.C. § 3301.

121 Risk Mgmt. Controls for Brokers or Dealers with Mkt. Access, Release No. 63241, 75 Fed. Reg. 69794 (Nov. 15, 2010).

122 Market Access, Overview, FINRA (2021), https://www.finra.org/rules-guidance/key-topics/market-access.

123 *See, e.g., Robert Marcus Lane*, EA Release No. 74269, 2015 SEC LEXIS 558, at *78 n.93 (Feb. 13, 2015).

124 *Mark H. Love*, EA Release No. 49248, 2004 SEC LEXIS 318, at *14-16 (Feb. 13, 2004).

VIII. Private Rights of Action for Spoofing

In addition to enforcement by government agencies, private rights of action exist for price manipulation with respect to both securities and commodities and derivatives.

A. Commodities and Derivatives

The CEA provides for a private right of action in certain circumstances. CEA § 22, 7 U.S.C. § 25, authorizes a private lawsuit for damages where, among other things, a person has been harmed through a violation of the CEA that constitutes "the use or employment of, or an attempt to use or employ, . . . any manipulative device or contrivance in contravention of" CFTC-promulgated rules or "a manipulation of the price" of a commodity, future, or swap.[125] Given this language, it seems relatively clear that CEA § 22 can be invoked for alleged violations of CEA §§ 6(c)(1), 6(c)(3), and 9(a)(2), all of which specifically reference "manipulation" or "manipulative" conduct.[126] What is less clear is whether Congress intended to convey a private right of action for spoofing conduct, which is defined and prohibited in CEA § 4c(a)(5)(C), 7 U.S.C. § 6c(a)(5)(C), a provision that describes spoofing as a "disruptive practice" but not an act of "manipulation." This issue is discussed in Section IX.M., below.

Liability under the CEA, if any, is limited to "actual damages."[127] The "most direct way" to plead the requisite damage "is to point to a specific manipulated transaction or set of transactions between a plaintiff and a defendant with the plaintiff on the (net) losing end and the defendant on the (net) winning end."[128] A less direct, though still viable, way to plead actual damages is by alleging that a plaintiff "traded and lost money (or failed to gain as much money as she otherwise would have) during a bout of defendant's alleged market manipulation in the same contract type in the same exchange for delivery at the same time and place . . . ."[129] That said, bare bones allegations that a price was manipulated at the same time that a plaintiff was in the market trading the same product is not enough: a plaintiff must plead "additional facts to make it plausible that the impact on her was harmful rather than neutral or beneficial."[130]

The limitations period for private claim under CEA § 22(a), 7 U.S.C. § 25(a), is "two years after the claim arises."[131] Under the case law, a claim arises—and, thus, the clock starts—when the plaintiff discovers his or her "CEA injury" (actual notice) or has constructive knowledge or is put on "inquiry notice" of that injury, whichever is earlier.[132]

With respect to derivatives and commodities spoofing, two private non-class actions and 34 putative class actions (many of which have been consolidated) have been filed since 2015. Generally speaking, plaintiffs seek damages based on alleged spoofing conduct that plaintiffs claim violated the CEA's anti-manipulation provisions (not the specific anti-spoofing statute). The majority of these private actions—which are summarized in detail in Section X.D., below—were brought against entities and individuals that were the subject of DOJ and/or CFTC spoofing enforcement efforts, and the private plaintiffs rely upon the same facts and theories that were advanced by the government.

Thirty of the 34 class actions were pending at the time this Guide was published. One class action was dismissed on summary judgment because plaintiffs failed to establish that the CEA applied to the orders and trading in question.[133]

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125 7 U.S.C. § 25(a)(1)(D).

126 *See id.* §§ 9(1) and (3), and 13(a)(2).

127 7 U.S.C. § 25(a)(1); see also I*n re Amaranth Nat. Gas Commodities Litig.*, 269 F.R.D. 366, 378 (S.D.N.Y. 2010) ("in order to state a manipulation claim under the CEA, Plaintiffs must allege 'actual damages resulting from' the alleged manipulation") (quoting 7 U.S.C. § 25(a)(1)(D)).

128 *Harry v. Total Gas & Power N. Am., Inc.*, 889 F.3d 104, 109-110 (2d Cir. 2018).

129 *Id.* at 112.

130 *Id.* at 113.

131 *See id.* § 25(c) ("The United States district courts shall have exclusive jurisdiction of actions brought under this section. Any such action shall be brought not later than two years after the date the cause of action arises.")

132 *See Levy v. BASF Metals Ltd.*, 917 F.3d 106, 108-109 (2d Cir. 2019).

133 *See* Opinion and Order, *Choi v. Tower Research Capital LLC*, No. 14-Cv-9912 (S.D.N.Y. Mar. 30, 2020), ECF. No. 234.

Three other such actions were dismissed at the pleading stage because plaintiffs' claims were untimely and they otherwise failed to adequately plead actual damages.[134] Of the two non-class actions, one was voluntarily dismissed,[135] and one went to arbitration.[136]

B. Securities

Likewise, a private plaintiff can bring a lawsuit for spoofing. The Exchange Act expressly provides for a private right of action for violations of § 9(a)(2), 15 U.S.C. § 78i(a)(2).[137] To establish such a claim, a plaintiff must allege and prove: "(1) a series of transactions in a security creating actual or apparent trading in that security *or* raising or depressing the price of that security, (2) carried out with scienter, (3) for the purpose of inducing the security's sale or purchase by others, (4) was relied on by the plaintiff, (5) and affected plaintiff's purchase or selling price."[138] The statute of limitations for these private rights of action is the earlier of "(1) 2 years after the discovery of the facts constituting the violation; or (2) 5 years after such violation."[139]

In addition, there is an implied private right of action under Exchange Act § 10(b) and SEC Rule 10b-5.[140] To establish liability under 10(b) and Rule 10b-5, a private plaintiff must prove that "(1) the defendant made a false statement or omission of material fact (2) with scienter (3) upon which plaintiff justifiably relied (4) that proximately caused the plaintiff's damages."[141]

A private action under § 10(b) and Rule 10b-5 "must be brought "not later than the earlier of—(1) 2 years after the discovery of the facts constituting the violation; or (2) 5 years after such violation."[142]

Our research has uncovered only one private spoofing lawsuit related to securities in recent years. In that case, plaintiffs have brought claims for damages under the Exchange Act for the alleged manipulation of the price of a certain company's stock, which trades on exchange in both the U.S. and Canada. That case is currently pending and is explained at Section X.E., below.

IX. Key Legal and Factual Issues in Spoofing Cases

With increased enforcement and private litigation in recent years, several significant legal and factual questions have been raised in spoofing cases—particularly in litigated cases involving commodities futures. Below is a discussion of the more salient issues.

134 *See* Opinion and Order, In re *Merrill, BOFA, and Morgan Stanley Spoofing Litigation*, No. 19-Cv-6002 (S.D.N.Y. Mar. 4, 2021), ECF No. 72.

135 *See* Notice of Voluntary Dismissal by Mark Mendelson, *Mendelson v. Allston Trading LLC*, No. 15-cv-04580 (N.D. Ill. Jul. 30, 2015), ECF No. 25.

136 *See* Judgment in a Civil Case, *HTG Capital Partners, LLC, v. John Doe 1, A, B, and C*, No. 15-cv-2129 (N.D. Ill. Feb. 16, 2016), ECF No. 63.

137 *See* 15 U.S.C. § 78i(4). The statute provides that "[a]ny person who willfully participates in any act or transaction in violation of subsections (a), (b), or (c) of this section, shall be liable to any person who shall purchase or sell any security at a price which was affected by such act or transaction, and the person so injured may sue in law or in equity in any court of competent jurisdiction to recover the damages sustained as a result of any such act or transaction." *Id.*

138 *Fezzani v. Bear, Stearns & Co.*, 384 F. Supp. 2d 618, 637 (S.D.N.Y. 2004); *see also Cohen v. Stevanovich*, 722 F. Supp. 2d 416, 424 (S.D.N.Y. 2010) ("Section 9(a)(2) requires plaintiffs to identify transactions in a security creating actual or apparent trading in that security or raising or depressing the price of that security with the intent to deceive or defraud investors.").

139 *See* 28 U.S.C. § 1658.

140 *See, e.g., Superintendent of Ins. v. Bankers Life & Cas.*, 404 U.S. 6, 13 n.9 (1971) ("It is now established that a private right of action is implied under [§] 10(b)"); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 196-97 (1976).

141 Hillson Partners Ltd. P'ship v. Adage, Inc., 42 F.3d 204, 208 (4th Cir.1994) (and numerous cases cited therein). There is no private right of action under Securities Act § 17(a). *See Finkel v. Stratton Corp.*, 962 F.2d 169, 174 (2d Cir. 1992).

142 28 U.S.C. § 1658(b); *see also Merck & Co. v. Reynolds*, 559 U.S. 633, 653 (2010) (holding that limitations period for private actions begin to run "once the plaintiff actually discovered or a reasonably diligent plaintiff would have 'discovered the facts constituting the violation'—whichever comes first.").

A. Spoofing as Commodities Fraud

Subsection (1) of the securities and commodities fraud statute, 18 U.S.C. § 1348, makes it a felony to execute or attempt to execute a scheme or artifice to defraud any person "in connection with any commodity for future delivery. . . ."[143] In *United States v. Coscia*, the Seventh Circuit rejected the argument that the spoof orders in question—which related to oil, natural gas, corn, and soybean futures contacts, among others—were not fraudulent as a matter of law because they were exposed to genuine market risk, becoming the first federal appellate court to hold that spoofing may be prosecuted under a statute that prohibits "schemes to defraud" generally.[144]

Coscia was charged with six counts of commodities fraud and six counts of violating the CEA's specific anti-spoofing provision (all 12 counts were predicated factually on spoofing conduct), having allegedly used computer algorithms to implement a "high frequency trading strategy in which he entered large orders that he intended to immediately cancel before they could be filled by other traders."[145] According to the indictment, Coscia placed a so-called "trade order" on one side of the market that he legitimately intended to execute, and, nearly simultaneously, placed multiple, large "quote orders" on the other side of the market—which were automatically cancelled in a fraction of a second—to give the appearance of market interest. The government's theory was that the algorithms that Coscia used to place orders were designed to, and did in fact, cancel the quote orders with lightning speed because Coscia never intended to fill those orders, but used them instead to trick other traders into reacting to "false" price and volume information.[146] Coscia was convicted on all counts after the jury deliberated only one hour.[147]

On appeal, Coscia argued that the jury's finding of fraudulent intent was unsupported by the evidence because his spoof orders were not deceptive or fraudulent as a matter of law since they "were fully executable and subject to legitimate market risk" and were "left open in the market long enough that other traders could—and often did—trade against them, leading to thousands of completed transactions."[148] The Seventh Circuit rejected this argument, holding that, even if the orders were executable, the evidence established that Coscia's scheme was designed to "pump and deflate the market through the placement of large orders," and "was deceitful because, at the time he placed the large orders, he intended to cancel the orders."[149] As the court put it, the defendant's argument "confuse[d] illusory orders with an illusion of market movement."[150]

The court also catalogued the "substantial" evidence supporting a finding that Coscia intended to cancel his orders at the time he placed them. Such evidence included testimony from the programmer of Coscia's trading software, who explained that the software was designed to use large orders to deflate or inflate prices while, at the same time, ensure that the large orders were *not* executed.[151] It also included statistical evidence showing that: (1) on the CME, 35.61% of Coscia's small orders were filled, as compared to only .08% of his large orders; (2) on the Intercontinental Exchange, only .05% of his large orders were filled; (3) only 0.57% of Coscia's large orders were on the market for more than one second, whereas 65% of large orders entered by other high-frequency traders were open for more than a second; and (4) Coscia's order-to-trade ratio—that is, the size of his average order relative to the

143 18 U.S.C. §1348(1).

144 *See United States v. Coscia*, 866 F.3d 782 (7th Cir. 2017). The DOJ never prosecuted spoofing under the commodities fraud statute prior to Dodd-Frank.

145 Indictment ¶ 3, *United States v. Coscia*, No. 14-Cr-00551 (N.D. Ill. Oct. 1, 2014), ECF No. 1.

146 *Id.* ¶ 10.

147 *See* Trotter, *supra* note 11.

148 *Coscia*, 866 F.3d at 797.

149 *Id.*

150 *Id.*; *see also United States v. Mahaffy*, 693 F.3d 113, 125 (2d Cir. 2012) (holding that "[f]alse representations or material omissions are not required" elements under subsection (1) of § 1348).

151 *See Coscia*, 866 F.3d at 797.

size of his average executed trade—was six to 17 times larger than the order-to-trade ratio of other market participants.[152]

Finally, the court found that the conduct at issue was material even under the instruction that Coscia maintained should have been delivered to the jury, holding that "[t]he evidence at trial showed that his course of action was not only 'reasonably calculated to deceive' but also that actual investors *did* find his actions 'important in making a decision.'"[153]

B. Spoofing as Wire Fraud

1. *United States v. Vorley*

On October 21, 2019, United States District Judge John Tharp Jr. held that spoofing is actionable under the wire fraud statute, 18 U.S.C. § 1343, marking another judicially-approved application of a general "scheme to defraud" statute to spoofing conduct.[154] This decision, which remains subject to future appeal, confirms the DOJ's ability to avoid the five-year limitations period under the anti-spoofing provision in favor the ten-year limitations period that applies where a wire fraud "affects" a financial institution. *See* Section VI.F., above. It also subjects defendants to the statutory maximum sentence of 30 years' imprisonment for fraud affecting a financial institution as opposed to ten years for spoofing.

The *Vorley* indictment alleged that the defendants—both former precious metals futures traders at Deutsche Bank—placed one or more visible orders on one side of the market that they intended to cancel before execution (the so-called "Fraudulent Orders"), and smaller orders on the other side of the market that they intended to execute (the "Primary Orders").[155] The defendants allegedly placed the Fraudulent Orders with the intent to: (1) "communicate false and misleading information regarding supply or demand. . . in order to deceive other traders" and cause them "to buy or to sell futures contracts at prices, quantities, and times that they otherwise would not have"; and (2) "artificially manipulate and move the prevailing price in a manner that would increase the likelihood that one or more of their Primary Orders would be filled."[156] The Fraudulent Orders were also alleged to constitute "material misrepresentations that falsely and fraudulently represented to traders that [the defendants] . . . were intending to trade the Fraudulent Orders when, in fact, they were not because, at the time the Fraudulent Orders were placed, [the defendants] . . . intended to cancel them before execution."[157] The indictment charged both defendants with one count of conspiracy to commit wire fraud affecting a financial institution, in violation of 18 U.S.C. § 1349. It also charged Vorley with eight counts and Chanu with ten counts of substantive wire fraud affecting a financial institution, in violation of 18 U.S.C. § 1343 (most of the substantive wire fraud counts were lodged against *either* Vorley *or* Chanu, except for two, in which both were named).

The defendants moved to dismiss the indictment for failure to state an offense, arguing that the indictment must allege either an affirmative false statement or a material omission in the face of a fiduciary duty to disclose, and that it did neither.[158] The government conceded at oral argument that the indictment did not allege any express, affirmative misrepresentation by either defendant, and the defendants maintained that the so-called Fraudulent Orders—the crux of the

152 *See id*. at 795-96.

153 *Id*. at 799-800 (emphasis in original). Modeling its commodities fraud instructions on the pattern jury instructions for mail and wire fraud, the district court instructed the jury that "the alleged wrongdoing had to be 'capable of influencing the decision of the person to whom it was addressed.'" *Id*. at 798. Coscia maintained that such an instruction was error, and that the jury should have been instructed that the "alleged scheme had to be 'reasonably calculated to deceive persons of ordinary prudence' and that 'there is a substantial likelihood that a reasonably investor [or trader] would consider [the deceptive conduct] important in making a decision.'" *Id*. at 799.

154 *See United States v. Vorley*, 420 F. Supp. 3d 784, 806 (N.D. Ill. 2019).

155 Superseding Indictment ¶¶ 4-9, *United States v. Vorley*, No. 18-Cr-35 (N.D. Ill. Nov. 26, 2019), ECF No. 127 [hereinafter *Vorley* Indictment].

156 *Id*. ¶¶ 5, 6, 10.

157 *Id*. ¶ 11.

158 Memorandum of Law in Support of Defendants' Motion to Dismiss the Indictment at 12-14, 18-19, *United States v. Vorley,* No. 18-Cr-00035 (N.D. Ill. 2018), ECF No. 71-1.

alleged wrongdoing—were not "false" since the indictment acknowledged that they accurately communicated a willingness to execute at the stated terms if the orders were accepted before cancellation.[159] The defendants also noted that the indictment failed to allege a fiduciary (or other duty) to disclose their alleged subjective intent to cancel the Fraudulent Orders (accepted as true for purposes of the motion) before execution, precluding an omissions-based theory of wire fraud.[160]

Judge Tharp rejected both legal arguments. To begin with, he found that the defendants were "simply wrong" to claim that the wire fraud statute—which proscribes "schemes to defraud"—requires an affirmative misrepresentation.[161] In doing so, Judge Tharp relied on Seventh Circuit precedent construing the wire fraud statute, including *United States v. Stephens*, 421 F.3d 503, 507 (7th Cir. 2005), which held that a "half-truth, or what is usually the same thing a misleading omission, is actionable as [wire] fraud," and *United States v. Doherty*, 969 F.2d 425 (7th Cir. 1992), which held that a "course of conduct *not involving any factual misrepresentations* can be prosecuted as a 'scheme to defraud' under the mail and wire fraud statutes" (emphasis added).[162] He also relied on cases construing the mail fraud statute—on which the wire fraud statute was based—including *McNally v. United States*, 483 U.S. 350 (1987), in which the Supreme Court held that the words "to defraud" mean "'wronging one . . . by dishonest methods of schemes,' and 'usually signify the deprivation of something of value by trick, deceit, chicane or overreaching'"—making no mention of false statements.[163] In addition, the court invoked the Seventh Circuit's ruling in *Coscia* (*see* discussion above), reasoning that "[i]f spoofing can be a scheme to defraud under §1348(1) [the securities and commodities fraud statute] . . . it can be a scheme to defraud under the wire fraud statute as well."[164]

Judge Tharp likewise rejected defendants' position that omissions can suffice for liability under the wire fraud statute "only where the alleged fraudster owes a fiduciary duty to disclose the omitted information," quoting *United States v. Weimert*, 819 F.3d 351, 355 (7th Cir. 2016), for the proposition that a "misrepresentation" under the mail and wire fraud statutes "includes not only affirmative misstatements but also 'the omission or concealment of material information, *even absent an affirmative duty to disclose*, if the omission was intended to induce a false belief and action to the advantage of the victim.'"[165]

Finally, Judge Tharp applied the law (as he construed it) to the allegations in the indictment, which were accepted as true for purposes of the motion. He found that the indictment's allegations fit squarely within the legal pronouncements of *Weimert* (above), *to wit*, that the defendants "did not disclose, at the time they placed their Spoofing Orders, their intent to cancel the orders before they could be executed, inducing by the placement of those orders a false belief about the supply or demand for a commodity, so that the market would move in a direction that favored the Primary Orders, to their benefit and to the

159 *Id*. at 13.

160 *Id.*

161 *United States v. Vorley*, 420 F. Supp. 3d 784, 790 (N.D. Ill. 2019).

162 *See also id.* at 796-97 (citing *United States v. Richman*, 944 F.2d 323, 332 n. 10 (7th Cir. 1991)) (rejecting the notion that the wire and mail fraud statutes require affirmative false statements since "the mail fraud statute proscribes fraudulent schemes' rather than specific misrepresentations to the party to be defrauded").

163 *Id.* at 793 (quoting *Mcnally v. United States*, 483 U.S. 350, 358 (1987)).

164 *Id.* at 795.

165 *Id*. at 790 (emphasis added). The court also relied upon *United States v. Keplinger*, 776 F.2d 678, 697-98 (7th Cir. 1985) ("It requires no extended discussion of authority to demonstrate that omissions or concealment of material information can constitute fraud cognizable under the mail fraud statute, without proof of a duty to disclose the information pursuant to a specific statute or regulation."). Other circuits have reached similar conclusions. *See, e.g., Langford v. Rite Aid of Alabama*, Inc., 231 F.3d 1308, 1312 (11th Cir. 2000) (explaining that an independent duty to disclose is not required and that the concealment of critical data, even without a formalized duty to disclose, can constitute mail and wire fraud in some scenarios); *U.S. v. Cochran*, 109 F.3d 660, 665 (10th Cir. 1997) (finding that a fiduciary relationship is not an essential element of wire fraud prosecution and that misleading omissions are actionable as fraud when intended to induce false beliefs).

detriment of traders in that market."[166] According to the court, "[e]ven 'real' and 'at risk' orders that create an illusion of market movement can be fraudulent where they inject inaccurate information into the market."[167] Judge Tharp also held that the failure to disclose a Fraudulent Order amounts to more than a "mere omission" of potentially relevant information—it "is an active misrepresentation of the true supply and demand for the commodities that were the subject of the Spoofing Orders that renders the market price of the commodity less accurate."[168] He analogized a Fraudulent Order to a "half-truth" or an omission of "facts necessary to make the statements made in light of the circumstances under which they were being made not misleading."[169] The court noted that the "central fact question presented by the indictment" and to be decided by a jury was "whether the defendants' Spoofing Orders carried with them any implied misrepresentations."[170]

In pretrial litigation relating to the admissibility of co-conspirator statements, Judge Tharp reiterated that the key factual question in the case was whether "the placement of an order to buy or sell futures contracts carries with it a representation that the party entering the order intends—at the moment the order is placed—for the order to be executed by a counterparty."[171] The government called several witnesses at trial, among them two representatives of algorithmic trading houses who testified to the effect that they traded with the understanding that live orders reflected a genuine intent to execute and gave accurate indications of true supply and demand.[172]

Both defendants were convicted on September 25, 2020, though not on all counts. The jury acquitted the defendants of conspiracy, notwithstanding lengthy testimony from a cooperator who explained that he was part of the alleged conspiracy. Vorley was convicted of only three of the eight substantive wire fraud counts with which he was charged, and Chanu was convicted on seven of the ten wire fraud counts against him.[173] The defendants' post-trial motions for judgement of acquittal and a new trial were denied by Judge Tharp on March 18, 2021.[174]

2. *United States v. Smith*

Arguments very similar to those advanced in *Vorley* were also made by the defendants in *United States v. Smith*, Case No. 19-Cr-00669 (N.D. Ill.), another case pending in the Northern District of Illinois (before District Judge Edmond

166 *Vorley*, 420 F. Supp. 3d. at 790-91.

167 *Id. at* 802.

168 *Id*.

169 *Id*. at 802-03 (quoting *United States v. Biesiadecki*, 933 F.2d 539, 543 (7th Cir. 1991) (discussing trial court's jury instructions on mail and wire fraud charges)).

170 *Id*. at 790. On May 20, 2020, the presiding judge in the *Bases* case rejected nearly identical arguments by the defendants for reasons very similar to those articulated by Judge Tharp. *See United States v. Bases*, 2020 WL 2557342 (N.D. Ill. May 20, 2020).

171 Order, *United States v. Vorley*, No. 18-Cr-00035 (N.D. Il. August 30, 2020), ECF No. 291 ("The government maintains that a market order carries with it an implied representation as to that intent and alleges that the defendants and their coconspirators therefore made fraudulent misrepresentations and omissions when they entered orders they intended to cancel before they could be executed. To carry the day, the government will have to prove not just that the defendants engaged in "deceptive" trading, but that they engaged in trading that was fraudulent in this manner.").

172 *See* Trial Transcript at 1619: 5-9, *United States v. Vorley,* No. 18-Cr-00035 (N.D. Ill. Sept. 18, 2020), ECF No. 340, (Citadel representative: "we take bids and offers in the order books as orders that are intended to trade"); *Id*. at 1796:3-7 (Quantlab Financial representative: "The Quantlab model . . . sees the orders in the book and assumes they're real, legitimate, bona fide orders in the order book."). In addition, a senior director from the CME Groups' Global Command Center testified that the CME's rules have always required that orders be entered for the bona fide purpose of executing a transaction, *id*. at 387:7-19, and the government's cooperating witness, David Liew, testified that, as part of the scheme, he "gave false signals that [he] wanted to execute the orders that [he] sent to the exchange, but in reality [he] had the intention to cancel them . . .", *id*. at 577:23-579:19.

173 *Id*. at 2293:23-2295:13.

174 *See* Defendants' Joint Motion for Judgments of Acquittal Pursuant to Rule 29, *United States v. Vorley,* No. 18-Cr-00035 (N.D. Ill. Nov. 13, 2020), ECF No. 355; Defendants' Supplemental Motion for a New Trial Based on Recently Disclosed Exculpatory Evidence, *United States v. Vorley*, No. 18-Cr-00035 (N.D. Ill. Dec. 7, 2020), ECF No. 361; Memorandum Opinion and Order, *United States v. Vorley,* No. 18-Cr-00035 (N.D. Ill. March 18, 2021), ECF No. 371.

Chang). In *Smith*, the defendants and their co-conspirators—former employees at JPMorgan—are alleged to have engaged in "thousands of trading sequences" in which they placed "one or more orders for precious metals futures contracts that they intended to execute ('Genuine Orders')" and, at or around the same time, "placed one or more orders that they intended to cancel before execution ('Deceptive Orders'). . . ."[175] Once the Deceptive Orders worked to fill the Genuine Orders, the defendants allegedly "attempted to, and generally did, quickly cancel their Deceptive Orders before they could be executed."[176] According to the indictment, when placing the Deceptive Orders, the defendants "intended to inject false and misleading information about genuine supply and demand for precious metals futures contracts into the markets, and to deceive other participants in those markets into believing something untrue, namely that the visible order book accurately reflected market-based forces of supply and demand."[177] The defendants also allegedly acted with the "intent to fraudulently and artificially move the price of a given precious metals futures contract in a manner that would increase the likelihood that one or more of their own opposite-side Genuine Orders would be filled by other market participants, allowing the Defendants . . . to generate trading profits and avoid losses for themselves and" JPMorgan.[178]

Notwithstanding the October 21, 2019 holding in *Vorley*, *Smith* defendants moved in late February 2020 to dismiss bank, wire and commodities fraud allegations predicated on alleged spoofing, arguing that "open-market orders that carry a genuine risk of execution cannot, by themselves, constitute a scheme or artifice to defraud," regardless of any subjective intent to cancel.[179] The defendants attempt to distinguish the Seventh Circuit's holding in *Coscia* by focusing on the fact that their orders were manually placed and, as a result, were subject to a "real" risk execution.[180] In this vein, the defendants highlight the government's concession that the defendants, at times, "had to accept" unwanted executions.[181] In contrast, Coscia's trading was carried out by an algorithm that "all but ensured that the orders would not be executed."[182] As for the *Vorley* decision, the *Smith* defendants maintain that Judge Tharp erred as a matter of law in finding that spoofing can constitute a "scheme to defraud" under the wire and bank fraud statutes,[183] and seek to distinguish *Vorley* because the indictment in that case expressly alleged that the spoof orders were fraudulent because they "contained some form of misrepresentation," a claim missing from the *Smith* indictment.[184]

The four defendants in *Smith* have pled not guilty. Their motion to dismiss was pending at the time that this Guide was published, and trial is currently scheduled for October 2021.

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175 Superseding Indictment ¶¶ 26a-b, *United States v. Smith,* No. 19-Cr-00669 (N.D. Ill. Nov. 14, 2019), ECF No. 52 [hereinafter *Smith* Indictment].

176 *Id.* ¶ 26k.

177 *Id.* ¶ 26f.

178 *Id.* ¶ 26j.

179 *See* Defendants' Memorandum of Law in Support of Joint Motion to Dismiss the Indictment and to Strike Surplusage at 11-12, *United States v. Smith*, No. 19-cr-00669 (N.D. Ill. Feb. 28, 2020), ECF No. 114 [hereinafter *Smith* MTD].

180 *Id.*

181 *Id.*

182 *Id.* at 13-14. In the *United States v. Bases*, District Judge John Lee addressed and rejected this same argument as inappropriate at the motion to dismiss stage. First, the court noted that a (small) portion of Coscia's large, non-bona fide orders were, in fact, filled by other market participants. Moreover, the court found that the probability of non-bona fide orders being filled, and whether the defendants were aware of that probability, "are all factors in determining whether Defendants possessed an intent to defraud other market participants when the [alleged spoof orders] were placed. . . . [I]t will be up to the jury to decide whether the government has proven beyond a reasonable doubt that Defendants acted with the requisite intent to defraud when posting their orders." *United States v. Bases*, 2020 WL 2557342, at *6 (N.D. Ill. May 20, 2020). *See also Morissette v. United States*, 342 U.S. 246, 274 (1952) ("Where intent of the accused is an ingredient of the crime charged, its existence is a question of fact which must be submitted to the jury.")

183 *Smith* MTD, *supra* n. 179 at 16 n.10.

184 *Id.* at 16-17.

C. Spoofing as Bank Fraud

Three of the four defendants in the *Smith* case (Smith, Nowak and Jordan) are the first individuals to be charged with bank fraud based on alleged spoofing conduct. According to the indictment, these three defendants, while employed as futures traders at JPMorgan, allegedly schemed to defraud "one or more financial institutions, including [JPMorgan] and other financial institutions who were participants in the precious metals futures markets."[185] By incorporating other allegations by reference, the superseding indictment alleges that the traders carried out the bank fraud scheme by "placing orders to buy and sell precious metals futures contracts" on the COMEX and NYMEX "with the intent to cancel those orders before execution, including in an attempt to artificially affect prices and to profit by deceiving other market participants."[186] In other words, the defendants are accused of bank fraud because spoofing "inject[ed] false and misleading information about genuine supply and demand . . . into the markets," and that "information was intended to, and at times did, trick other market participants, including competitor financial institutions . . . into reacting to the apparent change and imbalance in supply and demand by buying and selling . . . futures contracts at quantities, prices, and times that they otherwise likely would not have traded."[187]

In addition to maintaining that spoofing, standing alone, cannot amount to a "scheme to defraud," *see* Section VI.F., above, the *Smith* defendants have also moved to dismiss the bank fraud allegations on the ground that they fail to allege specific intent to defraud a financial institution.[188] In *Loughrin v. United States*, the Supreme Court held that to prove bank fraud the government must establish "that a defendant intended to defraud a financial institution; indeed, that is § 1344(1)'s whole sum and substance."[189] Relying on *Loughrin*, the Seventh Circuit has held that "specific intent to defraud a financial institution . . . is required under § 1344(1)."[190] In *Smith*, the defendants characterize the government's theory of bank fraud—at least with respect to the "other market participants who were participants in the precious metals futures markets"—as spoofing "intended to defraud the particular financial institutions who turned out to be trading counterparties of [J.P. Morgan] on a futures exchange."[191] They then argue that the superseding indictment fails to allege the requisite specific intent because "trading on the CME Group exchanges . . . is anonymous"—a fact as to which the court should take judicial notice.[192] Thus, the defendants assert that they "did not and could not know the identity of the party on the other side of any of their trades, which in turn makes it impossible for the government to allege or establish that they specifically intended to defraud a financial institution."[193]

While the district court has not yet ruled on the motion to dismiss in *Smith,* at the time of publication, relevant case law from other circuits appears to support the defendants' argument.[194]

D. Spoofing as a RICO Violation

The *Smith* case marks the first time that the government has charged spoofing as a violation of the RICO statute, which was initially enacted to prosecute organized crime syndicates (though

185 *Smith* Indictment, *supra* n. 175, ¶¶ 59, 61, 63.
186 *Id.* ¶¶ 2, 11-12, 26 (incorporated by reference in ¶¶ 58, 60 and 62, the specific bank fraud allegations).
187 *Id.* ¶¶ 26b, f and g.
188 *Smith* MTD, *supra* n. 179, at 17-18.
189 573 U.S. 351, 356-57 (2014) (quotations omitted).
190 *United States v. O'Brien*, 953 F.3d 449, 458 (7th Cir. 2020); *see also United States v. O'Brien*, 2018 WL 4205472, at *11 (N.D. Ill. Sept. 4, 2018).
191 *Smith* MTD, *supra* n. 179, at 20.
192 *Id.* at 20-23 & n.15.
193 *Id.* at 21.
194 *See, e.g., United States v. Bouchard*, 828 F.3d 116, 124 (2d Cir. 2016) (citing *Laughrin* and reversing bank fraud charges since there was "no evidence" that defendant "specifically intended to defraud Lehman Brothers *or was even aware of Lehman Brothers' role in the transactions* . . . .") (emphasis added).

enforcement activity since has not been limited to traditional organized crime).[195] Specifically, the *Smith* indictment charges a conspiracy to violate 18 U.S.C. § 1962(c), which makes it unlawful for any person "employed by or associated with any enterprise" engaged in or affecting interstate or foreign commerce "to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt."

An "enterprise" includes "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity,"[196] a relatively expansive definition.[197] A "pattern of racketeering activity" requires a showing of at least two predicate acts of racketeering activity committed within ten years of each other.[198] The government must also prove that the racketeering predicates are related to one another and pose the potential for continued wrongful conduct.[199] In general, predicate acts are considered related if they "have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events."[200]

The *Smith* indictment identifies the precious metals trading desk at JPMorgan (the "PM Trading Desk") as the pertinent enterprise, and alleges that that desk was comprised of a group of individuals, including the defendants, that were "associated in fact" by their positions and activities on that desk.[201] The indictment alleges further that the defendants agreed to conduct the affairs of the PM Trading Desk through a series of trading sequences that constituted spoofing and other manipulative trading designed to trigger (or avoid triggering) barrier options, in violation of the wire and bank fraud statutes,[202] both of which are statutorily defined as predicate acts under RICO.[203]

In February 2020, the *Smith* defendants moved to dismiss the RICO allegations, arguing, first, that neither spoofing nor the alleged manipulation related to barrier options (so called "barrier-running") can constitute wire or bank fraud as a matter of law and, as such, the Indictment fails to allege any predicate criminal acts.[204] This argument, as it relates to spoofing, was previously rejected in *Vorley* and *Bases*, and thus appears to face serious headwinds. *See* Sections IX.B. and IX.G.[205] Defendants argue, in the alternative, that if the district court finds that one type of allegedly fraudulent scheme, but not the other, is actionable as bank or wire fraud, the RICO claim remains deficient because the allegations fail to "meet the standard for continuity required for a 'pattern' of racketeering activity" under the factors set forth in *Morgan v. Bank of Waukegan*, 804 F.2d 970, 975 (7th Cir. 1986).[206] With respect to the alleged

195 *See, e.g., United States v. Alkins*, 925 F.2d 541, 551-553 (2d Cir. 1991) (employees of the New York State Department of Motor Vehicles violated RICO statute by using the DMV to process fraudulent licenses and registrations for stolen vehicles in exchange for money); *United States v. Dempsey*, 768 F. Supp. 1256, 1260 (N.D. Ill. 1990) (alleged RICO conspiracy involving fraud by traders and brokers of soybean futures contracts traded on the CBOT), *aff'd in part and rev'd in part sub. nom., United States v. Ashman*, 979 F.2d 469 (7th Cir. 1992).

196 18 U.S.C. § 1961(4).

197 *See United States v. Delano*, 825 F. Supp. 534, 538-39 (W.D.N.Y. 1993), *aff'd in part, rev'd in part*, 55 F. 3d 720 (2d Cir. 1995), and cases cited therein.

198 18 U.S.C. § 1961(5).

199 *See H.J., Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 239 (1989).

200 *Id.* at 240 (citations and quotations omitted).

201 *Smith* Indictment, *supra* n. 175, ¶¶ 17-21.

202 *Id.* ¶¶ 15-16, 25-34.

203 *See* 18 U.S.C. § 1961(l).

204 *Smith* MTD, *supra* n. 179, at 17-18.

205 With respect to barrier options, the indictment alleges that the defendants defrauded JPMorgan clients "by trading in a manner that was calculated to push the price of the underlying assets away from the price point at which [JPMorgan] would lose money on the options toward the price point at which [it] would profit from the option." *Smith* Indictment, *supra* n. 175, ¶ 27. Defendants' argue, however, that the Indictment fails to plead actionable wire (or other) fraud "because it *does not* allege that Defendants misrepresented or omitted any material fact in connection with their purported trading activity relating to barrier options, nor that they made any misrepresentation or omission" to JPMorgan clients. *Smith* MTD, *supra* n. 179, at 34-36. More specifically, the Defendants observe that allegations that traders traded in a manner calculated to "push" prices—even if true—do "not amount to an allegation that they made any misrepresentation (express or implied) or material omission." *Id*. at 35.

206 *Id.* at 38-40.

spoofing scheme, for example, Defendants claim that the requisite RICO continuity does not exist because the allegations describe a single scheme, comprised of repeated, homogenous acts that carry a single type of "vague" harm, and fail to identify a large number of victims.[207] The DOJ, of course, has opposed these arguments. The district court has not yet decided the motion to dismiss.

E. Statutes of Limitation and Charging Decisions

Constraints imposed by statutes of limitations have, at times, influenced the government's charging decisions in relation to spoofing conduct. For example, the defendants in *Vorley* were originally indicted on January 19, 2018 for spoofing that allegedly took place from December 2009 to November 2011. Given the passage of time (over six years) between the conduct and the charges, the government did not proceed under the anti-spoofing and/or anti-manipulation provisions of the CEA, which are subject to a five-year limitations period, or the commodities fraud statute in Title 18, which has a six-year statute of limitations. *See* Sections VI.A. and VI.F., above. Instead, the government alleged that the defendants' spoofing amounted to wire fraud that affected a financial institution, which carries a ten-year statute of limitations. *See* Section VI.F., above.[208] The government invoked this longer period by alleging that the defendants' fraud affected their former employer, Deutsche Bank, by exposing the bank to reputational and other risks.[209]

Statute-of-limitations constraints also played a role in the charging decisions in *Smith*, where former JPMorgan precious metals traders are accused of spoofing conduct dating back to May 2008. According to the indictment, which was originally filed on August 22, 2019, one of the traders, Christopher Jordan, left JPMorgan in December 2009, and his last allegedly wrongful trading sequence took place on November 10, 2009—9 years and 9 months before he was charged.[210] With respect to substantive violations, Jordan was not charged with spoofing, but with wire fraud affecting a financial institution, in violation of 18 U.S.C. § 1343, and bank fraud, in violation of 18 U.S.C. § 1344, both of which carry a ten-year limitations period. The alleged victims include the defendants' own employer, JPMorgan, on the theory that the defendants falsely certified to the bank that they had complied with all laws, regulations and policies, as well as other financial institutions who participated in the precious metals futures market.[211]

The CFTC is more limited in its ability to charge dated conduct, since the applicable statute of limitations for civil enforcement is five years, *see* Section VI.A., above, and the CFTC cannot avail itself of the ten-year limitations period for conduct affecting a financial institution, as Title 18 criminal offenses (and limitations periods) are the exclusive province of the DOJ. Accordingly, while the CFTC often brings parallel civil enforcement actions alongside the DOJ's criminal charges, it did not do so with respect to Jordan.

F. Constitutional Challenges

1. Vagueness and the CEA's Anti-Spoofing Provision

In *Coscia*, the Seventh Circuit rejected the defendant's claim that the CEA's anti-spoofing provision is unconstitutionally vague.[212]

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207 *Id.* at 39-44.

208 Specifically, the defendants were charged with conspiring together and with others to commit wire fraud affecting a financial institution, in violation of 18 U.S.C. § 1349, and substantive wire fraud affecting a financial institution, in violation of 18 U.S.C. § 1343. The grand jury returned a superseding indictment in November 2019, expanding the time period of the alleged scheme back to March 2008 and forward to July 2013. *See Vorley* Indictment, *supra* n. 155, ¶ 21.

209 At trial, the parties stipulated that Deutsche Bank "was a 'financial institution' as defined by Title 18 of the United States Code" and "that if the scheme or conspiracy alleged in the superseding indictment were proven beyond a reasonable doubt, then it would have affected Deutsche Bank, including for purposes of 18 U.S.C. 1343, 1349 and 3293(2)." Trial. Transcript at 491-92, *United States v. Vorley*, No. 18-Cr-00035 (N.D. Ill. Sept. 15, 2020).

210 *Smith* Indictment, *supra* n. 175, ¶ 32h.

211 *Id.* ¶¶ 43-46.

212 *See United States v. Coscia*, 866 F.3d 782, 790-95 (7th Cir. 2017); *see also* Gary DeWaal, *Coscia files motion to dismiss criminal spoofing indictment*, LEXOLOGY (Dec. 21, 2014), http://www.lexology.com/library/detail.aspx?g=6a310a42-c501-4e4e-8c76-242e10589c6c (arguing that the statutory definition of spoofing is problematic because it encompasses both legitimate and illegitimate trading activity).

"To satisfy due process, a penal statute must define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement."[213] The *Coscia* appeals court found that the CEA's definition of spoofing—*i.e.*, "bidding or offering with the intent to cancel the bid or offer before execution", 7 U.S.C. § 6c(a)(5)— provides sufficient notice of the proscribed conduct, even though the CFTC has not itself issued a regulatory definition of spoofing and even if there may be no accepted industry definition.[214] Coscia also lost on his related claim that the statutory definition of spoofing wrongly "encourages arbitrary enforcement." The court held that the statute sufficiently constrains prosecutorial discretion because the intent requirement—*i.e.*, that an individual place orders with 'the intent to cancel the bid or offer before execution'"—"imposes clear restrictions on whom a prosecutor can charge with spoofing; prosecutors can charge only a person whom they believe a jury will find possessed the requisite specific intent to cancel orders at the time they were placed."[215]

2. Vagueness and Spoofing Charged as Wire Fraud

Similarly, the district court in *Vorley* rejected a claim that the wire fraud statute was unconstitutionally vague when applied to spoofing schemes. The court found that the statute provided fair notice that implied misrepresentations (of all types) can be actionable as wire fraud given its holding that "the wire fraud statute has long encompassed implied misrepresentations, and that its application [to the defendants' alleged spoofing conduct] does not present a radical expansion in the statute's reach . . . ."[216] The court further rejected the notion that the indictment represented a "novel" use of the wire fraud statute, noting that the alleged spoofing scheme was "akin to the 'pump and dump' schemes that have frequently been prosecuted under the mail and wire fraud statutes."[217]

Like the Seventh Circuit in *Coscia*, the district court in *Vorley* also disagreed that permitting the prosecution of spoofing as wire fraud would open the door to "arbitrary enforcement" since it would, according to the defendants, sanction the prosecution of legitimate trading practices such as "fill-or-kill or iceberg orders that, like spoofing orders, obscure the effect of the order on supply and demand."[218] The court distinguished these trading practices, noting that fill-or-kill and iceberg orders do "do not involve the placement of orders that the traders do not intend to fill," whereas spoof orders "impliedly misrepresent[] the defendants' intention, at the time they were placed, to fill the orders."[219] In addition, the court reasoned that the (express or implied) misrepresentation requirement under the wire fraud statute, as well as its "intent to defraud" requirement, "effectively mitigate any risk that applying the mail fraud statute to spoofing will invite

213 *Skilling v. United States,* 561 U.S. 358, 402-03 (2010).
214 *Coscia*, 866 F.3d at 792-93.
215 *Id.* at 794-95.
216 *United States v. Vorley*, 420 F. Supp. 3d 784, 806 (N.D. Ill. 2019).
217 *Id.* at 807 (citing Pickholz et al., *Recent trends in Securities-Related Mail and Wire Fraud Prosecutions—Market Manipulation*, 21 Sec. Crimes § 6:36 (Nov. 2018 Update) ("Mail fraud charges are routinely included in prosecutions charging market manipulation, especially so-called 'pump and dump' schemes").
218 *Id.* "A Fill-Or-Kill order is an order to buy or sell a stock that must be executed immediately in its entirety; otherwise, the entire order will be cancelled (i.e., no partial execution of the order is allowed)." *See* S.E.C., Investor.gov, Fill-or-Kill Order. https://www.sec.gov/fast-answers/answersfokordhtm.html. The NASDAQ defines an "iceberg order" as an order where a [trader] "determines the number of shares to be displayed, while the remaining shares are hidden in reserve. When the visible portion is fully executed, a new visible displayed size is refreshed, drawing from the amount of the reserve. New displayed sizes will refresh until the amount of the reserve is less than the displayed amount. At that point, the remaining reserve quantity will be displayed." NASDAQ CXC Ltd., Trading Functionality Guide, § 6.2.4, https://www.osc.gov.on.ca/documents/en/Marketplaces/Marketplaces_ats_20171012_trading-functionality-guide.pdf.
219 *Vorley*, 420 F. Supp. 3d at 808; *see also Coscia*, 866 F.3d at 795.

arbitrary enforcement [against] traders engaged in routine trading practices."[220]

The defendants in *Smith* have also attacked the bank, wire and commodities fraud charges against them as unconstitutionally vague. Among other things, they argue that, during the period in question, there was no "legal guidance" that put them on notice that "placing open market orders with the intent to cancel them—standing alone—carried any implied representation about a trader's desire to transact, the theory of the Indictment."[221] As noted, the motion to dismiss in *Smith* is still pending.

3. Commercial Speech

In *United States v. Bases, et al.* (N.D. Ill.)—a spoofing case pending in the Northern District of Illinois before District Judge John Lee—defendant Pacilio challenged the CEA's anti-spoofing provision as, among other things, an unconstitutional restriction on commercial speech[222]—*i.e.*, "speech that proposes a commercial transaction," which is protected (to a certain extent) by the First Amendment.[223] Judge Lee rejected this challenge, however, finding that the commercial speech identified in the indictment is allegedly false and misleading, and thus not entitled to protection.[224]

In *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, the Supreme Court held that false and misleading commercial speech is not entitled to any First Amendment protection, and that the government "may ban forms of communication more likely to deceive the public than to inform it or commercial speech related to illegal activity." Only commercial speech that is "neither misleading nor related to unlawful activity" is afforded protection.[225]

Pacilio argued that the anti-spoofing statute improperly regulates truthful speech, because all open-market orders accurately reflect to market participants the terms on which they can be filled.[226] The court disagreed, finding that the spoof orders alleged in the indictment "do not constitute truthful speech, but fraudulent speech. This is so because (it is alleged) Defendants intended not to fill them *at the time that the orders were placed*."[227] In so holding, the court relied upon the Seventh Circuit's holding in *Coscia* to distinguish spoof orders—which "'are never intended to be filled at all'"—from "other lawful orders, such as 'fill-or-kill' and 'stop-loss' orders, that 'are designed to be executed upon the arrival of *certain subsequent events*.'"[228]

G. Duplicity and the CEA's Anti-Spoofing Provision

The second superseding indictment in the *Bases* case charged both Bases and Pacilio in a single count with conspiracy to commit wire fraud affecting a financial institution, and each separately with several substantive counts of wire fraud. The sole count brought under the CEA's specific anti-spoofing provision—Count 20—was lodged against Pacilio only (apparently due to statute of limitations issues related to Bases' conduct), and Pacilio moved to dismiss that count as duplicitous. Judge Lee agreed, but granted leave to the government to seek an amended indictment that corrects the infirmity.

Parroting, in part, the language of CEA § 4c(a)(5)(C), 7 U.S.C. § 6c(a)(5)(C), Count 20 alleged that, from

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220 *Vorley*, 420 F. Supp. 3d at 808 (citing *McFadden v. United States*, 135 S.Ct. 2298, 2307 (2015), and *Vill. Of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982)); *see also United States v. Bases*, 2020 WL 2557342, at *11-13 (N.D. Ill. May 20, 2020) (denying challenge to the commodities and wire fraud statutes as unconstitutionally vague where underlying conduct is alleged spoofing).

221 *Smith* MTD, *supra* n. 179, at 27.

222 *See* Memorandum of Law in Support of Defendant John Pacilio's Motion to Dismiss the Indictment at 18-23, *United States v. Bases*, No. 18-Cr-00048 (N.D. Ill. Nov. 16, 2018), ECF No. 118 [hereinafter *Pacilio* MTD].

223 *See Jordan v. Jewel Food Stores, Inc.*, 743 F.3d 509, 515–16 (7th Cir. 2014); *see also Bd. of Trs. of State Univ. of New York v. Fox*, 492 U.S. 469, 477 (1989) ("[C]ommercial speech enjoys a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, and is subject to modes of regulation that might be impermissible in the realm of noncommercial expression.") (internal quotation marks omitted).

224 *See United States v. Bases*, 2020 WL 2557342, at *14 (N.D. Ill. May 20, 2020).

225 447 U.S. 557, 563-64 (1980).

226 *See Pacilio* MTD, *supra* n. 222, 18-23.

227 *See Bases*, 2020 WL 2557342, at *14 (emphasis in original).

228 *See Id.* at *13 (emphasis in original).

July 16, 2011 to at least November 2014, Pacilio "knowingly engaged in trading, practice, and conduct on and subject to the rules of a registered entity . . . that was 'spoofing', that is, bidding and offering with the intent, at the time the bid and offer was placed, to cancel the bid and offer before execution . . . ." Count 20 also alleged that such conduct *included*, but was *not* limited to, a specific order placed by Pacilio on April 17, 2014 to sell 100 silver futures contracts, and, through incorporation by reference, other instances of Pacilio's spoofing alleged elsewhere in the indictment.[229]

"An indictment is deemed duplicitous when it charges two or more distinct offenses within a single count."[230] "The overall vice of duplicity is that the jury cannot in a general verdict render its finding on each offense, making it difficult to determine whether a conviction rests on only one of the offenses or both."[231]

In opposition to Pacilio's motion, the government argued that Count 20 properly charged a "scheme offense" since the anti-spoofing provision prohibits "trading, *practice*, and conduct," and, as such, the government was allowed to charge multiple instances of criminal behavior in a single count.[232] Judge Lee rejected this argument because, unlike the wire fraud and commodities fraud statutes, the anti-spoofing provision "does not include the word 'scheme.'"[233] Judge Lee also rejected the government's contention that the jury could, in fact, reach a proper unanimous verdict because Count 20 specifically referenced a single, identifiable sell order related to silver futures. In so doing, he highlighted that Count 20 essentially described the silver order as only one example, and it incorporated other trading events by reference, "leav[ing] the jury to guess as to what other transactions are included in the count."[234] In short, the court found that "[a]s Count Twenty currently stands, a jury could find Pacilio guilty of spoofing under § 6c(a)(5)(C) so long as each member of the jury finds that Pacilio committed spoofing at some point during the relevant time period, even if there is no unanimity that he did so on any particular occasion. Under this scenario, Pacilio could be convicted by a less-than-unanimous jury."[235]

While Judge Lee dismissed Count 20, he did so without prejudice and afforded the government an opportunity "to seek a clearer superseding indictment."[236] A grand jury returned a third superseding indictment on November 12, 2020. Count 20 is now limited to the single sell order related to silver futures that Pacilio is alleged to have placed on April 17, 2014.[237]

H. Preemption Issues

In *Vorley*, Judge Tharp readily rejected the argument—advanced by the Futures Industry Association acting as *amicus*—that congressional regulation of the commodities markets implicitly precludes application of the wire fraud statute. In doing so, the court invoked *United States v. Dial*, 757 F.2d 163, 167 (7th Cir. 1985), in which the Seventh Circuit observed that it "was wise" for the defendants in that case not to have argued that

229 Third Superseding Indictment ¶¶ 29-30, *United States v. Bases*, No.18-Cr-00048 (incorporating Paragraphs 16-20, among others) (N.D. Ill. Nov. 12, 2020), ECF No. 372 [hereinafter *Bases* Third Superseding Indictment].

230 *United States v. Shorter*, 874 F.3d 969, 976 (7th Cir. 2017) (internal quotation marks omitted); *accord United States v. Berardi*, 675 F.2d 894, 897 (7th Cir. 1982).

231 *United States v. Buchmeier*, 255 F.3d 415, 425 (7th Cir. 2001) (quotation marks and citation omitted).

232 Government's Opposition to Defendant John Pacilio's Motion to Dismiss Count Twenty of the Second Superseding Indictment at 2, *United States v. Bases*, No.18-Cr-00048 (N.D. Ill. Mar. 27, 2020), ECF No. 269. The "scheme to defraud" statutes criminalize each "execut[ion]" of a scheme. Thus, "for each count of conviction, there must be an execution," but "the law does not require the converse: each execution need not give rise to a charge in the indictment." *United States v. Hammen*, 977 F.2d 379, 383 (7th Cir. 1992).

233 Order at 6, *United States v. Bases,* No. 18-Cr-00048 (N.D. Ill. Oct. 16, 2020), ECF No. 366. *Compare* 7 U.S.C. § 6c(a)(5)(C) ("It shall be unlawful for any person to engage in any trading, practice, or conduct . . . ."), *with* 18 U.S.C. § 1343 (criminalizing any "scheme or artifice" to commit wire fraud), *and* 18 U.S.C. § 1348 (criminalizing any "scheme or artifice" to commit commodities fraud").

234 Order at 5, *United States v. Bases,* No. 18-Cr-00048 (N.D. Ill. Oct. 16, 2020), ECF No. 366.

235 *Id.* at 8.

236 *Id.*

237 *Bases* Third Superseding Indictment, *supra* n. 229, ¶ 30. The defendants in *Smith* also moved to dismiss the substantive counts alleging attempted price manipulation, bank fraud, wire fraud, and spoofing as duplicitous. *See Smith* MTD, *supra* n. 179, at 52-60. That motion is still pending.

the Commodity Futures Trading Act had superseded the wire and mail fraud statutes, and *United States v. Brien*, 617 F.2d 299, 309-11 (1st Cir. 1980), in which the First Circuit affirmed wire and mail fraud convictions, holding, among other things, that the CEA did not occupy the entire field of commodities futures regulation, since "there was no evidence to overcome the strong presumption against implied repeal of statutes."[238]

I. Does Section 4c(a)(5)(C) Prohibit Conduct Other Than Spoofing?

Section 4c(a)(5)(C) of the CEA prohibits spoofing as well as activity that is "of the character" of spoofing. The statute defines "spoofing" but not the latter. Moreover, the CFTC has said that the four types of behavior listed in the 2013 Guidance are not exclusive. *See* Section VI.A., above.[239] Although a number of spoofing cases have been filed and several legal issues have been litigated, no court has made any legal pronouncement regarding the statute's outer boundaries, which remain unclear. Conduct that is "of the character" of spoofing is imprecise and vague, and certainly open to interpretation.

J. Spoofing Under the CEA's Amended Anti-Manipulation Provision

Since Dodd-Frank, the CFTC has charged violations of CEA § 6(c)(3)—the CEA's newer anti-manipulation provision—in four spoofing cases, and the DOJ has done so in three such cases,[240] though all of these cases were settled without significant litigation or any meaningful interpretation of that provision. As discussed above, *see* Section VI.A., the new anti-manipulation provision—like the original—requires government enforcers to prove that the individual in question had the ability to influence market prices, and had the specific intent to, and did, cause artificial prices. While neither statute is necessarily easy to satisfy, it may be more difficult to establish the elements of manipulation than proving that an order was placed with the intent to cancel it before execution.

While the CFTC has infrequently invoked the newer anti-manipulation provision, it has charged violations of CEA § 6(c)(1), 7 U.S.C. § 9(1), the new anti-deception/manipulation provision, in 23 spoofing cases since Dodd-Frank was enacted (19 of which were settled short of trial). The CFTC may take the position that, because a CEA § 6(c)(1) (and Rule 180.1) violation can be established by recklessness, the agency faces a relaxed intent standard under these provisions as compared with the specific anti-spoofing prohibition or the anti-manipulation provision of CEA § 6(c)(3). However, as noted above, *see* Section VI.B., CEA § 6(c)(1) and Rule 180.1 were modeled on Exchange Act § 10(b) and Rule 10b-5, and courts interpreting those provisions generally define market manipulation as "practices . . . that are intended to mislead investors by artificially affecting market activity."[241] Accordingly, those targeted by a CFTC or DOJ spoofing probe may argue that the agency, even under CEA § 6(c)(1), must show "artificial[] . . . market activity." And, as noted below, an accused spoofer will often have a potentially plausible explanation for his cancelled orders that has nothing to do with artificial activity. Thus, proving "manipulation" may not be much different from proving specific intent to create artificial conditions.

Beyond that, even to show "recklessness," the government, as a practical matter, may need to prove that an order was not bona fide at the time it was placed. The CFTC's definition of recklessness draws on the case law defining recklessness in the securities context of Exchange Act § 10(b) and Rule 10b-5.[242] The type of recklessness required for a § 10(b) and Rule 10b-5 violation is not far from full-blown intent. "The kind of recklessness required [under § 10(b)] . . . is not

238 *United States v. Vorley*, 420 F. Supp. 3d 784, 798, n.18 (N.D. Ill. 2019).

239 *See* CFTC, *Antidisruptive Practices Authority*, 78 Fed. Reg. at 31896 (May 28, 2013).

240 *In re Merrill Lynch Commodities Inc.*, CFTC No. 19-07 (2019); *In re Deutsche Bank AG,* CFTC No. 18-06 (2018); *In re Liew*, CFTC No. 17-14 (2017); *C.F.T.C. v. Nav Sarao Futures Ltd. PLC*, No. 15-Cv-03398 (N.D. Ill. 2015). DOJ: *United States v. Flaum*, 19-Cr-0038 (E.D.N.Y. 2019); *United States v. Edmonds*, 18-Cr-239 (D. Conn 2018); *United States v. Sarao*, 15-Cr-00075 (N.D. Ill. 2015).

241 *Santa Fe Indus. v. Green*, 430 U.S. 462, 476 (1977).

242 *See* Rules 180.1 and 180.2 Adopting Release, 76 Fed. Reg. at 41404 & n.87; *see also C.F.T.C. v. Equity Fin. Grp. LLC*, 572 F.3d 150, 160 n.17 (3d Cir. 2009).

merely a heightened form of ordinary negligence; it is an 'extreme departure from the standards of ordinary care, . . . which presents a danger of misleading buyers or sellers that is either known to the defendant or so obvious that the actor must have been aware of it.'"[243] By definition, the "danger of misleading buyers" can exist only where an order was not bona fide when placed—if it were bona fide, no one can have been misled by it. Similarly, showing that the actor must have been "aware of what he or she was doing" implies that the actor was "doing" something wrong—which is impossible if the order was placed with bona fide intent to have it filled.

K. Trading Venue

By their terms, the CEA's anti-spoofing, anti-deception, and anti-manipulation provisions—whether invoked by enforcement authorities or private litigants—apply only to the trading of futures contracts "on or subject to the rules of any registered entity."[244] On March 30, 2020, District Judge Kimba Wood adopted a magistrate's report and recommendation to grant summary judgement in favor of the defendants in the *Tower Research* case because plaintiffs failed to produce evidence that the futures at issue were subject to such rules, and thus failed to establish that the CEA applied.[245]

At issue in *Tower Research* were futures contracts for the Korea Composite Stock Price Index known as KOSPI 200 Futures, which are traded on the Korea Exchange in Seoul, South Korea, during that exchange's regular business hours. From 5:00 p.m. to 6:00 a.m. Seoul time, KOSPI 200 Futures can also be traded using CME Globex, an electronic trading platform based in the United States that matches bids and offers for a number of exchanges. While Globex matches after-hours orders out of Seoul, the trades themselves are settled on the Korea Exchange the next day.[246] Plaintiffs alleged that Tower Research manipulated the price of KOSPI 200 Futures (by spoofing) in violation of CEA §§ 6(c)(1) and (3), 7 U.S.C. §§ 9(1) and (3), both of which require that the manipulative or deceptive conduct be aimed at a commodity "for future delivery on or subject to the rules of any registered entity." Plaintiffs conceded that the subject trades did not take place "on" any registered entity within the meaning of the CEA— *i.e.,* they did not take place on the CME, CBOT, NYMEX or COMEX,[247] all of which are exchanges owned by the CME Group Inc. holding company.[248] The only question, then, was whether the KOSPI 200 futures contracts were traded "subject to the rules of any registered entity"—that is, subject to the rules of the CME.

Judge Wood agreed with the magistrate's conclusion that the futures in question were not subject to the rules of the CME. She rejected the idea that the matching of bids and offers through Globex meant that the trading of KOSPI 200 Futures were subject to the CME Rulebook, since those rules expressly apply to futures traded on CME exchanges, and do not mention KOSPI 200 futures.[249] She likewise found that nothing in the Globex Reference Guide supported plaintiffs' claim that trading facilitated by Globex is subject to the rules of the CME.[250] After rejecting various secondary arguments advanced by plaintiffs—including the policy argument that a finding that trading KOSPI 200 futures using Globex was beyond the reach of the CEA would compromise a regulatory regime designed to protect

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243 *S.E.C. v. Steadman*, 967 F.2d 636, 641-42 (D.C. Cir. 1992); *see also* Rules 180.1 and 180.2 Adopting Release, 76 Fed. Reg. at 41404 ("Consistent with longstanding precedent under the commodities and securities laws, the [CFTC] defines recklessness as an act or omission that 'departs so far from the standards of ordinary care that it is very difficult to believe the actor was not aware of what he or she was doing.'" (citing *Drexel Burnham Lambert Inc. v. C.F.T.C.*, 850 F.2d 742, 748 (D.C. Cir. 1988))).

244 *See* 7 U.S.C. §§ 6c(a)(5)(C), 9(1) and 9(3).

245 *Choi v. Tower Research Capital LLC*, 2020 WL 1503446 (S.D.N.Y., March 30, 2020).

246 *Id.* at *1-2.

247 As noted, registered entity is defined, among other things, as "a board of trade designated as a contract market" by the CFTC. 7 U.S.C. §§ 1a(40), 7.

248 *Choi*, 2020 WL 1503446, at *2.

249 *Id.* at *3-4.

250 *Id.* at *4-5.

investors—Judge Wood granted defendants' motion for summary judgement with respect to plaintiffs' CEA claims.[251]

L. Key Factual Issues

As discussed, for a trader's behavior to qualify as spoofing, she must place her bids or offers with the contemporaneous intent of cancelling them before they are filled.[252] But there are plenty of legitimate reasons to cancel orders soon after placing them. In fact, in certain markets, more than 95% of all orders go unfilled.[253] In such a world, it can be very difficult to distinguish improper spoofing behavior from legitimate, good faith trading.

1. Trading Intent Can Be Complicated

In many markets, traders are likely to offer a series of legitimate reasons for quickly cancelling orders, including rapid changes in market conditions. Manual traders may argue that at the time they placed an order, they specifically intended that it be executed immediately or not at all—as with a "fill or kill" or "immediate or cancel" order. *See* note 218, above. Such an order would be exposed for less time than a manual trader would have to react to market conditions—but that would not necessarily mean that the trader's intent at the outset was to cancel. Rather, the intent in such a situation would be to get a fill immediately upon placing the order, or not at all. Traders may also maintain that they are using their subsequently cancelled orders to gather information. That is, the trader may say that he wished to observe how other market participants would respond to the order—would the order be filled and, if so, at what price?—which is not the same thing as placing an order with the sole intent to cancel it.

These and other dynamics can lead to problems of proof, particularly in criminal cases where the DOJ must prove its case beyond a reasonable doubt.

2. Proof of Intent and Related Challenges

Some spoofing cases involve high-frequency, algorithmic trading. In such cases, both the DOJ and CFTC have used the content of the algorithms themselves as evidence of intent. In *Coscia*, for example, significant focus was placed on the fact that the defendant's trading software was "*specifically designed* to" cancel large orders if there was a risk that they would actually be filled.[254] The program cancelled large orders "(1) after the passage of time [sometimes milliseconds], (2) if the small [genuine] orders were filled, or (3) if a single large order was filled."[255] The Seventh Circuit held that, "read together, these parameters clearly indicate an intent to cancel. . . ."[256] Similarly, in *CFTC v. Navinder Singh Sarao et al.*, Case No. 15-Cv-03398 (N.D. Ill.), the CFTC emphasized the fact that, as the market price for a given future moved, the defendants' "dynamic layering program automatically and simultaneously modified the large layered [spoof] orders at the various price levels, resulting in the Defendants' orders generally remaining at least three or four ticks from the best asking price" and "keep[ing] them from resulting in executed trades, before eventually being cancelled."[257]

Of course, more traditional types of direct evidence may also be available to prove (or disprove) the requisite intent. This includes, *inter alia*, contemporaneous emails, instant messages,

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251 *Id.* at *5-6. As to the policy argument, Judge Wood noted: "Of course,e KOSPI 200 futures traders would remain protected by the rules of the Korea Exchange and the laws of South Korea." *Id.* at *6.

252 *United States v. Coscia*, 866 F.3d 782, 795 (7th Cir. 2017) (emphasis added).

253 *See* SEC, *Trade to Order Volume Ratios* (Oct. 9, 2013), https://www.sec.gov/marketstructure/research/highlight-2013-01.html#.YC6IFGhKiUk

254 866 F.3d at 794.

255 *Id.*

256 *Id.*

257 Consent Order of Permanent Injunction, Civil Monetary Penalty, And Other Equitable Relief Against Navinder Singh Sarao at 11 ¶ 33, *C.F.T.C. v. Navinder Singh Sarao*, No. 15-Cv-03398 (N.D. Ill. 2016), ECF No. 77.

chats and voice recordings.[258] It may also include testimony from one or more witnesses—including cooperating accomplices—who interacted directly with the alleged spoofer and personally witnessed the conduct in question.

Such direct evidence is not always available, however, or, if available, may be relatively thin or otherwise open to meaningful challenge. Accordingly, there are likely to be cases in which most, if not all, of the evidence is circumstantial—namely, the trading activity itself—which could present challenges for law enforcement seeking to prove the forbidden intent. *United States v. Flotron*, 17-Cr-00220 (D. Conn.), for example, ended in acquittal on the sole count of conspiracy to commit commodities fraud, in violation of 18 U.S.C. § 1349.[259] Unlike Coscia, Flotron traded manually, and kept some orders open for up to a minute, during which time the order could have been traded upon by any market participant, making it more difficult to establish that he intended to cancel his orders before execution.[260] The trial record included testimony from cooperators, but was also heavy on trading data—upon which the government focused during summations.[261] One expert commented after trial that "'[t]his is something of a unique case in that it was meatware,' or human traders, 'not software or hardware involved,'" noting that "'[t]he jury seemed unimpressed by [the] statistical [trading data] evidence. . . .'"[262]

That said, order and trading data will always play a central role in spoofing cases, perhaps more so in cases involving "manual" trading, since evidence of intent in such cases cannot be based on software designed to avoid the execution of spoof orders even before such orders are placed. As such, a thorough and detailed analysis of the relevant order, trading, and market data—often with the assistance of experts—is necessary to properly evaluate the strengths and weaknesses of spoofing allegations. Among other information, the following data points may be relevant in drawing inferences with respect to intent at the time an order was placed:

- The size of the alleged spoof orders compared to the size of the allegedly genuine orders—the larger the spoof orders relative to the genuine orders, the greater the apparent imbalance of supply and demand and the easier to infer an intent to move prices in favor of the smaller orders. The appearance of disproportionality can be achieved where a trader's "genuine" orders are "iceberg" orders—*i.e.*, orders that display only a fraction of the full order size to other market participants—and the government

258 In the *Vorley* case, for example, the government introduced one written communication where Vorley, just after a questionable trading sequence, wrote to Liew, a cooperating witness, "was classic / jam it / wooooooo . . . bi[d] it up", and Liew replied "tricks from the . . . master." Indictment ¶ 17; Trial Transcript at 700:8-25, *United States v. Vorley*, No. 18-Cr-35 (N.D. Ill. Sept. 16, 2020), ECF No. 342. In another communication, an alleged co-conspirator, referring to his own order activity, told Chanu that "[t]hat was a lot of clicking." Chanu responded "you tricked all the algorithm[s]", and the co-conspirator replied "I know how to game this stuff." Trial. Transcript at 1861:22-25, *United States v. Vorley,* No. 18-Cr-35 (N.D. Ill. Sept. 21, 2020), ECF No. 345. The Indictment in *Smith* also catalogs various communications that the government will offer as evidence at trial. In one electronic chat, a co-conspirator allegedly told defendant Nowak that defendant Smith "just bid it up to . . . sell." *Smith* Indictment, supra n. 175, ¶ 35. In another, former JPMorgan trader Christian Trunz (a cooperating witness) told another alleged co-conspirator "so you know its Gregg [Smith] bidding up on the futures trying to get some off . . . [i]ncase [sic] you were watching some large bids come into market", to which the co-conspirator replied "sweet mate", "that worked." *Id.* ¶ 36.

259 *See* P.J. Henning, *The Problem with Prosecuting 'Spoofing,'* N.Y. Times (May 3, 2018), https://www.nytimes.com/2018/05/03/business/dealbook/spoofing-prosecuting-andre-flotron.html.

260 *Id.*

261 *See* Trial Transcript at 1347-52, *United States v. Flotron*, No. 17-Cr-00220 (D. Conn. Apr. 24, 2018), ECF No. 234; Govt. Exhibits 126AA, 126BB, 144 and 375, *United States v. Flotron,* No. 17-Cr-00220 (D. Conn.). During summation, the prosecutor emphasized that "[t]he [trading] pattern, the pattern, the pattern speaks for itself," *id.* at 1348, and that "Mr. Flotron's own trades . . . are the best evidence of what he actually did . . . ." *Id.* at 1347.

262 Christie Smythe, *Ex-UBS Metals Trader Flotron Beats Spoofing Conspiracy Charge*, Bloomberg (Apr. 25, 2018), https://www.bloomberg.com/news/articles/2018-04-25/ex-ubs-metals-trader-flotron-beats-spoofing-conspiracy-charge.

has focused on such tactics in recent cases.[263]

- The length of time between the placement and cancellation of alleged spoof orders (both in absolute terms and relative to comparable traders in the market). The longer an order is open and susceptible of being executed, the more likely it is that the trader actually intended to execute on the order. This is particularly true considering that trading algorithms can hit a bid or lift an offer at speeds measured in millionths of a second, or microseconds.[264]
- The length of time between filling the allegedly genuine order and the subsequent cancellation of the supposed spoof order. The longer a trader leaves the supposedly fake order live and at risk after having achieved the purported goal of that order, the more difficult it is to conclude that it was not genuine. This is particularly true in the case of a manual trader if the data shows that she was capable of cancelling much faster than she did in a sequence that is the focus of government inquiry.
- The placement of the alleged spoof order in the order book. Placing an order at the best bid or ask tends to increase the likelihood that it will be filled, making it less likely that the trader did not intend to execute (order priority and other conventions of a particular market will also bear on this issue).
- The number of alleged spoof orders, such as instances of "layering," where a trader places multiple spoof orders on the same side of the market at slightly different prices, which may give the impression of multiple orders and multiple investors on a given side. The greater number of orders (and cancellations) the easier it is for a fact finder to conclude that the trader acted with the intent to fill an opposite side order at a more favorable price rather than to execute any of the layered orders.[265]
- The number of order cancellations by the alleged spoofer as a percentage of all cancellations in the relevant financial product during the relevant time period. The greater the percentage, the easier to infer an absence of an intent to fill the suspect orders.
- The alleged spoofer's order-to-trade ratio, *i.e.*, the total size of his orders relative to the total size of his executed trades over a given period (both in absolute terms and in relation to other comparable traders during a given period). If the alleged spoofer's order-to-trade ratio is meaningfully higher than that of the market, it may be easier to infer that he did not intend to execute at the time of placing his orders.

Moreover, the government, if put to its proof, may need to demonstrate the forbidden intent on an order-by-order basis, which may present additional hurdles. For example, spoofing may be more difficult to prove where an accused spoofer cancelled the allegedly non-bona fide order *before* filling what the government contends to have been the genuine order. In criminal cases, the DOJ has consistently advanced the theory that the defendant's order activity sent false messages of increased supply relative to demand or vice versa. That being the case, the government has also consistently focused on trading sequences where the alleged non-bona fide orders were larger—sometimes much larger—than the (visible) opposite-side and allegedly genuine orders. That lopsidedness, according to the government, communicates outsized supply or demand that

263 *See* note 218, above, regarding iceberg orders. The use of such orders, in and of itself, is not prohibited by the CME, CBOT, NYMEX, and COMEX. However, a violation may occur if the iceberg order is used as part of a larger scheme to mislead market participants. *See* Market Regulation Advisory Notice (Apr. 25, 2019), https://www.cmegroup.com/rulebook/files/cme-group-Rule-575.pdf.

264 Charles R. Korsmo, *High-Frequency Trading: A Regulatory Strategy*, Univ. of Richmond L. Rev., 523, 538 (Dec. 16, 2013) ("Average execution times [for algorithmic trading] are now measured on an inhuman electronic scale, in terms of milliseconds and microseconds.")

265 This factual question seems to have influenced the jury's decision-making in *Vorley*. For the most part, the jury convicted on a given substantive count where a defendant placed and cancelled multiple, layered orders, and acquitted where he placed and cancelled a single order. *Compare* Trial Transcript at 2295:4-5, *United States v. Vorley*, No. 18-Cr-00035 (N.D. Ill. Sept. 25, 2020), ECF No. 349. (convicting Chanu on Count 12, which involved the placement of 40 layered orders to buy ten gold futures contracts, *see Vorley* Indictment, *supra* n. 155, ¶ 21), *with* Vorley Trial Transcript 2295:6-7, *United States v. Vorley*, No. 18-Cr-00035 (N.D. Ill. Sept. 25, 2020), ECF No. 349 (acquitting Chanu on Count 13, which involved the placement and cancellation of one order to buy 50 gold contracts, *see Vorley* Indictment, *supra* n. 155, ¶ 21.).

is quickly picked up by other market participants (including algorithms) and serves to move the price.[266] If one accepts this theory, it would seem equally true that the cancellation of the larger alleged spoof order would send an equal *but opposite* signal to the market and would have the reverse effect. Thus, a trading sequence where the spoof order is cancelled *before* the genuine order is filled would be inconsistent with the government's explanation as to how spoofing works.

In addition, the close analysis of a given order sequence may show that the trader in question was not responsible for, or even aware of, the alleged spoof order, or, if he was, that there was a legitimate reason for cancelling. Traders may cancel, for example, where they placed an order at the best bid or ask but the market moved away from that level. In that circumstance, the trader may very well have cancelled because she could no longer fill her order, not because she never intended to trade. That inference gets much stronger if the data shows that the trader reestablished a similar order at the new best bid or ask soon after cancelling. Separately, manual traders may also use automated trading software for certain types of trades (*e.g.*, spread trades), whereby the trader inputs specific parameters (*e.g.*, lot sizes, price levels, spreads, etc.) and the software goes to work on its own, placing and cancelling orders depending on market movements. The trader will simultaneously pursue separate trading strategies and work unrelated client orders *via* manual trading, not knowing what orders the software has placed or cancelled or when. To complicate matters further, the manual and automated orders may carry the same trader identification tag—making it very difficult to tell if an order was placed and/or cancelled by the software or manually by the trader. It will be very challenging, in such circumstances, to prove that the trader spoofed. Indeed, it may not be feasible to establish that the trader even knew about some of the orders that comprise the questioned sequence.

Careful analysis of the orders and trades questioned by the government is essential of course, but it is also important to go beyond that and evaluate a trader's *overall* order and trading activity and patterns. The data may show, for example, numerous instances where the trader placed a smaller order that rested for some time and was then cancelled, but never placed a large opposite side order. One would not expect to see such sequences if, as the government may contend, the trader typically places large orders to fill small, opposite side orders on more favorable terms. A macro analysis of order and trading activity may also serve to undercut any suggestion by the government that there was no legitimate reason for the trader to be on both the bid and offer side of the market at the same time, *i.e.*, the only reason was to spoof. The data may show, for example, numerous instances where the trader placed a resting order and then an order on the opposite side that was of *equal* or *smaller* size. Logically, such trading sequences cannot amount to spoofing—indeed, they are contrary to the government's fundamental premise that the non-bona fide opposite side order is always *larger* than the genuine order, since that is necessary to move the market in favor of that order. Accordingly, such trading sequences would tend to establish that there are legitimate reasons to be on both sides of the market at the same time that have nothing to do with spoofing.

That is hardly a remarkable proposition, as there are any number of legitimate reasons for being on both sides of the market at the same time. Perhaps the most basic reason is to profit from the bid-offer spread by making markets. To be sure, that is why high frequency (algorithmic) traders are very often on both sides of the

266 In opening statements in Vorley, the government previewed that "[t]he evidence at trial will show that these defendants took advantage of these basic rules of supply and demand, turned the market on its head, and defrauded other traders by distorting the picture of supply and demand in the market." Trial Transcript at 319:11-14, *United States v. Vorley,* No. 18-Cr-00035 (N.D. Ill. Sept. 15, 2020), ECF No. 341. They did this, according to the government, by placing small genuine buy or sell orders, followed by large opposite side orders (sometimes several), to drive the price toward where they actually wanted to execute. *Id.* at 319-20. "It's the same as if [the trader] were whispering that he wanted to buy but shouting that he wanted to sell. It gets a lot of attention, and it moves the market." *Id.* at 320; *see also id.* at 2161 (Government closing argument: "The defendants' fake orders, their visible orders, induced other traders to fill their iceberg orders. That was the entire point. Use the fake orders to make money on the real orders. Full stop.")

market.[267] Facilitating client trades and orders, and managing the risk from those orders—which can be numerous and constantly changing—may also place a trader on both sides of the market at the same time. Traders may also be on both sides of the market for purposes of price discovery and assessing market depth—which can be very valuable information.[268]

Establishing the requisite intent may be particularly difficult with respect to individuals in support roles as opposed to the persons who actually placed the allegedly improper orders and/or trades. In *United States v. Thakkar*, 19-Cr-00036 (N.D. Ill.), for example, Jitesh Thakkar—an Illinois-based software engineer, and the owner of a company that developed software for professional traders—was charged with aiding and abetting spoofing and conspiring to spoof, after his company created a computer program that, according to the government, was designed to facilitate spoof trades.[269] The company did so at the request of a professional trader based in England, Navinder Sarao, and the program was used *exclusively* by Sarao. The conspiracy count was dismissed by the district court at the end of the government's case for lack of evidence, leaving only the aiding and abetting charge. During summations, the defense focused on the fact that there was no evidence that Thakkar even knew of the two trading sequences (undertaken by Sarao) featured in the indictment as spoofing, and Sarao's testimony that he alone was responsible for all decisions related to those trades, and that he alone decided whether to activate the software's spoofing function while trading.[270] The case ended in dismissal with prejudice after the jury deadlocked (10-2) in favor of acquittal.[271] Commentators noted at the time that "'[g]etting someone who is a step removed from trading is difficult' for prosecutors"; the DOJ was also criticized in the press for having brought the case in the first place.[272]

Finally, it should be noted that district courts have allowed defendants to use the existence of certain market rules, and their compliance with them, as evidence of good faith and to negate prohibited intent. For example, in *Coscia* and *Vorley*, the defendants were permitted to introduce evidence that the exchanges they traded on, among other things: allowed orders to be placed simultaneously on both sides of the market; did not require orders to be kept open for any minimum length of time before being cancelled; had maximum order-cancellation rates that the defendants did not reach; had position limits (*i.e.*, limits on the number of open

267 Scott Patterson and Geoffrey Rogow, *What's Behind High Frequency Trading,* The Wall Street J. (Aug. 1, 2009), https://www.wsj.com/articles/SB124908601669298293 (high frequency traders make money, among other ways, by "[m]arket-making, high-frequency firms hope to make money on the difference between how much investors are willing to buy and sell a stock, or the 'bid-ask spread.' They do this by selling and buying on both sides of the trade.")

268 For example, a Treasuries trader may have a large long position in 10-year Treasury notes due to a client trade and is hedging that trade by selling 10-year Treasury futures. Even though she is a seller, the trader may place a sizable *buy* order for 10-year Treasury futures, intending to leave it live for only a second or two during the hedging process, placing her on both sides of the market. If the bid is hit immediately, the trader knows there are large sellers in the market and that she should quickly offload the rest of her risk, even if that means at a loss (to avoid even larger losses if she waits). If the bid is not hit, that tells the trader that there are no sellers of size and she can manage her risk more patiently with an eye toward turning a profit. While the trader may plan to cancel the bid very quickly after placing it, she is essentially indifferent as to whether it is filled or not filled, since both outcomes provide valuable information. That is a fundamentally different state of mind than a trader who, at the time of placing an order, specifically intended to cancel it before being executed.

269 Indictment at ¶¶ 1, 17-20, 37, *United States v. Thakkar*, No. 18-Cr-00036 (N.D. Ill. Feb. 14, 2018), ECF No. 17.

270 *See* Trial Transcript at 645, 661-64, *United States v. Thakkar*, No. 18-Cr-00036 (N.D. Ill. Apr. 8, 2019), ECF No. 126.

271 Order, *United States v. Thakkar*, No. 18-Cr-00036 (N.D. Ill. Apr. 9, 2019), ECF No. 119; Robert Channick, *Federal Spoofing Trial of Chicago Software Developer Ends in Hung Jury*, The Chicago Tribune (April 9, 2019), https://www.chicagotribune.com/business/ct-biz-software-developer-spoofing-verdict-20190408-story.html; Minute Order, *United States v. Thakkar*, No. 18-Cr-00036 (N.D. Ill. Apr. 23, 2019), ECF No. 134 (Judge granting the DOJ's motion to dismiss with prejudice).

272 Janan Hanna, *Spoofing Mistrial Shows the Limit of Dodd-Frank on Fake Trade Orders*, Bloomberg (Apr. 12, 2019), https://www.bloomberg.com/news/articles/2019-04-12/spoofing-mistrial-shows-limit-of-dodd-frank-on-fake-trade-orders.

contracts that a trader may hold at a given time) that were not breached; and allowed "laddered" and "ping" orders.[273]

Finally, and related to some of the points above, the CEA's statutory definition of spoofing ("bidding or offering with the intent to cancel the bid or offer before execution") arguably leaves additional room for interpretation and argument in that it could encompass legitimate and common practices. For instance, many traders hedge with the use of stop loss and other types of orders that are put in place as a precaution but that the trader hopes (and perhaps expects) to unwind without execution.

M. Private Rights of Action Under the CEA's Anti-Spoofing Provision

Section 22 of the CEA, 7 U.S.C. § 25, confers the "exclusive remedies" to a private person for violations of the CEA, but only in relatively narrow circumstances. As one court has put it, § 22 "expresses Congress's intent to limit the 'circumstances under which a civil litigant could assert a private right of action for a violation of the CEA or CFTC regulations.'"[274]

By its terms, CEA § 22 confers a private right of action in four circumstances, including where a person was allegedly harmed by a violation of the CEA that constituted (1) "the use or employment of, or an attempt to use or employ, . . . any manipulative device or contrivance in contravention of" CFTC-promulgated rules; or (2) "a manipulation of the price" of a commodity, future, or swap.[275] This statutory provision does not include violations that constitute "disruptive practices" such as spoofing. This raises the question of whether the statute confers a private right of action for claims under the CEA's specific anti-spoofing provision.

Whether a private right of action exists depends on whether Congress intended to create such a right.[276] Congressional intent, in turn, is largely based on the plain text and framework of the statute in question.[277] For a number of reasons, it is difficult to conclude that Congress intended to create a private right of action for claims under the CEA's anti-spoofing provision:

- First, Dodd-Frank amended the CEA by, among other things, prohibiting three forms of "disruptive practices", of which spoofing is one. *See* Section VI.A., above. On its face, however, CEA § 4c(a)(5)(C)—the anti-spoofing provision—does not provide for any private cause of action;
- Second, Congress amended CEA § 22 *via* Dodd-Frank—the provision that confers private rights of action—but did so *only* with respect to the use of a "manipulative device"—it did not amend § 22 to include the newly-created "disruptive practices";[278] and

273 *See* Memorandum Opinion and Order at 2-3, *United States v. Coscia*, No. 14-Cr-551 (N.D. Ill. Oct. 19, 2015); Defendant's Response to the Government's Consolidated Motions in Limine at 1-5, *United States v. Coscia*, No. 14-Cr-551 (N.D. Ill. Oct. 12, 2015); *see* Trial Transcript at 558-562, *United States v. Coscia*, No. 14-Cr-551 (N.D. Ill. Nov. 10, 2015), ECF No. 87; Trial Transcript at 1699-1704 *United States v. Vorley*, No. 18-Cr-35 (N.D. Ill. Sept. 21, 2020), ECF No. 345.

274 *In re MF Global Holdings Ltd. Inc. Litigation*, 998 F.Supp.2d 157, 175–176 (S.D.N.Y.2014) (quoting *Klein & Co. Futures, Inc. v. Board of Trade of N.Y.*, 464 F.3d 255, 262 (2d Cir.2006)); *see also Starshinova v. Batratchenko*, 931 F. Supp. 2d 478, 487 (S.D.N.Y. 2013) (plaintiffs had no standing since "Section 22 of the CEA enumerates the *only* circumstances under which a private litigant may assert a private right of action for violations of the CEA.") (emphasis in original) (quotations and citations omitted).

275 CEA § 22(a)(1)(D), 7 U.S.C. § 25(a)(1)(D).

276 *See, e.g., Endsley v. City of Chicago*, 230 F.3d 276, 280 (7th Cir. 2000).

277 *See Ardestani v. I.N.S.*, 502 U.S. 129, 135 (1991) (acknowledging that there is a "strong presumption" that a statute's plain text expresses congressional intent and can only be rebutted in "rare and exceptional circumstances.").

278 *See* Dodd-Frank, Pub. L. No. 111-203, § 753(a), 124 Stat. 1376 (2010); *compare* 7 U.S.C. § 25(a)(1) (2009) *with* 7 U.S.C. § 25(a)(1) (2012) (among other things, the post-Dodd-Frank version of the CEA added swap contracts to the products covered, and the use of a manipulative device or contrivance to the conduct covered, but not disruptive practices). It is well settled that "where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *United States v. Florida*, 938 F.3d 1221 (11th Cir. 2019).

- Third, the CFTC has taken the position that the CEA's disruptive practices prohibitions, including the anti-spoofing provision, are distinct and separate from the anti-manipulation provisions of the CEA.[279]

Consistent with the above, the court in *Braman v. the CME Group, Inc.*, observed that that "although many of the activities alleged in plaintiffs' complaint violate the CEA—spoofing, wash trading, etc.—the CEA does not create a private right of action for such violations," though it did so with virtually no legal analysis.[280] The apparent lack of a statutory hook for a private claim under the anti-spoofing provision may explain why all of the recent private spoofing lawsuits rely upon the CEA's more general anti-manipulation provisions. *See* Section X.D., below.

A related but separate question exists as to whether Congress, in structuring the CEA as it did, intended to *preclude* private claims based on spoofing conduct under the CEA's more general anti-manipulation provisions. These and related issues were briefed in *In re Deutsche Bank Spoofing Litigation* and *In re Merrill, BofA, and Morgan Stanley Spoofing Litigation*, where plaintiffs brought claims for alleged violations of the CEA's anti-manipulation provisions based exclusively on spoofing conduct.[281] In both cases, the defendants moved to dismiss those claims, arguing, among other things, that CEA § 22 provides no private cause of action against those who allegedly employed a disruptive device such as spoofing.[282] The defendants emphasized that Congress "bifurcated the CEA's prohibitions on 'manipulative' practices, which appear in Section 6 of the CEA . . . and the prohibitions on 'disruptive' practices (including spoofing), which appear in Section 4," specifically described spoofing "as a 'disruptive' trading practice and not a form of manipulation," and amended CEA § 22 to add a private cause of action for manipulative devices, but not disruptive practices.[283] As such, the defendants argued that plaintiffs' spoofing allegations should not be permitted to proceed under the CEA's more general anti-manipulation provisions since, to do so, would contradict Congress's (apparent) intent to exclude disruptive practices from private rights of action.

On March 4, 2021, United States District Judge Lewis Liman dismissed plaintiffs' claims in *In re Merrill, BofA, and Morgan Stanley Spoofing Litigation* as untimely and insufficient because plaintiffs failed to adequately allege actual damages.[284] But he never reached the private-right-of-action question, which remains an open issue.[285] The motion to dismiss in *In re Deutsche Bank Spoofing Litigation* is pending.

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279 *See* CFTC, *Antidisruptive Practices Authority*, 78 Fed. Reg. at 31892 (May 28, 2013).

280 149 F. Supp.3d 874, 885 (N.D. Ill. 2015).

281 Consolidated Class Action Complaint, *In re Deutsche Bank Spoofing Litig.*, No. 20-Cv-03638 (N.D. Ill. Nov. 13, 2020); Consolidated Class Action Complaint, *In re Merrill, BOFA, and Morgan Stanley Spoofing Litig.*, No. 19-Cv-06002 (S.D.N.Y. Nov. 12, 2019).

282 Defendant Deutsche Bank AG and Deutsche Bank Securities Inc.'s Memorandum in Support of their Motion to Dismiss Plaintiffs' Consolidated Class Action Complaint Pursuant to Federal Rule of Civil Procedure 12(b)(6) at 6-7, *In re Deutsche Bank Spoofing Litig.*, No. 20-Cv-03638 (N.D. Ill. Jan. 15, 2021), ECF No. 42 [hereinafter DB MTD]; Defendants Merrill Lynch Commodities, Inc., Bank of America Corporation, and Morgan Stanley & Co. LLC's Joint Memorandum of Law in Support of their Motion to Dismiss the Consolidated Class Action Complaint at 13-14, *In re Merrill, BOFA, and Morgan Stanley Spoofing Litig.*, No. 19-Cv-06002 (S.D.N.Y. Jan. 13, 2020), ECF No. 34 [hereinafter ML MTD].

283 ML MTD, *supra* n. 282, at 14-16; DB MTD, *supra* note 282, at 7-8.

284 *See* Opinion and Order, *In re Merrill, BOFA, and Morgan Stanley Spoofing Litigation*, No. 19-cv-6002 (S.D.N.Y. Mar. 4, 2021), ECF No. 72.

285 *In re Merrill, BofA, and Morgan Stanley Spoofing Litigation* is the second case where the parties briefed, but the court never decided, this issue. The defendant in *Mendelson v. Allston Trading LLC*, No. 15-cv-04580 (N.D. Ill.), moved to dismiss on the same grounds, arguing that the CEA does not extend a private right of action to the anti-spoofing provision or to asserted violations of the anti-manipulation provisions where the plaintiff simply recast his spoofing allegations as manipulation. *See* Allston Trading LLC's Motion to Dismiss, *Mendelson v. Allston Trading LLC*, No. 15-cv-04580 (N.D. Ill. Jul. 22, 2015), ECF No. 14. The case was voluntarily dismissed before the motion was decided, however.

X. Comprehensive Summary of Spoofing Cases

A. Criminal Cases

1. *United States v. JPMorgan Chase & Co.*, No. 20-cr-00175 (D. Conn. Sept. 29, 2020)

i. On September 29, 2020, the DOJ filed an information against JPMorgan Chase & Co. and entered into a three-year DPA with JPMorgan to resolve spoofing and wire fraud allegations based on the activity of several former JP Morgan employees on two different trading desks.

Some of the individuals—including John Edmonds, Christian Trunz, Gregg Smith, Michael Nowak, Christopher Jordan, and Jeffrey Ruffo—worked on the precious metals desk at JPMorgan. The DPA summarizes the relevant spoofing conduct as involving "tens of thousands of instances of unlawful trading" in precious metals futures contracts "by ten former traders . . . resulting in at least $205,992,102 of loss to other precious metals futures market participants between March 2008 and August 2016." Edmonds and Trunz have pled guilty (discussed below). The case against Smith, Nowak, Jordan, and Ruffo is ongoing and currently scheduled for trial on October 18, 2021 (discussed above and below).

According to the DPA, other unnamed traders worked on the U.S. Treasuries trading desk at JPMorgan. The DPA describes the alleged conduct on this desk as involving "thousands of instances of unlawful trading in U.S. Treasury futures contracts and in U.S. Treasury notes and bonds in the secondary ("cash") market by five former traders on the U.S. Treasuries desk of the Company and the Related Entities resulting in at least $105,744,906 of loss to other U.S. Treasury futures and cash market participants between April 2008 and January 2016."

ii. The information charges JP Morgan with two counts of wire fraud—one in relation to the trading of precious metals futures, and the other in connection with the trading of U.S. Treasuries futures and notes and bonds—in violation of 18 U.S.C. § 1343. Under the DPA, JPMorgan agreed to cooperate with the DOJ, and admitted that the detailed statement of facts accompanying the DPA is "true and accurate". JPMorgan also agreed to pay a total Criminal Monetary Amount of $920,203,609, comprised of: (1) a Criminal Monetary Penalty of $436,431,811; (2) $172,034,790 in "Criminal Disgorgement"; and (3) $311,737,008 in "Victim Compensation". The DOJ agreed that the Criminal Monetary Penalty would be offset by any penalty paid by JPMorgan under the parallel settlement with the CFTC, and that the Criminal Disgorgement Amount would be offset by the $10 million disgorgement payment in the parallel settlement with the SEC. The DOJ indicated that the nature of the resolution and level of penalties were based on a number of factors, including, notably, that JPMorgan failed to fully and voluntarily self-disclose the conduct at issue.

iii. As noted, the CFTC and SEC announced settlements with JPMorgan in parallel with the DOJ, based upon the same operative facts. Given its jurisdictional focus, the CFTC's civil enforcement action focused on conduct related to order sequences and the trading of precious metals and treasury futures. *See In re JPMorgan Chase & Co.*, CFTC No. 20-69 (Sept. 29, 2020) (discussed below). The SEC's action was predicated on conduct related to order sequences and the trading of U.S. Treasury notes and bonds in the secondary market. *See In re J.P. Morgan Secs. LLC*, SA Release No. 10958 (Sept. 29, 2020) (discussed below). In addition, private class action complaints were filed against JPMorgan in 2018 based on the alleged spoofing conduct related to precious metals. See *In re JPMorgan Precious Metals Spoofing Litig.*, No. 18-cv-10356 (S.D.N.Y.) (discussed below). Class actions based on the alleged spoofing conduct related to Treasury futures were filed in 2020. *See In re JPMorgan Treasury Futures Spoofing Litig.*, No. 20-Civ.3515 (S.D.N.Y) (discussed below).

2. *United States v. Bank of Nova Scotia*, No. 20-cr-00707 (D.N.J. Aug. 19, 2020)

i. On August 19, 2020, the DOJ filed an information against the Bank of Nova Scotia ("BNS"),

which entered into a three-year DPA to resolve wire fraud allegations predicated on spoofing. According to court documents, between January 2008 and July 2016, four traders who formerly worked for the bank manipulatively traded precious metals futures contracts on the NYMEX and COMEX. One of these traders, Corey Flaum, was individually prosecuted by the DOJ and pled guilty in July 2019 (discussed below).

ii. The information charges BNS with one count of wire fraud, in violation of 18 U.S.C. § 1343, and one count of attempted price manipulation, in violation of CEA § 9(a)(2), 7 U.S.C. § 13(a)(2). Under the DPA, Bank of Nova Scotia has agreed to cooperate with the DOJ and to pay a total Criminal monetary penalty in the amount of $60,451,102, which is comprised of: (1) $42,000,000 in "Criminal Monetary Penalties"; (2) $11,828,912 in "Criminal Disgorgement"; and (3) $6,622,190 in "Victim Compensation." The DOJ agreed that up to $21,000,000 of the Criminal Monetary Penalty (*i.e.*, up to half of $42,000,000) may be offset by the amount paid to the CFTC in a parallel settlement. As with JPMorgan, the form of resolution with BNS, and the penalties imposed, were based on a number of factors, including BNS's failure to fully and voluntarily self-disclose the violative conduct.

iii. For its part, the CFTC simultaneously announced two separate settlements with BNS, one in relation to the same spoofing conduct that is the subject of the criminal DPA, and the other in relation to false statements by BNS in connection with the CFTC's initial investigation of the spoofing conduct at issue. *See In re Bank of Nova Scotia*, CFTC Nos. 20-27 and 20-28 (Aug. 19, 2020) (discussed below). On August 21, 2020, two individual traders filed a putative class action against BNS and others based on the spoofing conduct described in the criminal DPA and settlement with the CFTC. *See Sterk v. The Bank of Nova Scotia*, 20-cv-11059 (D.N.J.).

3. *United States v. Propex Derivatives Pty Ltd*, No. 20-cr-0039 (N.D. Ill. Jan. 21, 2020)

i. On January 21, 2020, the DOJ filed an information against Propex Derivatives Pty Ltd ("Propex"), which entered into a three-year DPA to resolve spoofing allegations based on the trading conduct of former employee Jiongsheng Zhao, who was separately charged (discussed below). Among other things, the information alleges that, from 2012 to 2016, Zhao manipulated E-Mini S&P 500 futures contracts traded on the CME by placing thousands of buy or sell orders with the intent to cancel those orders before execution.

ii. The information charges Propex with one count of spoofing, in violation of CEA §§ 4c(a)(5)(C) and 9(a)(2), 7 U.S.C. §§ 6c(a)(5)(C) and 13(a)(2). Under the DPA, Propex agreed to cooperate with the DOJ, admitted responsibility for Zhao's conduct, and acknowledged the accuracy of a detailed statement of facts appended to the DPA. In addition, Propex agreed to pay: (1) $464,300 in victim compensation; (2) $73,429 in disgorgement; and (3) a criminal monetary penalty of $462,271 (for a total of $1,000,000). The DOJ agreed that the criminal monetary penalty will be offset by the amount of any payment made pursuant to Propex's settlement with the CFTC.

iii. A parallel civil enforcement action was brought by the CFTC. *See In re Propex Derivatives Pty Ltd*, CFTC No. 20-12 (Jan. 21, 2020) (discussed below).

4. *United States v. Tower Research Capital LLC*, No. 19-cr-00819 (S.D. Tex. Nov. 6, 2019).

i. On November 6, 2019, the DOJ filed an information against Tower Research Capital LLC ("Tower Research" or "Tower") and entered into a DPA with Tower to resolve corporate criminal exposure based on spoofing and related conduct undertaken by Kamaldeep Gandhi, Krishna Mohan, and Yuchun Mao, former employees of Tower who were separately charged (discussed below). Among other things, the information alleges that, from March 2012 to December 2013, the former traders placed thousands of orders to buy and sell E-Mini S&P 500 futures contracts with the intent to cancel those orders before execution.

ii. The information charges Tower Research with one count of commodities fraud, in violation of 18 U.S.C. § 1348(1). Under the DPA, Tower agreed

to cooperate with certain DOJ investigations, and to undertake certain reporting obligations, during the three-year term of the agreement. In addition, Tower agreed to pay a total of $67,493,849, comprised of: (1) a criminal monetary penalty in the amount of $24.4 million; (2) a criminal disgorgement amount of $10.5 million; and (3) a victim compensation payment of $32,593,849. Tower also agreed that the detailed factual statement attached to the DPA was "true and accurate." The DOJ agreed that the criminal monetary penalty and disgorgement amounts would be offset by the amount paid by Tower in connection with its settlement of a parallel action brought by the CFTC (discussed below).

iii. As noted, a parallel civil enforcement action was brought by the CFTC. *See In re Tower Research Capital LLC*, CFTC No. 20-06 (Nov. 6, 2019). In addition, a class action was brought on October 19, 2018 against Tower Research and others based on the same conduct that was the subject of the DOJ's criminal case and the CFTC's civil enforcement action related to E-mini futures. *See Boutchard v. Gandhi*, No. 18-cv-07041 (N.D. Ill.) (discussed below).[286] A separate private lawsuit was filed against Tower for alleged spoofing in relation to Korea Composite Stock Price Index ("KOSPI") 200 futures contracts, but that action was dismissed for failure to establish that the CEA applied to the products in question. *See Choi v. Tower Research Capital LLC*, No. 14-cv-9912 (S.D.N.Y.) (discussed above and below).

5. *United States v. Wang*, No. 19-mj-06485 (D. Mass. Oct. 14, 2019)

i. By criminal complaint dated October 14, 2019, Xiaosong Wang and Jiali Wang, two Chinese nationals with residences in the United States, are alleged to have schemed with others to manipulate the prices of thinly traded stocks traded on the NYSE and NASDAQ. The defendants allegedly placed (or coordinated the placement of) thousands of non-*bona fide* purchase/sell orders in order to move stock prices up or down. After the prices moved and the defendants purchased/sold the securities at the artificially higher/lower price, the initial orders were cancelled. According to the complaint, the scheme resulted in millions of dollars in illicit profits.

ii. Both defendants are charged with one count of conspiracy to commit securities fraud, in violation of 18 U.S.C. § 371, and were arraigned on October 15, 2019.

iii. The two criminal defendants are also among 18 defendants and 6 relief defendants who are the subject of a parallel civil enforcement action filed by the SEC. *See SEC v. Chen*, No. 19-cv-12127 (D. Mass. Oct. 15, 2019) (discussed below).

6. *United States v. Smith*, No. 19-cr-00669 (N.D. Ill. Aug. 22, 2019) (superseding indictment filed Nov. 14, 2019)

i. By superseding indictment dated November 14, 2019, three former JPMorgan precious metals traders (Gregg Smith, Michael Nowak, and Christopher Jordan), and one former JPMorgan precious metals salesperson (Jeffrey Ruffo), are accused of widespread spoofing and related misdeeds. The indictment characterizes the precious metals trading desk at JPMorgan as a criminal "enterprise," and alleges that, from March 2008 until August 2016, the four defendants (and others) created and/or conspired to create thousands of "trading sequences" for gold, silver, platinum, and/or palladium futures contracts traded on the NYMEX and COMEX that involved genuine orders along with spoof orders that they intended to cancel before execution. This conduct is alleged to have communicated false and misleading information about supply and demand, thereby deceiving other market participants, including financial institutions other than JPMorgan that were engaged in trading. According to the indictment, the defendants engaged in spoofing, among other reasons, to provide better prices to large hedge fund clients that were important

286 An earlier class action was brought against Tower Research and one individual on December 16, 2014 based upon alleged spoofing with respect to the trading of KOSPI 200 Futures Contracts on the Overnight Futures Market via CME Globex. *See Choi v. Tower Research Capital LLC*, No. 14-cv-9912 (S.D.N.Y.) (discussed below).

sources of revenue and market intelligence. The indictment also alleges that the four defendants (and others) hid their unlawful activities from JPMorgan, the CFTC and the exchanges by, among other things: (1) falsely certifying that they had complied with all policies and/or that they had reported any suspected violations of policy, laws and regulations; and/or (2) lying to compliance officers at JPMorgan. The indictment identifies former JPMorgan traders John Edmonds and Christian Trunz, both of whom were separately charged (*see* below), and several unnamed co-conspirators, as having participated in the allegedly wrongful conduct.

ii. The indictment catalogues numerous allegedly deceptive trading sequences, and charges each Smith, Nowak, Ruffo, and Jordan with one count of RICO conspiracy to commit multiple acts of wire fraud affecting a financial institution and bank fraud, in violation of 18 U.S.C. § 1962(d), and one count of conspiracy to commit wire fraud affecting a financial institution, bank fraud, commodities fraud, price manipulation, and spoofing, in violation of 18 U.S.C. § 371. Smith, Nowak and Jordan are also charged with bank fraud, in violation of 18 U.S.C. § 1344(1), and wire fraud affecting a financial institution, in violation of 18 U.S.C. § 1343. Finally, Smith and Nowak are further charged with attempted price manipulation, in violation of CEA § 9(a)(2), 7 U.S.C. § 13(a)(2), spoofing, in violation of CEA §§ 4c(a)(5)(C) and 9(a)(2), 7 U.S.C. §§ 6c(a)(5)(C) and 13(a)(2), and commodities fraud, in violation of 18 U.S.C. § 1348(1).

iii. All defendants have been arraigned and pled not guilty. As described above in greater detail, *see* Section IX.B., the defendants' filed a joint motion to dismiss on February 28, 2020 for a variety of reasons. That motion was still pending at the time that this Guide was published. Trial is currently scheduled for October 2021.

iv. The CFTC also filed civil enforcement claims against Gregg Smith and Michael Nowak. *See C.F.T.C. v. Nowak*, No. 19-cv-6163 (Sept. 16, 2019) (discussed below). Jordan was not charged civilly by the CFTC, likely due to statute of limitations constraints. *See* Section IX.E., above. The CFTC has not taken any action (publicly) with respect to Ruffo.

7. *United States v. Trunz*, No. 19-cr-00375 (E.D.N.Y. Aug. 20, 2019)

i. By information dated August 20, 2019, Christian Trunz, a former precious metals trader at Bear Stearns and JPMorgan, was accused of having engaged in spoofing while working at both organizations, over the period July 2007 to August 2016. Trunz allegedly placed thousands of orders for gold, platinum, and palladium futures contracts on the NYMEX and COMEX that he never intended to execute, thereby deceiving market participants and moving the price of precious metals futures contracts in a direction that was favorable to Trunz and unnamed co-conspirators. The government also alleged that Trunz "learned this trading strategy from more senior traders" and "personally deployed this strategy thousands of times with the knowledge and consent of his immediate supervisors."

ii. Trunz was charged with conspiring to spoof, in violation of 18 U.S.C. § 371, and spoofing, in violation of CEA §§ 4c(a)(5)(C) and 9(a)(2), 7 U.S.C. §§ 6c(a)(5)(C) and 13(a)(2).

iii. On August 20, 2019, Trunz pled guilty to both counts pursuant to a plea agreement. Trunz's sentencing is currently scheduled for October 28, 2021.

iv. The CFTC also filed a civil enforcement action against Trunz. *See In re Trunz*, CFTC No. 19-26 (Sept. 16, 2019) (discussed below).

8. *United States v. Flaum*, No. 19-cr-00338 (E.D.N.Y. July 25, 2019)

i. In an information dated July 25, 2019, Corey Flaum, a former precious metals trader at Scotia Capital and Bear Stearns, was accused of manipulating the price of precious metals futures contracts from June 2007 to July 2016 by engaging in spoofing activity. Flaum allegedly placed thousands of spoof orders during this period in order to deceive other market participants regarding actual supply and demand levels and to artificially move the prices of futures contracts traded on both the NYMEX and COMEX.

ii. The DOJ charged Flaum with one count of attempted commodities price manipulation, in violation of CEA § 9(a)(2), 7 U.S.C. § 13(a)(2). Flaum pled guilty to that charge on July 25, 2019 and is cooperating with the DOJ. He is scheduled to be sentenced on July 27, 2021.

iii The CFTC also brought a civil enforcement action against Flaum. *See In re Flaum,* CFTC No. 19-15 (July 25, 2019) (discussed below).

9. *Merrill Lynch Commodities, Inc.* Criminal Investigation (June 25, 2019)

i. On June 25, 2019, Merrill Lynch Commodities, Inc. entered into an NPA with the DOJ to resolve corporate criminal exposure based on the alleged spoofing and related conduct of Edward Bases and John Pacilio, two former precious metals traders who were separately charged by the DOJ (*see* below for a summary of their alleged conduct).

ii. Among other things, Merrill Lynch agreed to pay $25 million, which represented the "combined appropriate criminal fine, forfeiture, and restitution amounts." Merrill Lynch also agreed that the allegations of wrongful conduct and conclusions of law set forth in an attachment to the NPA are "true and accurate," and that it will cooperate with the government's ongoing investigations.

iii. The CFTC filed a parallel civil enforcement action against Merrill Lynch. *See In re Merrill Lynch Commodities Inc.*, CFTC No. 19-07 (June 25, 2019) (discussed below). Class action lawsuits were also filed against Morgan Stanley & Co. LLC, Bank of America Corp., Merrill Lynch Commodities Inc., and several individual defendants, seeking damages under the CEA. *See In re Merrill, BOFA, and Morgan Stanley Spoofing Litigation,* No. 19-cv-6002 (S.D.N.Y.) (discussed below). The CFTC and private civil actions are premised on the same alleged conduct (by Bases, Pacilio and others) that formed the basis for the DOJ's action against Merrill Lynch.

10. *United States v. Zhao,* No. 18-cr-00024 (N.D. Ill. Dec. 18, 2018)

i. By information filed on December 18, 2018, the government alleged that, from July 2012 to March 2016, while working at Propex—a proprietary trading firm based in Sydney, Australia (*see* above)—Jiongsheng Zhao placed thousands of fraudulent orders on the CME for E-Mini S&P 500 futures contracts that he never intended to execute.

ii. The government charged Zhao with one count of spoofing, in violation of CEA §§ 4c(a)(5)(C) and 9(a)(2), 7 U.S.C. §§ 6c(a)(5)(C) and 13(a)(2).

iii. After extradition, Zhao pled guilty on December 26, 2018 pursuant to a plea agreement, by which he agreed to cooperate with the government, among other things. Zhao was sentenced to time served on February 4, 2020 (he had served a total of 302 days in pre-trial custody in Australia and the United States). Zhao was neither fined nor required to pay restitution (any restitution obligation was satisfied by Propex's $464,300 victim compensation payment).

iv. The CFTC initiated a civil enforcement action against Zhao in January 2018. *See C.F.T.C. v. Zhao,* No. 18-cv-00620 (January 28, 2018) (discussed below).

11. *United States v. Gandhi,* No. 18-cr-00609 (S.D. Tex. Oct. 11, 2018)

i. By information dated October 11, 2018, the Government accused Kamaldeep Gandhi, a former commodities trader in New York City, of placing orders on the CME and CBOT for E-Mini Dow, E-Mini NASDAQ, and/or E-Mini S&P 500 futures contracts that he and others intended to cancel before they were executed. Gandhi was accused of engaging in such conduct while working at Tower Research along with two other Tower traders, Krishna Mohan and Yuchun Mao (who were separately charged, *see* below). He was also accused of engaging in similar conduct with at least one other trader while working at another trading firm, referred to as "Trading Firm B" in the information.

ii. The Government charged Gandhi with two separate counts of conspiracy to engage in wire fraud, commodities fraud, and spoofing, in violation of 18 U.S.C. § 371. The first conspiracy relates to conduct by Gandhi, Mohan, and Mao, from March 2012 to March 2014, while working

at Tower Research. The second covers conduct by Gandhi and another (unnamed) trader from May 2014 through October 2014, while working at Trading Firm B.

iii. Gandhi pled guilty on November 2, 2018 pursuant to a plea agreement. Among other things, Gandhi agreed to cooperate with the government, and stipulated that the spoofing conduct at Tower resulted in at least $61.5 million in losses. His sentencing is currently scheduled for May 21, 2021.

iv. The CFTC also initiated a civil enforcement action against Gandhi. *See In re Gandhi,* CFTC No. 19-01 (Oct. 11, 2018) (discussed below).

12. *United States v. Mohan,* No. 18-cr-00610 (S.D. Tex. Oct. 11, 2018)

i. In an information dated October 11, 2018, the government accused Krishna Mohan, a former programmer and trader at Tower Research, of engaging in spoofing along with Gandhi and Mao, as described in more detail immediately above in relation to defendant Gandhi.

ii. The government charged Mohan with one count of conspiracy to commit wire fraud, commodities fraud, and spoofing, in violation of 18 U.S.C. § 371.

iii. Mohan pled guilty on November 6, 2018 pursuant to a plea agreement and agreed to cooperate with the government. Mohan's sentencing is presently scheduled for May 27, 2021.

iv. The CFTC also initiated a civil enforcement case against Mohan. *See In re Mohan*, CFTC No. 19-06 (Feb. 25, 2019) (discussed below).

13. *United States v. Mao,* No. 18-cr-00606 (S.D. Tex. Oct. 10, 2018)

i. In an indictment filed on October 10, 2018, Yuchun "Bruce" Mao was charged with participating in the spoofing scheme that took place at Tower Research, as described immediately above in relation to defendants Gandhi and Mohan.

ii. Mao is charged with one count of conspiracy to commit commodities fraud, in violation of 18 U.S.C. § 1349, two counts of commodities fraud, in violation of 18 U.S.C. § 1348, and two counts of spoofing, in violation of CEA §§ 4c(a)(5)(C) and 9(a)(2), 7 U.S.C. §§ 6c(a)(5)(C) and 13(a)(2).

iii. It appears that Mao—a citizen of the Peoples Republic of China—is currently a fugitive.[287]

14. *United States v. Edmonds,* No. 18-cr-239 (D. Conn. Oct. 9, 2018)

i. By information dated October 9, 2018, the government alleged that, from 2009 to 2015, John Edmonds, a former trader at JPMorgan, worked with others at JPMorgan to inject "false and misleading information into the precious metals futures contracts markets about the existence of supply and demand for those futures contracts, and thus to induce other market participants to buy and sell futures contracts at prices, quantities, and times that they otherwise likely would not have traded, all in order to make money and avoid losses" for Edmonds, his co-conspirators, and the Bank. To accomplish this, Edmonds routinely placed orders to buy and sell futures contracts on the NYMEX and COMEX with the intent to cancel those orders before execution. The government alleged further that Edmonds learned to do so from more senior traders at JPMorgan and engaged in the wrongful conduct hundreds of times with the knowledge and consent of his immediate supervisors.

ii. The Government charged Edmonds with conspiracy to commit wire fraud, commodities fraud, price manipulation, and spoofing, in violation of 18 U.S.C. § 371, and commodities fraud, in violation of 18 U.S.C. § 1348(1).

iii. On October 9, 2018, Edmonds pled guilty to both counts pursuant to a plea agreement. Edmonds is cooperating with the DOJ and has not yet been sentenced.

iv The CFTC filed a civil enforcement action against Edmonds in July 2019. *See In re*

287 The only docket entries in the case indicate that Mao was indicted on Oct. 10, 2018, at which time a bench warrant for his arrest was issued. *See United States v. Mao*, No. 18-Cr-00606 (S.D. Tex. Oct. 10, 2018), ECF No. 3.

Edmonds, CFTC No. 19-16 (July 25, 2019) (discussed below). In addition, several class actions were filed against JPMorgan and others based on the spoofing conduct of Edmonds and other JP Morgan employees in relation to precious metals futures. *See In re JPMorgan Precious Metals Spoofing Litig.,* No. 18-cv-10356 (S.D.N.Y.) (discussed below), and *United States v. Smith*, No. 19-cr-669 (N.D. Ill.) (discussed above).

15. *United States v. Vorley,* No. 18-cr-00035 (N.D. Ill. July 24, 2018) (superseding indictment filed November 26, 2019)

i. James Vorley and Cedric Chanu, two former traders at Deutsche Bank AG, were charged with placing spoof orders in precious metals futures contracts from May 2008 to July 2013. According to the indictment, the defendants placed larger orders on one side of the market that they intended to cancel before execution (so-called "Fraudulent Orders") and placed smaller orders on the other side of the market that they intended to execute. The indictment alleged that the Fraudulent Orders to buy created the false and misleading impression of increased demand, designed to move prices higher, and the Fraudulent Orders to sell created the false and misleading impression of increased supply, designed to move prices lower. The Fraudulent Orders amounted to "material misrepresentations that falsely and fraudulently represented to traders that [the defendants] . . . were intending to trade the Fraudulent Orders when, in fact, they were not . . . ." The indictment also alleged that Deutsche Bank was affected by this conduct in the form of new and increased risk of loss (stemming from reputational harm and costs associated with legal proceedings arising from the conduct, for example), and actual loss, including the $30 million civil money penalty that Deutsche Bank paid to the CFTC as a result of the conduct (discussed below). The indictment identified David Liew—a former precious metals trader at Deutsche Bank who was separately charged (*see* below)—as having participated in the allegedly wrongful conduct along with Vorley and Chanu. Liew is a cooperator.

ii. The superseding indictment against Vorley and Chanu charged the defendants with conspiring to commit wire fraud affecting a financial institution, in violation of 18 U.S.C. § 1349. In addition, Vorley was charged with eight, and Chanu with ten, substantive counts of wire fraud affecting a financial institution, in violation of 18 U.S.C. § 1343. Each substantive wire fraud count named a single defendant, except for two, where both were named as defendants.

iii. As described in detail above, *see* Section IX.B., in November 2018, Vorley and Chanu moved to dismiss the allegations, arguing, among other things, that the spoofing conduct, as alleged, did not amount to a scheme to defraud within the meaning of the wire fraud statute. The court heard argument on the motion to dismiss on January 24, 2019 and denied the motion on October 21, 2019.[288]

iv. A jury trial against Vorley and Chanu commenced on September 14, 2020 and concluded on September 25, 2020. Both defendants were acquitted of the lone conspiracy charge, notwithstanding the fact that cooperator David Liew testified at length about his involvement in a spoofing conspiracy with Vorley and Chanu. The jury returned guilty verdicts against Vorley on three of the wire fraud counts, but acquitted as to five. The jury returned guilty verdicts against Chanu on seven wire fraud counts and acquitted on three such counts. On March 18, 2021, the district court denied the defendants' motion for judgement of acquittal or, alternatively, for a new trial. Neither defendant has been sentenced.

v. The CFTC also filed a civil enforcement action against Vorley and Chanu. *See C.F.T.C. v. Vorley*, No. 18-cv-00603 (Jan. 26, 2018) (discussed below).

288 On May 20, 2020, the defendants' filed a motion to dismiss the Government's superseding indictment with prejudice, arguing that undue delay in the case violated both the Speedy Trial Act and their rights under the Sixth Amendment. The Court denied this motion on July 21, 2020. *See* Order, *United States v. Vorley*, No. 18-cr-00035 (N.D. Ill. Jul. 21, 2020), ECF. No. 254.

16. *United States v. Bases*, No. 18-cr-00048 (N.D. Ill. July 17, 2018) (superseding indictment filed on Nov. 26, 2019; second superseding indictment filed on Feb. 27, 2020; third superseding indictment filed on Nov. 12, 2020)

i. Edward Bases and John Pacilio are accused of engaging in spoofing, both in concert with others and on their own, from 2008 to 2014 in connection with the trading of precious metals futures contracts. The defendants allegedly placed orders for precious metals futures on one side of the market that they never intended to execute in order to create the false and misleading impression of increased supply or demand and thereby move prices artificially. In doing so, the defendants allegedly misrepresented that they were willing to trade those orders when, in fact, they were not, and did so in order to fill orders on the other side of the market that they genuinely intended to execute. Bases worked at Deutsche Bank from 2008 to 2010, and at Merrill Lynch Commodities, Inc. from 2010 to 2015. Pacilio worked at Merrill Lynch Commodities from 2007 to 2011, and at Morgan Stanley starting in 2011.

ii. Bases and Pacilio were both charged with conspiring to commit commodities fraud and wire fraud affecting a financial institution, in violation of 18 U.S.C. § 1349, and commodities fraud, in violation of 18 U.S.C. § 1348. Pacilio alone is also charged with spoofing, in violation of CEA §§ 4c(a)(5)(C) and 9(a)(2), 7 U.S.C. §§ 6c(a)(5)(C) and 13(a)(2).

iii. In November 2018, the defendants moved to dismiss the wire fraud object of the conspiracy count in the original indictment on essentially the same grounds advanced by defendants Vorley and Chanu. *See* Section IX.B., above. They also moved to dismiss the commodities fraud charge on various grounds at that time.[289] The court denied these motions on January 16, 2020.[290]

iv. In March 2020, Pacilio moved to dismiss the lone count that alleged a violation of the CEA's anti-spoofing provision based on three grounds: duplicity, lack of specificity, and statute of limitations. As discussed above in more detail, *see* Section IX.G., the court granted Pacilio's motion on duplicity grounds. The Court, however, allowed the DOJ to cure the defective charge, and a grand jury returned a third superseding indictment on or about November 12, 2020.

v. The parties are currently engaged in discovery. A jury trial is set for July 12, 2021.

17. *United States v. Taub*, No. 18-cr-00079 (D.N.J. Feb. 21, 2018) (superseding indictment filed on Oct. 23, 2019)

i. Joseph Taub, a self-employed securities trader, was initially indicted on February 21, 2018 for scheming with others to manipulate the prices of securities of various publicly traded companies from 2013 to 2016. A superseding indictment was filed against Taub on October 23, 2019. The superseding indictment alleges that Taub coordinated trading in dozens of brokerage accounts that he secretly funded and controlled in order to create the false impression of real supply and demand in various securities. As part of the scheme, Taub and others employed, among other things, non-*bona fide* orders that were designed either to be cancelled before execution or lose money. Additionally, Taub allegedly coordinated with others to defraud the United States by concealing from the IRS Taub's beneficial interest in so-called "straw accounts" so that any profits from such trading accounts were taxed at a lower marginal rate.

ii. Taub was charged with one count of conspiracy to commit securities fraud, in violation of 18 U.S.C. § 1349; one count of securities fraud, in violation of 18 U.S.C. § 1348; one count of conspiracy to commit securities fraud in violation of 18 U.S.C. § 371; one count of securities fraud, in violation of 15 U.S.C. § 78j(b) and 17 C.F.R. § 240.10b-5; and

289 *See* Bases Motion to Dismiss Br. at 5-9, *United States v. Bases*, No. 18-cr-00048 (Nov. 16, 2018), ECF No. 117; Pacilio Motion to Dismiss Br. at 5-24, *United States v. Bases*, No. 18-cr-00048 (Nov. 16, 2018), ECF No. 118.

290 *See* Notification of Docket Entry at 1, *United States v. Bases*, No. 18-cr-00048 (Jan. 16, 2020), ECF No. 236.

one count of conspiracy to defraud the United States, in violation of 18 U.S.C. § 371. On July 28, 2020, Taub pled guilty to securities fraud, in violation of 15 U.S.C. §§ 78j(b) and 78ff, 17 C.F.R. § 240.10b-5, and 18 U.S.C. § 2, and conspiracy to defraud the United States, in violation of 18 U.S.C. § 371. He was sentenced on December 22, 2020 to 18 months' imprisonment, to be followed by one year of supervised release. He was also ordered to pay forfeiture of $17.1 million, and restitution in the amount of $394,424.

iii. The SEC also brought a civil enforcement action against Taub as well as Elazar Shmalo, who allegedly participated in the manipulative conduct along with Taub. *SEC v. Taub*, No. 16-cv-09130 (D.N.J. Dec. 12, 2016) (discussed below).

18. *United States v. Thakkar*, No. 18-cr-00036 (N.D. Ill. Feb. 14, 2018)

i. Jitesh Thakkar was a software engineer who founded Edge Financial Technologies, Inc., a company that designed trading software for professional traders. According to a February 14, 2018 indictment, Navinder Sarao—a British trader accused of contributing to the May 2010 "flash crash"—came up with the idea for an automated computer program "to execute a strategy to place large-volume orders that, at the time the orders were placed, Sarao intended to cancel before execution." Sarao (who separately pled guilty and cooperated, *see* below) retained Edge Financial to develop his idea into software, and Thakkar was said to have "led and oversaw" those efforts. The resulting software allegedly allowed Sarao to place orders at or near the best price with great confidence that his order would not be filled, which he did hundreds of times in 2012 and 2013. According to the charges, such orders were "intended to create a false sense of supply . . . or demand . . . , induce other market participants to react to this deceptive information, and to pump up or deflate . . . futures contracts prices" so that Sarao could profit. The government alleged that Thakkar's involvement with Sarao in developing the software amounted to a criminal conspiracy.

ii. Thakkar was charged with one count of conspiracy to commit spoofing, in violation of 18 U.S.C. § 371, and two counts of spoofing, in violation of CEA §§ 4c(a)(5)(C) and 9(a)(2), 7 U.S.C. §§ 6c(a)(5)(C) and 13(a)(2).

iii. The case went to trial in April 2019. At the close of the government's case, the district judge granted Thakkar's motion for judgement of acquittal on the conspiracy count,[291] but allowed the two spoofing counts to go to the jury.[292] The jury reached an impasse after less than two days of deliberation (ten of twelve jurors were in favor of acquittal), resulting in a mistrial.[293] Two weeks later, the judge granted the DOJ's motion to dismiss the indictment with prejudice, ending the case for good.[294]

iv. The CFTC also brought a civil enforcement action against Thakkar. *See C.F.T.C. v. Thakkar*, No. 18-cv-00619 (Jan. 28, 2018) (discussed below).

19. *United States v. Flotron*, No. 17-cr-00220 (D. Conn. Sept. 26, 2017) (superseding indictment filed Jan. 30, 2018)

i. By indictment dated September 26, 2017, Andre Flotron, a former senior trader of precious metals at UBS, was accused of placing manual

291 In his motion, Thakkar highlighted the fact that *both* supposed conspirators (Sarao and himself) denied that there was any agreement to spoof. *See* Motion for Judgement of Acquittal, at 11, *United States v. Thakkar*, No. 18-cr-00036 (Apr. 3, 2019), ECF No. 105. Sarao, a government cooperator, testified that he never used the word "spoofing" when communicating with Thakkar. *See id.* at 4 (quoting trial testimony). He also testified that Thakkar never told him that he "agreed to be part of a scheme to spoof the market" and that "he did not think [that Thakkar] was involved in committing a crime." *Id.*

292 *See* Minute Order, *United States v. Thakkar*, No. 18-cr-00036 (Apr. 4, 2019), ECF No. 110.

293 *See* Order, *United States v. Thakkar*, No. 18-cr-00036 (Apr. 9, 2019), ECF No. 119; Robert Channick, *Federal Spoofing Trial of Chicago Software Developer Ends in Hung Jury*, The Chicago Tribune, Apr. 9, 2019. Sarao testified at trial that he and he alone was responsible for all decisions related to those trades, and he alone decided whether to activate the "Back-of-Book" function while trading. *See* Motion for Judgement of Acquittal, at 1-2, 7-10, *United States v. Thakkar*, No. 18-cr-00036 (Apr. 3, 2019), ECF No. 105.

294 *See* Minute Order, *United States v. Thakkar*, No. 18-cr-00036 (Apr. 23, 2019), ECF No. 134.

spoof orders to create the false impression of supply and demand and thereby manipulate the prices of futures contracts traded on the COMEX. Flotron allegedly placed large orders for precious metals futures contracts "with the intent, at the time the orders were entered, to cancel before execution" to deceive market participants by "supplying materially misleading information about increased supply or demand," which "induced market participants to buy or to sell . . . futures contracts at prices and at times that they otherwise would not" have traded. According to the charges, this allowed Flotron to execute smaller orders at more favorable prices.

ii. In the superseding indictment, Flotron was charged with one count of conspiring to commit commodities fraud, in violation of 18 U.S.C. § 1349, three counts of commodities fraud, in violation of 18 U.S.C. § 1348, and three counts of spoofing, in violation of CEA §§ 4c(a)(5)(C) and 9(a)(2), 7 U.S.C. §§ 6c(a)(5)(C) and 13(a)(2).

iii. On February 19, 2018, the district court dismissed the six substantive counts for lack of venue, since the government charged Flotron in the District of Connecticut for alleged spoofing activity that admittedly did not take place in that district.[295] The case proceeded forward on the single count of conspiracy to commit commodities fraud, and the jury acquitted Flotron after a five-day trial.[296]

iv. The CFTC also filed a civil enforcement action against Flotron. *See C.F.T.C. v. Flotron,* No. 18-158 (Jan. 28, 2018) (discussed below).

20. *United States v. Liew,* No. 17-cr-0001 (N.D. Ill. May 24, 2017)

i. In an information dated May 24, 2017, David Liew, a former precious metals trader at Deutsche Bank, was accused of having participated in a multi-year conspiracy to defraud other market participants through spoofing. Among others, Liew allegedly conspired with James Vorley and Cedric Chanu, two other Deustche Bank traders who were separately charged (discussed above).

ii. Liew was charged with one count of conspiracy to commit spoofing and wire fraud affecting a financial institution, in violation of 18 U.S.C. § 371.

iii. Liew pled guilty to the information on June 1, 2017 pursuant to a plea agreement and agreed to cooperate with the government. Liew was called as a witness by the DOJ in the trial against Vorley and Chanu, who were convicted of certain counts and acquitted of others and who have not yet been sentenced. The DOJ has requested that the court delay Liew's sentencing hearing until after the sentencings of Vorley and Chanu.[297]

iv. The CFTC also brought a civil enforcement action against Liew. *See In re Liew*, CFTC No. 17-14 (June 2, 2017) (discussed below).

21. *United States v. Sarao,* No. 15-cr-00075 (N.D. Ill. Sept. 2, 2015)

i. Navinder Singh Sarao, a resident of the United Kingdom, was indicted on September 2, 2015 for having engaged in a "layering" scheme involving E-Mini S&P 500 futures contracts using trading software that he developed with the assistance of Edge Financial Technologies, Inc., a U.S.-based software engineering company owned by Jitesh Thakkar (who was separately charged, *see* above). The software allowed Sarao to simultaneously place numerous orders at different price points and automatically cancel those orders as the market approached those points and before they could be executed, so that Sarao could obtain more favorable pricing on trades that he did execute. Sarao implemented this strategy many times between 2010 and 2014, and his trading activity was alleged to have contributed to the May 6, 2010 "Flash Crash."

295 *See United States v. Flotron*, No. 17-cr-00220, 2018 WL 940554, at *3-4 (D. Conn. Feb. 19, 2018).
296 *See* P.J. Henning, *The Problem with Prosecuting 'Spoofing,'* N.Y. Times, May 3, 2018.
297 *See* Letter from Michael T. O'Neill and Cory E. Jacobs, on behalf of the United States and with the Defendant's Consent dated Dec. 10, 2020, ECF No. 79.

ii. Sarao was charged with wire fraud, in violation of 18 U.S.C. § 1343, commodities fraud, in violation of 18 U.S.C. § 1348, price manipulation, in violation of CEA § 9(a)(2), 7 U.S.C. § 13(a)(2), and spoofing, in violation of CEA §§ 4c(a)(5)(C) and 9(a)(2), 7 U.S.C. §§ 6c(a)(5)(C) and 13(a)(2).

iii. Following extradition, Sarao pled guilty, on November 9, 2016, to one count of wire fraud and one count of spoofing pursuant to a plea agreement in which he agreed to cooperate with the government (Sarao testified against Thakkar at trial, *see* above). On January 29, 2020, the District Judge sentenced Sarao to time served (he had spent approximately 120 days in a British prison pending extradition), due in large part to the fact that he suffers from autism. The court also ordered that Sarao be confined to his home for a one-year period of supervised release and forfeit $12,871,587.26.

iv. The CFTC also brought a civil enforcement action against Sarao. *See C.F.T.C. v. Nav Sarao Ltd. PLC*, No. 15-civ-03398 (N.D. Ill.) (discussed below).

22. *United States v. Milrud*, No. 15-455 (D.N.J. June 10, 2015)

i By information filed on June 10, 2015, the government accused Aleksandr Milrud, a stock trader who resided in both Canada and the United States, of recruiting many overseas traders to engage in layering and spoofing schemes in connection with the trading of equities, including stocks traded on the New York Stock Exchange, from January 2014 to January 2015. In addition, Milrud allegedly directed his overseas traders to cover up their spoofing and Milrud's involvement in it by using multiple trading accounts and working through third parties.

ii. Milrud was charged with conspiring to commit securities fraud, in violation of 18 U.S.C. § 371.

iii. Milrud pled guilty on September 11, 2015 pursuant to a plea agreement and the court entered a forfeiture judgment of $285,000 in December 2015. On April 24, 2020, the court sentenced Milrud to five years' probation, a $10,000 fine, and imposed a $100 special assessment.

iv. A parallel civil enforcement action was brought against Milrud by the SEC. *See S.E.C. v. Milrud*, No. 15-cv-00237 (D.N.J.) (Jan. 13, 2015) (discussed below).

23. *United States v. Coscia*, No. 14-cr-00551 (N.D. Ill. Oct. 1, 2014)

i. By indictment dated October 1, 2014, Michael Coscia, the manager and owner of Panther Energy Trading LLC, was alleged to have used an algorithm to place and then rapidly cancel large orders for futures contracts from August 2011 to October 2011, allowing him to buy lower (or sell higher) than was possible before the orders were entered. Coscia allegedly then reversed the strategy, selling contracts for a price higher than the price at which he bought them, or buying back contracts at a price lower than the price at which he sold them. The grand jury alleged that Coscia placed the large orders to confuse other market participants and induce them to react to his deceptive information.

ii. Coscia was indicted on six counts of commodities fraud, in violation of 18 U.S.C. § 1348, and six counts of spoofing, in violation of CEA §§ 4c(a)(5)(C) and 9(a)(2), 7 U.S.C. §§ 6c(a)(5)(C) and 13(a)(2).

iii. On November 3, 2015, a jury returned verdicts of guilty on all counts. Coscia was sentenced to three years in prison. His convictions were affirmed on appeal by the Seventh Circuit, and the U.S. Supreme Court declined to hear his case.

iv. The CFTC also brought a civil enforcement action against Coscia and Panther Energy. *See In re Panther Energy Trading LLC*, CFTC No. 13-26 (July 22, 2013) (discussed below).

B. CFTC Enforcement Cases

1. *In re Sunoco LP*, CFTC No. 20-75 (Sept. 30, 2020)

ii. On September 30, 2020, the CFTC settled spoofing charges against Sunoco LP, a limited partnership headquartered in Texas that distributes motor fuel. According to the Consent Order, Sunoco, by and through the acts of a former trader, engaged in spoofing gasoline,

heating and crude oil futures contracts traded on the NYMEX on a number of occasions from February 2014 to January 2015.

iii. The CFTC found that Sunoco engaged in spoofing in violation of CEA § 4c(a)(5)(C), 7 U.S.C. § 6c(a)(5)(C). Sunoco did not admit or deny the findings or conclusions set forth the in the CFTC's Order.[298]

iv. Sunoco was required to pay $450,000 in civil monetary penalties. The CFTC recognized Sunoco's remedial efforts and cooperation with the investigation in determining the appropriate outcome.

2. *In re Delovitch,* CFTC No. 20-71 (Sept. 30, 2020); *In re Johnson,* CFTC No. 20-72 (Sept. 30, 2020); *In re Kansal,* CFTC No. 20-73 (Sept. 30, 2020); *In re ARB Trading Group LP,* CFTC No. 20-74 (Sept. 30, 2020).

i. On September 30, 2020, the CFTC filed and settled cases against Brendan Delovitch, Wesley Johnson, Rajeev Kansal, and ARB Trading Group LP, a Chicago-based trading firm, for spoofing precious metals and agricultural futures contracts traded on the CME, COMEX, CBOT, and/or ICE. Depending on the individual, the conduct took place during various periods from 2017 to 2019. ARB was found to be vicariously liable, through two of its wholly-owned subsidiaries, for the conduct of the individuals.

ii. In all four Consent Orders, the CFTC found that the Respondents engaged in spoofing, in violation of CEA § 4c(a)(5)(C), 7 U.S.C. § 6c(a)(5)(C).

iii. The CFTC imposed a total of $745,000 in civil money penalties. Delovitch, Kansal, and Johnson were required to pay $100,000 each in civil monetary penalties and were suspended from trading on any CFTC-designated exchange for a period of time. ARB Trading was required to pay $445,000 in civil monetary penalties. All four Respondents were also ordered to cease and desist violating the CEA's spoofing prohibition.

iv. A parallel investigation was conducted by CME Group and ICE, resulting in disciplinary actions against Kansal, Johnson, Delovitch, and other individuals, as well as ARB Trading and certain subsidiaries of ARB (discussed below). This case marks the first time that a CFTC enforcement action was brought in parallel with actions by both ICE and CME Group.[299]

3. *C.F.T.C. v. Banoczay,* No. 20-cv-5777 (N.D. Ill. Sept. 29, 2020)

i. On September 29, 2020, the CFTC filed a complaint against Roman Banoczay Jr., Roman Banoczay Sr., and their company Bazur Spol. S.R.O., alleging that Banoczay Jr. (acting as the agent of Banoczay Sr. and Bazur Spol) spoofed crude oil futures contracts on CME Group exchanges during a one-month period in 2018.

ii. The CFTC alleges that the defendants engaged in spoofing, and employed a manipulative and deceptive device, scheme, or artifice, in violation of CEA §§ 4c(a)(5)(C) and 6(c)(1), 7 U.S.C. §§ 6c(a)(5)(C), 9(1) (2018), and Regulation 180.1(a)(1) and (3), 17 C.F.R. § 180.1(a)(1), (3) (2019). It also alleges that Banoczay Sr. and Bazur Spol are strictly liable for the underlying violations pursuant to 7 U.S.C. § 2(a)(1)(B) (2018) and 17 C.F.R. § 1.2. Among other forms of relief, the CFTC seeks civil monetary penalties, disgorgement, trading bans, and a permanent injunction against future violations. The case is ongoing.

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298 In a settlement on a neither-admit-nor-deny basis, the defendant (known as a respondent in agency proceedings) consents to the *issuance* of an order by the regulator, or the entry of a judgment by a court, that imposes sanctions and often contains findings by the regulator, including findings that the defendant/respondent has violated the law. The defendant/respondent expressly does not admit or deny the findings, despite consenting to their public dissemination. In addition, SEC and CFTC rules prohibit a defendant/respondent who enters into a neither-admit-nor-deny settlement from publicly denying or even factually undermining the agency's findings. 17 C.F.R. §202.5(e) (SEC Rule); 17 C.F.R. § Pt. 10, App. A (CFTC Rule).

299 *See* Press Release, CFTC Orders Chicago Prop Firm and 3 Traders to Pay $745,000 for Spoofing in Agricultural and Metal Futures (Sept. 30, 2020).

iii. Banoczay Jr. was previously the subject of a disciplinary action brought by the CME Group, Inc. on March 23, 2020 for the same underlying conduct. *See* CME Notice of Disciplinary Action NYMEX 18-0877-BC (discussed below).

4. *In re JPMorgan Chase & Co,* CFTC No. 20-69 (Sept. 29, 2020)

i. On September 29, 2020, the CFTC filed and settled charges against JPMorgan Chase & Company and certain subsidiaries for spoofing that took place, according to the CFTC, over a span of eight years and involved hundreds of thousands of spoof orders in precious metals futures contracts that were traded on the CME, NYMEX, and CBOT. The trading was allegedly undertaken by traders on JPMorgan's precious metals desk (including John Edmonds, Christian Trunz, Gregg Smith and others), as discussed in more detail in other sections of this Guide.

ii. In its Order, the CFTC found that Respondents engaged in spoofing, in violation of CEA § 4c(a)(5)(C), 7 U.S.C. §§ 6c(a)(5)(C), and both manipulation and attempted manipulation in violation of CEA §§ 6(c)(1), 6(c)(3), and 9(a)(2), 9(1), (3), 13(a)(2), and Regulations 180.1(a)(1) and (3), and 180.2, 17 C.F.R. §§ 180.1(a)(1), (3), 180.2, and that J.P. Morgan Securities failed to properly supervise its employees' conduct in violation of Regulation 166.3, 17 C.F.R. § 166.3. JPMorgan did not admit or deny any of the findings or conclusions in the Consent Order, except to the extent that findings were admitted in connection JPMorgan's criminal DPA (discussed above).

iii. Under the terms of the Consent Order, JPMorgan was required to pay a total of $920.2 million—specifically, $436,431,811 in civil monetary penalties, restitution in the amount of $311,737,008, and $172,034,790 in disgorgement. The Consent Order also provides, however, that the requirements to pay restitution and disgorgement will be offset by the amount of any criminal restitution or disgorgement made pursuant to the DPA executed with the DOJ. The CFTC found that JPMorgan's cooperation at the beginning of the investigation was unsatisfactory but recognized its substantial cooperation in the later stages.

iv. As noted, the DOJ brought parallel criminal charges against JPMorgan and various individuals based upon the same conduct outlined in the CFTC's Consent Order (discussed above and below). As discussed below, the CFTC has also lodged a civil enforcement action against certain former JPMorgan precious metals futures traders, whose alleged conduct forms the basis for the corporate resolution, including Michael Nowak and Gregg Smith.[300]

5. *In re Donino,* CFTC No. 20-68 (Sept. 28, 2020)

i. On September 28, 2020, the CFTC issued two orders settling spoofing allegations against Thomas Donino and his employer, FNY Partners Fund LP. Between January 2013 and January 2016, Donino placed multiple orders on the COMEX and NYMEX to trade soybean, crude oil, and or gold futures contracts, intending to cancel the orders before execution. Typically, he would place a small, genuine order on one side of the market and a larger, spoof order on the other side, and then quickly cancel the spoof order after the genuine order was filled.

ii. The CFTC found that Donino violated CEA § 4c(a)(5)(C), 7 U.S.C. § 6c(a)(5)(C), and that FNY Partners was vicariously liable for that violation.

iii. Donino was required to pay $135,000 in civil monetary penalties and was suspended from trading on any CFTC-designated exchange for three months. The CFTC ordered that FNY Partners pay $450,000 in civil monetary penalties. Both Donino and FNY were also ordered to cease and desist violating § 4c(a)(5)(C) of the CEA. Donino and FNY neither admitted nor denied the CFTC's findings.

300 *C.F.T.C. v. Nowak*, No. 19-cv-6163 (N.D. Ill. Sept. 16, 2019).

6. *In re Bank of Nova Scotia,* CFTC No. 20-27 (Aug. 19, 2020)

i. On August 19, 2020, the CFTC issued an order settling spoofing charges against the Bank of Nova Scotia ("BNS").

ii. According to the CFTC's Order, from January 2008 to January 2016, certain former BNS traders engaged in spoofing in relation to the trading of gold and silver futures contracts listed on the COMEX.

iii. The CFTC found that BNS, through its agents, violated CEA § 4c(a)(5)(C), 7 U.S.C. § 6c(a)(5)(C). The CFTC also found that BNS engaged in attempted manipulation in violation of CEA § 9(a)(2), 7 U.S.C. § 13(a)(2) and, for conduct occurring on or after August 15, 2011, CEA §6(c)(1) and Regulation 180.1(a)(1), and (3). BNS neither admitted nor denied the findings or conclusions set forth in the CFTC's Consent Order, except to the extent it did so in connection with the DPA it executed with the DOJ (described above).[301]

iv. BNS was ordered to pay $60.4 million, which was comprised of: (1) $6,622,190 in restitution; (2) $11,828,912 in disgorgement; and (3) $42 million in civil monetary penalties. Among other things, BNS was also required to retain an independent compliance monitor.

7. *In re Deutsche Bank Secs. Inc.,* CFTC No. 20-17 (June 18, 2020)

i. On June 18, 2020, the CFTC instituted and settled proceedings against respondent Deutsche Bank Securities Inc. ("DBSI"). The CFTC found that, from January 2013 to December 2013, two traders at DBSI "engaged in the disruptive practice of 'spoofing' . . . with respect to Treasury and/or eurodollar futures contracts" traded on the [CME]."

ii. The CFTC found that DBSI, through the acts of its traders, violated the CEA's anti-spoofing provision, CEA § 4c(a)(5)(C), 7 U.S.C. § 6(c)(a)(5)(C).

iii. Among other things, the Order required DBSI to pay a civil monetary penalty of $1.25 million plus post-judgement interest.

8. *In re Propex Derivatives Pty Ltd,* CFTC No. 20-12 (Jan. 21, 2020)

i. On January 21, 2020, the CFTC filed and settled charges against Propex, an Australian trading firm that engages in futures trading. The CFTC found that, from, July 2012 to March 2017, a Propex trader (Zhao) engaged in thousands of instances of spoofing on the CME.

ii. The CFTC found that Propex, by and through the acts of Zhao, violated the anti-spoofing statute, CEA § 4c(a)(5)(C), 7 U.S.C. § 6(c)(a)(5)(C). Propex neither admitted nor denied the CFTC's findings and conclusions, except to the extent already admitted by Propex in connection with its DPA, discussed above.

iii. In the settlement with the CFTC, Propex was ordered to pay $464,300 in restitution, $462,271 in civil monetary penalties, and $73,429 in disgorgement, and each amount could be offset by any payments to the DOJ of the same kind.

9. *In re Mirae Asset Daewoo Co.*, CFTC No. 20-11 (Jan. 13, 2020)

i. On January 13, 2020, the CFTC filed and settled charges against Mirae Asset Daewoo Co., Ltd. ("Mirae"), a brokerage and investment banking firm based in Korea. The CFTC found that, from December 2014 to April 2016, a trader at Daewoo Securities ("Daewoo") engaged in spoofing

301 In a related proceeding filed and settled on the same day, the CFTC accused BNS of making false and misleading statements to the CFTC, COMEX and NFA during the course of their initial investigation of the spoofing conduct at issue, including by misrepresenting and under-reporting the breadth and scope of the spoofing conduct. *See In re Bank of Nova Scotia*, CFTC No. 20-28 (Aug. 19, 2020). The CFTC found that BNS made false statements to the CFTC in violation of CEA § 6(c)(2), 7 U.S.C. § 6c(a)(5)(C), and false statements to the COMEX and NFA, in violation of CEA § 9(a)(4), 7 U.S.C. § 13(a)(4). BNS neither admitted nor denied the CFTC's findings or conclusions, except to the extent it already admitted the underlying facts pursuant to the DPA it executed with the DOJ. BNS was required to pay an additional $17 million for the false statements.

in relation to E-mini S&P 500 Index futures contracts traded on the CME. Mirae acquired Daewoo after the conduct in question.

ii. The CFTC found that Daewoo, by and through one of its traders, engaged in spoofing, in violation of CEA § 4c(a)(5)(C), 7 U.S.C. § 6(c)(a)(5)(C). Mirae, in turn, was liable as successor in interest to Daewoo. Mirae neither admitted nor denied the CFTC's findings and conclusions.

iii. The CFTC ordered Mirae to pay $700,000 in civil monetary penalties and acknowledged that Mirae's cooperation resulted in a reduced civil monetary penalty.

10. *In re Mitsubishi International Corp.*, CFTC No. 20-07 (Nov. 7, 2019)

i. On November 7, 2019, the CFTC filed and settled charges against Mitsubishi International Corporation ("Mitsubishi") based on findings that a trader at Mitsubishi engaged in spoofing in relation to precious metals futures contracts traded on the NYMEX from April 5, 2018 through April 13, 2018.

ii The CFTC found that Mitsubishi, by and through the acts of its trader, engaged in spoofing, in violation of CEA § 4c(a)(5)(C), 7 U.S.C. § 6(c)(a)(5)(C). Mitsubishi neither admitted nor denied the findings or conclusions set forth in the CFTC's Consent Order.

iii. Under the Order, Mitsubishi was required to pay $500,000 in civil monetary penalties plus post-judgment interest and to cease and desist from violating § 4c(a)(5)(C) of the CEA. The CFTC noted that Mitsubishi's cooperation and remediation resulted in a reduced penalty.

iv. The CME Group brought proceedings against Mitsubishi based on the same alleged conduct. *See Mitsubishi Corp. RTM Japan Ltd.*, NYMEX File No. 18-0921-BC (Nov. 7, 2019) (discussed below).

11. *In re Tower Research Capital LLC*, CFTC No. 20-06 (Nov. 6, 2019)

i. On November 6, 2019, the CFTC filed and settled charges against Tower Research, a New York-based limited liability company engaged in futures trading, among other things. The CFTC found that, from March 2012 to December 2013, Tower employed three traders (Kamaldeep Gandhi, Krishna Mohan, and Yuchun Mao) who engaged in numerous acts of spoofing in relation to E-mini futures contracts traded on the CME and CBOT.

ii. The CFTC found that Tower Research, by and through the acts of its traders, engaged in spoofing, in violation of CEA § 4c(a)(5)(C), 7 U.S.C. § 6(c)(a)(5)(C), and employed manipulative contrivances and deceptive acts, in violation of CEA § 6(c)(1), 7 U.S.C. § 9(1) and CFTC Regulation 180.1, 17 C.F.R. § 180.1. Tower neither admitted nor denied the CFTC's findings and conclusions, except to the extent already admitted by Tower in connection with the DPA it entered into with the DOJ, discussed above.

iii. Under the CFTC settlement, Tower Research was required to pay a $24.4 million civil money penalty, $10.5 million in disgorgement, and $32,593,849 in restitution, and was ordered to cease and desist further violations of the CEA. For each category of payment ordered the amount could be offset by any like payment made to the DOJ pursuant to the DPA. The CFTC noted that Tower's civil monetary penalty was reduced based on its cooperation.

iv. In addition, the CFTC found that disqualification under Rule 506(d)(l) of Regulation D of the SEC, 17 C.F.R. § 230.506(d)(l) (2019), should not arise as a result of the Commission's findings. (If certain prerequisites are satisfied, Rule 506 allows companies to issue securities without registering them with the SEC, subject to a "bad actor" exclusion.) In concurring opinions, two CFTC Commissioners disagreed with that part of the Order that did not automatically disqualify Tower Research as a "bad actor" under Rule 506.

12. *In re Belvedere Trading LLC*, CFTC No. 19-45 (Sept. 30, 2019)

i. On September 30, 2019, the CFTC issued an order simultaneously filing and settling charges

against Belvedere Trading LLC, a proprietary trading firm located in Chicago, Illinois, for engaging in acts of spoofing on hundreds of occasions in relation to E-Mini S&P 500 futures contracts. The CFTC found that two Belvedere traders engaged in such conduct between June 2014 and February 2015 as well as between October 2015 and November 2015.

ii. The CFTC concluded that Belvedere, by and through the acts of its traders, engaged in spoofing, in violation of CEA § 4c(a)(5)(C), 7 U.S.C. § 6c(a)(5)(C). The company neither admitted nor denied the Commission's findings or conclusions.

iii. Belvedere was assessed a $1.1 million civil monetary penalty and ordered to cease and desist from violating the CEA, as well as to maintain reasonably adequate procedures and controls to detect spoofing, among other things. The CFTC reduced Belvedere's monetary penalty because of its prompt resolution of the matter.

13. *In re Morgan Stanley Capital Group Inc.*, CFTC No. 19-44 (Sept. 30, 2019)

i. On September 30, 2019, the CFTC filed and settled administrative charges against Morgan Stanley Capital Group Inc. The CFTC found that Morgan Stanley, by and through the acts of one of its traders, engaged in the disruptive trading practice of spoofing on multiple occasions from November 2013 to November 2014 with respect to precious metals futures contracts traded on the COMEX.

ii. The CFTC found that Morgan Stanley engaged in spoofing, in violation of CEA §4c(a)(5)(C), 7 U.S.C. § 6c(a)(5)(C). The company neither admitted nor denied the Commission's findings or conclusions.

iii. Morgan Stanley was ordered to pay a $1.5 million civil money penalty, and to cease and desist from violating the CEA's spoofing prohibition. The Order acknowledged Morgan Stanley's "significant cooperation" with the CFTC's investigation, and noted that the cooperation as well as pro-active remediation resulted in a reduced money penalty.

14. *In re Mitsubishi Int'l Corp.*, CFTC No. 19-46 (Sept. 30, 2019)

i. On September 30, 2019, the CFTC filed and settled administrative charges against Mitsubishi International Corporation ("Mitsubishi"). The CFTC found that Mitsubishi, by and through the acts of one of its traders, engaged in multiple acts of spoofing with respect to silver and gold futures traded on the COMEX between April 2016 and January 2018.

ii. The CFTC found that Mitsubishi engaged in spoofing in " in violation of CEA § 4c(a)(5)(C), 7 U.S.C. § 6c(a)(5)(C). The company neither admitted nor denied the CFTC's findings or conclusions.

iii. Mitsubishi was ordered to pay a $400,000 civil monetary penalty and to cease and desist violating the CEA's anti-spoofing prohibition. Mitsubishi's monetary penalty was reduced due to the company's self-reporting and prompt remedial measures.

15. *In re Hard Eight Futures, LLC*, CFTC No. 19-30 (Sept. 30, 2019); *In re Igor Chernomzav*, CFTC No. 19-31 (Sept. 30, 2019)

i. On September 30, 2019, the CFTC filed and settled administrative charges against Hard Eight Futures, LLC ("Hard Eight") and Igor Chernomzav for spoofing in relation to the trading of E-mini S&P 500 futures contracts. The CFTC found that Chernomzav, the founder of Hard Eight, placed orders to create the false impression of buying and selling interest. As a result of these acts, which allegedly took place form March 2014 to March 2015, other market participants allegedly transacted at prices and quantities more favorable to Chernomzav and Hard Eight Futures.

ii. The CFTC found that the respondents engaged in spoofing in violation of CEA § 4c(a)(5)(C), 7 U.S.C.§ 6c(a)(5)(C), and employed manipulative contrivances and deceptive acts, in violation of CEA § 6(c)(1), 7 U.S.C. § 9(1) and CFTC Regulation 180.1, 17 C.F.R. § 180.1. The respondents neither admitted nor denied the CFTC's findings or conclusions.

iii. The CFTC ordered Hard Eight to pay $1.75 million and Chernomzav to pay $750,000. Additionally, Chernomzav was barred from trading in any CFTC regulated market for a nine-month period.

16. *In re Lawrence*, CFTC No. 19-27 (Sept. 16, 2019)

i. On September 16, 2019, the CFTC issued an order simultaneously commencing and settling charges against John Lawrence, a trader at Heraeus Metals New York LLC. The CFTC found that Lawrence engaged in spoofing in relation to silver and gold futures traded on the COMEX from May 2017 to January 2018. Lawrence's trading pattern typically involved first placing a one lot order on one side of the market as a genuine order. Next, Lawrence allegedly would place a larger order—about 20 lots—on the other side of the market that he cancelled before execution. This practice induced other market participants to fill his genuine orders.

ii. The CFTC found that Lawrence engaged in spoofing, in violation of CEA § 4c(a)(5)(C), 7 U.S.C. § 6c(a)(5)(C), though Lawrence neither admitted nor denied the Commission's findings and conclusions.

iii. The CFTC ordered Lawrence to pay a $130,000 civil monetary penalty. Lawrence was also suspended from trading on any CFTC-designated exchange for a period of four months and was ordered to cease and desist violating the CEA's anti-spoofing provision.

17. *In re Heraeus Metals New York LLC*, CFTC No. 19-28 (Sept. 16, 2019)

i. By order dated September 16, 2019, the CFTC filed and simultaneously settled charges against Heraeus Metals New York LLC ("Heraeus Metals"), based on the spoofing conduct of its employee, John Lawrence (who was separately charged by the CFTC, *see* immediately above).

ii. The CFTC found that Heraeus Metals, by and through the acts of Lawrence, engaged in spoofing, in violation of § 4c(a)(5)(C) of the CEA, 7 U.S.C. § 6c(a)(5)(C).

iii. Heraeus—which was ordered to pay a $900,000 civil money penalty—neither admitted nor denied the findings and conclusions of the Commission.

18. *C.F.T.C. v. Nowak*, No. 19-cv-6163 (N.D. Ill. Sept. 16, 2019)

i. By complaint filed in the Northern District of Illinois on September 16, 2019, the CFTC commenced a civil enforcement action against Michael Nowak and Gregg Smith, former JPMorgan traders who were also criminally charged with spoofing-related conduct on August 22, 2019 (*see* above). In summary, the CFTC complaint alleges that, from at least 2008 through at least 2015, while placing orders for and trading precious metals futures contracts on CME exchanges, Nowak and Smith repeatedly engaged in manipulative and/or deceptive acts and practices by spoofing.

ii. The CFTC alleges that Smith and Nowak engaged in spoofing, in violation of CEA § 4c(a)(5)(C), 7 U.S.C. § 6c(a)(5)(C), employed manipulative contrivances and deceptive acts, in violation of CEA § 6(c)(1), 7 U.S.C. § 9(1) and CFTC Regulation 180.1, 17 C.F.R. § 180.1, and manipulated and attempted to manipulate the price of a commodity, in violation of CEA § 9(a)(2), 7 U.S.C. § 13(a)(2).

iii. The CFTC is seeking civil monetary penalties, disgorgement, restitution, and an injunction permanently barring the defendants from trading commodities, among other equitable remedies. Discovery is currently stayed pending the outcome of the parallel criminal case (discussed above).

19. *In re Trunz*, CFTC No. 19-26 (Sept. 16, 2019)

i. On September 16, 2019, the CFTC filed and settled administrative charges against Christian Trunz, based on the same spoofing conduct that formed the basis for criminal charges against Trunz, to which he pled guilty on August 20, 2019 (*see* above).

ii. The CFTC found that Trunz engaged in spoofing, in violation of CEA § 4c(a)(5)(C), 7 U.S.C. § 6c(a)(5)(C). Trunz admitted the findings and conclusions of the Commission.

iii. The September 16, 2019 CFTC Order recognizes that Trunz entered into a formal cooperation agreement with the CFTC and requires the respondent to cease and desist any and all violations of the CEA. The CFTC reserved any determination on monetary sanctions given that Trunz's cooperation was ongoing at the time of settlement.

20. *In re Cox*, CFTC No. 19-18 (July 31, 2019)

i. On July 31, 2019, the CFTC filed and settled charges against Benjamin Cox, a self-employed trader who had been registered with the CFTC as a floor broker since 1994, for engaging in spoofing with respect to E-mini S&P 500 and E-mini Nasdaq 100 futures contracts traded on the CME.

ii. The CFTC found that, from April 2014 until at least February 2018, Cox engaged in spoofing in violation of CEA § 4c(a)(5)(C), 7 U.S.C. § 6c(a)(5)(C). Cox neither admitted nor denied the findings of the Commission.

iii. Pursuant to the July 31, 2019 Order, Cox was required to pay a $150,000 civil monetary penalty and was suspended from trading for three months. The CFTC indicated that Cox's early resolution of the matter resulted in reduced sanctions.

21. *In re Flaum*, CFTC No. 19-15 (July 25, 2019)

i. In an order dated July 25, 2019, the CFTC filed and settled administrative charges against Corey Flaum based on the same spoofing conduct that formed the basis for the criminal charges against Flaum, to which he pled guilty on July 25, 2019 (*see* above).

ii. With respect to conduct that took place on or after July 16, 2011, the CFTC found that Flaum engaged in spoofing, in violation of CEA § 4c(a)(5)(C), 7 U.S.C. § 6c(a)(5)(C). The CFTC also found that Flaum employed manipulative and deceptive devices, in violation of CEA § 6(c)(1), 7 U.S.C. § 9(1), for conduct that occurred on or after August 15, 2011. Finally, for conduct occurring from 2007 to 2016, the CFTC found that Flaum manipulated or attempted to manipulate the price of a commodity, in violation of CEA § 9(a)(2), 7 U.S.C. § 13(a)(2), and Regulation 180.1(a)(1) and (3), 17 C.F.R. §§ 180.1(a)(1), (3). Flaum admitted the facts found by the Commission and acknowledged that he violated the CEA.

iii. Pursuant to the July 25, 2019 Order, Flaum agreed and is required, among other things, to cooperate with the CFTC's investigation and cease and desist from violating CEA §§ 4c(a)(5)(C) and 6(c)(1). The CFTC reserved its decision with respect to monetary sanctions given that Flaum's cooperation was continuing at the time of settlement.

22. *In re Edmonds*, CFTC No. 19-16 (July 25, 2019)

i. By order dated July 25, 2019, the CFTC filed and settled charges against John Edmonds based on the same spoofing conduct that formed the basis for criminal charges against Edmonds, to which he pled guilty on October 9, 2018 (*see* above).

ii. The CFTC found that Edmonds engaged in price manipulation, in violation of CEA § 9(a)(2), 7 U.S.C. § 13(a)(2). For conduct that occurred on or after July 16, 2011, the CFTC found that Edmonds engaged in spoofing, in violation of CEA § 4c(a)(5)(C), 7 U.S.C. § 6c(a)(5)(C). For conduct that occurred on or after August 15, 2011, the Commission found, among other things, that Edmonds employed manipulative contrivances and deceptive acts, in violation of CEA § 6(c)(1), 7 U.S.C. § 9(1) and CFTC Regulation 180.1, 17 C.F.R. § 180.1. Edmonds admitted the CFTC's factual findings and acknowledged that he violated the CEA.

iii. The CFTC Order requires Edmonds to cease and desist his violations of the CEA and CFTC regulations, and to cooperate with the CFTC Division of Enforcement. The CFTC reserved any determination on monetary sanctions given that Edmond's cooperation was ongoing at the time of settlement.

23. *In re Merrill Lynch Commodities, Inc.*, CFTC No. 19-07 (June 25, 2019)

i. By order dated June 25, 2019, the CFTC instituted and settled spoofing-related charges against

Merrill Lynch Commodities, Inc., which had entered into an NPA with the DOJ that same day, under which it agreed to pay $25 million, among other things (*see* above). Like the criminal matter, the CFTC action is in large part based on the conduct of Edward Bases and John Pacilio, both of whom currently face criminal charges in the Northern District of Illinois (*see* above).

ii. For conduct occurring before August 15, 2011, the CFTC found that Merrill Lynch, by and through the acts of its former employees, manipulated and/or attempted to manipulate the price of commodities, in violation of CEA § 9(a)(2), 7 U.S.C. § 13(a)(2) (2009 version). For conduct that took place on or after August 15, 2011, the CFTC found that Merrill Lynch engaged in spoofing, in violation of CEA § 4c(a)(5)(C), 7 U.S.C. § 6c(a)(5)(C), and engaged in price manipulation and employed manipulative contrivances and deceptive acts, in violation of CEA §§ 6(c)(1) and (3), 7 U.S.C. § 9(1) and (3) and CFTC Regulations 180.1 and 180.2, 17 C.F.R. §§ 180.1 and 180.2.

iii. Pursuant to the June 25 Order, Merrill Lynch was required to pay $11.5 million as a civil monetary penalty (in addition to the $25 million criminal penalty). Additionally, it was ordered to pay $11.1 million in disgorgement and $2,364,585 in restitution (both of which could be fully offset by amount paid under DOJ agreement). Merrill Lynch must also cooperate with the CFTC in matters related to the underlying conduct associated with this action. Merrill Lynch neither admitted nor denied any of the CFTC's findings or conclusions, unless already admitted pursuant to its non-prosecution agreement with the DOJ (discussed above). The CFTC noted that Merrill's cooperation resulted in a substantially reduced penalty.

24. *In re Mohan*, CFTC No. 19-06 (Feb. 25, 2019)

i. By order dated February 25, 2019, the CFTC commenced and settled administrative charges against Krishna Mohan, based upon the same spoofing conduct that resulted in criminal charges against Mohan, as to which he pled guilty on November 6, 2018 (*see* above).

ii. The CFTC found that Mohan engaged in spoofing, in violation of CEA § 4c(a)(5)(C), 7 U.S.C. § 6(a)(5)(C), and employed manipulative contrivances and deceptive acts, in violation of CEA § 6(c)(1), 7 U.S.C. § 9(1) and CFTC Regulation 180.1, 17 C.F.R. § 180.1. Mohan admitted the Commission's findings and acknowledged that he violated the CEA.

iii. As part of his settlement, Mohan agreed to cooperate with the CFTC and was ordered to cease and desist violating the relevant provisions of the CEA. He was also banned from trading in CFTC-regulated markets for a three-year period. The CFTC reserved any determination on monetary sanctions given that Mohan's cooperation was ongoing at the time of settlement.

25. *In re Crepeau*, CFTC No. 19-05 (Jan. 31, 2019)

i. By order dated January 31, 2019, the CFTC filed and settled charges against Kevin Crepeau, a trader at a firm in Chicago. The CFTC found that Crepeau engaged in spoofing in relation to the trading of soybean futures contracts on the CME between August 2013 and June 2016. Crepeau used automated tools to place genuine orders opposite spoof orders.

ii. The CFTC found that Crepeau engaged in spoofing, in violation of CEA § 4c(a)(5)(C), 7 U.S.C. § 6c(a)(5)(C). Crepeau neither admitted nor denied the CFTC's findings and conclusions.

iii. The CFTC ordered Crepeau to pay a $120,000 civil monetary penalty and imposed a four-month suspension on Crepeau from trading on all registered entities and all commodities interests.

26. *In re Gandhi*, CFTC No. 19-01 (Oct. 11, 2018)

i. By order dated October 11, 2018, the CFTC instituted and settled charges against Kamaldeep Gandhi based on the same spoofing conduct that formed the basis for criminal charges against Gandhi, to which he pled guilty on November 2, 2018 (*see* above).

ii. The CFTC found that Gandhi engaged in spoofing, in violation of CEA § 4c(a)(5)(C), 7 U.S.C. § 6c(a)(5)(C), and that he employed manipulative contrivances and deceptive acts, in violation of CEA § 6(c)(1), 7 U.S.C. § 9(1) and CFTC Regulation 180.1, 17 C.F.R. § 180.1. Gandhi admitted the CFTC's factual findings and acknowledged that he violated the CEA.

iii. The settlement order requires Gandhi to cease and desist further violations of the CEA and CFTC regulations, bans him from trading activities in CFTC-regulated markets, and requires him to cooperate with the CFTC's investigations. The CFTC reserved any determination on monetary sanctions given that Gandhi's cooperation was ongoing at the time of settlement.

27. *In re the Bank of Nova Scotia,* CFTC No. 18-50 (Sept. 28, 2018)

i. The CFTC simultaneously filed and settled charges against BNS on September 28, 2018. The CFTC found that BNS, by and through the acts of former traders who worked on the precious metals desk—including Corey Flaum, who pled guilty on July 25, 2019—had engaged in multiple acts of spoofing in gold and silver futures contracts traded on the CME. The conduct occurred for a three-year period—from June 2013 until June 2016.

ii. The CFTC found that BNS engaged in spoofing, in violation of CEA § 4c(a)(5)(C), 7 U.S.C. § 6c(a)(5)(C). The bank neither admitted nor denied the findings or conclusions of the CFTC.

iii. Among other things, BNS was ordered to: (1) pay an $800,000 civil monetary penalty; (2) cease and desist violations of the CEA; and (3) cooperate with the Commission's investigation. The CFTC acknowledged that the bank had notified the CFTC promptly when it became aware of the misconduct. The CFTC also noted that this cooperation resulted in a substantially reduced civil monetary penalty. As described above, however, it was later determined by the CFTC that BNS had not accurately revealed the true nature and scope of the wrongful conduct and was not forthright with the CFTC during the course of the initial investigation. As a result, BNS was the subject of additional civil enforcement efforts in August 2020 (as well as criminal charges), resulting in significantly increased money penalties for spoofing and new penalties for false and misleading statements to the CFTC, COMEX, and the NFA (in addition to criminal enforcement by the DOJ) (discussed above).

28. *In re Mizuho Bank Ltd.,* CFTC No. 18-38 (Sept. 21, 2018)

i. The CFTC filed and settled administrative charges against Mizuho Bank on September 21, 2018. The CFTC found that Mizuho Bank engaged in spoofing in a variety of futures contracts traded on the CME and CBOT. The conduct occurred from May 2016 to May 2017 and was undertaken by a Mizuho employee who accessed the trading platform from the bank's Singapore office.

ii. The CFTC found that Mizuho Bank, by and through the acts of its trader, engaged in spoofing, in violation of CEA § 4c(a)(5)(C), 7 U.S.C. § 6c(a)(5)(C). Mizuho neither admitted nor denied the findings or conclusions of the Commission.

iii. The September 21, 2018 order required, among other things, that Mizuho: (1) pay a $250,000 civil monetary penalty; (2) cease and desist violations of the CEA; and (3) cooperate with the Commission's investigation. The CFTC noted that the Bank's cooperation resulted in a significantly reduced penalty.

29. *In re Geneva Trading USA, LLC,* CFTC No. 18-37 (Sept. 20, 2018)

i. On September 20, 2018, the CFTC filed and simultaneously settled charges against Geneva Trading USA, LLC ("Geneva Trading"). The CFTC found that—from January to December 2013, and again from June 2015 to October 2016—three traders at Geneva Trading had engaged in spoofing in relation to a variety of futures contracts traded on the CME.

ii. The CFTC concluded that Geneva Trading, by and through the acts of its traders, engaged in spoofing, in violation of CEA § 4c(a)(5)(C), 7 U.S.C. § 6c(a)(5)(C). Geneva Trading neither admitted nor denied the CFTC's findings or conclusions.

iii. Among other things, Geneva Trading was ordered to: (1) pay a $1.5 million civil monetary penalty; (2) cease and desist from violating the CEA; and (3) cooperate with the Commission's investigation. The CFTC stated that Geneva's early resolution of the issues resulted in a reduced civil monetary penalty.

30. *In re Victory Asset Inc.*, CFTC No. 18-36 (Sept. 19, 2018); *In re Michael D. Franko*, CFTC No. 18-35 (Sept. 19, 2018)

i. On September 19, 2018, the CFTC filed and settled two related administrative actions, one against Victory Asset Inc., and the other against Michael Franko, a New Jersey-based trader and the former Director of Commodities trading at the predecessor to Victory Asset. The CFTC found that Franko engaged in spoofing in both domestic and international markets from May 2013 until July 2014. The scheme involved cross-market spoofing, whereby Franko engaged in spoofing in one market to benefit a position in another market.

ii. The CFTC found that Franko engaged in spoofing, in violation of CEA § 4c(a)(5)C), 7 U.S.C. § 6c(a)(5)(C), and employed manipulative contrivances and deceptive acts, in violation of CEA § 6(c)(1), 7 U.S.C. § 9(1) and CFTC Regulation 180.1, 17 C.F.R. § 180.1. In addition, the Commission found that Victory Asset was liable for Frank's actions on a vicarious liability theory. Victory Asset and Franko neither admitted nor denied the Commission's findings and conclusions.

iii. Franko was ordered to pay a civil monetary penalty of $500,000, and Victory was required to pay a $1.8 million penalty. Both were also ordered to cease and desist violating CEA §§ 4c(a)(5)(C) and 6(c)(1) and related regulations.

31. *In re Singhal*, CFTC No. 18-11 (Apr. 9, 2018)

i. The CFTC filed and simultaneously settled charges against Anuj Singhal on April 9, 2018. The CFTC found that Anuj Singhal, a registered floor broker, engaged in spoofing through manually trading wheat futures on the CME markets from March to June 2016.

ii. The CFTC found that Singhal engaged in spoofing, in violation of CEA § 4c(a)(5)(C), 7 U.S.C. § 6c(a)(5)(C), but Singhal neither admitted nor denied the Commission's findings or conclusions.

iii. Singhal was ordered to pay a $150,000 civil monetary penalty and was suspended from trading for four months. As a result of his conduct, Singhal was also the subject of a CME disciplinary action, which resulted in a $60,000 fine, among other things.

32. *In re UBS AG*, CFTC No. 18-07 (Jan. 29, 2018)

i. The CFTC filed and settled charges against UBS AG on January 29, 2018. The CFTC found that from January 2008 until at least December 2013, certain UBS precious metals traders engaged in spoofing and attempted manipulation in relation to precious metals futures contracts traded on the COMEX.

ii. For conduct occurring prior to August 15, 2011, the CFTC found that UBS AG, by and through the acts of its traders, attempted to manipulate prices, in violation of CEA § 9(a)(2), 7 U.S.C. § 13(a)(2), and CEA §§ 6(c) and (d), 7 U.S.C. §§ 9 and 13b. For conduct occurring after August 15, 2011, the CFTC found that UBS AG, by and through the acts of its traders, attempted to manipulate prices in violation of CEA §§ 6(c)(1), 6(c)(3) and 6(d), 7 U.S.C. §§ 9(1), 9(3), 13b and Regulations 180.1 and 180.2, 17 C.F.R. § 180.1, 180.2. The CFTC also found that UBS AG engaged in spoofing, in violation of CEA § 4c(a)(5)(C), 7 U.S.C. § 6c(a)(5)(C). UBS AG neither admitted nor denied the Commission's findings or conclusions.

iii. Among other things, the CFTC imposed a $15,000,000 civil monetary penalty, which, according to the CFTC, accounted for UBS's self-reporting and cooperation, which resulted in a substantially reduced penalty.

33. *In re Deutsche Bank AG*, CFTC No. 18-06 (Jan. 29, 2018)

i. The CFTC filed and settled charges against Deutsche Bank AG and Deutsche Bank

Securities Inc. (collectively, "Deutsche Bank") on January 29, 2018. The CFTC found that, from 2008 to 2014, certain former precious metals traders at Deutsche Bank schemed to manipulate the price of precious metals futures by employing a variety of manual spoofing techniques. One such trader, David Liew, pled guilty on June 1, 2017 (*see* above). In a split verdict, two other such traders—James Vorley and Cedric Chanu—were convicted of wire fraud (based on spoofing) on September 25, 2020.

ii. For conduct occurring prior to August 15, 2011, the CFTC found Deutsche Bank, by and through the acts of its employees, manipulated and attempted to manipulate the price of precious metals futures contracts, in violation of CEA § 9(a)(2), 7 U.S.C. § 13(a)(2), and CEA §§ 6(c) and (d), 7 U.S.C. §§ 9 and 13b (2009 version). For conduct occurring on or after August 15, 2011, the CFTC found that Deutsche Bank, by and through the acts of its employees, employed manipulative contrivances and deceptive acts, in violation of CEA § 6(c)(1), 7 U.S.C. § 9(1) and CFTC Regulation 180.1, 17 C.F.R. § 180.1, and manipulated and attempted to manipulate the price of commodities, in violation of CEA § 6(c)(3), 7 U.S.C. § 9(3), and CFTC Rule 180.2, 17 C.F.R. § 180.2. Deutsche Bank also failed to properly supervise, in violation of 17 C.F.R. § 166.3. It neither admitted nor denied the findings and conclusions of the Commission.

iii. Among other things, Deutsche Bank was ordered to pay a $30 million civil monetary penalty and cooperate with the CFTC's investigation. According to the Commission, the penalty amount was significantly reduced due to Deutsche Bank's cooperation and remedial efforts.

34. *In re HSBC Secs. (USA) Inc.*, CFTC No. 18-08 (Jan. 29, 2018)

i. The CFTC filed and settled charges against HSBC Securities (USA) Inc. ("HSBC USA"), on January 29, 2018. The CFTC found that one of HSBC USA's New York traders engaged in spoofing, from 2011 to 2014, in relation to certain futures products in gold and other precious metals traded on the COMEX.

ii. The CFTC found that HSBC USA, by and through the acts of one of its traders, engaged in spoofing, in violation of CEA § 4c(a)(5)(C), 7 U.S.C. § 6c(a)(5)(C). HSBC neither admitted nor denied the Commission's findings or conclusions.

iii. Among other things, HSBC was ordered to pay a civil monetary penalty of $1.6 million, to cease and desist from violating the CEA, and to cooperate with the Commission's investigation. The CFTC noted that HSBC's cooperation and remediation resulted in a reduced penalty.

35. *C.F.T.C. v. Thakkar,* No. 18-cv-00619 (N.D. Ill. Jan. 28, 2018)

i. In a complaint dated January 28, 2018, the CFTC accused Thakkar of developing a custom software that aided Navinder Sarao in spoofing-related activities. The CFTC's civil allegations hinge on whether Thakkar intended to develop software program for the purpose of aiding and abetting Sarao's spoofing scheme.

ii. The CFTC charged that Thakkar engaged in spoofing, in violation of CEA § 4c(a)(5)(C), 7 U.S.C. § 6(a)(5)(C), and employed manipulative contrivances and deceptive acts, in violation of CEA § 6(c)(1), 7 U.S.C. § 9(1) and CFTC Regulation 180.1, 17 C.F.R. § 180.1.

iii. While Thakkar prevailed on all criminal charges (*see* above), the CFTC went forward with a civil enforcement action.

iv. On August 13, 2020, the Court filed a Consent Order against Edge Financial Technologies, permanently enjoining Edge from providing computer programming services in connection with trading in CFTC-regulated markets for a two-year period. The Order also required Edge to pay disgorgement in the amount of $25,200 and a civil monetary penalty of $48,400.

v. Given the Consent Order against Edge Financial, the Court entered an Agreed Order of Dismissal on September 14, 2020, dismissing all claims against Thakkar with prejudice.

36. *C.F.T.C. v. Zhao,* No. 18-cv-00620 (N.D. Ill. Jan. 28, 2018)

i. In a civil complaint filed in the Northern District of Illinois in January 2018, the CFTC alleges that Jiongsheng Zhao, an Australian commodities trader who worked at Propex, carried out a spoofing scheme designed to reap financial benefits for himself and his firm. He is accused of spoofing 3,100 times during from July 2012 to March 2017 in relation to E-Mini S&P futures traded on the CME. These civil allegations are based on the same facts that form the basis of criminal accusations against Zhao, to which he pled guilty on December 26, 2018 (*see* above).

ii. The CFTC's complaint alleges that Zhao engaged in spoofing, in violation of CEA § 4c(a)(5)(C), 7 U.S.C. § 6c(a)(5)(C), and employed manipulative contrivances and deceptive acts, in violation of CEA § 6(c)(1), 7 U.S.C. § 9(1) and CFTC Regulation 180.1, 17 C.F.R. § 180.1.

iii. The CFTC seeks relief in the form of civil monetary penalties, disgorgement, trading and registration bans, and a permanent injunction against further violations of the federal commodities laws. A Joint Status Report was submitted by Zhao on July 23, 2020, indicating that the parties were engaged in settlement discussions.

37. *C.F.T.C. v. Flotron,* No. 18-cv-158 (D. Conn. Jan. 26, 2018)

i. In a complaint filed in January 2018, the CFTC alleged that Andre Flotron—a former precious metals trader at UBS—engaged in spoofing from 2008 to 2013 in connection with precious metals commodities futures traded on the COMEX. This civil enforcement action was premised on essentially the same facts that formed the basis of criminal accusations against Flotron, as to which he was acquitted on April 25, 2018 (*see* above).

ii. The CFTC alleged that Flotron engaged in spoofing, in violation of CEA § 4c(a)(5)(C), 7 U.S.C. § 6c(a)(5)(C), and employed manipulative contrivances and deceptive acts, in violation of CEA § 6(c)(1), 7 U.S.C. § 9(1) and CFTC Regulation 180.1, 17 C.F.R. § 180.1. Flotron neither admitted nor denied the Commission's findings or conclusions.

iii. The action was resolved by Final Judgment and Consent Order, which was agreed among the parties and signed by the District Court on February 5, 2019 (the "Consent Order"). Among other things, the Consent Order required Flotron to pay a $100,000 civil money penalty, restrains him from trading on any registered entity for a period of one year, and permanently prohibits Flotron from engaging in spoofing or other manipulative, fraudulent, or deceitful conduct in connection with the sale of commodities.

38. *C.F.T.C. v. Vorley,* No. 18-cv-00603 (N.D. Ill. Jan. 26, 2018)

i. By civil complaint filed on January 26, 2018 in the Northern District of Illinois, the CFTC alleged that James Vorley and Cedric Chanu—two former traders at Deutsche Bank—engaged in spoofing on the COMEX in relation to the trading of precious metals futures contracts and did so from May 2008 to July 2013. These civil allegations are based on the same nucleus of alleged facts that form the basis of criminal accusations against the two defendants (*see* above).

ii. The CFTC alleges that the defendants engaged in spoofing, in violation of CEA § 4c(a)(5)(C), 7 U.S.C. § 6c(a)(5)(C), and employed manipulative contrivances and deceptive acts, in violation of CEA § 6(c)(1), 7 U.S.C. § 9(1) and CFTC Regulation 180.1, 17 C.F.R. § 180.1.

iii. The CFTC is seeking monetary penalties, disgorgement, and an order permanently enjoining the defendants from engaging in any future violations of the CEA and/or CFTC Regulations. At the request of the DOJ, the Court stayed the civil enforcement action pending the outcome of the criminal trial. As noted, the defendants were convicted on September 25, 2020, and the DOJ asked that the stay continue pending post-judgment motion practice and sentencing in the criminal matter.

39. *In re Arab Global Commodities DMCC,* CFTC No. 18-01 (Oct. 10, 2017)

i. On October 10, 2017, the CFTC settled charges against Arab Global Commodities, a trading firm in Dubai, for spoofing by one of its traders in relation to copper futures contracts traded on the COMEX between March and August 2016.

ii The CFTC found that Arab Global Commodities, through its trader, engaged in spoofing in violation of CEA § 4c(a)(5)(C), 7 U.S.C. § 6c(a)(5)(C). Arab Global did not admit or deny the findings in the CFTC's Order.

iii. The Consent Order requires Arab Global to pay $300,000 in civil monetary penalties, plus post-judgment interest, among other things.

40. *In re Logista Advisors LLC,* CFTC No. 17-29 (Sept. 29, 2017)

i. By order dated September 29, 2017, the CFTC simultaneously initiated and settled spoofing-related claims against Logista Advisors LLC ("Logista"), a crude-oil trading firm based in Houston, Texas. The CFTC found that an employee responsible for the trading of crude oil futures had engaged in spoofing as a result of inadequate training, direction and supervision. As such, the CFTC found that Logista had failed to diligently supervise its employees.

ii. The CFTC found that Logista violated CFTC Regulation 166.3, 17 C.F.R. § 166.3, which imposes an affirmative duty on registrants like Logista to supervise their employees and implement adequate compliance programs. Logista neither admitted nor denied the Commission's findings and conclusions.

iii. Logista was ordered to pay a $250,000 civil monetary penalty and to cease and desist from violating the CFTC Regulation associated with diligent supervision.

41. *In re Posen,* CFTC No. 17-20 (July 26, 2017)

i. In an order filed on July 26, 2017, the CFTC filed and settled administrative charges against Simon Posen. From 2011 to 2015, Posen allegedly engaged in thousands of incidents of spoofing with respect to crude oil futures contracts traded on the NYMEX, and gold, silver, and copper futures contracts traded on the COMEX. Posen was based in New York City and traded from his home.

ii. The CFTC found that Simon Posen engaged in spoofing, in violation of CEA § 4c(a)(5)(C), 7 U.S.C. § 6c(a)(5)(C). Posen neither admitted nor denied the Commission's findings and conclusions.

iii. Posen was ordered to pay a $635,000 civil money penalty and to cease and desist from violating the CEA's prohibition against spoofing. Posen was also permanently banned from trading in any CFTC regulated market and from applying for registration or claiming exemption from registration with the CFTC.

42. *In re Liew,* CFTC No. 17-14 (June 2, 2017)

i. In an order dated June 2, 2017, the CFTC initiated and settled charges against David Liew, a former precious metals trader at Deutsche Bank. The CFTC found that Liew engaged, along with other traders at Deutsche Bank, in numerous acts of spoofing, and actual and/or attempted manipulation, of the gold and silver futures markets. The civil allegations were based on the same facts that formed the basis for criminal charges against Liew, to which he pled guilty on June 12, 2017 (*see* above).

ii. For conduct occurring prior to August 15, 2011, the CFTC found that Liew had manipulated and attempted to manipulate the price of precious metals futures contracts, in violation of CEA § 9(a)(2), 7 U.S.C. § 13(a)(2), and CEA §§ 6(c) and (d), 7 U.S.C. §§ 9 and 13b (2009). For conduct occurring on or after July 16, 2011, the CFTC found that Liew engaged in spoofing, in violation of in violation of CEA § 4c(a)(5)(C), 7 U.S.C. § 6c(a)(5)(C). For conduct occurring on or after August 15, 2011, the CFTC found that Liew: (1) employed manipulative contrivances and deceptive acts, in violation of CEA § 6(c)(1), 7 U.S.C. § 9(1) and CFTC Regulation 180.1, 17 C.F.R. § 180.1; and (3) manipulated and attempted to manipulate the price of commodities, in violation of CEA § 6(c)(3), 7 U.S.C. § 9(3), and CFTC Rule 180.2, 17 C.F.R.

§ 180.2, among other charges. Liew admitted that the facts alleged by the Commission were true and accurate, and conceded that he had violated the CEA.

iii. Under the June 2, 2017 Order, Liew agreed to cooperate with the Commission's investigation, and was permanently banned from trading commodity interests. No civil monetary penalty was imposed, subject to the CFTC's right to revisit that issue in the event that Liew provides false information or otherwise violates the terms of his cooperation.

43. *In re Gola,* CFTC No. 17-12 (Mar. 30, 2017); *In re Brims,* CFTC No. 17-13 (Mar. 30, 2017)

i. In two separate, but related, orders dated March 30, 2017, the CFTC initiated and settled administrative charges against Stephen Gola and Jonathon Brims, two former traders at Citigroup Global Markets, Inc. The CFTC found that Gola and Brims engaged in spoofing more than 1,000 times in various CME U.S. Treasury futures products from July 2011 to December 2012. The spoofing scheme allegedly involved placing bids of 1,000 or more lots with intent to cancel the orders before execution. The CFTC also accused the two respondents of coordinating with other Citigroup traders on the U.S. Treasury Desk to help implement their spoofing strategy.

ii. The CFTC found that Gola and Brims engaged in spoofing, in violation of CEA § 4c(a)(5)(C), 7 U.S.C. § 6c(a)(5)(C). Neither respondent admitted or denied the Commission's findings or conclusions.

iii. Both Settlement Orders required each respondent to pay a civil money penalty (Gola $350,000, and Brims $200,000). In addition, both Gola and Brims were banned from trading in the futures markets for six months following their respective penalty payments and ordered to cease and desist from violating the CEA anti-spoofing provision. Both respondents were also required to cooperate with the Commission's investigation.

iv. The CFTC issued an Order against Citigroup Global Markets Inc. for related CEA violations (*see* immediately below).

44. *In re Citigroup Global Markets Inc.,* CFTC No. 17-06 (Jan. 19, 2017)

i. On January 19, 2017, the CFTC initiated and settled charges against Citigroup Global Markets Inc. The CFTC found that five traders at Citigroup—including Stephen Gola and Jonathon Brims (*see* above)—engaged in spoofing more than 2,500 times in various CME U.S. Treasury futures products from July 16, 2011 until December 31, 2012. The CFTC also found that Citigroup failed to adequately supervise its traders and failed to provide adequate training.

ii. The CFTC found that Citigroup, by and through the acts of its traders, engaged in spoofing, in violation of CEA § 4c(a)(5)(C), 7 U.S.C. § 6c(a)(5)(C). The CFTC also found that Citigroup violated CFTC Regulation 166.3, 17 C.F.R. § 166.3, which imposes an affirmative duty on registrants to supervise their employees and implement appropriate compliance programs. Citigroup neither admitted nor denied the Commission's findings or conclusions.

iii. Among other things, Citigroup was ordered to pay a $25 million civil monetary penalty. The Order also requires Citigroup to cease and desist from violating the CEA, implement adequate compliance procedures, and cooperate with the Commission's investigation.

iv. Relatedly, on June 29, 2017, the CFTC entered into non-prosecution agreements with Jeremy Lao, Daniel Liao, and Shlomo Salant, three former Citigroup Global Markets employees. Each non-prosecution agreement—the first of their kind to be entered into by the Commission—lasts for a term of two years and requires, among other things, that the individuals cooperate with the CFTC with respect to any "enforcement litigation or proceeding to which the Commission is a party" and admit the accuracy of a statement of facts detailing the individual's wrongdoing. In exchange, the Commission agreed not to bring an enforcement action against the individual, assuming full compliance with the agreement. The CFTC emphasized each person's "timely and substantial cooperation," "willingness to accept responsibility", and "material assistance" as grounds for entering into the agreements.

45. *In re Advantage Futures LLC,* CFTC No. 16-29 (Sept. 21, 2016)

i. On September 21, 2016, the CFTC initiated and settled administrative charges against Advantage Futures LLC ("Advantage"), a Futures Commission Merchant (FCM), and Joseph Guinan and William Steele, respectively, Advantage's Chief Executive Officer and Chief Risk Officer. Advantage allegedly failed to diligently supervise the trading of an Advantage customer (which included spoofing and other manipulative conduct), failed to properly manage risk, and knowingly made inaccurate statements to the CFTC. The CFTC also found that Guinan and Steele failed to adequately supervise employees.

ii. The CFTC found that Advantage, by and through the acts of its employees, submitted false and misleading reports regarding the company's risk and compliance programs and practices to the CFTC, in violation of CEA § 6(c)(2), 7 U.S.C. § 9(2). The CFTC also found that Advantage violated Regulation 1.11(e), 17 C.F.R. § 1.11(e), which required that Advantage implement certain risk management controls and supervisory systems, and CFTC Regulation 1.73(a), 17 C.F.R. § 1.73(a)(1), which required Advantage to adopt and implement certain risk limits. Finally, the CFTC found that Guinan violated CFTC Regulation 166.3, 17 C.F.R. § 166.3, which imposes certain supervisory requirements, and that Steele violated CFTC Regulation 1.11(e)(4), as discussed immediately above. No respondent admitted or denied the Commission's findings or conclusions.

iii. The September 21, 2016 order required each respondent to pay, jointly and severally, a $1.5 million civil monetary penalty. The Order also required Advantage to comply with certain undertakings to improve its compliance policies and the implementation thereof. The CFTC recognized Advantage's cooperation during the investigation and its efforts to implement remedial measures.

iv. This was the CFTC's first action enforcing CFTC Regulations 1.11 and 1.73, which relate to risk management programs and supervisory obligations.

46. *C.F.T.C. v. Oystacher,* No. 15-cv-9196 (N.D. Ill. Oct. 19, 2015)

i. The CFTC alleged that trader Igor Oystacher, and his wholly owned trading firm, 3 Red Trading LLC, used large, non-bona fide orders to create a false picture of the order book and thereby induce the execution of the defendants' smaller orders on the other side of the market. The CFTC challenged order activity relating to various commodity futures (including for copper, crude oil, natural gas) on at least 51 days from December 2011 to January 2014.

iii. The CFTC alleged that Oystacher and 3 Red Trading engaged in spoofing, in violation of CEA § 4c(a)(5)(C), 7 U.S.C. § 6c(a)(5)(C), and employed manipulative contrivances and deceptive acts, in violation of CEA § 6(c)(1), 7 U.S.C. § 9(1) and CFTC Regulation 180.1, 17 C.F.R. § 180.1.

iii. The action was resolved by Final Judgment and Consent Order, which was agreed among the parties and signed by the District Court on December 20, 2016 (the "Consent Order"). Among other things, the Consent Order required Oystacher and 3 Red Trading to jointly and severally pay $2.5 million in civil money penalties. The Consent Order also imposed an independent monitor (for a period of three years) to surveil for and detect violations of the CEA and CFTC regulations, and the adoption of additional compliance tools. In settling the matter, the respondents neither admitted nor denied the findings of fact or conclusions of law set forth in the Consent Order.

47. *C.F.T.C. v. Khara,* No. 15-civ-03497 (S.D.N.Y. May 5, 2015)

i. In a civil complaint filed on May 5, 2015, the CFTC alleged that defendants Khara and Salim, while located in the United Arab Emirates, traded gold and silver futures in the United States. On several occasions in early 2015, the defendants allegedly entered small orders on one side of the market as well as a series of larger, layered orders on the opposite side of the market. Once their small orders were filled, the traders cancelled their large orders.

The CFTC alleged that the defendants never intended to fill their large orders.

ii. The CFTC alleged that Khara and Salim engaged in spoofing, in violation of CEA § 4c(a)(5)(C), 7 U.S.C. § 6c(a)(5)(C).

iii. The matter was resolved by Consent Order and Permanent Injunction, which was agreed upon by the parties and signed by the District Court on March 31, 2016. Pursuant to the Consent Order, Khara and Salim were each required to pay a civil monetary penalty of, respectively, $1,380,000 and $1,310,000, and were subject to broad injunctions against trading commodities. Neither defendant admitted nor denied any wrongdoing.

48. *C.F.T.C. v. Nav Sarao Futures Ltd. PLC*, No. 15-civ-03398 (N.D. Ill. Apr. 17, 2015)

i. By civil complaint filed on April 17, 2015, the CFTC alleged that Navinder Singh Sarao and his wholly-owned trading entity used an automated layering and spoofing algorithm as well as manual techniques to reap $40 million in profits. On November 9, 2016, Sarao pled guilty to criminal charges based on this same conduct (*see* above).

ii. For conduct occurring before August 15, 2011, the CFTC alleged that Sarao engaged in attempted and actual price manipulation, in violation of CEA § 9(a)(2), 7 U.S.C. § 13(a)(2). For conduct taking place on or after August 15, 2011, the CFTC alleged that Sarao manipulated and attempted to manipulate commodities prices, in violation of CEA §§ 6(c)(3) and 9(a)(2), 7 U.S.C. §§ 9(3) and 13(a)(2) and CFTC Rule 180.2, 17 C.F.R. § 180.2, and employed manipulative contrivances and deceptive acts, in violation of CEA § 6(c)(1), 7 U.S.C. § 9(1) and CFTC Regulation 180.1, 17 C.F.R. § 180.1. Finally, for conduct on or after July 16, 2011, the CFTC alleged that Sarao engaged in spoofing, in violation of CEA § 4c(a)(5)(C), 7 U.S.C. § 6c(a)(5)(C).

iii. The matter was resolved by Consent Order, which was agreed upon by the parties and signed by the District Court in November 2016. The Order requires Navinder Sarao to pay a $25,743,174.52 civil monetary penalty and $12,871,587.26 in disgorgement (as to the latter, the CFTC agreed to an offset for any disgorgement/forfeiture amounts paid by Sarao in the parallel criminal action). The Court's Order also permanently prohibits Sarao from further violations of the CEA and CFTC Regulations, and imposes permanent trading and registration bans against Sarao. An Order of Default Judgment against Sarao's wholly-owned trading entity, Nav Sarao Futures Limited PLC, required the above penalties to be paid jointly and severally by both Respondents. *See* Order of Default Judgment, Permanent Injunction, and Ancillary Equitable Relief Against Defendant Nav Sara Futures Limited PLC at 20-21, *C.F.T.C. v. Nav Sarao Futures Limited PLC and Navinder Singh Sarao*, No. 15-cv-03398 (N.D. Ill. Jan. 9, 2017), ECF No. 82.

49. *In re RP Martin Holdings Ltd.*, CFTC No. 14-16 (May 15, 2014)

i. In an order dated May 15,2014, the CFTC initiated and settled charges against RP Martin Holdings and Martin Brokers (UK) Ltd (Collectively, "RP Martin"), in a case arising out of the global investigation into LIBOR manipulation. RP Martin's Yen brokers allegedly offered false bids to their clients, many of which were Yen submitters, creating the false impression that banks were willing to trade Yen at a particular price. The CFTC alleged that the RP Martin brokers did this in order to manipulate Yen LIBOR rates in ways that benefited a UBS trader who was paying the RP Martin brokers to offer false bids. The alleged violations occurred before the enactment of Dodd-Frank.

ii. The CFTC found that RP Martin engaged in manipulation and attempted manipulation, in violation of pre-Dodd-Frank CEA §§ 6(c), 6(d), and 9(a)(2), 7 U.S.C. §§ 9, 13b and 13(a)(2), and submitted false and misleading statements to the CFTC, in violation of 7 U.S.C. § 13(a)(2). The respondents neither admitted nor denied the Commission's findings or conclusions.

iii. Among other things, the May 15, 2015 Order required RP Martin to pay a $1.2 million civil monetary penalty, strengthen its internal controls, policies and procedures, and cooperate with the Commission's investigations related to LIBOR.

50. *In re Panther Energy Trading LLC*, CFTC No. 13-26 (July 22, 2013)

i. By order dated July 22, 2013, the CFTC initiated and settled charges against Panther Energy Trading LLC ("Panther Trading") on July 22, 2013. The CFTC found that Michael Coscia, the manager and owner of Panther Energy Trading LLC, used an algorithm to place orders in a wide variety of futures, and then cancel the orders before they could be executed. Coscia was criminally convicted for this same conduct on November 3, 2015 (*see* above).

ii. The CFTC alleged that Coscia and Panther Trading, by and through the acts of Coscia, engaged in spoofing, in violation of CEA § 4c(a)(5)(C), 7 U.S.C. § 6c(a)(5)(C).

iii. Coscia and Panther Trading settled on a neither-admit-nor-deny basis, paying a $1.4 million civil monetary penalty plus $1.4 million as disgorgement. Under the CFTC's order, the respondents were barred from futures trading for one year, and the obligation to pay the disgorgement amount would be offset by any disgorgement payments to the CME Group.

51. *In re Gelber Group*, CFTC No. 13-15 (Feb. 8, 2013)

i. By order dated February 8, 2013, the CFTC initiated and settled manipulation claims against the Gelber Group ("Gelber"), a proprietary trading group headquartered in Chicago, Illinois during the relevant period. The CFTC found that a Gelber trader[302] entered orders for NASDAQ E-Mini 100 futures contracts during pre-opening sessions, then withdrew the orders before the market opened. The CFTC also found that the trader had no intention of filling his orders and that the orders caused price fluctuations in the market for NASDAQ E-mini 100 futures. Later, two Gelber traders engaged in wash trades in certain futures contracts, allegedly in order to inflate Gelber's volume, which enabled Gelber to obtain rebates through an exchange program that rewarded trade volume. The alleged violations occurred in 2009 and 2010, before Dodd-Frank took effect.

ii. The CFTC concluded that Gelber offered to enter into transactions that would cause the reported price of a commodity to be untrue and/or not bona fide, in violation of pre-Dodd-Frank CEA § 6c(a)(2)(B), 7 U.S.C. § 6c(a)(2)(B); submitted false and misleading statements to the CFTC, in violation of CEA § 9(a)(2), 7 U.S.C. § 13(a)(2); and entered into non-competitive trades, in violation of Rule 1.38, 17 C.F.R. § 1.38. Gelber neither admitted nor denied the Commission's findings or conclusions.

iii. Pursuant to the February 8, 2013 order, Gelber paid a $750,000 civil monetary penalty, and was required to cooperate with the Commission's investigation.

52. *In re UBS AG*, CFTC No. 13-09 (Dec. 19, 2012)

i. By order dated December 19, 2012, the CFTC initiated and settled claims against UBS AG and UBS Securities Japan Co., Ltd. (collectively, "UBS"). The CFTC found that UBS, by and through the conduct of its employees and agents, engaged in a variety of misconduct with the aim of manipulating LIBOR rates. Some of the alleged manipulation was said to constitute spoofing: in particular, according to the CFTC, a UBS trader asked brokers to make false bids and offers to skew market perception. The alleged violations occurred before Dodd-Frank took effect.

ii. The CFTC found that UBS engaged in actual and attempted price manipulation, and submitted false and misleading reports to the CFTC, in violation of pre-Dodd-Frank CEA §§ 6(c), 6(d) and 9(a)(2), 7 U.S.C. §§ 9, 13b, and 13(a)(2). UBS neither admitted nor denied the Commission's findings or conclusions.

302 While somewhat unclear, it is possible that the trader was Igor Oystacher, who worked at Gelber during the time period at issue. *See, e.g.*, Matthew Leising, *The Man Accused of Spoofing Some of the World's Biggest Futures Exchanges*, BLOOMBERG (Oct. 19, 2015), http://www.bloomberg.com/news/articles/2015-10-19/before-u-s-called-igor-oystacher-a-spoofer-he-was-known-as-990; Bradley Hope, *As 'Spoof' Trading Persists, Regulators Clamp Down*, WALL ST. J., Feb. 22, 2015.

iii. Pursuant to the December 19, 2012 Order, UBS was required to pay a $700 million civil monetary penalty and agreed to develop more comprehensive monitoring and auditing systems, among other things. The bulk of this penalty was not related to forms of manipulation other than spoofing.

53. *C.F.T.C. v. Moncada,* No. 12-cv-8791 (S.D.N.Y. Dec. 3, 2012)

i. In a complaint dated December 3, 2012, the CFTC alleged that Eric Moncada, a Serdika LLC ("Serdika") employee responsible for trading on behalf of both Serdika and BES Capital LLC ("BES"), entered and then canceled numerous orders for wheat futures contracts traded on the CBOT. According to the CFTC, Moncada never intended to fill those orders and he placed them for the purpose of misleading other market participants and thereby manipulating the market. The alleged violations occurred in 2009, before the enactment of Dodd-Frank.

ii. The CFTC alleged that defendants attempted to manipulate prices, in violation of pre-Dodd-Frank CEA §§ 4c(a), 6(c), 6(d), and 9(a)(2), 7 U.S.C. §§ 6c(a), 9, 13b, and 13(a)(2) and Commission Regulation 1.38(a), 17 C.F.R. § 1.38(a).

iii. On March 5, 2014, the court entered a default judgment requiring Serdika and BES to pay $13.12 million and $19.12 million in civil monetary penalties, respectively. *See* Order of Default Judgment ¶70, No. 12-cv-8791 (S.D.N.Y. Mar. 4, 2014), ECF No. 65.

iv. After litigating for a time, the CFTC and Moncada settled the manipulation charges on a neither-admit-nor-deny basis. Moncada agreed to pay a $1.56 million monetary penalty, a one-year trading ban, and a five-year prohibition on trading wheat futures.

54. *In re Bunge Global Markets,* CFTC No. 11-10 (Mar. 22, 2011)

i. By order dated March 22, 2011, the CFTC initiated and settled allegations against Bunge Global Markets ("Bunge"). The CFTC found that Bunge traders entered orders for soybean futures contracts during pre-opening sessions, then withdrew their orders before the market opened. The CFTC alleged that the traders entered the orders to gauge the depth of support for soybean futures at different price levels and had no intention of allowing the orders to be executed. The orders allegedly had a major effect on the Indicative Opening Price (IOP) for soybeans futures. The conduct at issue occurred in 2009, before the enactment of Dodd-Frank.

ii. The CFTC found that Bunge Global Markets offered to enter into transactions that would cause the reported price of a commodity to be untrue and/or not bona fide, in violation of pre-Dodd-Frank CEA § 6c(a)(2)(B), 7 U.S.C. § 6c(a)(2)(B), and submitted false and misleading statements to the CFTC, in violation of CEA § 9(a)(2), 7 U.S.C. § 13(a)(2). Bunge neither admitted nor denied the Commission's findings or conclusions.

iii. Pursuant to the March 22, 2011 Order, Bunge was required to pay a $550,000 civil monetary penalty.

C. SEC Enforcement Cases

1. *In re J.P. Morgan Secs. LLC,* SA Release No. 10958 (Sept. 29, 2020)

i. On September 29, 2020, the SEC instituted and settled administrative proceedings against J.P. Morgan Securities LLC for engaging in spoofing in relation to U.S. Treasury cash securities traded in the secondary market.

ii. According to the SEC's Order, between April 2015 and January 2016, traders on the U.S. Treasuries trading desk placed bona fide orders to buy or sell certain treasury bonds or notes on one side of the market, while nearly simultaneously placing non-bona fide orders with respect to the same security on the opposite side of the market, which traders never intended to execute. These orders, according to the SEC, created the false appearance of genuine buying or selling interest and caused other market participants to trade against the bona fide orders at prices more favorable to J.P. Morgan, at which time the non-bona fide orders were then cancelled.

iii. J.P. Morgan admitted to the SEC's factual findings. It also admitted that the conduct violated Securities Act § 17(a)(3), 15 U.S.C. § 77q(a)(3). J.P. Morgan was ordered to pay disgorgement of $10 million and a civil monetary penalty of $25 million (the latter, however, was offset by the penalty paid by J.P. Morgan in the parallel CFTC action, *see* above). It was also censured and ordered to cease and desist from any further violations.

2. *In re Scrivener,* SA Release No. 89517 (Aug. 10, 2020)

i. On August 10, 2020, the SEC instituted and settled administrative proceedings against Nicholas Mejia Scrivener, an independent day trader based in California, for having engaged in a "manipulative securities trading strategy known as spoofing."

ii. According to the Order, from February 2015 to September 2016, Scrivener engaged in manipulative trading, generally by placing multiple orders to buy or sell a stock that he did not intended to execute, sometimes at multiple price levels, in order to induce market participants to trade against his genuine orders on the opposite side of the market at artificially inflated or depressed prices. Scrivener made $140,000 in profits by doing so.

iii. The SEC alleged that Scrivener engaged in market manipulation, in violation of Exchange Act § 9(a)(2), 15 U.S.C. § 78i(a)(2).

iv. Without admitting or denying any wrongdoing, Scrivener consented to the entry of the SEC's Order, which required him to pay disgorgement of $140,250, prejudgment interest of $15,020 (totaling $155,270), and a civil monetary penalty of $50,000. He was also ordered to cease and desist from committing any future violations of § 9(a)(2) of the Exchange Act.

3. *S.E.C. v. Nielson,* No. 20-cv-03788 (N.D. Cal. June 9, 2020)

i. On June 9, 2020, the SEC filed a complaint against Jason Nielson, a penny stock trader based in California. According to the complaint, in March 2020, Nielson attempted to drive the price of Arrayit Corporation stock higher through online posts encouraging investors to purchase shares, including false claims regarding an approved COVID-19 test. Nielson is also alleged to have created the appearance of high demand for Arrayit stock by placing and then cancelling several large orders to purchase Arrayit stock, *i.e.*, spoofing. The SEC maintains that Nielson made $137,000 using these tactics.

ii. The SEC alleges that Nielsen violated Securities Act § 17(a), 15 U.S.C. §§ 77q(a), Exchange Act §§ 9(a)(2) and 10(b) and Rule 10b-5, 15 U.S.C. §§ 78i(a)(2), 78j(b), and 17 C.F.R. § 240.10b-5, and is seeking permanent injunctions, civil monetary penalties, a penny stock bar, and disgorgement with prejudgment interest.

iii. The case is ongoing.

4. *S.E.C. v. Chen,* No. 19-cv-12127 (D. Mass. Oct. 15, 2019)

i. On October 15, 2019, the SEC filed a complaint against one organization and 23 individual defendants for manipulating and/or attempting to manipulate the price of thousands of securities from August 2013 to October 2019. The SEC alleges that the defendants schemed to manipulate prices through coordinated trading in multiple accounts—often in the nature of spoofing and/or layering—in order to artificially affect the prices of securities traded on exchanges in United States, and to induce others to buy and sell those securities at the resulting artificially high or low prices.

ii. The SEC alleges that all defendants engaged in fraud in connection with the purchase or sale of securities, in violation of § 10(b) of the Exchange Act, 15 U.S.C. § 78j(b), and Rule 10b-5(a), 17 C.F.R. § 240.10b-5, fraud in the offer or sale of securities, in violation of the Securities Act §§ 17(a)(1) and (3), 15 U.S.C. §§ 77q(a)(1), (3), and market manipulation, in violation of Exchange Act § 9(a)(2), 15 U.S.C. § 78i(a)(2). The SEC also brought a claim for unjust enrichment against six "relief" defendants.

iii. On October 15th, 2019, the district court issued a temporary restraining order that enjoined the

defendants from further violations of the federal securities laws and granted an emergency asset freeze to preserve assets necessary to satisfy any eventual judgment. On October 28, 2019 the court issued a preliminary injunction. Trial is scheduled for June 7, 2021.

iv. Two of the eighteen defendants, Xiaosong Wang and Jiali Wang, were also charged criminally. *See United States v. Wang*, No. 19-mj-6485-MPL (D. Mass.) (discussed above).

5. *S.E.C. v. Taub,* No. 16-cv-09130 (D.N.J. Dec. 12, 2016) (amended complaint filed in Apr. 2018)

i. In December 2016, the SEC filed a complaint in the District of New Jersey charging two traders—Joseph Taub and Elazar Shmalo—with manipulating the price of more than 2,000 securities traded on the NYSE and NASDAQ, during the period January 2014 to December 2016. The complaint was amended in April 2018 to add Shaun Greenwald as a defendant, who was an accountant alleged to have aided Shmalo and Taub in their scheme. The SEC alleges that the defendants used coordinated trading in multiple securities accounts at several brokerage houses to "create the false appearance of trading interest and activity in particular stocks"—often through orders that were placed and then cancelled before execution—thereby "enabling them to purchase stocks at artificially low prices and then quickly sell them at artificially high prices", reaping over $26 million in illicit profits.

ii Taub, Shmalo, and Greenwald were charged with: (1) fraud in connection with the offer or sale of a security, in violation of §§ 17(a)(1) and (3) of the Securities Act, 15 U.S.C. §§ 77q(a)(1) and(3); (2) fraud in connection with the purchase or sale of a security, in violation of § 10(b) of the Exchange Act, 15 U.S.C. § 78j(b), and Rule 10b-5, 17 C.F.R. § 240.10b-5; and (3) market and price manipulation, in violation of Exchange Act § 9(a)(2), 15 U.S.C. § 78i(a)(2).

iii. The SEC's civil action was stayed beginning in early 2017 pending the outcome of parallel criminal proceedings against Taub (Taub pled guilty on July 28, 2020, *see* above). The SEC eventually settled with defendant Shmalo, and a final judgment was entered against him on October 23, 2020, requiring him to pay disgorgement of $395,207.98 and prejudgment interest of $20,007.66, totaling $415,215.64, to be offset by the amount of assets that Shmalo forfeited in the related proceeding captioned *United States v. Any and All Ownership in the Name, ex rel. Joseph Taub and/or JT Capital*, 16-cv-9158 (D.N.J).[303] The Order also permanently enjoins Shmalo from future violations of federal securities laws and from participating in the issuance, purchase, offer, or sale of any security listed on a national securities exchange (with certain express exceptions). Shmalo neither admitted nor denied the allegations of the Complaint.

iv Final Judgment was entered as to Taub on December 28, 2020. The court found Taub liable for disgorgement in the amount of $17.1 million. The court noted that in the event that a forfeiture order is entered against Taub in the parallel criminal action (discussed above), his monetary obligation under the civil judgement will be credited by the amount of the court's forfeiture order.

v. Greenwald's case is still pending as of January 5, 2021.

6. *S.E.C. v. Lek Securities Corp.,* No. 17-cv-01789 (S.D.N.Y. Mar. 10, 2017)

i. In a complaint dated March 10, 2017, the SEC alleged that Avalon FA Ltd, a Ukraine-based trading firm, and two of its principals (Pustelnik and Fayyer), perpetrated a layering scheme involving U.S. stocks during a five-year period, which was purportedly made possible by Lek Securities Corp., a U.S. broker-dealer, and its CEO, Samuel Lek. More specifically, the SEC claimed that Avalon engaged in hundreds of

303 In *United States v. Any and All Ownership in the Name, ex rel. Joseph Taub and/or JT Capital,* 16-cv-9158 (D.N.J), Docket Entry No. 209, an *in rem* civil forfeiture action, Shmalo forfeited all of his right, title, and interest in certain bank and brokerage accounts in his name. The combined dollar value of this was $280,399.49 as of August 31, 2020. Shmalo was thus obligated to pay an additional $134,816.15 to the SEC.

thousands of instances of layering in numerous securities from approximately December 2010 through at least September 2016, and that Avalon made millions of dollars in profits from the scheme.

ii. The SEC alleged that the defendants engaged in market manipulation, in violation of Exchange Act § 9(a)(2), 15 U.S.C. § 78i(a)(2), fraud in connection with the purchase or sale of a security, in violation of § 10(b) of the Exchange Act, 15 U.S.C. § 78j(b), and Rule 10(b)(5), 17 C.F.R. § 240.10b-5, and fraud in connection with the offer or sale of a security, in violation of §§ 17(a)(1) and (3) of the Securities Act, 15 U.S.C. §§ 77q(a)(1) and (3). Certain individual defendants were also charged with control-person liability under § 20(a) of the Exchange Act, 15 U.S.C. § 78t(a).

iii. Lek Securities and Samuel Lek settled their cases before trial and Final Judgment was entered on October 1, 2019. Lek Securities was ordered to pay disgorgement of $419,623, plus prejudgment interest of $106,892, totaling $526,515, and a civil monetary penalty of $1 million. Samuel Lek was ordered to pay a civil monetary penalty of $420,000. Both defendants admitted the allegations set forth in their respective Consent Orders.

iv. On November 12, 2019, a jury returned a verdict against Avalon, Pustelnik, and Fayyer, finding that they violated § 10(b) of the Exchange Act and §§ 17(a)(1) and (3) of the Securities Act. The SEC sought three forms of relief: (1) $4,627,314 in disgorgement and prejudgment interest (on a joint-and-several basis); (2) $13.8 million in civil money penalties; and (3) injunctions against further securities law violations.

v. Final judgment was entered on April 14, 2020, awarding the SEC disgorgement of $4,495,564 and prejudgment interest of $131,750, totaling $4,627,314 (joint and several among Avalon, Fayyer, and Pustelnik). Avalon, Fayyer, and Pustelnik were also ordered to pay $5,000,000 each in civil money penalties. The defendants appealed and, on November 20, 2020, the Second Circuit remanded the case for the purpose of determining whether the disgorgement award is consistent with the Supreme Court's decision in *Liu v. S.E.C.*, 120 S. Ct. 1936, 1940 (June 22, 2020).

vi. On remand, the SEC conceded that the disgorgement remedy was not enforceable against defendants in light of *Liu v. S.E.C. See* Order at 2, *S.E.C. v. Lek Securities Corp.,* No. 17-cv-01789 (S.D.N.Y. Feb. 9, 2021), ECF No. 594. The district court increased the civil money penalty imposed on each defendant to $7.5 million, referencing the language in its March 20, 2020 opinion that "[i]n the event that no order of disgorgement may be enforced, the civil penalty assessed against each Defendant shall be increased to $7.5 million." *Id.* at 1-2 (quoting Order at 25, *S.E.C. v. Lek Securities Corp.,* No. 17-cv-01789 (S.D.N.Y. Mar. 20, 2020).

7. *In re Afshar,* SA Release No. 9983 (Dec. 3, 2015)

i. The SEC instituted administrative proceedings against twin brothers (Behruz Afshar and Shahryar Afshar), their friend (Richard F. Kenny, IV), and two limited liability companies owned by the brothers (Fineline Trading Group LLC and Makino Capital LLC). Among other things, the SEC alleged that Respondents engaged in a scheme to take advantage of the PHLX exchange's "maker-taker" model, by placing large All-Or-Nothing ("AON") orders and then placing smaller displayed orders for the same option series and price on the opposite side. The Respondents allegedly did not intend to execute the smaller orders, but instead, placed the orders to alter the best bid or offer so that other market participants would submit orders at the new best bid or offer that would execute against the Respondents' AON orders. After the AON orders were executed, the Respondents cancelled their open smaller orders. The Respondents, according to the SEC, received "maker" rebates for adding liquidity (because the large AON orders pre-existed the other market participants' induced orders) but were not penalized for cancelling the smaller orders.

ii. The SEC alleged that the subject conduct violated § 17(a) of the Securities Act, 15 U.S.C. § 77q(a), and §§ 9(a)(2) and 10(b) of the Exchange Act, 15 U.S.C. §§ 78i(a)(2) and § 78j(b), and Rule 10b-5 thereunder, 17 C.F.R. § 240.10b-5.

iii. The case settled on June 13, 2016. Behruz Afshar and Kenny were both banned from: (1) associating with any broker, dealer and the like; (2) serving as an employee, officer, director, member of an advisory board, etc.; and (3) participating in any offering of penny stock. All respondents faced disgorgement and civil monetary penalties. Behruz and Shahryar Afshar were ordered to pay $1,048,824.67 in disgorgement (on a joint-and-several basis), and to pay $150,000 and $75,000 in civil monetary penalties, respectively. Respondent Kenny was ordered to pay disgorgement of $524,412.33 and a civil monetary penalty of $100,000. The respondents neither admitted nor denied the SEC's allegations or conclusions.

8. *In re Briargate Trading*, LLC, SA Release No. 9959 (Oct. 8, 2015)

i. The SEC alleged that Briargate, a proprietary trading firm, and its co-founder, Eric Oscher, submitted large non-bona fide pre-open orders to affect the NYSE's preopen imbalance messages. Briargate also allegedly sent orders in the same security—but on the opposite side of the market—to other exchanges that opened before the NYSE. Oscher cancelled the non-bona fide NYSE orders prior to opening. The published imbalances impacted the opening price at other exchanges where the respondents had bona fide orders on the other side of the market.

ii. The Commission filed settled charges under § 17(a) of the Securities Act, 15 U.S.C. § 77q(a), and Exchange Act §§ 9(a)(2) and 10(b), 15 U.S.C. §§ 78i(a)(2) and 78j(b), and Rule 10b-5, 17 C.F.R. § 240.10b-5.

iii. Respondents consented on a neither-admit-nor-deny basis to pay disgorgement of $525,000 plus prejudgment interest of $37,842.32, totaling 562,842.32 (jointly and severally). Briargate and Oscher were ordered to pay civil monetary penalties of $350,000 and $150,000, respectively.

9. *S.E.C. v. Milrud*, No. 15-cv-00237 (D.N.J. Jan. 13, 2015)

i. By civil complaint filed in the District of New Jersey, the SEC alleged that Milrud directed overseas traders to engage in a layering and spoofing scheme. On September 11, 2015, Milrud pled guilty to criminal charges based on this same conduct (*see* above).

ii. The SEC accused Milrud of violating § 17(a) of the Securities Act, 15 U.S.C. § 77q(a), Exchange Act §§ 9(a)(2) and 10(b), 15 U.S.C. §§ 78i(a)(2), and Rule 10b-5, 17 C.F.R. § 240.10b-5.

iii. The civil enforcement matter was concluded by a consent judgement entered by the district court on April 9, 2018, whereby the court permanently enjoined Milrud from violating § 17(a) of the Securities Act, and §§ 9(a)(2) and 10(b) of the Exchange Act, and Rule 10b-5. Milrud was also ordered to pay disgorgement and a civil monetary penalty in amounts to be determined by the district court upon motion by the SEC.

10. *In re Wedbush Secs. Inc.*, EA Release No. 72340 (June 6, 2014) (charging order), EA Release Nos. 73652-54 (Nov. 20, 2014) (settlement orders)

i. The SEC charged Wedbush Securities Inc. and two of its executives—Jeffrey Bell and Christina Fillhart—with violating the Market Access Rule (SEC Rule 15c3-5, 17 C.F.R. § 240.15c3-5) by failing to implement proper controls and procedures to prevent, among other things, illegal layering. The Market Access Rule requires a broker-dealer that gives customers access to exchanges and other trading venues to establish controls and procedures designed to ensure that customers comply with relevant regulatory requirements.

ii. Wedbush allowed customer orders to bypass its trading system and be routed directly to exchanges and other trading venues. The customers, which had hundreds of traders, used proprietary trading platforms or platforms leased from third-party vendors, known as service bureaus. Among other failures, Wedbush received reports of layering activity in one of its customer's accounts but did not take appropriate measures to stop it. Wedbush also failed to monitor for layering and neglected to file required suspicious activity reports relating to layering.

iii. Wedbush consented to a $250,000 penalty and a series of remedial undertakings. The executives each consented to $25,000 disgorgement, plus $1,478.31 prejudgment interest (totaling $26,478.31) and a $25,000 penalty. The respondents neither admitted nor denied the facts alleged by the Commission.

11. *In re Visionary Trading LLC,* EA Release No. 71871 (Apr. 4, 2014)

i. By order dated April 4, 2014, the SEC instituted and settled charges against several traders, a trading company and a registered broker-dealer. Among other findings and conclusions, the SEC found that one of the traders (Joseph Dondero) had engaged in layering, in violation of §§ 9(a)(2) and 10(b) of the Exchange Act, 15 U.S.C. §§ 78i(a)(2) and 78j(b), and Rule 10b-5, 17 C.F.R. § 240.10b-5. None of the other traders were charged with layering or spoofing. All respondents neither admitted nor denied the Commission's findings.

ii. Dondero consented to an industry bar and agreed to pay disgorgement of $1,102,999.96 plus pre-judgment interest of $46,792, for a total of $1,149,791.96, and a $785,000 civil money penalty.

12. *In re Biremis Corp.,* EA Release No. 68456 (Dec. 18, 2012)

i. By order dated December 18, 2012, the SEC instituted and settled charges against Biremis Corp., a broker-dealer, and its two co-founders, Peter Beck and Charles Kim. The Commission found that the three respondents failed to reasonably supervise overseas day traders that engaged in layering in U.S. securities markets. The Commission maintained that the traders' layering activity violated § 9(a)(2) of the Exchange Act, 15 U.S.C. § 78i(a)(2), and the respondents' failure to reasonably supervise the traders violated § 15(b)(4)(e) of the Exchange Act, 15 U.S.C. § 78o. Respondents were also charged with failing to file suspicious activity reports ("SARs") and maintain proper records, in violation of 17 C.F.R. § 17a-8. The respondents neither admitted nor denied the SEC's findings.

ii. Pursuant to the December 18, 2012 Order, the SEC revoked Biremis' brokerdealer registration. It also barred Beck and Kim from the securities markets and imposed a $250,000 civil monetary penalty on each.

13. *In re Hold Brothers On-Line Investment Services, LLC,* EA Release No. 67924 (Sept. 25, 2012)

i. By order dated September 25, 2012, the SEC instituted and settled charges against Hold Brothers On-Line Investment Services, LLC ("Hold Brothers"), a registered broker-dealer, two foreign companies that held accounts at Hold Brothers (Demostrate, LLC and Trade Alpha Corporate Ltd.), and Steve Hold, Robert Vallone, and William Tobias, all of whom worked at Hold Brothers (Steve Hold also partially owned the Customers). The SEC found that overseas traders, the vast majority of which were associated with Demostrate or Trade Alpha, had engaged in layering and spoofing in accounts held at Hold Brothers, and that Hold Brothers and the three individual respondents knew, or should have known, of that conduct and failed to properly police the activity.

ii. The SEC accused Hold Brothers, Demostrate, and Trade Alpha of violating § 9(a)(2) of the Exchange Act, 15 U.S.C. § 78i(a)(2), which prohibits any person from effecting "a series of transactions in any security . . . creating actual or apparent active trading in such security, or raising or depressing the price of such security, for the purpose of inducing the purchase or sale of such security by others." The individual respondents were charged with aiding and abetting and causing the § 9(a)(2) violations, and some were charged with failure to reasonably supervise, in violation of 15 U.S.C. § 78o(b)(4)(E), and failure to file SARs, in violation of 17 C.F.R. § 17a-8. The respondents neither admitted nor denied the Commission's findings.

iii. Hold Brothers agreed to pay disgorgement of $629,167 and post-Order interest of $9,285.22, totaling $638,452.22, as well as a civil monetary penalty of approximately $1.9 million (including post-Order interest). Demostrate agreed to $1,258,333 million in disgorgement. The three

individual respondents each agreed to pay $75,000 in civil monetary penalties. and consented to various industry bars. (Trade Alpha was not ordered to pay any civil monetary penalties.)

iv. After making one payment of $503,333.40, Hold Brothers defaulted on its remaining obligations, prompting the SEC to file an action in federal district court to enforce the settlement decree. *See* Application to Enforce Final Order as to Hold Brothers at 2, *S.E.C. v. Hold Brothers On-Line Investment Services, Gregory Hold, and Steven Hold*, 14-cv-07286 (D.N.J. Nov. 21, 2014), ECF No. 1. On January 9, 2017, the court issued a Final Judgment ordering Hold Brothers to pay disgorgement and a civil money penalty (and interest on both) that totaled $2,116,998.69. *See* Final Judgment Enforcing Commission Order Against Respondent Hold Brothers On-Line Investment Services, LLC at 2, *S.E.C. v. Hold Brothers On-Line Investment Services, Gregory Hold, and Steven Hold*, 14-cv-07286 (D.N.J. Jan. 9, 2017), ECF No. 64. Thus, Hold Brothers was ultimately ordered to pay a total of $2,620,332.09.

14. *S.E.C. v. Kahn*, SEC Lit. Release No. 19139 (Mar. 16, 2005); see also 5/29/04 SEC Order, Administrative Proceeding, File No. 3-11468

i. On April 29, 2004, the SEC instituted cease and desist proceedings against Cary Kahn, a self-employed investor living in Colorado at the time. Kahn was alleged to have engaged in spoofing by entering small market moving orders at prices between the best bid and offer for NASDAQ stocks. Kahn then entered a larger order on the opposite side of the market. Once the larger orders were filled by NASDAQ market makers, Kahn cancelled the earlier smaller orders before they were executed. Kahn succeeded in 49 out of his alleged 52 spoofing attempts.

ii. The SEC alleged that Kahn violated § 17(a) of the Securities Act, 15 U.S.C. §§ 77q(a), and § 10(b) of the Exchange Act, 15 U.S.C. § 78j(b), and Rule 10b-5 thereunder, 17 C.F.R. § 240.10b-5.

iii. After Kahn failed to file an answer, the administrative law judge set a June 30, 2004 deadline for Kahn to show cause why he should not be held in default. Kahn did not respond, and a default judgment was entered on September 15, 2004. Kahn owes disgorgement of $12,186.21, plus prejudgment interest of $1,217.54, totaling $13,403.75.

15. *S.E.C. v. Awdisho,* Lit. Release No. 18926 (October 7, 2004), Release No. 18894 (Sept. 23, 2004)

i. In September 2004, the SEC filed a settled action against Stanley Awdisho, Michael Kundrat, and Kristopher Smolinski. The SEC alleged that the respondents engaged in spoofing in relation to certain stock options approximately 75 times between September and December 2009. The SEC found that such conduct amounted to price manipulation, in violation of § 9(a)(2) of the Exchange Act, 15 U.S.C. § 78i(a)(2), and securities fraud, in violation of § 10(b) of the Exchange Act, 15 U.S.C. § 78j(b), and Rule 10b-5, 17 C.F.R. § 240.10b-5. The respondents neither admitted nor denied the Commission's findings.

ii. Pursuant to the final judgements entered as part of the settled action, all respondents agreed to a permanent injunction against future violations of §§ 9(a)(2) and 10(b) of the Securities Exchange Act and Rule 10b-5. Further, Awdisho and Kundrat each agreed to pay a $10,000 civil monetary penalty. Smolinski agreed to pay a $20,000 penalty.

16. *S.E.C. v. Sheehan,* No. 03-cv-00694 (D.D.C. Mar 18, 2003); *In re Sheehan,* SA Release No. 33-8208, EA Release No. 34-47521 (Mar. 18, 2003); *S.E.C. v. Frazee,* No. 03-cv-0695 (D.D.C. March 18, 2003); *In re Frazee,* SA Release No. 33-8209, EA Release No. 17479 (Apr. 19, 2002)

i. In March 2003, the SEC filed settled actions against Leonard T. Sheehan and Jason T. Frazee. The SEC accused Sheehan of spoofing 25 times and Frazee of spoofing 16 times. The spoofing scheme allegedly manipulated the National Best Bid and Offer prices on thinly traded NASDAQ stocks.

ii. The SEC alleged that the defendants' conduct violated § 17(a) of the Securities Act, 15

U.S.C. § 77q, and § 10(b) of the Exchange Act, 15 U.S.C. § 78i(a)(2), and Rule 10b-5 thereunder, 17 C.F.R. § 240.10b-5. Neither Sheehan nor Frazee admitted or denied the SEC's allegations or findings.

iii. To settle, Sheehan and Frazee each agreed to pay a $10,000 civil monetary penalty. The Commission also issued cease-and-desist orders against Sheehan and Frazee to stop violating § 17(a) of the Securities Act, § 10(b) of the Exchange Act, and Rule 10b-5. Sheehan and Frazee were also required to pay disgorgement plus prejudgment interest in the amounts of $11,558 and $21,011, respectively.

17. *S.E.C. v. Pomper,* No. 01-cv-7391 (E.D.N.Y. Nov. 5, 2001); SEC Lit. Release No. 17479 (Apr. 19, 2002)

i. In November 2001, the SEC filed a complaint in the Eastern District of New York alleging that Alexander Pomper, a trader, engaged in spoofing by using phantom limit orders to affect the National Best Bid and Offer prices for thinly traded securities.

ii. The Commission alleged that Pomper violated § 17(a) of the Securities Act, 15 U.S.C. § 77q, and § 10(b) of the Exchange Act, 15 U.S.C. § 78i(a)(2), and Rule 10b-5 thereunder, 17 C.F.R. § 240.10b-5. Pomper neither admitted nor denied the Commission's findings.

iii. The parties settled the matter by way of final judgement entered by the district court in April 2002. Pomper agreed to pay disgorgement of $8,100 and prejudgment interest of $1,700, for a total of $9,800, and a $15,000 civil monetary penalty.

18. *S.E.C. v. Shpilsky,* No. 01-cv-02298 (D.D.C. Nov. 9, 2001); *S.E.C. v. Shenker,* No. 01-cv-02296 (D.D.C. Nov. 5, 2001); *In re Shenker,* SA Release No. 33-8029, EA Release No. 34-45017 (Nov. 5, 2001); *S.E.C. v. Blackwell,* No. 01-cv-02297 (D.D.C. Nov. 5, 2001); *In re Blackwell,* SA Release No. 8030, EA Release No. 45018 (Nov. 5, 2001); see also generally SEC Lit. Release No. 17221 (Nov. 5, 2001)

i. The SEC alleged that Shpilsky, Shenker, and the Blackwells engaged in spoofing to obtain improper price improvements on stocks trading on the NASDAQ. (Alexander Shushovksy and Grigory Kagan were named solely as relief defendants.)

ii. The Commission alleged that the defendants' conduct violated § 17(a) of the Securities Act, 15 U.S.C. § 77q, and § 10(b) of the Exchange Act, 15 U.S.C. § 78i(a)(2), and Rule 10b-5 thereunder, 17 C.F.R. § 240.10b-5. The defendants neither admitted nor denied the SEC's allegations or findings.

iii. These matters were resolved by Final Judgments in November 2001. All defendants agreed to a permanent injunction against future violations of § 17(a) of the Securities Act, § 10(b) of the Exchange Act and Rule 10b-5. The following defendants were ordered to pay the following disgorgement amounts: (1) Shpilsky ($12,000 total, which includes prejudgment interest of $5,040); (2) Relief defendants Shushkovsky ($9,962 plus prejudgment interest of $2,058, totaling $12,020) and Kagan ($1,169 plus prejudgment interest of $241, totaling $1,410) ($13,430 total between the two of them); Shenker ($7,206 including prejudgment interest); and the Blackwells ($3,213, including prejudgment interest, total between the three of them). Shenker and the Blackwells were also each ordered to pay a $10,000 civil monetary penalty.

19. *S.E.C. v. Monski,* No. 01-cv-00943 (D.D.C. May 3, 2001); SEC Lit. Release No. 16986 (May 3, 2001)

i. On May 3, 2001, the SEC entered a settled order against Robert Monski, a self-employed investor. The Commission alleged that, between early October and Mid-November 1997, Monski placed hundreds of small buy and sell limit orders to affect and manipulate the National Best Bid or Offer of thinly traded stocks. After moving the bid or offer quote as desired, Monski immediately cancelled or attempted to cancel the small orders.

ii. The SEC alleged that Monski's conduct violated § 17(a) of the Securities Act, 15 U.S.C. § 77q, and § 10(b) of the Exchange Act, 15 U.S.C. § 78i(a)(2), and Rule 10b-5 thereunder, 17 C.F.R. § 240.10b-5.

iii. Monski neither admitted nor denied the Commission's allegations or findings, but consented to the entry of an order that required him to cease and desist from violating § 17(a) of the Securities Act, § 10(b) of the Exchange Act and Rule 10b-5, and pay disgorgement and pre-judgment interest totaling $15,000. He also consented to an entry of final judgment in federal court requiring him to pay a $10,000 civil monetary penalty.

D. Private Actions Under the CEA

1. *In re Bank of Nova Scotia Spoofing Litigation,* No. 20-Cv-11059 (D.N.J.)

i. On October 29, 2020, U.S. District Court Judge Michael A. Shipp consolidated ten related putative class actions filed in August and September 2020 against Bank of Nova Scotia, Corey Flaum, and other "John Doe" defendants.
   a. *Casey Sterk and Kevin Maher v. Bank of Nova Scotia,* No. 20-11059;
   b. *Yuri Alishaev, Abraham Jeremias, and Morris Jeremias v. Bank of Nova Scotia,* No. 20-11329;
   c. *Jeffrey Tomasulo and Christopher Depaoli v. Bank of Nova Scotia,* No. 20-12111;
   d. *Jeff Braun of ML Options Trading v. Bank of Nova Scotia,* No. 20-12217;
   e. *Don Tran v. Bank of Nova Scotia,* No. 20-12261;
   f. *Mark Serri v. Bank of Nova Scotia,* No. 20-12927;
   g. *Larry Blankenship v. Bank of Nova Scotia,* No. 20-12998;
   h. *Port 22, LLC v. Bank of Nova Scotia,* No. 20-12999;
   i. *Arthur H. Lamborn, Jr. v. Bank of Nova Scotia,* No. 20-13035;
   j. *Robert Charles Class A, L.P., v. Bank of Nova Scotia,* No. 20-13116.

ii In general, the various complaints allege that, between January 2008 and July 2016, BNS, Flaum and others engaged in fraudulent and manipulative trading practices in connection with the purchase and sale of gold, silver, platinum, and palladium futures contracts traded on the NYMEX and COMEX. Plaintiffs' allegations are based largely on the facts set forth in the August 13, 2020 DPA between BNS and the DOJ as well as Flaum's July 25, 2019 guilty plea.

iii. Plaintiffs allege that the defendants, through the acts of their agent traders: (1) engaged in price manipulation, in violation of CEA §§ 6(c), 6(d), 9(a), and 22(a), 7 U.S.C. §§ 9, 13b, 13(a) and 25(a); and (2) employed a manipulative and deceptive device in violation of CEA §§ 6(c) and 22(a), 7 U.S.C. §§ 9 and 25(a), and Regulation 180.1(a), 17 C.F.R. § 180.1(a). Plaintiffs also allege unjust enrichment.

iv. Plaintiffs are seeking class certification, unspecified damages on behalf of themselves and the alleged class, restitution, disgorgement, and the costs of the lawsuit, including reasonable attorneys' and experts' fees.

v. A consolidated class action complaint has not yet been filed.

2. *In re JPMorgan Treasury Futures Spoofing Litig.,* No. 20-Cv-3515 (S.D.N.Y.)

i. On October 9, 2020, U.S. District Court Judge Paul A. Engelmayer consolidated seven related putative class actions against JPMorgan Chase & Co., JP Morgan Clearing Corp., J.P. Morgan Securities LLC, J.P. Morgan Futures Inc., and other "John Doe" defendants that were filed between May and July 2020:
   a. *Breakwater Trading LLC v. JPMorgan Chase & Co.,* No. 20-cv-3515;
   b. *John Grace v. JPMorgan Chase & Co.,* No. 20-cv-4523;
   c. *Endeavor Trading, LLC v. JPMorgan Chase & Co.,* No. 20-cv-5285;
   d. *Robert Chase Class A, L.P. v. JPMorgan Chase & Co.,* No. 20-cv-5298;
   e. *Charles Herbert Proctor, III and Synova Asset Management, LLC v. JPMorgan Chase & Co.,* No. 20-cv-5360;
   f. *Budo Trading LLC v. JPMorgan Chase & Co.,* No. 20-cv-5772;
   g. *Thomas Gramatis v. JPMorgan Chase & Co.,* No. 20-cv-5918;

ii. The putative class actions arise out of claims that the defendants engaged in spoofing with respect to the trading of U.S. Treasury futures. The cases were filed in May and June 2020, after JPMorgan had publicly reported, on February 25, 2020, that it was responding to requests from

the DOJ and other authorities relating to JPMorgan's trading practices in financial instruments, including U.S. Treasuries, but before JPMorgan settled with the SEC and DOJ and admitted certain damaging facts.

iii. A consolidated complaint was filed on April 2, 2021 and relies heavily upon the facts set out in JPMorgan's DPA with the DOJ. Based on those facts, Plaintiffs allege, among other things, that defendants: (1) manipulated the price of U.S. Treasury futures in violation of CEA §§ 6(c), 6(d), 9(a), and 22(a), 7 U.S.C. §§ 9, 13b, 13(a) and 25(a), and Regulation 180.2, 17 C.F.R. § 180.2; (2) employed a manipulative and deceptive device in connection with U.S. Treasury futures, in violation of CEA §§ 6(c) and 22(a), 7 U.S.C. §§ 9 and 25(a), and Regulation 180.1(a), 17 C.F.R. § 180.1(a); and (3) are liable under a theory of unjust enrichment. Plaintiffs seek class certification, actual and punitive damages on behalf of themselves and the alleged class, restitution, disgorgement, and the costs of the lawsuit, including reasonable attorneys' and experts' fees.

3. *In re Deutsche Bank Spoofing Litig.*, No. 20-cv-03638 (N.D. Ill.)

i. On August 26, 2020, U.S. District Judge Joan B. Gottschall consolidated five related actions against Deutsche Bank Securities, Deutsche Bank AG, and other "John Doe" defendants filed in the Northern District of Illinois between June and July 2020:
   a. *Rock Capital Markets, LLC, v. Deutsche Bank Secs., Inc.*, No. 20-cv-03638;
   b. *Proctor v. Deutsche Bank Secs. Inc.*, No. 20-cv-3821;
   c. *Robert Charles Class A, L.P. v. Deutsche Bank Secs. Inc.*, No. 20-cv-3913;
   d. *Vecchione v. Deutsche Bank Secs. Inc.*, No. 20-cv-4303;
   e. *Rowan v. Deutsche Bank Secs. Inc.*, No. 20-cv-4353.

ii. On November 13, 2020, the Plaintiffs filed a consolidated class action complaint based on the conduct described in the CFTC's June 18, 2020 Consent Order in *In re Deutsche Bank Secs. Inc.*, CFTC No. 20-17 (June 18, 2020) (*see* above), which involves the alleged manipulation—through spoofing—of Treasury and Eurodollar futures traded on the CME and CBOT in 2013.

iii. Plaintiffs allege that the defendants, through the acts of their agent traders: (1) engaged in price manipulation, in violation of CEA §§ 6(c), 6(d), 9(a), and 22(a), 7 U.S.C. §§ 9, 13b, 13(a) and 25(a), and Regulation 180.2, 17 C.F.R. § 180.2; and (2) employed a manipulative and deceptive device in violation of CEA §§ 6(c) and 22(a), 7 U.S.C. §§ 9 and 25(a), and Regulation 180.1(a), 17 C.F.R. § 180.1(a). Plaintiffs also allege unjust enrichment against all defendants.

iv. Plaintiffs are seeking class certification, unspecified damages on behalf of themselves and the alleged class, restitution, disgorgement, and the costs of the lawsuit, including reasonable attorneys' and experts' fees. As discussed above, on January 15, 2021, Deutsche Bank filed a Motion to Dismiss. On January 20, 2021 the court established a briefing schedule that is set to be complete by April 16, 2021.

4. *In re Merrill, BOFA, and Morgan Stanley Spoofing Litigation*, No. 19-cv-6002 (S.D.N.Y.)

i. On September 13, 2019, U.S. District Judge Allison Nathan consolidated three putative class actions filed in the Southern District of New York in June and July 2019 against Merrill Lynch Commodities, Inc., Bank of America Corporation, Morgan Stanley & Co. LLC, Edward Bases, John Pacilio, and other "John Doe" defendants. The three actions are:
   a. *Gamma Traders v. Merrill Lynch Commodities, Inc.*, No. 19-cv-06002;
   b. *Robert Charles Class A, L.P. v. Merrill Lynch Commodities, Inc.*, No. 19-cv-06172; and
   c. *Alishaev v. Merrill Lynch Commodities, Inc.*, No. 19-cv-06488.

ii. A consolidated class action complaint was filed on November 12, 2019, and an amended consolidated complaint was filed on March 9, 2020. Plaintiffs' allegations focus on spoofing by defendants Bases and Pacilio (and other unnamed traders) in relation to precious metals futures contracts during the period

January 1, 2007 to December 31, 2014 (the "Class Period"), during which time Bases worked at Deutsche Bank and Merrill Lynch Commodities Inc. (owned by Bank of America Corporation), and Pacilio was employed at Merrill Lynch Commodities Inc. and Morgan Stanley & Co. LLC. Plaintiffs allege that they transacted in precious metals futures contracts (including for platinum, palladium, silver and gold) during the Class Period and were injured as a result of the artificial prices allegedly created by the defendants' spoofing. The plaintiffs purport to bring their actions on behalf of themselves and all other persons and entities that traded NYMEX Platinum and Palladium futures contracts and COMEX silver and gold futures contracts during the Class Period. As discussed above, defendants Bases and Pacilio were indicted on July 18, 2018 in connection with alleged spoofing, and the class action allegations are premised on that same conduct. As also noted, Merrill Lynch Commodities Inc. entered into a non-prosecution agreement with the DOJ on June 25, 2019 based on the conduct of Bases and Pacilio, admitted to the underlying facts, and paid $25 million to resolve the matter.

iii. Plaintiffs alleged that the defendants, through the acts of their trader agents: (1) engaged in price manipulation, in violation of CEA §§6(c), 6(d), 9(a), and 22(a), 7 U.S.C. §§ 9, 13b, 13(a), and 25(a); and (2) employed a manipulative or deceptive device, in violation of CEA §§ 6(c) and 22(a), 7 U.S.C. §§ 9 and 25(a) and Regulation 180.1., 17 C.F.R. § 180.1.

iv. In terms of relief, plaintiffs sought class certification, unspecified damages on behalf of themselves and the alleged class, restitution in the amount of the defendants' unjust enrichment, and the costs of the lawsuit, including reasonable attorneys' and experts' fees. As discussed above, *see* Section IX.M., the defendants moved to dismiss the manipulation claims on May 8, 2020 on three primary grounds, arguing that the claims were untimely, that plaintiffs failed to adequately plead injury and actual damages, and that the CEA confers no private right of action for spoofing. On March 4, 2021, U.S. District Judge Lewis Liman, to whom the case had been transferred in early 2020, dismissed the case with prejudice on statute of limitations grounds and for failing to adequately plead actual harm. The court did not decide whether the CEA provides for a private cause of action for spoofing conduct. *See* Opinion and Order, *In re Merrill, BOFA, and Morgan Stanley Spoofing Litigation*, No. 19-cv-6002 (S.D.N.Y. Mar. 4, 2021), ECF No. 72.

5. *In re JPMorgan Precious Metals Spoofing Litig.*, No. 18-cv-10356 (S.D.N.Y.)

i. On February 5, 2019, United States District Judge John Koeltl consolidated seven putative class actions filed in the Southern District of New York in November and December 2018 against one or more of the following defendants: JPMorgan Chase & Co., John Edmonds, Michael Nowak, Robert Gottlieb, and other "John Doe" defendants. The seven actions are:
   a. *Cognata v. JPMorgan Chase & Co.*, No. 18-cv-10356;
   b. *Melissinos Trading, LLC v. JPMorgan Chase & Co.*, No. 18-cv-10628;
   c. *Sterk v. JPMorgan Chase & Co.*, No. 18-cv-10634;
   d. *Ryan v. JPMorgan Chase & Co.*, No. 18-cv-10755;
   e. *Robert Charles Class A, L.P. v. JPMorgan Chase & Co.*, No. 18-cv-11115;
   f. *Serri v. JPMorgan Chase & Co.*, No. 18-cv-11458; and
   g. *Alishaev v. JPMorgan Chase & Co.*, No. 18-cv-11629.

ii. While differing in the details, each of the seven complaints focuses on the Defendants' alleged manipulation of precious metals futures contracts and options traded on the NYMEX and COMEX during the period of January 1, 2009 through December 31, 2015. Defendants are a group of former precious metals traders—including John Edmonds and Christian Trunz, who pled guilty to related criminal charges on October 9, 2018 and August 20, 2019, respectively (*see* above)—and their former employers. All plaintiffs allege that they transacted in precious metals futures and options contracts during the relevant period and were injured as a result of the defendants' manipulative strategy because such strategy caused them to transact at artificial prices. As a result, they purportedly suffered monetary loses. All plaintiffs seek to

bring their actions on behalf of themselves and as a representative of similarly situated persons and entities who traded on the NYMEX and COMEX during the relevant class period.

iii. The complaints allege, among other things, that the defendants, through the acts of its agents: (1) manipulated and/or attempted to manipulate the price of commodities, in violation of CEA §§ 6(c), 9(a) and 22(a), 7 U.S.C. §§ 9, 13(a) and 25(a); and (2) employed a manipulative and deceptive device and contrivance in connection with the sale of a commodities future, in violation of CEA §§ 6(c) and 22(a), 7 U.S.C. §§ 9 and 25(a), and CFTC Regulation 180.1, 17 C.F.R. § 180.1. They also assert claims for common law unjust enrichment.

iv. All plaintiffs are seeking class certification, unspecified damages on behalf of themselves and the alleged class, restitution in the amount of the defendants' unjust enrichment, and the costs of the lawsuit, including reasonable attorneys' and experts' fees. At the request of the DOJ, the civil matter was originally stayed through May 30, 2021. A request to extend that stay is expected given that the criminal trial in *United States v. Smith,* 19-cr-669 (N.D. Ill.) was moved from April 2021 to October 2021.

6. *Boutchard v. Gandhi,* No. 18-cv-07041 (N.D. Ill. Oct. 19, 2018)

i. On October 19, 2018, Plaintiff Gregory Boutchard filed a putative class action against Kamaldeep Gandhi, Yuchun Mao, Krishna Mohan, Tower Research and 5 unnamed individuals. Boutchard alleges that defendants Mao, Gandhi, and Mohan—all former employees of defendant Tower Research Capital—employed spoofing strategies to manipulate the prices of E-mini index futures contracts traded on the CME from March 2012 to October 2014 (the "Class Period"). He also alleges that he transacted in thousands of E-Mini S&P 500 Futures contracts and E-mini NASDAQ 100 Futures contracts throughout the Class Period and lost money due to artificial prices caused by Defendants' alleged unlawful manipulation. Boutchard purports to bring the action on behalf of himself and "[a]ll persons and entities that purchased or sold any E-mini Dow Futures contract(s), E-mini S&P 500 Futures contract(s), or E-mini NASDAQ 100 Futures contract(s), or any option on those futures contracts, during the" Class Period. As discussed above, defendant Gandhi pled guilty to criminal charges on November 2, 2018, and defendant Mohan pled to criminal charges on November 6, 2018. Defendant Mao was charged criminally but remains at large.

ii. The complaint alleges essentially the same statutory and common law causes of action and bases for relief, and requests essentially the same relief, as the class actions described immediately above.

iii. On January 8, 2021, the Parties filed a joint motion requesting that the Court set a briefing schedule for preliminary approval of a class action settlement. The motion for preliminary approval was filed on January 29, 2021 and objections are due no later than February 19, 2021.

7. *Mendelson v. Allston Trading LLC and John Does 1-10,* No. 15-cv-04580 (N.D. Ill. May 26, 2015).

i. On May 26, 2015, plaintiff Mendelson alleged that, from 2011 to 2015, defendant Allston Trading LLC, a trading firm based in Chicago, Illinois (and others) placed "spoof" orders for U.S. treasuries futures contracts traded on the CBOT.

ii. Plaintiff alleged that the defendants engaged in spoofing, in violation of CEA § 4c(a)(5)(C), 7 U.S.C. § 6c(a)(5)(C), employed manipulative and deceptive devices and contrivances in connection with the sale of commodities, in violation of CEA § 6(c)(1), 7 U.S.C. § 9(1), and CFTC Regulation 180.1, 17 C.F.R. § 180.1(a)(1), and manipulated and attempted to manipulate the price of commodities, in violation of CEA § 6(c)(3), 7 U.S.C. § 9(3), and CFTC Rule 180.2, 17 C.F.R. § 180.2. Mendelson also invoked CEA § 22(a), 7 U.S.C. § 25(a), which allows for a private right of action in certain circumstances.

iii. Plaintiff voluntarily dismissed the case before the court had the opportunity to rule on Allston's motion to dismiss, in which it argued that the CEA does not extend a private right of action to a spoofing violation under CEA § 4c(a)(5)(C), or to an asserted violation of CEA § 6(c) that simply recast the spoofing allegations as more general manipulation. *See* Allston Trading LLC's Motion to Dismiss, *Mendelson v. Allston Trading LLC and John Does 1-10*, No. 15-cv-04580 (N.D. Ill. Jul. 22, 2015), ECF No. 14.

8. *HTG Capital Partners, LLC, v. John Doe(s),* No. 15-cv-2129 (N.D. Ill.).

i. On March 10, 2015, Plaintiff HTG Partners ("HTG")—an equity member firm of the CBOT—filed a private civil action against a group of unidentified traders. Among other things, HTG alleged that, from January 2013 until August 2014, the Defendants engaged in thousands of instances of spoofing with respect to U.S. Treasuries futures contracts traded on the CBOT by submitting orders that they intended to cancel before execution.

ii. HTG alleged that the defendants engaged in spoofing, in violation of CEA §§ 4c(a)(5)(C) and 22(a), 7 U.S.C. §§ 6c(a)(5)(C) and 25(a), and used a manipulative and deceptive device and contrivance in connection with the sale of commodities, in violation of CEA §§ 6(c)(1) and 22(a), 7 U.S.C. §§ 9(1) and 25(a).

iii. On February 16, 2016, the district court granted defendants' motion to compel arbitration (because CBOT Rule 600 requires arbitration of disputes among members) and dismissed the case without prejudice.[304]

9. *Choi v. Tower Research Capital LLC,* No. 14-cv-9912 (S.D.N.Y.)

i. On December 14, 2014, Plaintiffs Myun-Uk Choi, Jin-Ho Jung, Sung-Hun Jung, Sung-Hee Lee, and Kyung-Sub Lee filed a putative class action against Tower Research Capital LLC and Mark Gordon, the principal, founder and managing director of Tower Research during relevant period. The Plaintiffs allege that between January 1, 2012 and December 31, 2012 (the "Class Period"), Defendants engaged in spoofing to manipulate the price of KOSPI 200 futures contracts traded on the CME.[305] Specifically, Plaintiffs allege that Defendants entered large-volume buy and sell orders that they had no intention of filling in order to create a false impression of the number of contracts available on the market. These tactics allegedly earned the defendants $14.1 million in profits.

ii. The second amended complaint alleged that the defendants manipulated the price of KOSPI 200 Futures in violation of CEA §§ 6(c), 6(d), 9(a), and 22(a), 7 U.S.C. §§ 9, 13b, 13(a), and 25(a). Plaintiffs also alleged that each defendant is vicariously liable for the manipulative acts of their agents and representatives, *see* CEA § 2(a)(1), 7 U.S.C. § 2(a)(1), and that defendant Gorton was liable as an aider and abettor and control person. Finally, Plaintiffs asserted a claim for unjust enrichment.

iii. Among other things, the plaintiffs sought class certification, unspecified damages, repayment of the amounts by which defendants were unjustly enriched, and reimbursement of litigation costs, including attorney's fees.

iv. As discussed above in some detail, *see* Section IX.K., on December 17, 2019, a magistrate judge recommended that defendants' motion for judgment on the pleadings, or alternatively, summary judgment, should be granted since plaintiffs failed to provide support for the fact that the subject trading of the KOSPI 200 futures contract occurred "on or subject to the rules of any registered entity." 7 U.S.C. § 9. The Plaintiffs filed an objection to the Report and Recommendations on January

304 We have been unable to locate any private securities actions based upon alleged spoofing.

305 The KOSPI 200 is a stock index for Korean stocks. It is comparable to the S&P 500 or Dow Jones indexes in the United States. The Korea Exchange created KOSPI 200 Futures Contracts as its first derivative product in 1996. In 2007, CME Group and the Korea Exchange signed an agreement allowing for KOSPI 200 futures contracts to be listed and traded on CME Globex.

14, 2020. Defendants filed a response to the Objection on February 11, 2020. On March 30, 2020, United States District Court Judge Kimba Wood adopted the magistrate's report and recommendation and granted defendants' motion for summary judgment on plaintiffs' CEA claims, and final judgment in favor of the defendants was entered on May 13, 2020. On May 22, 2020, plaintiffs appealed the district court's ruling to the Second Circuit, and that appeal is pending.

E. Private Civil Actions Under the Securities Laws.

1. *Harrington Global Opportunity Fund, Ltd. v. CIBC World Markets Corp.*, No. 21-cv-0761 (S.D.N.Y.)

i. On January 28, 2021, plaintiff Harrington Global Opportunity Fund Ltd. ("Harrington") brought claims against several financial institutions based, in part, on alleged spoofing with respect to the stock of Concordia International Corp., a healthcare company based in Canada. Plaintiffs allege that, from January to November 2016, certain defendants—using algorithmic trading software—placed tens-of-thousands of spoof orders to sell Concordia stock (on both U.S. and Canadian exchanges) in order to drive down its price, nearly simultaneously placed buy orders for the same stock, purchased that stock at artificially low prices, then cancelled the sell orders. (The complaint also alleges a "naked short selling scheme" against certain defendants, but we do not address that here.)

ii. Harrington—who owned and sold nearly ten million shares of Concordia stock during the relevant period—alleges that the defendants' alleged spoofing violated § 10(b) of the Exchange Act, 15 U.S.C. § 77j(b), and Rule 10b-5, 17 C.F.R. § 240.10b5, as well as § 9(a)(2) of the Exchange Act, 15 U.S.C. § 78i(a)(2).

iii. The case is at a very early stage.

F. FINRA Cases—Securities Spoofing[306]

1. FINRA has brought at least 26 cases for spoofing under various applicable rules.[307]

i. *Credit Suisse Securities (USA) LLC*, Letter of Acceptance, Waiver and Consent No. 2012034734501 (Dec. 23, 2019) (Credit Suisse censured and fined $16.5 million ($566,593 to be paid to FINRA and the balance to be paid to 11 exchanges), for alleged supervisory failures that allowed spoofing and layering, in violation of Exchange Act Rules 15c3-5(b), 15c3-5(c)(1)(i),15c3-5(c)(2)(iv), NASD Rule 310 (for conduct occurring before December 1, 2014), and FINRA Rules 3110 (for conduct occurring on and after December 1, 2014) and 2010).

ii. *LEK Securities Corp. and Samuel Fredrik Lek*, FINRA Disc. Proc. No. 2011029713004 (Dec. 17, 2019) (Trader permanently barred in all capacities and Corporation censured and fined $900,000 ($69,230.77 of which paid to FINRA) for numerous violations of NASD, FINRA and Exchange Act Rules, including alleged supervisory failures that allowed layering and spoofing, in violation of NASD Rule 3010 (prior to December 1, 2014), FINRA Rule 3110 (after December 1, 2014), and FINRA Rule 2010).

iii. *Lime Brokerage LLC*, Letter of Acceptance, Waiver and Consent No. 2013037572601 (Aug. 15, 2019) (Lime Brokerage firm censured and fined $625,000 for alleged supervisory failures that allowed layering and spoofing, in violation of NASD Rule 3010 (prior to December 1, 2014),

306 FINRA has brought many cases involving allegations of spoofing and layering, or brokerage firms' failure to police the same. This section covers most of the cases filed since 2005 but is not necessarily comprehensive. Note that each FINRA proceeding referenced in this section represents a settlement in which the respondent consented to the entry of FINRA's findings without admitting or denying the allegations or findings. See footnote 122 above.

307 This Section and the next two provide many examples of enforcement actions brought by self-regulatory organizations, but are not necessarily comprehensive.

FINRA Rule 3110 (after December 1, 2014), and FINRA Rule 2010).

iv. *Clearpool Execution Services LLC*, Letter of Acceptance, Waiver and Consent No. 2014042373804 (Jul. 10, 2019) (broker-dealer firm censured and fined $473,000 for alleged supervisory failures that allowed layering and spoofing in violation of NASD Rule 3010, FINRA Rule 3110, and FINRA Rule 2010).

v. *Tripoint Global Equities, LLC*, FINRA Disciplinary Proceeding, No. 2015048172801 (Aug. 29, 2018) (broker-dealer firm censured, fined $100,000, ordered to disgorge commissions in the amount of $34,001 (plus interest), and subjected to a 12-month prohibition from buying or selling penny stock based on supervisory failures that allowed layering and spoofing, in violation of NASD Rule 3010, FINRA Rule 3110, FINRA Rule 3310 and FINRA Rule 2010).

vi. *SMF Trading Inc. d/b/a/ World-Xecution Strategies*, Letter of Acceptance, Waiver and Consent No. 20122031480722 (Aug. 29, 2018) (in an action involving respondents Simon Librati and associated entity World-Xecution strategies, Librati was found liable (for the conduct of firms engaged in spoofing and layering) as a control person under § 20(a) of the Exchange Act and FINRA Rule 2010, and World-Xecution was found to have violated FINRA Rule 2010 and NASD Rule 3010 by failing to reasonably supervise trading activity. Librati consented to a two-year suspension from associating with an FINRA member and World-Xecution consented to an expulsion from FINRA membership.)

vii. *Maurice Elyezer Bensoussan*, Letter of Acceptance, Waiver and Consent No. 2012031480701 (Aug. 29, 2018) (Bensoussan barred from associating with any FINRA Member for, among other things, alleged supervisory failures that allowed layering and spoofing, in violation of FINRA Rule 2010 and § 20(a) of the Exchange Act).

viii. *Instinet, LLC*, Letter of Acceptance, Waiver and Consent No. 2013036836015 (Apr. 11, 2018) (broker-dealer firm fined $1,575,000 for supervisory failures related to equities layering and spoofing in violation of Exchange Act Rules 15c3-5(b) and (c)(2), NASD Rule 3010 for conduct prior to December 1, 2014, and FINRA Rule 3110 for conduct on or after December 1, 2014 and 2010).

ix. *Lightspeed Trading, LLC*, FINRA Disciplinary Proceeding, No. 2013035468201 (Nov. 9, 2017) (firm Lightspeed Trading was fined $290,000 for: (1) supervisory failures that allowed spoofing and layering in violation of NASD Rule 3010 and FINRA Rules 3110 and 2010; (2) failing to make and preserve books and records in violation of § 17(a) of the Exchange Act, NASD Rule 3010, 3110 and FINRA Rules 4511 and 2010; and (3) failing to file an amended form U4 in violation of FINRA By-Laws Article V, Section 2 and FINRA Rule 2010).

x. *Deutsche Bank Secs. Inc.*, Letter of Acceptance, Waiver and Consent No. 2013039313504 (Jul. 27, 2017) (firm consents to fine of $2,500,000 for failing to adequately supervise which resulted in spoofing and layering activities in violation of SEC Rule 15c3-5(b) and FINRA Rule 2010 and NASD 3010).

xi. *Elec. Transaction Clearing, Inc.*, FINRA Disciplinary Proceeding, No. 2013037709301 (Jul. 24, 2017) (firm fined $250,000 for failing to police layering, in violation of (1) FINRA Rules 3310 and 2110, (2) NASD Rule 3010 and (3) FINRA Rule 3110. Electronic Transaction also violated Exchange Act Rule 15c3-3, 17a-3 and 17a-4).

xii. *Two Sigma Secs., LLC*, Letter of Acceptance, Waiver and Consent No. 2013039165804 (Apr. 6, 2017) (firm fined $65,000 for failing to adequately risk manage and supervise manipulative trading practices, in violation of SEC 14c3-5, NASD Rule 3010 (now FINRA Rule 3110), and FINRA Rule 2010).

xiii. *Credit Suisse Secs. (USA) LLC*, Letter of Acceptance, Waiver and Consent No. 2013038726101 (Dec. 5, 2016) (firm censured and fined $16.5 million for allegedly failing to police spoofing and other forms of manipulative trading, in violation of FINRA Rules 2010 and 3310).

xiv. *Marcus C. Rodriguez*, Letter of Acceptance, Waiver and Consent, No. 2013037932401 (Feb. 24, 2016) (president, compliance officer, and principal fined $50,000 and barred from associating with a FINRA member firm for, among other things, alleged supervisory failures that allowed layering and spoofing, in violation of NASD Rule 3010 and FINRA Rule 2010). Rodriguez was also the subject of another enforcement action for previous conduct at another employer.

xv. *Elec. Transaction Clearing, Inc.*, FINRA Disciplinary Proceeding, No. 2010025475601 (Feb. 19, 2016) (brokerage firm censured and fined $875,000 pursuant to a settlement for allegedly failing to police spoofing and other forms of manipulative trading in violation of NASD Rule 3010, FINRA Rules 2010 and 3110, Exchange Act § 15(c)(3), and Exchange Act Rule 15c3-5).

xvi. *Great Point Capital LLC*, FINRA Disciplinary Proceeding, No. 2008014822702 (Dec. 11, 2015) (brokerage firm censured, fined $1,100,000, and ordered to retain an Independent Consultant, with executive jointly liable for $50,000 of the fine and barred from association with a FINRA member, pursuant to a settlement for allegedly failing to police layering, in violation of NASD Rules 3010 and 2110, and FINRA Rule 2010, among other violations).

xvii. *Wedbush Secs. Inc.*, FINRA Disciplinary Proceeding, No. 2009020634401 (Dec. 1, 2015) (brokerage firm fined a total of $1,800,000 in the concurrent settlements of several Disciplinary Proceedings, including one that alleged failure to police spoofing and other forms of manipulative trading, in violation of NASD Rules 3010, 2110, and 3011, FINRA Rules 3310 and 2010, Exchange Act § 15(c)(3), and Exchange Act Rule 15c3-5).

xviii. *Lightspeed Trading, LLC*, FINRA Letter of Acceptance, Waiver and Consent, No. 2010023935005 (Feb. 13, 2015) (brokerage firm fined $250,000 for allegedly failing to police spoofing, in violation of NASD Rules 3010 and 2110, and FINRA Rule 2010, among other violations).

xix. *Transcend Capital, LLC*, FINRA Letter of Acceptance, Waiver and Consent, No. 2011029039801 (Dec. 17, 2013) (brokerage firm fined $200,000 for allegedly failing to police spoofing and other forms of manipulative trading, in violation of NASD Rule 3010, FINRA Rules 2010 and 3310, and Exchange Act Rule 15c3-5).

xx. *Newedge USA, LLC*, FINRA Letter of Acceptance, Waiver and Consent, No. 20090186944 (July 10, 2013) (brokerage firm fined $9.5 million for allegedly failing to police spoofing, in violation of NASD Rules 3010 and 2110, and FINRA Rule 2010, among other violations).

xxi. *Title Secs., Inc.*, FINRA Letter of Acceptance, Waiver and Consent, No. 2010022913901 (Sept. 26, 2012) (brokerage firm fined $150,000 for allegedly failing to police spoofing and other forms of manipulative trading, in violation of NASD Rule 3011 and FINRA Rules 3310 and 2010).

xxii. *Hold Brothers On-Line Investment Services, LLC*, FINRA Letter of Acceptance, Waiver and Consent, No. 2010023771001 (Sept. 25, 2012) (brokerage firm fined $5.9 million for allegedly failing to police spoofing, in violation of Exchange Act § 9(a)(1)-(2), NASD Rules 3010, 3310, IM-3310, 3320 and FINRA Rules 2010, 2020, 5210, 5210.01, and 5520, among other violations).

xxiii. *Biremis Corp.*, FINRA Letter of Acceptance, Waiver and Consent, No. 2010021162202 (July 30, 2012) (brokerage firm expelled from FINRA, and executive barred from association with any member firm, for allegedly failing to police layering, in violation of NASD Rules 2110 and 3010, and FINRA Rule 2010, among other violations).

xxiv. *Todd M. Fernbach*, FINRA Letter of Acceptance, Waiver and Consent, No. 2009021082506 (June 18, 2012) (compliance officer fined $10,000 and suspended for 90 days for allegedly failing to police layering, in violation of NASD Rules 3011 and 2110, and FINRA Rule 2010, among other violations).

xxv. *Robert T. Bunda*, FINRA Letter of Acceptance, Waiver and Consent, No. 2006005157101 (May 26, 2011) (trader suspended for 16 months and ordered to pay $175,000 fine and $171,740 in restitution, for alleged spoofing and other forms of manipulative trading, in violation of NASD Rules 2110, 2120, 3310, and IM-3310, among other violations).

xxvi. *Trillium Brokerage Servs., LLC*, FINRA Letter of Acceptance, Waiver and Consent, No. 2007007678201 (August 5, 2010) (brokerage firm, compliance officer, trading supervisor, and nine traders ordered to pay a total of $2.27 million in fines and disgorgement, in addition to individual suspensions, based on alleged layering in proprietary accounts and supervisory failures, in violation of NASD Rules 2110, 2120, 3310, IM-3310, and 3010).

G. Exchange Cases—Derivatives Spoofing

1. The CME has brought at least 14 cases under its new antispoofing rule, Rule 575. ICE has brought at least seven cases under its new anti-spoofing rule, Rule 4.02(l). These disciplinary cases include:

i. *Brendan Delovitch*, COMEX No. 18-0888-BC (Sept. 30, 2020) (trader fined $50,000 and suspended from accessing any trading floor owned or controlled by CME Group, and denied access to all platforms owned or controlled by CME Group for four months, for violating Exchange Rule 575).

ii. *Wesley Johnson*, CME No. 17-0763-BC (Sept. 30, 2020) (trader fined $35,000 and suspended from accessing any trading floor owned or controlled by CME Group, and denied access to all platforms owned or controlled by CME Group for four months, for violating Exchange Rule 575).

iii. *Rajeev Kansal*, ICE No. 2019-045 (Sept. 30, 2020) (trader required to pay $50,000 in monetary penalties, $5,584 in disgorgement, and suspended from direct and indirect access to all ICE Futures US electronic trading platforms for four months, for violating ICE Rules 4.02(l)(1)(A), (C); 4.02(I)(2); and 4.04).

iv. *ARB Trading Group North LLC*, ICE Nos. 2019-019, 2019-045, & 2020-005 (Sept. 30, 2020) (trading firm, based on the acts of three employees, fined $75,000 and required to disgorge $3,492 in profits for violation of ICE Rules 4.02(I)(1)(A), (C); 4.02(I)(2); 4.04; and 4.01(a)).

v. *Roman Banoczay*, NYMEX No. 18-0877-BC (Mar. 23, 2020) (trader fined $100,000, required to disgorge $118,599.34, and permanently barred from CME Group membership, and from accessing any CME Group trading floor and access to all electronic trading and clearing platforms owned by CME Group, for violation of Exchange Rules 575.A. and 432.L.2).

vi. *Andrew Stanley Lombara*, COMEX No. 15-0326-BC (Dec. 23, 2019) (trader fined $60,000, suspended from accessing any trading floor owned or controlled by CME Group, and denied access to all platforms owned or controlled by CME Group for ten business days for violating Exchange Rules 575.A. and 575.B.).

vii. *Mitsubishi Corp. RTM Japan Ltd.*, NYMEX No. 18-0921-BC (Nov. 7, 2019) (Mitsubishi fined $250,000 for violating Exchange Rules 432, 575.A., and 433).

viii. *Daesoon Park*, COMEX No. 17-0691-BC (Aug. 05, 2019) (trader fined $80,000, required to disgorge $2,262 in profits, and barred from applying for Membership at any CME Group Exchange and from accessing CME Group trading venues for alleged violations of Exchange Rules 575.A., 575.B., and 432.L.2, among other violations).

ix. *Brian Soldano*, ICE No. 2017-001 (Dec. 5, 2018) (trader fined $15,000 and suspended from accessing all electronic trading and clearing platforms owned or controlled by ICE Futures U.S. for nine weeks for possible violations of ICE Rule 4.02(l), including its anti-spoofing prohibition).

x. *Uncia Energy LP*, ICE No. 2017-047 (Dec. 4, 2018) (Uncia fined $37,500 and ordered to cease and desist future violations of ICE Rule 4.02(l)).

xi. *Shay Caherly*, ICE No. 2017-030 (Sept. 18, 2018) (trader fined $25,000 and suspended from accessing all electronic trading and clearing platforms owned or controlled by ICE Futures U.S. for two weeks for possible violations of ICE Rule 4.02(l), including its anti-spoofing prohibition).

xii. *Step Consulting LLC*, ICE No. 2017-049 (Sept. 17, 2018) (Step Consulting fined $22,500 and ordered to cease and desist future violations of ICE Rules 4.15(b) and 4.02(l)).

xiii. *Weihao Huang,* COMEX No. 16-0495-BC (Jun.14, 2018) (trader fined $25,000, ordered to disgorge profits in amount of $6,447.10, and suspended for 20 days from access to any CME Group trading floor and access to all electronic trading and clearing platforms owned by CME Group for violation of Exchange Rule 575).

xiv. *Ali Abbassi,* NYMEX No. 16-0478-BC (Apr. 20, 2018) (trader fined $5,000 and, suspended for three months from membership privileges on any CME Group Inc. exchange, and denied access to all trading and clearing platform owned by CME Group during that same period, for violating Exchange Rule 575.A.).

xv. *Peter Miller*, NYMEX No. 16-0504-BC (Feb. 1, 2018) (trader fined $35,000 and suspended for ten business days from access to any CME Group trading floor and access to all electronic trading and clearing platforms owned by CME Group for violation of Exchange Rule 575.A.).

xvi. *Sudeep Moniz*, NYMEX No. 16-0469-BC (Nov. 3, 2017) (trader fined $150,000 and suspended for six weeks from CME membership privileges, denied access to any CME Group trading floor, and denied access to all electronic trading and clearing platforms owned or controlled by the CME for alleged violations of Exchange Act Rules 575.A. and 432.L.; trader neither admitted nor denied the violations).

xvii. *Simon Posen,* NYMEX No. 13-9258-BC (Nov. 23, 2016) (trader fined $90,000 and denied access to any CME Group Inc. trading floor and all electronic trading and clearing platforms owned or controlled by CME Group for four weeks, for violating Exchange Rule 575.A.; trader neither admitted nor denied the violations).

xviii. *William Chan*, COMEX No. 14-0059-BC, NYMEX No. 14-0059-BC (June 9, 2016) (trader fined a total of $45,000 in companion cases and suspended from accessing CME Group trading venues for 15 business days for alleged violations of Exchange Rule 575.A.; trader neither admitted nor denied the violations).

xix. *Joshua Bailer*, NYMEX No. 15-0073-BC (May 26, 2016) (trader fined $35,000 and suspended from accessing CME Group trading venues for ten business days for alleged violations of Exchange Rule 575.A.; trader neither admitted nor denied the violations).

x.x *Heet Khara*, *Nasim Salim*, COMEX Nos. 15-0103-BC-1, 15-0103-BC-2 (Apr. 28, 2016) (traders fined respectively, $90,000 and $100,000 and barred from applying for Membership at any CME Group Exchange and from accessing CME Group trading venues for alleged violations of Exchange Rule 575.A., among other violations; traders neither admitted nor denied the violations).

xxi. *James Shrewsbury*, ICE No. 2015-045 (Mar. 11, 2016) (trader fined $139,850, including $69,850 disgorgement, and suspended from accessing all electronic trading and clearing platforms owned or controlled by ICE Futures U.S. for ten business days for possible violations of ICE Rule 4.02(l), including its anti-spoofing prohibition; trader neither admitted nor denied the violations).

2. Disciplinary cases brought by exchanges under more general prohibitions on manipulative or dishonest practices for conduct associated with spoofing:

i. *303 Proprietary Trading LP,* CME No. 17-0763-BC-2 (Sept. 30, 2020) (trading firm fined $25,000 for violating CME Rule 432.W.).

ii. *Michael Vukmir,* CME No. 17-0802-BC (May 10, 2019) (trader fined $15,000 and denied access to the CME group trading floor and electronic

trading and clearing platforms for three months for violations of CME Rule 575.A.).

iii. *Sharp Link Developments LTD.*, COMEX/NYMEX No. 17-052-BC-1 (Mar. 5, 2019) (Sharp Link fined $200,000 ($160,000 allocated to COMEX and $40,000 allocated to NYMEX) for violating Exchange Rules 575.D. and 539).

iv. *Kevin Crepeau*, CBOT No. 16-0466-BC (Jan. 31, 2019) (trader fined $30,000 and denied access to any CME Group trading floor and all electronic trading and clearing platforms owned or operated by CME Group for four months for violating CME Rule 575.A.).

v. *Timothy Roach,* CBOT No. 16-0489-BC (Nov. 29, 2018) (trader fined $90,000, ordered to disgorge profits in the amount of $11,178.88, and denied access to any CME Group trading floor or electronic platform for violations of CBOT for 30 days, including violation of Rule 575).

vi. *Yuchun Bruce Mao*, CME No. 13-9693 (Aug. 10, 2018) (trader fined $125,000 ($75,000 allocated to CME) and denied access to any CME Group trading floor and all electronic trading and clearing platforms owned or controlled by CME Group for two years for violating Exchange Rules 432.B.2., 432.Q., 432.T., and 575.A.).

vii. *Andrei Sakharov*, NYMEX No. 16-0486-BC-1 (Aug. 9, 2018) (trader fined $80,000 in connection with this case and companion case COMEX 16-046-BC ($60,000 allocated to NYMEX case) and denied access to any CME Group trading floor and all electronic trading and clearing platforms owned or controlled by CME Group for 45 days, for violating Exchange Rules 575.A., 432.T., 432.U., and 576).

viii. *AlphaBit Trading LLC,* CME No. 15-0334-BC (June 15, 2018) (trader fined $25,000 for violating Exchange Rule 432.W.).

ix. *Corey Flaum*, COMEX No. 16-0529-BC (Apr. 02, 2018) (trader fined $35,000 and denied membership privileges on any CME Group exchange and access to all electronic trading and clearing platforms owned or operated by CME Group for ten days, for violating Rule 575.A.).

x. *Belvedere Trading, LLC* CME No. 16-0364-BC-2 (Mar. 16, 2018) (trader fined $100,000 for violating Exchange Rule 432.W.).

xi. *Marc Sonnabend*, NYMEX No. 16-0441-BC (Feb. 1, 2018) (trader fined $65,000, ordered to disgorge profits in the amount of $19,003, and suspended from access to all electronic trading and clearing platforms owned or operated by CME Group for 6 months for violating NYMEX Rule 575.A.)

xii. *RWE Supply and Trading GMH,* COMEX No. 16-522-BC-2 (Dec. 22, 2017) (RWE ordered to disgorge profits in the amount of $18,841 based on the acts of its employees, which violated NYMEX Rule 575.A.).

xiii. *Dan Ostroff*, CME No. 15-0078-BC (Dec. 21, 2017) (trader fined $35,000 and faced 25-day suspension from accessing CME Group trading floors and access to all electronic CME trading).

xiv. *Jiongsheng Zhao,* CME No. 16-0396-BC (Nov. 9, 2017) (trader fined $35,000 and barred from accessing all CME Group trading floors and access to all electronic trading and clearing platforms owned or controlled by CME Group for violating CME Rule 575.A.).

xv. *Tower Research Capital, LLC*, CME No. 13-9693-BC-1 (Nov. 3, 2017) (Tower ordered to pay fine of $150,000 and disgorge $162,000 in profits in connection with this case and companion cases CBOT/NYMEX/COMEX 13-9693-BC).

xvi. *Zachary Abraham*, CME No. 16-0395-BC (Oct. 20, 2017) (trader fined $75,000 and denied access to any CME Group trading floor and all electronic trading and clearing platforms owned by CME group for three weeks, for violations of CME Rule 575.A).

xvii. *Arab Global Commodities* DMCC, COMEX No. 16-0513-BC-1 (Oct. 10, 2017) (Arab Global ordered to pay $70,000 for violating Rules 575.A. and 432.W.).

xviii. *Michael Schneider,* NYMEX No. 15-0198-BC (Oct. 2, 2017) (trader fined $45,000 and denied access to any CME Group trading floor and all electronic trading and clearing platforms owned or controlled by CME Group for ten days, for violation of Exchange Rule 575.D.).

xix. *Andrew Anascewicz*, CBOT No. 16-0416-BC (Sept. 28, 2017) (trader fined $50,000, required to disgorge $5,296.88, and denied access to any CME Group trading floor for four weeks, for violation of CBOT Rule 575.A.).

xx. *Gregg Smith*, COMEX No. 12-8979-BC (July 24, 2017) (trader fined $95,000 and denied access to any CME Group trading floor and all electronic trading and clearing platforms owned or controlled by CME Group for ten days, for violations of Exchange Rules 432.B.2., 432.Q., and 432.T.).

xxi. *John Ruggles*, NYMEX No. 12-9153-BC-1 (June 13, 2016) (trader fined $300,000, ordered to disgorge profits in the amount of $2,812,126.20, and permanently barred from applying for membership at any CME Group exchange, and accessing any trading floor owned or operated by CME Group, for violations of NYMEX Rules 432, 530, 532, and 576).

xxii. *David Kotz*, NYMEX No. 14-9933-BC (Apr. 28, 2016) (trader fined $200,000 and suspended from accessing any CME Group trading venue for 15 business days; trader neither admitted nor denied the violations).

xxiii. *Matthew Garber*, CBOT No. 12-8862-BC (Nov. 6, 2015), CBOT File No. 11-8570-BC (Nov. 6, 2015) (trader fined in two separate cases, a total of $60,000, and suspended from accessing CME Group trading venues for a total of 35 business days; trader neither admitted nor denied the violations).

xxiv. *Nitin Gupta*, COMEX No. 13-9391-BC (Oct. 12, 2015) (trader fined $100,000 and banned from trading on any CME Group exchange).

xxv. *James Groth*, CBOT No. 11-8463-BC (July 20, 2015) (trader fined $55,000 and suspended from trading on any CME Group exchange for ten business days; trader neither admitted nor denied the violations).

xxvi. *Igor Oystacher*, ICE No. 2013-009 (June 5, 2015) (trader fined $125,000; trader neither admitted nor denied the findings).

xxvii. *Michaele Simonian*, COMEX No 13-9598-BC (Mar. 20, 2015) (trader fined $35,000 and suspended from accessing CME Group trading venues for 15 business days for alleged violations of Exchange Rule 432.B.2.; trader neither admitted nor denied the violations).

xxviii. *Jonathan Brims*, CBOT No. 12-8860-BC-1 (Jan. 22, 2015) (trader fined $50,00 and suspended from accessing CME Group trading venues for ten business days for violations of Exchange Rule 432.B.2. and 432.Q.).

xxix. *Igor Oystacher*, COMEX No. 11-08380-BC & NYMEX No. 10-07963-BC (Nov. 28, 2014) (trader fined $150,000 and suspended from trading on any CME Group exchange for one month; trader neither admitted nor denied the violations).

xxxi. *Michael Coscia*, CME No. 11-8581-BC (July 22, 2013) (trader fined $200,000 ($76,760 of which was allotted to CME), suspended from trading on any CME group exchange for six months, and ordered, jointly and severally with Panther Energy Technology, to pay $1,312,947.02 in disgorgement ($525,178.81 of which was allotted to CME) for violation of CME rules 432.B.2, 432.Q, 432.T, and 576).w

APPENDIX A

DOJ/CRIMINAL SPOOFING CASES						
Case Name	**Defendants**	**Primary Criminal Charges[1]**	**Charging Instrument (Date)[2]**	**Financial Product**	**Outcome**	**Parallel Civil Enforcement? (Y/N)**
***United States v. JPMorgan & Chase Co.*, Case No. 20-Cr-175 (D. Conn.)**	1 company	Wire fraud, 18 U.S.C. § 1343	Information (9/29/20)	Futures Contracts ("FC") and Securities	DPA Monetary Penalty: $436,431,811 Disgorgement: $172,034,790 Victim Compensation: $311,737,008	Y – CFTC and SEC (9/29/20)
***United States v. Bank of Nova Scotia*, Case No. 20-Cr-00707 (D.N.J)**	1 company	Wire fraud, 18 U.S.C. § 1343; Attempted price manipulation, 7 U.S.C. § 13(a)(2)	Information (08/19/20)	FC	DPA Monetary Penalty: $42M Disgorgement: $11,828,912 Victim Compensation: $6,622,190	Y – CFTC (8/19/20)
***United States v. Propex Derivatives Pty Ltd*, Case No. 20-Cr-0039 (N.D. Ill.)**	1 company	Spoofing, 7 U.S.C. §§ 6c(a)(5)(C) and 13(a)(2)	Information (1/21/20)	FC	DPA Monetary Penalty: $462,271 Disgorgement: $73,429 Victim Compensation: $464,300	Y—CFTC (1/21/20)
***United States v. Tower Research Capital LLC*, Case No. 19-Cr-819 (S.D. Tex.)**	1 company	Commodities fraud, 18 U.S.C. § 1348(1)	Information (11/6/19)	FC	DPA Monetary Penalty: $24.4M Disgorgement: $10.5M Victim Compensation: $32,593,849	Y—CFTC (11/6/2019)
***United States v. Xiaosong Wang and Jiali Wang*, 19-mj-6485 (D. Mass.)**	2 individuals	Conspiracy to commit securities fraud, 18 U.S.C. § 371	Complaint (10/14/19)	Securities	Pending	Y—SEC (10/15/19)
***United States v. Smith, Nowak, Ruffo, and Jordan*, 19-Cr-00669 (N.D. Ill.)**	4 individuals	All: RICO Conspiracy, 18 U.S.C. § 1962(d); conspiracy to commit wire fraud affecting a financial institution, bank fraud, commodities fraud, price manipulation, and spoofing, 18 U.S.C. § 371 Smith, Nowak, Jordan: Bank fraud, 18 U.S.C. § 1344(1); wire fraud affecting a financial institution, 18 U.S.C. § 1343 Smith & Nowak: Spoofing, 7 U.S.C. §§ 6c(a)(5)(C) and 13(a)(2); Commodities fraud, 18 U.S.C. § 1348(1); Attempted price manipulation, 7 U.S.C. § 13(a)(2)	Indictment (8/22/19)	FC	Pending	Y—CFTC (9/16/19)
***United States v. Trunz*, 19-Cr-00375 (E.D.N.Y.)**	1 individual	Conspiracy to spoof, 18 U.S.C. § 371; Spoofing, 7 U.S.C. §§ 6c(a)(5)(C) and 13(a)(2)	Information (8/20/19)	FC	Pled guilty (cooperating) Sentencing on 5/14/21	Y—CFTC (9/16/19)
***United States v. Flaum*, 19-Cr-00338 (E.D.N.Y.)**	1 individual	Attempted price manipulation, 7 U.S.C. § 13(a)(2)	Information (7/25/19)	FC	Pled guilty (cooperating) Sentencing on 7/27/21	Y—CFTC (7/25/19)
In re Merrill Lynch Commodities, Inc.	1 company	N/A—Non-prosecution agreement	N/A	FC	NPA Fine/forfeiture/ restitution combined: $25M	Y—CFTC (6/25/2019)
***United States v. Zhao*, 18-Cr-00024 (N.D. Ill.)**	1 individual	Spoofing, 7 U.S.C. §§ 6c(a)(5)(C) and 13(a)(2)	Information (12/18/18)	FC	Pled guilty (cooperating) Imprisonment: 302 days (time served) No criminal monetary sanction	Y—CFTC (1/28/18)

APPENDIX A *(cont'd)*

DOJ/CRIMINAL SPOOFING CASES						
Case Name	**Defendants**	**Primary Criminal Charges[1]**	**Charging Instrument (Date)[2]**	**Financial Product**	**Outcome**	**Parallel Civil Enforcement? (Y/N)**
***United States v. Gandhi*, 18-Cr-609 (S.D. Tex.)**	1 individual	Conspiracy to commit wire fraud, commodities fraud, and spoofing, 18 U.S.C. § 371	Information (10/11/18)	FC	Pled guilty (cooperating) Sentencing on 5/21/21	Y—CFTC (10/12/18)
***United States v. Mohan*, 18-Cr-00610 (S.D. Tex.)**	1 individual	Conspiracy to commit wire fraud, commodities fraud, and spoofing, 18 U.S.C. § 371	Information (10/11/18)	FC	Pled guilty (cooperating) Sentencing on 5/27/21	Y—CFTC (2/25/19)
***United States v. Mao*, 18-Cr-00606 (S.D. Tex.)**	1 individual	Conspiracy to commit commodities fraud, 18 U.S.C. § 1349; Commodities fraud, 18 U.S.C. § 1348; Spoofing, 7 U.S.C. §§ 6c(a)(5)(C) and 13(a)(2)	Indictment (10/10/18)	FC	Pending	N
***United States v. Edmonds*, 18-Cr-239 (D. Conn.)**	1 individual	Conspiracy to commit wire fraud, commodities fraud, price manipulation, and spoofing, 18 U.S.C. § 371; Commodities fraud, 18 U.S.C. § 1348 (1)	Information (10/9/18)	FC	Pled guilty (cooperating) No sentencing date	Y—CFTC (7/25/19)
***United States v. Vorley and Chanu*, 18-Cr-00035 (N.D. Ill.)**	2 individuals	Conspiracy to commit wire fraud affecting a financial institution, 18 U.S.C. § 1349; Wire fraud affecting a financial institution, 18 U.S.C. § 1343	Indictment (7/24/18)	FC	Jury Verdict: Vorley and Chanu: acquitted on lone conspiracy count Vorley: guilty on 3 counts and not guilty on 5 counts of wire fraud Chanu: guilty on 7 counts and not guilty on 3 counts of wire fraud No sentencing date	Y—CFTC (1/26/18)
***United States v. Taub*, Case No. 16-8190 (D.N.J.)**	1 individual	Conspiracy to commit securities fraud, 18 U.S.C. § 1349; Securities fraud, 18 U.S.C. § 1348; Conspiracy to commit securities fraud, 18 U.S.C. § 371; Securities fraud, 15 U.S.C. § 78j(b) and 17 C.F.R. § 240.10b-5; Conspiracy to defraud the United States, 18 U.S.C. § 371	Indictment (2/21/18)	Securities	Pled guilty 18 months' imprisonment; 1-yr supervised release Disgorgement: $17.1 million Restitution: $394,424 to IRS	Y–SEC (12/12/16)
***United States v. Bases and Pacilio*, 18-Cr-00048 (N.D. Ill.)**	2 individuals	Bases and Pacilio: Conspiracy to commit commodities fraud and wire fraud affecting a financial institution, 18 U.S.C. § 1349; Commodities fraud, 18 U.S.C. § 1348 Pacilio: Spoofing, 7 U.S.C. §§ 6c(a)(5)(C), 13(a)(2)	Indictment (7/17/18)	FC	Pending Trial scheduled for 7/12/21	N
***United States v. Thakkar*, 18-Cr-00036 (N.D. Ill)**	1 individual	Conspiracy to commit spoofing, 18 U.S.C. § 371; Spoofing, 7 U.S.C. §§ 6c(a)(5)(C) and 13(a)(2)	Indictment (2/14/18)	FC	Exonerated at/after trial	Y—CFTC (1/28/18)
***United States v. Flotron*, 17-Cr-00220 (D. Conn.)**	1 individual	Conspiracy to commit commodities fraud, 18 U.S.C. §1349; Commodities fraud, 18 U.S.C. § 1348; Spoofing, 7 U.S.C. §§ 6c(a)(5)(C), 13(a)(2)	Indictment (9/26/17)	FC	Acquitted at trial	Y—CFTC (1/26/18)
***United States v. Liew*, 17-Cr-00001 (N.D. Ill.)**	1 individual	Conspiracy to commit spoofing and wire fraud affecting a financial institution, 18 U.S.C. § 371	Information (5/24/17)	FC	Pled Guilty (cooperating) No sentencing date	Y—CFTC (6/2/17)
***United States v. Milrud*, 15-Cr-455 (D.N.J.)**	1 individual	Conspiracy to commit securities fraud, 18 U.S.C. § 371	Information (9/10/15)	Securities	Pled guilty 5-yrs probation Fine: $10K	Y—SEC (1/13/15)

APPENDIX A *(cont'd)*

DOJ/CRIMINAL SPOOFING CASES						
Case Name	**Defendants**	**Primary Criminal Charges[1]**	**Charging Instrument (Date)[2]**	**Financial Product**	**Outcome**	**Parallel Civil Enforcement? (Y/N)**
***United States v. Sarao*, 15-Cr-00075 (N.D. Ill.)**	1 individual	Wire fraud, 18 U.S.C. § 1343; Commodities fraud, 18 U.S.C. 1348; Price manipulation, 7 U.S.C. § 13(a)(2); Spoofing, 7 U.S.C. §§ 6c(a)(5)(C) and 13(a)(2)	Indictment (9/2/15)	FC	Pled guilty (cooperated) Imprisonment: 120 days (time served) and 1-yr home confinement Forfeiture: $12,871,587.26	Y—CFTC (4/17/15)
***United States v. Coscia*, 14-Cr-00551 (N.D. Ill.)**	1 individual	Commodities fraud, 18 U.S.C. § 1348; Spoofing, 18 U.S.C. §§ 6c(a)(5)(C) and 13(a)(2)	Indictment (10/1/14)	FC	Convicted at trial Imprisonment: 3-yrs; 2-yrs supervised release	Y—CFTC (7/22/13)

APPENDIX B

CFTC SPOOFING CASES					
Case Name (Date)	**Type of Proceeding**	**Defendant/ Respondent**	**Primary Statutes Charged**	**Admitted CFTC Findings? (Y/N)**	**Result/Monetary Sanctions**
In re Sunoco LP, CFTC No. 20-75 **(11/30/20)**	Administrative	1 organization	Spoofing, 7 U.S.C. §§ 6c(a)(5)(C)	N	Settled Civil Money Penalty ("CMP"): $450K
In re Delovitch, **CFTC No. 20-71 (9/30/20)**	Administrative	1 individual	Spoofing, 7 U.S.C. §§ 6c(a)(5)(C)	N	Settled CMP: $100K
In re Johnson, **CFTC No. 20-72(9/30/20)**	Administrative	1 individual	Spoofing, 7 U.S.C. §§ 6c(a)(5)(C)	N	Settled CMP: $100K
In re Kansal, **CFTC No. 20-73 (9/30/20)**	Administrative	1 individual	Spoofing, 7 U.S.C. §§ 6c(a)(5)(C)	N	Settled CMP: $100K
In re ARB Trading Group LP., **CFTC No. 20-74 (9/30/20)**	Administrative	1 organization	Spoofing, 7 U.S.C. §§ 6c(a)(5)(C)	N	Settled CMP: $445K
C.F.T.C. v. Banoczay, **No. 20-Cv-5777 (N.D. Ill., 9/29/20)**	District Court	1 organization 2 individuals	Spoofing, 7 U.S.C. § 6c(a)(5)(C); Manipulative contrivances and deceptive acts, 7 U.S.C. § 9(1) and 17 C.F.R. § 180.1	Pending	Pending
In re JPMorgan Chase & Co., **CFTC No. 20-69 (9/29/20)**	Administrative	3 organizations	Spoofing, 7 U.S.C. § 6c(a)(5)(C); Manipulative contrivances and deceptive acts, 7 U.S.C. § 9(1) and 17 C.F.R. § 180.1; Attempted price manipulation, 7 U.S.C. § 13(a)(2) and 17 C.F.R. § 180.2; Failure to supervise, 17 C.F.R. § 166.3	N (unless admitted pursuant to DPA)	Settled Restitution: $205,992,102 (JPMCB & JPMC & Co. jointly and severally); 105,744,906 (JPMS & JPMC & Co. jointly and severally) Disgorgement: $120,332,430 (JPMCB & JPMC & Co. jointly and severally); $51,702,360 (JPMS & JPMC & Co. jointly and severally) CMP: $436,431,811 (joint and several)
In re Donino, **CFTC No. 20-68 (9/28/20)**	Administrative	1 individual	Spoofing, 7 U.S.C. § 6c(a)(5)(C)	N	Settled CMP: $135K
In re FNY Partners Fund LP, **CFTC No. 20-67 (9/28/20)**	Administrative	1 organization	Spoofing, 7 U.S.C. § 6c(a)(5)(C)	N	Settled CMP: $450K
In re Bank of Nova Scotia, **CFTC Nos. 20-27 and 20-28 (8/19/20)**[3]	Administrative	1 organization	Spoofing, 7 U.S.C. § 6c(a)(5)(C) (for conduct occurring on, or after 7/16/07); Attempted manipulation 7 U.S.C. § 13(a)(2) and 7 U.S.C. § 9(1); 17 C.F.R. §§ 180.1(a)(1), (3) (for conduct occurring on, or after, 7/16/07)	N (unless admitted pursuant to DPA)	Settled Restitution: $6,622,190 Disgorgement: $11,828,912 CMP: $42M
In re Deutsche Bank Secs. Inc., **CFTC No. 20-17 (6/18/20)**	Administrative	1 organization	Spoofing, 7 U.S.C. § 6(c)(a)(5)(C)	N	Settled CMP: $1.25M
United States v. Propex Derivatives Pty Ltd, **CFTC No. 20-12 (1/21/20)**	Administrative	1 organization	Spoofing, 7 U.S.C. §§ 6c(a)(5)(C) and 13(a)(2)	N (unless admitted pursuant to DPA with DOJ)	DPA (cooperating) Restitution: $464,300 Disgorgement: $73,429 CMP: $462, 271
In re Mirae Asset Daewoo Co., **CFTC No. 20-11 (1/13/20)**	Administrative	1 organization	Spoofing, 7 U.S.C. §§ 6c(a)(5)(C)	N	Settled CMP: $700K
In re Mitsubishi RtM Japan Ltd., **CFTC No. 20-07 (11/7/19)**	Administrative	1 organization	Spoofing, 7 U.S.C. §§ 6c(a)(5)(C)	N	CMP: $500K

APPENDIX B *(cont'd)*

CFTC SPOOFING CASES					
Case Name (Date)	**Type of Proceeding**	**Defendant/ Respondent**	**Primary Statutes Charged**	**Admitted CFTC Findings? (Y/N)**	**Result/Monetary Sanctions**
***In re Tower Research Capital LLC*, CFTC No. 20-06 (11/6/19)**	Administrative	1 organization	Spoofing, 7 U.S.C. § 6c(a)(5)(C); Manipulative contrivances and deceptive acts, 7 U.S.C. § 9(1) and 17 C.F.R. § 180.1	N (unless admitted pursuant to DPA with DOJ)	Settled CMP: $24.4M Disgorgement: $10.5M Restitution: $32,593,849
***In re Belvedere Trading LLC*, CFTC No. 19-45 (9/30/19)**	Administrative	1 organization	Spoofing, 7 U.S.C. § 6c(a)(5)(C)	N	Settled CMP: $1.1M
***In re Morgan Stanley Capital Group Inc.*, CFTC No. 19-44 (9/30/19)**	Administrative	1 organization	Spoofing, 7 U.S.C. § 6c(a)(5)(C)	N	Settled CMP: $1.5M
***In re Mitsubishi International Corp.*, CFTC No. 19-46 (9/30/19)**	Administrative	1 organization	Spoofing, 7 U.S.C. § 6c(a)(5)(C)	N	Settled CMP: $400K
***In re Hard Eight Futures, LLC*, CFTC No. 19-30 (9/30/19)**	Administrative	1 organization	Spoofing, 7 U.S.C. § 6c(a)(5)(C); Manipulative contrivances and deceptive acts, 7 U.S.C. § 9(1) and 17 C.F.R. § 180.1	N	Settled CMP: $1.75M
***In re Chernomzav*, CFTC No. 19-31 (9/30/19)**	Administrative	1 individual	Spoofing, 7 U.S.C. § 6c(a)(5)(C); Manipulative contrivances and deceptive acts, 7 U.S.C. § 9(1) and 17 C.F.R. § 180.1	N	Settled CMP: $750K
***In re Lawrence*, CFTC No. 19-27 (9/16/19)**	Administrative	1 individual	Spoofing, 7 U.S.C. § 6c(a)(5)(C)	N	Settled CMP: $130K
***In re Heraeus Metals New York LLC*, CFTC No. 19-28 (9/16/19)**	Administrative	1 organization	Spoofing, 7 U.S.C. § 6c(a)(5)(C)	N	Settled CMP: $900K
***C.F.T.C. v. Nowak*, No. 19-cv-6163 (N.D. Ill., 9/16/19)**	District Court	2 individuals	Spoofing, 7 U.S.C. § 6c(a)(5)(C); Manipulative contrivances and deceptive acts, 7 U.S.C. § 9(1) and 17 C.F.R. § 180.1; Attempted price manipulation, 7 U.S.C. § 13(a)(2)	N/A	Pending
***In re Trunz*, CFTC No. 19-26 (9/16/19)**	Administrative	1 individual	Spoofing, 7 U.S.C. § 6c(a)(5)(C)	Y	Settled CFTC reserved on monetary sanctions pending cooperation
***In re Cox*, CFTC No. 19-18 (7/31/19)**	Administrative	1 individual	Spoofing, 7 U.S.C. § 6c(a)(5)(C)	N	Settled CMP: $150K
***In re Flaum*, CFTC No. 19-15 (7/25/19)**	Administrative	1 individual	Spoofing, 7 U.S.C. § 6c(a)(5)(C) (for conduct on or after 7/16/11); Manipulative contrivances and deceptive acts, 7 U.S.C. § 9(1) and 17 C.F.R. § 180.1 (for conduct on or after 8/15/11); Price manipulation, 7 U.S.C. § 13(a)(2) (for conduct prior to 7/16/11)	Y	Settled CFTC reserved on monetary sanctions pending cooperation
***In re Edmonds*, CFTC No. 19-16 (7/25/19)**	Administrative	1 individual	Spoofing, 7 U.S.C. § 6c(a)(5)(C) (for conduct on or after 7/16/11); Manipulative contrivances and deceptive acts, 7 U.S.C. § 9(1) and 17 C.F.R. § 180.1 (for conduct on or after 8/15/11); Price manipulation, 7 U.S.C. § 13(a)(2)	Y	Settled CFTC reserved on monetary sanctions pending cooperation
***In re Merrill Lynch Commodities Inc.*, CFTC No. 19-07 (6/25/19)**	Administrative	1 organization	Spoofing, 7 U.S.C. § 6c(a)(5)(C); Deceptive and manipulative contrivances, 7 U.S.C. §§ 9(1), 9(3) and C.F.R. §§ 180.1 and 180.2 (for conduct occurring on or after 8/15/11); Price manipulation, 7 U.S.C. § 13(a)(2) (for conduct before 8/15/11)	N (unless admitted pursuant to NPA with DOJ)	Settled CMP: $11.5M Disgorgement: $11.1M Restitution: $2,364,585

APPENDIX B *(cont'd)*

CFTC SPOOFING CASES					
Case Name (Date)	**Type of Proceeding**	**Defendant/ Respondent**	**Primary Statutes Charged**	**Admitted CFTC Findings? (Y/N)**	**Result/Monetary Sanctions**
***In re Mohan*, CFTC No. 19-06 (2/25/19)**	Administrative	1 individual	Spoofing, 7 U.S.C. § 6c(a)(5)(C); Manipulative contrivances and deceptive acts, 7 U.S.C. § 9(1) and 17 C.F.R. § 180.1	Y	Settled CFTC reserved on monetary sanction pending cooperation
***In re Crepau*, CFTC No. 19-05 (1/31/19)**	Administrative	1 individual	Spoofing, 7 U.S.C. § 6c(a)(5)(C)	N	Settled CMP: $120K
***In re Gandhi*, CFTC No. 19-01 (10/11/18)**	Administrative	1 individual	Spoofing, 7 U.S.C. § 6c(a)(5)(C); Manipulative contrivances and deceptive acts, 7 U.S.C. § 9(1) and C.F.R. § 180.1	Y	Settled CFTC reserved on monetary sanction pending cooperation
***In re the Bank of Nova Scotia*, CFTC No. 18-50 (9/28/18)**	Administrative	1 organization	Spoofing, 7 U.S.C. § 6c(a)(5)(C)	N	Settled CMP: $800K
***In re Mizuho Bank, Ltd.*, CFTC No. 18-38 (9/21/18)**	Administrative	1 organization	Spoofing, 7 U.S.C. § 6c(a)(5)(C)	N	Settled CMP: $250K
***In re Geneva Trading USA, LLC*, CFTC No. 18-37 (9/20/18)**	Administrative	1 organization	Spoofing, 7 U.S.C. § 6c(a)(5)(C)	N	Settled CMP: $1.5M
***In re Victory Asset Inc.*, CFTC No. 18-36 (9/19/18)**	Administrative	1 organization	Spoofing, 7 U.S.C. § 6c(a)(5)(C); Manipulative contrivances and deceptive acts, 7 U.S.C. § 9(1) and 17 C.F.R. § 180.1	N	Settled CMP: $1.8M
***In re Franko*, CFTC No. 18-35 (9/19/18)**	Administrative	1 individual	Spoofing, 7 U.S.C. § 6c(a)(5)(C); Manipulative contrivances and deceptive acts, 7 U.S.C. § 9(1) and 17 C.F.R. § 180.1	N	Settled CMP: $500K
***In re Singhal*, CFTC No. 18-11 (4/9/18)**	Administrative	1 individual	Spoofing, 7 U.S.C. § 6c(a)(5)(C)	N	Settled CMP: $150K
***In re Deutsche Bank AG and Deutsche Bank Secs. Inc.*, CFTC No. 18-06 (1/29/18)**	Administrative	2 organizations	Manipulative contrivances and deceptive acts, 7 U.S.C. § 9(1) and 17 C.F.R. § 180.1, and price manipulation, 7 U.S.C. § 9(3) and 17 C.F.R § 180.2 (for conduct on or after 8/15/11); Price manipulation, 7 U.S.C. §§ 9, 13(a)(2), 13(b) (2006) (for conduct prior to 8/15/11); Failure to supervise, 17 C.F.R. § 166.3	N	Settled CMP: $30M (joint and several)
***In re HSBC Secs. (USA) Inc.*, CFTC No. 18-08 (1/29/18)**	Administrative	1 organization	Spoofing, 7 U.S.C. § 6c(a)(5)(C)	N	Settled CMP: $1.6M
***In re UBS AG*, CFTC No. 18-07 (1/29/18)**	Administrative	1 organization	Attempted price manipulation, 7 U.S.C. §§ 9, 13b, and 13(a)(2) (for conduct before 8/15/11); Attempted price manipulation, 7 U.S.C. 9(1), 9(3), 13(b), and 17 C.F.R. §§ 180.1, 180.12 (for conduct on or after 8/15/11); Spoofing, 7 U.S.C. § 6c(a)(5)(C) (for conduct on or after 7/16/11);	N	Settled CMP: $15M
***C.F.T.C. v. Thakkar*, No. 18-Cv-00619 (N.D. Ill. 1/28/18)**	District Court	1 individual 1 organization	Spoofing, 7 U.S.C. § 6c(a)(5)(C); Manipulative contrivances and deceptive acts, 7 U.S.C. § 9(1) and 17 C.F.R. § 180.1	N	Settled as to Edge Financial Technologies Disgorgement: $25.2K CMP: $48.4K Dismissed as to Thakkar
***C.F.T.C. v. Zhao*, No. 18-Cv-00620 (N.D. Ill. 1/28/18)**	District Court	1 individual	Spoofing, 7 U.S.C. § 6c(a)(5)(C); Manipulative contrivances and deceptive acts, 7 U.S.C. § 9(1) and 17 C.F.R. § 180.1	N/A	Pending; Engaged in settlement discussions
***C.F.T.C. v. Vorley*, No. 18-Cv-00603 (N.D. Ill. 1/26/18)**	District Court	2 individuals	Spoofing, 7 U.S.C. § 6c(a)(5)(C); Manipulative contrivances and deceptive acts, 7 U.S.C. § 9(1) and 17 C.F.R. § 180.1	N/A	Pending

APPENDIX B *(cont'd)*

CFTC SPOOFING CASES					
Case Name (Date)	**Type of Proceeding**	**Defendant/ Respondent**	**Primary Statutes Charged**	**Admitted CFTC Findings? (Y/N)**	**Result/Monetary Sanctions**
***C.F.T.C. v. Flotron*, No. 18-158 (D. Conn. 1/26/18)**	District Court	1 individual	Spoofing, 7 U.S.C. § 6c(a)(5)(C); Manipulative contrivances and deceptive acts, 7 U.S.C. § 9(1) and 17 C.F.R. § 180.1	N	Settled CMP: $100K
***In re Arab Global Commodities DMCC*, CFTC No. 18-01 (10/10/17)**	Administrative	1 organization	Spoofing, 7 U.S.C. § 6c(a)(5)(C)	N	Settled CMP: $300K
***In re Logista Advisors LLC*, CFTC No. 17-29 (9/29/17)**	Administrative	1 organization	Failure to supervise, 17 C.F.R. § 166.3	N	Settled CMP: $250K
***In re Posen*, CFTC No. 17-20 (7/26/17)**	Administrative	1 individual	Spoofing, 7 U.S.C. § 6c(a)(5)(C)	N	Settled CMP: $635K
***In re Liew*, CFTC No. 17-14 (6/2/17)**	Administrative	1 individual	Spoofing, 7 U.S.C. § 6c(a)(5)(C) (for conduct on or after 7/16/11); Manipulative contrivances and deceptive acts, 7 U.S.C. § 9(1) and 17 C.F.R. § 180.1, and actual and attempted price manipulation, 7 U.S.C. § 9(3) and 17 C.F.R § 180.2 (for conduct on or after 8/15/11); Manipulation and attempted manipulation, 7 U.S.C. §§ 9, 13b, 13(a)(2) (2006) (for conduct prior to 8/15/11)	Y	Settled CFTC reserved on monetary sanction pending cooperation
***In re Gola*, CFTC No. 17-12 (3/30/17)**	Administrative	1 individual	Spoofing, 7 U.S.C. § 6c(a)(5)(C)	N	Settled CMP: $350K
***In re Brims*, CFTC No. 17-13 (3/30/17)**	Administrative	1 individual	Spoofing, 7 U.S.C. § 6c(a)(5)(C)	N	Settled CMP: $200K
***In re Citigroup Global Markets Inc.*, CFTC No. 17-06 (1/19/17)**	Administrative	1 organization	Spoofing, 7 U.S.C. § 6c(a)(5)(C); Failure to supervise, 17 C.F.R. § 166.3	N	Settled CMP: $25M
***In re Advantage Futures LLC, Joseph Guinan & William Steele*, CFTC No. 16-29 (9/21/16)**	Administrative	2 individuals 1 organization	Submission of false documents to the CFTC, 7 U.S.C § 9(2); Failure to comply with risk management requirements, 17 C.F.R. § 1.11; Failure to establish risk-based limits, 17 C.F.R. § 1.731(a); Failure to supervise, 17 C.F.R. 166.3	N	Settled CMP: $1.5M (joint and several)
***C.F.T.C. v. Oystacher*, No. 15-Cv-9196 (N.D. Ill. 10/19/15)**	District Court	1 individual 1 organization	Spoofing, 7 U.S.C. § 6c(a)(5)(C); Manipulative contrivances and deceptive acts, 7 U.S.C. § 9(1) and 17 C.F.R. § 180.1	N	Settled CMP: $2.5M (joint and several)
***C.F.T.C. v. Khara*, No. 15-Cv-03497 (S.D.N.Y. 5/5/15)**	District Court	2 individuals	Spoofing, 7 U.S.C. § 6c(a)(5)(C)	N	Settled CMP: $1.38M (Khara); $1.31M (Salim)
***C.F.T.C. v. Nav Sarao Futures Ltd. PLC*, No. 15-Cv-03398 (N.D. Ill. 4/17/15)**	District Court	1 individual 1 organization	Attempted and actual price manipulation, 7 U.S.C. §§ 9, 13(a)(2) (for conduct before 8/15/11); Price manipulation, 7 U.S.C. 9(3), 13(a)(2) (for conduct on or after 8/15/11); Spoofing, 7 U.S.C. § 6c(a)(5)(C) (for conduct on or after 7/16/11); Manipulative contrivances and deceptive acts, 7 U.S.C. § 9(1) and C.F.R. § 180.1 (for conduct on or after 8/15/11)	Y	Settled CMP: $25,743,174.52 (joint and several) Disgorgement: $12,871,587.26 (joint and several, but offset by Sarao's payment to the DOJ)
***In re of RP Martin Holdings Limited and Martin Brokers (UK) Ltd.*, CFTC No. 14-16 (5/15/14)**	Administrative	2 organizations	Actual and attempted price manipulation, 7 U.S.C. §§ 9, 13b, 13(a)(2) (2006); Submitting false/ misleading statements to CFTC, 7 U.S.C. § 13(a)(2) (2006) (all conduct was prior to Dodd-Frank)	N	Settled CMP: $1.2M (joint and several; portion unrelated to spoofing)

APPENDIX B *(cont'd)*

CFTC SPOOFING CASES					
Case Name (Date)	**Type of Proceeding**	**Defendant/ Respondent**	**Primary Statutes Charged**	**Admitted CFTC Findings? (Y/N)**	**Result/Monetary Sanctions**
***In re Panther Energy Trading LLC, and Michael J. Coscia,* CFTC No. 13-26 (7/22/13)**	Administrative	1 individual 1 organization	Spoofing, 7 U.S.C. § 6c(a)(5)(C)	N	Settled CMP: $1.4M Disgorgement: $1.4M (Both joint and several)
***In re Gelber Group*, CFTC No. 13-15 (2/8/13)**	Administrative	1 organization	Offering to enter into transactions that cause reported price to be untrue and/or not bona fide, 7 U.S.C. § 6c(a)(2)(B) (2006); Submission of false/misleading reports to CFTC, 7 U.S.C. § 13(a)(2) (2006); improper wash trades, 7 U.S.C. § 6c(a)(2)(A) (2006); Entering non-competitive trades, 17 C.F.R. § 1.38 (all conduct was prior to Dodd-Frank)	N	Settled CMP: $750K
***C.F.T.C. v. Moncada*, No. 12-Cv-8791 (S.D.N.Y. 12/3/12)**	District Court	1 individual 2 organizations	Actual and attempted price manipulation, 7 U.S.C. §§ 6(c)(a), 9, 13b, 13(a)(2) (2006) (all conduct pre-Dodd-Frank)	N	Settled CMP: $1.56M (Eric Moncada); $13.12M (Serdika); $19.12 (BES)
***In re UBS AG and UBS Secs. Japan Co.*, CFTC No. 13-09 (12/19/12)**	Administrative	2 organizations	Actual and attempted price manipulation, 7 U.S.C. §§ 9, 13b, 13(a)(2) (2006); Submitting false/misleading reports to CFTC, 7 U.S.C. § 13(a)(2) (2006) (all conduct was prior to Dodd-Frank)	N	Settled CMP: $700M (joint and several, large portion unrelated to spoofing conduct)
***In re Bunge Global Markets*, CFTC No. 11-10 (3/22/11)**	Administrative	1 organization	Offering to enter into transactions that cause reported price to be untrue and/or not bona fide, 7 U.S.C. § 6c(a) (2006); Submitting false/misleading reports to CFTC, 7 U.S.C. § 13(a)(2) (2006) (all conduct was prior to Dodd-Frank)	N	Settled CMP: $550K

APPENDIX C

SEC SPOOFING CASES					
Case Name	**Type of Proceeding**	**Defendant/ Respondent**	**Primary Statutory Charges**	**Admitted SEC Findings? (Y/N)**	**Result/Monetary Sanctions**
***In re J.P. Morgan Secs. LLC*, SA Release No. 10958 (9/29/20)**	Administrative	1 organization	Fraud in connection with the purchase and sale of securities, 15 U.S.C. §§ 77q(a)(3)	Y	Settled (amount offset by parallel proceedings by CFTC and DOJ) Disgorgement: $10M CMP: $25M
***In re Scrivener*, SA Release No. 89517 (8/10/20)**	Administrative	1 individual	Market manipulation, 15 U.S.C. § 78i(a)(2)	N	Settled Disgorgement including prejudgement interest (PJI): $155,270 CMP: $50K
***S.E.C. v. Nielson*, No. 20-Cv-03788 (N.D. Cal. 6/9/20)**	District Court	1 individual	Fraud in connection with the purchase and sale of securities, 15 U.S.C. §§ 77q(a), 78j(b), and 17 C.F.R. §§ 240.10b; Market/price manipulation, 15 U.S.C. § 78i(a)(2)	N/A	Pending
***S.E.C. v. Chen*, No. 19-Cv-12127 (D. Mass. 10/15/19)**	District Court	23 individuals 1 organization	Fraud in connection with the purchase and sale of securities, 15 U.S.C. §§ 77q(a) and § 78j(b), and 17 C.F.R. §§ 240.10b; Market/price manipulation, 15 U.S.C. § 78i(a)(2)	N/A	Pending Trial scheduled for 6/7/21
***S.E.C. v. Taub*, No. 16-Cv-09130 (D.N.J. 4/26/18)**	District Court	3 individuals	Fraud in connection with the purchase and sale of securities, 15 U.S.C. §§ 77q(a)(1), 78j(b) and 17 C.F.R. §§ 240.10b-5; market/price manipulation, *id.* § 78i(a)(2)	N as to Shmalo; Y as to Taub	Pending as to Greenwald. Settled as to Taub and Shmalo Disgorgement including PJI: $415,215.64 (Shmalo) Disgorgement: $17,100,00.00 (Taub)
***S.E.C. v. Lek Secs. Corp.*, No. 17-Cv-1789 (S.D.N.Y. 3/10/17)**	District Court	3 individuals 2 organizations	Fraud in connection with the purchase and sale of securities, 15 U.S.C. §§ 77q(a), 78j(b), and 17 C.F.R. §§ 240.10b; Market/price manipulation, 15 U.S.C. § 78i(a)(2)	Y as to Samuel Lek and Lek Securities	Settled as to Lek Securities and Samuel Lek. CMP: $420,000 (Samuel Lek) and $1M (Lek Securities); Disgorgement including PJI: $526,515 (Lek Securities) Jury verdict against Avalon, Pustelnik and Fayyer: CMP: $7.5M each
***In re Afshar*, SA Release No. 9983 (12/3/15)**	Administrative	3 individuals 2 organizations	Fraud in connection with the purchase and sale of securities, 15 U.S.C. §§ 77q(a), 78j(b) and 17 C.F.R. §§ 240.10b-5; market/price manipulation, *id.* § 78i(a)(2)	N	Settled CMPs: $150K (B. Afshar); $75K (S. Afshar): $100K (Kenny) Disgorgement: $1,048,824.67 (B. and S. Afshar, jointly); $524,412.33 (Kenny)
***In re Briargate Trading, LLC*, SA Release No. 9959 (10/8/15)**	Administrative	1 individual 1 organization	Fraud in connection with the purchase and sale of securities, 15 U.S.C. §§ 77q(a), 78j(b) and 17 C.F.R. §§ 240.10b-5; Market/price manipulation, *id.* § 78i(a)(2)	N	Settled CMPs: $350K (Briargate); $150K (Oscher) Disgorgement including PJI: $562,842.32 (Oscher and Briargate, jointly)
***S.E.C. v. Milrud*, No. 15-Cv-00237 (D.N.J. 1/13/15)**	District Court	1 individual	Fraud in connection with the purchase and sale of securities, 15 U.S.C. §§ 77q(a), 78j(b) and 17 C.F.R. §§ 240.10b-5; Market/price manipulation, *id.* § 78i(a)(2)	Y	Settled Disgorgement ordered but amount unknown

APPENDIX C *(cont'd)*

SEC SPOOFING CASES					
Case Name	**Type of Proceeding**	**Defendant/ Respondent**	**Primary Statutory Charges**	**Admitted SEC Findings? (Y/N)**	**Result/Monetary Sanctions**
***In re Wedbush Secs. Inc.*, EA Release Nos. 73652-54 (11/20/14)**	Administrative	2 individuals 1 organization	Violation of the Market Access Rule by failing to implement proper controls, among other things, 17 C.F.R. § 240.15c3-5	Y	Settled CMPs: $250K (Wedbush); $25K (Fillhart); $25K (Bell) Disgorgement including PJI: $26,478.31 (Fillhart) $26,478.31 (Bell)
***In re Visionary Trading LLC*, EA Release No. 71871 (4/4/14)**	Administrative	1 individual (multiple respondents, but only 1 engaged in spoofing)	Fraud in connection with the purchase and sale of securities, 15 U.S.C. §§ 78j(b) and 17 C.F.R. §§ 240.10b-5, and market/price manipulation, *id*. § 78i(a)(2)	N	Settled CMPs: $785,000 (Dondero) Disgorgement including PJI: $1,149,791.96 (Dondero)
***Biremis Corp., Peter Beck, and Charles Kim*, EA Release No. 68456 (12/18/12)**	Administrative	2 individuals 1 organization	Failure to properly supervise overseas day traders that allegedly engaged in layering/spoofing, 15 U.S.C. § 78o, and failure to file suspicious activity reports ("SARs") and maintain records, 17 C.F.R. § 17a-8	N	Settled CMPs: $250K each for Beck and Kim
***Hold Brothers On-Line Investment Services, LLC, Demostrate LLC, Trade Alpha Corporate, Ltd, Steven Hold, Robert Vallone, and William Tobias*, EA Release No. 67924 (9/25/12)**	Administrative	3 individuals 3 organizations	Market/price manipulation, 15 U.S.C. § 78i(a)(2); failure to file SARs and maintain records, 17 C.F.R. § 17a-8, and failure to supervise, 15 U.S.C. § 78o(b)(4)(E)	N	Settled CMPs: $75K (S. Hold); $75K (Vallone); $75K (Tobias); $1,913,226.80 (Hold Brothers). Disgorgement including PJI: $1,258,333 (Demostrate); $707,105.29 (Hold Brothers)
***S.E.C. v. Kahn*, Lit. Release No. 19139 (3/16/05); *see also* 5/29/04 SEC Order, Administrative Proceeding, File No. 3-11468**	Administrative	1 individual	Fraud in connection with the purchase and sale of securities, 15 U.S.C. §§ 77q, 78j(b) and 17 C.F.R. §§ 240.10b-5	N/A	Default Judgment Disgorgement including PJI: $13,403.75
***S.E.C. v. Awdisho*, No. 04-Cv-6125 (N.D. Ill. 9/21/04); Lit. Release No. 18926 (10/1/04)**	District Court	3 individuals	Fraud in connection with the purchase and sale of securities, 15 U.S.C. § 78j(b) and 17 C.F.R. §§ 240.10b-5; Market/price manipulation, *id*. § 78i(a)(2).	N	Settled CMPs: $10K (Awdisho): $10K (Kundrat); $20K (Smolinski)
***S.E.C. v. Sheehan*, No. 03-Cv-00694 (D.D.C. 3/18/03); *In re Sheehan*, SA Release No. 33-8208, EA Release No. 34-47521 (3/18/03)**	District Court Administrative	1 individual	Fraud in connection with the purchase and sale of securities, 15 U.S.C. §§ 77q, 78j(b) and 17 C.F.R. §§ 240.10b-5	N	Settled CMP: $10K Disgorgement including PJI: $11,558
***S.E.C. v. Frazee*, No. 03-cv-00695 (D.D.C., 3/18/03); *In re Frazee*, SA Release No. 33-8209, EA Release No. 47522 (3/18/03)**	District Court Administrative	1 individual	Fraud in connection with the purchase and sale of securities, 15 U.S.C. §§ 77q, 78j(b) and 17 C.F.R. §§ 240.10b-5	N	Settled CMP: $10K Disgorgement including PJI: $21,011
***S.E.C. v. Pomper*, No. 01-cv-7391 (E.D.N.Y. 11/5/01); Lit. Release No. 17479 (4/19/02)**	District Court	1 individual	Fraud in connection with the purchase and sale of securities, 15 U.S.C. §§ 77q, 78j(b) and 17 C.F.R. §§ 240.10b-5	N	Settled CMP: $15K Disgorgement including PJI: $9.8K
***S.E.C. v. Shpilsky*, No. 01-cv-2298 (D.D.C. 11/9/01); SEC Lit. Release No. 17221 (Nov. 5, 2001)**	District Court	3 individuals	Fraud in connection with the purchase and sale of securities, 15 U.S.C. §§ 77q, 78j(b) and 17 C.F.R. §§ 240.10b-5	N	Settled Disgorgement including PJI: $12,020 (Shushovsky); $12K (Shpilsky); $1,410 (Kagan)

APPENDIX C *(cont'd)*

SEC SPOOFING CASES					
Case Name	**Type of Proceeding**	**Defendant/ Respondent**	**Primary Statutory Charges**	**Admitted SEC Findings? (Y/N)**	**Result/Monetary Sanctions**
***SEC v. Shenker*, No. 01-Cv-296 (D.D.C. 11/5/01); *In re Shenker*, SA Release No. 33-8029, EA Release No. 34-45017 (11/5/01); SEC Lit. Release No. 17221 (Nov. 5, 2001)**	District Court Administrative	1 individual	Fraud in connection with the purchase and sale of securities, 15 U.S.C. §§ 77q, 78j(b) and 17 C.F.R. §§ 240.10b-5	N	Settled CMP: $10K Disgorgement including PJI: $7,206
***S.E.C. v. Blackwell*, No. 1-Cv-2297 (D.D.C. 11/6/01); *In re Blackwell*, SA Release No. 8030, EA Release No. 45018 (11/5/01); SEC Lit. Release No. 17221 (Nov. 5, 2001)**	District Court Administrative	3 individuals	Fraud in connection with the purchase and sale of securities, 15 U.S.C. §§ 77q, 78j(b) and 17 C.F.R. §§ 240.10b-5	N	Settled CMP: $10K (jointly) Disgorgement including PJI: $3,212.67 (jointly)
***S.E.C. v. Monski*, No. 01-Cv-00943 (D.D.C. 5/3/01); Lit. Release No. 16986 (5/3/01)**	District Court	1 individual	Fraud in connection with the purchase and sale of securities, 15 U.S.C. §§ 77q, 78j(b) and 17 C.F.R. §§ 240.10b-5	N	Settled CMP: $10K Disgorgement including PJI: $15,000

NOTES:

1 In the event that original charges were amended or revised only the most recent statutory charges are listed.

2 The original charging date is listed even if the original charges were later amended or revised.

3 In a separate, but simultaneous, Consent Order, the CFTC imposed an additional $17 million civil money penalty on the Bank of Nova Scotia for making false statements to the CFTC and self-regulatory organizations during the CFTC's initial investigation of the spoofing conduct at issue. *See In re Bank of Nova Scotia*, CFTC No. 20-28 (8/19/20).

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