

***CFTC Anti-Fraud and Anti-Manipulation Authority:
A Focus on Intermediaries***

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I. Introduction

The 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”), significantly expanded the Commodity Futures Trading Commission’s (“CFTC” or “Commission”) anti-fraud and anti-manipulation statutory authority to monitor activity in futures, swaps, and options markets, as well as in the underlying “spot” markets.

For more than a decade, the CFTC has aggressively applied this new statutory authority. The CFTC has pursued fraud and manipulation in many contexts: misappropriation of material, nonpublic information by regulated entities, abusive practices in derivatives markets, such as spoofing, as well as fraud and manipulation in both traditional agricultural commodity and digital asset spot markets.

We do not expect this trend to change. As Chairman Rostin Behnam recently explained, “the Commission continues to remain laser-focused on stopping and deterring fraud and manipulation in the U.S.”² Consistent with the Chairman’s statements, the CFTC’s fiscal year 2023 enforcement results focus mostly on fraud and manipulation, both in the digital asset space and among registrants and market participants in CFTC-regulated markets.³ Moreover, on October 17, 2023, the CFTC Division of Enforcement issued an advisory announcing that “the Division is recalibrating how it is assessing proposed CMPs [civil monetary penalties] to ensure the CMPs are at the level necessary to achieve general and specific deterrence, which may result in the Division recommending higher penalties in resolutions than may have been imposed in similar cases previously.”⁴ Market participants should continue to expect aggressive CFTC anti-fraud and anti-manipulation enforcement activity.

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² *CFTC Releases FY 2023 Enforcement Results*, COMMODITY FUTURES TRADING COMMISSION (Nov. 7, 2023), <https://www.cftc.gov/PressRoom/PressReleases/8822-23>.

³ *Id.*

⁴ *CFTC Releases Enforcement Advisory on Penalties, Monitors and Admissions*, COMMODITY FUTURES TRADING COMMISSION (Oct. 17, 2023), https://www.cftc.gov/PressRoom/PressReleases/8808-23?utm_source=govdelivery.

This paper will analyze the CFTC’s anti-fraud and anti-manipulation enforcement authority. It will explore the relevant statutory provisions and adopting CFTC regulations. In the process, the paper will discuss some of the similarities and differences between the CFTC’s anti-fraud and anti-manipulation enforcement authority under the Commodity Exchange Act (“CEA”) and the Securities and Exchange Commission’s (“SEC’s”) enforcement authority under section 10(b) and Rule 10b-5 of the Securities Exchange Act of 1934 (“Securities Exchange Act”). Finally, the paper will focus on recent CFTC fraud and manipulation enforcement cases that involve unregistered and registered intermediaries.

II. CFTC Anti-Fraud/Anti-Manipulation Authority

A. “Regulatory” Authority vs “Enforcement” Authority

The CEA provides the CFTC with broad regulatory authority over futures and swaps markets. The CEA requires intermediaries like futures commission merchants (“FCMs”), introducing brokers (“IBs”), commodity pool operators (“CPOs”), commodity trading advisors (“CTAs”), and swap dealers to register with both the CFTC and the National Futures Association, the primary self-regulatory organization for the derivatives industry.⁵ The CFTC also oversees exchanges and clearinghouses, and it imposes a number of compliance requirements on market participants and intermediaries, including net capital requirements and disclosure requirements.⁶ In contrast, subject to one important exception⁷, the CFTC does not have regulatory authority over commodity cash markets.⁸ It has *only* anti-fraud and anti-manipulation enforcement authority.

B. Anti-Fraud/Anti-Manipulation Statutory Authority

The CFTC’s anti-fraud and anti-manipulation statutory authority comes principally from CEA section 6(c)(1). Added to the CEA by Dodd-Frank, section 6(c)(1) prohibits the use or attempted use of “any manipulative or deceptive device or contrivance,” “in connection with” a swap, futures or cash contract, in contravention of the rules and regulations required to be promulgated by the CFTC within one year after Dodd-Frank’s enactment.⁹ Before Dodd-Frank, the CFTC had more limited anti-fraud and anti-manipulation enforcement authority over derivatives markets and some anti-fraud and anti-manipulation enforcement authority over cash

⁵ *Who Has to Register*, NATIONAL FUTURES ASSOCIATION (accessed on Nov. 30, 2023), <https://www.nfa.futures.org/registration-membership/who-has-to-register/index.html>.

⁶ *See, e.g.*, 17 C.F.R. § 1.17 (“Minimum financial requirements for futures commission merchants and introducing brokers.”); 17 C.F.R. § 4.21 (“Required delivery of pool Disclosure Document.”).

⁷ 7 U.S.C. § 2(c)(2)(D).

⁸ Statement of Commissioner Dawn D. Stump on the CFTC’s Regulatory Authority Applicable to Digital Assets, COMMODITY FUTURES TRADING COMMISSION (Aug. 23, 2012), <https://www.cftc.gov/PressRoom/SpeechesTestimony/stumpstatement082321#:~:text=Stump%20on%20the%20CFTC%27s%20Regulatory%20Authority%20Applicable%20to%20Digital%20Assets,-August%2023%2C%202021&text=The%20CFTC%27s%20regulatory%20oversight%20authority,proper%20regulatory%20compliance%20be%20demanded>.

⁹ 7 U.S.C. § 9(1).

markets so as to protect derivatives markets, but with the addition of CEA section 6(c)(1), the CFTC could exercise expansive authority over all transactions “related to futures or swaps markets, or prices of commodities ... or where fraud or manipulation has the potential to affect cash commodity, futures, or swaps markets or participants in these markets.”¹⁰ Today, in practice, the CFTC relies on CEA section 6(c)(1) as essentially a catch-all anti-fraud and anti-manipulation provision, comparable to section 10(b) of the Securities Exchange Act.¹¹

CEA section 6(c)(1) is not the only anti-fraud or anti-manipulation provision in the CEA. CFTC anti-manipulation enforcement actions also frequently rely on CEA sections 6(c)(3) and 9(a)(2).¹² 6(c)(3) and 9(a)(2) prohibit price manipulation and attempted price manipulation in futures, swaps, and commodities markets. As discussed below, the CFTC applies a four-part test for price manipulation under 6(c) (the predecessor to 6(c)(3)) and 9(a)(2). 9(a)(2) makes market manipulation and certain knowing violations of the CEA a felony.

There are also more specific anti-fraud provisions that predate 6(c)(1) in the CEA. For example, section 4b makes it unlawful for any person, in or in connection with any order to make, or the making of, a futures contract, to cheat or defraud, or attempt to defraud, a counterparty or a person for whom or on whose behalf the order or contract was made.¹³ Dodd-Frank amended CEA section 4b to cover swaps and added new CEA subsection 4b(e) to make it unlawful, in connection with any order to make, or the making of, any covered instrument, to engage in fraud.¹⁴ Similarly, CEA section 4o is a special anti-fraud provision for CTAs, CPOs and associated persons of CTAs and CPOs.¹⁵

Finally, CEA section 4c(a) prohibits specific abusive trading practices in futures and swaps markets.¹⁶ Dodd-Frank added CEA section 4c(a)(5), which provides that it is unlawful for any person to engage in any trading, practice, or conduct on or subject to the rules of a registered entity that: (A) violates bids or offers; (B) demonstrates intentional or reckless disregard for the orderly execution of transactions during the closing period; or (C) is, is of the character of, or is commonly known to the trade as “spoofing” (*i.e.*, bidding or offering with the intent to cancel the bid or offer before execution).¹⁷

¹⁰ Prohibition on the Employment, or Attempted Employment, of Manipulative and Deceptive Devices and Prohibition on Price Manipulation, 76 Fed. Reg. 41,398, 41,401 (Jul. 14, 2011) (“Adopting Release”).

¹¹ Adopting Release, 76 Fed. Reg. at 41,399.

¹² 7 U.S.C. § 9(3); 7 U.S.C. § 13(a)(2).

¹³ 7 U.S.C. § 6b.

¹⁴ 7 U.S.C. § 6b(e).

¹⁵ 7 U.S.C. § 6o.

¹⁶ 7 U.S.C. § 6c(a).

¹⁷ See *CFTC Staff Finalizes Guidance on Anti-Disruptive Trading Practices*, WILMERHALE (May 23, 2011), <https://www.wilmerhale.com/insights/client-alerts/cftc-staff-finalizes-guidance-anti-disruptive-trading-practices>.

C. Regulatory Authority

In Dodd-Frank, Congress instructed the CFTC to promulgate anti-fraud and anti-manipulation regulations, and in 2011, the CFTC issued Rule 180.1 and Rule 180.2 pursuant to its general rulemaking authority (CEA section 8a(5)) and its authority under CEA sections 6(c)(1) and 6(c)(3).¹⁸ Rule 180.1 “prohibits fraud and fraud-based manipulation, and attempts: (1) by any person (2) acting intentionally or recklessly (3) in connection with (4) any swap, or contract of sale of any commodity in interstate commerce, or subject to the rules of any registered entity.”¹⁹ New CFTC Rule 180.1 represents a significant expansion of the CFTC’s enforcement authority.

Rule 180.2, by contrast, merely “codifies the Commission’s long-standing authority to prohibit price manipulation by making it 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 a registered entity.”²⁰ For the Commission to succeed under Rule 180.2, it must establish: “(1) that the accused had the ability to influence market prices; (2) that the accused specifically intended to create or effect a price or price trend that does not reflect legitimate forces of supply and demand; (3) that artificial prices existed; and (4) that the accused caused the artificial prices.”²¹ In cases of attempted manipulation, the Commission will ignore the last two prongs. Instead, the Commission will search for evidence of (1) the requisite intent and (2) an overt act in furtherance of that intent.²² Unlike Rule 180.1, Rule 180.2 does not apply to reckless conduct.²³

D. Comparison of CEA Statutory Authority and SEC 10b-5 Authority

Recognizing the similarities between CEA section 6(c)(1) and Securities Exchange Act section 10(b), the CFTC expressly modeled CFTC Rule 180.1(a)(1)-(3) on Securities Exchange Act Rule 10b-5.²⁴ As the CFTC explained in the adopting release for Part 180, “the language of CEA section 6(c)(1), particularly the operative phrase ‘manipulative or deceptive device or contrivance,’ is virtually identical to the terms used in section 10(b) of the Securities Exchange Act of 1934.”²⁵ Thus, “the [CFTC] deems it appropriate and in the public interest to model final

¹⁸ Adopting Release, 76 Fed. Reg. at 41,399. *See also The Commodity Futures Trading Commission Issues Sweeping New Rules to Prohibit Fraud and Manipulation in the Swaps, Cash, and Futures Markets*, WILMERHALE (Jul. 28, 2011), <https://www.wilmerhale.com/insights/publications/the-commodity-futures-trading-commission-issues-sweeping-new-rules-to-prohibit-fraud-july-28-2011>.

¹⁹ Adopting Release, 76 Fed. Reg. at 41,400.

²⁰ *Anti-Manipulation and Anti-Fraud Final Rules*, COMMODITY FUTURES TRADING COMMISSION (accessed on Nov. 30, 2023), https://www.cftc.gov/sites/default/files/idc/groups/public/@newsroom/documents/file/amaf_factsheet_final.pdf.

²¹ *Id.*

²² *Id.*

²³ Adopting Release, 76 Fed. Reg. at 41,407.

²⁴ *Id.* at 41,399.

²⁵ *Id.*

Rule 180.1 on SEC Rule 10b-5.”²⁶ Like 10b-5, Rule 180.1 applies to not only intentional misconduct but also reckless misconduct.²⁷ In addition, the Commission has taken the position that Rule 180.1 applies to fraud in commodity or derivatives markets, even in the absence of market manipulation, and courts have generally agreed.²⁸

There are, however, some differences between the two regimes. For one, unlike Rule 10b-5, Rule 180.1 and Rule 180.2 apply to attempted actions.²⁹ The CFTC has also recognized that securities markets and derivatives markets are not identical, and as a result, it may be necessary in some cases to depart from 10b-5 case law. As the Commission observed in the Part 180 adopting release, “to account for the differences between the securities markets and the derivatives markets, the Commission will be guided, *but not controlled*, by the substantial body of judicial precedent applying the comparable language of SEC Rule 10b-5.”³⁰ For example, one of the primary aims of U.S. securities regulation is to reduce information asymmetries. Thus, there are extensive disclosure requirements in securities markets. By comparison, CEA 6(c)(1) expressly provides that “no rule or regulation promulgated by the Commission shall require any person to disclose to another person nonpublic information that may be material to the market price, rate, or level of the commodity transaction, except as necessary to make any statement made to the other person in or in connection with the transaction not misleading in any material respect.”³¹ The Part 180 adopting release clarifies that it is “not, by this rulemaking, imposing any new affirmative duties of inquiry, diligence, or disclosure.”³²

III. Recent CFTC Anti-Fraud/Anti-Manipulation Cases for Intermediaries

The CFTC has pursued enforcement cases to address a wide variety of misconduct in derivatives and commodities markets. Recent CFTC enforcement actions involve, among other things, digital assets and associated technology (including DeFi, oracle technology and decentralized autonomous organizations); the misappropriation of material, non-public information by intermediaries; price manipulation; and fraudulent misstatements. In fiscal year 2023 alone, the CFTC’s Division of Enforcement filed 96 enforcement actions, resulting in over \$4.3 billion in penalties, restitution, and disgorgement.³³ In this section, we survey a small sample of recent cases, with a focus on those involving intermediaries.

²⁶ *Id.*

²⁷ *Id.* at 41,400.

²⁸ See, e.g., *Commodity Futures Trading Comm’n v. Monex Credit Co.*, 931 F.3d 966, 976 (9th Cir. 2019) (“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.”); *Commodity Futures Trading Comm’n v. My Big Coin Pay, Inc.*, 334 F.Supp.3d 492, 498 (D. Mass. 2018) (“... both Section 6(c)(1) and Regulation 180.1 explicitly prohibit fraud even in the absence of market manipulation.”).

²⁹ Adopting Release, 76 Fed. Reg. at 41,400.

³⁰ *Id.* at 41,399 (emphasis added).

³¹ 7 U.S.C. § 9(1).

³² Adopting Release, 76 Fed. Reg. at 41,402.

³³ Commodity Futures Trading Commission, *supra* note 2.

A. Market Integrity Cases

Several CFTC enforcement actions concern market integrity. The CFTC recently charged a global bank provisionally registered as a swap dealer with spoofing and price manipulation under CEA sections 4c(a)(5)(C), 4s(h)(1)(A), (B) and (D), 6(c)(1) and Rules 23.410(a)(2), 23.410(c)(1)(ii), and 180.1, among other violations.³⁴ According to the CFTC, bond issuers would enter into interest rate swaps with the bank near the time of their bond issuances.³⁵ The swaps were priced on “pricing calls,” during which individuals at the bank would price the swap.³⁶ By agreement, the relevant prices were quoted from screens published by broker firms, including swap execution facilities.³⁷ Trading at the relevant broker firm would affect the prices displayed on the screens (and thus the price of the swaps).³⁸ The bank allegedly manipulated prices by trading at firms whose “pricing screens” were being used to price the issuer swap.³⁹ The CFTC also brought spoofing cases against Walleye Capital and Logista Advisors.⁴⁰ Both are registered CPOs and CTAs.

B. Information-based Cases

The CFTC has pursued derivatives intermediaries for the “misappropriation of material, nonpublic information” in several cases. In March 2023, the CFTC charged an introducing broker, its owners and certain affiliated trading firms with “taking the opposite side of thousands of brokerage customer block trade orders without the customers’ prior consent.”⁴¹ That same month, the CFTC filed a complaint charging a Chinese national with “a fraudulent scheme in which he misused knowledge of his employer’s trading in feeder cattle futures and options to trade for his own benefit in breach of a duty to his employer.”⁴² In both cases, the CFTC stressed that the defendant traded in breach of a “pre-existing duty” to another. In these cases, the CFTC’s misappropriation theory under CEA section 4b(a)(1), 6(c)(1), and Rule 180.1 is different from the express prohibition of “insider trading” under Section 9(e) of the CEA, which applies to

³⁴ In the Matter of HSBC Bank USA, N.A., CFTC Docket No. 23-26 (May 12, 2023). Section 4s(h)(1)(A), (B), (D) requires swap dealers and major swap participants to “conform with such business conduct standards as prescribed [in the Act] and as may be prescribed by the Commission by rule or regulation that relate to (A) fraud, manipulation, and other abusive practices involving swaps (including swaps that are offered but not entered into); (B) diligent supervision of the business of the registered swap dealer and major swap participant; ... and (D) such other matters as the Commission determines to be appropriate.” 7 U.S.C. § 6s(h)(1)(A), (B), (D).

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ In the Matter of Walleye Capital LLC, CFTC Docket No. 23-04 (Dec. 12, 2022); Complaint, *Commodity Futures Trading Comm’n v. Logista Advisors LLC*, No. 1:23-cv-07485 (N.D. Ill. Sept. 7, 2023).

⁴¹ Consent Order, *Commodity Futures Trading Comm’n v. Coquest Inc., Buttonwood LLC, Weva Properties LTD., Dennis Weinmann, and John Vassallo*, No. 3:21-cv-2599 (N.D. Tex. Mar. 7, 2023).

⁴² Complaint, *Commodity Futures Trading Comm’n v. Dichao Xie*, No. 1:23-cv-01947 (Mar. 28, 2023).

trading on the basis of MNPI “obtained through special access related to the performance of [certain] duties” at certain types of entities.⁴³

C. Fraud Cases

Several CFTC intermediary cases are based on claims of fraud, including, for example, reliance on express material misstatements. For example, in July 2023, the CFTC sued Celsius and its CEO Alexander Mashinsky for violations of CEA section 6(c)(1) and Rule 180.1, as well as other provisions, after they allegedly made material misrepresentations when they solicited investments for their commodity pool.⁴⁴ Specifically, Celsius allegedly marketed itself as a “safe” alternative for customers’ digital asset commodities, similar to a traditional bank.⁴⁵ Celsius also promised high-yield interest payments.⁴⁶ According to the CFTC, “instead of engaging in ‘safe’ investments, Mashinsky and Celsius engaged in increasingly risky trading strategies when they were unable to make customers’ interest payments.”⁴⁷ In another case, the CFTC filed claims against a company called “Mirror Trading International Proprietary Limited (MTI)” and its controlling person for violations of CEA sections 4b(a)(2) and 4o(1) when they allegedly “engaged in an international fraudulent multilevel marketing scheme to solicit Bitcoin from members of the public for participation in an unregistered commodity pool MTI operated.”⁴⁸ In that case, the CFTC claims that “the defendants misappropriated all of the Bitcoin they accepted from pool participants.”⁴⁹

IV. Conclusion

The CFTC’s relatively new statutory authorities remain in flux and unsettled. The CFTC has aggressively applied the powers it received from Congress in 2010, and has done so in a wide array of case types, including misappropriation of information, abusive trade practices, and fraudulent market activity. The CFTC has also pursued cases in a variety of areas, including agricultural commodity, financial, and digital asset markets.

Given the CFTC’s recent track record in enforcement cases, as well as statements by the Chairman and the Division of Enforcement, we expect these trends to continue in the future. Intermediaries should remain aware of the CFTC’s interest in, and aggressive reliance on, these authorities to investigate and bring actions against market participants for these behaviors.

⁴³ 7 U.S.C. § 13(e).

⁴⁴ Complaint, *Commodity Futures Trading Comm’n v. Celsius Network, LLC*, No. 1:23-cv-6008 (S.D.N.Y. Jul. 13, 2023).

⁴⁵ *Id.* at 1.

⁴⁶ *Id.*

⁴⁷ *CFTC Charges Alexander Mashinsky and Celsius Network, LLC with Fraud and Material Misrepresentations in Massive Commodity Pool Scheme Involving Digital Asset Commodities*, COMMODITY FUTURES TRADING COMMISSION (Jul. 13, 2023), <https://www.cftc.gov/PressRoom/PressReleases/8749-23>.

⁴⁸ Consent Order, *Commodity Futures Trading Comm’n v. Mirror Trading International Proprietary Ltd*, No. 1:22-cv-635-DAE (W.D. Tex. Sept. 6, 2023).

⁴⁹ *Id.* at 6.