



GIBSON DUNN

What's Next: Spoofing and
Manipulation in Commodities
and Derivatives Markets

December 9, 2021

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What Comes Next

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Spoofting and Disruptive Trading Practices– An Overview

Disruptive Trading Practices - Generally

- The CFTC and futures exchanges (i.e., designated contract markets or DCMs) have regulations/rules in place to prevent disruptive trading practices.
- DCMs and the CFTC actively monitor for abusive trading activity and have pursued enforcement actions against firms and individuals engaging in the prohibited activity.
- CFTC has labeled a lot of things as disruptive trading, for example:
 - Trading in large volumes in a price setting window
 - Trading in large volumes around a news release
 - Trading too quickly in reaction to news
 - Sweeping order books in both options and the futures that underlie the options at the same time

Disruptive Trading Practices - Generally

- Commodity Exchange Act section 4c(a)(5) states that it shall be unlawful for any person to engage in any trading, practice, or conduct on or subject to the rules of a registered entity (i.e., a Swap Execution Facility (SEF) or DCM) that:
 - Violates bids or offers;
 - Demonstrates intentional or reckless disregard for the orderly execution of transactions during the closing period; or
 - 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).



Spooing – What Is It?

Spooing is defined in the Commodity Exchange Act as “bidding or offering with the intent to cancel the bid or offer before execution.”

– 7 U.S.C. § 6c(a)(5)(C)

“‘Spooing’ includes, but is not limited to:

(i) submitting or cancelling bids or offers to overload the quotation system of a registered entity,

(ii) submitting or cancelling bids or offers to delay another person’s execution of trades,

(iii) submitting or cancelling multiple bids or offers to create an appearance of false market depth, and

(iv) submitting or canceling bids or offers with intent to create artificial price movements upwards or downwards.”

– CFTC Interpretive Guidance and Policy Statement
on Disruptive Practices (May 2013)

Spoofing – What Is It?

“Spoofing is a particularly pernicious example of bad actors seeking to manipulate the market through the abuse of technology. The technological developments that enabled electronic and algorithmic trading have created new opportunities in our markets. At the CFTC, we are committed to facilitating these market-enhancing developments. But at the same time, we recognize that these new developments also present new opportunities for bad actors. We are equally committed to identifying and punishing these bad actors.

Spoofers seek to profit by unlawfully **injecting false information** into the market **to distort prices** and **to trick** others into trading at manipulated prices. If left unchecked, spoofers will gain an unfair and unlawful advantage over others, which hinders competition, undermines market integrity, and harms law-abiding victims. Spoofing drives traders away from our markets, reducing the liquidity needed for these markets to flourish. And spoofing harms businesses, large and small, that use our markets to hedge their risks in order to provide stable prices that all Americans enjoy.”

– CFTC Director of Enforcement (Jan. 29, 2018)

Spooing – What Is It?



CFTC Whistleblower Alert: Blow the Whistle on Spooing in the Commodities and Derivatives Markets

Under the Whistleblower Program of the Commodity Futures Trading Commission (CFTC), individuals can become eligible for both financial awards and certain protections by identifying Commodity Exchange Act (CEA) violations connected to spooing.

What is spooing?

A trader “spooes” when he or she places an order in a futures market with the intention to cancel the order prior to execution. Traders typically spooe to misrepresent supply or demand in order to induce other traders to act in a way beneficial to the spooer. Spooing is a federal crime punishable by up to 10 years’ imprisonment per violation.

– CFTC Whistleblower Alert, *Blow the Whistle on Spooing in the Commodities and Derivatives Markets* (January 2020)

Spoofing – What Is It?



CFTC Whistleblower Alert: Blow the Whistle on Spoofing in the Commodities and Derivatives Markets

What types of misconduct should you be on the lookout for?

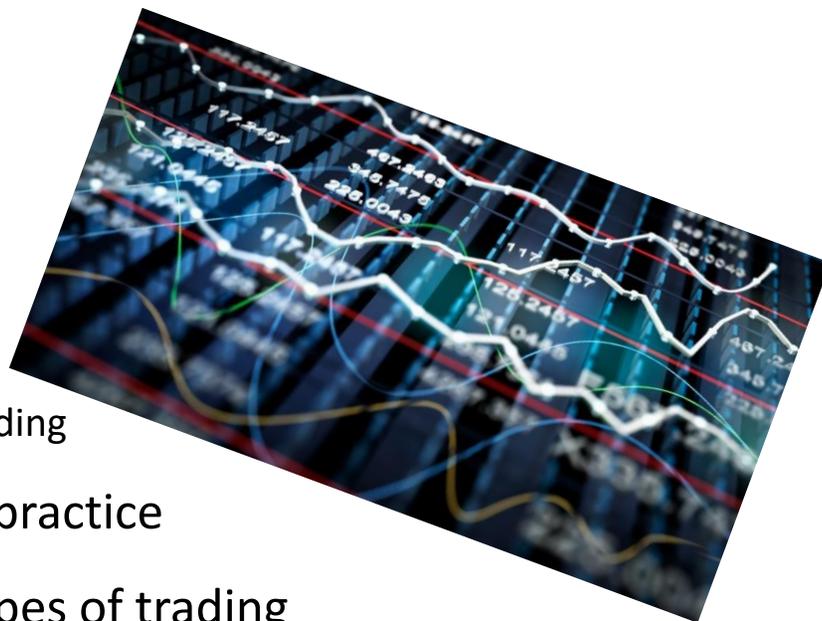
The Commission is concerned with conduct such as:

- Manual and automated trading schemes that place and quickly cancel bids and offers in futures contracts in order to benefit other orders and/or positions
- Orders being quickly placed and canceled at or near the best bid or offer, especially if opposite-side orders are filled
- Multiple orders of the same size repeatedly and simultaneously being placed and canceled
- Any scheme designed to cause prices to artificially move

– CFTC Whistleblower Alert, *Blow the Whistle on Spoofing in the Commodities and Derivatives Markets* (January 2020)

Spoofing – What Is It and Why Is It Against the Law?

- Markets Where We See Spoofing:
 - Typically seen in futures and securities markets
 - Can also extend into OTC markets
- Automated Trading vs. Manual Trading
 - Spoofing can occur with automated trading (including high frequency trading) or manual trading
- Spoofing is considered a disruptive trading practice
- Spoofing is not the same as other, lawful types of trading
- Criminal and civil liability
- Which US regulators are interested?
 - DOJ
 - CFTC
 - SEC



Spoofing – What Is It?

Simple spoofing involves placing a small order on one side of the book with the intent to trade followed by a large order or orders on the other side of the book which are not intended for execution.

Example:

Bid (Demand)	Price	Ask (Supply)
	53	100
	52	100
	51	100
	50	
100	49	
100	48	
100	47	

Spoofing – What Is It?

Simple spoofing involves placing a small order on one side of the book with the intent to trade followed by a large order or orders on the other side of the book which are not intended for execution.

Example:

Bid (Demand)	Price	Ask (Supply)
	53	100
	52	100
	51	1100
	50	
110	49	
100	48	
100	47	

Buy 10 @ 49

Sell 1000 @ 51

Spooing – What Is It?

Simple spoofing involves placing a small order on one side of the book with the intent to trade followed by a large order or orders on the other side of the book which are not intended for execution.

Example:

Bid (Demand)	Price	Ask (Supply)
	53	100
	52	100
	51	1100
	50	
10	49	
100	48	
100	47	
100	46	

Trader's Resting Spoof Order

Trader's Resting Order

Market adjusts
by moving
down the price



Spoofing – What Is It?

Simple spoofing involves placing a small order on one side of the book with the intent to trade followed by a large order or orders on the other side of the book which are not intended for execution.

Example:

Trader's order filled. Bought 10 @ 49

Bid (Demand)	Price	Ask (Supply)
	53	
	52	
	51	1100
	50	100
	49	90
100	48	
100	47	
100	46	

Trader's Resting Spoof Order

Supply side drop prices

Spoofering – What Is It?

Simple spoofing involves placing a small order on one side of the book with the intent to trade followed by a large order or orders on the other side of the book which are not intended for execution.

Example:

Market returns to normal supply and demand after spoofed order is cancelled and removed

Bid (Demand)	Price	Ask (Supply)
	53	100
	52	100
	51	100
	50	
100	49	
100	48	
100	47	

Cancel 1000 @ 51



Flipping

- **“Flipping”** is the entry of orders or trades for the purpose of causing turns of the market and the creation of volatility and instability.
- A flip order has two characteristics: (1) it is an aggressor order; and (2) shortly before the entry of the order, the market participant cancels an order(s) on the opposite side of the market, typically at the same price as the aggressor order.
- Exchange rules do not prohibit a market participant from changing his or her bias from short (long) to long (short).
- However, flipping activity may be disruptive to the market and result in a violation of exchange and CFTC rules (may be viewed as a form of spoofing).
- In considering whether flipping violates disruptive trading practices rules, look at:
 - impact on market participants
 - price fluctuations
 - market conditions in the impacted market(s) and related markets
 - whether the flip involved the cancellation of a large sized order(s) relative to the existing bid or offer depth
 - whether repeated flipping turns the market back and forth

Other Forms of Spoofing and Disruptive Trading

- **Layering:** A trader places a series of non-bona fide orders increasingly far from the prevailing best price on one side of the market. The intent is to create a false sense of liquidity.
- **Vacuuming:** A trader places many orders on both sides of the market, but there is a large spoof order on one side that is cancelled in order to entice a market participant to execute against a smaller order on the same side of the market.
- **Flickering:** Occurs with high frequency trading and occurs when an order is repeatedly submitted and cancelled, which can be a form of quote stuffing and give the impression that the quote was traded through and hence more buying and selling than there actually is.
- **Collapsing of Layers:** A trader places a small order on one side of the market and several spoof orders at different price points on the other side of the market. The spoof orders are then changed into a single price point to give the appearance of large volume.
- **Short squeeze:** A trader takes long positions in futures contracts at a low price and then tries to purchase the entire supply of the same commodity.

Wash Trades

- A “**wash trade**” is a form of fictitious trade in which a transaction, or a series of transactions, gives the appearance that bona fide purchases and sales have been made, but where the trades have been entered into without the intent to take a bona fide market position or without the intent to execute bona fide transactions subject to market risk or price competition.
- In order for a trade to be characterized as a wash trade:
 - The transaction produces a wash result; and
 - The parties intend to achieve a wash result (i.e., more than de minimis self-matching) or reasonably should know that the purpose of the orders will result in a wash trade
- Can be used to give the impression of a new market high or low price or to give a false impression of market volume or used as a means of illegal transfer of funds.
- One of the most common violations on exchanges - often coupled with failure to supervise on the company.



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Recent Trends and Developments

Coordination Among Regulators

“We know that twenty-first century bad actors do not conform their misconduct to the technical boundaries of our respective jurisdictions, nor do they pause as their conduct crosses international borders. So we in the enforcement community must work together to meet the challenges presented by this sort of wrongdoing.”



– CFTC Director of Enforcement,
Speech to American Bar Association’s
National Institute of White Collar Crime
(March 6, 2019)

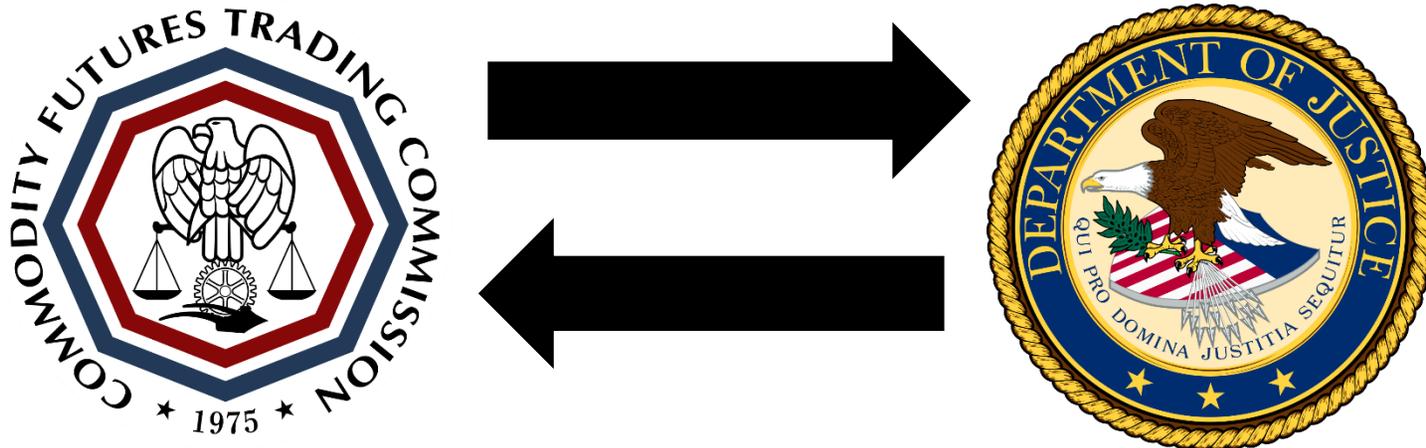
Coordination Among Regulators

“The Commission’s enforcement program focuses on collaborative relationships with SROs, state, federal, and international authorities, including achieving efficiencies through referrals, to meet its enforcement objectives. The parallel enforcement program starts with the premise that [the] **CFTC can most effectively protect markets when working together with colleagues in the enforcement and regulatory community.** In particular, the CFTC believes a **robust combination of criminal prosecution and regulatory enforcement is critical to deterring violators, punishing misconduct, preserving market integrity, and protecting market participants.** During FY 2020, the Commission filed 16 actions parallel with federal criminal authorities, **raising the three-year total of such actions to 46, which far surpasses the total number over the prior seven fiscal years.** . . . During FY 2022, [the Division of Enforcement] looks forward to continued cooperation and coordination with enforcement counterparts on matters of mutual interest.”

-CFTC, FY 2022 President’s Budget, at 18–19 (May 2021)

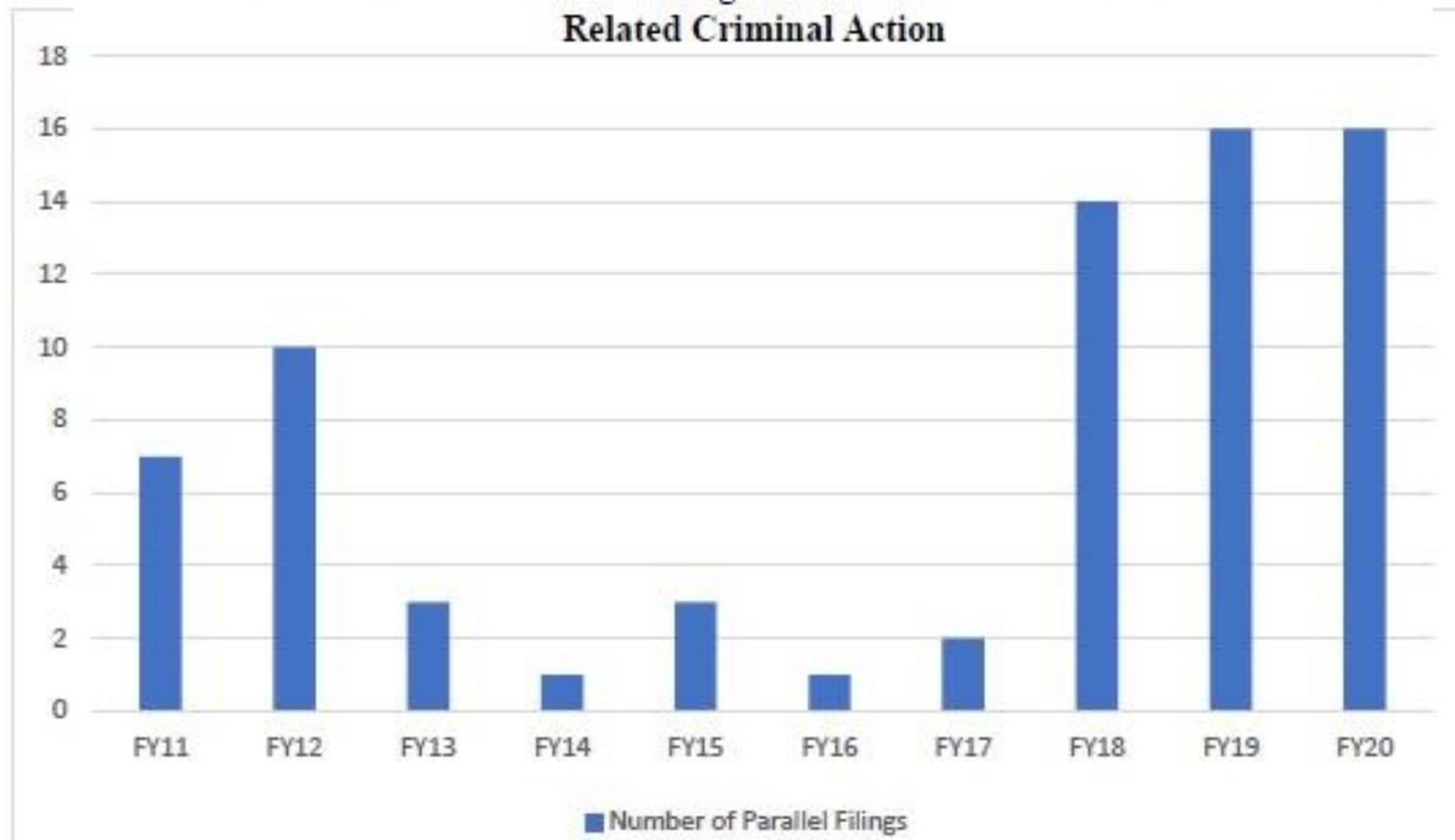
Coordination Among Regulators

- Coordination between CFTC and DOJ
 - Frequent coordination in bringing parallel spoofing enforcement actions
 - DOJ Policy on Coordination of Corporate Resolution Penalties



Coordination Among Regulators and Law Enforcement Agencies

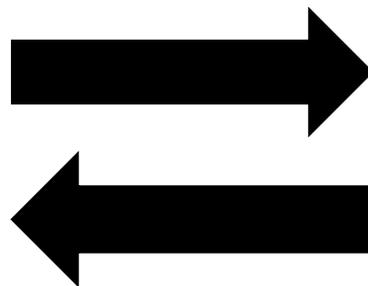
CFTC Enforcement Actions Filed During FY 2020 That Were Filed in Parallel with a Related Criminal Action



– FY 2020 Division of Enforcement Annual Report at 9 (December 2020)

Coordination Among Regulators

- Coordination between CFTC and SEC
 - CFTC-SEC Memorandum of Understanding regarding coordination and information sharing (July 2018)
 - Increase in coordination since release
 - Coordination and parallel actions for spoofing



Coordination Among Regulators

Financial Institution – \$920.2 million (Sept. 2020)

CFTC	DOJ	SEC
September 29, 2020	September 29, 2020	September 29, 2020
Admin Consent Order	DPA/Criminal Information	Admin Consent Order
Spoofing Price Manipulation/Attempt Deceptive Device/Fraudulent act	Wire fraud	Securities Act Section 17(a)(3)

Financial Institution – \$77.4 million (Aug. 2020)

CFTC	DOJ
August 19, 2020	August 19, 2020
Admin Consent Order	DPA/Criminal Information
Spoofing Making false statements	Attempted manipulation Wire fraud

Trading Firm – \$67.4 million (2019)

CFTC	DOJ
November 7, 2019	November 7, 2019
Admin Consent Order	DPA/Criminal Information
Spoofing Manipulative/Deceptive Scheme	Commodities Fraud

Recent Spoofing Cases

Type of Defendant	Outcome	Penalty
Individuals (August 2021)	Conviction	Pending sentence
Individuals (June 2021/September 2020)	Conviction	Terms of imprisonment of 1 year and 1 day
Individual (June 2021/December 2018)	Guilty Plea; Consent Order	Time served; \$21,000 disgorgement
Financial Institution (September 2020)	Settlement	\$920.2 million
Financial Institution (August 2020)	Settlement	\$77.4 million
Financial Services Fund (2019)	Settlement	\$67.4 million
Individual (April 2019)	Mistrial; Case Dismissed	---
Individual (April 2018)	Acquittal	---
Financial Institution (January 2018)	Settlement	\$30 million
Financial Institution (January 2018)	Settlement	\$15 million
Financial Institution (2017)	Settlement	\$25 million

DOJ – Recent Spoofing Actions



THE UNITED STATES
DEPARTMENT of JUSTICE

New Commodities Fraud Sub-Unit

“Spoofing Takedown”

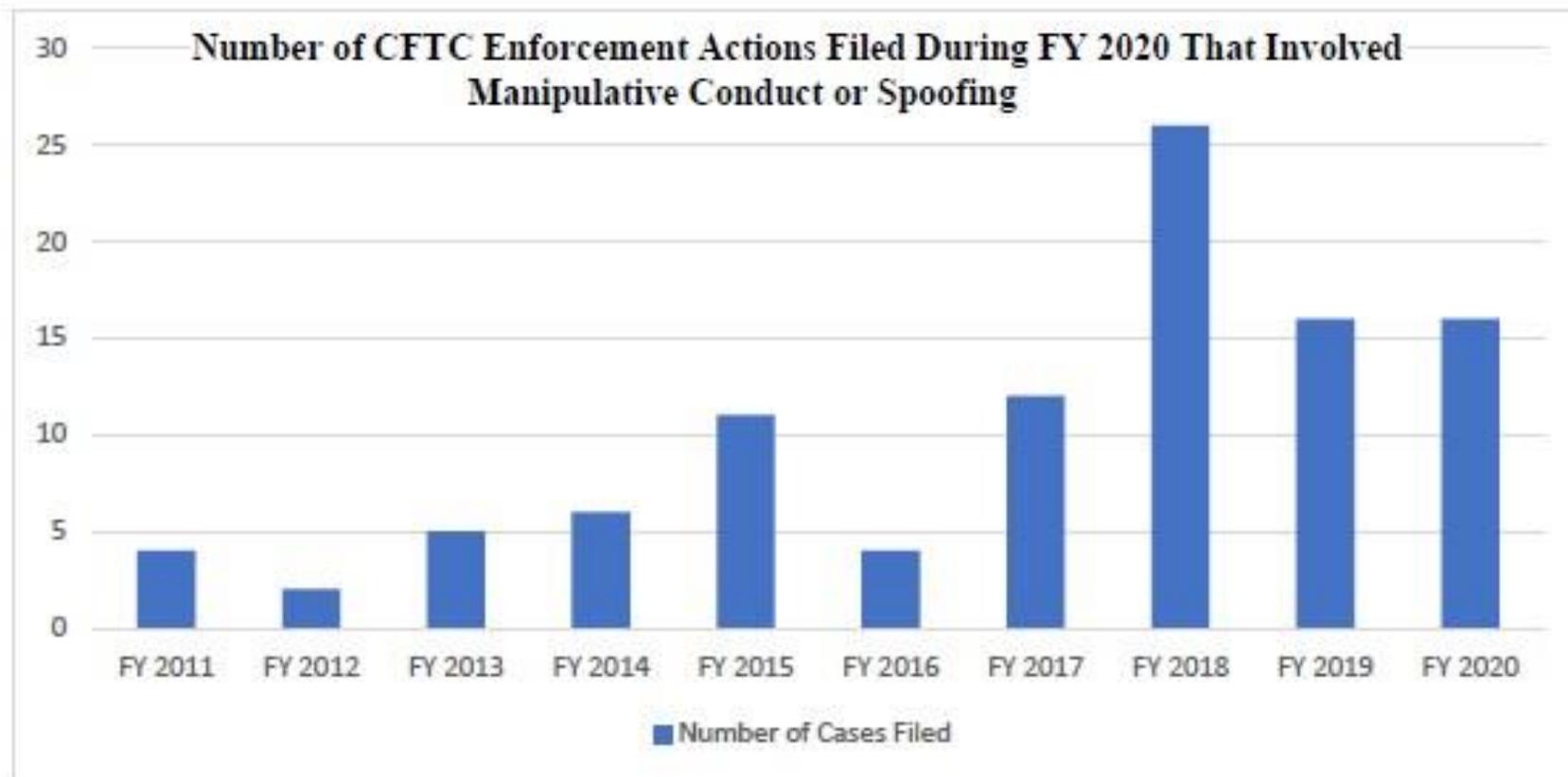
- [U.S. v. Propex Derivatives Pty Ltd.: Docket No. 1:20-cr-00039-1](#)
- [U.S. v. Jiongsheng "Jim" Zhao: Docket No. 1:18-cr-00024-1](#)
- [U.S. v. Jitesh Thakkar: Docket No. 1:18-cr-00036-1](#)
- [U.S. v. James Vorley: Docket No. 1:18-cr-00035-1](#)
- [U.S. v. Cedric Chanu: Docket No. 1:18-cr-00035-2](#)
- [U.S. v. Edward Bases: Docket No. 1:18-cr-00048-1](#)
- [U.S. v. John Pacilio: Docket No. 1:18-cr-00048-2](#)
- [U.S. v. Andre Flotron: Docket No. 3:17-cr-00220-JAM-1](#)

“There is just a wealth of information there, which is going to give us years and years of cases to come, I would expect.”

– Department of Justice
Fraud Section Chief (May 2020)

CFTC – Recent Actions Involving Manipulative Conduct or Spoofing

- Spoofing and manipulation continue to be significant enforcement priorities



– FY 2020 Division of Enforcement Annual Report at 5 (December 2020)

CFTC – Recent Spoofing & Market Manipulation Actions

- **Case No. 1:20 cv 5777 (N.D. Ill. December 8, 2021):** Consent order found a Slovakia-based company and its CEO vicariously liable for alleged spoofing by an in the crude oil futures market on the CME's exchanges from January through February 2018 by an employee (the CEO's son)
 - Civil monetary penalty of \$750,000
- **Docket No. 21-04 (March 25, 2021):** Administrative order found manipulation of a U.S. price-assessment benchmark relating to physical fuel oil products by an individual for several years
 - Civil monetary penalty of \$100,000
- **Docket No. 21-01 (December 3, 2020):** Administrative order found that a trading firm corruptly obtained confidential business information which it used to manipulate oil benchmarks to benefit the company's related physical and derivatives positions
 - Civil monetary penalty and disgorgement of \$95 million

CFTC – Recent Spoofing & Market Manipulation Actions

- **CFTC Docket No. 20-75 (September 30, 2020):** Company vicariously liable for the conduct of a former trader who spoofed in 2015 in oil, gasoline, and heating oil futures traded on NYMEX
 - \$450,000 civil monetary penalty
- **CFTC Docket No. 20-69 (September 29, 2020):** Company and subsidiaries liable for conduct of numerous traders for spoofing in precious metals and U.S. Treasury futures contracts on CBT, NYMEX and COMEX over a period of eight years
 - Record \$920 million fine
- **CFTC Docket No. 20-26 (August 19, 2020):** Penalties for both spoofing in gold and silver futures contracts traded on COMEX over eight years and making false statements to CFTC
 - \$77.4 million civil monetary penalty; must retain independent compliance monitor
- **CFTC Docket No. 2-17 (June 18, 2020):** Company settled charges that two traders engaged in spoofing by manually placing bids or offers on the CME with the intent to cancel those bids before execution.
 - Civil monetary penalty of \$1,250,000

Spoofing – Not Just the Big Banks

CFTC Orders Chicago Prop Firm and 3 Traders to Pay \$745,000 for Spoofing in Agricultural and Metals Futures

September 30, 2020

Washington, D.C. — The Commodity Futures Trading Commission issued four orders today filing and settling charges against **Brendan Delovitch** and **Wesley Johnson** both of Canada, **Rajeev Kansal** of India, and **ARB Trading Group LP**, a proprietary trading firm headquartered in Chicago, for spoofing across four exchanges in various agricultural and metals futures contracts.

– CFTC Release No. 8265-20 (September 30, 2020)

Federal Court Sanctions Slovakian Trader and His Principals for Spoofing and Engaging in a Manipulative and Deceptive Scheme

December 08, 2021

Washington, D.C. — The Commodity Futures Trading Commission today announced the U.S. District Court for the Northern District of Illinois entered a consent order on December 7, resolving CFTC charges that **Roman Banoczay Jr.** (Banoczay Jr.) of Bratislava, Slovakia, as an agent of **Roman Banoczay Sr.** (Banoczay Sr.) and their company, **BAZUR Spol. S.R.O.** (BAZUR), engaged in spoofing and in a manipulative and deceptive scheme to defraud in the Chicago Mercantile Exchange (CME) crude oil futures market in violation of the Commodity Exchange Act (CEA) and CFTC regulations.

– CFTC Release No. 8467-21 (December 8, 2021)

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Government Investigation and Prosecution Strategies

Government Investigation and Prosecution Strategies – Statutory Framework

Commodity Exchange Act	Section	Max. Penalty	Max Prison Term	Statute of Limitations
Knowing Violations of CEA sections concerning Spoofing, Manipulative or Deceptive Devices, or Fraud	CEA § 9(a)(2)	\$1,000,000	10 years	5 years
Criminal Code				
Wire Fraud	18 USC § 1343	\$250,000	20 years	5 years
Wire Fraud Affecting a Financial Institution		\$1,000,000	30 years	10 years
Bank Fraud	18 USC § 1344	\$1,000,000	30 years	10 years
Commodities Fraud	18 USC § 1348	\$250,000	25 years	6 years
Conspiracy	18 USC § 371 18 USC § 1349	\$250,000	5 years	
Racketeering – RICO Racketeering & Bank Fraud	18 USC § 1962	\$250,000	20 years	5 years 10 years
Securities and Exchange Act of 1934				
Manipulative Securities Trading	15 USC § 78i(a)(2)	\$5,000,000	20 years	5 years
Sherman Act				
Price Fixing & Bid Rigging	15 USC § 1	\$100,000,000	10 years	5 years

Government Investigation and Prosecution Strategies: Charging Strategies

- DOJ pursuing novel prosecution theories:
 - Wire Fraud
 - RICO
 - Bank Fraud
 - Fraud Enforcement and Recovery Act of 2009
 - Commodities Fraud
 - Conspiracy

Government Investigation and Prosecution Strategies: DOJ Charging Strategies & Jury Instructions

- US v. Flotron – Jury Instructions (April 2018)
 - **Conspiracy to execute a commodities fraud scheme**
 - The existence of the charged conspiracy: there existed a conspiracy as charged between two or more persons to commit the federal crimes of commodities fraud that continued after May 20, 2009, to as long as approximately November 2013
 - Defendant’s membership in the conspiracy: Defendant knowingly and willfully joined as a member of the conspiracy to commit commodities fraud
 - **Commodities fraud**
 - Defendant knowingly and with intent to defraud executes or attempts to execute a scheme to defraud in connection with the purchase or sale of commodities for future delivery
 - **Good faith**
 - Defendant cannot be convicted if he held an honest belief that his actions, as charged, were proper and not in furtherance of any unlawful activity

Government Investigation and Prosecution Strategies: DOJ Charging Strategies & Jury Instructions

- US v. Vorley and Chanu – Jury Instructions (September 2020)
 - **Wire fraud affecting a financial institution**
 - Defendant knowingly devised or participated in the scheme to defraud involving a materially false or fraudulent pretense, representation, or promise
 - Defendant did so with the intent to defraud
 - For the purpose of carrying out the scheme or attempting to do so, defendant caused interstate or international wire communications to take place in the manner charged
 - Scheme affected a financial institution
 - **Conspiracy to commit wire fraud affecting a financial institution**
 - Conspiracy to commit wire fraud affecting a financial institution existed
 - Defendant knowingly became a member of the conspiracy with an intent to advance the conspiracy
 - **Evidence that defendant engaged in spoofing or violated CME rules or bank policies is not, standing alone, sufficient to convict defendant**

Government Investigation and Prosecution Strategies: DOJ Charging Strategies & Jury Instructions

- **US v. Bases – Jury Instructions (August 2021)**
 - **Commodities Fraud**
 - Defendant knowingly engaged in a scheme to defraud in connection with any commodity for future delivery
 - Defendant did so with the intent to defraud
 - **Wire fraud affecting a financial institution**
 - Defendant knowingly devised or participated in the scheme to defraud involving a materially false or fraudulent pretense, representation, or promise
 - Defendant did so with the intent to defraud
 - For the purpose of carrying out the scheme or attempting to do so, defendant caused interstate or international wire communications to take place in the manner charged
 - Scheme affected a financial institution Commodities fraud
 - Defendant knowingly and with intent to defraud executes or attempts to execute a scheme to defraud in connection with the purchase or sale of commodities for future delivery
 - **Conspiracy to commit wire fraud affecting a financial institution**
 - Conspiracy to commit wire fraud affecting a financial institution existed
 - Defendant knowingly became a member of the conspiracy with an intent to advance the conspiracy

Government Investigation and Prosecution Strategies: CFTC Whistleblower Developments

- In 2020, 30% to 40% of active CFTC investigations involved whistleblowers
- On July 7, 2021, President Biden signed the CFTC Fund Management Act, creating a separate fund for the CFTC’s whistleblower office at least until October 2022 and enabling the office to continue operations even if the fund becomes depleted
- On October 21, 2021 (FY2022), the CFTC announced a nearly \$200 million award, the largest to a single whistleblower
 - Whistleblower’s information “significantly contributed” to the success of three actions: (1) already open CFTC investigation; (2) action by U.S. federal regulator; and (3) foreign regulator
 - First award relating to an action by a foreign futures authority to address harm outside the United States, a decision from which Commissioner Dawn Stump dissented
- The CFTC announced its latest award on November 22, 2021, totaling nearly \$1 million dollars split between two whistleblowers

	Number of Whistleblower Awards	Amount of Whistleblower Awards
FY21	6	\$3,002,027
FY20	16	\$20,261,000
FY19	5	\$15,384,644
FY18	5	\$75,575,113
FY17	0	\$0
FY16	2	\$11,551,320
FY15	1	\$300,000
FY14	1	\$246,000
FY13	0	\$0
FY12	0	\$0
FY11	0	\$0

Government Investigation and Prosecution Strategies: The Role of Data Analytics

CFTC's Enhanced Data Analytics Capabilities

“The enforcement program is engaging in a multi-year project to enhance our ability to detect misconduct with data analytics. As part of this effort, the Commission has developed an ability to identify, in the trading data, forms of misconduct that we might otherwise have been unable to detect. **The significant increase in the number of cases** involving manipulative conduct, and the significant increase in the percentage of the overall docket involving charges of manipulative conduct and commodities fraud, **is directly tied to these data analytical efforts.”**

– CFTC President’s Budget FY 2021, at 11
(February 2020)

The Commission maintains a **robust market surveillance program that utilizes sophisticated systems to analyze trade data and respond to outlying events.** . . . The Commission is engaged in a multi-year project to strengthen its data analytics capability to enhance the ability to identify, in the trading data, forms of misconduct that might otherwise have been undetectable. **During FY 2020, use of the surveillance technology resulted in the three largest spoofing cases in the Commission’s history,** including a matter in which the Commission imposed the highest monetary relief in the Commission’s history (\$920 million)[.]”

– FY 2020 Division of Enforcement
Annual Report at 8 (December 2020)

Government Investigation and Prosecution Strategies: The Role of Data Analytics

DOJ's Push to Use Big Data to Make Cases

“[W]e are building up to **surge resources for corporate enforcement**. . . . [For example], we need to take advantage of . . . new tools . . . **[B]ig data** . . . offers **new opportunities** for prosecutors **to detect wrongdoing**. . . . [W]e're going to work closely with regulatory and other partners so that we're sharing the same fruits of analytic labor.”

– Principal Associate Deputy Attorney General John Carlin (October 5, 2021)

Data Analytics Limitations

- Presents challenge for prosecution – translating complex data into digestible narrative
- Who presents data? Expert? Agent? Cooperating Witness?



Spooing & Manipulation Investigations – More to Come

Energy

Exclusive: U.S. Justice Department probes suspected manipulation of Platts benchmarks -sources

US prosecutors accuse NatWest of breaching non-prosecution deal

Sam Fry
29 October 2021

Connecticut federal prosecutors are currently investigating whether traders at NatWest's investment management arm engaged in a market manipulation practice known as spoofing, where traders place orders they intend to cancel to create a false impression of market demand.

How Do You Protect Against Spoofing and Other Manipulative Conduct?

Best Practices for Effective Monitoring and Surveillance: Surveillance Concepts

- Market misconduct and internal misconduct
- Surveillance concepts
 - Rule based
 - Spoofing, “bang the close,” mismarking, employee securities trading
 - Pattern based
 - Tipping / information sharing, triggering stops, use of dormant accounts
 - P&L based
 - Focus on large losses as well as large gains

Best Practices for Effective Monitoring and Surveillance: Screening Technology in Exchange Traded and OTC Markets

- Firms are using a combination of off-the-shelf tools, custom tools, and customized off-the-shelf solutions
- These tools need access to intraday market data
- Tuning to reduce false positives and missed instances
- Tools need to be tested and re-tuned both regularly and in response to new information

Best Practices for Effective Monitoring and Surveillance: Training and Support for Compliance Programs

- Surveillance Team Needs

- Core skills
- Access to systems and people
- Technology
- Internal data
- External data
- Training
- Physical space



Best Practices for Effective Monitoring and Surveillance: Integrated Communications Reviews

- Surveillance reviews need to integrate written and audio communications
- Integrating communications reviews at the investigation level vs. detection level
 - Detecting patterns in communications
 - Moving beyond lexicon searches
 - What sounds good vs. what is feasible?



Best Practices for Effective Monitoring and Surveillance: Additional Surveillance Topics

- Reviews during employees' 2-week leave
- Random sampling of traders and salespeople
- Integrating with KYC
- Sharing intelligence around market events

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What Comes Next?

SEC – Settlement Admissions

- In October 2021, at SEC Speaks, Director of Enforcement suggested that the SEC may revert to requiring defendants in enforcement actions to admit wrongdoing in certain types of settlements
 - Potential move away from “neither admit nor deny”
 - Signals more aggressive action from the SEC
 - May deter companies and individuals from agreeing to enter into settlements



SEC's Top Enforcer Says Admissions Are Back On The Menu

DOJ – Changes to Corporate Criminal Enforcement Policies

- Key Takeaways:
 - Cooperation credit: information regarding *all* individuals involved
 - Charging decisions: full review of corporate record
 - Corporate monitors: no more presumption against use
- Looking Ahead:
 - More prosecutorial flexibility and focus on total culture of compliance
 - No apparent intent to require production of privileged information for cooperation credit
 - No announced intent to rescind Trump-era anti-"piling on" policy



CFTC Forecast

- CFTC is currently staffed with only two Commissioners: Acting Chair Behnam (D) and Commissioner Stump (R).
 - Acting Chair Behnam has been nominated to be the permanent Chair of the CFTC. He is awaiting Senate confirmation.
 - Additionally, President Biden has nominated two Democrats for CFTC Commissioner positions: Kristin Johnson and Christy Goldsmith Romero.
 - No one has been nominated for the vacant Republican seat.
- Division of Enforcement, Division of Market Oversight, Market Participants Division and the Legal Division all have “acting directors.” It will not be until after Behnam is confirmed by the Senate as Chairman that we will see permanent directors in these roles.



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Q & A

MCLE Credit

- MCLE Certificates:
 - Most participants should anticipate receiving their certificate of attendance in eight weeks following the webcast
 - Please direct all questions regarding MCLE to CLE@gibsondunn.com

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Upcoming Webcasts & Contact Information

Gibson Dunn Webcasts

Upcoming Webcasts (CLE credit available)

- January 13 | FCPA Trends in Emerging Markets | 10:30 am – 12:30 pm EST [REGISTER](#)
- January 19 | Bank Secrecy Act / Anti-Money Laundering and Sanctions Enforcement and Compliance in 2022 and Beyond | 12:00 – 2:35 pm EST [REGISTER](#)
- February 1 | FCPA 2021 Year-End Update | 12:00 – 2:00 pm EST [REGISTER](#)
- February 24 | Corporate Compliance and Sentencing Guidelines | 12:00 – 1:30 EST [REGISTER](#)

Recorded Webcasts (CLE credit available)

- 2021 – Managing Internal Audit and Investigations
- Compliance Monitors: Everything that you wanted to know but were afraid to ask
- 2021 – Negotiating Closure of Government Investigations: NPAs, DPAs, and Beyond

David Burns

Washington, D.C.



David P. Burns is a litigation partner in the Washington, D.C., office of Gibson, Dunn & Crutcher. He is the co-chair of the firm's National Security Practice Group, and a member of the White Collar and Investigations and Crisis Management practice groups. His practice focuses on white-collar criminal defense, internal investigations, national security, and regulatory enforcement matters. Mr. Burns represents corporations and executives in federal, state, and regulatory investigations involving securities and commodities fraud, sanctions and export controls, theft of trade secrets and economic espionage, the Foreign Agents Registration Act, accounting fraud, the Foreign Corrupt Practices Act, international and domestic cartel enforcement, health care fraud, government contracting fraud, and the False Claims Act.

Prior to re-joining the firm, Mr. Burns served in senior positions in both the Criminal Division and National Security Division of the U.S. Department of Justice. Most recently, he served as Acting Assistant Attorney General of the Criminal Division, where he led more than 600 federal prosecutors who conducted investigations and prosecutions involving securities fraud, health care fraud, Foreign Corrupt Practices Act violations, public corruption, cybercrime, intellectual property theft, money laundering, Bank Secrecy Act violations, child exploitation, international narcotics trafficking, human rights violations, organized and transnational crime, gang violence, and other crimes, as well as matters involving international affairs and sensitive law enforcement techniques. Prior to joining the Criminal Division, Mr. Burns served as the Principal Deputy Assistant Attorney General of the National Security Division from September 2018 to December 2020. In that role, he supervised the Division's investigations and prosecutions, including counterterrorism, counterintelligence, economic espionage, cyber hacking, FARA, disclosure of classified information, and sanctions and export controls matters. He also spent five years as an Assistant United States Attorney in the Southern District of New York, Criminal Division, from 2000 to 2005.

Joel Cohen

New York, NY



Joel M. Cohen, a trial lawyer and former federal prosecutor, is Co-Chair of Gibson Dunn’s White Collar Defense and Investigations Group, and a member of its Securities Litigation, Class Actions and Antitrust Practice Groups. Mr. Cohen has been lead or co-lead counsel in 24 civil and criminal trials in federal and state courts. Mr. Cohen is equally comfortable leading confidential investigations, managing crises or advocating in court. Mr. Cohen’s experience includes all aspects of FCPA/anticorruption issues, insider trading, cross-border tax issues, securities and financial institution litigation, class actions, sanctions, money laundering and asset recovery, with a particular focus on international disputes and discovery.

Mr. Cohen was the prosecutor of Jordan Belfort and Stratton Oakmont, which is the focus of “The Wolf of Wall Street” film by Martin Scorsese. He was an advisor to the OECD in connection with the effort to prohibit corruption in international transactions and was the first Department of Justice legal liaison advisor to the French Ministry of Justice. Mr. Cohen is highly-rated in *Chambers*, where practitioners and clients have noted that he “is very, very good at getting the big picture . . . understanding where his clients want to be, which leads to better strategic judgments,” he has “incredibly strong substantive depth melded with a risk-based practicality,” “strong trial skills and handling of large-scale investigations,” “has a finger on the pulse of the regulators and government,” is “very, very smart and very knowledgeable,” and praised his ability to “handle very intense, complex matters with regulatory authorities and really just deliver great results.” Mr. Cohen has been repeatedly named a leading white collar criminal defense attorney by *The Best Lawyers in America*®, a “Litigation Star” and national Top 100 Trial Lawyer by *Benchmark Litigation*, an “MVP” by *Law360*, one of the world’s leading practitioners in White Collar Crime in Legal Media Group’s Expert Guides – *White Collar Crime*, a “Super Lawyer” in Criminal Litigation, by Global Investigations Review, and his work has been noted by *Legal 500* in the areas of white collar criminal defense and securities litigation.

Jeffrey Steiner

New York, NY



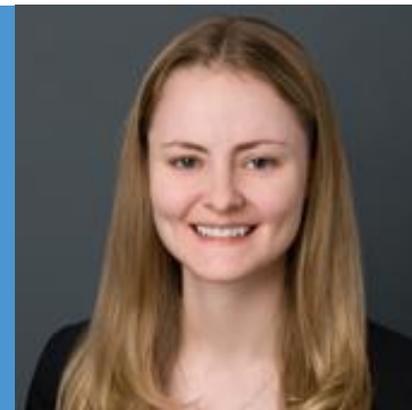
Jeffrey L. Steiner is Co-Chair of the firm's Derivatives Practice and Digital Currencies and Blockchain Technologies Practice. Mr. Steiner advises a range of clients on regulatory, legislative, enforcement and transactional matters related to OTC and listed derivatives, commodities and securities. He frequently assists clients with compliance and implementation issues relating to the Dodd-Frank Act, the rules of the Commodity Futures Trading Commission (CFTC), the Securities and Exchange Commission (SEC), the National Futures Association and the prudential banking regulators.

Mr. Steiner also advises a range of clients on issues related to digital assets, cryptocurrencies, non-fungible tokens (NFTs) and distributed ledger technology, including analyzing and advising on regulatory and enforcement matters relating to their application and use. He regularly works with clients on structuring products involving the use of digital assets and the application of blockchain technology, including digital token issuances and cryptocurrency trading. He also analyzes the cross-border impacts relating to clients' use of digital currencies and blockchain technology.

Prior to joining Gibson, Dunn & Crutcher, Mr. Steiner was special counsel in the Division of Market Oversight at the CFTC where he handled issues relating to trading and execution of futures and swaps, designated contract markets (DCMs), market maker and incentive programs, exempt markets, reporting, swap data repositories (SDRs) and off-exchange derivatives transactions (block trades, EFRPs). He served as team lead for the Real-Time Public Reporting of Swap Transaction Data rulemaking team for both the proposed and final rules, both of which he presented before the CFTC for public vote. While at the CFTC, he also worked on resolving and advising on issues relating to Title VII of the Dodd Frank Act, including reporting, trading and execution in all asset classes (i.e., interest rates, credit, FX, equity and other commodity), SDRs, swap execution facilities (SEFs), block trades and extraterritoriality. Prior to being a special counsel at the CFTC, he served as an attorney-advisor in the CFTC's Division of Market Oversight from 2009 – 2010. Mr. Steiner began his career in private law practice where he focused on representing clients on OTC derivatives, futures and commodities related matters, capital markets transactions and hedge fund formation.

Darcy Harris

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Darcy C. Harris is a senior litigation associate in the New York office of Gibson, Dunn & Crutcher. She is a member of Gibson Dunn's Securities Enforcement, Securities Litigation, and White Collar Defense and Investigations Practice Groups.

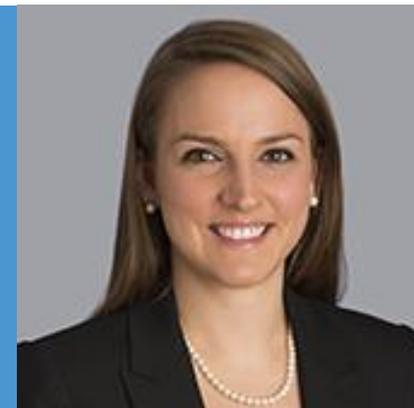
Ms. Harris's practice focuses on complex commercial litigation, internal and regulatory investigations, securities litigation, and white collar defense. She has represented clients across a variety of industries, including financial services, insurance, accounting and auditing, healthcare, real estate, consumer goods, media and entertainment, and non-profit.

Ms. Harris has extensive experience preparing complex financial cases for trial. She was a member of the Gibson Dunn team that secured a jury trial victory on behalf of Wynnefield Capital and its portfolio manager, Nelson Obus, in *SEC v. Obus*, one of the longest running insider trading cases in history.

Ms. Harris often represents hedge funds, private equity funds, public companies, auditing and accounting firms, and other financial institutions in SEC and PCAOB enforcement inquiries. Ms. Harris also has experience advising boards of directors of public companies, and she has conducted confidential investigations for boards of directors and privately held companies.

Amy Feagles

Washington, D.C.



Amy Feagles is a senior associate in the Washington, D.C. office of Gibson, Dunn & Crutcher. She practices in the Firm's Litigation Department and is a member of its Antitrust and Competition and White Collar Defense and Investigations Practice Groups.

Ms. Feagles' practices encompasses a wide range of experience in internal investigations, regulatory and criminal investigations, and complex commercial litigation across a range of industries, including financial services, government contracting, healthcare, and international shipping. She has substantial experience in the defense of multinational companies and individuals in connection with U.S. grand jury investigations and international cartel investigations by U.S. and international antitrust agencies, including the U.S. Department of Justice and European Commission. For example, she represented a global financial institution in connection with the foreign exchange and LIBOR investigations conducted by the Criminal and Antitrust Divisions of the U.S. Department of Justice, the U.S. Commodity Futures Trading Commission, the U.K. Financial Conduct Authority, and numerous other international competition, criminal, and regulatory authorities. Ms. Feagles also represents clients in complex antitrust litigation matters, including class actions involving allegations of price fixing and related claims in federal courts. She was named by *Best Lawyers* as a 2022 "One to Watch" in Antitrust Law.

Prior to law school, Ms. Feagles worked at the U.S. Department of State, where she oversaw the implementation of foreign assistance programs in Iraq. In that capacity, she also developed and coordinated policies with respect to human rights and governance in Iraq.

Jaclyn Neely

New York, NY



Jaclyn Neely is a senior litigation associate in the New York office of Gibson, Dunn & Crutcher. She is a member of the Firm’s White Collar Defense and Investigations, Securities Enforcement, Anti-Money Laundering, and Litigation Practice Groups.

Ms. Neely regularly represents clients, including major multinational corporations, financial institutions, and individuals, in criminal, regulatory, and internal investigations, with a focus on anti-corruption and anti-money laundering issues. Her practice includes advising clients under investigation by regulators; coordinating and conducting site visits, witness interviews, and document reviews and productions; working with in-house and outside legal, audit, and compliance teams; preparing presentations and reports; and designing remediation measures. Ms. Neely’s practice also includes assessing corruption risks and advising clients on anti-corruption and general compliance programs, procedures, and training. Ms. Neely has participated in multiple large-scale FCPA investigations and SEC enforcement actions relating to allegations of securities fraud and other violations of the securities laws, and she recently represented an individual defendant in a white collar criminal trial in federal court. Ms. Neely also regularly advises on transactions, evaluating corruption and related risks and conducting due diligence.

Ms. Neely has been recognized by *The Best Lawyers in America*® as “One to Watch” in the area of Criminal Defense: White-Collar.

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