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DEVELOPMENTS AND TRENDS IN CFTC ENFORCEMENT

In the last 18 months, armed with new powers under Dodd-Frank, the Commission has stepped up its enforcement activities. It has imposed significant civil monetary penalties on the largest global banks for benchmark rate manipulation, pursued swap dealers for reporting violations, made spoofing an enforcement priority, and brought its first insider trading case. It has also brought major cases alleging a variety of trade practice violations and aggressively enforced customer protection rules. Nor has it shied away from cases raising cross-jurisdictional issues. The authors describe these developments and other enforcement themes.

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The 2014-2015 fiscal year was highly significant for the Enforcement Division of the CFTC. Five years after the passage of the Dodd-Frank Act and its expansion of the CFTC's enforcement authority, annual enforcement fines have become very substantial: the Commission ordered a record $3.14 billion in civil monetary penalties in 2015.[1]

This article describes the most significant CFTC enforcement actions and principal enforcement themes of the 2014-2015 fiscal year, which suggest that the following developments will continue: CFTC involvement with federal and international regulatory authorities on major enforcement matters that go beyond the Commodity Exchange Act (CEA), such as benchmark investigations; increasing efforts to police the new Dodd-Frank Act regulations; attacking market manipulation in a variety of forms; demanding individual responsibility for wrongdoing and assisting DOJ in pursuing criminal actions; bringing insider trading cases; policing transactions in digital currencies where there is a jurisdictional basis to do so; and pushing jurisdictional boundaries with other agencies, such as the SEC and FERC.

BENCHMARKS – FX, LIBOR, EURIBOR, AND ISDAFIX

The CFTC's 2014-15 fiscal year saw key developments in the pursuit of alleged benchmark rate manipulation, as the Commission imposed penalties of

[1] Press Release, CFTC Releases Annual Enforcement Results for Fiscal Year 2015, *available at* http://www.cftc.gov/PressRoom/PressReleases/pr7274-15.

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approximately $2.73 billion in the area.[2] Including prior years' actions, the CFTC has imposed over $4.6 billion in civil monetary penalties in 15 actions against banks and brokers.[3]

On November 11, 2014, the CFTC settled charges[4] against Citibank, HSBC, JPMorgan Chase, Royal Bank of Scotland, and UBS AG, relating to alleged manipulation of certain foreign exchange (FX) rates, including the World Markets/Reuters Closing Spot Rates (WM/R Rates) used, *inter alia*, to establish values for different currencies.[5] The orders in the action alleged that, from 2009 through 2012, employees of the banks used private electronic chat rooms to share confidential information and coordinate trading.[6] Specifically, it was alleged that during a 60-second period, FX traders at the banks would collude to bid up the prices of currencies in order to inflate the rates. The CFTC further claimed that the behavior by traders at the banks occurred without detection in part "because of internal control[] and supervisory failures." Collectively, the CFTC fined the banks at issue more than $1.4 billion.

The CFTC also continued enforcement actions directed at the alleged manipulation of the London Interbank Offered Rate (LIBOR) and Euro Interbank Offered Rate (EURIBOR) – both widely used rates that form the basis of trillions of dollars of financial instruments. In prior years, the CFTC had imposed more than a billion dollars in penalties for abuses of these and other interest rate benchmarks; yet the 2014-2015 fiscal year stands out for the magnitude of its fines.

On April 23, 2015, the CFTC issued an order settling charges against Deutsche Bank AG relating to allegations of manipulating and falsely reporting LIBOR and EURIBOR, and imposing an $800 million penalty.[7] The order alleged that from 2005 through 2011, at least 29 Deutsche Bank employees were involved in improper submission of rates. Rather than submitting rates that reflected Deutsche Bank's cost of borrowing unsecured funds in the cash markets, Deutsche Bank allegedly based its LIBOR and EURIBOR submissions on its own cash and derivatives trading positions for the purpose of profiting from those positions. The CFTC also alleged that Deutsche Bank aided manipulation attempts by other banks. The CFTC claimed that the improper submission of rates resulted from an inappropriate culture of information-sharing between Deutsche Bank personnel; from a lack of internal controls, procedures and policies; and a failure of appropriate supervision.

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[2] *Compare id.* ($4.6 billion from benchmark actions), with Press Release, CFTC Releases Annual Enforcement Results for Fiscal Year 2014 (Nov. 6, 2014), *available at* http://www.cftc.gov/PressRoom/PressReleases/pr7051-14 ($1.87 billion from benchmark actions).

[3] Press Release, CFTC Releases Annual Enforcement Results for Fiscal Year 2015, *supra* n.1.

[4] Unless otherwise noted, respondents in all the CFTC settlement orders discussed in this Article neither admitted to nor denied the CFTC's allegations.

[5] Press Release, CFTC Orders Five Banks to Pay Over $1.4 Billion in Penalties for Attempted Manipulation of Foreign Exchange Benchmark Rates (Nov. 12, 2014), *available at* http://www.cftc.gov/PressRoom/PressReleases/pr7056-14.

[6] Order Instituting Proceeding Pursuant to Sections 6(c)(4)(A) and 6(d) of the Commodity Exchange Act, Making Finding, and Imposing Remedial Sanctions, CFTC Docket No. 15 – 03 (Nov. 11, 2014), *available at* http://www.cftc.gov/idc/groups/public/@lrenforcementactions/documents/legalpleading/enfcitibankorder111114.pdf.

[7] Order Instituting Proceedings Pursuant to Sections 6(c) and 6(d) of the Commodity Exchange Act, Making Finding, and Imposing Remedial Sanctions, CFTC Docket No. 15-20 (Apr. 23, 2015), *available at* http://www.cftc.gov/idc/groups/public/@lrenforcementactions/documents/legalpleading/enfdeutscheorder042315.pdf.

In the settlement order, Deutsche Bank did not admit to or deny the CFTC's allegations "except to the extent [that it] admitt[ed] those findings in any related action against [Deutsche Bank] by, or any agreement with, the Department of Justice or any other governmental agency or office, [it] consent[ed] to the entry [of] and acknowledge[d] service of [the settlement order]." Press Release, Deutsche Bank to Pay $800 Million Penalty to Settle CFTC Charges of Manipulation, Attempted Manipulation, and False Reporting of LIBOR and Euribor (Apr. 23, 2015), *available at* http://www.cftc.gov/PressRoom/PressReleases/pr7159-15 (describing "the largest fine in the CFTC's history").

The CFTC also brought an enforcement proceeding alleging the manipulation of ISDAFIX, a leading global benchmark referenced in a range of interest rate products. On May 25, 2015, the CFTC issued an order settling charges against Barclays PLC for allegedly manipulating ISDAFIX.[8] The CFTC claimed that from 2007 through 2012, Barclays engaged in acts of false reporting and manipulation of ISDAFIX by executing transactions in targeted interest rate products during a critical "fixing time." By doing so, Barclays allegedly manipulated the rates through its trading and made submissions to an interest rate swaps broker that benefited derivatives positions held by Barclays.[9] The CFTC fined Barclays $115 million.

The principal lesson from recent years' benchmark manipulation cases is straightforward: the CFTC is aggressive and penalties are higher than ever. In addition, every financial institution (and both interdealer brokers) to have settled with the CFTC agreed to prospective remedial steps, such as implementation of firewalls, auditing, CFTC-approved training, and regular compliance reports.[10] In flexing its regulatory muscle so forcefully, the CFTC served notice that, in its view, it has broad jurisdiction over conduct affecting commodities transactions in the U.S., even conduct that occurs exclusively abroad.

DODD-FRANK ACT REGULATORY VIOLATIONS

Title VII of the Dodd-Frank Act established a broad, new regulatory regime that created many significant obligations for swap market participants, with the objective of increasing transparency and reducing systemic risk in the derivatives markets. Among other things, Title VII required new real-time public reporting procedures, trade monitoring, registration and compliance requirements for swap dealers, and the establishment of systems for obtaining information subject to mandatory disclosure. Although the CFTC initially granted market participants a "phase-in" period to implement the new reforms, the enforcement period clearly is underway.

On September 17, 2015, the CFTC entered into a settlement with Australia and New Zealand Banking Group Ltd. (ANZ), a registered swap dealer, under which ANZ agreed to pay a $150,000 civil monetary penalty for violating Section 4s(f) of the CEA and CFTC Regulations 20.4 and 20.7.[11] Under the statute and regulations, ANZ was required to file daily large trader reports (LTRs) for reportable positions in physically settled commodity swaps. These reports were required to conform to the form and manner for reporting and submitting information mandated by CFTC Regulation 20.7 and to contain the data elements provided in CFTC Regulation 20.4.

According to the CFTC, the LTRs that ANZ submitted between March 2013 and November 2014 routinely failed to comply with these requirements. At times the reports did not identify any underlying commodity, presented information in improper formats, reported non-zero positions with a value of zero, and misidentified counterparty positions as ANZ's own positions, among other errors. As a result of these mistakes, the CFTC claimed that ANZ inaccurately reported its own positions, in one case reporting a position that was more than 5,000 times its actual size. Moreover, ANZ allegedly neglected its duties entirely on some days by failing to submit any report.

On September 30, 2015, the CFTC entered into a settlement with Deutsche Bank, also a registered swap dealer, over allegations that it had violated certain reporting requirements under CFTC Parts 23, 43, and 45.[12] Regulations 43 and 45 specify requirements for

[8] Press Release, CFTC Orders Barclays to Pay $115 Million Penalty for Attempted Manipulation of and False Recording of U.S. Dollar ISDAFIX Benchmark Swap Rates (May 20, 2015), *available at* http://www.cftc.gov/PressRoom/PressReleases/pr7180-15.

[9] Order Instituting Proceeding Pursuant to Section 6(c) and 6(d) of the Commodity Exchange Act, Making Findings, and Imposing Remedial Sanctions, CFTC Docket No. 15 – 25 (May 20, 2015), *available at* http://www.cftc.gov/idc/groups/public/@lrenforcementactions/documents/legalpleading/enfbarclaysorder052015.pdf.

[10] These lessons were confirmed in Citibank's May 2016 settlement related to ISDAFIX, under which it paid a $250 million civil monetary penalty to the CFTC. Order Instituting Proceedings Pursuant to Sections 6(c) and 6(d) of the Commodity Exchange Act, Making Findings, and Imposing Remedial Sanctions, CFTC Docket No. 16 – 16 (May 25, 2016), *available at* http://www.cftc.gov/PressRoom/PressReleases/pr7371-16.

[11] In re Australia and New Zealand Banking Group Ltd., CFTC No. 15-31 (Sep. 17, 2015), *available at* http://www.cftc.gov/idc/groups/public/@lrenforcementactions/documents/legalpleading/enfaustraliaorder091715.pdf.

[12] In the Matter of Deutsche Bank AG, CFTC Docket 15-40, Order Instituting Proceedings Pursuant to Sections 6(c) and 6(d) of the Commodity Exchange Act, Making Findings and

real-time public reporting of swaps, the reporting of swaps to a swap data repository (SDR), and the reporting of continuation data. The CFTC alleged that Deutsche Bank had violated these regulations between January 2013 and July 2015 by failing properly to report cancellations of its swap transactions.[13] The CFTC claimed that the violations were in part due to Deutsche Bank's lack of an adequate system to supervise these activities, which was itself alleged to be a violation of CFTC Regulation 23.602, under which registered swap dealers must maintain a system for diligent supervision of their activities and one reasonably designed to achieve compliance with the CEA and CFTC regulations. Deutsche Bank's settlement resulted in a $2.5 million civil monetary penalty, and an order that Deutsche Bank cease and desist from committing further violations.

More recently, the CFTC has taken note of widespread issues related to Dodd-Frank's swap reporting infrastructure. In a November 4, 2015 speech, CFTC Chairman Timothy Massad noted that current swap reporting practices needed improvements and discussed several proposals that the CFTC is currently developing.[14] One such improvement is the need to reform the role of SDRs: Massad explained that within the next year, the CFTC intends to propose rules that would give SDRs the ability to verify the completeness and accuracy of swap data before these are submitted to the CFTC for review. Relatedly, SDRs will also be held accountable for "the manner in which they collect, compile, and report the data that they receive." The CFTC has signaled its intention to remain aggressive in this area. In his November 4 speech, Chairman Massad stated that the CFTC "will not hesitate to carry out enforcement actions" against industry participants who fail to engage in timely, complete, and accurate reporting.

Spoofing and Market Manipulation

In 2015, the CFTC made enforcement of spoofing activities a priority, focusing on the acquisition of physical commodity trading positions in an amount well exceeding a party's capacity to accept physical delivery of that commodity. In doing so, the CFTC made use of new Dodd-Frank Act provisions: new CEA Section 6(c)(1),[15] which empowers the CFTC to promulgate rules and regulations prohibiting the use of "any manipulative or deceptive device or contrivance;" new CEA Section 6(c)(3),[16] which prohibits price manipulation and attempts to do the same; and new CEA Section 4c(a)(5),[17] which prohibits certain trading practices deemed disruptive of fair and equitable trading, including "spoofing," or "bidding or offering with the intent to cancel the bid or offer before execution," as well as its rules thereunder.

The first of these rules is CFTC Regulation 180.1, which was promulgated under CEA Section 6(c)(1).[18] CEA Section 6(c)(1) was deliberately "patterned after" section 10(b) of the Securities Exchange Act; based on this resemblance, the CFTC modeled CFTC Regulation 180.1 on SEC Rule 10b-5 and has stated that it will be guided by judicial precedent applying that SEC rule.[19] CFTC Regulation 180.1 does, however, require the CFTC to show either that the defendant breached a preexisting duty (established by another law, rule, agreement, understanding, or other source), or that the defendant executed trades based on material, non-public information acquired through fraud or deception.[20]

CFTC Regulation 180.2, promulgated under CEA Section 6(c)(3), addresses non-fraud based manipulation.[21] The CFTC has stated that in applying CFTC Regulation 180.2, "it will be guided by the traditional four-part test for manipulation that has developed in case law arising under [CEA Sections] 6(c) and 9(a)(2)," namely –

- "that the accused had the ability to influence market prices";

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Imposing Remedial Sanctions (Sep. 30, 2015), *available at* http://www.cftc.gov/idc/groups/public/@lrenforcementactions/documents/legalpleading/enfdeutscheorder09305.pdf.

[13] Specifically, the CFTC alleged violations of CFTC Regulations 17 C.F.R. §§ 43.3(a), 43.3(e), 45.4(a), 45.14(a) and 23.602.

[14] Timothy Massad, Chairman, U.S. Commodity Futures Trading Comm'n, Keynote Remarks of Chairman Timothy Massad before the Futures Industry Association Futures and Options Expo (Nov. 4, 2015), *available at* http://www.cftc.gov/PressRoom/SpeechesTestimony/opamassad-33.

[15] 7 U.S.C. § 9(1).

[16] 7 U.S.C. § 9(3).

[17] 7 U.S.C. § 6c(a)(5).

[18] 17 C.F.R. § 180.1.

[19] Prohibition on the Employment, or Attempted Employment, of Manipulative and Deceptive Devices and Prohibition on Price Manipulation, 76 Fed. Reg. 41398, 41399 (July 14, 2011).

[20] 17 C.F.R. § 180.1.

[21] 76 Fed. Reg. at 41407.

- "that the accused specifically intended to create or effect a price or price trend that does not reflect legitimate forces of supply and demand";
- "that artificial prices existed"; and
- "that the accused caused the artificial prices."

The CFTC has emphasized that, unlike CFTC Regulation 180.1, "a person must act with the requisite specific intent" under CFTC Regulation 180.2, and "recklessness will not suffice." According to the CFTC, "this level of intent [is] necessary to ensure that legitimate conduct is not captured by" the regulation. This said, the CFTC has also stated that "an artificial price may be conclusively presumed under certain facts and circumstances."[22] For example, where "a trader violates bids and offers in order to influence the volume-weighted average settlement price, an artificial price will be a reasonably probable consequence of the trader's intentional misconduct."

CFTC Regulation 180.2 also amplifies the pre-Dodd-Frank CEA provision for price manipulation, CEA Section 9(a)(2), in that the latter, unlike CFTC Regulation 180.2, does not include any express provision prohibiting "indirectly" manipulating or attempting to manipulate prices.[23] The CFTC has interpreted the term "indirectly" in CFTC Regulation 180.2 to "include a circumstance where a person uses a third party (*e.g.*, an executing broker) to execute trades designed to manipulate."[24]

Regarding the statute's spoofing prohibition itself, CEA Section 4(c)(a)(5), the CFTC has interpreted it to require scienter "beyond recklessness," and thus a person must "intend to cancel a bid or offer before execution" to commit spoofing.[25] The CFTC has also articulated four non-exclusive examples of spoofing:

- "[s]ubmitting 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 cancel[l]ing bids or offers with intent to create artificial price movements upwards or downwards."[26]

In "distinguishing between legitimate trading and 'spoofing,'" the CFTC has expressed its intention to evaluate "all of the facts and circumstances of each particular case," including "the person's pattern of trading activity (including fill characteristics), and other relevant facts and circumstances." The CFTC also has stated that the "spoofing" prohibition does not require a pattern of activity; "even a single instance of trading activity can violate" this provision, "provided that the activity is conducted with the prohibited intent."

All of the foregoing provisions were at issue in the CFTC's enforcement action against Navinder Singh Sarao (Sarao) and Nav Sarao Futures Limited PLC (Sarao Futures), charged with violating CEA Sections 4c(a)(5)(C), 6(c)(1), 6(c)(3), and 9(a)(2), and CFTC Regulations 180.1 and 180.2.[27] The CFTC alleged that the defendants engaged in various forms of spoofing tactics that manipulated prices of the Chicago Mercantile Exchange's E-mini S&P 500 futures (E-mini S&P) from June 2009 to April 2015. The alleged spoofing tactics stemmed from an algorithm that "layered four to six exceptionally large sell orders into the visible E-mini S&P central order book" by first placing an order three to four price levels above the best asking price, then placing each subsequent order one price level above the next (for example, on a day when the best asking price was $1172.50, the algorithm placed orders at $1173.25, $1173.50, $1173.75, and $1174.00). The algorithm also tracked the market's price movement in response to the algorithm's orders and shifted its sell-side order price levels so that they would remain three to four price levels from the market's best asking price.

[22] *Id.* at 41408.

[23] *Compare* CEA Section 6(c)(3) and 17 C.F.R. § 180.2 *with* CEA Section 9(a)(2).

[24] 76 Fed. Reg. at 41408.

[25] Anti-disruptive Practices Authority, 78 Fed. Reg. 31890, 31896 (May 28, 2013). The CFTC has opted to issue orders providing interpretive guidance rather than promulgate a regulation under CEA Section 4(c)(a)(5). Under this guidance, the CFTC has advised that CEA Section 4c(a)(5) generally has no manipulative intent requirement. *Id.* at 31892.

[26] *Id.* at 31896.

[27] Complaint, *CFTC v. Nav Sarao Futures Ltd. PLC*, No. 15-cv-3398 (N.D. Ill. Apr. 17, 2015), *available at* http://www.cftc.gov/idc/groups/public/@lrenforcementactions/documents/legalpleading/enfsaraocomplaint041715.pdf; Statutory Restraining Order, CFTC v. Nav Sarao Futures Ltd. PLC, No. 15-cv-3398 (N.D. Ill. Apr. 17, 2015), *available at* http://www.cftc.gov/idc/groups/public/@lrenforcementactions/documents/legalpleading/enfsaraoorder041715.pdf.

According to the complaint, the goal of the algorithm was to overload the E-mini S&P sell side in order to temporarily lower the market price. The defendants allegedly switched the algorithm on and off to create price volatility, as the price would rebound when the algorithm was not in use. While the price was unstable, the defendants were alleged to have traded high volumes of E-mini S&P futures contracts worth a daily average of $7.8 billion in notional value, which garnered approximately half a million dollars in daily profits.

The CFTC did not contend that the use of the algorithm itself violated the CEA or CFTC Rules; rather, the CFTC alleged that the defendants used the algorithm to place sell orders they had no intention of fulfilling. To establish the defendants' intent, the CFTC focused on time periods when the defendants' use of the algorithm was at its highest, and pointed out that the defendants on average canceled over 99% of sell orders on days where the rest of the market never cancelled more than 49% of orders. Furthermore, the defendants' orders through the algorithm were modified an average of 161 times per order, versus just one modification per order in the rest of the market. The CFTC further stated that the defendants' alleged spoofing contributed to a "Flash Crash" on May 6, 2010, when the E-mini S&P and other U.S. equities' prices fell sharply and then recovered in a matter of minutes.

The case of *CFTC v. Heet Khara* cautions that the CFTC may take notice of potential spoofing behavior even when the volume of trading is not extremely high.[28] Here, the CFTC alleged that defendants Heet Khara and Nasim Salim spoofed the gold and silver futures markets in violation of CEA Section 4c(a)(5). The CFTC alleged that between February and April 2015, Khara and Salim, acting alone and later in concert, engaged in illegal spoofing by habitually entering large orders for gold and silver futures contracts that they did not intend to execute in order to ensure that their smaller orders on the opposite side of the market were filled. Once the smaller orders were filled, the defendants cancelled the larger orders. During February 2015, Khara purportedly made $200,000 from this type of trading behavior. In May 2015, the Southern District of New York issued a statutory restraining order freezing both defendants' assets, and ordering them to allow the CFTC to inspect their books, records, other documents, e-mail accounts, bank accounts, and electronic devices.

The CFTC also aggressively brought enforcement actions involving more subtle forms of alleged manipulation. In April 2015, the CFTC filed a complaint against Kraft Foods Group, Inc., alleging that Kraft had engaged in price manipulation in violation of CEA Sections 6(c)(1), 6(c)(3), and 9(a)(2) and CFTC Regulation 180.2.[29] The CFTC alleged that in late 2011, Kraft acquired a long position of December 2011 wheat futures, worth approximately $90 million, to raise the price of such futures and decrease the price differential between December 2011 futures and cash wheat. The CFTC's price manipulation allegations stemmed from the percentage of futures in the market Kraft purchased, and the high rate at which Kraft subsequently cancelled its orders. The CFTC also relied on allegations that Kraft could not accept the amount of wheat it initially ordered.

The Kraft case has the potential to affect the commodities and derivatives industries profoundly. Commercial end users, such as Kraft, are permitted to apply for hedging exemptions that allow them to carry long futures positions in excess of generally imposed limits. Although Kraft did not have an exemption when it acquired the December 2011 wheat futures, the complaint suggests that the CFTC would have brought manipulation charges regardless since it viewed Kraft's actions as reaching beyond proper commercial hedging. The outcome of this case could affect the way that hedge exemptions are viewed or granted in the future.

Insider Trading

For the first time, the CFTC exercised its broad anti-fraud authority under the Dodd-Frank Act to take enforcement action against insider trading. On December 2, 2015, the CFTC simultaneously brought and settled charges against defendant Arya Motazedi for trading on confidential, material, and non-public information.[30] Motazedi, a trader in gasoline and other

[28] Complaint, CFTC v. Khara, No. 15-cv-3497 (S.D.N.Y. May 5, 2015), *available at* http://www.cftc.gov/idc/groups/public/@lrenforcementactions/documents/legalpleading/enfkharacomplaint050515.pdf; Order, CFTC v. Khara, No. 15-cv-3497 (S.D.N.Y. May 5, 2015), *available at* http://www.cftc.gov/idc/groups/public/@lrenforcementactions/documents/legalpleading/enfkharaorder050515.pdf.

[29] Complaint, *CFTC v. Kraft Foods Group, Inc*., No. 15-2881 (N.D. Ill. Apr. 1, 2015), *available at* http://www.cftc.gov/idc/groups/public/@lrenforcementactions/documents/legalpleading/enfkraftcomplaint040115.pdf.

[30] Order Instituting Proceedings Pursuant to Sections 6(c) and 6(d) of the Commodity Exchange Act, Making Findings and

energy products and employed by a large, publicly traded corporation, had access to confidential, material, and non-public information regarding the times, amounts, and prices at which his employer intended to trade gasoline and energy futures.

The CFTC alleged that Motazedi fraudulently misappropriated and traded on this information through several different types of transactions. First, Motazedi used his personal trading account to enter into at least 34 non-competitive, fictitious trades against his employer's trading account. Using his employer's proprietary information, Motazedi arranged his buy or sell orders to match the times, prices, and amounts of futures on which his employer intended to trade. These trades were executed at prices that were profitable to Motazedi, but disadvantageous to his employer. Second, on at least 12 different occasions, Motazedi used his employer's proprietary information regarding the times, amounts, and prices at which it intended to trade futures, so as to trade ahead of, or "frontrun," his employer's orders. In these transactions, any subsequent price movement resulting from Motazedi's frontrunning caused his employer's orders to be executed at disadvantageous prices.

In total, Motazedi's trading activity caused his employer $216,955.80 in trading losses. The CFTC's order required Motazedi to pay a civil penalty of $100,000, and restitution in the amount of $216,955.80. In addition, Motazedi was permanently banned from trading or registering as a futures professional with the CFTC.

The Motazedi case represents a significant departure from the CFTC's historical approach to combatting insider trading. Before the passage of the Dodd-Frank Act, the CFTC's authority to prosecute insider trading was limited to cases involving three general categories of persons: CFTC Commissioners, CFTC employees, and CFTC agents.[31] Furthermore, the elements of an insider trading claim were difficult to prove. To prevail on its claim, the CFTC had to show that: (1) the defendant had the ability to manipulate market prices; (2) the defendant specifically intended to influence market prices in a manner that did not reflect legitimate sources of supply and demand; (3) an artificial price existed; and (4) the defendant caused that artificial price.

The Dodd-Frank Act greatly expanded the scope of the CFTC's reach by amending CEA Section 6(c)(1) to prohibit fraud and manipulation "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."[32] These amendments also eliminated the need to show that a defendant's fraudulent or manipulative activity caused an artificial price, and lowered the scienter requirement to allow recklessness to suffice for liability. As noted above, the CFTC implemented CEA Section 6(c)(1) by promulgating Rule 180.1.

In alleging that Motazedi had committed insider trading, the CFTC noted that Motazedi had a relationship of trust and confidence with his employer, which he breached by misappropriating his employer's confidential and proprietary information. Furthermore, Motazedi acted with the requisite scienter because he "knowingly or recklessly" misappropriated this information to trade for his own benefit, while failing to disclose his trading activity to his employers.[33]

Trade Practice Violations

In addition to spoofing, market manipulation, and insider trading, the CFTC proved itself to be a powerful force in sanctioning trade practice violations, including, among other things, wash sales, fictitious sales, non-competitive transactions, position limit violations, and unauthorized trading. With electronic trading now the norm, the complexity of evidence has increased, the number of relevant documents that must be reviewed has multiplied, and the amount of data that must be analyzed during an investigation has similarly significantly grown.

The 2014-2015 fiscal year saw major cases alleging a variety of trade practice violations. On January 20, 2015, the CFTC filed and settled charges against Olam International, Ltd. and its subsidiary for allegedly violating position limits for cocoa futures traded on ICE Futures U.S. Inc. and for allegedly impermissibly

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Imposing Remedial Sanctions, CFTC Docket No. 16-02 (CFTC Dec. 2, 2015), *available at* http://www.cftc.gov/idc/groups/public/@lrenforcementactions/documents/legalpleading/enfmotazediorder120215.pdf.

[31] 7 U.S.C. § 13(c).

[32] 7 U.S.C. § 9(1).

[33] Order Instituting Proceedings Pursuant to Sections 6(c) and 6(d) of the Commodity Exchange Act, Making Findings and Imposing Remedial Sanctions, CFTC Docket No. 16-02 (CFTC Dec. 2, 2015), *available at* http://www.cftc.gov/idc/groups/public/@lrenforcementactions/documents/legalpleading/enfmotazediorder120215.pdf.

entering into the exchange of futures for physical transactions opposite each other.[34] The CFTC also claimed that the defendants failed to disclose that their cocoa future trading accounts were not independently operated. As part of the settlement, a $3 million civil monetary penalty was agreed to.

Second, the CFTC filed a complaint against Gregory Christopher Evans, a former risk management consultant, alleging that he had engaged in 30 unauthorized swap transactions on behalf of one of his employer's customers.[35] As the deception progressed, it became harder to conceal, considering the original customer's account contained a negative balance of $550,276.03. Evans allegedly attempted to cover up the losses with a number of reverse mark-ups, but was unable to erase the customer's deficit. Evans was ordered to pay a civil monetary penalty of more than $1.2 million. In a related action, the provisionally registered swap dealer of FCStone, Inc. was ordered to pay $200,000 for its alleged failure to supervise its employees, including Evans, pursuant to CFTC Rule 23.602, and to have suitable policies in place to control the transfer of positions between customer accounts. It was also required to cease and desist from violating CFTC Rule 23.602. This was the first CFTC enforcement action charging a registered swap dealer with failure to meet its supervisory obligations imposed by the Dodd-Frank Act.

PROTECTION OF CUSTOMER FUNDS

Several CFTC regulations protect customer funds through capital requirements and segregation of customer accounts. These regulations govern the operations of FCMs,[36] swap dealers with respect to uncleared swaps,[37] derivatives clearing organizations with respect to cleared swaps,[38] and transfers by debtors in bankruptcy.[39] They also apply to retail foreign exchange dealers (RFEDs), requiring minimum capital holdings in proportion to investment risks.[40] The regulations also specify the currencies in which segregated accounts must be denominated[41] and how segregated funds may be invested.[42] Section 724(a) of the Dodd-Frank Act added segregation requirements for FCMs for cleared swaps.[43]

The CFTC has enforced these customer protection rules aggressively. In addition, CFTC Regulation 166.3 requires that each registrant (*e.g.*, an FCM or swap dealer) "diligently supervise the handling by its partners, officers, employees, and agents . . . of all commodity interest accounts carried, operated, advised, or introduced by the registrant."[44] Adding breadth to that requirement, the regulation also calls for the same diligent supervision for all "activities of [the registrants'] partners, officers, employees, and agents . . . relating to its business as a [] registrant." The CFTC frequently adds failure-to-supervise charges when it finds other violations, but it can also charge failure to supervise as an independent violation even in the absence of any other underlying violation. The CFTC can demonstrate failure to supervise by showing either that the registrant "lack[ed] an adequate supervisory system" or that the system in place was not "diligently administered."[45]

At the end of 2014, the CFTC and Deutsche Bank Securities settled charges that Deutsche Bank Securities had improperly invested customers' segregated funds, and failed to make proper records and reports about those funds.[46] A CFTC Regulation 166.3 failure-to-supervise charge was also included. Although Deutsche

[34] Press Release, CFTC Imposes $3 Million Penalty against Olam International, Ltd. and Olam Americas, Inc. for Violating Cocoa Position Limits and Unlawfully Executing Non-competitive Trades (Jan. 20, 2015), *available at* http://www.cftc.gov/PressRoom/PressReleases/pr7104-15.

[35] Press Release, CFTC Charges Gregory Christopher Evans with Unauthorized Trading and Concealing Trading Losses (Sept. 25, 2014), *available at* http://www.cftc.gov/PressRoom/PressReleases/pr7011-14.

[36] 17 C.F.R. § 30.7(a).

[37] *Id.* Pt. 23, Subpart L.

[38] *Id.* § 22.3(b)(1).

[39] *Id.* § 190.06(f)(1)(i).

[40] *Id.* §§ 1.71, 5.7(a).

[41] *Id.* § 1.49(b)(1).

[42] 7 U.S.C. § 6d(a)(2).

[43] Pub. L. No. 111-203, § 124(a), 124 Stat. 1376, 1682-83 (2010).

[44] 17 C.F.R. § 166.3; *see also id.* § 5.21 (same for retail foreign exchange dealers).

[45] *Id.*; Opinion and Order, *In the Matter of GNP Commodities Inc.*, Dkt. No. 89-1, 1992 WL 201158, *at* *19 (CFTC Aug. 11, 1992), *aff'd sub nom. Monieson v. CFTC*, 996 F.23d 852 (7th Cir. 1993).

[46] Press Release, "CFTC Orders Deutsche Bank Securities Inc. to Pay $3 Million to Settle Charges of Improper Investment of Customer Segregated Funds, Reporting and Recordkeeping Violations, and Supervision Failures," Dec. 22, 2014, *available at* http://www.cftc.gov/PressRoom/PressReleases/pr7089-14.

Bank had invested its segregated customer funds in the permitted types of investment products, it allegedly violated concentration limits for those investments. Specifically, its investments in large money market mutual funds exceeded the 50% "asset-based" concentration limit for those investments by accounting for customer margin in a way that made the investments' concentration appear smaller than it was in fact.[47] Deutsche Bank paid a $3 million civil monetary penalty.

IBFX, Inc., a Japanese-owned RFED formerly known as Tradestation Forex, settled with the CFTC at the end of 2014, paying a $600,000 penalty for failing to meet minimum capital requirements on several occasions.[48] Additional charges included failing to report these deficiencies and failing to supervise its employees. One capital deficiency was the result of an employee's "fat finger" error in which the employee took a position in the wrong currency for the wrong amount; although the error was corrected in 44 minutes, the increased risk during the intervening time left IBFX approximately $8 million under its minimum net capital requirements.[49]

On August 6, 2015, the CFTC ordered Morgan Stanley to pay a $300,000 civil penalty on the grounds that the firm had not held sufficient U.S. Dollars in segregated accounts to meet its obligations to cleared swaps customers.[50] The deficits ranged from $5 million to $265 million at various points in time, sometimes representing more than 10 percent of the amount Morgan Stanley was obligated to maintain. The alleged violation stemmed from a currency denomination issue: because Morgan Stanley had held "portions of its U.S. Dollar obligations in other currencies," there were insufficient U.S. Dollars in the accounts in the United States for purposes of the CFTC currency denomination requirements. At the same time as the CFTC ordered the penalty, it noted that Morgan Stanley had reported its own deficiencies and implemented corrective measures.[51]

DIGITAL CURRENCIES

2015 saw the expansion of CFTC enforcement into the realm of digital currency with the settlement of cases involving derivatives referencing Bitcoin. In an order concluding the CFTC's case against Coinflip, Inc., the Commission asserted for the first time that bitcoins are commodities under the CEA.[52] Although the CFTC has made clear that its position is that derivatives on bitcoins (and other digital currencies for that matter) fall under the CEA, it is not yet clear whether the CFTC will wish to seek to use its general authority over manipulation of the price of a commodity in interstate commerce over transactions in bitcoin (and other digital currencies) that are not themselves derivatives or do not have a derivatives component.

In the Coinflip case, focusing on bitcoin derivatives, the CFTC's settlement order with Coinflip and Francisco Riordan, Coinflip's founder, CEO, and controlling person, cited violations of CEA Section 5h(a)(1) and Rule 37.3(a)(1), which prohibit the operation of an unregistered swap execution facility (SEF). Coinflip was said to have violated these requirements by operating Derivabit, a trading platform that listed bitcoin options, without registering the platform as an SEF. Coinflip advertised Derivabit as a "risk management platform . . . that connects buyers and sellers of standardized Bitcoin options and futures contracts," and listed several put and call options as eligible to be traded on Derivabit; in addition, users had the ability to post, and did post, bids and offers. The settlement order also asserted that by publically confirming bids and offers made on the platform by its 400 users, Coinflip violated CEA Section 4c(b) and CFTC Regulation 37.3(a)(1),

[47] Order Instituting Proceedings, In the Matter of Deutsche Bank Securities Inc., Dkt. No. 15-11, slip op. *at* 2-3 (CFTC Dec. 22, 2014).

[48] Order Instituting Proceedings, In the Matter of IBFX, Inc., Dkt. No. 15-10 (CFTC Dec. 10, 2014).

[49] *Id.* at 3. The applicable CFTC regulation specifies that an RFED must comply with its capital requirements "at all times." 17 C.F.R. § 5.7(a)(3).

[50] *See*, e.g., Order Instituting Proceedings, In the Matter of Morgan Stanley & Co. LLC, Dkt. No. 15-26 (CFTC Aug. 6, 2015).

[51] Press Release, "CFTC Orders Morgan Stanley & Co. LLC to Pay a $300,000 Civil Monetary Penalty for Violations of Customer Protection Rule for Cleared Swaps and Related Supervision Failures," Aug. 6, 2015, *available at* http://www.cftc.gov/PressRoom/PressReleases/pr7209-15.

[52] "Section 1a(9) of the [Commodity Exchange] Act defines 'commodity' to include, among other things, 'all services, rights, and interests in which contracts for future delivery are presently or in the future dealt in.' 7 U.S.C. § 1a(9). . . . Bitcoin and other virtual currencies are encompassed in the definition." Order Instituting Proceedings Pursuant to Sections 6(c) and 6(d) of the Commodity Exchange Act Making Findings and Imposing Remedial Sanctions, *In the Matter of Coinflip, Inc.*, d/b/a Derivabit, and Francisco Riordan, CFTC Docket No. 15-29 (Sep. 17, 2015).

which bar persons from confirming the execution of transactions that are not in compliance with any of the CFTC's rules, regulations, or orders.

In September 2015, the CFTC also settled an action against TeraExchange LLC.[53] The settlement order alleged that, in October 2014, Tera arranged and facilitated a prearranged wash trade of $500,000 of Bitcoin between the only two traders currently registered on their trading platform. This action violated SEF Core Principle 2,[54] which Tera, as a properly registered SEF, was required to comply with under CEA Section 5h(f)(1).[55] According to the order, when questioned about the trade by the CFTC and the National Futures Association, Tera stated that it was a legal, preoperational trade done in order to test the platform. Although such preoperational trades are permissible, the CFTC asserted that Tera had advertised this trade as "the first bitcoin derivative transaction to be executed on a regulated exchange" in both a press release and at the CFTC's Global Markets Advisory Committee meeting.[56] In its settlement order, the CFTC required Tera to cease violations of SEF Core Principle 2, but notably required no monetary penalties and did not issue any trading bans.

KEY ENFORCEMENT THEMES

The Chairman, Commissioners, and Directors play a key role in enforcement policy at the CFTC. Accordingly, their public statements, both in connection with orders and in other forums, provide important insight into the agency's enforcement focus.

Aitan Goelman, Director of the CFTC's Enforcement Division, assumed his position in June 2014. Foremost among his notable statements was his announcement that the CFTC will again make use of administrative courts for contested enforcement cases – the last contested enforcement case filed before a CFTC administrative law judge (ALJ) was in 2001.[57] In addition to the criticisms that administrative courts have received in the SEC context,[58] the CFTC has another issue – it no longer has its own ALJs and therefore will be required to borrow ALJs from other administrative agencies. Mr. Goelman has stated that it is important for the CFTC to "present a credible trial threat" to those that violate CFTC rules, and he believes that instituting administrative court proceedings will allow those judges to increase their knowledge of complex derivatives fraud matters.

Second, the CFTC is not shying away from large enforcement matters involving multiple regulatory agencies. The benchmark manipulation investigations offer a powerful example, with the CFTC touting the effort as an "unprecedented international cooperation with agencies such as U.K. Financial Conduct Authority, Japanese Financial Services Agency, Dutch National Bank, Dutch Public Prosecutor's Office and others."[59] The CFTC's cooperation with other U.S. law enforcement agencies – such as the DOJ and SEC – is even more commonplace.

Third, in keeping with a growing trend, the CFTC has renewed its focus on individual responsibility. This renewal coincides with a broader shift in the government's emphasis on individual responsibility, as signaled most publicly by the memorandum from Deputy Attorney General Sally Quillian Yates announcing that federal prosecutors would seek to hold individual actors civilly and criminally responsible for corporate misdeeds (Yates Memorandum).[60] Although the Yates Memorandum attracted popular attention, the CFTC's analogous efforts began nearly a year earlier, when Director Goelman stated as a goal "putting actual human beings in jail" for spoofing and other types of market manipulation.[61] In addition to being the subject of a civil enforcement action for spoofing, Navinder

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[53] *In re TeraExchange LLC*, CFTC No. 15-33 (Sept. 24, 2015).

[54] SEF Core Principle 2 requires SEFs to prohibit abusive trading practices like wash trading.

[55] 7 U.S.C. § 7b-3(f)(1).

[56] Transcript of CFTC Global Markets Advisory Committee Oct. 9, 2014 Meeting *at* 108, http://www.cftc.gov/idc/groups/public/@aboutcftc/documents/file/gmac_100914_transcript.pdf.

[57] *In the Matter of Anthony J. DiPlacido*, Comm.Fut. L. Rep. (CCH) ¶ 30,970 (CFTC, Nov. 5, 2008).

[58] *See, e.g.*, Jean Eaglesham, SEC Gives Ground on Judges, WALL ST. J. (Sept. 25, 2015), *available at* http://www.wsj.com/articles/sec-gives-ground-on-judges-1443139425.

[59] Press Release, CFTC Releases Annual Enforcement Results for Fiscal Year 2014 (Nov. 6, 2014), *available at* http://www.cftc.gov/PressRoom/PressReleases/pr7051-14.

[60] "Individual Accountability for Corporate Wrongdoing" (Memorandum of Deputy Attorney General Sally Quillian Yates), Sept. 9, 2015, *available at* https://www.justice.gov/dag/file/769036/download.

[61] Jean Eaglesham, CFTC Turns Toward Administrative Judges, WALL ST. J. (Nov. 9, 2014), *available at* http://www.wsj.com/articles/cftc-turns-toward-administrative-judges-1415573398.

Singh Sarao was indicted for wire fraud and commodities fraud. Director Goelman stated further that the CFTC is "going to try very hard to increase the number of CEA violations that are prosecuted criminally."[62]

Finally, like Chairman Massad, Director Goelman has stressed that compliance with reporting requirements, including those resulting from the Dodd-Frank Act, is an enforcement priority. In March 2015, when the CFTC ordered ICE Futures U.S. to pay a $4 million civil monetary penalty for submitting incomplete and erroneous data to the CFTC over nearly two years, Mr. Goelman stated: "Today's action makes clear that registrants who fail to meet their reporting obligations will be held accountable and that the CFTC takes a particularly dim view of reporting violations that continue over many months, especially after CFTC staff has repeatedly alerted the registrant in question to the problems in its reporting."[63] Chairman Massad similarly underlined the significance of compliance with reporting requirements: "For those industry participants who do not make timely, complete, and accurate reporting, we will not hesitate to carry out enforcement actions. . . . We will continue to promote compliance in recordkeeping and reporting – and hold those who are not in compliance accountable."[64]

Cross-Jurisdictional Issues

Cross-jurisdictional issues were also very significant in 2015 – between the CFTC and the SEC, and between the CFTC and the Federal Energy Regulatory Commission (FERC).

With respect to the SEC, the jurisdictional line between the CFTC and the SEC grows ever more complex as investment products blur the line between commodity derivatives and securities. As a formal matter, the CFTC maintains exclusive regulatory control over all futures and option contracts related to commodities, but the two commissions share concurrent jurisdiction over some hybrid entities or instruments. The Dodd-Frank Act complicated this jurisdictional picture by splitting jurisdiction over over-the-counter swaps between the two agencies.[65] The CFTC has jurisdiction over the vast majority of the swaps market, which includes foreign exchange, interest rate, and other commodity swaps, as well as credit default and equity derivatives based on indices, two or more loans, and broad-based (10 or more) groups of securities. The SEC's jurisdiction is limited to "security-based swaps" – credit default and equity swaps based on a single security, loan, narrow-based (nine or fewer) groups or index of securities, or events relating to a single issuer or issue of securities in a narrow-based security index.

In July 2015, tension between the commissions arose when the CFTC approved a futures contract on a dividend index over the SEC's objection. On July 2, the SEC expressed to the CFTC its "substantial legal and policy concerns" with the proposed futures contract, and appealed to the Commissions' "long history of cooperating to find solutions to facilitate trading and appropriate market oversight of futures that may be classified as security futures."[66] Notwithstanding this comment, on July 22, the CFTC determined that the dividend index at the heart of the futures contract was in fact an "excluded commodity" as such term is defined in CEA Section 1a(19) and not a "security-based index," because its value was "beyond the control of the parties to the relevant contract;" the CFTC therefore assumed exclusive jurisdiction over the contract and approved it.[67]

Notwithstanding these jurisdictional differences, the commissions also displayed their capacity for coordinated enforcement in 2015. For example, in December 2015, the CFTC and SEC jointly announced a settlement with JPMorgan Chase Bank for failure to disclose conflicts of interest related to commodity pools. The bank reached a global settlement with the CFTC and

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[62] Stephanie Russell-Kraft, CFTC Plans More Administrative Actions, Criminal Crackdowns, LAW360 (Nov. 7, 2014), *available at* http://www.law360.com/articles/594484/cftc-plans-more-administrative-actions-criminal-crackdowns.

[63] Press Release, CFTC Orders ICE Futures U.S., Inc. to Pay a $3 Million Civil Monetary Penalty for Recurring Data Reporting Violations (Mar. 16, 2015), *available at* http://www.cftc.gov/PressRoom/PressReleases/pr7136-15.

[64] Keynote Remarks of Chairman Timothy Massad before the Futures Industry Association Futures and Options Expo (Nov. 4, 2014), *available at* http://www.cftc.gov/PressRoom/SpeechesTestimony/opamassad-33.

[65] 7 U.S.C. §§ 1a(47) & 1a(42); 15 U.S.C. § 78c(a).

[66] Letter from Brian A. Bussey & David R. Fredrickson to Christopher Kirkpatrick, dated July 2, 2015, *available at* http://www.cftc.gov/groups/public/@otherif/documents/ifdocs/ProdCMECommentLetter_150702.pdf.

[67] Order Approving the Listing of the Chicago Mercantile Exchange's S&P 500 Dividend Index Futures Contract | July 22, 2015), *available at* http://www.cftc.gov/groups/public/@otherif/documents/ifdocs/ProdCMEApprovalOrdrDividx_1507.pdf.

SEC pursuant to a separate order from each commission. All told, JPMorgan agreed to pay a $40 million penalty to the CFTC, a $128 million penalty to the SEC, and $139 million in disgorgement and interest, and to cease and desist from the alleged violations that gave rise to the settlement. The two agencies were mutually involved because the JPMorgan funds at the heart of the matter included both securities-based funds and commodities-based funds.[68]

As for FERC, its enforcement actions have recently come into tension with the exclusive commodities futures jurisdiction of the CFTC. Although the CFTC has jurisdiction over fraud and manipulation in the physical markets that impact the derivatives markets, it does not have *exclusive* jurisdiction over those transactions in the same way it does over futures contracts. Two recent decisions have sought to resolve these tensions: the 2014 case of *Hunter v. FERC*, and the 2015 case of *FERC v. Barclays Bank PLC*.

In the first case, the two agencies began concurrent actions against Brian Hunter, an energy trader for the Amaranth Advisors hedge fund, who was accused of manipulating gas futures in 2006. Early in the investigation, the commissions appeared to work closely together. But on the day after the CFTC sued Hunter, FERC issued a $30 million proposed penalty, far greater than the amount the CFTC sought in its lawsuit.[69] When Hunter challenged FERC's penalties in federal court, the CFTC made an unusual show of interagency tension by entering the litigation in support of Hunter. It wrote to the court that "FERC's assertion of jurisdiction directly conflicts with the express statutory grant of exclusive jurisdiction to the CFTC over futures trading on futures exchanges."[70]

The U.S. Court of Appeals for the D.C. Circuit agreed with the CFTC, holding that the CFTC's exclusive jurisdiction over futures contracts foreclosed any FERC enforcement action for Hunter's alleged transactions.[71] The court reasoned that "manipulation of natural gas futures contracts falls within the CFTC's exclusive jurisdiction and . . . nothing in the Energy Policy Act clearly and manifestly repeals the CFTC's exclusive jurisdiction." Following the D.C. Circuit's decision, the CFTC (now left to its own devices without interference by FERC) set a trial date in its case against Hunter and then, in September 2014, reached a $750,000 settlement.[72]

Against the backdrop of *Hunter*, a federal court in 2015 upheld FERC's jurisdiction over Barclays Bank PLC and four Barclays traders for manipulation of electricity markets. FERC accused the defendants of manipulative trades on a daily index that was based on "day-ahead fixed-price physical electricity transactions at a particular trading location."[73] The defendants moved to dismiss FERC's action, arguing that because the trades at issue were motivated by Barclays's swaps positions, and "because trading swaps may serve a similar purpose as trading futures – in that they both can be used to speculate on future changes in the price of electricity"[74] – they belonged in the CFTC's exclusive jurisdiction. FERC responded that the trades were in the physical market for electricity because the index traded on essentially current prices; trading the index just happened to benefit swaps as well.[75]

The U.S. District Court for the Eastern District of California distinguished *Hunter*, explaining that in that case, the key to the manipulation was in the futures markets. In Barclays' case, however, the alleged manipulative scheme occurred in the physical electricity market, not a futures market; accordingly, the court determined that the index at issue was traded in "a FERC-jurisdictional market."

Taking *Hunter* and *Barclays* together, the FERC-CFTC jurisdictional boundary depends on a highly fact-specific analysis of where the manipulative scheme or activity actually occurs. That is, does it occur in a

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[68] Sarah N. Lynch, JP Morgan to Pay $307 Million to Settle SEC, CFTC Disclosure Charges, REUTERS (Dec. 18, 2015), *available at* http://www.reuters.com/article/us-jpmorgan-sec-settlement-idUSKBN0U124R20151218; Press Release, SEC, J.P. Morgan to Pay $267 Million for Disclosure Failures (Dec. 18, 2015), *available at* https://www.sec.gov/news/pressrelease/2015-283.html.

[69] *Hunter v. FERC*, 711 F.3d 155, 156 (D.C. Cir. 2013).

[70] Amanda Bransford, CFTC Challenges FERC's Authority to Fine Gas Trader $30M, Law360 (Apr. 26, 2012), *available at* http://www.law360.com/articles/334686/cftc-challenges-ferc-s-authority-to-fine-gas-trader-30m.

[71] *Hunter*, 711 F.3d at 156.

[72] Consent Order, *CFTC v. Hunter*, 07 Civ. 6682 (Sept. 15, 2014), *available at* http://www.cftc.gov/idc/groups/public/@lrenforcementactions/documents/legalpleading/enfbhunterorder091514.pdf.

[73] *FERC v. Barclays Bank PLC*, 105 F. Supp. 3d 1121, 1125 (E.D. Cal. 2015).

[74] *Id.* at 1143.

[75] *Id.* at 1144.

futures market with merely an effect on the physical market, thereby triggering the CFTC's exclusive jurisdiction, or does it occur in a physical market while also affecting a related derivatives market, thereby avoiding the CFTC's exclusive jurisdiction and permitting FERC enforcement? This line is not yet fully defined, and so more intra-agency disputes are likely.

Whistleblowers

Created by the Dodd-Frank Act in 2010, the CFTC's whistleblower program finally got going in 2015. The whistleblower program provides monetary rewards for people who voluntarily report violations of the CEA. The information must be original and it must lead to a judgment of more than $1 million. Whistleblowers do not need to report the misconduct internally and they are eligible for 10 to 30 percent of the funds collected, not just from the CFTC but from other entities that exploit the information they provide.

In May 2014, the CFTC issued the first whistleblower reward for approximately $240,000, sending a signal that whistleblowers really would be rewarded.[76] The CFTC now has an extraordinary $268 million in its own funds specifically budgeted for whistleblower awards, $18 million more than its entire operating budget for fiscal year 2016. Director Goelman has stated that "[r]eceiving high quality information from whistleblowers is an essential part of the CFTC's overall enforcement program. Such information allows the staff to bring cases more quickly and with fewer agency resources and we will continue to provide financial incentives for people with specific and credible information about violations of the CEA to come forward."[77] As the CFTC continues to present more people with awards for their information and people continue to learn about the whistleblower program, we are likely to see additional CFTC enforcement actions. Indeed, in April 2016, the CFTC announced that it would pay more than $10 million to a whistleblower who provided original information leading to a successful CFTC enforcement action.[78]

CONCLUSION

Aided by the Dodd-Frank Act's expansion of its enforcement authority, the CFTC has clearly joined other leading U.S. government agencies as a regulator with an active and aggressive agenda. We expect the CFTC to continue down the enforcement path it blazed in 2015. Companies located in the U.S. and abroad that are active in the many areas where it is possible for the CFTC to assert jurisdiction must pay close attention to continued developments, especially in the areas of market or other price manipulation and compliance with the CFTC's regulations under Title VII of Dodd-Frank. As the CFTC matures, moreover, we would expect that its confidence to pursue all available legal remedies will increase, and this increased confidence is itself a development for which one cannot be too well prepared. ■

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[76] Press Release, U.S. Commodity Futures Trading Comm'n, CFTC Issues First Whistleblower Award (May 20, 2014), *available at* http://www.cftc.gov/PressRoom/PressReleases/pr6933-14.

[77] Press Release, CFTC to Issue Whistleblower Award of Approximately $290,000 (Sept. 29, 2015), *available at* http://www.cftc.gov/PressRoom/PressReleases/pr7254-15.

[78] Press Release, CFTC Announces Whistleblower Award of More Than $10 Million (Apr. 4, 2016), *available at* http://www.cftc.gov/PressRoom/PressReleases/pr7351-16.

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