

Trading Freedom in the Age of Heightened Market Protection: The U.S. CFTC's Expanding Interpretation of Price Manipulation

The CFTC is taking a position in enforcement litigation that would lower the bar for proving unlawful price manipulation. By abandoning the requirement of proving that the accused had a specific intent to create an artificial price and replacing it with an intent to influence price, the CFTC would materially ease its burden of proof. While doubtlessly motivated by the desire to enhance price integrity, the CFTC's position is being strongly questioned from a legal and a policy point of view by the futures industry. A group representing the major futures industry institutions and trade associations is seeking to oppose the CFTC in an *amicus* brief on grounds that the CFTC's position deviates from decades of precedent and would blur the line between legitimate trading and manipulation to create inappropriate legal uncertainty, which would act to the detriment of well-functioning markets.

Bills now pending in the U.S. Congress that would require proof that a person knew his or her conduct was unlawful in order to be convicted of a federal crime have spawned significant public controversy.¹ Senator Elizabeth Warren has stated that the bills would make "it much harder for the government to prosecute hundreds of corporate crimes."² Others, such as Senator Orrin Hatch, have stated that the new intent standard protects "innocent people . . . by strengthening one of the bedrock principles of our legal tradition, namely, that to be guilty of a criminal offense, a person must have acted with a guilty mind."³

Although far less publicized, a similar dispute is brewing in the courts concerning the intent requirement for a Commodity Exchange Act ("CEA") provision that has long prohibited commodities and derivatives price manipulation. This prohibition against price manipulation, Section 6(c)(3) of the CEA,⁴ has been in the law since the CEA's 1936 enactment, and is separate from the fraud-based manipulative schemes prohibition that was added by the more recent Dodd-Frank Wall Street Reform and Consumer Protection Act in 2011 ("Dodd-Frank Act").⁵ In enforcement actions alleging that traders have committed price

¹ Criminal Code Improvement Act of 2015, H.R. 4002, 114th Cong. (2015); Mens Rea Reform Act of 2015, S. 2298, 114th Cong. (2015).
² 162 Cong. Rec. S535 (daily ed. Feb. 3, 2016) (statement of Sen. Warren).

³ Sen. Orrin Hatch, *Feds Criminalize Things That Aren't Crimes*, Wall St. J., Feb. 4, 2016, <http://www.wsj.com/articles/feds-criminalize-things-that-arent-crimes-1454614019>.

⁴ 7 U.S.C. §§ 9(1), 13(a)(2).

⁵ See 17 C.F.R. § 180.1 (CFTC's final rule prohibiting the use of "any manipulative device, scheme, or artifice to defraud," as well as "any act practice or course of business, which operates or would operate as a fraud or deceit upon any person," which was promulgated under

manipulation and attempted price manipulation, the U.S. Commodity Futures Trading Commission (the "CFTC" or the "Commission"),⁶ through its Division of Enforcement, is claiming that it does not need to prove that a trader who was engaging in otherwise lawful open market transactions intended to cause an "artificial price," but rather must only prove an intent to "influence price."⁷ In so doing, the CFTC would be expanding the scope of conduct constituting price manipulation, which has not gone unnoticed by the futures industry. An *amici curiae* brief opposing the CFTC's interpretation, which leading futures industry representatives requested permission to file in one of the suits, asserts that the CFTC's interpretation "effectively eras[es]" a "carefully defined line between trading misconduct and legitimate trading," which has been developed through decades of "jurisprudence on price manipulation under the CEA, including the CFTC's own precedent."⁸ The outcome of this highly contentious litigation clearly holds potential significance both to market institutions and the trading community alike.

A Brief History of CEA Price Manipulation Law

The CFTC likely believes itself free to take this controversial stance because the CEA, much like the criminal statutes at issue in the Congress, does not specify the "scienter" or level of intent necessary to commit price manipulation. Indeed, although the CEA has prohibited "manipulat[ing] or attempt[ing] to manipulate the price of any commodity in interstate commerce"⁹ for more than 80 years, it does not define price manipulation.¹⁰ Further, the CFTC has never provided any rule or interpretative guidance defining price manipulation. Instead, consistent with an early court decision on the issue, the CFTC has recognized that the means of price manipulation "are limited only by the ingenuity of man,"¹¹ and has generally used "case-by-case judicial development" to determine whether trading is manipulative.¹²

Thus, analysis of the required standard of intent depends heavily on precedent. In 1982, the Commission addressed the intent requirement for price manipulation in great depth in considering and ultimately dismissing charges that the Indiana Farm Bureau manipulated the price of a corn future contract by conducting a squeeze.¹³ In that case, over the course of a 39-page opinion, the Commission considered a variety of policy and economic issues with a particular emphasis on the purposes and operations of the market it regulates, and concluded that the "specific intent to create an 'artificial' or 'distorted' price is a *sine qua non* of price manipulation."¹⁴ In particular, the Commission recognized that "since the self-interest of every market participant plays a legitimate part in the price setting process, it is not enough to prove simply that the accused intended to influence price."¹⁵ In coming to this decision, the Commission expressed particular concern that a "weakening of the manipulative intent standard"

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

⁶ The Commission has been used in this article to refer to decisions in administrative enforcement proceedings that were made by the CFTC Commissioners in their adjudicative role, while the CFTC is used to refer to the agency in general.

⁷ Pl. Response in Opp. to Defs. Mot. For Summary Judgment, at 29, *U.S. Commodity Futures Trading Comm'n v. Wilson*, No. 13-7884, (S.D.N.Y. Dec. 22, 2015), ECF No. 119 (citing *U.S. Commodity Futures Trading Comm'n v. Wilson*, 27 F. Supp. 3d 517, 531-32 (S.D.N.Y. 2014)); Pl. Response in Opp. to Defs. Mot. To Dismiss, at 21, *U.S. Commodity Futures Trading Comm'n v. Kraft Foods Grp., Inc.*, No. 15 C 2881 (N.D. Ill. July 13, 2015), ECF No. 64 (citing *U.S. Commodity Futures Trading Comm'n v. Parnon Energy*, 875 F. Supp. 2d 233, 244 (S.D.N.Y. 2012)).

⁸ Brief of the CME Group, Inc., Commodity Markets Council, Futures Industry Association, Inc., Intercontinental Exchange, Inc., and Managed Funds Association as *Amici Curiae*, at 1, *U.S. Commodity Futures Trading Comm'n v. Wilson*, No. 13-7884, (S.D.N.Y. Jan. 12, 2016), ECF No. 125 ("Industry Brief.").

⁹ 7 U.S.C. §§ 9(1), 13(a)(2).

¹⁰ See *In re Ind. Farm Bureau Coop. Ass'n, Inc.*, [1982-1984 Transfer Binder] Comm. Fut. L. Rep. (CCH) P 21, 796, 1982 WL 30249 at *3, (CFTC Dec. 17, 1982) (explaining that "[n]either manipulation nor attempted manipulation is defined in the Commodity Exchange Act").

¹¹ *Cargill Inc. v. Hardin*, 452 F.2d 1154, 1163 (8th Cir. 1971).

¹² *Ind. Farm Bureau*, 1982 WL 30249, at *3.

¹³ *Id.* at *1.

¹⁴ *Id.* at *6.

¹⁵ *Id.* at *6.

would "wreak havoc with the market place," as a "clear line between lawful and unlawful activity is required in order to ensure that innocent trading activity not be regarded with the advantage of hindsight as unlawful manipulation."¹⁶

Based on this reasoning, the Commission in its *Indiana Farm Bureau* decision carefully crafted a four-part test, which courts and the Commission have relied upon for decades to determine whether price manipulation is proven. Following the passage of the Dodd-Frank Wall Street Reform and Consumer Protection Act in 2011, the CFTC again publically declined to specifically define price manipulation,¹⁷ but in a Federal Register release restated that it would be guided by the traditional four-part test in determining whether conduct was manipulative. The release, which relied upon *Indiana Farm Bureau* as precedent, states that in order to prove price manipulation, the CFTC must show "(1) [t]hat the accused had the ability to influence market prices; (2) that the accused specifically intended to create or effect a price or price trend that does not reflect legitimate forces of supply and demand; (3) that artificial prices existed; and (4) that the accused caused the artificial prices."¹⁸

DRW and the CFTC's Present Litigation Position Concerning Scinter

Although the Commission has as recently as 2011 cited *Indiana Farm Bureau* with favor, this apparently has not constrained the CFTC from now advocating a different position on the intent requirement for price manipulation. Indeed, in enforcement actions pending in New York¹⁹ and Chicago²⁰ federal courts, the CFTC is advocating a theory of price manipulation that turns on the intent of the trader to influence price, rather than the specific intent to create an artificial price.

First, in November 2013, the CFTC filed a civil action in federal court in Manhattan against the proprietary trading firm DRW Investments and its founder and CEO Donald R. Wilson, alleging that DRW had attempted to manipulate and manipulated an exchange-traded interest rate swap futures contract by placing bids for the purpose of influencing the price of the contract. DRW has not denied that its bids were intended to influence the price of the contract. In fact, DRW admitted that after studying the contract, its management believed that the contract was undervalued as a result of the methodology used to price it and traded in a manner intended to bring price in line with fair value.²¹ The CFTC has not alleged that DRW's conduct involved fraud or deceit, but instead alleges that DRW placing bids in the open market for the purpose of influencing a price is proof of specific intent to manipulate prices.

The trial court rejected DRW's motion to dismiss in 2014, holding that it was inappropriate at that early stage to rule on DRW's factually-disputable argument that bids based on its subjective belief regarding the value of the contract were not intended to cause an artificial price.²² In the same decision, the court used a short-hand version of the four-part test, which originated in a 1987 Commission decision dismissing an enforcement action. In that case, *In re Cox*, the Commission ultimately "did not find it

¹⁶ *Id.* at *6.

¹⁷ See Prohibition on the Employment, or Attempted Employment, of Manipulative and Deceptive Devices and Prohibition on Price Manipulation, 76 Fed. Reg. 41398, 41406-07 (July 14, 2011) (explicitly declining to adopt a definition of manipulation).

¹⁸ *Id.* at 41407.

¹⁹ *U.S. Commodity Futures Trading Comm'n v. Donald R. Wilson, Jr. and DRW Invs., LLC*, No. 13-7884 (S.D.N.Y. filed Nov. 5, 2013).

²⁰ *U.S. Commodity Futures Trading Comm'n v. Kraft Foods Grp., Inc.*, No. 15 C 2881 (N.D. Ill. filed Apr. 1, 2015).

²¹ The enforcement action relates to the IDEX Interest Rate Swap Futures Contract ("IDEX Contract"), which is an exchange-traded Interest Rate Swap contract. The IDEX Contract is designed to mimic Over the Counter Interest Rate Swap Futures ("OTC Contract"), but it does not have a Price Adjustment Interest ("PAI") that would account for the contract's natural convexity bias. As a result, the long-side of the IDEX Contract is economically more valuable than the long-side of the OTC Contract. However, despite the difference in the value of the contracts, the method of calculating the settlement price for the IDEX Contract could result in the contract being treated as economically equivalent to the OTC Contract. This would occur because the settlement price would be based on the swap curve for OTC Contracts if there were no electronic trades during the settlement period, or if there were no bids or offers, or the clearinghouse decided not to consider bids and offers in calculating the settlement price.

²² *U.S. Commodity Futures Trading Comm'n v. Wilson*, 27 F. Supp. 3d 517, 533 (S.D.N.Y. 2014).

necessary" to examine the defendant's intent, but noted that the Administrative Law Judge may have "used the same flawed methodology that we rejected in *Indiana Farm Bureau*" in ruling on specific intent.²³ This shorthand version requires that the CFTC must "allege '(1) that the accused had the ability to influence market prices; (2) that [he] specifically intended to do so; (3) that artificial prices existed; and (4) that the accused caused the artificial prices'"²⁴ to support a price manipulation claim.²⁵

In the context of pending cross-motions for summary judgment, the CFTC now argues that under the shorthand version it need only show that DRW intended to influence price.²⁶ And, consequently, since it is undisputed that DRW acted to influence price, the CFTC argues that it has satisfied the intent requirement for price manipulation.

Not unexpectedly, in addition to the requisite intent point, DRW contests the CFTC's motion on various grounds. Of particular note, however, has been the reaction of the futures industry to the CFTC's position on culpable intent. The CME Group Inc., the Commodity Markets Council, the Futures Industry Association Inc., the Intercontinental Exchange, Inc. and the Managed Funds Association have requested permission from the court to file an *amici curiae* brief (the "Industry Brief"). Although the Industry Brief speaks solely to the attempted price manipulation charge, which DRW seeks to have dismissed, it is also relevant to price manipulation in general. In the Industry Brief, which the CFTC has urged the court to refuse to consider, these industry representatives argue that the CFTC's position is an "attempt[] to recast three decades of law," which "consistently concluded that to establish attempted price manipulation, it must prove a specific intent to create an artificial price."²⁷ In particular, the Industry Brief argues that the CFTC's position ignores the central tenet of *Indiana Farm Bureau*, namely that "market participants have a right to trade in their own best interests without regard to the positions of others as long as their trading activity does not have as its purpose the creation of 'artificial' or 'distorted' prices."²⁸

Consequences of the New Standard of Intent

If the CFTC's position on intent "becomes the new standard for attempted price manipulation, then price discovery, efficient hedging, and disseminating price information would be expected to suffer as traders could forego customary and efficient trading practices out of fear of prosecution as an attempted manipulator," according to the Industry Brief.²⁹ It further states that the use of the CFTC's proposed mere "intent to influence price" standard creates a risk that, without a clear line, there is no way "to ensure that innocent trading activity not be regarded with the advantage of hindsight as unlawful manipulation," which led the Commission to reject this standard in *Indiana Farm Bureau*.³⁰

²³ *In re Cox* [1986–1987 Transfer Binder] No. 75–16, Comm. Fut. L. Rep. (CCH) ¶ 23,786, 1987 WL 106879, at *4 (CFTC July 15, 1987). Similarly, *DiPlacido v. CFTC*, a Second Circuit decision which was also cited by the court, did not turn on the intent of the trader. Instead, the Administrative Law Judge ("ALJ") who initially decided the case found that DiPlacido had an intent to manipulate the contract because it "had no apparent business or economic rationale except to influence market prices." *In re Anthony J. DiPlacido*, CFTC No. 01-23, 2008 WL 4831204, at *10 (Nov. 5, 2008). The Second Circuit, in reviewing the decision, similarly held that the ALJ's intent decision was supported by DiPlacido "having violated bids and offers," as well as "taped conversations signaling manipulative intent and the ALJ's finding that DiPlacido's denial of intent lacked credibility." *DiPlacido v. CFTC*, 364 F. App'x 657, 661 (2d Cir. 2009).

²⁴ See *id.* at 531 (quoting *DiPlacido*, 364 F. App'x at 661. *DiPlacido* in turn cited to the CFTC's decision in *In re Cox*, in support of this standard, 1987 WL 106879, at *4.

²⁵ The court also noted that the CFTC must prove that Defendants "acted (or failed to act) with the purpose or conscious object of causing or effecting a price or price trend in the market that did not reflect the legitimate forces of supply and demand." *Wilson*, 27 F. Supp. 3d at 532 (quoting *Parmon Energy*, 875 F. Supp. 2d at 244, 249.

²⁶ Pl. Response in Opp. to Defs. Mot. For Summary Judgment, at 29, *U.S. Commodity Futures Trading Comm'n v. Wilson*, No. 13-7884, (S.D.N.Y. Dec. 22, 2015), ECF No. 119 (citing *Wilson*, 27 F. Supp. 3d at 531-32).

²⁷ See Industry Brief at 4-5.

²⁸ *Id.* at 6 (quoting *Ind. Farm*, 1982 WL 30249, at *6.).

²⁹ *Id.* at 8.

³⁰ *Id.* at 6 (quoting *Ind. Farm*, 1982 WL 30249, at *6).

Concern about this risk is fully understandable in view of generally accepted market economics, as well as the difficulty of distinguishing knowledge from intent. Economic theory, often acknowledged by the CFTC itself, holds that purchases or sales in a free market will in general have an impact on market price through the natural forces of supply and demand. Thus, price influence can be anticipated from an economic standpoint. In addition, from a legal standpoint, it is axiomatic that for judicial purposes knowledge and intent are intertwined, as reflected in a standard jury instruction that "an actor intended the foreseeable consequences of his actions."³¹ Therefore, if a mere "intent to influence" standard is used, then every time a trader acts, regardless of ill-motive, he can be seen to have intended to influence price because he knows such a result is a likely economic consequence. Thus, a mere "intent to influence" standard provides inadequate guidance to traders, which may in turn destabilize the market by increasing uncertainty.

When viewed in the context of a charge of attempted price manipulation based on otherwise lawful open market trading, the CFTC's litigation position on intent appears particularly questionable. Attempted price manipulation is a serious violation of the CEA, and like completed price manipulation, it can also be prosecuted as a crime by the Department of Justice. With that in mind, the very ease of proof of intent to influence price seems inconsistent with the gravity and consequences of the price manipulation offense. The CFTC argues in *DRW* that a trader will be guilty of attempted price manipulation if the CFTC demonstrates that the trader merely intended to influence price and acted in furtherance thereof. Since an attempted price manipulation charge does not require any proof of actual influence on price, let alone any distortion of artificial price analysis, and because every bid, offer or trade has the potential to influence price, the CFTC's proposed intent formulation fails to provide an adequately discernible standard against which to judge alleged misconduct. Traders could be left to guess which price influencing conduct the CFTC will choose to treat as unlawful.

The uncertainty of this standard is compounded because the CFTC's proposed intent standard "does not require that the alleged attempted manipulation be for the *sole* purpose of influencing price, or even require proof that influencing price to a specific level was the clear, principal purpose of the trader."³² Therefore, attempted price manipulation will be very much in the eye of the beholder. This type of *ad hoc* judgment was notably articulated by U.S. Supreme Court Justice Potter Stewart in a 1964 decision in which he described censorable obscenity as "I know it when I see it."³³ This approach seems to be particularly ill suited to policing the participants in fast moving derivative markets.

There are other potential adverse market consequences flowing from the CFTC's proposed intent standard. As the CFTC recognized in *Indiana Farm Bureau*, using intent to influence price as the scienter standard for price manipulation will "wreak havoc with the market place," as traders would be left without adequate guidance regarding what constituted price manipulation.³⁴ As the Industry Brief points out, it is easy to imagine scenarios where a trader may be forced to "abstain from legitimate trading to avoid the risk of being branded an attempted manipulator," even if the trader did not intend to create artificial prices.³⁵ For example, a trader who holds positions in both the futures and physical markets may abstain from trading in either or both markets to avoid being accused of trading to affect price. Or, a trader who believes prices are low may abstain from taking advantage of this pricing inefficiency by trying to buy as much as possible due to a fear of influencing the price. And what happens to the market maker who trades during the settlement period at the behest of an exchange to promote liquidity and attract other market participants? All of these traders risk being branded a manipulator or attempted manipulator pursuant to the CFTC's proposed looser intent standard.

The potential reach of the CFTC's proposed intent standard is exemplified by an enforcement action against Kraft Foods currently pending in Chicago federal court where the previously accepted proof element of establishing an artificial price is now

³¹ *United States v. Nelson*, 277 F.3d 164 (2d. Cir. 2002).

³² Industry Brief at 9 (emphasis in original).

³³ *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964).

³⁴ *Ind. Farm*, 1982 WL 30249, at *6.

³⁵ Industry Brief at 9.

in question.³⁶ In that price manipulation suit, the CFTC alleges that the defendant exploited its position as a large commercial user of wheat to manipulate cash wheat prices and wheat futures prices – which are related but separate markets – for its financial benefit. The CFTC relies on a similar "intent to influence" standard in that case. This, in turn, leads directly to a critical abridgement of the four-part *Indiana Farm Bureau* requirement that the conduct created an artificial price, as the CFTC takes the position that any intentionally influenced price is *per se* artificial. Therefore, the long-standing four-part test would effectively be short-circuited and essentially turn almost exclusively on the trader's intent to influence price. In that case, the court denied the defendant's motion to dismiss, holding that the CFTC only had to allege that the defendant (1) possessed the ability to influence price; (2) intended to influence price; and (3) did influence price, to adequately allege price manipulation.³⁷ Not surprisingly, the defendant has sought interlocutory appeal.

Some Thoughts on Policy Balance

Nonetheless, the CFTC's present litigation stance doubtless stems from an admirable goal, to effectively police any misbehavior aimed at compromising the price integrity of the markets regulated by the CEA. Historically, the CFTC has at times been frustrated by the "artificial price" aspect of the intent and causation elements of the four-part test. However, other tools available to the CFTC can remedy this without the disruptive effects of abandoning the longstanding and balanced approach followed by the Commission and courts alike for the past three decades. Just a few years ago, Congress with the Dodd-Frank Act gave the CFTC a new provision which prohibits fraud-based price manipulation and is not constrained by the artificial price elements of the four-part test. Unlike the CEA's traditional price manipulation prohibition, which can reach non-fraudulent activity, the new prohibition is fraud-based. Thus, where fraud is demonstrated, intent to cause price artificiality need not be separately proven. In contrast, absent fraud, it is sensible and appropriate that an intent to create an artificial price be proven, lest otherwise lawful trading becomes a trap for the unwary.

In addition to the availability of an alternative basis for liability for fraud-based price manipulation, the CFTC has in recent years gained another important advantage in policing price manipulation. Technology has revolutionized the investigative process and greatly facilitated what had previously been challenging investigations of proof. Review of the CFTC's recent price manipulation cases shows clearly how electronic communications and trading systems have impacted enforcement. Not long ago, the CFTC was often required to rely on the rare admissions of traders made during testimony or in the only occasionally retained writing to prove state of mind.

Furthermore, the pit auction trading system, with its imprecise recordkeeping mechanisms, made reconstruction of bids, offers, trades and prices labor-intensive and open to dispute. Written materials, any telephone recordings that existed (i.e., survived routine taping over) as well as trade data needed to be reviewed individually in an extraordinarily time consuming manner. Today's CFTC investigation into price manipulation is facilitated by not only readily produced instant messages, emails, digital telephone recordings and precise electronic market data, but also by an array of software applications that are capable of searching for a word or phrase in millions of documents, or thousands of hours of phone conversations in a matter of minutes. Computer programs permit investigation to array, rearrange and reconstruct markets in seconds.

³⁶ *U.S. Commodity Futures Trading Comm'n v. Kraft Foods Grp., Inc.*, No. 15 C 2881, 2015 WL 9259885 (N.D. Ill. Dec. 18, 2015).

³⁷ In particular, the court held that the CFTC was able to adequately allege manipulation by showing that: (i) the defendant had the ability to influence price because it was a large wheat consumer holding a large position and intentionally sent false signals to the market, *id.* at *16; (ii) because the defendant's actions "were not taken due to a legitimate demand," but rather to influence price, "the prices created by those actions were artificial," *id.* at *19; (iii) the CFTC adequately alleged causation through circumstantial evidence, price changes in the markets, and the defendant's internal communications regarding the purpose and effectiveness of its strategy, *id.* at *19; and (iv) internal strategy e-mails and the defendant's uneconomic market behavior show an intent to influence price, *id.* at *17.

Conclusion

It remains to be seen whether courts will accept the CFTC's proposed price manipulation intent standard. However, it is clear that the CFTC has shown it will aggressively advocate its position. Indeed, the CFTC has even opposed the very filing of the Industry Brief and has urged the court to reject the submission. While the CFTC is a litigant in the DRW suit, and as such is expected to strongly advocate its position, it is also a body with the overarching purpose of developing and furthering the policy purposes of the CEA. Consequently, it may be hoped that the Commissioners will reconsider this litigation position and consequent expansion of price manipulation, and, at a minimum withdraw opposition to the submission of the Industry Brief. This seems particularly appropriate here where the Commission has determined to change a decades-old precedent through litigation, rather than by rulemaking, with its cost benefit analysis and the opportunity for public comment.

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