

U.S. COMMODITIES ANTI-MANIPULATION LAW AND OPEN MARKET TRADING

A Recent Wall Street Journal Article Highlights Threat of Vague Regulation to Lawful Trading Strategies

In an article published on January 3, 2020, the Wall Street Journal caused some concern and confusion about the reach of the U.S. Commodity Futures Trading Commission (“CFTC”) to prosecute open market trading as price manipulation without proving the intent to create an artificial price.¹ If free to do so, CFTC would have broad discretion to prohibit a variety of trading strategies long thought to be lawful. As we have explained in previous alerters,² and contrary to the impression left by a quotation in the Wall Street Journal article, no court to date has found manipulation based on open-market trading absent proof of an intent to create an artificial price. If courts in fact find that the CFTC can prove manipulation without this intent, then all sizeable trades in a given market—including completely legitimate trades—would be subject to a significant risk of mischaracterization as manipulative trades, due to their inevitable price impact.

Although it does not expressly identify any particular provision of a statute or CFTC rule, the Wall Street Journal article appears to rely for its conclusion upon Section 6(c)(1)³ of the Commodity Exchange Act (the “CEA”)⁴ and CFTC Rule 180.1. Section 6(c)(1) and Rule 180.1, which were added to the historical anti-manipulation provisions governing commodities and derivatives markets in the aftermath of the financial crisis of 2008, prohibit the use of “any manipulative or deceptive device or contrivance” in connection with any product or instrument covered by the Commodity Exchange Act. Although Rule 180.1 on its face prohibits both intentional and reckless conduct and does not include a requirement of price artificiality, its application to open-market manipulation is very uncertain. To date, the CFTC has brought actions under Rule 180.1 for various types of fraud, including insider trading. However, the CFTC has not yet litigated an open-market price-manipulation case under Rule 180.1 to a decision.

¹ Dave Michaels, “Market Regulator Heads Back to Court Against Kraft and Mondelez,” WALL STREET J, (Jan 3, 2020, 8:00 AM), <https://www.wsj.com/articles/market-regulator-heads-back-to-court-against-kraft-and-mondelez-11578056400>.

² Please see our prior briefings at <https://www.cliffordchance.com/content/dam/cliffordchance/briefings/2016/02/sec-and-cftc-market-abuse-and-fraud-enforcement-regimes-compared-becoming-similar-but-still-materially-different.pdf> and <https://www.cliffordchance.com/content/dam/cliffordchance/briefings/2016/02/trading-freedom-in-the-age-of-heightened-market-protection-the-us-cftcs-expanding-interpretation-of-price-manipulation.pdf>.

³ 7 U.S.C. § 9(1).

⁴ 7 U.S.C. § 1, *et seq.*

Given that virtually all bona fide open-market trading could be expected to have at least some *influence* on price, it is not readily apparent how open-market trading would constitute a “manipulative or deceptive device or contrivance” unless the trader intended to create an *artificial* price. Indeed, courts considering the CFTC’s anti-manipulation authority under other statutory sections and CFTC rules have required proof of price artificiality to ensure that “[t]he laws that forbid market manipulation [do] not encroach on legitimate economic decisions lest they discourage the very activity that underlies the integrity of the markets they seek to protect.”⁵ Courts analyzing an analogous provision of the U.S. securities law have reached a similar conclusion.⁶ Thus, despite the impression left by the Wall Street Journal, it is unlikely that the CFTC would prevail in an open-market price-manipulation case under Rule 180.1 without proving the intent to create an artificial price.

⁵ *U.S. Commodity Futures Trading Comm’n v. Wilson*, No. 13 Civ. 7884 (RJS), 2018 WL 6322024, at *15 (S.D.N.Y. Nov. 30, 2018) (quoting *In re Amaranth Nat. Gas Commodities Litig.*, 587 F.Supp. 2d 513, 534 (S.D.N.Y. 2008)). For further discussion of the *Wilson* decision, please see our prior briefing at <https://www.cliffordchance.com/content/dam/cliffordchance/briefings/2018/12/us-court-affirms-economic-realism-and-rejects-cftc-bid-to-expand-the-offense-of-price-manipulation.pdf>.

⁶ See, e.g., *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 199 (1976) (“Use of the word ‘manipulative’ . . . connotes intentional or willful conduct designed to deceive or defraud investors by controlling or artificially affecting the price of securities.”)

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