
January 28, 2020

Anti-Spoofing Enforcement: 2019 Year in Review

2019 marked another unprecedented year in civil and criminal anti-spoofing enforcement.

The Commodity Futures Trading Commission (“CFTC” or “Commission”) brought a near-record number of anti-spoofing enforcement actions, secured a record spoofing-related fine, carried forward its efforts to leverage the cooperation of institutions and individuals alike and showcased the impact of its data analytics capabilities. After failing to secure a conviction in another spoofing-related trial, the Department of Justice (“DOJ”) implemented a novel and aggressive approach to prosecuting alleged spoofers, indicting four traders under the Racketeer Influenced and Corrupt Organization Act (“RICO”)—a statute originally enacted to help federal prosecutors defeat organized crime. The DOJ also reached a non-prosecution agreement with one institution and a deferred prosecution agreement with another, marking the first two criminal resolutions that the DOJ reached with institutions (as opposed to individuals) for spoofing-related conduct.

This memorandum provides an overview of anti-spoofing enforcement in 2019 and the trends we expect to continue in 2020.

What Is Spoofing: A Refresher

As described in more detail in our 2018 Year in Review,¹ spoofing is a trading practice defined in the Commodity Exchange Act (“CEA”) as “bidding or offering with the intent to cancel the bid or offer before execution.”² The CFTC, which has civil enforcement authority over the CEA’s anti-spoofing provision, has described spoofing as a “particularly pernicious” disruptive practice that sends false signals to the market by altering the appearance of supply and demand, which can cause other market participants to modify their trading strategy and execute trades based on those false signals.³ The CEA makes the knowing violation of the anti-spoofing provision a felony.⁴

Civil Anti-Spoofing Enforcement in 2019

In 2018, the CFTC brought an unprecedented number of anti-spoofing enforcement actions.⁵ The high number of CFTC anti-spoofing enforcement matters in 2019 suggests that 2018 was not an outlier but the beginning of a trend. In the 2019 CFTC fiscal year (October 2018 – September 2019), the CFTC “filed more cases involving manipulative conduct and spoofing than any prior year,” save for 2018.⁶ As the CFTC Division of Enforcement stated in its 2019 Annual Report: “If this point strikes a familiar chord, it should[.]”⁷

The CFTC's 2019 anti-spoofing enforcement also reflects a continued: (i) commitment to coordination with criminal authorities, (ii) focus on individual accountability and (iii) emphasis on the value of cooperation from investigatory targets. The number of anti-spoofing actions brought in 2019—and the record spoofing fines attained—by the CFTC and its two-year-old Spoofing Task Force suggest that spoofing will remain among the CFTC's top enforcement priorities in 2020.⁸

Continued Coordination with Criminal Authorities and On-Going Focus on Individual Accountability

In 2019, the CFTC carried forward its efforts to coordinate with criminal authorities and to hold individuals accountable for spoofing-related conduct. The CFTC filed “more cases in parallel with criminal authorities” in fiscal year 2019 than in “any prior year,” eclipsing the “previous high” that was “reached during FY 2018.”⁹ The Division of Enforcement has described the significant increase in the number of actions filed “in parallel with [the CFTC's] criminal counterparts” in 2018 and 2019 as part of a “trend” that the Division “expect[s] to continue.”¹⁰

The sustained uptick in parallel enforcement actions dovetails with two CFTC objectives: “to deter wrongdoers from committing misconduct in the first place” and “to hold individuals accountable for wrongdoing.”¹¹ The Division of Enforcement specifically emphasized the Commission's focus on “individual accountability,” noting that “the Commission charged eleven individuals with spoofing-related misconduct” in FY 2019 alone.¹²

Continued Emphasis on Cooperation, Remediation and Self-Reporting

CFTC spoofing resolutions with institutions continue to emphasize the value that the Commission places on self-reporting and cooperation.¹³ James McDonald, Director of the Division of Enforcement, has described self-reporting and cooperation as “related, but distinct” concepts.¹⁴ In 2017, first in January and then in a September update, the CFTC issued Enforcement Advisories clarifying when companies and individuals would receive benefits for cooperation with its investigations and enforcement actions.¹⁵ These advisories clarified that the CFTC would award mitigation credit in the form of a reduced penalty when a company cooperates with its investigation, but “will reserve its recommendations for the most substantial reductions in civil monetary penalty for those instances where a company or individual has self-reported the misconduct *and* fully cooperated with the Division's investigation and remediated.”¹⁶ Director McDonald put it bluntly: while the Division will “give substantial credit for cooperation,” “all else equal, it will be significantly less than for those companies that self-report the misconduct at the outset.”¹⁷

Several of the CFTC's 2019 anti-spoofing enforcement resolutions with institutions reflect civil monetary penalty reductions due to cooperation.¹⁸ Only one resolution reflects a “significantly reduced civil monetary penalty” due to “self-report[ing], cooperation, and remediation.”¹⁹

Increasing Reliance on Cooperation from Individuals

A significant development in the CFTC's investigatory approach has been its increased reliance on cooperation from individuals.²⁰ This is a trend Director McDonald foreshadowed last year, when he said that he expected there would be "more bifurcated orders" in spoofing-type cases—i.e., more resolutions with individuals in which determinations of liability were bifurcated from the assessment of penalties.²¹ In 2019, the CFTC entered into 4 public cooperation agreements with individuals for spoofing in which the Commission reserved its determination as to sanctions based on an "undertaking to continue to cooperate" with the Division.²² Director McDonald said that the Enforcement Division has "worked to develop our cooperation program for individuals who have committed misconduct, but wish to cooperate with us in our investigations" and that this program has opened "valuable new avenues of information that has led to additional prosecutions."²³

Record-breaking Monetary Settlement

The impact of the CFTC's investigatory strategies is evidenced not just by the number of anti-spoofing enforcement actions that the Commission has brought, but also by the magnitude of penalties that the Commission has assessed. The \$67.4 million resolution that the CFTC announced on November 7, 2019 with proprietary trading firm Tower Research Capital LLC ("Tower") was the largest total monetary relief ever ordered in a spoofing case.²⁴ The CFTC's case against Tower was brought in parallel with the DOJ and the DOJ simultaneously announced that it had entered into a deferred prosecution agreement ("DPA") with Tower.²⁵

According to the CFTC, between at least March 2012 and December 2013, three of Tower's former traders placed thousands of spoof orders in the E-mini S&P 500, E-mini NASDAQ 100 and E-mini Dow (\$5) futures contracts markets.²⁶ The traders placed orders that they wanted filled ("genuine orders") on one side of the market opposite one or more orders they intended to cancel prior to execution ("spoof orders"). To exacerbate the appearance of market imbalance, the traders typically placed their genuine orders as iceberg orders²⁷ and placed their spoof orders as large, fully visible, passive orders.²⁸ The consent order states that traders also used an "order splitter" to enter several smaller, randomly sized orders in an effort to obscure their scheme.²⁹ According to the CFTC, traders' conduct caused almost \$33 million in market losses.³⁰

The three traders involved in the misconduct were Kamaldeep Gandhi, Krishna Mohan and Yuchun (Bruce) Mao.³¹ Gandhi and Mohan each entered into a consent order with the CFTC in which they agreed to cooperate with the Commission.³² Gandhi and Mohan also each pled guilty to conspiracy to engage in wire fraud, commodities fraud and spoofing.³³ A warrant has been issued for Mao's arrest.³⁴

The CFTC's resolution with Tower was notable for a reason beyond the size of the monetary sanction. Two CFTC commissioners voiced disagreement with the Commission's decision to grant Tower a waiver from the "bad actor" disqualification under Securities and Exchange Commission Rule 506(d)(1) of

Regulation D.³⁵ Commissioner Rostin Behnam concurred with the resolution but wrote separately to express “extreme reservations” about the Commission’s decision to advise against disqualification under SEC Rule 506.³⁶ Commissioner Dan Berkovitz took an even stronger position, dissenting from the resolution on the basis of the waiver.³⁷ While Commissioners Behnam’s and Berkovitz’s statements were driven in part by broader concerns they hold about the CFTC’s role in granting Regulation D waivers, Commissioner Behnam made clear his view that Tower’s “unprecedented levels of spoofing” left him “[un]comfortable advising the SEC that the automatic disqualification should not apply.”³⁸

Other Notable Civil Actions

Several other 2019 anti-spoofing resolutions reflect the strategies and trends summarized above, and provide additional insight into both the spoofing strategies that traders have employed and the tools that the CFTC is using to detect them.

Merrill Lynch Commodities, Inc. On June 25, 2019, the CFTC settled charges against Merrill Lynch Commodities, Inc. (“MLCI”) for spoofing, manipulation and attempted manipulation.³⁹ The CFTC order imposed approximately \$25 million in monetary sanctions, including a \$11.5 million civil monetary penalty, approximately \$2.3 million in restitution and \$11.1 million in disgorgement, which could be offset against payments made under the terms of a non-prosecution agreement (“NPA”) MLCI entered into in a parallel criminal proceeding.⁴⁰ According to Director McDonald, the case against MLCI resulted from a multiyear effort by the CFTC to enhance its ability to detect misconduct using data analytics.⁴¹ He said that the CFTC “invested significant resources in [its] data analytics capabilities” and as a result, the CFTC has now “developed an ability to identify, in the trading data, forms of misconduct in ways that complement our understanding of the activity through our other enforcement tools” and that in “certain instances, it has allowed [the CFTC] to identify wrongful conduct that may have otherwise gone undetected.”⁴²

Hard Eight Futures, LLC and Chernomzav. On September 30, 2019, the CFTC settled spoofing and manipulative and deceptive trading scheme charges against Hard Eight Futures, LLC (“Hard Eight”) and its founder and trader Igor Chernomzav. The CFTC alleged that between March 2014 to March 2015, Chernomzav engaged in spoofing in E-mini S&P 500 futures contracts on the Chicago Mercantile Exchange (“CME”) and utilized at least three different spoofing strategies. One of these alleged strategies involved trading in a manner designed to create what is sometimes called a market “vacuum”: Chernomzav cancelled multiple spoof orders “to create the false impression of a sudden and significant decline in buying or selling interest, thus indicating an imminent price decrease or increase.”⁴³ The orders state that Chernomzav cancelled these spoofs with the intent that other traders would react to the “vacuum” by filling genuine orders he had placed on the same side of the market as the “vacuum” he created. According to the CFTC, this trading pattern “often resulted in Chernomzav successfully moving the market an entire price level.”⁴⁴

While the “vacuum” strategy is somewhat different from the conduct reflected in many other spoofing-related resolutions, Director McDonald said that the conduct had the same “[m]arket integrity”

implications that motivated other anti-spoofing actions, emphasizing the CFTC's focus on "making sure bids and offers represent real buying and selling interest, not fake order flow intended to manipulate other market participants."⁴⁵ The CFTC orders required Hard Eight and Chernomzav to pay \$1.75 million and \$750,000, respectively, in civil monetary penalties.⁴⁶ Chernomzav was also barred from trading for nine months.⁴⁷

Flotron. On February 5, 2019, Judge Vanessa Bryant of the U.S. District Court for the District of Connecticut issued a Final Judgment and Consent Order against Andre Flotron, a former UBS AG precious metals trader.⁴⁸ The CFTC's case against Flotron was filed in 2018. Its resolution is notable because it followed his acquittal in April 2018 of criminal charges.⁴⁹ Director McDonald said that the case "shows" that the CFTC "will continue to work vigorously to hold individuals accountable, and not just the companies that employ them, for misconduct in our markets."⁵⁰

Criminal Anti-Spoofing Enforcement in 2019

In 2019, the criminal authorities continued to vigorously prosecute spoofing-related conduct, even in the face of continued challenges. As we reported last year, in April 2018, a jury acquitted trader Andre Flotron of conspiracy in what was the government's second-ever criminal spoofing trial.⁵¹ The government's next criminal spoofing trial, held in 2019, ended in a hung jury. These results notwithstanding, the DOJ continued in 2019 to pursue spoofing-related charges against individuals, including in a case that the Assistant Attorney General for the Criminal Division called "the government's most significant step to date in our ongoing efforts to identify and prosecute fraud and manipulation in our Nation's commodities markets."⁵² The number of spoofing-related cases that the DOJ has pursued—and the new legal and tactical approaches that they have introduced—suggest a continued commitment to the prosecution of spoofing-related conduct.

United States v. Jitesh Thakkar

In February 2018, the government filed a three-count criminal indictment against Jitesh Thakkar, the founder and principal of Edge Financial Technologies.⁵³ The indictment charged Thakkar with one count of conspiracy to commit spoofing and two counts of spoofing. The government alleged that Thakkar conspired with and aided and abetted trader Navinder Sarao, whose trading allegedly played a role in the 2010 "Flash Crash" in which the Dow Jones Industrial Average dropped 600 points in five minutes, in developing the customized software program that Sarao used to spoof the market.⁵⁴ The government's case against Thakkar is believed to be the first against a non-trader software developer.⁵⁵

Trial began on April 1, 2019 in the Northern District of Illinois. Sarao, who had, years prior, pleaded guilty to one count of wire fraud and one count of spoofing, testified as the government's witness.⁵⁶ But after the government presented its case, Thakkar's counsel filed a motion for judgment of acquittal on the bases that: (1) the government failed to establish conspiracy because Sarao, Thakkar's only alleged co-conspirator,

admitted that there was no conspiracy; and (2) the government failed to present evidence to support a conviction under the two substantive counts of spoofing.⁵⁷ Judge Robert Gettleman agreed with Thakkar's first argument and dismissed the conspiracy count.⁵⁸ Judge Gettleman allowed the two spoofing counts to go to the jury on an aiding and abetting theory, but described the evidence as "thin."⁵⁹ After a day of deliberations, the jury announced that it could not reach a unanimous verdict, and a mistrial was declared.⁶⁰ The government declined to retry the case and, on April 23, 2019, filed and executed a motion to dismiss the indictment in its entirety.⁶¹

Spoofing, RICO and United States v. Smith

Several months after the Thakkar trial, the DOJ and the CFTC held a joint press conference to unveil perhaps the highest-profile spoofing-related action ever brought. The regulators announced on September 16, 2019 the unsealing of an indictment alleging that three individuals at one of the country's largest financial institutions engaged in "widespread spoofing, fraud, and market manipulation" in gold, silver, platinum and palladium futures prices.⁶² The announcement attracted significant attention for the DOJ's novel and aggressive decision to prosecute the traders under the Racketeer Influenced and Corrupt Organization Act ("RICO"), 18 U.S.C. § § 1961–1968, a statute that was enacted in 1970 to help prosecutors fight organized crime.⁶³ The CFTC simultaneously announced civil charges against two of the three individuals.⁶⁴

As alleged in the indictment, between approximately May 2008 and August 2016, members of "Bank A's" precious metals desk placed spoof orders in the precious metals futures markets, including "in an attempt to artificially affect prices and to profit by deceiving other market participants."⁶⁵ The indictment alleges that the defendants and their co-conspirators placed spoof orders in "thousands of sequences" and Assistant Attorney General Brian A. Benczkowski described the conduct as a "massive, multiyear scheme."⁶⁶ According to FBI Assistant Director in Charge William F. Sweeney Jr. of the FBI's New York Field Office, the alleged trading not only affected the precious metals markets, "but also correlated markets and the clients of the bank [the traders] represented."⁶⁷ The three individuals named were Gregg Smith, an executive director and trader, Michael Nowak, a managing director who ran Bank A's global precious metals desk, and Christopher Jordan, a former executive director and trader.⁶⁸ On November 22, 2019, the government filed a superseding indictment adding charges against a fourth individual: Jeffrey Ruffo, an executive director and salesperson.⁶⁹

To bring charges under RICO, the government was required to allege that the defendants had a relationship to an "enterprise" and engaged in a "pattern of racketeering activity."⁷⁰ Notably, the "enterprise" alleged in the indictment was Bank A's "precious metals desk."⁷¹ According to the government, the defendants "conducted the affairs of [that] desk" through a "pattern" of wire fraud and bank fraud.⁷²

The DOJ's use of the RICO statute in this case is notable for several reasons. First, the regulator's use of the statute—which carries with it a long potential prison term⁷³—appears to underscore how seriously the DOJ

views spoofing-related conduct. Indeed, in the wake of the indictment, “several former prosecutors said they couldn’t recall another use of [RICO] to prosecute traders at a big bank.”⁷⁴ Second, and relatedly, the new approach suggests an effort by the DOJ to push forward on spoofing-related enforcement in the wake of the *Flotron* and *Thakkar* cases. That is, rather than shying away from bringing spoofing actions, the DOJ has advanced an aggressive legal approach that it did not use in the prior trials. Third, the indictment and other announcements suggest that the DOJ relied extensively on the cooperation of other Bank A traders. Two former Bank A precious metals traders, John Edmonds and Christian Trunz, have been named as being among the defendants’ co-conspirators and both have pleaded guilty: Edmonds to one count of commodities fraud and one count of conspiracy to commit wire fraud, commodities fraud, commodities price manipulation and spoofing,⁷⁵ and Trunz to one count of conspiracy to engage in spoofing and one count of spoofing.⁷⁶ As part of their pleas, both traders admitted that they learned the trading strategy from more senior traders and deployed it with the “knowledge and consent” of their supervisors.⁷⁷

Other Notable Criminal Spoofing Cases against Individuals

Throughout 2019, the DOJ actively pursued criminal cases against the remaining individuals against whom charges were announced the year prior. These cases continue to help shape the legal landscape surrounding spoofing enforcement, including with respect to the criminal statutes that might be used to prosecute spoofing-related conduct.

Vorley and Chanu. On July 24, 2018, traders James Vorley and Cedric Chanu were indicted on charges of wire fraud affecting a financial institution and conspiracy to commit wire fraud affecting a financial institution.⁷⁸ The case against Vorley and Chanu is believed to be the first spoofing prosecution based solely on the wire fraud statute, without parallel charges for violations of the commodities fraud statute or CEA anti-spoofing provision. The government alleged that between December 2009 and November 2011, Vorley, Chanu and their co-conspirators defrauded other traders by placing spoof orders to create the appearance of false supply and demand and induce other traders to trade at times and in quantities that they otherwise would not have traded.⁷⁹ Vorley and Chanu submitted a joint motion to dismiss the indictment for failure to state an offense because “[w]ire fraud requires a false statement and in placing the Spoofing Orders they made no false statements.”⁸⁰ In the alternative, they also argued that the wire fraud statute would be unconstitutionally vague if construed to extend to their trading activity.⁸¹ Several industry groups, including the Securities Industry and Financial Markets Association and the Futures Industry Association, filed *amici curiae* briefs in support of defendants’ argument.⁸²

Judge John Tharp of the United States District Court for the Northern District of Illinois denied the motion. According to Judge Tharp:

The defendants’ arguments come up short in two respects, one legal and one factual. As a question of law, the defendants’ argument that a wire fraud conviction requires proof of a false statement is inconsistent with both the history of the wire fraud statute and Circuit precedent. That the

indictment alleges no affirmative misrepresentations by the defendants does not mean that the defendants could not have engaged in a scheme to defraud by means of implied misrepresentations. And whether the defendants' Spoofing Orders carried with them any implied misrepresentations is the central fact question presented by the indictment. The defendants insist that real, at-risk, market orders communicate nothing beyond the offer to trade at the terms stated and that the Spoofing Orders did not deceive other traders about anything material to their trading decisions. That factual assault on the allegations of the indictment, however, must be made at trial.⁸³

This decision may have particular significance for the DOJ. The statute of limitations for wire fraud affecting a financial institution is 10 years, significantly longer than the statutes of limitations for spoofing and commodities fraud, which are five years and six years respectively.⁸⁴ Indeed, the longer statute of limitations likely partially explains why Vorley and Chanu were charged on a wire fraud theory but not with commodities fraud or spoofing.⁸⁵

Bases and Pacilio. On July 17, 2018, former MLCI traders Edward Bases and John Pacilio were charged with one count of conspiracy to commit wire fraud affecting a financial institution and commodities fraud and one count of commodities fraud.⁸⁶ Pacilio was also charged with spoofing.⁸⁷ Like Vorley and Chanu, Bases and Pacilio also filed motions to dismiss arguing, among other things, that spoofing cannot form the basis for a wire fraud charge.⁸⁸ Judge John Lee denied the motions to dismiss.⁸⁹

First Criminal Resolutions with Institutional Actors

In 2019, the DOJ announced its first criminal resolutions with institutional actors for crimes related to spoofing. This is a significant step, and underscores that under certain circumstances, spoofing-related conduct by traders could expose their employers to potential criminal liability.⁹⁰

Merrill Lynch Commodities Inc. On June 25, 2019, MLCI entered into NPA with the DOJ.⁹¹ According to the NPA, between at least 2008 and 2014, MLCI precious metals traders "schemed to deceive other precious metals market participants by injecting materially false and misleading information into the precious metals futures market" by placing spoof orders.⁹² The NPA required MLCI to admit that the facts described in the NPA were true and that those facts violate the law and constitute commodities fraud.⁹³ MLCI agreed to pay \$25 million in criminal fines, forfeiture and restitution.⁹⁴ The terms of the NPA also required MLCI and its ultimate parent, Bank of America Corporation ("BAC"), to review their compliance programs and, where necessary, modify those programs to meet specific, enumerated minimum standards designed to detect and deter violations of the anti-spoofing provision of the CEA as well as the wire, security and commodities fraud laws.⁹⁵ MLCI did not receive voluntary disclosure credit because it did not voluntarily and timely disclose the conduct, but did receive credit for cooperating with the Fraud Section's investigation.⁹⁶ The NPA specifically noted that both MLCI and BAC had already enhanced, and committed to continuing to enhance, their compliance program and internal controls.⁹⁷

Tower Research Capital LLC. As referenced above, on November 7, 2019, the DOJ announced that it had entered into a DPA with Tower. Under the terms of the DPA, Tower consented to the filing of a one count criminal information charging Tower with commodities fraud.⁹⁸ The DOJ agreed that if Tower complies with the terms of the DPA, the DOJ will seek dismissal with prejudice of the criminal information.⁹⁹ Tower admitted the facts set out in the DPA, including that Tower traders placed thousands of spoof orders with the intent to, and which did in fact, inject false and misleading information into the market.¹⁰⁰ Tower was required to pay \$67.4 million in criminal monetary penalties, criminal disgorgement and victim compensation with the criminal monetary penalty credited for payments to the CFTC.¹⁰¹ Like MLCI, Tower was also required to review its compliance program and where necessary modify its program to conform to specific minimum requirements designed to deter and detect violations of the commodities laws.¹⁰² According to the DOJ, “[a] number of significant factors contributed to the Department’s criminal resolution with Tower, including the company’s cooperation with the United States and Tower’s extensive remedial efforts[,]” “swiftly mov[ing] in early 2014 to terminate the three traders, [making] significant investments in sophisticated trade surveillance tools, increas[ing] legal and compliance resources, revis[ing] the company’s corporate governance structures and chang[ing] its senior management.”¹⁰³ Tower did not, however, receive voluntary discourse credit because it did not voluntarily and timely disclose the conduct to the DOJ.¹⁰⁴

Class action complaints have been filed against both MLCI and Tower on the basis of their admissions and admissions contained in related trader pleas, alleging that their traders’ spoofing caused plaintiffs to earn less profits or suffer greater losses in the relevant markets during the relevant periods.¹⁰⁵

Conclusion

The past year reflects significant anti-spoofing enforcement by both the CFTC and the DOJ. Their actions in 2019, particularly increased civil and criminal partnership and ongoing focus on cooperation and remediation, continue to highlight the importance of firms’ internal surveillance systems and controls designed to detect and deter spoofing.

We will continue to monitor and update you on these developments in 2020.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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- ¹ *Anti-Spoofing Enforcement: 2018 Year in Review*, Paul, Weiss, Rifkind, Wharton & Garrison LLP (Jan. 7, 2019) [hereinafter *Paul, Weiss 2018 Year In Review*], <https://www.paulweiss.com/practices/litigation/financial-institutions/publications/anti-spoofing-enforcement-2018-year-in-review?id=28056>.
- ² Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 747, 124 Stat. 1376, 1739 (2010); 7 U.S.C. § 6c(a)(5)(C).
- ³ See James McDonald, Director of Enforcement, U.S. Commodity Futures Trading Comm'n, Statement of CFTC Director of Enforcement James McDonald (Jan. 29, 2018), <https://www.cftc.gov/PressRoom/SpeechesTestimony/mcdonaldstatement012918>.
- ⁴ 7 U.S.C. § 6c(a)(5)(C); 7 U.S.C. § 13(a)(2).
- ⁵ J. Christopher Giancarlo, Chairman, U.S. Commodity Futures Trading Comm'n, Remarks of Chairman J. Christopher Giancarlo at Economic Club of Minnesota, Minneapolis, Minnesota (Oct. 2, 2018), <https://www.cftc.gov/PressRoom/SpeechesTestimony/opagiancarlo56>; COMMODITY FUTURES TRADING COMM'N, 2018 ANNUAL REPORT ON THE DIVISION OF ENFORCEMENT (Nov. 2018), https://www.cftc.gov/sites/default/files/2018-11/ENFAnnualReport111418_o.pdf.
- ⁶ COMMODITY FUTURES TRADING COMM'N, FY 2019 DIVISION OF ENFORCEMENT ANNUAL REPORT (Nov. 2019), <https://www.cftc.gov/PressRoom/PressReleases/8085-19>.
- ⁷ *Id.*

- ⁸ The CFTC resolved numerous spoofing enforcement actions in 2019. *See In re [A Japanese Company]*, CFTC No. 20-07, 2019 WL 6001894 (Nov. 7, 2019) (\$500,000); *In re Tower Research Capital LLC*, CFTC No. 20-06, 2019 WL 6001893 (Nov. 6, 2019) (\$67,400,000); *In re [A U.S. Subsidiary]*, CFTC No. 19-46, 2019 WL 4915919 (Sept. 30, 2019) (\$400,000); *In re Belvedere Trading LLC*, CFTC No. 19-45, 2019 WL 4915918 (Sept. 30, 2019) (\$1,100,000); *In re Morgan Stanley Capital Group Inc.*, CFTC No. 19-44, 2019 WL 4915491 (Sept. 30, 2019) (\$1,500,000); *In re Hard Eight Futures, LLC*, CFTC No. 19-30, 2019 WL 4915495 (Sept. 30, 2019) (\$1,750,000); *In re Chernomzav*, CFTC No. 19-31, 2019 WL 4915496 (Sept. 30, 2019) (\$750,000); *In re Lawrence*, CFTC No. 19-27, 2019 WL 4571731 (Sept. 16, 2019) (\$130,000); *In re Trunz*, CFTC No. 19-26, 2019 WL 4571730 (Sept. 16, 2019) (determination as to sanctions reserved based on cooperation agreement); *In re Heraeus Metals New York LLC*, CFTC No. 19-28, 2019 WL 4571732 (Sept. 16, 2019) (\$900,000); *In re Cox*, CFTC No. 19-18, 2019 WL 3572749 (July 31, 2019) (\$150,000); *In re Flaum*, CFTC No. 19-15, 2019 WL 3425039 (July 25, 2019) (determination as to sanctions reserved based on cooperation agreement); *In re Edmonds*, CFTC No. 19-16, 2019 WL 3425040 (July 25, 2019) (determination as to sanctions reserved based on cooperation agreement); *In re Merrill Lynch Commodities, Inc.*, CFTC No. 19-07, 2019 WL 2725774 (June 25, 2019) (\$25,000,000); *In re Mohan*, CFTC No. 19-06, 2019 WL 978808 (Feb. 25, 2019) (determination as to sanctions reserved based on cooperation agreement); *CFTC v. Flotron*, 18-cv-158, 2019 WL 458940 (D. Conn. Feb. 6, 2019) (\$100,000); *In re Crepeau*, CFTC No. 19-05, 2019 WL 448815 (Jan. 31, 2019) (\$120,000). As of the date of publication, the CFTC had settled two spoofing enforcement actions. *See In re Mirae Asset Daewoo Co.*, CFTC No. 20-11, 2020 WL 263595 (Jan. 13, 2020) (\$700,000); *In re Propex Derivatives Pty Ltd*, CFTC No. 20-12 (Jan. 21, 2020) (\$1,000,000).
- ⁹ COMMODITY FUTURES TRADING COMM'N, FY 2019 DIVISION OF ENFORCEMENT ANNUAL REPORT (Nov. 2019), <https://www.cftc.gov/PressRoom/PressReleases/8085-19>.
- ¹⁰ *Id.*; *see also* James McDonald, Commodity Futures Trading Comm'n, Keynote Address of Director of Enforcement James M. McDonald at the Practising Law Institute's White Collar Crime 2019 Program (Sept. 25, 2019), <https://www.cftc.gov/PressRoom/SpeechesTestimony/opamedonald5>.
- ¹¹ COMMODITY FUTURES TRADING COMM'N, FY 2019 DIVISION OF ENFORCEMENT ANNUAL REPORT (Nov. 2019), <https://www.cftc.gov/PressRoom/PressReleases/8085-19>.
- ¹² *Id.*
- ¹³ *See, e.g., In re Merrill Lynch Commodities, Inc.*, CFTC No. 19-07, 2019 WL 2725774 (June 25, 2019) (noting that civil monetary penalty was substantially reduced due to Merrill Lynch's cooperation).
- ¹⁴ James McDonald, Commodity Futures Trading Comm'n, Speech of James McDonald, Director of the Division of Enforcement Commodity Futures Trading Commission Regarding Perspectives on Enforcement: Self-Reporting and Cooperation at the CFTC (Sept. 25, 2017), <https://www.cftc.gov/PressRoom/SpeechesTestimony/opamedonald092517>
- ¹⁵ Press Release, Commodity Futures Trading Comm'n, CFTC's Enforcement Division Issues New Advisories on Cooperation (Jan. 19, 2017), <https://www.cftc.gov/PressRoom/PressReleases/pr7518-17>; Enforcement Advisory, Commodity Futures Trading Comm'n, Updated Advisory on Self Reporting and Full Cooperation (Sept. 25, 2017), <https://www.cftc.gov/sites/default/files/idc/groups/public/@lrenforcementactions/documents/legalpleading/enfadvisoryselfreporting0917.pdf>.
- ¹⁶ Enforcement Advisory, Commodity Futures Trading Comm'n, Updated Advisory on Self Reporting and Full Cooperation (Sept. 25, 2017),

- <https://www.cftc.gov/sites/default/files/idc/groups/public/@lrenforcementactions/documents/legalpleading/enfadvisoryselfreporting0917.pdf> (emphasis added).
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- ¹⁸ *In re [A Japanese Company]*, CFTC No. 20-07, 2019 WL 6001894 (Nov. 7, 2019) (noting that cooperation and remediation resulted in a "reduced civil monetary penalty"); *In re Tower Research Capital LLC*, CFTC No. 20-06, 2019 WL 6001893 (Nov. 6, 2019) (noting that cooperation resulted in a "reduced civil monetary penalty"); *In re Morgan Stanley Capital Group Inc.*, CFTC No. 19-44, 2019 WL 4915491 (Sept. 30, 2019) (noting that cooperation and remediation resulted in a "reduced civil monetary penalty"); *In re Merrill Lynch Commodities, Inc.*, CFTC No. 19-07, 2019 WL 2725774 (June 25, 2019) (noting that cooperation resulted in a "substantially reduced civil monetary penalty").
- ¹⁹ *In re [A U.S. Subsidiary]*, CFTC No. 19-46, 2019 WL 4915919 (Sept. 30, 2019).
- ²⁰ *In re Trunz*, CFTC No. 19-26, 2019 WL 4571730 (Sept. 16, 2019) (determination as to sanctions reserved based on cooperation agreement); *In re Flaum*, CFTC No. 19-15, 2019 WL 3425039 (July 25, 2019) (determination as to sanctions reserved based on cooperation agreement); *In re Edmonds*, CFTC No. 19-16, 2019 WL 3425040 (July 25, 2019) (determination as to sanctions reserved based on cooperation agreement); *In re Mohan*, CFTC No. 19-06, 2019 WL 978808 (Feb. 25, 2019) (determination as to sanctions reserved based on cooperation agreement).
- ²¹ *Paul, Weiss 2018 Year In Review*, *supra* note 1; James McDonald, Director of Enforcement, U.S. Commodity Futures Trading Comm'n, Speech of Enforcement Director James M. McDonald Regarding Enforcement trends at the CFTC, NYU School of Law: Program on Corporate Compliance & Enforcement (Nov. 14, 2018), <https://www.cftc.gov/PressRoom/SpeechesTestimony/opamcdonald1>.
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- ²³ Press Release, Commodity Futures Trading Comm'n, Remarks of Director of Enforcement James McDonald During CFTC-DOJ Press Conference Call (Sept. 16, 2019), <https://www.cftc.gov/PressRoom/SpeechesTestimony/opamcdonald4>.
- ²⁴ Press Release, Commodity Futures Trading Comm'n, CFTC Orders Proprietary Trading Firm to Pay Record \$67.4 Million for Engaging in a Manipulative and Deceptive Scheme and Spoofing (Nov. 7, 2019), <https://www.cftc.gov/PressRoom/PressReleases/8074-19>.
- ²⁵ *Id.* The monetary sanction the CFTC imposed against Tower comprised of \$32,593,849 in restitution, \$10,500,000 in disgorgement, and a \$24,400,000 civil monetary penalty, with those amounts to be offset against payments made under Tower's DPA. *Id.*; *see also* Press Release, U.S. Dep't of Justice, Tower Research Capital LLC Agrees to Pay \$67 Million in Connection With Commodities Fraud Scheme (Nov. 7, 2019), <https://www.justice.gov/opa/pr/tower-research-capital-llc-agrees-pay-67-million-connection-commodities-fraud-scheme>.
- ²⁶ *In re Tower Research Capital LLC*, CFTC No. 20-06, 2019 WL 6001893, at *2 (Nov. 6, 2019).

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- ²⁷ An “iceberg” order is an order placed in the market such that only a portion of the total order is visible to other market participants at a time. When the first visible preset portion is filled, the same quantity automatically becomes visible in the market and the process repeats until the order is either filled in its entirety or canceled.
- ²⁸ *In re Tower Research Capital LLC*, CFTC No. 20-06, 2019 WL 6001893, at *2 (Nov. 6, 2019).
- ²⁹ *Id.*
- ³⁰ *Id.*
- ³¹ Press Release, U.S. Dep’t of Justice, Tower Research Capital LLC Agrees to Pay \$67 Million in Connection With Commodities Fraud Scheme (Nov. 7, 2019), <https://www.justice.gov/opa/pr/tower-research-capital-llc-agrees-pay-67-million-connection-commodities-fraud-scheme>.
- ³² *In re Mohan*, CFTC No. 19-06, 2019 WL 978808 (Feb. 25, 2019) (determination as to monetary sanctions reserved based on cooperation agreement); *In re Gandhi*, CFTC No. 19-01, 2018 WL 5084650 (Oct. 11, 2018) (determination as to monetary sanctions reserved based on cooperation agreement).
- ³³ Press Release, U.S. Dep’t of Justice, Tower Research Capital LLC Agrees to Pay \$67 Million in Connection With Commodities Fraud Scheme (Nov. 7, 2019), <https://www.justice.gov/opa/pr/tower-research-capital-llc-agrees-pay-67-million-connection-commodities-fraud-scheme>.
- ³⁴ Indictment, *United States v. Mao*, No. 18-cr-606 (S.D. Tex. Oct. 10, 2018).
- ³⁵ Rule 506 exempts certain offerings from the registration requirements of the Securities Act and thus enables companies to obtain funding faster, more cheaply and with fewer disclosures. These exemptions, however, are not available if the issuer falls into the SEC’s “bad actor” disqualification, including because they were subject to a final order of the CFTC for “a violation of any law or regulation that prohibits fraudulent, manipulative, or deceptive conduct entered within ten years before such sale.” 17 C.F.R. § 230.506(d)(1)(iii)(B). An issuer can avoid disqualification if “the court or regulatory authority that entered the relevant order, judgment or decree advises in writing . . . that disqualification . . . should not arise as a consequence of such order, judgment or decree . . .” 17 C.F.R. § 230.506(d)(2)(iii).
- ³⁶ Rostin Behnam, Commissioner of the CFTC, Statement of Commissioner Rostin Behnam Regarding Tower Research Capital LLC (Nov. 7, 2019), https://www.cftc.gov/PressRoom/SpeechesTestimony/behnamstatement110719#_ftn8.
- ³⁷ Dan M. Berkovitz, Commissioner of the CFTC, Dissenting Statement of Commissioner Dan M. Berkovitz, *In re Tower Research Capital LLC: Waiver of SEC “Bad Actor” Disqualifications* (Nov. 7, 2019), <https://www.cftc.gov/PressRoom/SpeechesTestimony/berkovitzstatement110719>.
- ³⁸ Rostin Behnam, Commissioner of the CFTC, Statement of Commissioner Rostin Behnam Regarding Tower Research Capital LLC (Nov. 7, 2019), <https://www.cftc.gov/PressRoom/SpeechesTestimony/behnamstatement110719>.
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- 41 James McDonald, Commodity Futures Trading Comm'n, Keynote Address of Director of Enforcement James M. McDonald at the Practising Law Institute's White Collar Crime 2019 Program (Sept. 25, 2019), <https://www.cftc.gov/PressRoom/SpeechesTestimony/opamcdonald5>.
- 42 *Id.*
- 43 *In re Hard Eight Futures, LLC*, CFTC No. 19-30, 2019 WL 4915495 (Sept. 30, 2019); *In re Chernomzav*, CFTC No. 19-31, 2019 WL4915496 (Sept. 30, 2019).
- 44 *In re. Chernomzav*, CFTC No. 19-31, 2019 WL4915496 (Sept. 30, 2019).
- 45 Press Release, Commodity Futures Trading Comm'n, CFTC Orders Chicago Trading Firm and Its Co-Founder to Pay \$2.5 Million in Penalties for Spoofing and Manipulative Trading Scheme (Sept. 30, 2019), <https://www.cftc.gov/PressRoom/PressReleases/8024-19>
- 46 *Id.*
- 47 *Id.*
- 48 *CFTC v. Flotron*, 18-cv-158 (VLB), 2019 WL 458940 (D. Conn. Feb. 6, 2019).
- 49 *Paul, Weiss 2018 Year in Review, supra note 1.*
- 50 Press Release, Commodity Futures Trading Comm'n, In CFTC Action, Court Orders Precious Metals Trader to Pay Penalty and Imposes Trading Ban for Spoofing and Deceptive or Manipulative Scheme (Feb. 7, 2019), <https://www.cftc.gov/PressRoom/PressReleases/7867-19>.
- 51 *Paul, Weiss 2018 Year in Review, supra note 1.*
- 52 Brian Benczkowski, Assistant Att'y Gen. for the Crim. Div., U.S. Dep't of Justice, Opening Remarks by Assistant Attorney General Brian A. Benczkowski on Press Call Announcing *United States v. Gregg Smith, et al.* (Sept. 16, 2019), <https://www.justice.gov/opa/speech/opening-remarks-assistant-attorney-general-brian-benczkowski-press-call-announcing-united>.
- 53 Indictment, *United States v. Thakkar*, No. 18-cr-36 (N.D. Ill. Feb. 14, 2018), ECF No. 17, <https://www.justice.gov/criminal-vns/file/1070466/download>.
- 54 *Id.*; Press Release, U.S. Dep't of Justice, Futures Trader Pleads Guilty to Illegally Manipulating the Futures Market in Connection With 2010 "Flash Crash" (Nov. 9, 2016), <https://www.justice.gov/opa/pr/futures-trader-pleads-guilty-illegally-manipulating-futures-market-connection-2010-flash>.
- 55 Celeste Bott & Lauraann Wood, *Mistrial Declared in Ill. Software Exec's Spoofing Trial*, Law360 (Apr. 9, 2019), <https://www.law360.com/articles/1148235/mistrial-declared-in-ill-software-exec-s-spoofing-trial>.
- 56 Press Release, U.S. Dep't of Justice, Futures Trader Pleads Guilty to Illegally Manipulating the Futures Market in Connection With 2010 "Flash Crash" (Nov. 9, 2016), <https://www.justice.gov/opa/pr/futures-trader-pleads-guilty-illegally-manipulating-futures-market-connection-2010-flash>. Sentencing for Sarao is scheduled for January 28, 2020. On January 14, 2020, the government submitted a sentencing memorandum recommending that the court sentence Sarao to time served, a significant departure below the sentencing guidelines range. Among other things, the government cited Sarao's "substantial cooperation" and testimony in the *Thakkar* trial. Government's Sentencing Memorandum at 9, *United States v. Sarao*, 15-cr-75 (N.D. Ill. Jan. 14, 2020), ECF 111.

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- ⁵⁷ Motion for Judgment of Acquittal for Jitesh Thakkar at 7–8, *United States v. Thakkar*, 18-cr-36 (N.D. Ill. Apr. 3, 2019), ECF No. 105.
- ⁵⁸ Notification of Docket Entry, *United States v. Thakkar*, 18-cr-36 (N.D. Ill. Apr. 4, 2019), ECF No. 110.
- ⁵⁹ *Id.*; Lauraan Wood, *Software Exec Dodges Conspiracy Charge in Spoofing Trial*, Law360 (Apr. 4, 2019), <https://www.law360.com/articles/1146576/software-exec-dodges-conspiracy-charge-in-spoofing-trial>.
- ⁶⁰ Order, *United States v. Thakkar*, 18-cr-36 (N.D. Ill. Apr. 9, 2019), ECF No. 119.
- ⁶¹ Closed Criminal Division Cases, U.S. Dep’t of Justice, *United States v. Jitesh Thakkar*, <https://www.justice.gov/criminal-vns/case/jitesh-thakkar/update> (last updated July 17, 2019).
- ⁶² Brian Benczkowski, Assistant Att’y Gen. for the Crim. Div., U.S. Dep’t of Justice, Opening Remarks by Assistant Attorney General Brian A. Benczkowski on Press Call Announcing *United States v. Gregg Smith*, et al. (Sept. 16, 2019), <https://www.justice.gov/opa/speech/opening-remarks-assistant-attorney-general-brian-benczkowski-press-call-announcing-united>.
- ⁶³ U.S. DEP’T OF JUSTICE, ORGANIZED CRIME & GANG SEC., CRIMINAL RICO: 18 U.S.C. §§ 1961-1968 A MANUAL FOR FEDERAL PROSECUTORS at 5–6 (6th ed. May 2016), <https://www.justice.gov/usam/file/870856/download> (citing S. REP. NO. 91-617 at 78).
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- ⁶⁶ Press Release, U.S. Dep’t of Justice, Current and Former Precious Metals Traders Charged with Multi-Year Market Manipulation Racketeering Conspiracy (Sept. 16, 2019), <https://www.justice.gov/opa/pr/current-and-former-precious-metals-traders-charged-multi-year-market-manipulation>.
- ⁶⁷ *Id.*
- ⁶⁸ *Id.*
- ⁶⁹ Superseding Indictment, *United States v. Smith*, 19-cr-669 (EEC) (N.D. Ill. Nov. 14, 2019), ECF No. 52, <https://www.justice.gov/opa/press-release/file/1217956/download>.
- ⁷⁰ 18 U.S.C. § 1962(c).
- ⁷¹ Superseding Indictment, *United States v. Smith*, 19-cr-669 (EEC) (N.D. Ill. Nov. 14, 2019), ECF No. 52, <https://www.justice.gov/opa/press-release/file/1217956/download>.
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- ⁷⁸ Indictment, *United States v. Vorley*, No. 18 CR 35 (N.D. Ill. July 24, 2018), ECF No. 12, <https://www.justice.gov/opa/press-release/file/1083116/download>.
- ⁷⁹ *Id.* at 3–7; see Press Release, U.S. Dep't of Justice, Two Former Deutsche Bank Traders Charged With Deceptive and Manipulative Trading Practices in U.S. Commodities Markets (July 25, 2018), <https://www.justice.gov/opa/pr/two-former-deutsche-bank-traders-charged-deceptive-and-manipulative-trading-practices-us>.
- ⁸⁰ *United States v. Vorley*, No. 18 CR 00035, 2019 WL 5312335, at *3 (N.D. Ill. Oct. 21, 2019).
- ⁸¹ *Id.* at *15–16.
- ⁸² *Id.* at *2 n.6.
- ⁸³ *Id.* at *3.
- ⁸⁴ See 18 U.S.C. § 3293; 18 U.S.C. § 3301; 18 U.S.C. § 3282.
- ⁸⁵ On January 10, 2020, following Judge Tharp's denial of the motion to dismiss the indictment, Vorley filed a motion to suppress statements made in interviews with his employer on the grounds that the DOJ was behind the interviews and to let prosecutors use those statements would violate his Fifth Amendment rights. The motion is pending and not yet fully briefed. See Jody Godoy, *Ex-Deutsche Trader Says DOJ outsourced Spoofing Probe*, Law360 (Jan. 13, 2020), <https://www.law360.com/articles/1233749/ex-deutsche-trader-says-doj-outsourced-spoofing-probe>.
- ⁸⁶ Indictment, *United States v. Bases*, No. 18-CR-48 (N.D. Ill. July 17, 2018), ECF No. 66, <https://www.justice.gov/opa/press-release/file/1081431/download>.
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- ⁸⁸ See Memorandum of Law in Support of Defendant Edward Bases' Motion to Dismiss the Indictment, *United States v. Bases*, 18-cr-48 (N.D. Ill. Nov. 16, 2018), ECF No. 117; Memorandum of Law in Support of Defendant John Pacilio's Motion to Dismiss the Indictment, *United States v. Bases*, 18-cr-48 (N.D. Ill. Nov. 16 2018), ECF No. 118.
- ⁸⁹ Notification of Docket Entry, *United States v. Bases*, No. 18-CR-48 (N.D. Ill. Jan. 16, 2020), ECF No. 236.

- ⁹⁰ On January 21, 2020, the DOJ entered into a DPA with Propex Derivatives Pty Ltd (“Propex”). The agreement was filed in connection with a criminal information charging the company with one count of spoofing. The terms of the DPA require Propex to pay \$1 million, which includes criminal monetary payment, criminal disgorgement and victim compensation, with the criminal monetary penalty credited for payments made to the CFTC under a settlement announced the same day. Press Release, U.S. Dep’t of Justice, Propex Derivatives Pty Ltd Agrees to Pay \$1 Million in Connection with Spoofing Scheme (Jan. 21, 2020), <https://www.justice.gov/opa/pr/propex-derivatives-pty-ltd-agrees-pay-1-million-connection-spoofing-scheme>; Press Release, Commodity Futures Trading Comm’n, CFTC Orders Australian Company to Pay \$1 Million for Spoofing (Jan. 21, 2020), <https://www.cftc.gov/PressRoom/PressReleases/8105-20>.
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- ⁹³ *Id.* at 2.
- ⁹⁴ *Id.* at 5.
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- ⁹⁶ *Id.* at 1.
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- ¹⁰² *Id.* at 12–13.
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