

GLOBAL COMPETITION REVIEW

The Guide to Energy Market Manipulation

Editor

Gordon Kaiser, JAMS

GCR 
GLOBAL COMPETITION REVIEW

The Guide to Energy Market Manipulation

Editor

Gordon Kaiser

Reproduced with permission from Law Business Research Ltd
This article was first published in February 2018
For further information please contact Kieran.Hansen@lbresearch.com

GCR |
GLOBAL COMPETITION REVIEW

Published in the United Kingdom
by Global Competition Review

Law Business Research Ltd
87 Lancaster Road, London, W11 1QQ, UK
© 2018 Law Business Research Ltd
www.globalcompetitionreview.com

First edition

No photocopying: copyright licences do not apply.

The information provided in this publication is general and may not apply in a specific situation, nor does it necessarily represent the views of authors' firms or their clients. Legal advice should always be sought before taking any legal action based on the information provided. The publishers accept no responsibility for any acts or omissions contained herein. Although the information in this is accurate as of February 2018, be advised this is a developing area. Appendix 1 is a reproduction of a US federal document in the public domain to which Law Business Research does not purport to assert copyright.

To subscribe contact subscriptions@globalcompetitionreview.com

Enquiries concerning reproduction should be sent to Law Business Research, at the address above. Enquiries concerning editorial content should be directed to the Publisher – clare.bolton@globalcompetitionreview.com

ISBN 978-1-78915-092-6

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

Acknowledgements

The publisher acknowledges and thanks the following contributors' for their learned assistance throughout the preparation of this book:

AKIN GUMP STRAUSS HAUER & FELD LLP

ALBERTA UTILITIES COMMISSION

ALLEN & OVERY LLP

AUSTRALIAN ENERGY REGULATOR

BIRD & BIRD LLP

BLAKE, CASSELS & GRAYDON LLP

BORDEN LADNER GERVAIS LLP

CHARLES RIVER ASSOCIATES

COMPETITION AND MARKETS AUTHORITY

JAMS

MCCARTHY TÉTRAULT LLP

MORRISON & FOERSTER LLP

NEXTERA ENERGY, INC

OFGEM

PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP

QUEEN'S UNIVERSITY

ST. LAWRENCE BARRISTERS LLP

STIKEMAN ELLIOTT LLP

Contents

Energy Market Manipulation: A New Regulatory Regime 1
Gordon E Kaiser

Foreword.....11
Joseph T Kelliher

Part I: Legislation & Jurisprudence

1 Perspectives on FERC’s Enforcement Programme as it Relates to Energy
Market Manipulation..... 15
Robert S Fleishman and Paul C Varnado

2 Commodity Futures Trading Commission Enforcement..... 26
Anthony M Mansfield

3 Compliance and Enforcement in the Ontario Electricity Sector..... 34
Glenn Zacher

4 Investigating Energy Market Activity in Ontario 49
George Vegh

5 Energy Market Manipulation in Alberta..... 58
Randall W Block QC, John D Blair QC and Laura M Poppel

6 REMIT Energy Market Manipulation..... 72
Peter Willis

Contents

7	Testing Energy Market Manipulation in Great Britain.....	80
	<i>James Jamieson and Nenad Njegovan</i>	

8	Australia	87
	<i>Peter Adams, Kate Murphy and Jeremy Llewellyn</i>	

Part II: Enforcement Practices

9	FERC Practice and Procedure.....	99
	<i>David A Applebaum, Todd L Brecher and J Porter Wiseman</i>	

10	Energy Market Manipulation in the EU: Practice and Procedure	113
	<i>Mark J Mills</i>	

11	Fines, Sanctions and Settlements	122
	<i>JP Mousseau</i>	

12	Private Actions in the United States, Canada and Europe	131
	<i>Randall Hofley, Justine Johnston and Joseph J Bial</i>	

Part III: The Regulatory Process

13	Administrative Law Principles.....	147
	<i>David J Mullan</i>	

14	The Use of Expert Evidence	161
	<i>M Philip Tunley</i>	

15	Economic Evidence of Market Power and Market Manipulation in Energy Markets	178
	<i>Robin Cohen, David Hunger, Brian Rivard and Christopher Russo</i>	

	Staff White Paper on Anti-Market Manipulation Enforcement Efforts: Ten Years After EPAAct 2005, November 2016	193
--	--	-----

	Table of cases	225
--	----------------------	-----

	Reports and guidelines	227
--	------------------------------	-----

	About the Authors	229
--	-------------------------	-----

	Contributing Law Firms' Contact Details.....	241
--	--	-----

Part I

Legislation & Jurisprudence

2

Commodity Futures Trading Commission Enforcement

Anthony M Mansfield¹

Commodity Exchange Act Overview

Commodities markets in the United States are regulated under the Commodity Exchange Act (CEA), 7 U.S.C. Section 1, et seq. The CEA vests the US Commodity Futures Trading Commission (CFTC) with exclusive jurisdiction over futures listed on US exchanges and commodities-based over-the-counter (OTC) swaps.² Consistent with the CEA, the CFTC regulates markets on which futures and swaps contracts are listed and made available to market participants in the United States. It also regulates participants in those markets, e.g., futures commission merchants and swap dealers. Certain provisions of the CEA expressly extend to activities outside the United States. For example, Section 2(i), which was added to the CEA as part of the Wall Street Transparency and Accountability Act of 2010 (Dodd–Frank Act), applies to activities outside the United States related to swaps to the extent that such activities ‘have a direct and significant connection with activities in, or effect on, commerce of the United States’.³ The CFTC (and private litigants) have sought to enforce the CEA and regulations issued thereunder with respect to an array of activities occurring outside the United States with varying degrees of success. The ongoing financial benchmark matters, including the investigations of the London Interbank Offered Rate and the markets for foreign exchange, are recent examples of the extraterritorial application of the CEA.

Multiple regulators, including the CFTC, have authority to regulate different aspects of the commodities markets and to pursue misconduct in those markets. The Federal Energy Regulatory Commission (FERC) and the Federal Trade Commission, for example, are authorised to pursue manipulative and otherwise deceitful conduct in the energy markets.

¹ Anthony M Mansfield is a partner at Allen & Overy LLP.

² 7 U.S.C. § 2(a)(1)(A).

³ Id. at § 2(i)(1).

The US Department of Justice can pursue criminal penalties under the CEA and other US statutes for alleged abuse across physical and financial commodities markets. The delineation of authority among civil regulators and civil and criminal authorities is blurred and has been a source of friction among these agencies. For example, in 2008, the CFTC challenged the FERC's exercise of jurisdiction over activities occurring on a US futures exchange, claiming that the CFTC had exclusive jurisdiction to enforce conduct on these markets.⁴ Given this regulatory overlap, it is common for multiple regulators to investigate the same underlying conduct with sometimes notably divergent results.⁵ Moreover, what starts as an investigation by one regulator, for example, the surveillance function of a futures exchange, may escalate into an enforcement matter before the CFTC, and over time give rise to criminal liability.⁶

Enforcement authority under the CEA

The CEA makes a variety of enforcement tools available to the CFTC to pursue alleged abusive conduct in the commodities markets. Claims sounding in manipulation and fraud have historically garnered the most attention and penalties, but the CFTC is authorised to investigate disruptive practices, including spoofing, and exchange trade practice violations such as wash trading, position limit violations and fictitious trades, among others. It is fairly common for the CFTC to build a manipulation claim based on an underlying disruptive practice or trade practice violation, but the regulator will also enforce disruptive and trade practice violations as stand-alone claims.

The traditional concept of manipulation is grounded in notions of price formation and the alleged disruption of that process.⁷ A market price is one that reflects fundamental forces of supply and demand. Conversely, a manipulated price is the result of illegitimate forces injected intentionally into a market to set a price at a favourable level to a particular

4 Section 2(a) of the CEA provides that the CFTC shall have 'exclusive jurisdiction' with regard to transactions involving swaps or futures traded or executed on a registered futures exchange or swap execution facility. 7 U.S.C. §2(a)(1). The Natural Gas Act grants the FERC enforcement authority, making it unlawful for 'any entity, directly or indirectly, to use or employ, in connection with the purchase or sale of natural gas or the purchase or sale of transportation services subject to the jurisdiction of [FERC], any manipulative or deceptive device or contrivance . . . in contravention of such rules and regulations as [FERC] may prescribe . . .'. 15 U.S.C. § 717c-1.

5 In December 2015, Total Gas and Power North America (TGPNA) entered a settlement with the CFTC for alleged attempted manipulation of the natural gas markets in the Western United States, agreeing to pay a civil monetary penalty of US\$3.6 million. Thereafter, in April 2016, the FERC issued an order to show cause against TGPNA and certain affiliated entities alleging manipulation of the same natural gas markets based on roughly the same alleged activity and demanding US\$213.6 million.

6 For example, in July 2013, the CFTC entered a settlement with Panther Energy Trading LLC (Panther) and its principal trader, Michael Coscia (Coscia) for alleged 'spoofing' on a US futures exchange. The respondents paid a US\$2.8 million civil monetary penalty and were banned from trading on the exchange for one year. In connection with the same alleged activity, the Chicago Mercantile Exchanges fined Coscia US\$200,000 and ordered Coscia and Panther to disgorge approximately US\$1.3 million in alleged ill-gotten gains. In July 2016, Coscia was sentenced to three years in prison for the same alleged spoofing conduct.

7 7 U.S.C. § 13(a)(2).

actor. The fact patterns giving rise to manipulation claims are constantly evolving. Indeed, “[t]he methods and techniques of manipulation are limited only by the ingenuity of man.”⁸

Section 9(a)(2) of the CEA sets out the traditional manipulation claim. It shall be a felony for any person to:

*manipulate or attempt to manipulate the price of any commodity in interstate commerce, or for future delivery on or subject to the rules of any registered entity, or of any swap, or to corner or attempt to corner any such commodity or knowingly to deliver or cause to be delivered for transmission through the mails or interstate commerce by telegraph, telephone, wireless, or other means of communication false or misleading or knowingly inaccurate reports concerning crop or market information or conditions that affect or tend to affect the price of any commodity in interstate commerce . . .*⁹

For manipulation or attempted manipulation, the CFTC may extract civil penalties of up to US\$1 million or triple the monetary gain to the person for each violation.¹⁰ It may also pursue disgorgement of profits, revocation of registrations and imposition of trading bans. Criminal authorities may pursue imprisonment of up to 10 years along with monetary penalties of up to US\$1 million.¹¹

To establish a perfected manipulation claim, the CFTC must show that “(1) [a respondent] had the ability to influence market prices, (2) [the respondent] specifically intended to do so; (3) that artificial prices existed, and (4) [the respondent] caused the artificial price.”¹² A claim of attempted manipulation requires “(1) an intent to affect market price¹³ and (2) some overt act in furtherance of that intent.”¹⁴ Intent may be inferred from the conduct of the respondent.¹⁵ Over time, the CFTC has applied Section 9(a)(2) to a wide range of activities and trading strategies in the energy markets, including, by way of example, alleged submission of false information to compilers of natural gas indices in order to set index prices at artificially high (low) levels, alleged disruption of the process by which exchanges

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

9 7 U.S.C. § 13(a)(2).

10 7 U.S.C. § 13a-1(d)(1)(B).

11 7 U.S.C. § 13(a).

12 *In re Cox*, [1986-1987 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 23,786, at 34,061 (CFTC July 15, 1987).

13 In 2013, the CFTC sued DRW Investments, LLC and its namesake, Donald R. Wilson for alleged manipulation and attempted manipulation of the price of the IDEX USD Three-Month Futures Contracts. See *CFTC v. DRW Investments, LLC*, C.A. No. 13 CIV 7884 (S.D.N.Y. Nov. 2013). The CFTC moved for partial summary judgment on its attempted price manipulation claim, arguing that the manipulative intent standard under Section 9(a)(2) required only a showing that defendants intended to affect the price of a commodity, not that they intended to create an artificial price. To adopt the CFTC’s interpretation of the intent standard would have been to lower the threshold for proving a price manipulation claim. The court rejected the CFTC’s interpretation of the specific intent standard. *Id.*, Docket No. 139 at 26 (“The CFTC interprets this language as holding that the intent standard is merely the “intent to affect market price.” The CFTC’s interpretation is incorrect. The CFTC must prove that Defendants had the specific intent to affect market prices that “did not reflect the legitimate forces of supply and demand.” This means, that there is “no manipulation without intent to cause artificial prices.”)

14 See *CFTC v. Parmon Energy, Inc.*, 875 F. Supp. 2d 233, 250 (S.D.N.Y. 2012).

15 See *In re Ind. Farm Bureau Coop. Ass’n*, CFTC No. 75-14, 1982 WL 30249, at *7 (Dec. 17, 1982).

establish settlement prices for listed futures contracts, often referred to as ‘banging the close’, alleged trading of physical commodities at ‘uneconomic’ levels in order to influence prices of related derivative contracts, and alleged establishment of a dominant position in a physical commodity to disrupt the delivery process on a related futures contract.

Proving a perfected manipulation claim under Section 9(a)(2) is difficult, however, and the CFTC had with limited success in this regard. It is not uncommon, therefore, for the CFTC to charge attempted rather than perfected manipulation.¹⁶ Recognising this limitation, Congress amended the CEA in 2010 as part of the Dodd–Frank Act to add an alternative manipulation claim. CEA Section 6 (and with CFTC Rule 180.1, 17 C.F.R. Section 180.1, which implements this new statutory provision) provides:

*It shall be unlawful for any person, directly or indirectly, to use or employ, or attempt to use or employ, 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, any manipulative or deceptive device or contrivance . . .*¹⁷

In addition:

*Unlawful manipulation for purposes of this paragraph shall include, but not be limited to, delivering, or causing to be delivered for transmission through the mails or interstate commerce, by any means of communication whatsoever, a false or misleading or inaccurate report concerning crop or market information or conditions that affect or tend to affect the price of any commodity in interstate commerce, knowing, or acting in reckless disregard of the fact that such report is false, misleading or inaccurate . . .*¹⁸

Importantly, to prove manipulative conduct under Section 6, the CFTC does not have to show specific intent. Rather, it need only show recklessness.¹⁹ The CFTC defines recklessness as an act or omission that ‘departs so far from the standards of ordinary care that it is very difficult to believe the actor was not aware of what he or she was doing’.²⁰

As a result of amendments to the CEA under the Dodd Frank Act, the CFTC is also equipped with authority to pursue ‘disruptive practices’ under Section 4c, defined as activities ‘on or subject to the rules of a registered entity’, e.g., a futures exchange or swap

16 See, e.g., *In re Statoil ASA*, CFTC Docket No. 18 – 04 (Nov. 14, 2017) (finding that Statoil attempted to manipulate prices in the Far East propane markets in order to benefit Statoil’s financial and physical propane positions in the Far East, including Statoil’s NYMEX–cleared swaps, which settled to those prices).

17 7 U.S.C. § 9(1). The CFTC has asserted that Section 6 and CFTC Rule 180.1 do not require a showing of fraud to prove the claim. A federal district court for the Northern District of Illinois originally disagreed, holding that fraud is a necessary element of the claim. See *CFTC v. Kraft Foods Group, Inc.*, 153 F. Supp. 3d 996, 1007–10 (N.D. Ill. 2015). However, in a subsequent ruling denying Kraft’s motion for interlocutory appeal, the court held that a manipulation claim under Section 6 and Rule 180.1 does not require deception or misrepresentation. See *CFTC v. Kraft Foods Group, Inc.*, 195 F. Supp. 3d 996, 1006–07 (N.D. Ill. 2016).

18 Id. § 9(1)(A).

19 17 C.F.R. § 180.1(a).

20 *In re JP Morgan Chase Bank, N.A.*, CFTC Docket No. 14–01 (Oct. 16, 2013).

execution facility, that are ‘disruptive of fair and equitable trading.’²¹ Section 4c delineates a number of such practices, two of which are worth noting here: (1) ‘spoofing’ and (2) conduct that ‘demonstrates intentional or reckless disregard for the orderly execution of transactions during the closing period . . .’²² With regard to the former, spoofing is defined as ‘bidding or offering with the intent to cancel the bid or offer before execution.’²³ From the regulators’ perspective, spoofing may be employed for a variety of reasons, including to create an appearance of false market depth, to cause artificial up or down price movements, to overload the quotation system of a registered exchange, or to delay another person’s execution of trades.²⁴ The conduct has garnered significant enforcement attention since its incorporation into the CEA and the consequences of a spoofing violation can be severe. In 2016, for example, the CFTC imposed a civil monetary penalty of US\$25 million for alleged spoofing.²⁵ Similarly, in November 2015, an individual trader was criminally convicted of spoofing, resulting in a three-year prison sentence.²⁶

With regard to the latter, the CFTC’s pursuit of alleged abusive trading during a closing period predates the Dodd–Frank Act and amended Section 4c. For example, the CFTC has brought numerous cases alleging that a market participant carried a large open position into the final day of trading on a listed futures contract and subsequently traded out of that position in the closing period during which the exchange establishes the final settlement price on the expiring contract with the intent to cause the settlement price to set at an artificially high (low) price.²⁷ Importantly, however, amended Section 4c introduced the possibility that a market participant’s involvement in a closing period could give rise to a violation both for intentional and reckless conduct.

Finally, the CFTC will pursue trade practices that violate the rules of a futures exchange or swap execution facility. Notable among such trade practice violations are front running,²⁸

21 7 U.S.C. § 6c(a)(5).

22 *Id.* § 4c(a)(5)(B) & (C).

23 *In re Bank of Tokyo-Mitsubishi, UFJ Ltd.*, CFTC Docket No. 17 21 (Aug. 7, 2017).

24 Spoofing is both a violation of the CEA and the rules of US futures exchanges. See, e.g., Chicago Mercantile Exchange Rule 575. The exchanges have issued written guidance regarding the contours of a spoofing claim under exchange rules. See, e.g., CME Group RA1516-5 (Oct. 9, 2015).

25 *In re Citigroup Global Markets Inc.*, CFTC Docket No.: 17-06 (Jan. 19, 2017).

26 *U.S. v. Coscia*, C.A. 1:14 – cr – 00551 (N.D. Ill. 2014).

27 See, e.g., *CFTC v. Amaranth Advisors, L.L.C. et al.*, C.A. No. 07 civ 6682 (S.D.N.Y. July 25, 2007) (‘Defendants’ manipulative scheme included, in part, the purchase of a substantial amount of NYMEX natural gas futures contracts in advance of the closing range that Defendants planned to sell during the last half hour on the final day of trading such contracts (the “Manipulative Scheme”) . . . [T]he settlement price of the NYMEX natural gas futures contracts is determined by the volume weighted average of trades executed from 2:00–2:30 p.m. (“closing range”) on the last day of trading of such contracts (“expiration day”) . . . Defendants intended to create artificial natural gas futures prices by placing large sell orders in the closing range on expiration day.’).

28 Front-running can be defined as, ‘[w]ith respect to commodity futures and options, taking a futures or option position based upon non-public information regarding an impending transaction by another person in the same or related future or option . . .’ Glossary, www.cftc.gov/ConsumerProtection/EducationCenter/CFTCGlossary/glossary_f.

wash trades,²⁹ accommodation trades³⁰ and position limit violations.³¹ While potential trade practice violations are often handled in the first instance by the exchanges' own market regulation and enforcement teams, it is not uncommon for enforcement staff of the CFTC to investigate the same conduct in parallel with, or subsequent to, the exchange inquiry. A decision by CFTC staff separately to investigate conduct on an exchange may reflect the perceived severity of the potential violation or simply a desire of the CFTC to draw attention to a particular type of conduct which it seeks to deter.³² Where both exchange surveillance and CFTC enforcement staff investigate the same conduct, they may seek separate penalties for the same alleged infraction.

CFTC's application of enforcement authority under the CEA

The CFTC is a political body run by five commissioners, each appointed by the President and confirmed by the Senate. One member of the CFTC is appointed by the President as the chairman. No more than three commissioners may be from the same political party. Below the CFTC are separate divisions, each of which is responsible for a different aspect of the commodities markets, e.g., clearing, enforcement, registrants and general market oversight. Each new chairman typically appoints new division heads. Thus, while the tools available to the CFTC to enforce conduct in the commodities markets remain largely constant, decisions regarding the types of conduct to pursue, how to interpret and apply the laws and rules governing activities in the commodities markets, and the resources to devote to enforcement (as compared, for example, to regulation) may shift, depending on the agenda of a particular chairman and enforcement director.

-
- 29 In order to establish that a wash sale has occurred, it must initially be demonstrated that the transaction at issue achieved a wash result. The Commission may demonstrate that the trades resulted in a wash by showing '(1) the purchase and sale (2) of the same delivery month of the same futures contract (3) at the same (or a similar) price'. *Wilson v CFTC*, 322 F.3d 555, 559 (8th Cir. 2003) (citation omitted). Intent must be proven to establish a violation of Section 4c of the Act. *Reddy v CFTC*, 191 F.3d 109, 119 (2d Cir. 1999).
- 30 Accommodation trading 'involves ostensibly independent trades that were actually envisioned as paired at the time of initiation. The paired trades are designed to offset each other with little or no change in the trader's financial position . . . In these circumstances, market risk is negated because, by pairing the ostensibly independent trades at the time of initiation, the trader can predictably reduce risk to an inconsequential level'. *In re Baron*, CFTC Docket No: 12-30 (July 26, 2012) (citing *In re Fisher*, [2003-2004 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 29,725 (CFTC Mar. 24, 2004)).
- 31 See, e.g., 7 U.S.C. § 6a ('. . . For the purpose of diminishing, eliminating, or preventing such burden, the Commission shall . . . by rule, regulation, or order, proclaim and fix such limits on the amounts of trading which may be done or positions which may be held by any person, including any group or class of traders, under contracts of sale of such commodity for future delivery on or subject to the rules of any contract market or derivatives transaction execution facility, or swaps traded on or subject to the rules of a designated contract market or a swap execution facility, or swaps not traded on or subject to the rules of a designated contract market or a swap execution facility that performs a significant price discovery function with respect to a registered entity . . .').
- 32 As one example, the CFTC has devoted significant time and enforcement resources in recent years to alleged violations of exchange rules governing permitted, off exchange futures transactions, e.g. block transactions and exchange for related positions (exchange of futures for physical, exchange of futures for swaps and exchange of options for options), levying significant fines against market participants for, among other things, failure to maintain required records for such transactions and failure to report such transactions to the exchange on a timely basis.

For example, in the wake of the Enron accounting scandal, the CFTC moved aggressively to police conduct in the US natural gas markets, pursuing numerous energy companies for reporting of alleged false information about natural gas transactions to price index compilers like Platts.³³ Numerous market participants pushed back, arguing that the CFTC lacked the authority to enforce conduct in the physical commodities markets. The courts disagreed, holding that the CEA, ‘while granting the CFTC with exclusive jurisdiction to regulate transactions involving the futures markets, does not limit the CFTC’s broad authority to regulate price manipulation of any commodity in interstate commerce, as set forth in § 13(a)’.³⁴ To this day, the CFTC continues to enforce alleged abuse of a variety of price formation processes, including, most recently and perhaps most notably, the financial benchmarks.

In 2007, the CFTC introduced an arguably new theory of the case, charging an oil company, not with submitting false information about transactions to a price index compiler, but with executing transactions at alleged uneconomic prices for the purpose of causing the index to set at artificially low prices.³⁵ Alleged uneconomic trading in one market to distort prices in a separate, related market is now a staple theory of enforcement regulators in the United States and abroad.

In 2010, during a period of continued high oil prices, the CFTC pushed the envelope anew, this time pursuing a trading company for allegedly pushing the price of West Texas Intermediate crude oil futures through a perceived resistance level.³⁶ In concluding that a violation of the CEA had occurred, the CFTC rejected the respondent’s argument that it was prepared to trade at the price levels in question and that the levels in question were consistent with market fundamentals. Notably, the CFTC did not characterise the conduct as manipulation or attempted manipulation under Section 9(a)(2). Rather, the CFTC charged a violation of Section 4c(a)(2)(B), which prohibits transactions that cause a price to be reported that is not a true and bona fide price.³⁷

In 2015, the CFTC tacked again, this time injecting the concept of insider trading into the commodities markets. The CFTC charged a petrol trader with ‘misappropriating non-public, confidential material information’ belonging to his employer to trade in his own personal account.³⁸ The claim of misappropriation is generally associated with the securities markets, not the markets for commodities. The claim arises where one person obtains material, non-public information from another person, where a duty of ‘trust and confidence’ exists between the two persons, and the recipient of the information uses the information for his benefit in breach of the duty of trust and confidence owed to the provider of the information.³⁹ Interestingly, the facts giving rise to the alleged claim were anything but novel – the respondent’s alleged conduct amounted to front running. What

33 See, e.g., *In re Reliant Energy Services, Inc.*, CFTC Docket No. 4869-03 (Nov. 25, 2003).

34 See, e.g., *CFTC v. Reed*, 481 F.Supp. 2d 1190, 1196 (D. Colo. Mar. 27, 2007).

35 See *In re Marathon Petroleum Co. LLC*, CFTC Docket No. 07-09 (Aug. 1, 2007).

36 See *In re ConAgra Trade Group, Inc.*, CFTC Docket No. 10-14 (Aug. 16, 2010).

37 7 U.S.C. § 6c(a)(2)(B).

38 See *In re Motazed*, CFTC Docket No. 16-02 (Dec. 2, 2015).

39 See, e.g., *U.S. v. O’Hagan*, 521 U.S. 642 (1997).

was novel was the CFTC's decision to characterise the conduct as misappropriation. In support of this claim, the CFTC pointed to language found in the preamble to Rule 180.1:

Depending on the facts and circumstances, a person who engages in deceptive or manipulative conduct in connection with any swap, or contract of sale of any commodity in interstate commerce, or contract for future delivery on or subject to the rules of any registered entity, for example by trading on the basis of material non-public information in breach of a pre-existing duty (established by another law or rule, or agreement, understanding, or some other source), or deception, may be in violation of final rule 180.1.⁴⁰

As of the date of this publication, it is not clear how the CFTC intends to use its misappropriation authority. For now, the market knows only that the agency has added another arrow to its enforcement quiver.

40 *Motazed*, CFTC Docket No. 16-02, at 6 (citing 76 Fed. Reg. 41,398, 41,403 (July 14, 2011)).

Appendix 4

About the Authors

Anthony M Mansfield

Allen & Overy LLP

Anthony focuses his practice on enforcement defence, civil litigation and regulatory advice involving commodities, securities and related financial derivatives. He regularly represents clients before US and European regulators, including the Commodity Futures Trading Commission (CFTC), the Federal Trade Commission, the Federal Energy Regulatory Commission, other federal and state regulatory agencies, the UK Financial Conduct Authority and the European Commission. Anthony works with a broad spectrum of market participants, including US and non-US financial institutions, major integrated oil companies, global trading companies, hedge funds, energy marketers, intermediaries such as futures commission merchants and swap dealers, and exchanges. In recent years, Anthony has been heavily involved in advising clients with regard to the regulatory overhaul of the over-the-counter derivatives markets within and outside the United States.

Prior to returning to private practice in 2007, Anthony served as a chief trial attorney and counsel to the director in the Division of Enforcement of the CFTC. While there, he managed a team of lawyers and investigators focused primarily on manipulation in the commodities markets. He was responsible for the Division's investigations of numerous energy and power marketing companies relating to price reporting in the natural gas markets. He also played a central role in the Commission's subpoena enforcement actions against natural gas price index compilers, involving First Amendment 'Reporter's Privilege' issues, and was central in the Commission's defence of its exercise of jurisdiction over false reporting in the natural gas markets pursuant to the Commodity Exchange Act.

Anthony is a former member of the CFTC's Energy and Environmental Advisory Committee and the Law and Compliance Executive Committee of the Futures Industry Association.

Allen & Overy LLP

One Bishops Square

London E1 6AD

United Kingdom

Tel: +44 20 3088 0000

Fax: +44 20 3088 0088

anthony.mansfield@allenoverly.com

www.allenoverly.com

The Guide to Energy Market Manipulation is a survey of the law on market manipulation in the energy sector across nations that reflects the collective wisdom and real-life experiences of 30 distinguished practitioners from 18 different organisations.

Part I looks at legislation and jurisprudence where laws have been applied, most notably North America, but also Europe, the UK and Australia. Part II shines a light on enforcement practices, including negotiating with regulators and private actions. Part III looks at the regulatory process itself: administrative law, evidence and the use of expert evidence.

Visit globalcompetitionreview.com
Follow @gcr_alerts on Twitter
Find us on LinkedIn

ISBN 978-1-78915-092-6