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UNDERSTANDING AND PREPARING FOR THE CONVERGENCE OF US CRIMINAL ANTITRUST ENFORCEMENT WITH ANTI-MANIPULATION LAWS REGULATING DERIVATIVES, FX, CRYPTOCURRENCY, FUTURES, OPTIONS, AND OTHER COMMODITIES UNDER THE COMMODITY EXCHANGE ACT

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As recent enforcement history reveals, market participants that coordinate with competitors to violate the U.S. Commodity Exchange Act's ("CEA") prohibitions on manipulation of prices in covered product markets, may also find themselves subject to criminal liability for collusion under the Sherman Antitrust Act. While there is long historical precedent for this statutory overlap, the enforcement priorities of the U.S. Commodity Futures Trading Commission ("CFTC") and the U.S. Department of Justice, Antitrust Division ("DOJ") have recently converged. Complicating this convergence is that the standards under each regime differ, at times materially. Participants in the many markets covered by the CEA should be aware of this convergence and enact internal policies designed to promptly identify and investigate possible violations, including with an eye toward making a speedy assessment whether to disclose the conduct to the federal enforcement agencies under their respective self-reporting regimes.

I. INTRODUCTION

The CEA empowers the CFTC with enforcement authority over trading conduct in a vast array of product markets, including those for futures and options contracts traded on regulated exchanges,

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and most swaps contracts, as well as interstate trading of nearly all "commodities" including traditional physical commodities (like wheat or silver) as well as currencies and financial instruments and any other right or interest in which futures contracts are or may be traded (collectively, "Covered Instruments," and the markets for those instruments, "Covered Markets").[1] As participants in those markets are likely aware, CFTC may pursue civil enforcement actions targeting conduct that manipulates (or attempts to manipulate) price in those markets, and the U.S. DOJ may pursue criminal charges of that same misconduct. But when prohibited manipulative conduct is engaged on a concerted basis with competitors at the same level of a trading market, it can also be targeted for separate—and indeed, simultaneous—criminal antitrust enforcement by the DOJ, Antitrust Division, as anticompetitive conduct that violates Section 1 of the Sherman Antitrust Act of 1890.[2]

For many years, the risk of criminal antitrust enforcement in the commodity and derivatives trading markets was largely theoretical, as the Antitrust Division was inactive in respect of those markets. But in the last decade, some of CFTC's most high-profile market manipulation settlements—including the agency's investigations into the setting of the London Interbank Offered Rate ("LIBOR") and pricing of foreign exchange instruments ("FX")—have featured parallel criminal cartel investigations in which the Antitrust Division has secured corporate guilty pleas and imprisonment for employees participating in the manipulative conduct on a concerted basis with competitors.

Based on recent public pronouncements, the Antitrust Division's focus on cartel conduct in the Covered Markets appears set to continue as a core component of the current administration's antitrust enforcement regime. Senior Antitrust Division officials have said collusion in the trading markets is "no different" than collusion in the markets for sorts of "traditional products and services" that the Antitrust Division routinely prosecutes.[3] And the Antitrust Division affirmed that its strategy for the coming year includes "continu[ing] to uncover and prosecute cartels . . . in many areas including financial services."[4]

As a result, it is advisable for market participants to develop and maintain internal compliance and risk functions capable of (1) discouraging this conduct before it begins, (2) spotting the signs of this type of conduct quickly once undertaken, and, (3) when confronted with evidence of possible manipulative conduct in the Covered Markets, to conduct an immediate, expedited internal investigation into potential violations of both the CEA and the Sherman Act. The stakes are high at the point of early detection: in addition to allowing prompt cessation of any misconduct, DOJ Antitrust Division's Corporate Leniency program offers full immunity to the first company (and its employees) to report a criminal violation of the antitrust laws. The other members of the conspiracy are at risk of full prosecution. CFTC also has a cooperation program, though the benefits and obligations differ (sometimes in material ways).

That said, such an expedited assessment can be challenging, because in addition to time pressure on identifying and analyzing relevant trading and market data along with related communications, the legal standards and penalties under those statutes are sufficiently different to merit differing approaches to investigations

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under those laws. And the self-reporting leniency and cooperation regimes adopted by each enforcing agency are not fully aligned. Further, the line between permissible trading conduct and collusion is not always clear. Unlike the markets for most consumer goods, the efficient operation of many markets covered by the CEA—particularly decentralized, over-the-counter markets—frequently depends on *some* degree of interaction between nominal competitors, for example, as market-makers, trading counterparties, and/or resources of price discovery through "market color"-style communications. This article will describe the CEA and Sherman Act prosecution of market manipulation misconduct and suggest expedited means of identifying and responding to potential violations, with a view towards reducing exposure to potential government actions or private claims.

II. HISTORICAL BACKGROUND & LEGAL STANDARDS

Unlawful market price manipulation in the Covered Markets can take many forms, including through "rumors or false information conveyed to the marketplace" or "rigged trades." In addition, market participants may seek to manipulate price through what are commonly thought of as "market power manipulation[s]," including so-called "corners" or "squeezes," in which traders accumulate large positions in a futures contract (or underlying commodity), causing a shortage of available supply and forcing counterparties to pay prices dictated by the manipulator(s).[5] It can also occur through purposeful, focused trading aimed at short-term price distortion. Importantly, there is an overlap between conduct punishable as commodities market manipulation or abuse under the CEA and conduct criminally punishable as a restraint of trade under the Sherman Act. This overlap has historical precedent.

A. SHERMAN ACT

Section 1 of the Sherman Act,[6] which in pertinent part prohibits "contract[s], combination[s] . . . or conspirac[ies] in restraint of trade," is the principal federal statute used to prosecute cartel conduct between competitors in or affecting U.S. commerce, long recognized by the courts as "the supreme evil of antitrust."[7] Importantly, the Sherman Act predates any congressional regulation of trading in the commodity futures markets, and indeed, was an early tool of prosecutors seeking to punish manipulation in those markets.

The agricultural commodities futures markets developed in the United States in the 1860s, and almost from inception, were subjected to attempts to manipulate price, including through market-power manipulations such as corners and squeezes.[8] While Congress considered (and rejected) an effort to include in the Sherman Act provisions stating it applied to commodity futures trading, the U.S. Supreme Court recognized in the early part of the last century that the Sherman Act could be deployed to pursue criminal actions against parties who conspire to manipulate the commodities markets.[9]

In *United States v. Patten,* the Supreme Court held in 1913 that prosecutors could state a criminal action under Section 1 based on an alleged conspiracy by traders to "corner" the cotton market by buying up futures on the New York Cotton Exchange "greatly in excess of the amount available for delivery when deliveries should become due," creating "abnormal demand" on the part of short sellers who "would pay excessive prices to obtain cotton for delivery upon their contracts."[10]

The Court said cornering strategies "produce practically the same evils as does the suppression of competition," in that they "thwart the usual operation of . . . supply and demand," by "artificially enhancing the price of a commodity."[11] Indeed, the Supreme Court's *Socony-Vacuum* decision, coming a generation later and "widely considered the definitive statement of the rule against price fixing," concerned a conspiracy to restrain the market for a commodity: oil.[12] There, the Court said price-fixing prohibited by the Sherman Act includes any "combination formed for the purpose or with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity."[13]

Criminal violations of Sherman Act Section 1 can give rise to penalties to companies of up to USD 100 million or twice the conspirators' gross gain or loss caused by the *entire* conspiracy (not just attributable to the defendant's own conduct).[14] Individuals found guilty of a Sherman Act violation can be sentenced to up to 10 years in prison and fined up to USD 1 million.[15]

B. COMMODITY EXCHANGE ACT

More than 45 years after passing the Sherman Act, Congress enacted the CEA of 1936 to, among other things, "deter and prevent price manipulation or any other disruptions to market integrity" and "promote responsible innovation and fair competition" in the Covered Markets.[16] In service of these aims, the CEA—while never defining the term "manipulation"—is nonetheless brimming with prohibitions against manipulation of prices. In short, CFTC's traditional, pre-Dodd Frank Act test for price manipulation requires showing a defendant "specifically intended to"—and did—cause an "artificial" or "distorted" price; that is, a price that does not reflect the legitimate forces of supply and demand.[17] Interpreting courts read manipulation broadly to include "any and every operation or transaction or practice" that distorts price.[18] Efforts to influence price, including trading for the underlying purpose of moving price (as opposed to trades incidentally affecting price), may constitute manipulation or attempted manipulation. The CEA also prohibits false reporting in transmission or delivery of market reports or other information that tends to affect price.[19]

In addition, the CEA, as amended by Dodd-Frank,[20] prohibits certain disruptive trading practices that can impact price, such as "spoofing" (bidding or offering with the intent to cancel the bid or offer before execution). As part of the Dodd-Frank Act, Congress supplemented CFTC's existing enforcement authority with CEA section 6(c)(1), a new fraud and antimanipulation provision that resembles Exchange Act Section 10(b), prohibiting the use of "any manipulative or deceptive device or contrivance" in connection with a product or instrument covered by the CEA.[21] CFTC is authorized to pursue civil penalties and damages for violations of these provisions.[22] In addition, willful violations of the CEA (and implementing regulations) are crimes prosecutable by DOJ (usually through the Criminal Division or United States Attorney's offices); as with criminal antitrust violations, criminal CEA violations are subject to fines of up to USD 1 million and imprisonment for up to 10 years.[23]

Through the foregoing provisions, CFTC possesses the tools to target concerted activity that manipulates price in the Covered Markets.[24] Each of the foregoing violations can be accomplished not just unilaterally, but jointly by multiple mar-

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ket participants acting in concert. The CEA also provides a private right of action for market manipulation as well as for "aiding and abetting" of a primary violation.[25]

C. THE ANTITRUST DIVISION'S ENFORCEMENT PRIORITIES TURN TO THE COVERED MARKETS

For many years after CEA was enacted, DOJ pursued no antitrust actions targeting trading manipulation in the Covered Markets.[26] But that changed with the high-profile LIBOR and FX cartel cases. Since 2012, the Antitrust Division (in conjunction with DOJ's Fraud Section), has prosecuted at least 21 individuals and 10 corporations for conduct that CFTC asserted (in parallel) constituted punishable market manipulation.[27] A senior Antitrust Division official recently acknowledged that "awareness of antitrust issues" was for years "more commonplace" in "traditional industries like manufacturing," but emphasized that "[t]oday," the Division recognizes that "when it comes to antitrust enforcement, the financial services sector is in many ways no different than any other industry."[28]

Several factors may explain this shift in focus for the Antitrust Division. First, the global financial crisis invited broad scrutiny of conduct in the trading markets. In 2009, the Antitrust Division joined a presidentially-created Financial Fraud Enforcement Task Force, working with DOJ's Fraud Section, as well as CFTC and other agencies, in a collaboration that resulted in criminal prosecutions of more than 140 individuals and billions in corporate guilty pleas, including for antitrust crimes.[29] In addition, the advent of electronic communications such as emails, chat rooms, text messages, and digitally-recorded audio communications, and their use in the trading markets, has created new sources of evidence of agreements between competitors, which in the ordinary course are inherently self-concealing (since each conspirator is exposed to risk if the agreement comes to light). Further, prosecutors are likely to be well aware of the comparatively lighter evidentiary burden for criminal Section 1 violations; for example, as set forth below, once cartel action is proven (beyond a reasonable doubt), there is no need to prove existence of an "artificial price," as there would be for a CEA manipulation violation.

III. IDENTIFYING CONDUCT THAT MAY DRAW JOINT CFTC-ANTITRUST DIVISION SCRUTINY

In this landscape, counsel for market participants would be well-advised to remain vigilant in detecting potentially-manipulative conduct in the Covered Markets that could *also* constitute the sorts of concerted activity that raise the threat of criminal antitrust exposure. Here are some key considerations for counsel to bear in mind in making those assessments.

A. CRIMINAL SHERMAN ACT LIABILITY REQUIRES "HORIZONTAL" CONDUCT - WHO IS A COMPETITOR?

A critical threshold question in assessing whether concerted manipulation could give rise to a criminal Sherman Act violation is whether the restraint is properly characterized as "horizontal" or "vertical." Though Section 1, by its terms, gives rise to both civil and criminal liability, the DOJ Antitrust Division, as a policy, pursues criminal charges only for "horizontal" restraints between competitors.[30] This exercise of

prosecutorial discretion is rooted in the recognition that, in markets generally, "vertical" restraints between entities at different levels of a distribution chain may sometimes have *pro*-competitive benefits, and are therefore analysed under a so-called "Rule of Reason," which weighs the pro- and anti-competitive effects of the arrangement.[31] By contrast, a narrow class of "hard core" restraints between horizontal competitors—including agreements to fix prices, rig bids, or divide customers or markets—are deemed so antithetical to the ideals of free competition that they are deemed *per se* violations of Section 1, inherently lacking in—and thus eliminating the need to assess—any plausible pro-competitive justification.[32] This means whether a challenged restraint is viewed as horizontal or vertical "can make a huge difference in the outcome of an investigation"; in other words, that "classification is everything."[33]

A restraint is typically "horizontal" if it is between competitors at the "same level" of a market.[34] In markets for commercial goods and services, this analysis is reasonably straightforward: horizontal competitors are typically those firms operating at the same level of a distribution chain. A manufacturer's horizontal competitors include other manufacturers; downstream wholesalers would be vertically positioned to the manufacturer, and horizontally positioned as to one another.[35]

This analysis applies with equal force to the Covered Markets, and in some trading market settings, is no more challenging than in commercial goods and services markets. For example, in reinstating Section 1 civil claims by private investors alleging a conspiracy to manipulate LIBOR, the Court of Appeals for the Second Circuit focused on the role of defendant LIBOR panel banks competing with one another "as *sellers*" of LIBOR-linked financial products.[36]

But the analysis can be complicated when the conduct involves market-makers buying *and* selling in complex, decentralized, over-the-counter markets. For example, in May 2018, a New York federal court in *United States v. Usher* affirmed during pretrial motion practice that an Antitrust Division indictment satisfactorily asserted a horizontal restraint on the part of three former currency traders charged with criminal price fixing in connection with the FX cartel investigation. Defendants had argued *per se* treatment was inappropriate—making criminal charges a breach of DOJ policy—because they did not compete on the *same side* of the FX spot market as they "were not always buyers, or always sellers," in that market but instead were "constantly shifting from one side of the market to the other," sometimes buying, sometimes selling, including as "regular [ ] potential counterparties of one another," in a posture the Defendants characterized as "*not consistently horizontal, but instead often vertical*." The court disagreed, holding that the defendants were horizontally positioned to one another because they were accused of rigging the market price of EUR-USD currency pairs, "the very product over which they compete[d]" with one another to buy and sell.[37]

The *Usher* decision underscores that the horizontal-or-vertical question can sometimes be more complicated in Covered Markets than in traditional markets. Indeed, Covered Markets can include participants that are not at the same "level" of their respective industries, yet might under certain circumstances arguably be considered horizontal competitors for price, for pur-

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poses of Sherman Act Section 1. For example, a manufacturer may use derivatives contracts to hedge their exposure to price fluctuations in the market(s) for physical commodities that are production inputs; meanwhile, an investor may enter the same derivatives market to speculate on future changes in price in that market. While the manufacturer and investor would not appear to be natural horizontal competitors in their respective markets (for manufactured goods, and for trading and investment), they might, if the *Usher* rationale were extended, be considered competitors in the market to buy or sell derivatives contracts, exposing them to potential criminal liability for conspiring with one another to manipulate those markets.

Indeed, the Antitrust Division has shown a willingness to view market participants as horizontal competitors in contexts *other than* those parties' natural markets for their goods or services. For example, the Division has recently prioritized criminal targeting of so-called "no poach" agreements, in which companies agree not to hire each other's employees. In pursuing this conduct, DOJ has emphasized that companies can be subject to *per se*, criminal liability *not* only as horizontal competitors in the respective business lines in which they normally operate, but rather, because, for the purpose of the challenged "no poach" agreement, they are horizontal competitors in the markets for skilled employees.[38] This segmenting reflects that market participants are deemed not to operate *only* in the specific markets in which they sell goods or services, but in any ancillary market in which they become natural competitors.

B. *PER SE* VIOLATIONS OF THE SHERMAN ACT

Counsel assessing potential manipulation between horizontal participants at the same "level" of a Covered Market should assess whether the conduct constitutes (or resembles) the narrow class of *per se* Section 1 violations subject to criminal antitrust enforcement, which include collusion between competitors to (1) fix prices, (2) rig bids, or (3) allocate customers or markets.[39]

1. PRICE-FIXING AS MARKET MANIPULATION

Price-fixing is the "paradigm[atic]" *per se* Section 1 violation, in which competitors agree to fix prices at which they will sell (or buy).[40] The breadth of what is encompassed by price-fixing means concerted efforts between horizontal competitors to engage in trading strategies that manipulate the Covered Markets could give rise to parallel liability for criminal price fixing. The Supreme Court has defined price-fixing broadly to encompass "any combination which *tampers with price structures*."[41] Conspirators need not set a specific, "uniform," or "inflexible" price to subject themselves to liability.

The well-publicized investigation into manipulation of LIBOR is a prime example of the complimentary enforcement approaches applied by DOJ and CFTC to market manipulation as a Section 1 price fixing claim. LIBOR is a benchmark of private borrowing costs, which for years asked a "panel" of large financial institutions to voluntarily self-report their own estimated daily cost of borrowing unsecured funds on the interbank market in a range of currencies and maturities. LIBOR has been called "the world's most impor-

tant number":[42] it was incorporated as a pricing benchmark in a wide variety of financial products, including commercial loans and mortgages, as well as in derivatives products, such as the Eurodollar futures contract traded on the Chicago Mercantile Exchange (as well as LIBOR-linked options and swaps contracts).

Enforcement agencies around the world asserted that LIBOR panel banks—frequently on their own, but sometimes *in concert* with other panel banks—misstated their LIBOR levels to profit on their own proprietary positions in derivatives products that incorporated those rates as components of price (or, in some cases, to project an image of financial soundness).[43] Given the "high value of the notional amounts underlying derivatives transactions tied to LIBOR," even "very small movements" in LIBOR could lead to a "significant positive impact on the profitability" of a panel bank trader's LIBOR-linked portfolio.[44]

Press reports identify CFTC as the first regulator to investigate possible LIBOR manipulation in 2008.[45] The Commission subsequently settled allegations of market manipulation against a number of LIBOR panel-banks and brokers. In those settlements CFTC focused on the benchmarks as "commodities in interstate commerce" subject to CEA jurisdiction. CFTC pursued the settling banks for (a) making false and misleading reports in their LIBOR submissions, by reporting rates that underreported their borrowing costs or were intended to benefit derivatives positions; and (b) intentionally manipulating the prices of these commodities. CFTC's LIBOR settlements pointed to this conduct both undertaken unilaterally by settling panel banks, and on a concerted basis between them: in some circumstances, traders at LIBOR panel banks would make internal requests to their respective LIBOR submitters to adjust their submissions; in other circumstances, traders at competing banks *agreed* to ask their respective LIBOR setters to adjust their submissions in parallel directions, presumably to increase their impact on the final, averaged LIBOR. CFTC pursued both courses of conduct as primary violations of the false report and manipulation provisions and pursued the coordinated submissions under the CEA's aiding and abetting provisions.[46]

The DOJ pursued LIBOR manipulation in parallel to CFTC. The Antitrust Division, with the support of immunity applicants for the conduct under the Division's Corporate Leniency Policy, utilized a variety of charging tools at their disposal, such as Deferred and Non-Prosecution agreements, to impose significant corporate penalties on several panel banks. Consistent with the limits of Sherman Act Section 1, the Antitrust Division focused *only* on concerted efforts between competing banks that coordinated their LIBOR submissions.[47] In contrast to CFTC's emphasis on LIBOR as a commodity in interstate commerce, the Antitrust Division—which is not statutorily constrained to oversight of particular product markets within U.S. commerce—focused instead on LIBOR's role as a component of price for LIBOR-linked products, and on the panel banks' role as competitors in the market to sell such products.[48]

2. MANIPULATIVE BID-RIGGING

Bid-rigging is a "species" of price-fixing in which competitors agree to coordinate on the level at which they will bid (or whether they will bid at all).[49] Bid-rigging is "inherently anticom-

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petitive" because it suggests an unusual degree of confidence by the losing bidder that the winning bidder will reciprocate.[50]

In traditional markets, bid-rigging is an effective means of restraining trade in goods or services priced through a process of competitive bid-submission rather than a point-of-sale transaction at a price determined exclusively by the seller. By agreeing not to bid—or by submitting higher bids than they otherwise would have—competitors ensure favorable prices for one another. In exchange, this willingness not to bid can be reciprocated in subsequent transactions. Alternately, the winning bidder can agree to compensate the losing/abstaining bidder by sharing a piece of the won business (*e.g.*, the winning bidder as general contractor can nominate the losing bidder as a sub-contractor). DOJ Antitrust Division regularly pursues criminal bid-rigging charges against competitors to sell goods or services at prices that are anticompetitively high, or competitors to buy goods or services at prices that are anticompetitively low, such as residential property sold on foreclosure auction.[51]

Prices in many Covered Markets are typically set through rigorous competition for bids and offers by market participants. This leaves the Covered Markets susceptible to manipulative strategies in which participants coordinate their trading strategies in ways intended to influence price. This conduct can give rise to parallel claims of market manipulation and collusion. The recent FX cartel investigation conducted by DOJ and CFTC (among other global regulators) of foreign exchange traders from major "dealer" banks—who executed trades on behalf of customers and for their respective banks' proprietary trading accounts—provides a clear example. That investigation concluded that the traders had communicated with each other in online chatrooms (including one named "The Cartel"), in "near daily conversations" where they agreed to coordinate their trading in the USD/EUR currency pair to maximize their influence on two major daily FX benchmarks to benefit the traders' respective positions at the expense of customers (or others trading in FX-denominated products).[52] Among other things, traders agreed to "refrain from certain trading behavior" that would detrimentally impact a co-conspirator's open trading position.[53]

As in LIBOR, the CFTC (which secured a total of $1.8 billion in penalties from several dealer banks) focused on false reporting and manipulative conduct, including by "disclos[ing] confidential customer order information and trading positions."[54] DOJ Antitrust (six bank guilty pleas, more than $2.6 billion-plus in penalties)[55] focused on the conduct as conspiring to "rig bids and offers on" Euros and USD exchanged in FX spot markets.[56]

Of course, the FX investigation also highlights the challenges prosecutors face when pursuing criminal antitrust charges in open court for alleged collusion in the Covered Markets, in which setting the Antitrust Division must prove all elements of a Section 1 violation beyond a reasonable doubt. In subsequent criminal prosecutions of bank employees involved in the conduct underlying the financial institutions' FX guilty pleas, the Antitrust Division described the challenged conduct as "classic examples of bid rigging" whereby one defendant would (1) withhold bidding while a conspirator was bidding, for the purpose of maintaining or depressing price; or (2) refrain from trading into an FX benchmark

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fix as a seller when a co-conspirator was on the other side of the market.[57] At trial in the afore mentioned *Usher* case, the Antitrust Division relied on, among other things, messages from the "Cartel" chat room and testimony from a former currency trader cooperating with the government's case pursuant to a non-prosecution agreement. But the jury acquitted all three defendants in a matter of hours. Following the October 2018 verdict, the jury foreman explained in press reports that while jurors accepted the traders behaved as alleged, "there was not enough evidence" that the conduct amounted to a criminal Section 1 violation as opposed to normal trading conduct.[58] For its part, DOJ announced after the *Usher* acquittal that it "remains committed to holding individuals accountable for their roles in committing complex financial crimes."[59] Of course, it remains to be seen whether this outcome in *Usher* chills the Antitrust Division's interest in pursuing criminal Section 1 violations in the Covered Markets. However, the Division has since pressed ahead with at least one further criminal Section 1 claim against an ex-JP Morgan trader accused of conspiring to rig currency pairs, in an action styled similarly to the *Usher* case.[60] Trial in that matter is presently set for October 2019.

3. MANIPULATIVE ALLOCATION ARRANGEMENTS

The Antitrust Division also pursues criminal, *per se* charges against competitors who agree to allocate or divide markets or customers between them. Allocation restrains competition not just on price, but on *all* variables as to which competitors may pursue business (such as the quality of the offering). When rival firms agree not to compete for certain business, the conspirator that "wins" that business is potentially able to charge the customer more than they otherwise could have in a competitive market. In traditional markets, an allocation arrangement can take a variety of forms, including (a) agreements to refrain from soliciting or bidding for business in particular markets; (b) dividing up customers and agreeing not to approach them; or (c) purposefully failing to meet the needs of particular customers (such as by agreeing not to carry products a given customer requires).[61]

As a practical matter, allocation of specific customers would appear to be difficult in certain Covered Markets, such as those taking place on a multi-participant exchange, in which parties transact through an anonymous public auction rather than with identified trading counterparties. But participants in decentralized, over-the-counter trading markets could perhaps accomplish an allocation arrangement, for example, by agreeing with one another *not* to make markets or *not* to offer competitive prices for particular customers, leaving a single market-maker free to raise prices for that customer. For example, the New York Department of Financial Services ("DFS") penalized Deutsche Bank in 2018 based upon a finding that certain of its salespeople "explicitly coordinated" with their counterparts at other banks, to "secretly coordinate bids for a particular customer's business," agreeing with one another to reciprocally "overprice [their] bid[s]" for particular transactions.[62] According to DFS, the result of this arrangement was that "[t]he bank that did not overbid would then 'win' the bid," while earning "a higher markup than would have been the case" had the banks competed for the customer's business.[63] In this way, the participants allegedly engaged in bid-rigging

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conduct that had the effect of allocating customers among themselves.

C. COMPARISON OF *PER SE* RESTRAINTS WITH CEA MANIPULATION

The standard of proof for CEA manipulations is a challenging one for authorities to meet. Prior to the enactment of the Dodd-Frank Act, at least one commentator had referred to manipulation as virtually "unprosecutable."[64] CFTC had long chafed under its traditional manipulation standard, maintaining that the agency's enforcement efforts were hampered by the need to establish elements such as manipulative intent and artificial price (elements the proof of which, as noted below, remains in question under CFTC's post-Dodd Frank antifraud and manipulation authority).[65] Indeed, given the right facts (horizontal conspiracy), a criminal Sherman Act violation, requiring proof beyond a reasonable doubt, may in certain important ways be *easier* to establish than a civil enforcement action, requiring a mere preponderance of the evidence, by CFTC under its traditional manipulation standard. Simply put, this is because the CEA contains no clear analogue to the *per se* standard for horizontal restraints prohibited under the Sherman Act. This section considers some of the key elements of CFTC's traditional manipulation standard and how they differ from the *per se* standard applicable to cartel conduct under Section 1.

1. INTENT

CFTC's traditional, pre-Dodd Frank manipulation standard requires "specific intent to create an 'artificial' or 'distorted' price."[66] The challenge in meeting this standard is that, in many forms of market manipulation targeted by the CEA, the manipulative conduct consists of what is, after all, otherwise-lawful trading activity (rather than, say, fraudulent statements designed to move price). In CFTC's oft-cited 1982 *Indiana Farm Bureau* decision, the agency called specific intent to create an artificial price "the ***essence*** of manipulation," without which such legitimate trading activity risked "be[ing] regarded with the advantage of hindsight as unlawful," a prospect that would "wreak havoc with the market place."[67] Over time, critics of this standard have complained that it is challenging to meet because it requires hard-to-obtain "smoking gun" evidence of a trading party's specific intent to manipulate price through their transactions (and, as discussed below, that the effect of this conduct was to create an "artificial price").[68] Notably, since 2011 CFTC has taken the position that the anti-fraud and anti-manipulation provision added to the CEA as part of the Dodd Frank reforms in 2010, as implemented by CFTC Rule 180.1, can target market manipulation under a scienter standard of "recklessness," regardless of whether the conduct at issue was intended to create an artificial price.[69] That position is subject to judicial review and is not yet settled.[70]

In contrast to the "specific intent" requirement of the traditional CEA manipulation standard, *per se* liability under Sherman Act Section 1 requires only a showing of a general intent to conspire. This is a comparatively low threshold for prosecutors to meet: knowingly participating in a conspiracy is sufficient to establish this element.[71] Thus, there may be cases where DOJ can prove a course of conduct satisfying the elements of Sherman Act Section 1, but CFTC cannot prove a concerted manipulation. Of course, much as the *per se* Sherman Act standard embraces the view

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that price coordination between horizontal competitors inherently lacks any pro-competitive justification, CFTC would likely argue that trading activity coordinated with horizontal competitors bespeaks a manipulative intent.

2. ABILITY & EFFECT

CFTC's traditional, pre-Dodd Frank manipulation test also requires a showing that a defendant not only intended to, but had the ability to—and *did*—create an "artificial price."[72] The CFTC's *Indiana Farm Bureau* opinion 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," but rather that they succeeded in doing so.[73] Courts typically define an "artificial price" simply as a price "clearly outside the 'legitimate' forces of supply and demand."[74] As a practical matter, courts look to economic analyses of conduct to determine whether a price was "artificial."

CFTC has long chafed at the need to establish artificial price to prove a violation of the CEA. Although in recent years CFTC has secured numerous settlements in enforcement actions involving alleged manipulation under its pre-Dodd Frank antimanipulation authority, CFTC had historically experienced difficulty satisfying its burden of proving artificial price in judicial proceedings. Indeed, one commentator lamented that determining what constitutes an artificial price is "virtually impossible."[75] Perhaps for this reason, CFTC had recently adopted the position that, to prove manipulation under its traditional standard, it need only establish the ability to, and the accomplishment of, *influence* over price (as opposed to a truly "artificial" price). That assertion was rebuked in November 2018, in a strongly-worded decision by a New York federal court dismissing manipulation-related charges pursued by the agency in *CFTC v. Wilson and DRW Investments, LLC*, in which the judge criticized CFTC's arguments as an effort to "lower the bar" in proving manipulation by "read[ing] out the artificial price element," an approach the court concluded "finds no basis in law."[76]

CFTC has taken what is arguably an even stronger position with regard to its post-Dodd Frank Rule 180.1, asserting that the rule prohibits, among other things, "fraud and fraud-based manipulative schemes," and that this is so "regardless of whether [that conduct] was intended to *or did* create an artificial price."[77] It remains to be seen whether CFTC will persist and prevail in respect of this aggressive assertion regarding its post-Dodd Frank authority.

In contrast to CFTC's standards, DOJ need not establish price control or even price influence by conspirators to establish a criminal violation of Section 1, since such *per se* restraints of trade necessarily violate that Section without any examination into their effect on competition. This is because the *per se* offense is not "the charging of a monopoly price," but rather "the conspiracy, the attempt" to do so.[78] For clarity, the premise of the *per se* standard is not that horizontal agreements are competitively harmful absent market power, but that the standard "assumes the existence of market power," because the restraints involved make economic sense only on the "premise that the firms involved have market power."[79] Courts have reasoned that this makes the inquiry into the economic power of parties to a horizontal restraint "not worth the considerable costs and uncertainty that is inevitably required."[80]

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IV. NAVIGATING PARALLEL REGULATORY REGIMES IN AN EXPEDITED INTERNAL INVESTIGATION

In addition to understanding the varying elements of the relevant Sherman Act and CEA violations, participants in the Covered Markets should develop internal procedures and plan for how to address the risks those violations may occur. These include (1) developing up-front compliance tools to train employees and ready the company to manage a regulatory investigation; (2) planning steps to investigate potential misconduct once identified; and (3) understanding the dynamics of DOJ's and CFTC's self-reporting policies.

A. DEVELOPING AND MAINTAINING A STRONG CULTURE OF COMPLIANCE AND PREPAREDNESS

The most important early steps a company can take to avoid risks of competition liability in the Covered Markets are to train and educate employees to understand the law and the risks of non-compliance, including legal risks to the company and employee and professional risks to employees participating in misconduct. These steps should also include encouraging employees to report potential misconduct of which they become concerned (without fear of reprisal for doing so), and training employees on how to interact with competitors, particularly in financial markets where market-making correspondence with competitors is challenging to distinguish from actionable restraints. Limiting and appropriately monitoring communications channels with competitors is also prudent. In addition, the company should put in place strong data retention policies, so that it can investigate any potential misconduct and preserve the option of providing the appropriate authorities with an informed assessment. These steps will have value in helping to prevent or identify risk points. And the benefits may soon expand. Recently, a senior DOJ Antitrust Division official explained that the Division, in response to feedback from market participants, is "re-evaluating" its policies regarding corporate compliance efforts that are "pre-existing" when criminal cartel conduct is identified, including "carefully examining" whether to give cooperation credit under federal sentencing guidelines for strong corporate compliance programs that nonetheless failed to catch the cartel behavior at issue in a DOJ investigation.[81]

Another important step before any misconduct has been identified is for the company to prepare itself for an eventual regulatory investigation. This investment of time *before* a regulator or law enforcement agency contacts the company can have important benefits. For example, in-house lawyers (or even trading members of the business) may be better-prepared to protect the attorney-client privilege or work product protection when dealing with investigating authorities. One important example of this is preparedness for so-called "dawn raids," in which authorities arrive unannounced at the premises of an investigative target to secure documents and materials potentially relevant to that investigation. At the time of most dawn raids, the target company is not previously aware of the investigation, meaning company lawyers are not standing at the ready when investigators arrive. Moreover, while dawn raids are popular enforcement tools in non-U.S. jurisdictions (such as in Europe), CFTC does not use them at all, and until recently, DOJ Antitrust Division used them only rarely. But that has changed in the last two years, with DOJ dawn

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raids on the rise.[82] For that reason, participants in U.S. Covered Markets may be unfamiliar with best practices for managing an effective corporate response to a dawn raid (e.g., interacting with regulators on-site; documents to disclose and withhold). By taking steps to develop a dawn raid response, market participants can better prepare themselves to address competition issues in the Covered Markets.[83]

B. FIRST STEPS TO IDENTIFY & INVESTIGATE POTENTIAL MISCONDUCT: EXPEDITED INVESTIGATION

While a robust culture of compliance, training, and early internal reporting is essential to effectively minimize the risk of liability for anticompetitive conduct in the Covered Markets, it is difficult for even the most effective compliance program to prevent all potential misconduct before it begins. As a result, participants in the Covered Markets should be prepared to take several expedited first steps to assess a trading pattern and distinguish it as potentially anticompetitive and/or manipulative. This preliminary investigation will normally involve internal resources, potentially internal counsel and compliance staff, as well as external counsel versed in the relevant market operations, legal standards, and the conduct of expedited investigations. Critically, all steps should be taken with a view of the availability and limitations of attorney-client privilege and attorney work product protections in each potentially-relevant jurisdiction. Further, some of these steps should be taken simultaneously, and in any event, on a compressed schedule (particularly employee interviews), to facilitate prompt decision-making.

First, immediately identify the employee(s) most likely to be involved in, or aware of, the potential misconduct. This can involve a speedy assessment of the structure of the trading desks at issue, and preliminary discussions with supervisors, compliance, technology, and other personnel who can immediately acquaint the internal investigators as to the most pertinent communications and records systems as well as any special business or operational practices relevant to the practice(s) at issue. Frequently, collusive trading strategies do not simply require the participation of a single trader internally and at a competing firm; rather, in an era of global trading functions, in which multiple trading employees around the world can share responsibility for a common trading book during business hours in the Americas, Europe, and Asia, such a trading strategy can require buy-in from key employees with oversight of a trading book in multiple jurisdictions.[84]

Second, with the relevant personnel involved, immediately identify, preserve, and analyze a material subset of relevant records. For large, sophisticated market participants, which will likely maintain regular document destruction policies, this step will involve suspending those policies and (subject to certain considerations identified below in connection with DOJ's Corporate Leniency policy) notifying relevant employees of their obligation to maintain all records. For Sherman Act purposes (in which there is need to show only an anticompetitive agreement, rather than an effect), expedited investigation of potential trader collusion normally focuses on recorded communications, including instant messages, e-mails, telephone calls, and—increasingly—messaging apps such as WeChat. In addition, materials preserved on any shared computer hard drives used by relevant employee teams should be preserved. A CFTC-focused investigation will

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also likely involve recorded conversations, but in addition typically analyzes trading and market price data, to assess possible influence on price. The importance of this step cannot be overstated, as the failure to preserve relevant materials in the face of a pending or threatened enforcement action or litigation can have potentially dire consequences to the investigative target, including in the most extreme cases a possible adverse substantive inference attributed to destroyed materials.

Third, take steps to understand the contours of the traded products at issue, including what the products are designed to measure and how they are priced. This will facilitate a targeted assessment of the relevant conduct. For example, the strategies employed to manipulate a derivatives product priced by reference to a benchmark set during European trading hours through an independent assessment by bank employees of prevailing market forces (as LIBOR was) would likely differ from the strategies employed to manipulate a derivatives product priced by reference to observed trading activity during a finite window on a given date each month.

Fourth, discretely take steps to quickly gather additional information to support a decision. For example, an employee who informs in-house counsel of potentially-collusive conduct may possess examples of it in e-mail form. Likewise, companies should very likely interview key employees for their impressions of the conduct. In that event, companies should consider whether the quantity and type of documentary or other evidence gathered thus far suggests a degree of culpability on the part of a particular employee such that the employee should be represented by their own counsel when interviewed, potentially to be paid for by the company as a condition of the employee's cooperation with the investigation. These first-stage assessments can be challenging. A senior Antitrust Division official recently acknowledged that employees trading in derivatives markets "may naturally have more freedom and privacy in how they perform their jobs" than do employees in "more traditional industry[ies]," a circumstance that can make it "more difficult to detect and prevent" collusive trading strategies.[85]

Fifth, in making a threshold assessment of potential risk based on the foregoing steps, companies should be alert to—and closely scrutinize—pretextual employee explanations of seemingly-conspiratorial conduct. A senior Antitrust Division official recently acknowledged that while financial products "may be more complicated" than the markets in which the Division has recently targeted cartel conduct, such as those for auto parts or computer screens, agreements involving price fixing and bid rigging nevertheless "tend to look similar across industries."[86] In other words, conduct that *seems* collusive, may well be. But by the same token, firms should be wary of false positives suggesting collusion where there is none. For example, as the same senior Division official noted, a challenge in identifying collusion in financial markets, including the Covered Markets, is that competitors in those markets "may have far more frequent interfirm communications" than competitors in more traditional markets, because those entities are "often trading counterparties, sometimes on a daily or hourly basis."[87] Counsel will need to distinguish legitimate trading activity from inappropriate collusion.

This type of expedited, preliminary internal

investigation is best accomplished in a few weeks or less. Armed with a threshold understanding of the key employees, the relevant trading incentives, and examples of (and initial explanations for) the conduct, companies can make a better-informed assessment of potential legal liability under one or both regimes, develop an informed (if still preliminary) legal strategy, and assess next steps.

C. THE DOJ'S AND CFTC'S SELF-REPORTING POLICIES

When the foregoing expedited investigative efforts do indeed uncover potentially anti-competitive manipulation of the Covered Markets, counsel should promptly take steps aimed at facilitating a timely decision by management, based on less-than-complete information, about whether and when to self-report the potential misconduct to one or both enforcement agencies. That decision can be difficult: given the dire consequences of criminal enforcement—including significant corporate penalties, possible jail time for employees, negative publicity, and distraction to management—companies may be (understandably) tempted to simply seek to remedy the problem internally, without notifying authorities of the conduct. To respond to those concerns, both the Antitrust Division and CFTC Enforcement Division have adopted programs designed to encourage companies to self-report potential misconduct.

The Antitrust Division's Corporate Leniency Policy, a centerpiece of the Division's criminal enforcement efforts for 25 years, grants full immunity from criminal antitrust prosecution to the first company (and in most cases, its cooperating current employees) to, among other things, (1) report a criminal violation of the antitrust laws about which the Division had no knowledge (or lacked sufficient evidence to prosecute); (2) confess its participation in the conduct; (3) cooperate with the Division's prosecution of co-conspirators; and (4) make restitution to victims of the conspiracy.[88] The restitution prong of the leniency application is typically resolved through civil class action litigations that inevitably commence once news reports emerge detailing that DOJ has subpoenaed the alleged conspiracy participants in connection with a criminal investigation.[89]

CFTC also credits market participants that self-report misconduct and cooperate with the agency's investigation. Though CFTC had long maintained an informal policy of giving cooperation credit to investigative targets, the agency formalized that approach in 2017 through two Enforcement Advisories providing that market participants (companies or individuals) who self-report their misconduct, fully cooperate with CFTC's investigation, and take remedial measures to address the conduct, can enjoy a "substantial reduction" from otherwise-applicable civil monetary penalties, and in extraordinary circumstances, a total declination in prosecution.[90]

D. STRUCTURAL SIMILARITIES TO THE RELEVANT SELF-REPORTING REGIMES

Senior CFTC officials have said one purpose of the agency's adjustments to its self-reporting and cooperation program was to help CFTC's regime "line up with other self-reporting programs," particularly those of the Justice Department (including the Antitrust Division).[91] And the agencies' respective self-reporting regimes do indeed contain common incentives.

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First, both regimes encourage prompt disclosure of the conduct. By granting full amnesty only to the *first* company to report its participation in a conspiracy, the Antitrust Division's Leniency Policy deliberately creates "a race [between] co-conspirators" to report the conduct to the Division, with prosecutors emphasizing that "[o]n a number of occasions," the second company to report a conspiracy "has been beaten by a prior applicant by only a matter of hours."[92] And while Division policy is to provide benefits to the "second-in-the-door" company to report a conspiracy, those benefits typically do not include amnesty from criminal prosecution, and instead may involve efforts to reduce the magnitude of the company's criminal penalty and the penalties imposed on its (cooperating) employees, depending on the value of the cooperation provided by the second-in company.[93] Likewise, CFTC has sought to "incentivize voluntary disclosure at the earliest possible time," by pledging to "recommend" granting "full credit" to reporting companies that come forward "before an imminent threat of disclosure or of a Government investigation," and that "fully disclose[] the facts known to it at the time."[94]

Second, to further encourage recalcitrant firms, the evidentiary thresholds required to make an effective self-report under each regime are comparatively low. The Antitrust Division employs a "marker" system, whereby the first-reporting company can secure its position as the leniency applicant when it "first obtains indications of a possible criminal antitrust violation." A marker holds the first-reporting company's "place at the front of the line" for leniency, "for a finite period of time," while the company "gathers additional information" needed to "perfect" the application.[95] To obtain a marker, a potential leniency applicant need only disclose the "general nature" of the discovered conduct and identify itself and industry involved; the purpose of this disclosure is to facilitate DOJ's assessment of whether leniency is available.[96] Likewise, CFTC "recognize[s] that" companies "may not yet know all of the relevant facts, or even the full extent of the conduct," when first considering whether to report it.[97] On that basis, CFTC offers full cooperation credit to companies that self-reported what is known, "continued to investigate, and disclosed additional relevant facts as the company became aware of them."[98]

E. KEY DIFFERENCES TO BE AWARE OF (WHICH CAN IMPACT INVESTIGATIVE EFFORTS)

But importantly, features of the Leniency Program unique to the context of the Antitrust Division's mandate to pursue *cartel* activity, merit both expedited identification and targeted internal investigation on the part of companies seeking credit from both agencies.

For example, the Leniency Policy and CFTC's self-reporting program differ on how quickly a self-reporting company must terminate (and remediate) reported conduct. In line with typical in-house compliance initiatives focused on identifying and stopping misconduct, CFTC's determination of cooperation credit will assess whether the reporting company has "*[t]imely and appropriate[ly]*" remediated the conduct.[99] By contrast, the Antitrust Division prefers that corporate leniency applicants *do not stop the cartel conduct* before seeking leniency and instead give prosecutors time to consider placing "consensual monitors" with the company: FBI agents embedded in corporate facilities to witness the cartel

conduct taking place and gather evidence to be used in subsequent prosecutions of co-conspirators. Companies self-reporting collusive market manipulation to both agencies could thus find themselves in a difficult position: a decision by the Antitrust Division to utilize a consensual monitor to observe the conduct could effectively discourage the prompt remediation that CFTC demands as a condition of conferring credit under its policy. Fortunately, Antitrust Division prosecutors have indicated that where relevant, they will inform their counterparts in other enforcement agencies when installing a consensual monitor within industry participants.[100]

When self-reporting concerted manipulation to both agencies, companies should stress this point to DOJ and encourage them to alert CFTC to the consensual monitor, to adjust CFTC's expectations for what constitutes sufficiently "prompt" remediation to earn cooperation credit from that agency. Of course, this dynamic could lead to a tension that even disclosure to CFTC may not ameliorate: even if a company's delay to remediate due to a consensual monitorship by the Antitrust Division were to be accepted as appropriate by CFTC, a company could remain vulnerable to private claims alleging damages suffered due to market manipulation caused by that delay. Specifically, given the above-described standards for antitrust violations, the Antitrust Division's consensual monitors may wish to obtain evidence of an ongoing *agreement* between competitors to fix prices with a leniency applicant, which could suffice to prove an antitrust violation. However, if Antitrust Division insists on obtaining evidence of continued *implementation* of such an agreement, including by selling price-fixed products, this could give rise to continued liability under the CEA. As a result, self-reporting companies subject to consensual monitorship should work to strike a balance between the agencies.

Relatedly, and as noted above, best investigative practices typically encourage a company conducting a thorough internal review and self-report to take prompt steps to preserve all relevant materials, including by issuing litigation holds to all relevant employees. Indeed, these retention obligations are made plain in the Federal Rules of Civil Procedure, which set out penalties up to adverse inferences, monetary penalties, or other sanctions, for failure to adequately preserve materials in the face of litigation. And in that regard, both agencies will ultimately demand cooperating firms disclose all relevant information. For example, CFTC's Self-Report Guidance says the agency will assess the "materiality" of the company's assistance, including the conduct of the reporting company's own internal investigation.[101] But Antitrust Division prosecutors, eager to place consensual monitors internally at self-reporting cartelists to gather evidence of cartel members involved in conduct of the conspiracy, are wary of leniency applicants issuing broad litigation holds that could put employees and co-conspirators on notice of a monitoring program.[102] Thus, companies identifying potentially anticompetitive conduct in the Covered Markets should, in the first instance (and until having heard the Antitrust Division's position on whether it intends to put a monitor in place) endeavor to fulfill document gathering and retention obligations in ways intended not to "tip off" relevant employees that an early-stage investigation has commenced.

To earn cooperation credit from both agencies for concerted manipulation, a self-reporting

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company will need to address these issues head-on and square what is expected from each in terms of retention.

ENDNOTES:

[1]7 U.S.C.A. § 1a(9); *see also Commodity Futures Trading Com'n v. American Bd. of Trade, Inc.*, 803 F.2d 1242, 1248 (2d Cir. 1986) (recognizing that nearly "anything" can be treated as a "commodity" subject to CEA).

[2]*See* 15 U.S.C.A. § 1.

[3]*See* Press Release, U.S. Dep't of Justice, Second Foreign Currency Exchange Dealer Pleads Guilty to Antitrust Conspiracy (Jan. 12, 2017), https://www.justice.gov/opa/pr/second-foreign-currency-exchange-dealer-pleads-guilty-antitrust-conspiracy.

[4]*See* U.S. DEP'T OF JUSTICE, ANTITRUST DIVISION, FY 2019 BUDGET REQUEST AT A GLANCE 2 (2018), https://www.justice.gov/jmd/page/file/1033106/download.

[5]*See* Jerry W. Markham, *Manipulation of Commodity Futures Prices—The Unprosecutable Crime*, 8 YALE J. ON REG. 218, 283 (1991).

[6]15 U.S.C.A. § 1.

[7]*See Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 408, 124 S. Ct. 872, 157 L. Ed. 2d 823, 2004-1 Trade Cas. (CCH) ¶ 74241 (2004). Section 1 prohibits *concerted activity* between two or more parties that unreasonably restrains trade in or affecting U.S. commerce. 15 U.S.C.A. § 1 (prohibiting every "contract, combination . . . or conspiracy" in restraint of trade). Section 2 of the Sherman Act prohibits unilateral conduct that "monopolize[s] or attempt[s] to monopolize" trade, and, in theory, this provision could be applied to unilateral restraints of the Covered Markets. 15 U.S.C.A. § 2. But in practice, the DOJ pursues monopoly claims once generationally (*e.g.*, Microsoft in the 1990s), and the FTC, which also has enforcement authority over monopolization conduct through its FTC Act Section 5, has not waded into derivatives markets in recent memory.

[8]*See, e.g.*, Markham, *supra* note 5, at 288.

[9]*Id.* at 291.

[10]*U.S. v. Patten*, 187 F. 664 (C.C.S.D. N.Y. 1911), rev'd, 226 U.S. 525, 33 S. Ct. 141, 57 L. Ed. 333 (1913).

[11]*U.S. v. Patten*, 226 U.S. 525, 33 S. Ct. 141, 57 L. Ed. 333 (1913).

[12]RICHARD POSNER, ANTITRUST LAW 36-37 (U. of Chi. Press 2011) (citing *U.S. v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223-26 n. 59, 60 S. Ct. 811, 84 L. Ed. 1129 (1940)).

[13]*Socony Vacuum*, 310 U.S. at 223. The antitrust laws thus act as a "residual regulator" in the commodity derivatives markets, just as contract or tort law may do. Unlike the CEA, antitrust laws do not serve to impose "first instance supervisory rules" on these markets, but instead to condemn practices in those regulated markets that are found to be anticompetitive on a backward-looking, after-the-fact basis. In that sense, antitrust is comparatively "myopic" in focus: it is concerned "only with preserving competitive markets in the short run." Herbert Hovenkamp, *Antitrust Violations in Securities Markets*, 28 J. CORP. L. 607, 609 (2003).

[14]*See* 15 U.S.C.A. § 1; *see also* 18 U.S.C.A. § 3571(d) (providing alternate fine calculation in excess of USD 100 million); *see also U.S. v. Hui Hsiung*, 778 F.3d 738, 760-61 (9th Cir. 2015) (upholding $500 million criminal penalty against foreign participant in LCD panel price-fixing conspiracy based on the "gross gains to *all the coconspirators*") (emphasis added).

[15]15 U.S.C.A. § 1; OFFICE OF GENERAL COUNSEL, U.S. SENTENCING COMMISSION, PRIMER ON ANTITRUST 2 (2018).

[16]7 U.S.C.A. §§ 1-24. *See* 7 U.S.C.A. § 5(b) (identifying the "Purpose" of the CEA); *see also U.S. Commodity Futures Trading Commission v. Oystacher*, 203 F. Supp. 3d 934, 952, Comm. Fut. L. Rep. (CCH) P 33841 (N.D. Ill. 2016) (holding that CEA's "stated intentions provide an 'intelligible principle' focused on preserving market integrity and protecting market participants by preventing fraudulent and abusive trading practices").

[17]*See In re Indiana Farm Bureau Coop. Ass'n, Inc.*, [1982-1984 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 21,796 (Dec. 17, 1982); *see also In re Amaranth Natural Gas Commodities Litigation*, 730 F.3d 170, 173, Comm. Fut. L. Rep. (CCH) P 32819 (2d Cir. 2013) (identifying elements of market manipulation claim under CEA).

[18]*See Volkart Bros., Inc. v. Freeman*, 311 F.2d 52, 58 (5th Cir. 1962).

[19]7 U.S.C.A. § 6b(a).

[20]Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), Pub. L. No. 111-203, 124 Stat. 1376 (2010).

[21]*Compare* 7 U.S.C.A. § 6(c)(1), *with* 15 U.S.C.A. § 78j; *see also Oystacher*, 203 F. Supp. 3d at 949 (characterizing CFTC Regulation 180.1 as "nearly identical" to Exchange Act Section 10(b) (citations omitted)).

[22]7 U.S.C.A. § 9(10).

[23]7 U.S.C.A. § 13(a)(2).

[24]The CEA itself contains a number of provisions that refer to competition, including provisions requiring CFTC to "endeavor to take the least anticompetitive means of achieving the objectives" of the CEA, in its rulemaking, *see* 7 U.S.C.A. § 19, and prohibiting certain classes of participants in the swaps markets from "unreasonabl[y] restrain[ing] trade," except where such restraints are "necessary or appropriate to achieve the purposes" of the CEA, *see* 7 U.S.C.A. § 6s(j). These sections have never been the basis for an enforcement action under the CEA, and, as noted, they expressly acknowledge that at least some restraints may be "necessary" to achieve the CEA's objectives.

[25]7 U.S.C.A. § 25(a).

[26]Rather, it was private plaintiffs—incentivized by the "treble damages" and "joint and several liability" available under the antitrust laws—who frequently, and sometimes successfully, have alleged that a defendant's manipulation of a commodity market violated both the CEA and the Sherman Act. *See, e.g.*, *Loeb Industries, Inc. v. Sumitomo Corp.*, 306 F.3d 469, Comm. Fut. L. Rep. (CCH) P 29168, R.I.C.O. Bus. Disp. Guide (CCH) P 10330, 2002-2 Trade Cas. (CCH) ¶ 73813 (7th Cir. 2002)). The CEA was amended to provide a private right of action in 1983. *See* 7 U.S.C.A. § 25.

[27]*See* U.S. DEP'T OF JUSTICE, ANTITRUST DIVISION, DIVISION UPDATE SPRING 2017 (2017), https://www.justice.gov/atr/division-operations/division-update-spring-2017/individual-accountability-financial-services-industry.

[28]Andrew Finch, Principal Deputy Assistant Att'y Gen., Antitrust Division, U.S. Dep't of Justice, Remarks, Antitrust in the Financial Sector: Hot Issues & Global Perspectives 4 (May 2, 2018), https://www.justice.gov/opa/speech/file/1060981/download.

[29]*See* U.S. DEP'T OF JUSTICE, ANTITRUST DIVISION, DIVISION UPDATE SPRING 2010 (2010), https://www.justice.gov/atr/public-documents/division-update-spring-2010/criminal-program-update-2010; *see also* U.S. DEP'T OF JUSTICE, ANTITRUST DIVISION WORKLOAD STATISTICS FY 2008-2017, https://www.justice.gov/atr/file/788426/download; Erica Teichert, *Financial Markets Top DOJ Antitrust Priorities*, LAW360 (Mar. 26, 2014), https://www.law360.com/articles/522385/financial-markets-top-doj-antitrust-priorities (quoting DOJ Antitrust officials touting their "*considerable work*" with CFTC and others in "combat[ing] financial fraud").

[30]*See* Thomas O. Barnett, Assistant Att'y Gen., U.S. Dep't of Justice, *Criminal Enforcement Of Antitrust Laws: The U.S. Model*, Address at Fordham Competition Law Inst.'s Ann. Conf. on Int'l Antitrust L. & Pol'y (Sept. 14, 2006), https://www.justice.gov/atr/speech/criminal-enforcement-antitrust-laws-us-model (announcing Antitrust Division enforcement priorities) [hereinafter Barnett Speech].

[31]For example, an electronics manufacturer's territorial restrictions on where its downstream distributors can sell its products may pass muster under Section 1 because the restriction encourages regional competition *between* electronics brands.

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[32] *See* POSNER, *supra* note 12, at 39 (explaining that the *per se* rule was developed "only because the courts (following dominant economic opinion)" had become "confident that the ordinary garden-variety cartel or price-fixing agreement is socially inefficient").

[33] JULIAN O. VON KALINOWSKI ET AL., ANTITRUST LAWS AND TRADE REGULATION § 11.01[1] n.4 (2d. ed. 2018). The Antitrust Division defends this policy distinction as an important means of providing "transparency and predictability in cartel enforcement" and using the clear threat of criminal penalties—subject to the well-defined boundaries of the narrow categories of *per se* conduct—as a "critical foundation for effective deterrence" of hard-core restraints. *See* Barnett Speech, *supra* note 30.

[34] *United States v. Usher*, 17 CR. 19(RMB), 2018 WL 2424555, at *4 (S.D.N.Y. May 4, 2018) (citing *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 608 (1972)).

[35] *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 730 n.4 (1988) ("[A] restraint is horizontal . . . because it is the product of horizontal agreement.").

[36] *See Gelboim v. Bank of America Corp.*, 823 F.3d 759, 771, 2016-1 Trade Cas. (CCH) ¶ 79642 (2d Cir. 2016), cert. denied, 137 S. Ct. 814, 196 L. Ed. 2d 599 (2017) (emphasis added).

[37] *See* Decision & Order at 7, *United States v. Usher*, No. 1:17-cr-00019 (S.D.N.Y. May 4, 2018). This was the theory underlying the bank-level guilty pleas secured by the Antitrust Division in the FX cartel investigation, though those pleas necessarily did *not* test the legality of that position. *See, e.g.*, Plea Agreement at 5-7, *United States v. Citicorp*, No. 3:15-cr-00078 (D. Conn. May 20, 2015).

[38] *See* U.S. DEP'T OF JUSTICE, ANTITRUST DIVISION & FED. TRADE COMM'N, ANTITRUST GUIDANCE FOR HUMAN RESOURCE PROFESSIONALS 2 (Oct. 2016), https://www.justice.gov/atr/file/903511/download ("From an antitrust perspective, firms that compete to hire or retain employees are competitors *in the employment marketplace*" and can be *per se* liable for restraining the employment market, "regardless of whether the firms make the same products or compete to provide the same services." (emphasis added)) .

[39] *See Topco*, 405 U.S. at 607-08.

[40] *See, e.g.*, *U.S. v. Suntar Roofing, Inc.*, 897 F.2d 469, 473, 1990-1 Trade Cas. (CCH) ¶ 68936, 29 Fed. R. Evid. Serv. 1170 (10th Cir. 1990).

[41] *Socony-Vacuum*, 310 U.S. at 221.

[42] *See, e.g.*, Barry Ritholtz, *The World's Most Important Number*, BLOOMBERG (Apr. 3, 2018), https://www.bloomberg.com/view/articles/2018-04-03/the-world-s-most-important-number.

[43] Deferred Prosecution Agreement at 7, *United States v. Deutsche Bank AG*, No. 3:15-cr-00061 (D. Conn. Apr. 23, 2015) (derivatives) [hereinafter DB DPA]; Deferred Prosecution Agreement at 6, *United States v. Cooperatieve Centrale Raiffeisen-Boerenleenbank B.A.*, No. 3:18-cr-00614 (D. Conn. Oct. 29, 2013) (financial soundness).

[44] DB DPA Statement of Facts, *supra* note 43, at 70.

[45] *See, e.g.*, Kirstin Ridley, *Global Libor Probe Didn't Examine Yen Rates Until 2010, Court Hears*, REUTERS (June 18, 2015), https://www.reuters.com/article/us-trial-libor-hayes-idUSKBN0OY1XR20150618 (contrasting to other global regulators, including DOJ, who "were all investigating [LIBOR manipulation] by 2010").

[46] *See* Order, *In re Deutsche Bank AG*, CFTC Docket No. 15-20 (Apr. 23, 2015). Note, however, that in civil litigation, Judge Buchwald rejected the assertion that the benchmarks themselves were commodities in interstate commerce. Instead, the commodity in interstate commerce was the theoretical Eurodollar time deposit in London that underlay the LIBOR estimate. The practical consequence of this was that plaintiffs suing under the CEA needed to demonstrate that LIBOR panel bank defendants manipulating LIBOR did so with the *specific intent* to manipulate covered Eurodollar futures contracts priced based on LIBOR; not just LIBOR itself. This narrowed the claim substantially.

[47]The DOJ Fraud Section pursued wire fraud theories against panel banks based in part on their unilateral manipulation of their own LIBOR submissions. *See, e.g.*, Plea Agreement, *United States v. UBS AG*, No. 3:15-cr-00076 (D. Conn. May 20, 2015).

[48]*See* Press Release, U.S. Dep't of Justice, Deutsche Bank's London Subsidiary Agrees to Plead Guilty in Connection with Long-Running Manipulation of LIBOR (Apr. 23, 2015), https://www.justice.gov/opa/pr/deutsche-banks-london-subsidiary-agrees-plead-guilty-connection-long-running-manipulation (panel bank's "misconduct not only harmed its unsuspecting counterparties, it undermined the integrity and the competitiveness of financial markets everywhere").

[49]*Ruotolo v. Fannie Mae*, 933 F. Supp. 2d 512, 2013-1 Trade Cas. (CCH) ¶ 78308 (S.D. N.Y. 2013) ("Bid rigging is [. . .] merely a species of horizontal price fixing among competitors."); *see also Philip Morris Inc. v. Heinrich*, 95 CIV. 0328 (LMM), 1996 WL 363156, at *9 (S.D.N.Y. June 25, 1996) ("Courts have specifically classified bid-rigging as a form of price fixing that constitutes a *per se* violation.").

[50]*In re Insurance Brokerage Antitrust Litigation*, 618 F.3d 300, 336, R.I.C.O. Bus. Disp. Guide (CCH) P 11896, 2010-2 Trade Cas. (CCH) ¶ 77135 (3d Cir. 2010) ("Bid rigging[. . .] is quintessentially collusive behavior subject to per se condemnation under § 1 of the Sherman Act.").

[51]*See, e.g.*, *United States v. Stern*, No. 17-cr-80204 (S.D. Fla. Nov. 2, 2017).

[52]*See, e.g.*, Plea Agreement at 5, *United States v. Citicorp*, No. 3:15-cr-00078 (D. Conn. May 20, 2015).

[53]*Id.*

[54]*See, e.g.*, Order, *In re Citibank, N.A.*, CFTC Docket No. 15-03 (Nov. 11, 2014) [hereinafter Citibank Order]. Notably, the FX spot markets themselves are exempted from prescriptive regulation of the CEA through the so-called Treasury Amendment. *See* 7 U.S.C.A. § 2(c)(1)(A) (exempting from CEA regulation of "agreement[s], contract[s], or transaction[s] in foreign currency"). But CFTC nonetheless settled market manipulation allegations with several FX dealer banks, apparently on the theory that FX benchmarks were commodities in interstate commerce subject to its general anti-manipulation provisions. *See*, *e.g.*, Citibank Order at 2.

[55]Press Release, U.S. Dep't of Justice, Five Major Banks Agree to Parent-Level Guilty Pleas (May 20, 2015). The fifth bank was UBS, which violated its 2012 non-prosecution agreement in the LIBOR investigation and pleaded guilty to manipulating LIBOR and other interest rate benchmarks.

[56]*See e.g.*, Plea Agreement, *United States v. JPMorgan Chase & Co.*, No. 3:15-cr-79 (D. Conn. May 20, 2015).

[57]Memorandum of Law in Opposition to Defendants' Motion to Dismiss at 9, *United States v. Usher*, No. 1:17-cr-00019 (S.D.N.Y. Dec. 8, 2017).

[58]Bob Van Voris et al., *British Cartel Traders Acquitted of Rigging Currency Market*, BLOOMBERG, Oct. 28, 2018, https://www.bloomberg.com/news/articles/2018-10-26/jury-rejects-charge-that-chatroom-was-used-to-fix-fx-prices.

[59]*Id.*

[60]*See* Indictment, *United States v. Aiyer*, No. 1:18-cr-00333-JGK (S.D.N.Y. May 10, 2018).

[61]*See, e.g.*, *Suntar Roofing, Inc.*, 897 F.2d at 476-77 (competitors impermissibly allocated customers, including by agreeing to quote anticompetitive prices to certain customers and ceasing to use materials certain customers preferred); *see also In re Ins. Brokerage Antitrust Litig.*, 618 F.3d at 321-22 (reversing dismissal of claim against competitor insurers who allegedly "furnished purposefully uncompetitive sham bids on policies in order to facilitate the steering of business to other insurer-partners, on the understanding that the other insurers would later reciprocate").

[62]Consent Order at 10-11, *In the Matter of Deutsche Bank AG, el al.* (June 20, 2018).

[63]*Id.*

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[64]Markham, *supra* note 5, at 283.

[65]*See, e.g.*, Bart Chilton, Comm'r, CFTC, Speech before the Institutional Investors Carbon Forum, Moment of Inertia (Sept. 15, 2009) (lamenting rigors of CFTC's traditional manipulation standard and calling on Congress to enact an easier-to-satisfy standard) [hereinafter Chilton Speech].

[66]*In re Indiana Farm Bureau*, 1982 WL 30249, at *3.

[67]*Id.* at *4-6 (emphasis added); *see also In re Commodity Exch. Inc. Silver Futures Options Trading Litig.*, 560 F. App'x 84, 86 (2d Cir. 2014) (reciting traditional manipulation test under CEA).

[68]*See, e.g.*, Chilton Speech, *supra* note 65.

[69]Prohibition on the Employment, or Attempted Employment, of Manipulative and Deceptive Devices and Prohibition on Price Manipulation, 76 Fed. Reg. 41398, 41399 (July 14, 2011) (to be codified at 17 C.F.R. pt. 180) [hereinafter Prohibition on Deceptive Devices and Price Manipulation].

[70]The application of a recklessness standard to unlawful CEA market manipulation alleged to have resulted from genuine market transactions (rather than by fraud) has been upheld by at least one court, but is likely to be subject to further dispute. *U.S. Commodity Futures Trading Commission v. Kraft Foods Group, Inc.*, 153 F. Supp. 3d 996, Comm. Fut. L. Rep. (CCH) P 33614 (N.D. Ill. 2015) (holding that "a showing of recklessness is, at a minimum, necessary," and thus the CFTC "adequately pled scienter because [. . .] Kraft intended to 'deceive or defraud investors by controlling or artificially affecting the price of' commodities and/or futures")*, with Commodity Futures Trading Commission v. Monex Credit Company*, 311 F. Supp. 3d 1173 (C.D. Cal. 2018) (rejecting CFTC's interpretation of section 6(c)(1) in a related context); *see also* David Yeres et al., *U.S. Market Manipulation: Has Congress Given the CFTC Greater Latitude than the SEC to Prosecute Open Market Trading as Unlawful Manipulation? It's Doubtful.*, 38 FUTURES AND DERIVATIVES L. REP. 1 (2018).

[71]*See U.S. v. Gillen*, 458 F. Supp. 887, 893, 1978-2 Trade Cas. (CCH) ¶ 62178 (M.D. Pa. 1978), *judgment aff'd,*599 F.2d 541, 1979-1 Trade Cas. (CCH) ¶ 62627 (3d Cir. 1979) (*citing Socony-Vacuum*, 310 U.S. at 219 (1939)); *see also* U.S. ATTORNEYS' MANUAL, ANTITRUST RESOURCE MANUAL § 1 ("In a Sherman Act criminal case, general intent must be proven. Customarily, however, proof of the existence of a price fixing, or bid rigging or market allocation agreement is sufficient to establish intent to do what the defendants agreed among themselves to do.").

[72]*See In re Indiana Farm Bureau*, 1982 WL 30249, at *3.

[73]*Id.* at *6.

[74]*U.S. v. Radley*, 659 F. Supp. 2d 803, 814 (S.D. Tex. 2009), *aff'd,* 632 F.3d 177 (5th Cir. 2011); *see also In re Cox*, 1987 CFTC LEXIS 325, at *25 (CFTC July 15, 1987) ("An artificial price is one that does not reflect the market or economic forces of supply and demand.").

[75]Markham, *supra* note 5, at 284.

[76]*United States Commodity Futures Trading Commission v. Wilson*, Comm. Fut. L. Rep. (CCH) P 34395, 2018 WL 6322024 (S.D.N.Y. Nov. 30, 2018). The defendants in Wilson testified that they believed the pricing methodology for an exchange-traded interest rate swap futures contract undervalued the contract, and while conceding that they traded to influence the prices of those contracts, asserted they did so to move the contract price *closer* to its fair market value. The *Wilson* court criticized CFTC's theory of price manipulation based on this conduct as a "tautolog[y]" that "endeavors to conflate artificial prices with the mere intent to affect prices," *id.* at *14, and emphasized that trading patterns "supported by a legitimate economic rationale . . . cannot be the basis for liability under the CEA," *id.* at *20 (quotations omitted).

[77]Prohibition on Deceptive Devices and Price Manipulation, *supra* note 69 (emphasis added).

[78]*See* Posner, *supra* note 12, at 36-37 (discussing development of *per se* rule).

[79]Hovenkamp, *supra* note 13, at 611.

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[80]*Id.* A further basis for distinction between the two regimes is that CFTC can pursue a theory of *attempted* manipulation in violation of Sections 6(c) and 9(a)(2) of the CEA, a claim that requires proof of a defendant's intent to manipulate prices and some overt act in furtherance of that intent. *See U.S. Commodity Futures Trading Com'n v. Bradley*, 408 F. Supp. 2d 1214, 1220, 162 O.G.R. 882 (N.D. Okla. 2005) (holding that CFTC adequately alleged specific intent to manipulate natural gas prices based on conversation in which defendants discussed "mak[ing] up some numbers and turn[ing] them in" to reporting firms). By contrast, there is no claim for *attempted* violation of Sherman Act Section 1. Indeed there is no need for such an attempt claim because the *per se* standard prohibits agreements among competitors without regard to whether the anticompetitive objective of the agreement was accomplished.

[81]Andrew Finch, Principal Deputy Assistant Att'y Gen., Antitrust Division, U.S. Dep't of Justice, Onward and Upward: International Cooperation in Antitrust Enforcement, Address at ABA Antitrust in Asia Conference (May 31, 2018).

[82]CLIFFORD CHANCE, AN UPTICK DOJ ANTITRUST DAWN RAIDS: IS THE US DIPPING INTO THE EU ANTITRUST ENFORCEMENT TOOLKIT AND IS YOUR COMPANY PREPARED? 1 (May 4, 2017), https://www.cliffordchance.com/briefings/2017/05/an_uptick_doj_antitrustdawnraidsistheu.html.

[83]Clifford Chance offers a complimentary Dawn Raids App, compatible with most smart phones and available on the Apple App Store and Google Play, setting out key first steps when faced with dawn raids in a variety of jurisdictions, and providing emergency contacts on a jurisdiction-by-jurisdiction basis in the event of a raid. *See* Clifford Chance Dawn Raids App, https://www.cliffordchance.com/briefings/online_services/dawn-raids-app.html.

[84]*Accord* Finch, *supra* note 28, at 5 (recognizing that Antitrust Division's international focus is "especially" prevalent in financial markets, since "[a]lmost all financial products are sold across national borders").

[85]*Id.* at 4-5.

[86]*Id.* at 2.

[87]*Id.* at 4-5.

[88]*See* U.S. DEP'T OF JUSTICE, FREQUENTLY ASKED QUESTIONS ABOUT THE ANTITRUST DIVISION'S LENIENCY PROGRAM AND MODEL LENIENCY LETTERS 4-5 (Updated Jan. 26, 2017), https://www.justice.gov/atr/page/file/926521/download [hereinafter DOJ FAQs]. The Leniency Policy—along with inadvertent corporate disclosures of cartel conduct in materials produced to the Division in connection with its review of the competitive effects of planned mergers—is a primary means by which the Division identifies criminal antitrust conspiracies. *See* Leah Nylen, *Merger Reviews Becoming Source of Criminal Investigations, DOJ's Nigro Says*, MLEX (May 17, 2018), http://www.mlex.com/GlobalAntitrust/DetailView.aspx?cid=989840&siteid=191&rdir=1 (reporting that leniency applications and merger reviews are biggest sources of Antitrust Division cartel investigations). Individuals may also seek leniency directly.

[89]DOJ FAQs, *supra* note 88, at 18. An additional feature of the Antitrust Division's leniency program is that, under the Antitrust Criminal Penalty Enhancement and Reform Act of 2004, a leniency recipient that provides "satisfactory cooperation" to civil plaintiffs may have their damages reduced from the treble damages provided for on a joint-and-several basis in antitrust suits brought under the Clayton Act, to single damages based on the applicant's own involvement in the conduct. Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub. L. No. 108-237, § 213, 118 Stat. 661 (2004).

[90]U.S. COMMODITY FUTURES TRADING COMM'N, ENFORCEMENT ADVISORY: UPDATED ADVISORY ON SELF REPORTING AND FULL COOPERATION 2-3 (Sept. 25, 2017), https://www.cftc.gov/sites/default/files/idc/groups/public/@lrenforcementactions/documents/legalpleading/enfadvisoryselfreporting0917.pdf [hereinafter CFTC Enforcement Advisory]; *see also* CLIFFORD CHANCE,

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CFTC UPDATES SELF-REPORTING AND COOPERATION GUIDELINES 1-2 (Sept. 2017), https://www.cliffordchance.com/briefings/2017/09/cftc_updates_self-reportingandcooperatio.html.

[91]*See* James McDonald, Dir. of the Div. of Enforcement, CFTC, Self-Reporting and Cooperation at the CFTC, Speech at NYU Program on Corporate Compliance & Enforcement / Institute for Corporate Governance & Finance (Sept. 25, 2017), https://www.cftc.gov/PressRoom/SpeechesTestimony/opamcdonald092517 [hereinafter McDonald Speech].

[92]*See* DOJ FAQs, *supra* note 88, at 2.

[93]*See* Scott D. Hammond, Deputy Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Measuring the Value of Second-In Cooperation in Corporate Plea Negotiations, Speech Before the ABA Antitrust Section 2006 Spring Meeting (March 29, 2006), https://www.justice.gov/atr/file/518436/download.

[94]*See* McDonald Speech, *supra* note 91.

[95]*See* DOJ FAQs, *supra* note 88, at 2-3.

[96]*Id.*

[97]*See* McDonald Speech, *supra* note 91.

[98]*Id.*

[99]CFTC Enforcement Advisory, *supra* note 90, at 3.

[100]*See, e.g.*, Pallavi Guniganti, *US Prosecutors Stress Importance of Preservation of Evidence*, GLOBAL COMPETITION REVIEW (Feb. 15, 2018), https://globalcompetitionreview.com/article/1159060/us-prosecutors-stress-importance-of-preservation-of-evidence.

[101]U.S. COMMODITY FUTURES TRADING COMM'N, ENFORCEMENT ADVISORY: COOPERATION FACTORS IN ENFORCEMENT DIVISION SANCTION RECOMMENDATIONS FOR COMPANIES 2 (Jan. 19, 2017), https://www.cftc.gov/sites/default/files/idc/groups/public/@lrenforcementactions/documents/legalpleading/enfadvisorycompanies011917.pdf.

[102]DOJ FAQs, *supra* note 88, at 15.