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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

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The U.S. Commodity Futures Trading Commission (the "CFTC") has taken the position in a 2011 rulemaking and again in its enforcement program as late as 2015 that under the authority granted to it by the Dodd-Frank Act in 2010[1] by addition of section 6(c)(1) to the Commodity Exchange Act ("CEA"), as amended,[2] the CFTC's ability to prosecute large (and perhaps not so large) traders for commodities and derivatives market manipulation now extends to those who "recklessly" impact such prices by their bona fide open market trading. This purports to lower, from specific intent, the scienter required for establishing a CEA market manipulation that does not involve fraudulent or otherwise unlawful trading. Given that section 6(c)(1) was modeled on a similar Securities Exchange Act ("Exchange Act") provision—section 10(b)[3]—it is noteworthy that the CFTC's stated recklessness standard deviates from the judicially-determined scienter applicable to section 10(b)-based open market trading actions. Considering that the CFTC's anti-manipulation authority extends to a wide variety of markets, including spot and forward physical transactions, as well as exchange-traded and over-the-counter derivatives, the CFTC's broad interpretation of its anti-manipulation authority has potentially broad implications for a whole array of market participants—whether commercial firms, financial institutions, speculators or others transacting in these markets for legitimate purposes.

The CFTC's goal is doubtless to ease

its burden in its important role of policing the markets. However, there are several legal and policy considerations that strongly suggest that this particular type of CEA market manipulation allegation—that is, one based upon bona fide open market transactions rather than fraud—requires proof of specific intent to manipulate price, and that reckless behavior alone is an inadequate basis for a finding of violation. Support for requiring specific intent as a limiting principle to a manipulation charge in this context is found in the structure of CEA section 6(c)(1) and its legislative history. Longstanding judicial interpretation of the essentially identical language of Securities and Exchange Act section 10(b) and the courts' policy analyses also support a proof of specific intent requirement. However, one need not look beyond the CFTC's own earlier pronouncements for good policy reasons to require proof of intent. In its seminal 1982 decision concerning a charge of open market trading-based manipulation, *In re Indiana Farm Bureau Cooperative Association*,[4] the CFTC determined that in the CEA markets, proof of such intent was the "*sine qua non* of manipulation" and is required "to ensure that innocent trading activity not be regarded with the advantage of hindsight as unlawful manipulation."[5] This reasoning appears to be equally valid today and the *Indiana Farm Bureau* decision remains good law. Further, the CFTC has not articulated any change in its statutory mission nor any market development that would support a change in policy. Consequently, there are ample legal bases on which future courts may conclude that the federal commodities laws, like the federal securities laws, require proof of specific intent in bona fide open market transaction-based manipulation cases. In light of this framework, as well as considerations of good policy, the CFTC may wish to now revisit its contention that mere recklessness is an adequate basis on which to find manipulation.

I. The Statute: CEA Section 6(c)(1)

The CEA has long prohibited market manipulation. Before the amendments introduced by the Dodd-Frank Act of 2010, CEA sections 6(c) and 6(d) provided the CFTC with the authority to pursue manipulation or attempted manipulation of the market price of a commodity or future.[6] The CFTC and the courts understood that a prosecution for manipulation under this section required proof of specific intent to manipulate.[7] The issue of a lower scienter standard for proof of CEA open market transaction-based manipulation arises from the Dodd-Frank Act of 2010, which added a new offense relating to fraud and manipulation in the commodities and derivatives markets. Section 753 of Dodd-Frank amended CEA section 6(c) to supplement the CFTC's authority to pursue fraud and manipulation. Under the Dodd-Frank amendments, CEA section 6(c)(1) makes it "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, in contravention of such rules and regulations as the Commission shall promulgate."[8]

The section 6(c)(1) prohibition on "manipulative or deceptive" devices or contrivances is written in the disjunctive, and accordingly it is most logically read to prohibit two classes of misconduct: that which is manipulative, and that which is deceptive. While this structure allows for potentially differing elements for each class

of misconduct,[9] it does not address the mental state an actor must possess in order to have engaged in either of them. However, this absence is remedied by the legislative history of this provision and a series of judicial decisions considering the scienter standards required to establish a violation of Exchange Act section 10(b), after which CEA section 6(c)(1) is patterned.

II. Legislative History of CEA Section 6(c)(1)

Several key clauses of CEA section 6(c)(1) are fully borrowed from Exchange Act section 10(b). Each provides that "It shall be unlawful for any person, directly or indirectly, to use or employ . . . in connection with [a covered transaction] in interstate commerce . . . *any manipulative or deceptive* device or contrivance, in contravention of such rules or regulations" that each respective regulator (the CFTC or SEC) issues.[10]

This similarity has been accepted by courts as well as by the CFTC. For example, in *In re Commodity Exch., Inc.*, the court noted that CEA section 6(c)(1) and Exchange Act section 10(b) are "virtually identical."[11] And when promulgating its rule implementing CEA section 6(c)(1), the CFTC's Federal Register release asserted that, "[g]iven the similarities between CEA section 6(c)(1) and Exchange Act section 10(b), the Commission deems it appropriate and in the public interest to model Rule 180.1 on SEC Rule 10b-5."[12]

The legislative history of CEA section 6(c)(1) shows that borrowing the "manipulative or deceptive device" term of art from Exchange Act section 10(b) was not accidental, but rather that Congress intended to provide the CFTC with the same authority to pursue manipulation as the SEC already had under Exchange Act section 10(b). The sponsor of the legislation enacting section 6(c)(1), Senator Maria Cantwell, specifically remarked that the provision was intended to "give the CFTC the same anti-manipulation standard currently employed by the SEC."[13] In so doing, Congress thereby built section 6(c)(1) on the foundation of Exchange Act section 10(b)'s well-developed standards regarding the "manipulative or deceptive device" term of art. Senator Cantwell noted that material elements, including intent requirements, for CEA section 6(c)(1) would be construed in line with Exchange Act section 10(b), stating that "when the Congress uses language identical to that used in another statute, Congress intended for the courts and the Commission to interpret the new authority in a similar manner."[14]

As Senator Cantwell recognized, the virtue of aligning the CEA's "manipulative or deceptive device" term of art with securities law precedent was that the provision's interpretation would not be amorphous and undefined, but would benefit from existing judicial guidance. To this end, Senator Cantwell noted that federal courts have extensively explained and interpreted Exchange Act section 10(b), thereby providing valuable precedent for interpreting CEA section 6(c)(1): "In the 75 years since the enactment of the [Exchange Act], a substantial body of case law has developed over the last half century around Section 10(b). This will provide certainty in how this legislation will be interpreted and applied by the Courts and the CFTC."[15] The core principle underlying Senator Cantwell's remarks was expressly supported by the CFTC itself when it promulgated its rule implementing section 6(c)(1). There, the CFTC cited to *Morissette v. United States*,[16] for the proposition that "where

Congress borrows terms of art it 'presumably knows and adopts the cluster of ideas that were attached to each borrowed word' " and to *Nat'l Treasury Employees Union v. Chertoff*,[17] to note the "presumption that Congress uses the same term consistently in different statutes."[18]

III. The Implementing Rule: CFTC Rule 180.1

Despite the apparent Congressional imperative based upon the similarity of the CEA's and Exchange Act's statutory language, which includes judicial interpretation of the essentially identical securities law terms and the clear legislative history directing the CFTC to line up its rule implementing CEA section 6(c)(1) with that of SEC Rule 10b-5, which implements Exchange Act section 10(b), the CFTC asserted the authority to materially deviate in its rule (that is, Rule 180.1). In its notice of proposed rulemaking, the CFTC stated that the scienter standard applicable to its proposed implementing Rule 180.1 would not be controlled by SEC Rule 10b-5 precedent.[19] Rather, the CFTC stated that "judicial precedent interpreting and applying Exchange Act section 10(b) and SEC Rule 10b-5 in the context of the securities markets should guide, but not control, application of the scienter standard under subsection 6(c)(1) and the CFTC's implementing rule."[20] Notably, the rule proposal lacks a basis for the conclusion that judicial interpretation of identical Securities Exchange Act language could not be controlling, other than an unexplained assertion that differences in the two markets justify this outcome.

The CFTC continued in this view when it published final Rule 180.1 in July 2011.[21] Rule 180.1 provides, in pertinent part, that, "It shall be unlawful for any person, directly or indirectly, 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, to *intentionally or recklessly*: (1) Use or employ, or attempt to use or employ, any manipulative device, scheme, or artifice to defraud."[22] Rule 10b-5 provides, in pertinent part: "It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange, (a) To employ any device, scheme, or artifice to defraud."[23] In contrast to CFTC Rule 180.1, Rule 10b-5 is silent as to any "intentionally or recklessly" scienter requirement and, as discussed below, the appellate courts considering this issue have unanimously rejected a recklessness standard in 10b-5-based actions alleging open market transaction-based manipulation, and did so prior to the addition of section 6(c)(1) to the CEA. The CFTC explained this deviation by merely referencing without explanation its "distinct regulatory mission and responsibilities" and "the differences between the securities markets and the derivatives markets."[24] Notably, the CFTC did not identify any particular difference in the structures of SEC and CFTC regulated markets that requires any deviation from 10b-5 standards concerning an actor's intent to manipulate price. Furthermore, the final rule release did not analyze the judicial decisions discussed below, which examine the two distinct categories of misconduct covered by section 10(b) (manipulation or deception) or even acknowledge that the appellate courts that have considered the issue have rejected the use of a recklessness standard for open market transaction-based manipulation claims under Exchange Act section 10(b) and SEC Rule 10b-5.

Addressing public comments to its proposed Rule 180.1, the CFTC again asserted that it will be guided, but not controlled, by judicial precedent interpreting and applying scienter under Exchange Act section 10(b) and SEC Rule 10b-5, and that "a showing of recklessness is, at a minimum, necessary to prove the scienter element."[25] However, as in its original rule proposal, the CFTC did not articulate a persuasive basis for its deviation from the apparent intent of Congress, but merely asserted without support or explanation that the CEA markets required a different standard (an assertion at odds with earlier CFTC pronouncements as discussed below).

IV. Court-Articulated Requirements on the Scienter Requirement for 10(b) Manipulation

Although not discussed in the CFTC's CEA section 6(c)(1) implementing rulemaking process, for decades, courts have extensively interpreted Exchange Act section 10(b), upon which CEA section 6(c)(1) is patterned, and have long recognized that the statute separately prohibits two distinct types of misconduct: "manipulative devices" and "deceptive devices." Accordingly, courts have applied appropriately-tailored standards for establishing a violation for these distinct species of wrongdoing, including variations on what level of scienter is required for each form of section 10(b)-prohibited misconduct. Congress is presumed to have known of these court decisions when it imported section 10(b) language into the CEA.[26]

As the Supreme Court first explained in its 1977 *Santa Fe Industries, Inc. v. Green* decision, section 10(b) prohibits two distinct types of misconduct in the securities markets (deception or manipulation).[27] Building upon the Supreme Court's guidance, the several federal appellate courts examining this issue have required different standards of proof for intent as to each type of misconduct. These courts only apply a scienter of recklessness to claims based upon deception, and not to manipulation claims premised on open market transactions. Conversely, these courts have unanimously confirmed the applicability of a specific intent requirement in cases concerning alleged open market securities manipulations accomplished through otherwise bona fide open market transactions. For example, in *Markowski v. S.E.C.*,[28] the D.C. Circuit Court of Appeals affirmed an SEC finding of manipulation under section 10(b) based on an underwriter's over-bidding and buying up of undersubscribed securities it had underwritten. The *Markowski* court acknowledged that, absent "fictitious transactions," liability for manipulation under section 10(b) depends "entirely on whether the investor's intent was 'solely to affect the price of [the] security.' "[29] In *ATSI Communications, Inc. v. Shaar Fund, Ltd.*,[30] the Second Circuit recognized that, in some circumstances, a trader's intent "is the only factor distinguishing legitimate trading from manipulation."[31] And in *Sullivan & Long, Inc. v. Scattered Corp.*,[32] the Seventh Circuit held that a defendant's "massive short selling" of stock in a bankrupt company—including naked short-selling of more shares than existed—was not "manipulative" under section 10(b) because it was not done for the purpose of "fool[ing] the market" into believing there was "a lot of buying interest in the stock."[33] These well-established principles inform the "manipulative or deceptive device" term of art that Congress intended to embed in CEA section 6(c)(1), and demonstrate that specific intent is required to establish a violation under the manipulation prong.

V. Judicial Application of the CFTC's Rule 180.1 Recklessness Standard

Judicial application of the CFTC's Rule 180.1 recklessness standard has been limited to two trial court decisions. The sole published court decision applying the recklessness standard to a CFTC enforcement case under Rule 180.1 was commenced in 2015. It was then that the CFTC initiated an open market transaction-based manipulation action in Chicago federal district court on a recklessness theory by filing suit against Kraft Foods, in which the CFTC alleged that Kraft, as a commercial user of wheat, recklessly exploited its open market transactions to manipulate cash wheat prices and wheat futures prices for its financial benefit.[34] Relying on Rule 180.1, the CFTC claimed that it is not required to prove specific intent to manipulate.[35] In December 2015, the trial court agreed with the CFTC's proffered standard, and denied Kraft's motion to dismiss, wherein Kraft had argued that a scienter higher than recklessness was required.[36] In rejecting Kraft's argument, the court's decision did not analyze the judicially recognized distinction between scienter requirements in section 10(b) cases of deception, as opposed to open market manipulation. Rather, the trial court merely cited to Rule 180.1's statement that "a showing of recklessness is, at a minimum, necessary" without analyzing whether recklessness was the correct standard in an open market transaction-based case.[37] In support of this conclusion, the court found that section 10(b) cases adopt a recklessness standard, but cited only to deception-based cases, and not to any of the more relevant (and contrary) open market transaction-based cases.[38] Thus, while the CFTC has relied upon its recklessness standard in bringing complaints premised on alleged open market transaction-based manipulation, the *Kraft* CFTC enforcement case decision offers little durable support for the applicability of recklessness to open market transaction-based manipulation cases.[39]

In a parallel private litigation in a separate Chicago federal court, in June 2016 the judge rejected Kraft's motion to dismiss, finding the allegations that Kraft used its market power to "intentionally and knowingly deceive[] the market" to be sufficient to state a claim for manipulation.[40] But because the court found that the plaintiff's allegations contained "more than enough concrete facts to support his contention that Kraft intentionally and knowingly deceived the market," the court did not analyze the distinction in requisite intent standards for violations stemming from inherently deceptive conduct that affects price, as opposed to bona fide market actions that, may constitute manipulation due to the actor's intent to affect price.[41] Confusing the matter more, while the court acknowledged that "fraud . . . requires intent to manipulate or deceive," which appears "incongruous" with a recklessness scienter requirement under section 6(c)(1), the court then cited to non-manipulation securities cases in finding that "reckless disregard of the truth counts as intent under" section 10(b) and Rule 10b-5.[42]

In May 2018, a California federal district court rejected the CFTC's proffered interpretation of section 6(c)(1) that would have permitted the CFTC to pursue fraud in the absence of market manipulation under that provision.[43] In so doing, the court looked to the legislative history of section 6(c)(1) and courts' treatment of Exchange Act section 10(b) in an attempt to interpret section 6(c)(1) in a "holistic manner."[44] The court interpreted the phrase "manipulative or decep-

tive" to require the presence of both manipulative and deceptive conduct and concluded that section 6(c)(1) only prohibits "fraudulent manipulation." While the California federal court's interpretation and conclusion do not go directly to the scienter requirements for bona fide open market based manipulation, and furthermore may be of questionable durability, the decision makes clear that federal courts are not bound to follow the CFTC's interpretation of its section 6(c)(1) anti-manipulation authority, including the intent required to sustain a violation.[45]

VI. Core Policy Considerations Long Accepted in Both Securities and Commodities Cases Support a Specific Intent Standard

In the securities realm, all of the several appeals courts that have examined claims of open market transaction-based violations under Exchange Act section 10(b) have drawn upon the Supreme Court's guidance that the provision covers both manipulative and deceptive conduct, and have identified policy considerations demanding that an actor's specific intent (and not recklessness) is what renders otherwise bona fide open market transaction-based conduct illegal. For example, in *Markowski v. S.E.C.*, the Court of Appeals for the D.C. Circuit observed that section 10(b) manipulation cases based on otherwise lawful open market trading (as opposed to fictitious transactions) "raise interesting questions" due to the difficulty of "separat[ing] a 'manipulative' investor from one who is simply overenthusiastic, a true believer in the object of investment."[46] The D.C. Circuit cautioned that, absent facially impermissible conduct such as fictitious transactions, liability for market manipulation under section 10(b) depends "*entirely* on whether the investor's intent was an investment purpose or solely to affect the price of [the] security."[47]

Similarly, in *GFL Advantage Fund, Ltd. v. Colkitt*, the Third Circuit concluded in the context of a section 10(b) claim that because the "gravamen of manipulation" is the creation of a false impression that prices are "determined by the natural interplay of supply and demand" and not rigged, "courts must distinguish between legitimate trading strategies intended to anticipate and respond to prevailing market forces and those *designed to manipulate* prices."[48] Accordingly, the Third Circuit distinguished manipulative conduct from legal conduct by asking whether the alleged manipulator acted "*for the purpose* of artificially depressing or inflating the price of the security."[49]

Recognizing a like consideration in *ATSI Communications, Inc. v. Shaar Fund, Ltd.*,[50] the Second Circuit has explained that (as in commodities markets) efficient pricing in securities markets is derived from "competing judgments of buyers and sellers as to the fair price of [a] security," thereby leading market prices to "reflect[] as nearly as possible a just price."[51] Accordingly, where defendants were accused of engaging in a manipulative scheme through otherwise lawful open market transactions,[52] the Second Circuit will apply a specific intent standard rather than predicating liability on the price effect of merely reckless actions, recognizing that a trader's intent can be "the *only* factor that distinguishes legitimate trading from improper manipulation" of the securities markets under section 10(b).[53]

Moreover, the commodities regulators have previously expressed similar policy concerns. Indeed, the CFTC's recent position that recklessness can apply in cases of open market

transaction-based manipulation deviates sharply from the policy-based limiting principle that the CFTC has historically relied upon to distinguish unlawful manipulation from lawful trading. In 1982, the CFTC addressed the intent requirement for price manipulation in great depth in considering and ultimately dismissing charges that the Indiana Farm Bureau, by its open market trading, had created a market squeeze that manipulated the price of a corn futures contract. In that case, over the course of a 39-page opinion, which has been cited by numerous courts as the touchstone of commodities manipulation law, the CFTC considered a variety of policy and economic issues with a particular emphasis on the purposes and operations of the markets it regulates, and concluded in the context of the open market transactions forming the basis of the charge against the Indiana Farm Bureau that the "specific intent to create an 'artificial' or 'distorted' price is a sine qua non of price manipulation."[54]

In coming to its *Indiana Farm Bureau* decision, the CFTC expressed particular concern that a "weakening of the manipulative intent standard" would "wreak havoc with the market place," as a "clear line between lawful and unlawful activity is required in order to ensure that innocent trading activity not be regarded with the advantage of hindsight as unlawful manipulation."[55] The CFTC asserted that this "clear line," which "separates otherwise lawful business conduct from unlawful manipulative activity," is necessary to protect parties acting with a "profit motive" to obtain the best prices for their commodities, who should not, without proof of specific intent, be found to have violated the CEA.[56]

VII. Divergence from Precedent and Congressional Intent is Not Permissible

Beyond the CFTC's mere assertion in its Rule 180.1 rulemaking that certain unspecified differences in the commodities and derivatives markets necessitate flexibility on the required scienter for a finding of violation, the CFTC has offered no support for the notion that Congress intended for recklessness to apply in CEA market manipulation cases predicated on open market transactions or that the CFTC is free to deviate from what Congress intended. Through its use of borrowed language from Exchange Act section 10(b), along with a clear and persuasive legislative history indicating that its purpose was to align the CFTC's authority to pursue manipulation with the SEC's, Congress left no doubt of its intent. Indeed, when issuing Rule 180.1, the CFTC echoed the sentiments that Congress expressed regarding the virtues of relying upon well-developed securities case law for interpreting section 6(c)(1), particularly that decades' worth of "extensive judicial review serves as an important benefit to the [CFTC] and provides the public with increased certainty."[57]

Not addressed by the CFTC, however, is that the same judicial review demonstrates that courts have consistently required proof of specific intent rather than recklessness in cases of open market transaction-based manipulation. The courts have required specific intent in such cases because they have reasoned that where a claim is premised on otherwise bona fide transactions, an actor's intent is the factor that renders the behavior illegal, and to hold otherwise could risk imposing liability for lawful conduct.

The CFTC's assertion that it can diverge from

a specific intent standard in open market transaction-based cases is a curious one in view of this Congressional intent and the case law informing the analogous securities law provision that Congress modelled CEA section 6(c)(1) upon. It is also inconsistent with the Supreme Court's long-held view that it is not permissible for an administrative agency to vary a statute's meaning and interpretation through the rulemaking process.[58] Because Congress "was not writing on a clean slate" when it added the "manipulative or deceptive device" term of art to the CEA, its plain meaning under the Exchange Act applies under the CEA with equal force.[59] As Congress itself recognized when establishing CEA section 6(c)(1), when language borrowed from one statute is inserted into another, that language should be given the same meaning. That plain meaning includes judicial interpretations of existing statutory regimes.[60] Nothing in the language or legislative history of section 6(c)(1) suggests a Congressional desire to deviate from 10(b)'s scienter requirement, and the CFTC has not articulated specific characteristics of the CEA-governed markets to justify departing from the specific intent requirement in open market transaction cases under the identical language of Exchange Act section 10(b) is required.

VIII. Conclusion

In summary, it is doubtful that Congress intended to permit a recklessness standard in CEA section 6(c)(1) cases premised on bona fide open market transactions, but rather intended to align the relevant intent standards with existing securities law precedent requiring proof of specific intent to manipulate. This is consistent with the structure and language of section 6(c)(1), its legislative history and its similarity to the analogous Exchange Act section 10(b) as well as to decades of securities law precedent and the CFTC's own long-standing policy to "ensure that innocent trading activity not be regarded with the advantage of hindsight as unlawful manipulation."[61] This sentiment is likely to be recognized by courts analyzing section 6(c)(1) open market transaction cases, and would be an appropriate basis for further consideration by the CFTC. Rather than wait until the courts ultimately determine that the CFTC is not free to deviate from the scienter standard intended by Congress, the public interest would be well served should the CFTC now revisit this issue. In so doing, the CFTC could thereby avoid fruitless investigations, litigation, and, worse still, punitive enforcement settlements agreed for the sake of convenience where no violation has actually occurred.

ENDNOTES:

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

[2]7 U.S.C.A. § 6 (West 2010).

[3]15 U.S.C.A. § 78j (West 2010).

[4]CFTC No. 75-14, 1982 WL 30249 (C.F.T.C. Dec. 17, 1982).

[5]*Id.* at *6.

[6]*See* CEA §§ 6(c), 6(d) (2006).

[7]*See, e.g., In re Amaranth Natural Gas Commodities Litig.*, 730 F.3d 170, 173 (2d Cir. 2013).

[8]7 U.S.C.A. § 9 (West 2010).

[9]*But see Commodity Futures Trading Comm'n v. Monex Credit Co.*, No. 8:17-cv-1868, 2018 WL 2306863, at *8-9 (C.D. Cal. May 1, 2018) (interpreting the phrase "manipulative or deceptive" to require the presence of both manipulative and deceptive conduct in holding that

section 6(c)(1) does not permit the CFTC "to combat fraud absent market manipulation.").

[10]7 U.S.C.A. § 9 (West 2010) (emphasis added). *Compare* CEA section 6(c)(1): "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, in contravention of such rules and regulations as the Commission shall promulgate by not later than 1 year after the date of enactment of the Dodd-Frank Wall Street Reform and Consumer Protection Act, provided no rule or regulation promulgated by the Commission shall require any person to disclose to another person nonpublic information that may be material to the market price, rate, or level of the commodity transaction, except as necessary to make any statement made to the other person in or in connection with the transaction not misleading in any material respect." *with* Exchange Act section 10(b): "It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange - (b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, or any securities-based swap agreement any manipulative or deceptive device or contrivance in contravention of such rules or regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors."

[11]213 F. Supp. 3d 631, 672 (S.D.N.Y. 2016).

[12]CFTC, 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).

[13]*See* 155 Cong. Rec. S9557 (Sept. 17, 2009).

[14]*See* 156 Cong. Rec. S3333 (May 6, 2010); *see also Commodity Futures Trading Comm'n v. Monex Credit Co.*, No. 8:17-cv-1868, 2018 WL 2306863, at *8-9 (C.D. Cal. May 1, 2018) (examining legislative history in holding that section 6(c)(1) cannot be used to combat fraud in the absence of market manipulation). While the *Monex* court disagreed with the notion that section 6(c)(1) covers two distinct forms of misconduct, it did not have occasion to examine securities law precedent in manipulation cases premised on open market transactions.

[15]155 Cong. Rec. S9557 (Sept. 17, 2009).

[16]342 U.S. 246, 263 (1952).

[17]452 F.3d 839, 857 (D.C. Cir. 2006).

[18]CFTC, 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).

[19]CFTC, Prohibition of Market Manipulation, 75 Fed. Reg. 67657, 67658 (Nov. 3, 2010) (to be codified at 17 C.F.R. pt. 180).

[20]75 Fed. Reg. 67657, 67658. In response, recognizing that the language of CEA section 6(c)(1) did not provide for a recklessness scienter standard, several commenters argued that specific intent was the proper scienter for a 6(c)(1) violation. 76 Fed. Reg. at 41398-401.

[21]17 C.F.R. § 180.1 (2011).

[22]*Id.* (emphasis added).

[23]17 C.F.R. § 240.10b-5.

[24]76 Fed. Reg. at 41398-402.

[25]76 Fed. Reg. at 41398-401, 41404.

[26]*Morissette v. United States*, 342 U.S. 246, 263 (1952) ("[W]here Congress borrows terms of art it . . .presumably knows and adopts the cluster of ideas that were attached to each borrowed word.").

[27]430 U.S. 462, 473 (1977) ("[t]he language of § 10(b) gives no indication that Congress meant to prohibit any conduct not involving manipulation or deception. Nor have we been cited to any evidence in the legislative history that would support a departure from the language of the statute."); *see also Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511

U.S. 164, 177 (1994) ("we again conclude that [section 10(b)] prohibits only the making of a material misstatement (or omission) *or* the commission of a manipulative act." (emphasis added)).

[28]274 F.3d 525 (D.C. Cir. 2001).

[29]*Id.* at 528.

[30]493 F.3d 87 (2d Cir. 2007).

[31]*Id.* at 102; *see also S.E.C. v. Masri*, 523 F. Supp. 2d 361 (S.D.N.Y. 2007) (concluding that "if an investor conducts an open-market transaction with the intent of artificially affecting the price of the security, and not for any legitimate economic reason, it can constitute market manipulation. Indeed the only definition of market manipulation that makes any sense is subjective-it focuses entirely on the intent of the trader. ").

[32]47 F.3d 857 (7th Cir. 1995).

[33]*Id.* at 864.

[34]*U.S. Commodity Futures Trading Comm'n v. Kraft Foods Grp., Inc.*, 153 F. Supp. 3d 996 (N.D. Ill. Dec., 2015).

[35]Gov'ts Opp. to Mot. to Dismiss at 18-20, 21-22, *U.S. Commodity Futures Trading Comm'n v. Kraft Foods Grp., Inc.*, No. 1:15-cv-02881, Dkt. 64. In so doing, the CFTC cited the traditional standard for manipulation set forth in *In re Indiana Farm Bureau Cooperative Association*, CFTC No. 75-14, 1982 WL 30249 (C.F.T.C. Dec. 17, 1982), and articulated in CEA cases historically, to argue that its claim under Rule 180.1 sounded in manipulation rather than fraud, but then argued that specific intent was not necessary to plead a claim under Rule 180.1 because the rule required only recklessness. *See id.* at 12-14, 16-17.

[36]In denying Kraft's motion, the court held that to adequately allege price manipulation, the CFTC only had to allege that the defendant (1) possessed the ability to influence price; (2) intended to or recklessly influenced price; and (3) did influence price. *U.S. Commodity Futures Trading Comm'n v. Kraft Foods Grp., Inc.*, 153 F. Supp. 3d 996, 1015 (N.D. Ill. 2015). Notably, although beyond the scope of this article, in addition to stating a low scienter requirement, the court's standard did not require price artificiality.

[37]*Id.* at 1014.

[38]Similarly, the court did not distinguish between attempted manipulation and completed manipulation, or discuss how recklessness could conceivably apply to the attempt species of a 6(c)(1) violation.

[39]At least one CFTC settlement asserts that recklessness is the appropriate intent standard in open market transaction-based cases. In 2013, the CFTC utilized Rule 180.1 for the first time to penalize manipulation in settling the "London Whale" matter with JPMorgan. The CFTC order of settlement found that JPMorgan violated Rule 180.1 by its reckless open market selling of large volumes of certain credit default swaps on the last day of the month. The CFTC concluded that JPMorgan had violated Rule 180.1, because regardless of whether JPMorgan "intended to create or did create an artificial price," its trading conduct nevertheless recklessly "interfered with the free and open markets to which every participant is entitled." *In re JP Morgan Chase Bank*, CFTC No. 14-01, 2013 WL 6057042 (C.F.T.C. Oct. 16, 2013). Although this confirms the CFTC's stance on reckless manipulation, as a mere settlement it carries no precedential value for courts.

[40]*Ploss v. Kraft Foods Group, Inc.*, 197 F. Supp. 3d 1037, 1056 (N.D. Ill. 2016).

[41]*Id.* at 1059.

[42]*Id.* at n.10 (citations and quotations omitted).

[43]*Commodity Futures Trading Comm'n v. Monex Credit Co.*, No. 8:17-cv-1868, 2018 WL 2306863, at *9-10 (C.D. Cal. May 1, 2018).

[44]*Id.* (internal citation and quotation omitted).

[45]*See id.*

[46]*Markowski v. S.E.C.*, 274 F.3d 525, 528 (D.C. Cir. 2001).

[47]*Id.* at 528-29 (emphasis added and internal quotations omitted). The court found that testimony "substantially support[ed] the Commis-

sion's key finding: that the firm bought . . . securities *in order to maintain* their apparent market price." *Id.* at 530 (emphasis added).

[48]*GFL Advantage Fund, Ltd. v. Colkitt*, 272 F.3d 189, 205 (3d Cir. 2001) (emphasis added).

[49]*Id.* at 207 (emphasis added).

[50]493 F.3d 87 (2d Cir. 2007).

[51]*Id.*

[52]*Id.* at 96-97. In the purported scheme, defendants: (1) purchased plaintiff's "floorless" convertible preferred stock; (2) shorted plaintiff's *common* stock; and (3) covered their shorts by converting the preferred stock, resulting in a downward "spiraling" effect on plaintiff's stock price. *Id.*

[53]*Id.* at 102.

[54]*In re Indiana Farm Bureau Cooperative Association*, CFTC No. 75-14, 1982 WL 30249, at *6 (C.F.T.C. Dec. 17, 1982).

[55]*Id.* at *7.

[56]*Id.* at *6 (citing *In re Hohenberg Brothers*, [1975-1977 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 21,478 (C.F.T.C. Feb. 18, 1977)).

[57]76 Fed. Reg. at 41398-99.

[58]*Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984). Federal courts therefore do not need to defer to unreasonable agency interpretations of statutory language. *See id.* at 842. Accordingly, courts should refrain from requiring anything other than specific intent in CEA section 6(c)(1) cases premised on open market transactions.

[59]*Nat'l Treas. Empls. Union v. Chertoff*, 452 F.3d 839, 863 (absent evidence that Congress chose to "employ a term of art devoid of all meaning," Department of Homeland Security was obligated to interpret "collective bargaining" in the Homeland Security Act in accordance with prior statutory definitions).

[60]*See, e.g., United States v. Hunter*, 101 F.3d 82, 85 (9th Cir. 1996) ("[A]s a matter of statutory construction, we 'presume that Congress is knowledgeable about existing law pertinent to the legislation it enacts.' "); *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528 (1995) ("Congress is presumed to know the law.").

[61]*In re Indiana Farm Bureau Cooperative Association*, CFTC No. 75-14, 1982 WL 30249, at *7 (C.F.T.C. Dec. 17, 1982).