



Commodity Futures Trading Commission

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Anti-Manipulation and Anti-Fraud Final Rules

The Commodity Futures Trading Commission (CFTC) announced the publication in the Federal Register of final regulations concerning the prohibition of manipulation and fraud.

Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act)

On July 21, 2010, President Obama signed the Dodd-Frank Wall Street Reform and Consumer Protection Act into law. Among other things, section 753 of the Dodd-Frank Act amended section 6(c) of the Commodity Exchange Act (CEA) to prohibit manipulation and fraud 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. Among other things, Dodd-Frank Act section 753:

- Expands the reach of the Commission to prohibit manipulative and fraudulent behavior by eliminating the requirement to show an artificial price and lowering the scienter standard to recklessness for fraud-based manipulations.
- Preserves the Commission's existing authority to prohibit the manipulation of prices even in the absence of fraud.
- Adds a special provision for manipulation by false reporting, including an exception for good faith mistakes.
- Makes it unlawful to provide materially false information to the Commission.

Protecting the Public from Fraud and Manipulation

The Commission's final rules, to be codified in 17 CFR Part 180, function to protect the public from manipulation and fraud in connection with any swap, or contract of sale of a commodity in interstate commerce, or contract for future delivery on or subject to the rules of any registered entity. The preamble included in the rulemaking summarizes the comments received on the proposal and discusses key aspects of how the Commission intends to apply the rules. A brief summary of that discussion is as follows:

Final Rule 180.1, which is modeled on Securities and Exchange Commission Rule 10b-5, broadly prohibits manipulative and deceptive devices and contrivances, employed intentionally or recklessly, regardless of whether the conduct in question was intended to create or did create an artificial price.

The respective scienter requirements of final Rule 180.1 (intentional or reckless), final Rule 180.2 (specific intent), and CEA section 9(a)(2) (specific intent) function to ensure that good-faith mistakes or negligence will not constitute a violation of the final Rules.

Regarding final Rule 180.1:

- It reaches all manner of fraud and manipulation within the scope of the statute it implements, CEA section 6(c)(1).

- It does not impose any new affirmative duties of inquiry, diligence, or disclosure. The failure to disclose information prior to entering into a transaction, either in an anonymous market setting or in bilateral negotiations, will not, by itself, constitute a violation. However, depending on all of the facts and circumstances, trading on the basis of material nonpublic information in breach of a pre-existing duty (established by another law or rule, agreement, understanding, or some other source), or by trading on the basis of material nonpublic information that was obtained through fraud or deception, may violate final Rule 180.1. Similarly, fraud-by-partial-omission or half-truths could violate final Rule 180.1 if the facts and circumstances of a particular case so warrant.
- The “in connection with” requirement is to be read broadly, not technically or restrictively. Section 6(c)(1) and final Rule 180.1 reach all manipulative or deceptive conduct in connection with the purchase, sale, solicitation, execution, pendency, or termination of any swap, or contract of sale of any commodity in interstate commerce, or for future delivery on or subject to the rules of any registered entity.

Final Rule 180.2 codifies the Commission’s long-standing authority to prohibit price manipulation by making it unlawful for any person, directly or indirectly, to manipulate or attempt to manipulate the price of any swap, or of any commodity in interstate commerce, or for future delivery on or subject to the rules of a registered entity.

Regarding final Rule 180.2:

- It mirrors the text of new CEA section 6(c)(3), and its application will be guided by the traditional four-part test for manipulation that has developed in case law arising under old CEA section 6(c) and CEA section 9(a)(2): (1) that the accused had the ability to influence market prices; (2) that the accused specifically intended to create or effect a price or price trend that does not reflect legitimate forces of supply and demand; (3) that artificial prices existed; and (4) that the accused caused the artificial prices. Recklessness will not suffice under final Rule 180.2 as it will under final Rule 180.1.
- The rulemaking clarifies the above-listed elements and the manner in which the Commission interprets and intends to apply final Rule 180.2.

Final Rules 180.1 and 180.1 become effective 30 days after publication in the Federal Register.