Expert Analysis

A Bridge Too Far: CFTC's 'Reckless' Manipulation Theory

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The U.S. Commodity Futures Trading Commission has, by regulation, reduced a long-standing mens rea standard in connection with proof of unlawful price manipulation allegedly accomplished by open market transactions. By reducing the standard from specific intent to recklessness generally, and without distinguishing and providing a separate specific intent standard for allegations based upon open market transactions, the CFTC is deviating impermissibly from clear congressional intent, as well as long-standing, well-founded policy to rely upon the specific intent standard to distinguish innocent market transactions from unlawful price manipulation.

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Introduction

The U.S. Commodity Futures Trading Commission has taken a highly questionable view of its authority to pursue price manipulation charges against traders whose bona fide open market trading recklessly distorts market prices. Rather than proving that a trader, whose genuine trades were otherwise lawful, had the specific intent to distort prices, as required by the CFTC itself and the courts prior to the passage of the Dodd-Frank Act, or DFA,[1] the CFTC has asserted that, under a regulation it promulgated in 2011 to implement a new DFA-added Commodity Exchange Act, or CEA, statutory provision,[2] proof of mere recklessness will satisfy the CFTC's scienter evidentiary burden in such cases.[3]

The CEA provision that the DFA added essentially mirrors the Securities and Exchange Act's Section 10(b).[4] As this article demonstrates, Congress never intended for the CFTC's post-DFA anti-manipulation authority to exceed that of the U.S. Securities and Exchange Commission, which the courts have determined requires proof of specific intent in cases based upon open market trading.

Rather, the CFTC's assertion is premised on the conflation of two types of behavior that precedential securities case

law has clearly distinguished: manipulation allegations based upon fraudulent or deceptive acts for which courts have determined mere recklessness may be sufficient proof, and actions based upon bona fide open market trading for which the courts have consistently required proof of specific intent. The CFTC's rulemaking failed to articulate any support for the notion that Congress intended for the CFTC's authority in respect of open market trading-based cases to exceed the SEC's and, as discussed below, the statutory language and legislative history indicate the contrary.

Perhaps as importantly, the notion of "reckless" manipulation is completely contrary to the fundamental policy, firmly established in the CFTC's early years, of requiring proof of specific intent, in order to avoid the risk that otherwise innocent open market trading could in hindsight be recharacterized as manipulative misconduct.

CEA Section 6(c)(1) and Congressional Intent: Alignment with Exchange Act Section 10(b)

While the CEA had long prohibited price manipulation under its Section 6(c), 6(d) and 9(a)(2) authority,[5] the DFA added a new offense to the CEA in 2010 relating to fraud and manipulation in the commodities and derivatives markets. Specifically, Section 753 of the DFA added Section 6(c)(1) to the CEA, making 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."[6] The issue of the proper scienter standard to be applied in CEA manipulation cases premised on open market transactions arises from this new statutory authority.

In drafting the new provision, several key clauses of CEA Section 6(c)(1) were imported from Exchange Act Section 10(b), which has been judicially recognized as "virtually identical."[7] The incorporation of Section 10(b)'s "manipulative or deceptive device" term of art in CEA Section 6(c)(1) itself suggests that Congress intended to provide the CFTC with the same authority as the SEC to pursue manipulation. That intent is strongly supported by legislative history, as Sen. Maria Cantwell, D-Wash., the sponsor of the legislation, explained that it "would give the CFTC the same anti-manipulation standard currently employed by the SEC."[8]

To this end, Cantwell observed that aligning the CEA's "manipulative or deceptive device" term of art with firmly-established securities law precedent would enable interpretations of Section 6(c)(1) to benefit from the extensive judicial decisions interpreting Section 10(b).[9] This "substantial body of case law [that] has developed ... around Section 10(b)" over "the 75 years since the enactment of the [Exchange Act]" would "provide certainty in how this legislation will be interpreted and applied by the Courts and the CFTC."[10]

Thus, the touchstone for interpreting the reach of Section 6(c)(1) must be the Section 10(b) case law. Federal courts, beginning with the U.S. Supreme Court's 1977 decision in Santa Fe Industries Inc. v. Green,[11] have long recognized that Exchange Act Section 10(b) prohibits two distinct types of misconduct — "manipulative devices" and "deceptive devices"[12] — and the appellate courts have subsequently applied separate scienter requirements for each species of wrongdoing. Specifically, all three federal appellate courts that are most influential in respect of financial trading and regulation have required proof of

specific intent in cases involving manipulation accomplished through otherwise bona fide open market transactions.

As early as 1997, the Seventh Circuit held in Sullivan & Long Inc. v. Scattered Corp.[13] that proof of manipulation by open market trading required proof of specific intent.[14] In 2001, the D.C. Circuit Court of Appeals acknowledged in Markowski v. SEC[15] that a finding of manipulation depends "entirely on whether the investor's intent was 'solely to affect the price of [the] security.'"[16] And in 2007, the Second Circuit in ATSI Communications Inc. v. Shaar Fund Ltd.[17] recognized that a trader's intent "is the only factor distinguishing legitimate trading from manipulation."[18]

Consequently, the state of the relevant securities law requirement of specific intent in cases premised upon bona fide open market trading was clear, and Congress was not writing on a clean slate when it added the previously interpreted Exchange Act Section 10(b) phrase "manipulative or deceptive device" to the CEA in 2010. Nothing in the language or legislative history of Section 6(c)(1) suggests a congressional desire to deviate from 10(b)'s scienter requirement. It follows as a matter of logic and law that the scienter standard under the Exchange Act applies with equal force to the borrowed language under the CEA.[19]

CFTC Rule 180.1's Operative Language Opens the Door for Misapplication of Scienter Requirements

Section 6(c)(1) was not self-effecting, but provided that the CFTC would promulgate "rules and regulations" to outline prohibited conduct.[20] The CFTC published its final rule implementing Section 6(c)(1) in July of 2011. CFTC Rule 180.1 provides in pertinent part that it is unlawful for any person "to intentionally or recklessly: (1) use or employ ... any manipulative device, scheme or artifice to defraud."[21] While Section 6(c)(1) did not specifically enumerate the intent requirements Congress borrowed from securities law, the CFTC's rule proposal noted that, in general, a violation can occur "intentionally or recklessly," relying upon certain securities cases involving deceptive conduct that apply a recklessness standard and inexplicably failing to mention any of the several appellate decisions distinguishing open market trading allegations.[22]

The final rule maintained the same language, thereby permitting an interpretation for those not readily familiar with the distinctions articulated in securities cases that Congress had intended for recklessness to apply in any case under the rule, including cases based upon open market trading.[23] Thus, the CFTC had either intentionally or unintentionally blurred the distinction between the two scienter standards applied in securities cases beyond the scope Congress intended.

Examination of the initial Rule 180.1 proposal and final rule release shows the path taken by the CFTC to claim more authority than Congress had intended. While the CFTC stated in its November 2010 rule proposal that it modeled Rule 180.1 on SEC Rule 10b-5, in light of "the similarities between CEA section 6(c)(1) and Exchange Act section 10(b),"[24] the CFTC asserted that SEC Rule 10b-5 precedent would merely "guide, but not control" the scienter standard applicable to Rule 180.1.[25] Further, the rule proposal purported to prohibit "reckless" behavior without qualification.[26]

The CFTC persisted in its interpretation when it published its final Rule 180.1 in July 2011,

providing that “a showing of recklessness is, at a minimum, necessary to prove the scienter element,” without any further explanation of its authority to deviate from the well-established securities law precedent that Congress had intended to govern.[27] Despite the fact that public comments urged the CFTC to adopt a more stringent scienter standard than the CFTC offered in its initial rule proposal, the final rule release did not elaborate on the proposal’s unsupported statement that unspecified differences in the securities and commodities markets justified the rule’s novel scienter requirement.[28]

The CFTC’s final rule, like its rule proposal, did not analyze the judicial decisions that have examined the two distinct categories of misconduct (manipulation or deception), and their differing scienter standards.[29] Moreover, the CFTC did not 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. Ironically, in the final rule release, the CFTC cited the Supreme Court’s Morissette v. United States[30] decision, which implicitly limits CFTC authority to vary the scienter requirement by its holding that “where Congress borrows terms of art it ‘presumably knows and adopts the cluster of ideas that were attached to each borrowed word.’”[31]

Thus, even if Senator Cantwell had not so clearly expressed the intention that the CFTC must follow SEC precedent in this area, Supreme Court jurisprudence would require the same result. Nevertheless, the CFTC rule proposal and final rule release failed to analyze the “cluster of ideas” relating to scienter laden in the “manipulative or deceptive device” term of art.

Early Judicial Application of the CFTC’s Rule 180.1 Recklessness Standard

At the time of the writing of this article, only one district court decision had applied the CFTC’s chosen Rule 180.1 recklessness standard in a case alleging manipulation by bona fide open market trading. In 2015, the CFTC initiated a market transaction-based manipulation action against Kraft Foods in a Chicago federal district court, alleging that Kraft acted either intentionally or recklessly.[32] Relying on Rule 180.1, the CFTC claimed, and the court agreed, that it need not prove specific intent to manipulate, but rather that recklessness would suffice.[33]

Relying heavily upon the language of Rule 180.1, the court found that the CFTC only needed to plead that “Kraft’s conduct was either reckless or intentional” because, while Section 10(b) and Rule 10b-5 “contain no express scienter requirement,” CEA Section 6(c)(1) “via Regulation 180.1, specifically requires intentional or reckless conduct.”[34] Further, the district court reasoned that “case law interpreting Section 10(b) has actually adopted a recklessness standard,” and cited solely to cases premised on deceptive conduct involving misrepresentations and omissions as the CFTC had in its rulemaking process.[35]

Inexplicably, the district court’s discussion of the recklessness standard failed to distinguish or even reference the leading appellate decisions, including the decision of the court’s own circuit, separately analyzing open market securities trading cases and, for them, requiring proof of specific intent. As the conclusion of a trial court, this decision necessarily has limited precedential effect.

The Kraft decision’s failure to analyze the import of the different types of securities cases in

which recklessness or specific intent has been required would be expected to give it little persuasive power. However, more recent decisions do not seem to have conducted the expected independent, in-depth analysis. A parallel private litigation in a separate Chicago federal court did not address this issue directly, but muddied the waters somewhat by its 2016 finding that allegations that Kraft, through its open market trading, "intentionally and knowingly deceived the market" were sufficient to state a claim for manipulation under Section 6(c)(1).[36] While the court correctly applied a specific intent-level scienter standard, it appears to have mistakenly conflated the effect of alleged bona fide open market misconduct with the nature of the misconduct itself.

This approach introduces a circularity of reasoning whereby all allegations of manipulation by bona fide open market trading could cause such transactions to be recharacterized as deception-based manipulation by hindsight. Consequently, its holding seems especially fragile, as the appellate courts, including the Seventh Circuit, have eschewed this circularity for purposes of scienter requirements in securities cases under the analogous Rule 10b-5.[37] The appellate courts reviewing those cases have expressed a clear focus on the nature of the alleged misconduct, and have consistently addressed open market transaction-based cases as fundamentally different from cases based on false statements or other similar deceptive conduct.[38]

Any doubt that the meaning of Section 6(c)(1) was in need of closer analysis was extinguished in May 2018, when a California federal district court heard a CFTC enforcement action against Monex Credit Company alleging that the defendant defrauded thousands of retail customers through illegal, off-exchange leveraged precious metal transactions.[39] The court rejected the CFTC's proposed interpretation of Section 6(c)(1) and interpreted the phrase "manipulative or deceptive" to require the presence of both types of misconduct.[40] Notably, while the court did not directly address the scienter requirements for alleged market transaction-based manipulation, it novelly collapsed the two forms of misconduct that Section 6(c)(1) covers.[41] The resiliency of this view is in question, however, as it has subsequently been rejected by another district court.[42]

No further analysis of the scienter standard applicable to open market transaction-based manipulation under Rule 180.1 is available from an August 2018 Eastern District of New York decision in a CFTC enforcement action against Patrick McDonnell and CabbageTech Corp. for "conning [investors] into believing they were paying for, and receiving, bona fide advice on investing in virtual currencies."[43] That court found that a Rule 180.1 violation had occurred based on deceptive conduct alone,[44] citing to the language of Rule 180.1 and the Kraft decision for the proposition that "the Commission must show that Defendants' conduct was intentional or reckless."[45]

Consequently, the decision provides no analysis or even any comment on the scienter standard applicable to market transactions alleged to constitute unlawful manipulation. These recent decisions demonstrate that judicial interpretation of the reach of Rule 180.1 to market transaction-based conduct is in its earliest stages and still awaiting in-depth analysis.

Bedrock Policies Underlying Both Securities and Commodities Cases Support a Specific Intent Standard

The appellate courts' rulings on scienter in the context of the virtually identical 10b-5 language, as well as the CFTC itself in its early watershed decision defining the price manipulation offense, have identified sound policy reasons for requiring that specific intent be proven. For example, in Markowski, the D.C. Circuit recognized the very thin line "separat[ing] a 'manipulative' investor from one who is simply over-enthusiastic, a true believer in the object of investment," and determined that engaging in otherwise lawful open market trading as a reason for the liability for market manipulation must depend "entirely on whether the investor's intent was an investment purpose or solely to affect the price of [the] security."[46] Similarly, in ATSI Communications, the Second Circuit considered real world market operations and explained that because efficient pricing is derived from "competing judgments of buyers and sellers as to the fair price of [a] security," specific intent can be "the only factor that distinguishes legitimate trading from improper manipulation."[47]

Notably, the CFTC had previously expressed nearly identical policy concerns, and the agency's recent push for a recklessness standard deviates sharply from the limiting principle that the CFTC historically relied upon to distinguish unlawful manipulation from lawful trading under its pre-DFA antimanipulation authority. In a seminal 1982 decision, In re Indiana Farm Bureau Cooperative Association,[48] the CFTC extensively analyzed a variety of policy and economic issues and concluded that the "specific intent to create an 'artificial' or 'distorted' price is a sine qua non of price manipulation."[49]

In that extensively detailed decision, the CFTC expressed concern that a "weakening of the manipulative intent standard" would "wreak havoc with the marketplace," because a "clear line between lawful and unlawful activity" is necessary to protect parties acting with a "profit motive" to obtain the best prices for their commodities, who should not be found to have violated the CEA without proof of specific intent.[50] These policy considerations, which are prominently articulated in both the securities and commodities precedents, appear to be equally valid in the post-DFA environment. Critically, nothing in the language or legislative history of CEA Section 6(c)(1) suggests otherwise. Indeed, as discussed above, the relevant legislative history and the policies articulated in the securities case law expressly supports a continuation of these policies.

The CFTC's Recklessness Standard as Applied to Bona Fide Open Market Trading Is an Impermissible Deviation

As was the case with Exchange Act Section 10(b) and implementing Rule 10b-5, CEA Section 6(c)(1) required the CFTC to promulgate rules and regulations to effectuate its terms.[51] But in formulating implementing rules, administrative agencies are not permitted to exceed the scope of the statutory scheme that Congress devised.[52] Courts analyzing whether to defer to an administrative agency's interpretation of a congressional statute analyze whether Congress "directly addressed the precise question at issue."[53] As part of this inquiry, courts examining Section 6(c)(1) should apply "traditional tools of statutory construction" to discern the meaning of the "manipulative or deceptive device" term of art in determining whether to defer to the CFTC's scienter interpretation.[54]

Among those tools, Section 6(c)(1)'s legislative history and the CFTC's own prior practice are both instrumental in determining congressional intent.[55] As discussed above, the former demonstrates that Congress intended to delineate the CFTC's ability to pursue commodities manipulation to be coterminous with the SEC's enforcement powers in the

securities markets. Moreover, requiring a specific intent standard in cases premised upon bona fide open market trading is consistent with the CFTC's prior practice, as well as sound policy, in maintaining a clear distinction between conduct designed to affect price and otherwise lawful profit-seeking activities that may impact price.

The CFTC's position was not improved by the rulemaking process. Courts assessing the reasonableness of an administrative agency's interpretation of an enacting statute consider the sufficiency of an administrative agency's reasoning,[56] and the CFTC's thin rationale for asserting a right to expand the universe of cases subject to a recklessness standard into bona fide open market trading lacks persuasive support. The securities provision that Rule 180.1 is modeled upon, SEC Rule 10b-5, is silent as to any scienter requirement,[57] and the intent standards applicable to the various species of misconduct described above were fashioned through judicial decisions, which Congress expressly incorporated into the CEA's anti-manipulation authority.

Because Congress intended that the commodities provision rely upon the well-developed securities law principles, including the ample interpretive case law, more than a passing reference to unspecified differences in the two markets is necessary to persuasively explain why a lower scienter standard applies in bona fide open market trading cases. Absent any support for the CFTC's preferred recklessness standard in cases premised on bona fide open market trading that rests on Section 6(c)(1)'s language or congressional intent, a recklessness standard in such cases is not a permissible interpretation of the CFTC's authority.

Conclusion

The structure and language of CEA Section 6(c)(1), its legislative history and decades of securities law precedent, supported as a matter of logic and still-good policy by the CFTC's earlier case law, manifestly demonstrate that in creating Section 6(c)(1), Congress clearly intended to align its intent standards with existing securities law precedent requiring proof of specific intent to manipulate in open market trading cases. And as the Supreme Court has made clear, it is impermissible for an administrative agency to vary a statute's meaning and interpretation through the rulemaking process.[58] Consequently, it is reasonable to expect future courts that delve beyond the Rule 180.1 language to conclude that the CFTC has gone a bridge too far in asserting that recklessness is sufficient in bona fide open market trading-based manipulation cases.

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

[2] 17 C.F.R. § 180.1 (2011).

[3] CFTC v. Kraft Foods Grp. Inc., 153 F. Supp. 3d 996 (N.D. Ill. 2015).

[4] 17 C.F.R. § 240.10b-5.

[5] See CEA §§ 6(c), 6(d), 9(a)(2) (2006).

[6] 7 U.S.C.A. § 9 (West 2010).

[7] See, e.g., In re Commodity Exch. Inc., 213 F. Supp. 3d 631, 672 (S.D.N.Y. 2016) (noting that CEA Section 6(c)(1) and Exchange Act Section 10(b) are "virtually identical").

[8] 155 Cong. Rec. S9557 (Sept. 17, 2009).

[9] 156 Cong. Rec. S3348 (May 6, 2010).

[10] 155 Cong. Rec. S9557 (Sept. 17, 2009).

[11] 430 U.S. 462 (1977).

[12] Id. at 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 NA v. First Interstate Bank of Denver NA, 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").

[13] 47 F.3d 857 (7th Cir. 1995).

[14] Id. at 864 (holding 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").

[15] 274 F.3d 525 (D.C. Cir. 2001).

[16] Id. at 528.

[17] 493 F.3d 87 (2d Cir. 2007).

[18] Id. at 102; see also SEC 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").

[19] See Nat'l Treas. Empls. Union v. Chertoff, 452 F.3d 839, 863 (D.C. Cir. 2006) (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).

[20] 7 U.S.C.A. § 9 (West 2010).

[21] 17 C.F.R. § 180.1 (2011).

[22] 75 Fed. Reg. 67657, 67659.

[23] 76 Fed. Reg. 41398, 41410.

[24] 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); see also 75 Fed. Reg. 67657, 67658 ("Guided by section 6(c)(1)'s similarity to Exchange Act section 10(b), the Commission proposes an implementing rule that is also modelled on SEC Rule 10b-5, with modification to reflect the CFTC's distinct regulatory mission and responsibilities").

[25] 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.

[26] 75 Fed. Reg. 67657, 67658 ("only intentional or reckless conduct may violate CEA subsection 6(c)(1) and the Commission's implementing rule").

[27] 76 Fed. Reg. 41398, 41399.

[28] Id. ("To account for the differences between the securities markets and the derivatives markets, the Commission will be guided, but not controlled, by the substantial body of judicial precedent applying the comparable language of SEC Rule 10b-5").

[29] 75 Fed. Reg. 67657, 67658; see also 76 Fed. Reg. 41398, 41399.

[30] 342 U.S. 246, 263 (1952).

[31] 76 Fed. Reg. 41398, 41399.

[32] Kraft Foods Grp. Inc., 153 F. Supp. 3d 996; but see CFTC v. McDonnell, No. 18-cv-361, 2018 WL 4090784 (E.D.N.Y. Aug. 28, 2018) (in a CFTC enforcement suit alleging deceptive and fraudulent statements, rather than bona fide open market trading, the district court in dicta cited favorably the overall holding of the Kraft decision).

[33] Gov't Opp'n. to Mot. to Dismiss at 18–20, 21–22, CFTC v. Kraft Foods Grp. Inc., No. 1:15-cv-02881 (N.D. Ill. July 13, 2015), 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.

[34] Kraft Foods Grp. Inc., 153 F. Supp. 3d at 1015. 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.

[35] Id. at 1015.

[36] Ploss v. Kraft Foods Group Inc., 197 F. Supp. 3d 1037, 1059 (N.D. Ill. 2016).

[37] See, e.g., Sullivan, 47 F.3d 857 (7th Cir. 1995); Markowski, 274 F.3d 525 (D.C. Cir. 2001); ATSI, 493 F.3d 87 (2d Cir. 2007).

[38] See, e.g., Sullivan, 47 F.3d 857 (7th Cir. 1995).

[39] CFTC v. Monex Credit Co., 311 F. Supp. 3d 1173 (C.D. Cal. 2018).

[40] Id. at 1186.

[41] Id.

[42] See CFTC v. My Big Coin Pay Inc., No. 18-10077-RWZ, (D. Mass. Sep. 26, 2018) (finding that "both Section 6(c)(1) and Regulation 180.1 explicitly prohibit fraud even in the absence of market manipulation").

[43] McDonnell, 2018 WL 4090784, at *3-4.

[44] Id.

[45] Id. at *49.

[46] 274 F.3d at 528–30 (finding that testimony "substantially support[ed] the Commission's key finding: that the firm bought … securities in order to maintain their apparent market price") (emphasis added and internal quotations omitted). Similarly, in GFL Advantage Fund Ltd. v. Colkitt, 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" 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. 272 F.3d 189, 205, 207 (3d Cir. 2001).

[47] 493 F.3d at 96-97, 102.

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

[49] Id. at *6.

[50] Id. at *6-7 (citing In re Hohenberg Brothers, [1975–1977 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 21,478 (C.F.T.C. Feb. 18, 1977)).

[51] 7 U.S.C.A. § 9 (West 2010); 156 Cong. Rec. S3347 (May 6, 2010).

[52] Chevron USA Inc. v. Nat. Res. Def. Council Inc., 467 U.S. 837, 843 (1984).

[53] Id.

[54] Id. at n. 9.

[55] See INS v. Cardoza-Fonseca, 480 U.S. 421, 434-37, 441-42 (1987) (reviewing congressional record as well as agency's practice under prior version of statute).

[56] See, e.g., Zero Zone Inc. v. Dep't of Energy, 832 F.3d 654, 668 (7th Cir. 2016).

[57] 17 C.F.R. § 240.10b-5.

[58] Chevron, 467 U.S. at 844.