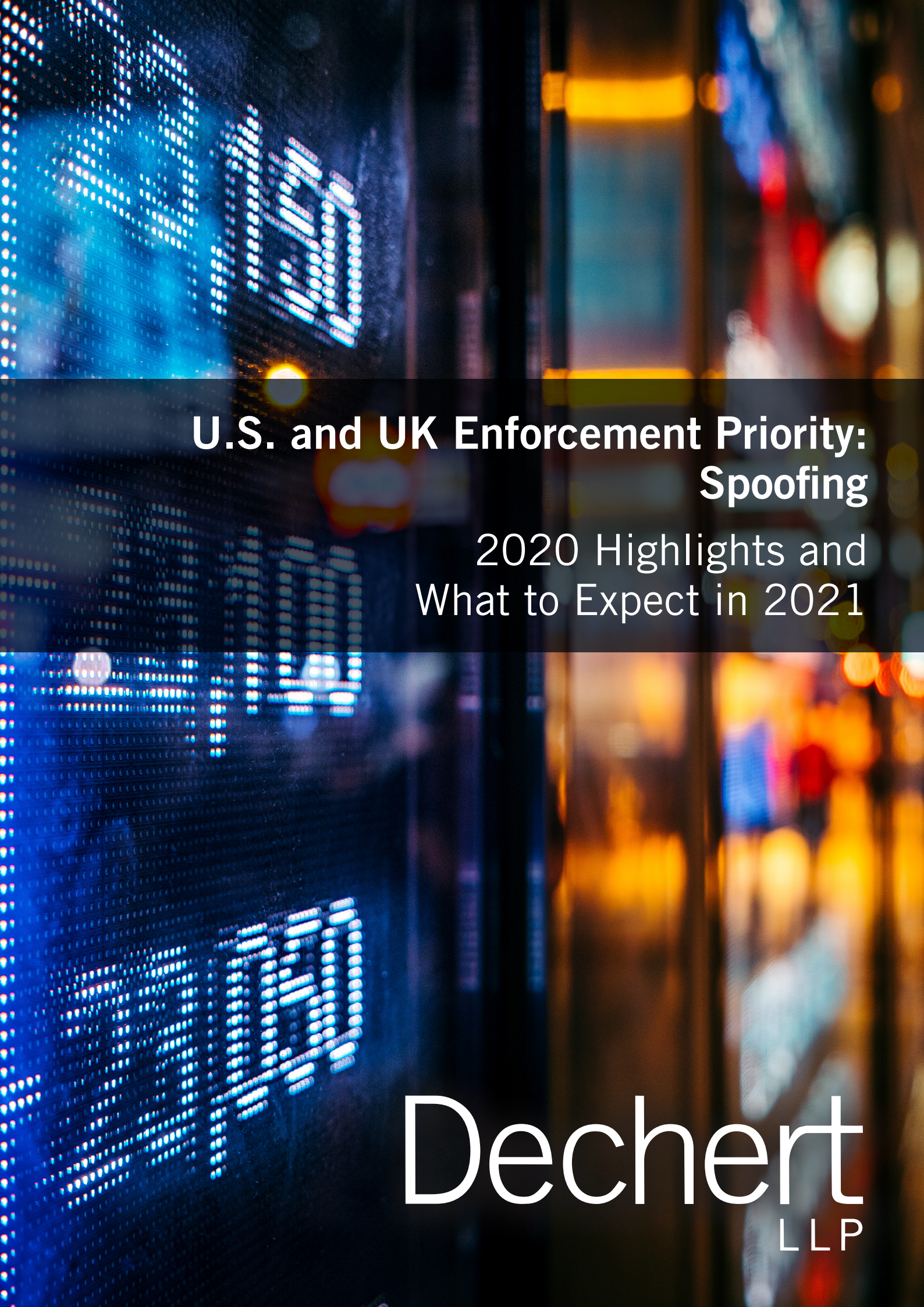

U.S. and UK Enforcement Priority: Spoofing

2020 Highlights and What to Expect in 2021

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Introduction

In a year of increased volatility across the world's financial markets, 2020 saw prosecutors, regulators, and exchanges on both sides of the Atlantic sharpen their focus on "spoofing" – i.e., bidding or offering without the intent to execute for the purpose of influencing prices in a direction favorable to a trader's desired position on the opposite side of the market.

In the United States, the Department of Justice's ("DOJ") Fraud Section's long-running criminal investigation into spoofing in the precious metals markets resulted in deferred prosecution agreements with three large banks and around US$1 billion in penalties, as well as continuing prosecutions of individual traders. The prosecutions featured novel and expansive theories of criminal liability, including the use of the wire fraud affecting a financial institution statute and the Racketeer Influenced and Corrupt Organizations Act ("RICO") statute. The DOJ's focus in this area has also illuminated the vulnerability that overseas traders face from U.S. prosecutions. The Commodity Futures Trading Commission ("CFTC") likewise brought and settled a steady stream of cases involving spoofing in commodities markets, and the U.S. Securities and Exchange Commission ("SEC") also showed increased interest. Civil class action lawyers too have tried to piggyback on settlements with regulators, so far with limited success.

Though they have so far eschewed heavy-handed American-style criminal prosecutions, UK regulators are also paying increased attention to spoofing. While the UK Financial Conduct Authority ("FCA") has previously taken enforcement action for spoofing conduct, in 2020, the FCA had its first enforcement action for market abuse under the EU civil market abuse regime (which forms part of retained EU law in the UK following the end of the Brexit transition period) against a former portfolio manager, based on conduct identified by the FCA's internal surveillance systems. Last year, British authorities also imposed a record fine targeting market manipulation in the wholesale energy markets.

KEY TAKEAWAYS

- The intensifying regulator interest in spoofing, new theories of civil and criminal liability, and the increased use of sophisticated data analytics suggest that regulators' focus on spoofing will continue for the foreseeable future. Moreover, with the U.S. increasingly targeting overseas traders in cross-border investigations, we may also begin to see more multi-jurisdictional investigations as we have increasingly seen in bribery and corruption cases.
- Market participants, including individual traders, asset managers, proprietary traders, and banks must remain vigilant. Compliance policies and training materials should specifically prohibit spoofing and other disruptive trading practices. Firms must also actively supervise, monitor, and educate traders and proactively investigate potential instances of spoofing. The alternative is to risk being in the headlines as the next target of an enforcement action and, down the line, a costly and lengthy civil class action.
- Given the global reach of spoofing enforcement and the potential for criminal liability, counsel must be prepared to deal with cross-border aspects of cases, including the involvement of regulators and prosecutors in more than one jurisdiction and, for individuals, possible extradition. Counsel should also be prepared to defend clients in civil and criminal regulatory actions in multiple jurisdictions, as well as follow-on private litigation.

For more information on notable enforcement actions and cases, please refer to the Appendix.

United States

U.S. Criminal Enforcement

Corporate Resolutions

The DOJ reached deferred prosecution agreements with three banks and a proprietary trading firm in 2020 and January 2021 that collectively imposed remedies of around US$1 billion for spoofing in various commodities and securities markets.[1] Two of the bank settlements stemmed from civil regulatory investigations that occurred years earlier.[2]

The DOJ reached its largest-ever corporate resolution related to spoofing with JPMorgan Chase & Co. ("JPMorgan") in September 2020.[3] Between the DOJ, CFTC, and SEC, JPMorgan was required to pay more than US$920 million.[4] The trigger for the settlement was the DOJ filing an information charging JPMorgan with two counts of wire fraud, one each for two separate alleged spoofing schemes.[5] The first alleged scheme involved tens of thousands of spoofing trades in the precious metals futures market.[6] The second alleged scheme involved thousands of spoofing trades in both Treasury futures traded on exchanges and cash Treasuries traded in other secondary markets.[7] Together, the DOJ asserted that the two schemes caused more than US$310 million in losses to other traders in these markets.[8] The penalties could have been even larger, but the settlement took into account the fact that most of the alleged misconduct took place prior to JPMorgan's criminal resolution with the DOJ in 2015 of manipulative trading practices in the foreign currency exchange spot market and the many improvements that JPMorgan had since made to its compliance department.[9]

Beyond just the eye-popping penalties, a clear takeaway from the DOJ's resolutions from 2020 is that the DOJ will look to reprimand a company if a trader's potential spoofing is brought to the attention of the compliance department or senior management, yet the company does nothing to stop the conduct. As part of a deferred prosecution agreement with the Bank of Nova Scotia, the DOJ imposed a criminal penalty at the maximum end of the range provided by the U.S. sentencing guidelines because the bank's compliance department took no remedial actions after learning about spoofing from both the trader himself and from a futures commission merchant.[10]

The DOJ similarly faulted a proprietary trading firm, Propex, for failing to prevent a trader's spoofing after a clearing firm informed the proprietary firm's senior management about suspicious trading.[11] The DOJ would likely have imposed a harsher penalty to discourage this supervisory failure if not for the fact that a larger criminal penalty would have prevented the firm from making restitution to its victims in light of its poor financial condition.[12]

1. *See Appendix.*
2. *See* Press Release, Dep't of Just., Deutsche Bank Agrees to Pay Over US$130 Million to Resolve Foreign Corrupt Practices Act and Fraud Case (Jan. 8, 2021), available at https://www.justice.gov/opa/pr/deutsche-bank-agrees-pay-over-130-million-resolve-foreign-corrupt-practices-act-and-fraud (resolving criminal wire fraud charges following a civil spoofing settlement with the CFTC that occurred nearly three years earlier); Press Release, Dep't of Just., The Bank of Nova Scotia Agrees to Pay US$60.4 Million in Connection With Commodities Price Manipulation Scheme (Aug. 19, 2020), available at https://www.justice.gov/opa/pr/bank-nova-scotia-agrees-pay-604-million-connection-commodities-price-manipulation-scheme (resolving criminal wire fraud and price manipulation charges after CFTC spoofing investigation had been closed prematurely nearly two years earlier).
3. Press Release, Dep't of Just., JPMorgan Chase & Co. Agrees to Pay US$920 Million in Connection with Schemes to Defraud Precious Metals and U.S. Treasuries Markets (Sept. 29, 2020), available at https://www.justice.gov/opa/pr/jpmorgan-chase-co-agrees-pay-920-million-connection-schemes-defraud-precious-metals-and-us.
4. *Id.*
5. Information, *United States v. JPMorgan Chase & Co.*, No. 20-cr-175 (D. Conn. Sept. 29, 2020), available at https://www.justice.gov/opa/press-release/file/1320581/download. See also 18 U.S.C. § 1343.
6. *Id. ¶¶ 4–5.*
7. *Id.* ¶¶ 14–15.
8. Deferred Prosecution Agreement at ¶ 15, *United States v. JPMorgan Chase & Co.*, No. 20-cr-175 (D. Conn. Sept. 29, 2020), available at https://www.justice.gov/opa/press-release/file/1320576/download [hereinafter "JPMorgan DPA"].
9. *Id.* ¶ 4(g).
10. Deferred Prosecution Agreement at Attach. A ¶¶ 15–21, *United States v. Bank of Nova Scotia*, No. 20-cr-707 (D.N.J. Aug. 19, 2020), available at https://www.justice.gov/opa/press-release/file/1306141/download.
11. Deferred Prosecution Agreement at Attach. A ¶ 4(d), *United States v. Propex Derivatives Pty Ltd.*, No. 20-cr-39 (N.D. Ill. Jan. 21, 2020), available at https://www.justice.gov/opa/press-release/file/1236691/download.
12. *Id.* ¶ 11.

Individual Prosecutions

The DOJ continued its pursuit of individuals in 2020, particularly manual traders employed by large banks to trade precious metals. Some commentators say that spoofing is a misplaced criminal enforcement priority that inures to the benefit of niche companies (such as proprietary high-frequency trading firms) who complain to regulators that they have been harmed by other financial actors (such as large banks) without any evidence that the alleged spoofing has caused wider harm to the market as a whole.[13] Whatever the merit of these cases, recent criminal prosecutions have resulted in significant legal developments.

The DOJ's novel and expansive "spoofing as wire fraud" theory of liability took a turn in the spotlight in 2020 at a masked and socially distanced criminal jury trial in the midst of the COVID-19 pandemic. James Vorley, a UK citizen, and Cedric Chanu, a citizen of France and the UAE, were charged with "wire fraud affecting a financial institution," 18 U.S.C. § 1343, based on their trading in the precious metals markets going back as early as 2008. (Dechert is counsel to Mr. Vorley.) The government's theory is that each bid or offer makes an "implied representation" that the trader intends to trade the order, as opposed to canceling it before execution, such that a spoof order designed to benefit an order on the opposite side of the market can defraud other market participants. Further, the government claimed that Vorley and Chanu, who traded for Deutsche Bank, also "affected" Deutsche Bank by exposing the bank to increased risks, including the risk of an investigation. By using this self-affecting theory, which has so far been upheld by the courts, the DOJ took advantage of a 10-year statute of limitations, as opposed to the five-year and six-year statutes of limitations available under the specific spoofing and commodities fraud statutes, respectively.[14] To date, two separate U.S. district court judges have upheld the legal viability of such a theory and ruled that the question of whether a trader's placement and subsequent cancellation of orders was intended to deceive other market participants is an issue of fact that must be decided by a jury at trial.[15]

After a week-long trial and three days of deliberations, a jury acquitted Vorley and Chanu on a conspiracy charge and eight substantive wire fraud counts but found them guilty on 10 other counts of wire fraud (three for Vorley and seven for Chanu).[16] Whether the convictions will stand and whether spoofing can be successfully prosecuted under the wire fraud statute remains an open question, as the court deferred a ruling on the defendants' motions for judgments of acquittal, which are still pending. Whichever way that ruling goes, the parties are sure to appeal to the Seventh Circuit. However, the verdict has already had an impact: In the aftermath of the trial, Deutsche Bank entered into a DPA with the DOJ in which it admitted that its traders engaged in wire fraud by spoofing in the precious metals markets.[17]

The DOJ concluded sentencing proceedings in 2020 in two criminal spoofing prosecutions of foreign nationals.[18] Navinder Sarao, a UK citizen facing a lengthy sentence on allegations he contributed to the 2010 Flash Crash – a 36-minute, trillion dollar stock market crash – secured a non-incarceratory sentence following his plea to a US$13 million spoofing scheme.[19] Despite spoofing entirely on his own, prosecutors agreed to his cooperation in hopes that Sarao, an autistic man with exceptional abilities, could enhance the DOJ's understanding of spoofing to further other investigations. (Dechert was counsel to Mr. Sarao.) Jiongsheng Zhao, an Australian national extradited following 10-months incarceration, pled guilty pursuant to a cooperation agreement and, in keeping with the government's recommendation, received a sentence of time served.[20,21] Explaining the sentence, the court emphasized the harsh conditions of his prior incarceration as well as his cooperation.[22]

13. *See* Ankush Khardori, *A Crime Epidemic Has Cost Americans Billions. Why Aren't More People Paying Attention?*, TIME (Jan. 27, 2021), https://time.com/5933674/financial-crime-justice-department/; Dave Michaels, *Justice Department Presses Ahead With 'Spoofing' Prosecutions Despite Mixed Record*, WALL ST. J. (Feb. 7, 2020 1:55pm ET), https://www.wsj.com/articles/justice-department-presses-ahead-with-spoofing-prosecutions-despite-mixed-record-11581095386?page=1.
14. *See* 18 U.S.C. §§ 1343, 1348, 3293(2), 3301.
15. *United States v. Vorley*, 420 F.Supp.3d 784 (N.D. Ill. 2019); *United States v. Bases*, No. 18-cr-48, 2020 WL 2557342 (N.D. Ill. May 20, 2020).
16. Order Entering Jury Verdicts, *United States v. Vorley, et al*, No. 18-cr-35, Dkt. No. 336 (N.D. Ill. Sept. 25, 2020).
17. JPMorgan DPA, *supra* n. 8.
18. *See United States v. Sarao*, No. 15-cr-75 (N.D. Ill. Sept. 2, 2015); *United States v. Zhao*, No. 18-cr-24 (N.D. Ill. Sept. 18, 2018).
19. Judgment, *United States v. Sarao*, No. 15-cr-75, Dkt. No. 119 (N.D. Ill. Jan. 29, 2020).
20. Government's Sentencing Mem., *United States v. Zhao,* No. 18-cr-24, Dkt. No. 66 (N.D. Ill. Jan. 21, 2020).
21. Judgment, *United States v. Zhao,* No. 18-cr-24, Dkt. No. 72 (N.D. Ill. Feb. 5, 2020).
22. Sentencing Hrg. Tr., *United States v. Zhao*, No. 18-cr-24, Dkt. No. 74 (N.D. Ill. Feb. 7, 2020).

Predictions

Looking ahead in 2021, in addition to the anticipated rulings on post-trial motions for Vorley and Chanu, the DOJ will try to obtain additional spoofing convictions against precious metals traders from the Bank of America and JPMorgan. In July, the DOJ will again pursue its wire fraud theory at a trial against Edward Bases and John Pacilio.[23] Later this year, the DOJ will try to prove that spoofing and other allegedly fraudulent conduct by precious metals traders Gregg Smith, Michael Nowak, Christopher Jordan, and Jeffrey Ruffo was so extensive that their bank's precious metals desk amounted to a criminal enterprise under RICO, a law that was passed to target organized crime enterprises and typically used in the prosecution of violent street gangs.[24] RICO violations entail, in addition to typical criminal fines, mandatory forfeiture of any interest the defendant held or proceeds that the defendant obtained from the criminal enterprise.[25] The defendants' motion to dismiss the RICO charges remains pending.

As criminal spoofing enforcement continues to move into 2021 and beyond, we expect the DOJ to continue relying on wire fraud, commodities fraud, bank fraud, and other types of charges other than the Dodd-Frank anti-spoofing provision to prosecute conduct that resembles spoofing (assuming those charging theories survive appeal). These charging theories each prohibit a "scheme or artifice" to defraud another party in some way, which allows the DOJ to string together a supposedly continuing course of conduct that precedes the statute of limitations – sometimes by years – so long as one instance of conduct in furtherance of the scheme falls within the statute of limitations.[26] A judge overseeing one of the DOJ's spoofing cases rebuffed the DOJ from doing the same thing using the Dodd-Frank anti-spoofing provision, which does not similarly define the misconduct it prohibits as a "scheme."[27] As a result, the DOJ can charge a defendant under the anti-spoofing provision only for instances of alleged spoofing that occur within the five-year statute of limitations for claims arising under the Commodity Exchange Act, and the DOJ must specifically identify each such instance.[28]

The DOJ's increased reliance on these alternative charging theories that allow for a 10-year statute of limitations could lead to a spate of new prosecutions in the coming years as we reach the 10-year anniversary of when Dodd-Frank's original anti-spoofing prohibition became effective in July 2011, so that the DOJ can preserve charges based on misconduct that might otherwise soon become time-barred.[29]

London-based former U.S. federal prosecutor Roger Burlingame, who led Dechert's representation in Sarao and Vorley

23. Order Denying Defs. Mot. to Dismiss the Indictment, *United States v. Bases*, No. 18-cr-48, Dkt. No. 301 (N.D. Ill. May 20, 2020).
24. *United States v. Smith, et al.*, No. 19-cr-669 (N.D. Ill. Aug. 22, 2019).
25. 18 U.S.C. § 1963(a).
26. 18 U.S.C. §§ 1343, 1344, 1348.
27. Order, *United States v. Pacilio*, No. 18-cr-48, Dkt. No. 366, at 6–7 (N.D. Ill. Oct. 6, 2020). *See also* 7 U.S.C. § 6c(a)(5)(C).
28. *See* 18 U.S.C. § 3282(a)
29. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 11-203 § 754 (2010).

U.S. Civil Enforcement

CFTC

2018 and 2019 were notable years for the CFTC's anti-spoofing enforcement efforts, with the CFTC filing more cases involving manipulative conduct and spoofing in those years than any prior year.[30] In 2020, the CFTC filed a total of 16 manipulative conduct- or spoofing-related actions, matching the number filed in 2019 and only rivaled by its 2018 count of 26.[31] Of those 16 cases, 12 were centered on spoofing conduct. The CFTC also resolved the two largest spoofing cases in its history, which included the CFTC imposing the highest monetary relief in its history in a settlement with JPMorgan.

Looking forward, we anticipate this enforcement trend to continue. The CFTC's escalating enforcement of spoofing conduct constitutes an important pillar of the CFTC's 2020-2024 Strategic Plan, which specifically cites spoofing in its Fourth Strategic Goal, where the CFTC promises to "[b]e tough on those who break the rules."[32] This commitment has been backed up by the CFTC's now two-year old Spoofing Taskforce, designed to "serve [...] as a coordinated effort across the Division of Enforcement – with members in each of our offices – to root out manipulation and spoofing from our markets."[33]

In 2020, the CFTC entered into settlements for conduct in a wide range of commodities markets: the CME S&P 500 (E-Mini), Treasury, Eurodollar, gold, silver, soybean, crude oil, lean hogs, live cattle, copper, cotton, canola, sugar, heating oil, and gasoline.

30. COMMODITY FUTURES TRADING COMM'N, FY 2019 DIVISION OF ENFORCEMENT ANNUAL REPORT, at 3 (Nov. 2019), available at https://www.cftc.gov/PressRoom/PressReleases/8085-19.
31. *Id.* at 6–7; COMMODITY FUTURES TRADING COMM'N, FY 2020 DIVISION OF ENFORCEMENT ANNUAL REPORT, at 5 (Dec. 2020), available at https://www.cftc.gov/PressRoom/PressReleases/8323-20.
32. COMMODITY FUTURES TRADING COMM'N, STRATEGIC PLAN 2020-2024, at 8 (July 2020), available at https://www.cftc.gov/media/3871/CFTC202024_2024StrategicPlan/download.
33. James McDonald, Director of Enforcement, Commodity Futures Trading Comm'n, Remarks During CFTC-DOJ Press Conference Call (Sept. 16, 2019), available at https://www.cftc.gov/PressRoom/SpeechesTestimony/opamcdonald4.

Predictions

Closer Ties With the DOJ

Coordination between the DOJ and CFTC has been notable in recent years. Secondments of CFTC enforcement attorneys to the DOJ's Fraud Section is but one tangible demonstration of increased cooperation.[34] Moreover, of the 12 enforcement actions brought by the CFTC, a third involved parallel DOJ actions.[35]

Targets of these multi-agency investigations face increased complexity and costs that may not be fully mitigated by the DOJ's 2018 guidance instructing prosecutors not to "pile on."[36]

Use of Data Analytics

In its 2020 Division of Enforcement Annual Report, the CFTC touted its "robust market surveillance program" utilizing "sophisticated systems to analyze trade data and respond to outlying events."[37] It also noted that it had engaged in a "multi-year project to strengthen its data analytics capability to enhance the ability to identify, in the trading data, forms of misconduct that might otherwise have been undetectable."[38] The CFTC noted that the use of data analytics led directly to its two biggest spoofing-related settlements of the year.[39]

34. Aitan Goelman, Program on Corporate Compliance and Enforcement, Is The Fraud Section Going All In On Commodities Cases? (Jan. 15, 2020), https://wp.nyu.edu/compliance_enforcement/2020/01/15/is-the-fraud-section-going-all-in-on-commodities-cases/.
35. *See In re JPMorgan Chase & Co., et al.,* CFTC Dkt. No. 20-69 (Sept. 29, 2020); *In re The Bank of Nova Scotia*, CFTC Dkt. No. 20-27 (Aug. 19, 2020); *In re Propex Derivatives Pty Ltd.*, CFTC Dkt. No. 20-12 (Jan. 21, 2020); *CFTC v. Edge Financial Technologies, Inc.*, No. 18-cv-00619 (N.D. Ill. Aug. 13, 2020).
36. U.S. Attorneys' Manual § 1-12.100, Coordination of Parallel Criminal, Civil, Regulatory, and Administrative Proceedings (last updated November 2018); *see also* Rod Rosenstein, Deputy Attorney General, Dep't of Just., Remarks to the New York City Bar White Collar Crime Institute (May 9, 2018).
37. CFTC FY 2020 DIVISION OF ENFORCEMENT ANNUAL REPORT, *supra* n. 31 at 8.
38. *Id.*
39. *Id.*

We should expect to see the CFTC continue to develop and flex its data analytics muscles in identifying and investigating potential instances of spoofing in 2021. The increased use of data analytics could lead to changes in the types of spoofing cases that the CFTC pursues and, in turn, the types of misconduct that are elevated to the attention of criminal prosecutors. Some market commentators have predicted that the CFTC's enhanced data analysis capabilities will decrease the agency's reliance on whistleblowers to bring enforcement actions.[40]

Novel Enforcement Theories

In recent years we have seen the CFTC not only double down on tried and tested theories of enforcement but begin to test more novel theories as it seeks to expand its arsenal. We see no reason for the CFTC to retreat on these efforts in 2021.

Pinging. One such novel theory, pursued by the CFTC beginning in 2018, is the theory that placing false orders on markets – not in order to induce other market participants to engage in trades, but instead to simply test how the market would react – constitutes spoofing.[41] The CFTC achieved its first success on this theory in 2018,[42] and we expect them to continue to seek to entrench these novel theories and investigate new ones.

Cross-market manipulation. Perhaps as another indicator of the CFTC's enhanced data analytics capacity, we have seen not only investigation of conduct in a diversity of markets, but of conduct spanning multiple markets – with alleged spoof orders being placed on one market in order to influence participants in another market.[43] Although the CFTC has to date targeted this spoofing strategy as applied to different tenors of the same types of futures products,[44] the SEC's recent increased attention to spoofing (explained later in this section) creates room for the CFTC to expand its focus. Since the CFTC's jurisdiction includes futures with values derived from securities that fall within the jurisdiction of the SEC (e.g., Treasury futures and S&P E-mini futures), the two agencies are natural enforcement partners in cross-product spoofing schemes. We anticipate more cases of this kind.

Increased Cooperation With Foreign Regulators and Exchanges

The CFTC has continued to prioritize international cooperation and the targeting of foreign traders in its spoofing strategy.

In an October 2019 speech, CFTC Chairman Heath P. Tarbert noted that "international cooperation is more important now than it has ever been,"[45] and the then-CFTC Enforcement Director James M. McDonald noted in 2018 that the CFTC was most effective at protecting markets when "working closely with our colleagues […] both domestic and international."[46]

In its 2020-2024 Strategic Plan, the CFTC specifically cited as part of its First Strategic Goal the importance of a "regulatory structure" in the derivatives market that relies "on international cooperation and comity" in order to reduce fragmentation and avoid "inconsistent or contradictory risk management requirements."[47] The CFTC's Division of Enforcement's 2020 Annual Report echoed this principle, emphasizing that the Division "believes a robust enforcement program should involve cooperation with colleagues in the enforcement and regulatory community."[48]

The CFTC has followed through on these principles. In its various spoofing-related press releases in 2020, the CFTC has acknowledged the assistance of foreign enforcement agencies such as the Australian Securities and Investments

40. Matt Robinson, *Wall Street Cop Amps Up Sleuthing to Ferret Out Spoofing Trades*, BLOOMBERG (last updated Aug. 21, 2020 12:39pm EDT), https://www.bloomberg.com/news/articles/2020-08-21/wall-street-cop-amps-up-sleuthing-to-ferret-out-spoofing-trades.
41. *In re Mizuho Bank Ltd.*, CFTC Dkt. No. 18-38 (Sept. 21, 2018); *In re Mitsubishi Corporation RtM Japan Ltd.*, CFTC Dkt. No. 20-07 (Nov. 7, 2019).
42. *In re Mizuho Bank Ltd.*, CFTC Dkt. No. 18-38 (Sept. 21, 2018)
43. *In re Deutsche Bank Securities Inc.*, CFTC Dkt. No. 20-17 (June 18, 2020); *In re Victory Asset, Inc.*, CFTC Dkt. No. 18-36 (Sept. 19, 2018); *In re Michael Franko*, CFTC Dkt. No. 18-35 (Sept. 19, 2018).
44. *See In re Deutsche Bank Securities Inc.,* CFTC Dkt. No. 20-17 (June 18, 2020); *In re Victory Asset, Inc.,* CFTC Dkt. No. 18-36 (Sept. 19, 2018); *In re Michael Franko,* CFTC Dkt. No. 18-35 (Sept. 19, 2018).
45. Heath P. Tarbert, Chairman, Commodity Futures Trading Comm'n, Remarks to the 35th Annual FIA Expo 2019 (Oct. 30, 2019), available at https://www.cftc.gov/PressRoom/SpeechesTestimony/opatarbert2.
46. James M. McDonald, Director of Enforcement, Commodity Futures Trading Comm'n, Speech Regarding Enforcement Trends at the CFTC, NYU School of Law: Program on Corporate Compliance & Enforcement (Nov. 14, 2018), available at https://www.cftc.gov/PressRoom/SpeechesTestimony/opamcdonald1.
47. CFTC STRATEGIC PLAN 2020-2024, *supra* n. 32 at 5.
48. CFTC FY 2020 DIVISION OF ENFORCEMENT ANNUAL REPORT, *supra* n. 31 at 9.

Commission,[49] the UK FCA,[50] and the South Korean Financial Services Commission.[51] It has also acknowledged in other settlements the assistance of exchanges such as the CME and ICE.[52]

Leveraging this increased cooperation, the CFTC is continuing to disproportionately target traders based overseas in its spoofing-related enforcement actions. Of the 12 spoofing actions the CFTC brought in 2020, 10 involved traders based overseas: the UK, South Korea, Japan, India, Singapore, Australia, Canada, and Slovakia.[53]

SEC

While the SEC's empowering statutes, the 1933 Securities Act and the 1934 Exchange Act, do not have a specific provision prohibiting spoofing, it has brought anti-spoofing enforcement actions under its authority prohibiting fraudulent behavior.

Compared to the DOJ and CFTC, the SEC has played a relatively muted role in anti-spoofing efforts. Nevertheless, there are signs in the last few years that the SEC has begun to turn its attention to spoofing in U.S. securities markets, and the SEC had some notable achievements in 2020 – one trial victory and two settlements.[54]

49. Press Release, Commodity Futures Trading Comm'n, CFTC Orders Australian Company to Pay US$1 Million for Spoofing (Jan. 21, 2020), available at https://www.cftc.gov/PressRoom/PressReleases/8105-20;
50. Press Release, Commodity Futures Trading Comm'n, CFTC Orders South Korean Company to Pay US$700,000 for Spoofing (Jan. 13, 2020), available at https://www.cftc.gov/PressRoom/PressReleases/8104-19.
51. *Id.*
52. Press Release, Commodity Futures Trading Comm'n, CFTC Orders Chicago Prop Firm and 3 Traders to Pay US$745,000 for Spoofing in Agricultural and Metals Futures (Sept. 30, 2020), available at https://www.cftc.gov/PressRoom/PressReleases/8265-20.
53. *See e.g. In re Deutsche Bank Securities Inc.*, CFTC Dkt. No. 20-17 (June 18, 2020); *In re Mirae Asset Daewoo Co., Ltd.*, CFTC Dkt. No. 20-121 (Jan. 13, 2020); *In re Propex Derivatives Pty Ltd*, CFTC Dkt. No. 20-12 (Jan. 21, 2020); *CFTC v. Edge Financial Technologies, Inc.*, No. 18-cv-00619, Dkt. No. 65-1 (N.D. Ill. Aug. 13, 2020); *CFTC v. Roman Banoczay Jr., et al.*, No. 20-cv-05777, Dkt. No. 1 (N.D. Ill. Sept. 29, 2020); *In re ARB Trading Group LP*, CFTC Dkt. No. 20-74 (Sept. 30, 2020).
54. *Secs. and Exch. Comm'n v. Lek Secs. Corp., et al.*, No. 17-cv-017898 (S.D.N.Y. Mar. 10, 2017); *In re. Nicholas Mejia Scrivener*, SEC Dkt. No. 3-19908 (Aug. 10, 2020); *In re. JP Morgan Securities LLC*, SEC Dkt. No. 3-20094 (Sept. 29, 2020).

Predictions

The Biden Administration's announcement that it will appoint former CFTC Chairman Gary Gensler as the Chairman of the SEC portends more aggressive SEC enforcement in 2021. The CFTC's spoofing initiative started during Gensler's stint at the CFTC, and all signs point to him continuing in that vein at the SEC.

Civil Class Actions

Nearly every corporate spoofing resolution reached by the DOJ in 2020 led to a follow-on putative class action lawsuit by private plaintiffs asserting claims of manipulation under the Commodity Exchange Act.[55] These lawsuits are brought by traders who transacted in the markets for the same commodities or futures in which the defendants allegedly committed spoofing. The plaintiffs assert that the defendants' spoofing altered the market price to the detriment of all traders in the market.

None of these lawsuits has reached the class certification stage or even made it past the motion to dismiss stage, so it remains to be seen whether they represent viable claims for plaintiffs and, if so, meaningful liability for defendants. The legal requirements for U.S. class action lawsuits do not appear to be easily satisfied for spoofing claims under the Commodity Exchange Act, and even a plaintiff who meets all the class action requirements might find the maximum amount of damages recoverable to be smaller than necessary to justify the cost of the lawsuit.

Even if class actions brought by other commodities and futures traders turn out to be unsuccessful or uneconomical, defendants who issue publicly traded stock and resolve spoofing enforcement actions will be at risk for shareholder lawsuits under the Securities Exchange Act, just like any other publicly traded company that resolves a significant enforcement action.

55. *See* 7 U.S.C. §§ 9, 25(a); 17 C.F.R. § 180.1. *See also* Appendix.

Predictions

Each Instance of Alleged Spoofing Involves Minimal Damages

The damages recoverable in a spoofing class action lawsuit under the Commodity Exchange Act are likely to be small. Even if thousands of trades were allegedly spoof trades, the alleged harm generally does not amount to a large monetary amount. Examples of alleged instances of spoofing in recent class actions illustrate the relatively small amount of potential damages at issue. One plaintiff who traded silver futures brought a spoofing class action against a major U.S. bank and its former trader and has so far identified only one alleged instance of spoofing in his complaint. Specifically, the plaintiff claims that the defendant trader placed a spoof order to sell silver futures contracts at a price of US$33.610 and thereby artificially decreased the market price to US$33.585 – a difference of only US$0.025.[56] Another plaintiff who has brought a spoofing class action against a major Canadian bank and its former trader has similarly alleged that the defendant trader placed a spoof order to buy gold futures at US$1,059.90 and thereby artificially increased the market price to US$1,060.40 – a difference of only US$0.50.[57]

Aggregating Multiple Instances of Spoofing Likely Jeopardizes a Plaintiff's Class Action Status

Given the small amount of potential damages at issue in any individual instance of spoofing, a class action representative who seeks to recover meaningful damages must aggregate many instances of spoofing into a single lawsuit. However, aggregating many instances of spoofing will inevitably create other problems that would jeopardize a plaintiff's class action status. In any class action lawsuit brought in U.S. federal court, the plaintiffs must prove, among other things, that their claims raise questions of law and fact common to the class, that those common issues predominate over individual issues unique to each class member, and that their claims are typical of the rest of the class.[58] Although no spoofing class action has advanced to the class certification stage, these requirements seem inherently difficult to prove in the context of spoofing.

The obstacles related to proving commonality and predominance become obvious once many instances of alleged spoofing are aggregated into one lawsuit. Each instance will involve different class members, different market prices, different prices for the defendant's alleged spoof orders, a different number of contracts for each order at issue, and likely even different types of commodities (e.g., gold, silver, platinum, etc.). A court would need to make findings of fact related to each of these issues in order to determine whether each alleged instance of spoofing is actionable under the Commodity Exchange Act. At some point, it will be become difficult for a plaintiff who has aggregated a sufficient number of instances of alleged spoofing to make his or her lawsuit economically rational to demonstrate that common issues predominate over individual factual issues related to each instance of spoofing.

Spoofing class action plaintiffs similarly face challenges related to typicality, which is normally satisfied where the class representative suffered damages during the same transaction or event as the other class members. That will not be the case for a plaintiff who brings a class action lawsuit based on many separate instances of alleged spoofing – many of which likely did not involve the plaintiff as the defendant's trade counterparty.

Defendants also have a wide array of arguments as to why trading that might appear similar to spoofing was entirely legitimate, and the plausibility of such defenses depends on the unique market conditions present during any alleged instance of spoofing. The court's need to address many different defense arguments for each alleged instance of spoofing is another barrier to a class action plaintiff's ability to prove typicality.

56. Compl., *In re JPMorgan Precious Metals Spoofing Litig.*, No. 18-cv-10356, Dkt. No. 1 ¶¶ 33–34 (S.D.N.Y. Nov. 7, 2018).
57. Compl., *Sterk, et al. v. The Bank of Nova Scotia, et al.*, No. 20-cv-11059, Dkt. No. 1 ¶¶ 49–51 (D.N.J. Aug. 21, 2020).
58. Fed. R. Civ. P. 23(a)(2), (a)(3), (b)(3).

Defendants Have Asserted Other Legal Challenges to Spoofing Class Actions

Many of the courts overseeing spoofing class actions have yet to determine whether the plaintiffs' claims can survive a motion to dismiss – let alone satisfy the class action requirements discussed above. A group of major U.S. banks who were jointly named as defendants in a spoofing class action lawsuit have filed a motion to dismiss arguing that when Congress prohibited spoofing by passing the Dodd-Frank Act in 2010, it intended only to authorize enforcement actions by government regulators such as a the CFTC and did not authorize private lawsuits by other traders.[59] If the court were to adopt the defendants' argument, it would create a precedent that could significantly undermine the viability of all other spoofing class action lawsuits under the Commodity Exchange Act.

A proprietary trading firm that resolved a spoofing enforcement action with the DOJ in 2019 has been facing a class action lawsuit since 2018 and has asserted additional challenges to private civil liability.[60] In this lawsuit, the plaintiffs assert that the firm and three of its traders, through their alleged spoofing, injured other traders who transacted in futures for various stock indices such as the Dow Jones Industrial Average, S&P 500, and NASDAQ.[61] The defendants have argued that the plaintiffs' allegations of damages are insufficient to plead a claim under the Commodity Exchange Act and that plaintiffs in spoofing class actions must do more to plead damages than simply assert that they traded in the same markets during the same general time period in which the defendants allegedly spoofed.[62] If adopted by the court, this position would impose a significant barrier to spoofing class actions because it would require plaintiffs' firms to find class representatives who traded at nearly exactly the same time as the defendants' alleged spoofing conduct, which typically lasts only seconds. However, it is unlikely that the court overseeing this case will have an opportunity to rule on these defense theories because the parties have recently proposed that the court approve a class-wide settlement of the plaintiffs' claims for US$15 million.[63]

In March 2020, the same proprietary trading firm obtained a notable victory on a motion for summary judgment dismissing class action claims under the Commodity Exchange Act in a separate lawsuit.[64] The court ruled that claims under the Commodity Exchange Act did not apply to alleged spoofing in futures traded on an exchange in South Korea because the exchange was not registered with the CFTC, notwithstanding the fact that after-hours trading in the same futures occurred on the Chicago Mercantile Exchange in the United States, which is regulated by the CFTC.[65] This precedent is of limited value to defendants who are the subject of spoofing allegations related to more commonly traded commodities such as precious metals or Treasury futures, which are traded on CFTC-registered exchanges.

Other Class Action Claims Are Foreseeable Consequences of Spoofing

Although future developments may demonstrate that class actions by commodities and futures traders under the Commodity Exchange Act pose little threat of liability, publicly traded companies that resolve spoofing enforcement actions may face class action lawsuits brought by shareholders under the Securities Exchange Act. This is typical of any publicly traded company that pays a significant penalty to resolve any type of enforcement action with the DOJ or a civil regulator such as the CFTC or SEC.

59. Defs. Mem. of Law in Supp. of their Mot. to Dismiss, *In re Merrill, BOFA, and Morgan Stanley Spoofing Litig.*, No. 19-cv-6002, Dkt. No. 55 (S.D.N.Y. May 8, 2020).
60. Compl., *Boutchard, et al. v. Gandhi, et al.*, No. 18-cv-7041, Dkt. No. 1 (N.D. Ill. Oct. 19, 2018). *See also* Deferred Prosecution Agreement, *United States v. Tower Research Capital LLC*, No. 19-cr-819, Dkt. No. 6 (S.D. Tex. Nov. 6, 2019).
61. Third Am. Class Action Compl., *Boutchard, et al. v. Gandhi, et al.*, No. 18-cv-7041, Dkt. No. 82 (N.D. Ill. June 3, 2019).
62. Def. Tower Research Capital LLC's Mot. to Compel Arbitration and to Dismiss the Third Am. Compl. and Mem. of Law in Supp., *Boutchard, et al. v. Gandhi, et al.*, No. 18-cv-7041, Dkt. No. 88, at 13–17 (N.D. Ill. July 1, 2019).
63. Class Pls. Mem. in Supp. of their Mot. for Prelim. Approval of Class Action Settlement, *Boutchard, et al. v. Gandhi, et al.*, No. 18-cv-7041, Dkt. No. 124 (N.D. Ill. Jan. 29, 2021).
64. Op. and Order, *Choi, et al. v. Tower Research Capital LLC*, et al., No. 14-cv-9912, Dkt. No. 234 (S.D.N.Y. Mar. 30, 2020). The court did not address the plaintiffs' state law claims for unjust enrichment, which remain pending.
65. *Id.*

In November 2020, less than two months after a major U.S. bank entered into a deferred prosecution agreement with the DOJ regarding alleged spoofing in the precious metals futures and Treasury futures market, the bank's shareholders filed a putative class action lawsuit under the Securities Exchange Act against the bank, its chief executive officer, and its current and former chief financial officer.[66] The plaintiff alleges that, based on the bank's admissions in its deferred prosecution agreement, the bank was aware of its traders' alleged spoofing. Despite this awareness, the defendants made public filings with the SEC that allegedly overstated the effectiveness of the bank's internal controls, misrepresented the bank's profits from trading in the affected markets, and failed to disclose that the government's investigations into the bank's alleged spoofing activity would result in significant fines.[67]

Whether the plaintiff's claims are viable remains to be seen. The court has yet to appoint a lead plaintiff, and the defendants have yet to move to dismiss the complaint or even to appear in the case. However, this lawsuit demonstrates that plaintiffs' firms are likely to use the Securities Exchange Act to assert civil claims against publicly traded companies that incur criminal spoofing liability.

66. Compl., *Lobevero v. JPMorgan Chase & Co., et al.*, No. 20-cv-5590 (E.D.N.Y. Nov. 17, 2020).

67. *Id.* ¶ 35.

United Kingdom

To date, there have been no criminal prosecutions for spoofing behavior in the UK. However, 2020 affirmed the FCA's commitment to spoofing enforcement, and recent developments suggest the FCA will become a more active spoofing enforcer in 2021 and beyond. As prosecutors in the U.S. have expanded their focus beyond only U.S.-based traders to schemes involving traders in other countries, including the UK, it is only natural that increased regulatory scrutiny will follow in those traders' home countries. The criminal spoofing trials that took place in the U.S. in 2020 or are scheduled to take place in 2021 all involve UK-based traders at major banks as either defendants or unindicted co-conspirators.[68] The FCA has cooperation and information-sharing arrangements in place with its U.S. counterparts; the FCA views cooperation with its overseas counterparts as an essential part of its regulatory functions and can use its investigative powers to assist overseas authorities.[69] The increased trend of cross-border cooperation between U.S. and UK prosecutors in other areas, such as the U.S. Foreign Corrupt Practice Act and UK Bribery Act, together with the international nature of spoofing activity, suggest that cross-border cooperation in the realm of spoofing and commodities fraud is a significant possibility.[70]

In March 2020, the FCA confirmed that it had five active spoofing investigations.[71] In late 2020, the FCA took enforcement action against an individual, Corrado Abbattista, for spoofing-type conduct. The continued enhancement of the FCA's analytical capabilities for market surveillance and its increased access to transaction reporting data, as a result of firms' transaction reporting and record-keeping requirements under EU legislation that came into force in 2018,[72] are likely to increase the FCA's enforcement capabilities in this area. Other regulators are following suit: in 2019, Great Britain's Office of Gas and Electricity Markets ("Ofgem") took action against spoofing conduct on the wholesale energy markets. These developments may lead to further UK spoofing enforcement in the near term.

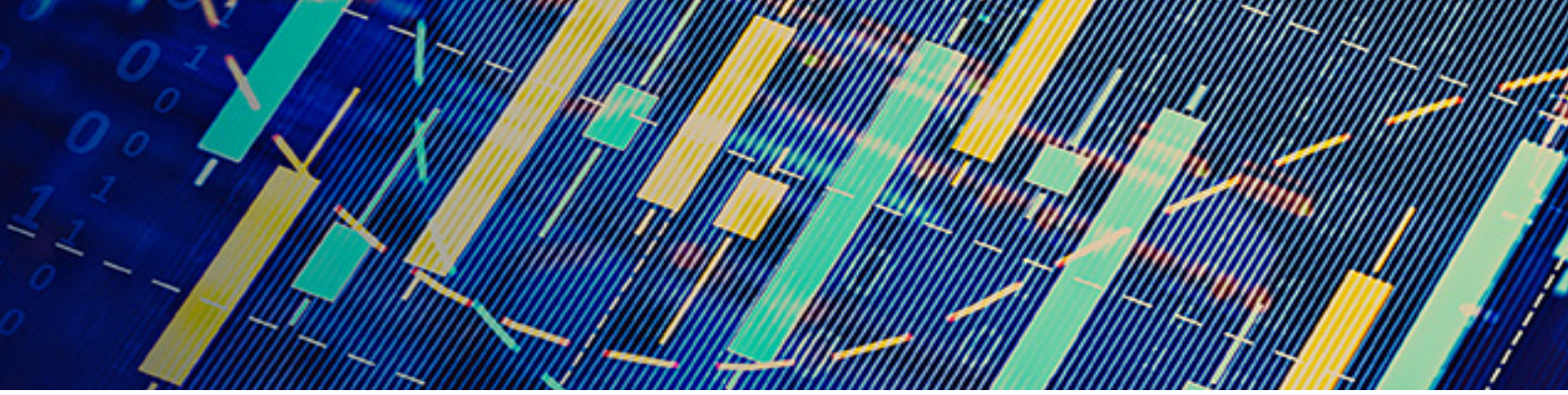
Overview of UK Enforcement Regime

The UK enforcement regime is arguably more straightforward than the U.S. regime from an evidentiary standpoint, at least on the civil/regulatory side. While U.S. spoofing legislation focuses on the *intent* of the trader, which can be hard to establish, the UK regime is primarily focused on the *market effect* of the conduct. Under the UK regime, civil liability can be established without demonstrating wrongful intent, and criminal liability can be established where there is only reckless conduct. UK civil cases to date suggest that spoofing liability essentially turns on whether the relevant activity created a false or misleading impression in the relevant financial market.

While there have been no criminal prosecutions for spoofing in the UK to date, UK criminal offenses relating to spoofing require the FCA to prove the trader either intended or was reckless as to whether his actions would create a false or misleading impression or would induce another market participant to do or refrain from doing something. We set out below some possible reasons for the FCA's lack of criminal prosecutions.

A summary of the UK civil and criminal regimes and enforcement to date follows, as a guide to what is likely to unfold in 2021 in the area of spoofing enforcement.

68. Superseding Indictment, *United States v. Vorley*, No. 18-cr-35, Dkt. No. 127 ¶¶ 1(a)-(b) (N.D. Ill. filed Nov. 26, 2019) (both defendants worked from their bank's London office during at least part of the alleged spoofing scheme); Third Superseding Indictment, *United States v. Bases*, No. 18-cr-48, Dkt. No. 372 ¶ 1(c) (N.D. Ill. filed Nov. 12, 2020) (an unindicted co-conspirator participated in the defendants' alleged spoofing scheme while working in the London office of multiple banks); Superseding Indictment, *United States v. Smith*, No. 19-cr-669, Dkt. No. 52 ¶¶ 18(b), 21 (N.D. Ill. filed Nov. 14, 2019) (one defendant and an unspecified number of unindicted co-conspirators worked from their bank's London office).
69. FCA Enforcement Guide (EG) 2.6.1 and 3.7.1.
70. *See, e.g.*, Press Release, Dep't of Just., Airbus Agrees to Pay Over US$3.9 Billion in Global Penalties to Resolve Foreign Bribery and ITAR Case (Jan. 31, 2020), available at https://www.justice.gov/opa/pr/airbus-agrees-pay-over-39-billion-global-penalties-resolve-foreign-bribery-and-itar-case.
71. https://www.fca.org.uk/publication/foi/foi7123-response.pdf
72. Refer to firms' reporting obligations under the Markets in Financial Instruments Regulation (600/2014) ("MiFIR") (retained EU law post Brexit transition period as UK MiFIR); https://www.fca.org.uk/markets/transaction-reporting



UK Civil/Regulatory Enforcement

The UK civil market abuse regime was previously governed by the EU Market Abuse Regulation (596/2014) ("EU MAR"). EU MAR was on-shored into UK law on December 31, 2020 as "UK MAR." Practically speaking, firms are not expected to experience any significant change under UK MAR. The UK Government may however choose to update and adapt the UK's legislative framework on market abuse in the future.

Under UK MAR, the act of spoofing is treated as "market manipulation" and can lead to civil consequences such as unlimited fines and, where appropriate, injunctions or prohibitions. UK MAR captures conduct related to instruments admitted to trading or traded on both UK and EU trading venues (together with related over the counter ("OTC") financial instruments). This ensures that post-Brexit, the FCA maintains the ability to prohibit, investigate and pursue cases of market abuse related to financial instruments (including spoofing-type conduct) which affect UK markets and their reputation: for example, taking action against abuse of a UK firm's financial instruments admitted to trading on EU trading venues.

Market Manipulation Under MAR

Market manipulation is covered by Articles 12 and 15 of UK MAR. In line with the civil burden of proof, the FCA must prove on a balance of probabilities that a trader's behavior created, or was likely to create, a relevant market effect, namely a false or misleading impression in the market, irrespective of the trader's intent. There is no requirement to prove that a trader intended, when placing an order, to cancel the order before execution, and the FCA has made it clear that "*ignorance of the requirements of MAR, or the absence of intent to commit market abuse, are not a defense to breaches of MAR. Abusive conduct committed in ignorance of the rules can be every bit as serious in its consequences as deliberate, dishonest conduct, and we will pursue it accordingly.*"[73]

Parts A and B of Annex I to UK MAR set out non-exhaustive lists of indicators of manipulative behavior relating to (i) false or misleading signals and price securing, and (ii) the employment of a fictitious device or any other form of deception or contrivance. Supplementary EU legislation which now forms part of UK MAR indicates that spoofing conduct may constitute manipulative behavior, including "*submitting multiple or large orders to trade often away from the touch on one side of the order book in order to execute a trade on the other side of the order book. Once the trade has taken place, the orders with no intention to be executed shall be removed – usually known as layering and spoofing.*"[74] The FCA has warned firms against treating the lists of indicators and related practices as exhaustive when undertaking market abuse risk assessments, stating that firms which treat them as such may fail to identify the risk of, and so fail to detect and report, other types of market manipulation within the scope of UK MAR.[75]

All but one of the FCA's civil cases to date for spoofing-type conduct were brought under the old civil law, section 118(5) of the Financial Services and Markets Act 2000 ("FSMA") (repealed and replaced from July 3, 2016, when MAR took effect). However, the most recent action was brought under EU MAR.[76]

Predictions

The FCA's 2019/20 Annual Report for the year ended March 31, 2020 (published in September 2020) indicated that the FCA had 29 open cases involving market manipulation as of March 31, 2020.[77] Earlier in March 2020, the FCA confirmed that it had five active investigations into spoofing, four relating to individuals and one concerning a firm.[78] This suggests an increasing focus on spoofing, which may be enhanced by the FCA's technological advances in monitoring and detecting market abuse.

73. Speech delivered by Julia Hoggett, Director of Market Oversight at the FCA on November 14, 2017: https://www.fca.org.uk/news/speeches/effective-compliance-market-abuse-regulation-a-state-of-mind
74. Annex II to Delegated Regulation (EU) 2016/522 (retained EU legislation post Brexit transition period).
75. https://www.fca.org.uk/publication/newsletters/market-watch-56.pdf
76. See the *Appendix* for further information on these cases.
77. https://www.fca.org.uk/data/enforcement-data-annual-report-2019-20
78. https://www.fca.org.uk/publication/foi/foi7123-response.pdf

Similar to its U.S. counterparts, the FCA is increasingly using data analytics to investigate spoofing and other forms of market manipulation:

- Under UK MAR, market operators and investment firms that operate a UK trading venue are required to establish and maintain effective systems and controls aimed at preventing market manipulation and insider dealing. UK trading venues, and firms and individuals who professionally arrange or execute transactions, are also required to detect and report suspicious transactions and orders that could constitute market manipulation or insider dealing (or attempted market manipulation or insider dealing) to the FCA without delay via the suspicious transaction and order reporting (STOR) regime.[79]
- The FCA also undertakes its own surveillance of financial markets and has systems for identifying market manipulation. The FCA ingests order book data from the leading UK equity trading venues and runs surveillance algorithms designed to identify potentially abusive behaviors across this data.[80] Similarly, firms' transaction reporting and record-keeping obligations under pre-existing EU legislation (retained post-Brexit) supply the FCA with the data needed to detect and investigate suspected market abuse.[81] The FCA's access to this trade data, coupled with its enhanced analytical capabilities, is likely to lead to an improvement in the FCA's detection of suspicious activity and increased FCA enforcement in this area.
- In October 2020, the director of market oversight at the FCA warned individuals who trade in financial markets against engaging in market abuse, as the FCA can "*see activity down to the individual account level.*"[82] Earlier in 2020, the FCA revealed the extent of its secondary market surveillance in relation to capital markets: In 2019 the FCA "*ingested close to 10 billion transaction reports and over 150 million order reports every day into our market data processor.*"[83]
- Notably, the FCA's press release relating to recent enforcement action for spoofing behavior taken against Corrado Abbattista, a former portfolio manager (see the *Appendix*), indicated that Abbattista's relevant trading activity was identified by the FCA's internal surveillance systems.[84]

Wholesale Energy Markets

Great Britain has also taken action for market manipulation (including spoofing) in the wholesale energy markets. In April 2020, Ofgem imposed a record penalty of £35 million (reduced to £24,500,000 for early settlement) on an energy company for sending misleading signals. Market manipulation (which covers spoofing-type conduct) on the wholesale energy markets is prohibited by the EU Regulation on Wholesale Energy Market Integrity and Transparency (1227/2011) ("REMIT"). Following the end of the Brexit transition period, REMIT is retained in UK law, with minimal changes. Ofgem is Britain's national regulatory authority for the retained version of REMIT and has powers to monitor, investigate and enforce against breaches of this regime.[85]

Predictions

The FCA works closely with Ofgem on REMIT investigations involving FCA-authorized and regulated market participants. Ofgem will continue to cooperate with the EU to detect and investigate cross-border market abuse.

79. https://www.fca.org.uk/markets/market-abuse/regulation, Article 16 of UK MAR
80. https://www.fca.org.uk/news/press-releases/fca-fines-and-prohibits-hedge-fund-chief-investment-officer-market-abuse
81. https://www.fca.org.uk/markets/transaction-reporting
82. Speech delivered by Julia Hoggett, Director of Market Oversight at the FCA on October 12, 2020: https://www.fca.org.uk/news/speeches/market-abuse-coronavirus
83. Speech delivered by Mark Steward, Executive Director of Enforcement and Market Oversight at the FCA, on 3 August 2020: https://www.fca.org.uk/news/speeches/capital-market-regulation-and-coronavirus
84. https://www.fca.org.uk/news/press-releases/fca-fines-and-prohibits-hedge-fund-chief-investment-officer-market-abuse
85. See the *Appendix* for further information on Ofgem cases.

UK Criminal Enforcement

Criminal liability for spoofing-type conduct can arise under sections 89 and 90 of the Financial Services Act 2012 ("FSA"), which cover false or misleading statements and impressions,[86] and under section 2 of the Fraud Act 2006 (the "Fraud Act") for fraud by false representation. Spoofing is more likely to be prosecuted by the FCA under the FSA: while the FCA has the power to prosecute offenses under the Fraud Act, where serious and complex fraud is the predominant issue, then another agency, such as the Serious Fraud Office, is likely to prosecute.

Penalties under the FSA include up to seven years' imprisonment and/or an unlimited fine. Penalties under the Fraud Act include up to 10 years' imprisonment and/or an unlimited fine. The UK Government is currently proposing to extend the maximum sentence for the FSA market manipulation offenses (and the insider dealing criminal offense) from seven to 10 years.[87]

While there have been no criminal prosecutions in the UK to date for spoofing, in the extradition proceedings of London-based trader, Navinder Sarao, to the U.S., the High Court affirmed that spoofing conduct was capable of constituting an offense under either the Fraud Act or the FSA.

The lack of criminal prosecutions for spoofing may be attributed to the challenges associated with proving that a canceled order is evidence of abusive trading or spoofing (particularly as there could be various reasons for canceling an order) and the complex investigative process requiring an in-depth analysis of a bid cancellation. Additionally, the higher standard of proof in criminal cases means the jury must be certain that this was the only possible reason for the canceled trade.

Predictions

The FCA's recent enforcement action in *Abbattista*, its active spoofing investigations, and the UK Government's proposals to increase the maximum sentence for market manipulation, are all indicative of a trend that UK spoofing enforcement may expand in 2021 and beyond.

Increased market volatility caused by Brexit and the impact of COVID-19 may prove to be fertile ground for spoofing opportunities. The FCA has consistently communicated its intention to tackle market abuse and set out its expectations on market abuse controls (particularly during the COVID era), including that market participants must remain alert to their obligations under what is now UK MAR.[88] In October 2020, the FCA said that it will remain focused on its tools to fight market abuse, "*including working with government on potential changes to the criminal market abuse regime to ensure that the UK's regime for combatting market abuse continues to work effectively in an evolving market.*"[89] The FCA's significant investment in improving and applying its market monitoring tools and increased use of data analytics may also lead to the detection and pursuit of more enforcement actions, as the FCA now has access to data which should make it easier to prove its case.

To prepare for the risk of increased FCA enforcement for spoofing conduct, FCA-regulated firms should assess their exposure to spoofing, and other forms of market manipulation, and identify whether their existing systems and controls adequately address the risks. This should include updating the firm's analytical tools and internal trading surveillance systems to match improvements to the FCA's technological capabilities.

86. For conduct before April 2013, the relevant criminal offense was contained in section 397 of FSMA. This was repealed and replaced by Part 7 of the FSA with effect from April 1, 2013.
87. Under the Financial Services Bill 2019-21 ("FSB") (introduced in Parliament on October 21, 2020), the UK Government is proposing to extend the maximum sentence for the FSA market manipulation offenses (and the insider dealing criminal offense) from seven to 10 years, bringing sentencing in line with that for fraud, which the Government considers to be a comparable economic crime. The FSB is currently proceeding through the parliamentary review and approval stages. Once agreed by both Houses of Parliament, the FSB will receive Royal Asset and become law.
88. The market abuse offenses under UK MAR are insider dealing, unlawful disclosure of inside information and market manipulation.
89. Speech delivered by Julia Hoggett, Director of Market Oversight at the FCA on October 12, 2020: https://www.fca.org.uk/news/speeches/market-abuse-coronavirus

APPENDIX

United States

DOJ

United States v. Propex Derivatives Pty Ltd., No. 20-cr-39 (N.D. Ill. Jan. 21, 2020)

Company Location: **Sydney, Australia**

Exchange: **Chicago Mercantile Exchange**

Market: **S&P 500 (E-Mini)**

Time Period: **July 2012 – March 2016**

Resolution: **US$1 million**

- US$462,271 (Criminal Penalty)
- US$73,429 (Disgorgement)
- US$464,300 (Victim Compensation)

Related Actions:

- ***United States v. Zhao***, No. 18-cr-24 (N.D. Ill. Dec. 18, 2018)
- ***In re. Propex Derivatives Pty Ltd***, CFTC Dkt. No. 20-12 (Jan. 21, 2020)

- The bank was charged with one count of Commodity Exchange Act spoofing in violation of 7 U.S.C. §§ 6c(a)(5)(C), 13(a)(2).

  The bank entered a three-year deferred prosecution agreement with mandatory compliance improvements and periodic reports to the DOJ.
- The total penalty was 50 percent below the minimum guidelines range due to company's inability to pay an amount within the guidelines range and make restitution to victims.
- Aggravating factors noted by the DOJ included senior management ignoring an employee's suspicious trading when called to their attention by a clearing firm.

United States v. Bank of Nova Scotia, No. 20-cr-707 (D.N.J. Aug. 19, 2020)

Company Location: **Toronto, Canada**

Exchange: **NYMEX, COMEX**

Market: **Precious Metals**

Time Period: **Jan. 2008 – July 2016**

Resolution: **US$60.4 million**

- US$42,000,000 (Criminal Penalty)
- US$11,828,912 (Disgorgement)
- US$6,622,190 (Victim Compensation)

Related Actions:

- ***United States v. Flaum***, No. 19-cr-338 (E.D.N.Y. July 22, 2019)
- ***In re The Bank of Nova Scotia***, CFTC Dkt. No. 20-27 (Aug. 19, 2020)
- ***Sterk, et al. v. The Bank of Nova Scotia, et al.***, No. 20-cv-11059 (D.N.J. Aug. 21, 2020)

- The bank was charged with one count of wire fraud, in violation of 18 U.S.C. § 1343, and one count of Commodity Exchange Act price manipulation, in violation of 7 U.S.C. § 13(a)(2).
- The DOJ imposed maximum penalty under the U.S. Sentencing Guidelines because the compliance department overlooked multiple spoofing red flags.
- The company had made prior incomplete disclosures to the CFTC of one trader's misconduct, but inadequate recordkeeping prevented the company from disclosing additional relevant misconduct.
- The three-year deferred prosecution agreement required reform of the company's compliance program and the hiring of an independent monitor.

United States v. JPMorgan Chase & Co., No. 20-cr-175 (D. Conn. Sept. 29, 2020)

Company Location: **New York City, USA**

Exchange: **NYMEX, COMEX, CBOT**

Market: **Precious Metals, Treasury Futures, Cash Treasuries**

Time Period: **Mar. 2008 – Aug. 2016**

Resolution: **US$920.2 million**

- US$436,431,811 (Criminal Penalty)
- US$172,034,790 (Disgorgement)
- US$311,737,008 (Victim Compensation)

Related Actions:

- ***United States v. Trunz***, No. 19-cr-375 (E.D.N.Y. Aug. 19, 2019)
- ***United States v. Smith, et al.***, No. 19-cr-669 (N.D. Ill. Aug. 22, 2019)
- ***United States v. Edmonds***, No. 18-cr-239 (D. Conn. Oct. 9, 2018)
- ***In re JPMorgan Chase & Co., et al.***, CFTC Dkt. No. 20-69 (Sept. 29, 2020)
- ***In re JPMorgan Securities LLC,*** SEC Dkt. No. 3-20094 (Sept. 29, 2020)
- ***In re JPMorgan Precious Metals Spoofing Litig.,*** No. 18-cv-10356 (S.D.N.Y. Nov. 7, 2018)
- ***In re JPMorgan Treasury Futures Spoofing Litig.***, No. 20-cv-3515 (S.D.N.Y. May 5, 2020)
- ***Lobevero v. JPMorgan Chase & Co., et al.***, No. 20-cv-5590 (E.D.N.Y. Nov. 17, 2020)

- The bank was charged with two counts of wire fraud affecting a financial institution, in violation of 18 U.S.C. § 1343, one count each relating to the alleged spoofing schemes on precious metals desk and treasury desk, respectively.
- The DOJ assessed a criminal penalty below the minimum recommended by the U.S. sentencing guidelines, crediting the company for making significant improvements to its compliance program since the alleged misconduct.
- The three-year deferred prosecution agreement included mandatory compliance improvements and periodic reports to the DOJ.

***United States v. Deutsche Bank*, No. 20-cr-584 (E.D.N.Y. Dec. 22, 2020)**

Company Location: **Frankfurt, Germany**

Exchange: **NYMEX, COMEX**

Market: **Precious Metals**

Time Period: **2008 – 2013**

Resolution: **US$7.5 million**

- US$5,625,000 (Criminal Penalty)
- US$681,480 (Disgorgement)
- US$1,223,738 (Victim Compensation)

Related Actions:

- ***United States v. Vorley, et al.,*** No. 18-cr-35 (N.D. Ill. Jan. 19, 2018)
- ***United States v. Bases, et al.,*** No. 18-cr-48 (N.D. Ill. July 17, 2018)
- ***In re Deutsche Bank Securities Inc.,*** CFTC Dkt. No. 20-17 (June 18, 2020)

- The bank was charged with one count of conspiracy to commit wire fraud affecting a financial institution, in violation of 18 U.S.C. § 1349.
- The agreement was part of a combined resolution with alleged violations of the Foreign Corrupt Practices Act.
- The three-year deferred prosecution agreement mandated compliance upgrades and reporting conditions related to preventing future FCPA misconduct.

CFTC

***In re Victory Asset, Inc.*, CFTC Dkt. No. 18-36 (Sept. 19, 2018)**

***In re Michael Franko*, CFTC Dkt. No. 18-35 (Sept. 19, 2018)**

Trader Location: **New Jersey, USA**

Exchange: **Commodity Exchange, New York Mercantile Exchange, London Metal Exchange**

Market: **Copper, Gold, and Crude Oil**

Time Period: **May 2013 – July 2014**

Resolution: **US$2.3 million**

- US$1.8 million (Victory, Civil Penalty)
- US$500,000 (Franko, Civil Penalty)

Related Actions: **None**

- Michael Franko, while employed as a trader for Victory Asset, Inc., during the relevant time period engaged in "spoofing" by placing orders for copper, gold, and crude oil futures contracts with the intent of canceling these orders before they were filled.
- Franko did this in order to falsely create or exacerbate order book imbalances in the various markets for the benefit of genuine orders he had also placed in the various markets.
- Franko would also engage in "cross-market manipulation" – placing false spoof orders in one market in order to favorably fill genuine orders he had placed on different but correlated markets. For example, Franko would place large spoof orders on the COMEX copper futures markets in order to create favorable conditions for his genuine order on the LME copper futures market.

In re Mizuho Bank Ltd., CFTC Dkt. No. 18-38 (Sept. 21, 2018)

Trader Location: **Tokyo, Japan**

Exchange: **Chicago Mercantile Exchange, Chicago Board of Trade**

Market: **Treasury and Eurodollar**

Time Period: **May 2016 – May 2017**

Resolution: **US$250,000** (Civil Penalty)	Related Actions: **None**

- A Mizuho trader based in Tokyo during the relevant time period engaged in "spoofing" by placing orders for various Treasury and Eurodollar futures contracts with the intent of canceling these orders before they were filled. The trader did not do this to induce other market participants to fill any genuine orders the trader had placed on the market, but in order to test the market's reaction to these false orders.
- The trader's spoofing generally involved flashing – quickly placing and canceling – large orders on the market and monitoring the market's reaction to these orders.
- This resolution is an example of the CFTC pursuing theories beyond that of the typical spoofing sequence.

In re Mitsubishi Corporation RtM Japan Ltd., CFTC Dkt. No. 20-07 (Nov. 7, 2019)

Trader Location: **Tokyo, Japan**

Exchange: **New York Mercantile Exchange**

Market: **Platinum and Palladium**

Time Period: **April 2018 – May 2018**

Resolution: **US$250,000** (Civil Penalty)	Related Actions: **None**

- A Mitsubishi trader based in Tokyo during the relevant time period engaged in "spoofing" by placing orders for platinum and palladium futures contracts with the intent of canceling these orders before they were filled. Not only did the trader engage in classic spoofing – placing false order to induce other market participants to trade his or her genuine orders at favorable prices – but also placed several orders on the market in order to test how the markets would react.
- To test how the markets would react, the trader would layer orders – placing a series of orders at gradually increasing or decreasing price levels on the same side of the order book.
- This resolution is an example of the CFTC pursuing theories beyond that of the typical spoofing sequence.

In re Mirae Asset Daewoo Co., Ltd., CFTC Dkt. No. 20-11 (Jan. 13, 2020)

Trader Location: **Seoul, South Korea**

Exchange: **Chicago Mercantile Exchange**

Market: **S&P 500 Index (E-Mini)**

Time Period: **Dec. 2014 – April 2016**

Resolution: **US$700,000** (Civil Penalty)	Related Actions: **None**

- A Mirae trader based in Seoul placed numerous orders with the intent to cancel those orders before execution to create a misleading impression of market depth in order to induce other market participants to trade opposite the orders. The trader did so while placing genuine orders on the opposite side of the market in order to take advantage of the resulting market fluctuation.
- The CFTC recognized Mirae's cooperation and imposed a reduced civil monetary penalty of US$700,000.
- This settlement demonstrates the CFTC's continued targeting of foreign-based traders.
- This settlement reflects the CFTC's increased cooperation with foreign enforcement agencies and the exchanges. In its press release, the CFTC specifically acknowledged the assistance of the UK FCA, the South Korean Financial Services Authority, and the CME Group.

In re. Propex Derivatives Pty Ltd, CFTC Dkt. No. 20-12 (Jan. 21, 2020)

Trader Location: **Sydney, Australia**

Exchange: **Chicago Mercantile Exchange**

Market: **S&P 500 E-Mini**

Time Period: **July 2012 – March 2017**

Resolution: **US$1,000,000** ■ US$462,271 (Civil Penalty) ■ US$73,429 (Disgorgement) ■ US$464,400 (Restitution)	Related Actions: ■ ***United States v. Propex Derivatives Pty Ltd,*** No. 20-cr-39 (N.D. Ill. Jan. 21, 2020)

- Propex's trader was alleged to have engaged in spoofing scheme on the S&P 500 E-mini futures market.
- In an example of cross-border cooperation, the CFTC specifically acknowledged the assistance of the Australian Securities and Investments Commission.

In re Deutsche Bank Securities Inc., CFTC Dkt. No. 20-17 (June 18, 2020)

Trader Location: **Tokyo, Japan**

Exchange: **Chicago Mercantile Exchange**

Market: **Treasury, Eurodollar**

Time Period: **Jan. 2013 – Dec. 2013**

Resolution: **US$1,250,000** (Civil Penalty)

Related Actions: **None**

- Two Deutsche Bank traders based in Tokyo placed numerous spoof orders for U.S. Treasury or Eurodollar futures contracts, while placing genuine orders on the same market or in correlated markets for different tenors (i.e., time-to-maturity) of the same type of futures contract. The spoof orders would have knock-on effects not only in the market it was placed, but also in those correlated markets.
- The CFTC recognized Deutsche's cooperation and imposed a reduced civil monetary penalty of US$1,250,000.
- The identification of spoofing conduct across correlated markets is a new development for the CFTC. It may also be an indication of the CFTC's increased data analytics capability.

CFTC v. Edge Financial Technologies, Inc., No. 18-cv-00619, Dkt. No. 65-1 (N.D. Ill. Aug. 13, 2020)

Trader Location: **London**

Exchange: **Chicago Mercantile Exchange**

Market: **S&P 500 E-Mini**

Time Period: **Jan. 2013 – Oct. 2013**

Resolution: **US$72,600**

- US$48,400 (Civil Penalty)
- US$24,200 (Disgorgement)

Related Actions:

- ***United States v. Sarao,*** No.15-cr-75 (N.D. Ill. Sept. 2, 2015)
- ***United States v. Thakkar,*** No. 18-cr-36 (N.D. Ill. Feb. 14, 2018)

- Instead of being accused of directly spoofing the market, Edge Financial was alleged to have created a custom software application for a trader to assist that trader in spoofing the S&P 500 E-Mini market.
- The program had a "Back-of-Book" feature with two elements: (1) it automatically and continuously ensured that the trader's order remained at the back of the book to minimize the chances that it would be filled and (2) it automatically canceled the trader's order as soon as any portion of that order was filled. This minimized the chances that the trader's spoof orders would be inadvertently filled.

In re The Bank of Nova Scotia, CFTC Dkt. No. 20-27 (Aug. 19, 2020)

Trader Location: **New York, Hong Kong, London**

Exchange: **Commodity Exchange, Inc.**

Market: **Gold, Silver**

Time Period: **Jan. 2008 – July 2016**

Resolution: **US$77.4 million**

- US$42,000,000 (Civil Penalty)
- US$11,828,912 (Disgorgement)
- US$6,622,190 (Restitution)
- US$17,000,000 (Civil Penalty for False and Misleading Statements)

Related Actions:

- ***United States v. Flaum,*** No. 19-cr-338 (E.D.N.Y. July 22, 2019)
- ***United States v. Bank of Nova Scotia,*** No. 20-cr-707 (D.N.J. Aug. 19, 2020)

- The CFTC alleged manipulative and deceptive conduct spanning more than eight years and involving thousands of occasions of attempted manipulation and spoofing by its traders in New York, London, and Hong Kong in gold and silver futures contracts traded on the CME.
- The CFTC alleged and Scotiabank admitted that, in addition to its traders engaging in spoofing, Scotiabank's compliance staff were aware of its traders' practices but failed to stop it.[90] On at least two occasions, according to the settlement order, senior members of Scotiabank's compliance group had "substantial information" regarding unlawful trading by one of its traders but failed to stop the activity.[91]
- Notably, the CFTC sanctioned Scotiabank not only for its traders' spoofing and compliance staff's failure to prevent it, but also for false statements that Scotiabank had made to the CFTC in a prior investigation settled approximately two years ago.[92] There, the CFTC had imposed an US$800,000 penalty for spoofing by Scotiabank traders in New York from June 2013 through to June 2016, and had expressly recognized and credited Scotiabank for self-reporting and cooperation in the form of a substantially reduced penalty.[93]
- Prior to the JPMorgan settlement, this was the largest civil monetary penalty ever ordered in a spoofing case. The CFTC imposed a total penalty of US$77.4 million, comprised of US$6.6 million in restitution, US$11.8 in disgorgement, and US$42 million in civil penalties for spoofing violations, as well as US$17 million for making false and misleading statements.

90. Press Release, Commodity Futures Trading Comm'n, CFTC Charges Traders at Major U.S. Bank with Manipulating the Precious Metals Futures (Sept. 16, 2019), available at https://www.cftc.gov/PressRoom/PressReleases/8013-19.
91. *Id.*
92. Press Release, Commodity Futures Trading Comm'n, CFTC Orders The Bank of Nova Scotia to Pay Record US$77.4 Million for Spoofing and Making False Statements (Aug. 19, 2020), available at https://www.cftc.gov/PressRoom/PressReleases/8221-20.
93. *Id.*

In re FNY Partners Fund LP, CFTC Dkt. No. 20-67 (Sept. 28, 2020)

In re Thomas Donino, CFTC Dkt. No. 20-68 (Sept. 28 2020)

Trader Location: **Florida, USA**

Exchange: **Chicago Mercantile Exchange, Commodity Exchange, New York Mercantile Exchange**

Market: **Soybean, Gold, Crude Oil**

Time Period: **Jan. 2013 – Jan. 2016**

Resolution: **US$585,000**

- US$135,000 (Donino, Civil Penalty)
- US$450,000 (FNY Partners Fund, Civil Penalty)

Related Actions: **None**

Alleged Facts:

- Donino was alleged to have engaged in spoofing on various markets for commodities, and FNY was alleged to be liable for failing to prevent his spoofing.

In re JPMorgan Chase & Co., et al., CFTC Dkt. No. 20-69 (Sept. 29, 2020)

Trader Location: **New York City, Singapore, London**

Exchange: **Chicago Mercantile Exchange, New York Mercantile Exchange, Chicago Board of Trade**

Market: **Precious Metals, Treasury Note, Treasury Bond**

Time Period: **2008 – 2016**

Resolution: **US$920.2 million**

- US$436,431,811 (Civil Penalty)
- US$172,034,790 (Disgorgement)
- US$311,737,008 (Restitution)

Related Actions:

- ***United States v. Edmonds,*** No. 18-cr-239 (D. Conn. Oct. 9, 2018)
- ***United States v. Trunz,*** No. 19-cr-375 (E.D.N.Y. Aug. 19, 2019)
- ***United States v. Smith, et al.,*** No. 19-cr-669 (N.D. Ill. Aug. 22, 2019)
- ***United States v. JPMorgan Chase & Co.,*** No. 20-cr-175 (D. Conn. Sept. 29, 2020)

- From at least 2008 through to 2016, JPMorgan precious metals and treasuries traders in New York, Singapore, and London, including the heads of both desks, intentionally placed hundreds of thousands of spoofing orders to send false signals to other market participants. These orders included "layered orders" – a series of rapidly placed non-iceberg resting orders intended to cumulatively place pressure on one side of the market.
- This settlement imposed a record-breaking penalty of US$920.2 million. This total included US$311.7 million in restitution, US$172 million in disgorgement, and US$436.4 million in civil penalties – all of which were the highest amounts imposed in any spoofing case.
- This settlement is the centerpiece of a series of actions and settlements focused on the same conduct. In mid-to-late 2019, the CFTC announced the settlements of charges against two former JPMorgan traders, John Edmonds and Christian Trunz, with both individuals entering formal cooperation agreements with the CFTC.[94] The CFTC is currently pursuing civil actions against two other former JPMorgan traders, Michael Nowak and Gregg Smith.[95]

94. Press Release, Commodity Futures Trading Comm'n, In CFTC Actions, Two Former Precious Metals Traders Admit To Engaging in Spoofing and Manipulation at New York Banks (July 25, 2019), available at https://www.cftc.gov/PressRoom/PressReleases/7983-19; Press Release, Commodity Futures Trading Comm'n, In CFTC Action, Former Precious Metal Trader Admits to Engaging in Spoofing at Two New York Banks (Sept. 16, 2019), available at https://www.cftc.gov/PressRoom/PressReleases/8014-19.
95. Press Release, Commodity Futures Trading Comm'n, CFTC Charges Traders at Major U.S. Bank with Manipulating the Precious Metals Futures (Sept. 16, 2019), available at https://www.cftc.gov/PressRoom/PressReleases/8013-19.

CFCT v. Roman Banoczay, Jr., et al., No. 20-cv-05777 (N.D. Ill. Sept. 29, 2020)

Trader Location: **Bratislava, Slovakia**

Exchange: **New York Mercantile Exchange**

Market: **Crude Oil**

Time Period: **Jan. 2018 – Feb. 2018**

Resolution: **Pending**	Related Actions: **None**

- Roman Banoczay Jr. and his father were alleged to have engaged in a typical spoofing scheme on the crude oil market through their company Bazur Spol. S.R.O. It is alleged that the defendants engaged in more than 2,000 instances of spoofing, earning them over US$332,000 in profits over eight days of trading.
- This case reflects the CFTC's continued targeting of overseas traders and is perhaps an indicator of its increased data analytics capabilities.

In re ARB Trading Group LP, CFTC Dkt. No. 20-74 (Sept. 30, 2020)
In re Brendan Delovitch, CFTC Dkt. No. 20-71 (Sept. 30, 2020)
In re Wesley Johnson, CFTC Dkt. No. 20-72 (Sept. 30, 2020)
In re Rajeec Kansal, CFTC Dkt. No. 20-73 (Sept. 30, 2020)

Trader Location: **Ontario, Canada; India**

Exchange: **Chicago Mercantile Exchange, Commodity Exchange, Chicago Board of Trade, ICE Futures US**

Market: **Lean Hogs, Live Cattle, Silver, Copper, Soybean, Cotton, Canola, Sugar**

Time Period: **March 2017 – June 2020**

Resolution: **US$745,000** ■ US$100,000 (each trader, Civil Penalty) ■ US$445,000 (ARB Trading Group, Civil Penalty)	Related Actions: **None**

- In September 2020, the CFTC announced the settlement of an enforcement action against ARB Trading Group LP, headquartered in Chicago, as well as settlements against three of its traders – Brendan Delovitch and Wesley Johnson, both based in Canada, and Rajeev Kansal of India.[96]
- The CFTC alleged and the defendants agreed that across various periods from May 2017 to June 2020, ARB's traders engaged in spoofing conduct in several commodities across several exchanges.[97] ARB further agreed that it was vicariously liable for the three named traders as well as two other unnamed traders.[98]
- Each individual trader was fined a US$100,000 civil monetary penalty and suspended for four months from trading on any CFTC-designated exchange and all other CFTC-registered entities, and in all commodity interests.[99] ARB was fined a US$445,000 civil monetary penalty.[100]
- This settlement demonstrates the CFTC's continued targeting of foreign-based traders.

96. Press Release, Commodity Futures Trading Comm'n, CFTC Orders Chicago Prop Firm and 3 Traders to Pay US$745,000 for Spoofing in Agricultural and Metals Futures (Sept. 30, 2020), available at https://www.cftc.gov/PressRoom/PressReleases/8265-20.
97. *Id.* (noting CBOT soybean futures, CME live cattle futures, COMEX copper futures, COMEX silver futures, CME lean hogs futures, ICE cotton futures and ICE sugar futures).
98. *Id.*
99. *Id.*
100. *Id.*

In re. Sunoco LP, CFTC Dkt. No. 20-75 (Sept. 30, 2020)

Trader Location: **Texas**

Exchange: **New York Mercantile Exchange**

Market: **Crude Oil, Heating Oil, Gasoline**

Time Period: **Feb. 2014 – Jan. 2015**

Resolution: **US$450,000 (Civil Penalty)**

Related Actions: **None**

- Sunoco's trader was alleged to have engaged in a spoofing scheme on the crude oil, heating oil, and gasoline futures market.

SEC

Secs. and Exch. Comm'n v. Lek Secs. Corp., et al., No. 17-cv-017898 (S.D.N.Y. Mar. 10, 2017)

Trader Location: **Ukraine**

Time Period: **Dec. 2010 – Sept. 2016**

Resolution: **US$21.58 million**

- US$525,892 (Lek Securities, Disgorgement)
- US$1,000,000 (Lek Securities, Civil Penalty)
- US$420,000 (Lek, Civil Penalty)
- US$4,637,314 (Avalon, Fayyer, and Pustelnik together, Disgorgement Plus Prejudgment Interest)
- US$5,000,000 (Avalon, Fayer, and Pustelnik each, Civil Penalty)

Related Actions: **None**

- Here, the SEC alleged that Nathan Fayyer and Sergey Pustelnik and their Ukraine-based firm Avalon FA Ltd illegally profited from placing and canceling "non-bona fide" orders on U.S. equity markets to inject false information into the marketplace in order to obtain more favorable prices on its bona fide orders on the same market.[101]
- It also alleged that the three defendants engaged in "cross-market manipulation," in which Avalon bought and sold U.S. stocks at a loss in order to move the prices of corresponding options that Avalon could then trade in order to make a profit.[102] Through these schemes, the complaint alleged that Avalon generated more than US$28 million in ill-gotten profit for Avalon.[103]
- In March 2020, Judge Cote of the Southern District of New York ordered that Fayyer, Pustelnik and Avalon together pay more than US$4.6 million and assessed third-tier civil penalties of US$5 million each against Fayyer, Pustelnik, and Avalon.[104]
- The complaint also alleged that Lek Securities and its CEO Sam Lek had facilitated Fayyer, Pustelnik, and Avalon's activities by providing Avalon access to U.S. equity markets, relaxing the brokerage firm's layering controls after Avalon complained, allowing Avalon to conduct the trading activity, and improving Lek Securities' technology to assist Avalon's trading.[105] Lek Securities and Sam Lek settled the claims against them, with Lek agreeing to pay a US$420,000 penalty and Lek Securities agreeing to a total penalty of US$1.53 million and retainer of a monitor for three years.[106]

101. Compl., *Secs. and Exch. Comm'n v. Lek Secs. Corp., et al,* No. 17-cv-017898, Dkt. No. 1 at ¶ 2 (S.D.N.Y. Mar. 10, 2017).
102. *Id.* at ¶ 3.
103. *Id.* at ¶ 4.
104. Op. and Order, *Secs. and Exch. Comm'n v. Lek Secs. Corp., et al,* No. 17-cv-017898, Dkt. No. 574 (S.D.N.Y. Mar. 20, 2020).
105. Securities and Exch. Comm'n, SEC Obtains Final Judgments Against Lek Securities and CEO in Layering, Manipulation Case (Oct. 2, 2019), available at https://www.sec.gov/news/press-release/2019-205.
106. *Id.*

In re. Nicholas Mejia Scrivener, SEC Dkt. No. 3-19908 (Aug. 10, 2020)

Trader Location: **California, USA**

Time Period: **Feb. 2015 – Jan. 2016**

Resolution: **US$205,270**	Related Actions: **None**
■ US$50,000 (Civil Penalty) ■ US$155,270 (Disgorgement Plus Prejudgment Interest)	

- In August 2020, the SEC announced that it had settled charges against Nicholas Mejia Scrivener of California, a day trader, for perpetrating a spoofing scheme on U.S. stock markets from February 2015 and September 2016 that netted him approximately US$140,000 in profits.[107] Mejia was ordered to pay a civil penalty of US$50,000 and disgorge US$140,250 plus prejudgment interest of US$15,020.[108]

In re. JPMorgan Securities LLC, SEC Dkt. No. 3-20094 (Sept. 29, 2020)

Trader Location: **Not specified**

Time Period: **April 2015 – Jan. 2016**

Resolution: **US$35 million**	Related Actions:
■ US$25 million (Civil Penalty) ■ US$10 million (Disgorgement)	■ ***In re JPMorgan Chase & Co., et al.,*** CFTC Dkt. No. 20-69 (Sept. 29, 2020) ■ ***United States v. JPMorgan Chase & Co.,*** No. 20-cr-175 (D. Conn. Sept. 29, 2020)

- In September 2020, the SEC announced that it had settled charges against JPMorgan Securities LLC, a broker-dealer subsidiary of JPMorgan, for fraudulently engaging in manipulative trading of U.S. Treasury securities.[109]
- According to the SEC's Order, between April 2015 and January 2016, certain JPMorgan treasury traders placed bona fide orders for a particular Treasury Security, while nearly simultaneously placing non-bona fide orders, which the traders did not intend to execute, for the same series of Treasury Security on the opposite side of the market.[110] The Order found that these non-bona fide orders were intended to create a false appearance of buy or sell interest, which would induce other market participants to trade against the bona fide orders at prices that were more favorable to JPMorgan Securities than otherwise.[111]
- JPMorgan was ordered to pay disgorgement of US$10 million and a civil penalty of US$25 million, with the civil penalty being offset by amounts paid by JPMorgan Chase & Co. and its affiliates in the parallel proceedings announced by the DOJ and the CFTC.[112]

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107. Order Instituting Cease-and-Desist Proceedings at 2, *In re Nicholas Mejia Scrivener*, Administrative Proceeding File No. 3-19908 (Aug. 10, 2020).
108. *Id.* at 3–4.
109. Press Release, Securities and Exch. Comm'n, JPMorgan Securities Admits to Manipulative Trading in U.S. Treasuries (Sept. 29, 2020), available at https://www.sec.gov/news/press-release/2020-233.
110. *Id.*
111. *Id.*
112. *Id.*

Civil Class Actions

***In re Commodity Exch., Inc., Gold Futures & Options Trading Litig.*, No. 14-md-2548, (S.D.N.Y. Aug. 14, 2014)**

***In re London Silver Fixing, Ltd., Antitrust Litigation*, No. 14-md-2573, (S.D.N.Y. Oct. 14, 2014)**

Company Location: **Various UK, European, and Other Banks**

Exchange: **NYMEX, COMEX**

Market: **Gold and Silver**

Class Period: **Jan. 1, 2004 – June 30, 2016**

Causes of Action:

- Agreement Restraining Trade – 15 U.S.C. § 1
- Manipulation – 7 U.S.C. §§ 9(3), 13(a)(2), 25(a); 17 C.F.R. § 180.2
- Employment of Manipulative Device – 7 U.S.C. §§ 9(1), 13(a), 25(a); 17 C.F.R. § 180.1
- Principal-Agent Liability – 7 U.S.C. § 2(a)(1)
- Aiding and Abetting Liability – 7 U.S.C. § 25
- Unjust Enrichment

Related Actions: **N/A**

- Major financial institutions referred to as "Fixing Banks" are alleged to have benefited either by pre-positioning in advance of a financial benchmarking event, the PM Gold Fix or Silver Fix, or using the information advantage that came with being involved in the "Fix" to engage in a variety of manipulative practices.
- Underlying misconduct is alleged to include spoofing.
- Discovery is ongoing, with depositions scheduled throughout 2021.

Choi, et al. v. Tower Research Capital LLC, et l., No. 14-cv-9912 (S.D.N.Y. Dec. 16, 2014)

Company Location: **New York City, USA**

Exchange: **Korea Exchange**

Market: **KOSPI 200**

Class Period: **Jan. 1, 2012 – Dec. 31, 2012**

Causes of Action:

- Manipulation – 7 U.S.C. §§ 9, 13b, 13(a), 25(a)
- Principal-Agent Liability – 7 U.S.C. § 2(a)(1)
- Aiding and Abetting Liability – 7 U.S.C. § 25
- Unjust Enrichment

Related Actions:

- ***United States v. Tower Research Capital LLC,*** No. 19-cr-819 (S.D. Tex. Nov. 6, 2019)
- ***In re Tower Research Capital LLC***, CFTC Dkt. No. 20-06 (Nov. 6, 2019)

- The founder and managing partner of firm is named as an individual defendant.
- The court granted summary judgment dismissing all Commodity Exchange Act claims because futures at issue were traded on foreign exchange.
- The unjust enrichment claim remains pending.

In re JPMorgan Precious Metals Spoofing Litig., No. 18-cv-10356 (S.D.N.Y. Nov. 7, 2018)

Company Location: **New York City, USA**

Exchange: **NYMEX, COMEX**

Market: **Precious Metals**

Class Period: **Jan. 1, 2009 – Dec. 31, 2015**

Causes of Action:

- Manipulation – 7 U.S.C. §§ 9, 13b, 13(a), 25(a)
- Employment of Manipulative Device – 7 U.S.C. §§ 9, 25(a); 17 C.F.R. § 180.1
- Principal-Agent Liability – 7 U.S.C. § 2(a)(1)
- Unjust Enrichment

Related Actions:

- ***United States v. Smith, et al.,*** No. 19-cr-669 (N.D. Ill. Aug. 22, 2019)
- ***United States v. Trunz,*** No. 19-cr-375 (E.D.N.Y. Aug. 19, 2019)
- ***United States v. Edmonds,*** No. 18-cr-239 (D. Conn. Oct. 9, 2018)
- ***United States v. JPMorgan Chase & Co.,*** No. 20-cr-175 (D. Conn. Sept. 29, 2020)
- ***In re JPMorgan Chase & Co., et al.,*** CFTC Dkt. No. 20-69 (Sept. 29, 2020)
- ***In re JPMorgan Securities LLC,*** SEC Dkt. No. 3-20094 (Sept. 29, 2020)

- The case currently stayed at request of DOJ to accommodate criminal trial in *United States v. Smith, et al.,* No. 19-cr-669 (N.D. Ill.).
- Defendants have not yet filed motion to dismiss or answer.

In re Merrill, BOFA, and Morgan Stanley Spoofing Litig., No. 19-cv-6002 (S.D.N.Y. June 27, 2019)

Company Location: **New York, USA**

Exchange: **NYMEX, COMEX**

Market: **Precious Metals**

Class Period: **Jan. 1, 2007 – Dec. 31, 2014**

Causes of Action:

- Manipulation – 7 U.S.C. §§ 9, 13b, 13(a), 25(a)
- Employment of Manipulative Device – 7 U.S.C. §§ 9, 25(a); 17 C.F.R. § 180.1
- Principal-Agent Liability – 7 U.S.C. § 2(a)(1)
- Unjust Enrichment

Related Actions:

- **Merrill Lynch Commodities, Inc. Non-Prosecution Agreement**
- ***In re Merrill Lynch Commodities, Inc.,*** CFTC Dkt. No. 19-07 (June 25, 2019)
- ***In re Morgan Stanley Capital Grp., Inc.,*** CFTC Dkt. No. 19-44 (Sept. 30, 2019)

- Defendants' motion to dismiss, which challenges plaintiffs' ability to bring private cause of action for spoofing, is pending.

In re JPMorgan Treasury Futures Spoofing Litig., No. 20-cv-3515 (S.D.N.Y. May 5, 2020)

Company Location: **New York City, USA**

Exchange: **CBOT**

Market: **Treasuries**

Class Period: **Jan. 1, 2009 – Present**

Causes of Action:

- Manipulation – 7 U.S.C. §§ 9, 13b, 13(a), 25(a)
- Employment of Manipulative Device – 7 U.S.C. §§ 9, 25(a); 17 C.F.R. § 180.1
- Principal-Agent Liability – 7 U.S.C. § 2(a)(1)
- Unjust Enrichment

Related Actions:

- ***United States v. JPMorgan Chase & Co.,*** No. 20-cr-175 (D. Conn. Sept. 29, 2020)
- ***In re JPMorgan Chase & Co., et al.,*** CFTC Dkt. No. 20-69 (Sept. 29, 2020)
- ***In re JPMorgan Securities LLC,*** SEC Dkt. No. 3-20094 (Sept. 29, 2020)

- The schedule in this case currently has been deferred to accommodate parties' exploring of mediation.
- Plaintiffs have not yet filed consolidated complaint, and defendants have not yet filed motion to dismiss or answer.

Sterk, et al. v. The Bank of Nova Scotia, et al., No. 20-cv-11059 (D.N.J. Aug. 21, 2020)

Company Location: **Toronto, Canada**

Exchange: **NYMEX, COMEX**

Market: **Precious Metals**

Class Period: **Jan. 2008 – July 2016**

Causes of Action:

- Manipulation – 7 U.S.C. §§ 9, 13b, 13(a), 25(a)
- Employment of Manipulative Device – 7 U.S.C. §§ 9, 25(a); 17 C.F.R. § 180.1
- Principal-Agent Liability – 7 U.S.C. § 2(a)(1)
- Unjust Enrichment

Related Actions:

- ***United States v. Flaum,*** No. 19-cr-338 (E.D.N.Y. July 22, 2019)
- ***United States v. Bank of Nova Scotia,*** No. 20-cr-707 (D.N.J. Aug. 19, 2020)
- ***In re The Bank of Nova Scotia,*** CFTC Dkt. No. 20-27 (Aug. 19, 2020)

- Plaintiffs have not yet filed consolidated complaint, and defendants have not yet filed motion to dismiss or answer.

Boutchard, et al. v. Gandhi, et al., No. 18-cv-7041 (N.D. Ill. Oct. 19, 2018)

Company Location: **New York City, USA**

Exchange: **CME, CBOT**

Market: **DJIA Futures (E-Mini), S&P 500 (E-Mini), NASDAQ 100 (E-Mini)**

Class Period: **Mar. 1, 2012 – Oct. 31, 2014**

Causes of Action:

- Manipulation – 7 U.S.C. §§ 9, 13b, 13(a), 25(a)
- Employment of Manipulative Device – 7 U.S.C. §§ 9, 25(a); 17 C.F.R. § 180.1
- Principal-Agent Liability – 7 U.S.C. § 2(a)(1)
- Unjust Enrichment

Related Actions:

- ***United States v. Tower Research Capital LLC,*** No. 19-cr-00819 (S.D. Tex. Nov. 6, 2019)
- ***United States v. Mao,*** No. 18-cr-606 (S.D. Tex. Oct. 10, 2018)
- ***United States v. Gandhi,*** No. 18-cr-609 (S.D. Tex. Oct. 11, 2018)
- ***United States v. Mohan,*** No. 18-cr-610 (S.D. Tex. Oct. 11, 2018)
- ***In re Tower Research Capital,*** CFTC Dkt. No. 20-06 (Nov. 6, 2019)
- ***In re Kamaldeep Gandhi,*** CFTC Dkt. No. 19-01 (Oct. 11, 2018)
- ***In re Krishna Mohan,*** CFTC Dkt. No. 19-06 (Feb. 25, 2019)

- Defendants have filed a motion to dismiss, on which the court has not yet ruled.
- After mediation, Plaintiffs and Defendants have proposed settling lawsuit on a class-wide basis for US$15 million, which requires approval by the court.

Lobevero v. JPMorgan Chase & Co., et al., No. 20-cv-5590 (E.D.N.Y. Nov. 17, 2020)

Company Location: **New York City, USA**

Exchange: **CBOT**

Market: **Treasury Futures**

Class Period: **Jan. 1, 2009 – Present**

Causes of Action:

- Employment of Manipulative Device – 15 U.S.C. § 78j(b); 17 C.F.R. § 240.10b-5
- Control Person Liability – 15 U.S.C. § 78t(a)

Related Actions:

- ***United States v. Edmonds,*** No. 18-cr-239 (D. Conn. Oct. 9, 2018)
- ***United States v. Trunz,*** No. 19-cr-375 (E.D.N.Y. Aug. 19, 2019)
- ***United States v. Smith, et al.,*** No. 19-cr-669 (N.D. Ill. Aug. 22, 2019)
- ***United States v. JPMorgan Chase & Co.,*** No. 20-cr-175 (D. Conn. Sept. 29, 2020)
- ***In re JPMorgan Chase & Co., et al.,*** CFTC Dkt. No. 20-69 (Sept. 29, 2020)
- ***In re JPMorgan Securities LLC,*** SEC Dkt. No. 3-20094 (Sept. 29, 2020)

- This is the first known class action by shareholders pursuant to Securities Exchange Act stemming from resolution of criminal spoofing charges.
- The CEO and current/former CFOs are named as individual defendants.
- Defendants have not yet filed motion to dismiss or answer.

United Kingdom

FCA

Michael Coscia, FCA Final Notice, (July 3, 2013)[113]

Trader Location: **United States**

Exchange: **ICE Futures Europe exchange ("ICE")**

Market: **Brent Crude, Gas Oil and Western Texas Intermediate (WTI) Crude**

Time Period: **Sept. 2011 – Oct. 2011**

Resolution: **£597,993** (Financial Penalty)

Related Actions:

- ***In re Panther Energy Trading LLC and Michael J. Coscia,*** CFTC Dkt. No. 13-26 (July 22, 2013)
- ***Notice of Disciplinary Action Against Michael Coscia,*** CME Group File No. CME 11-8581-BC (July 22, 2013)

- The FCA concluded that Coscia, a U.S. based high frequency trader, placed and rapidly canceled large orders which he did not intend to trade with the intention of creating a false impression as to the weight of buyer or seller interest, thereby "layering" the order book and manipulating the market. Coscia's conduct caused at least one significant market participant to withdraw from ICE during the relevant period.
- The FCA concluded that Coscia created a false or misleading impression on the ICE market, in contravention of section 118(5) of FSMA.
- The FCA acknowledged Coscia's agreement to settle at an early stage and imposed a reduced financial penalty of £597,993, down from £764,776 (i.e. a 30 percent discount).
- The FCA worked closely with ICE, the CFTC and the CME in taking action against Coscia, demonstrating the U.S. and UK authorities' willingness to cooperate and share information on cross-border spoofing cases.
- This case demonstrates the FCA's appetite for pursuing individuals based abroad who trade on UK markets.

113. https://www.fca.org.uk/publication/final-notices/coscia.pdf.

Paul Walter, FCA Final Notice, (November 22, 2017)[114]

Trader Location: **United Kingdom**

Bond: **Dutch State Loan ("DSL")**

Time Period: **July 2014 – Aug. 2014**

Resolution: **£60,090** (Financial Penalty)	Related Actions: **N/A**

- Walter, an experienced bond trader employed by Bank of America Merrill Lynch International Limited, implemented a strategy whereby he entered high bid quotes on the BrokerTec trading platform for DSL, giving the impression that he was a buyer in DSL. Other market participants who were tracking Walter's quotes with algorithms raised their own bids in response. Walter then canceled his own quotes and sold DSL to other market participants for a higher price.
- The FCA found that Walter's behavior constituted market abuse under section 118(5) of FSMA as it gave a false and misleading impression as to the price and supply or demand of the DSLs and it also secured the price at an artificial level.
- The FCA concluded that Walter's trading strategy negatively affected other market participants as it manipulated their prices and led to them either buying or selling DSLs at worse prices than they would otherwise have done.
- The FCA concluded that Walter was not aware that his conduct amounted to market abuse (i.e., it was not deliberate), but considered that he was negligent in not realizing this. This was despite BrokerTec notifying Walter of concerns about his conduct during the relevant period, following which Walter continued this conduct.

114. https://www.fca.org.uk/publication/final-notices/paul-axel-walter-2017.pdf

Corrado Abbattista, FCA Final Notice, (December 15, 2020)[115]

Trader Location: **United Kingdom**

Exchange: **London Stock Exchange ("LSE")**

Contract: **Contract for Difference (Equities)**

Time Period: **Jan. 2017 – May 2017**

Resolution: **£100,000** (Financial Penalty) and a prohibition order preventing Mr. Abbattista from carrying out any functions in relation to regulated activity.	Related Actions: **N/A**

- On multiple occasions, Abbattista, a portfolio manager and chief investment officer at an investment management firm, placed large misleading orders for contracts for difference (referenced to equities) which he did not intend to execute. At the same time, Abbattista placed smaller orders that he did intend to execute on the opposite side of the order book to the misleading orders. Through his large misleading orders, Abbattista falsely represented to the market an intention to buy/sell when his true intention was the opposite.
- The FCA found that Abbattista engaged in market manipulation in contravention of Article 15 of MAR as, in placing the misleading orders, he gave or is likely to have given, false and misleading signals as to the supply or demand for the shares to which the misleading orders related.
- The FCA found that Abbattista's trading would likely have had a material impact on other market participants, caused them to alter their trading strategies and created a false and misleading impression regarding the true supply and demand for the shares in question.
- The trading undertaken by Abbattista was identified by the FCA's internal surveillance systems.[116]
- Abbattista referred the matter to the Upper Tribunal (Tax and Chancery Chamber) ("Upper Tribunal"), an appellate tribunal which hears references and appeals arising from FCA decisions, but his reference was withdrawn in November 2020.
- This case is significant as it is the FCA's first enforcement action for market abuse under EU MAR and may signal enhanced focus by the FCA on pursuing spoofing behavior.

115. https://www.fca.org.uk/publication/final-notices/corrado-abbattista-dec-2020.pdf
116. https://www.fca.org.uk/news/press-releases/fca-fines-and-prohibits-hedge-fund-chief-investment-officer-market-abuse

Spoofing Cases Concerning Companies

7722656 Canada Inc. (formerly Swift Trade Inc.) & Anor. v FCA (December 19, 2013)[117]

Company Location: **Canada**

Exchange: **LSE**

Contract: **Contract for Difference (Equities)**

Time Period: **Jan. 2007 – Jan. 2008**

Resolution: **£8 million** (Financial Penalty)

Related Actions: **FCA Final Notice: *7722656 Canada Inc. formerly carrying on business as Swift Trade Inc, (January 24, 2014)***

- The Court of Appeal upheld an Upper Tribunal decision that Canada Inc. (a company formed via a merger involving Swift Trade Inc. ("Swift Trade") and another company) had engaged in market abuse in violation of section 118(5) of FSMA.
- The Financial Services Authority (FSA), the FCA's predecessor, concluded that traders at Swift Trade had engaged in "layering" in relation to shares traded on the LSE, and proposed imposing a fine of £8 million on Swift Trade.
- This trading activity involved traders at Swift Trade placing a series of short-lived, large orders to buy or sell shares that were close to the touch price, giving the impression of substantial supply and demand for the shares, causing the share price to move up for bids and down for offers. Traders at Swift Trade then entered smaller orders on the other side of the order book, which became more attractive and were executed.
- The regulator found that the trading led to a false or misleading impression of supply and demand and an artificial share price in the shares they traded, which was to the detriment of other market participants.
- Following the Court of Appeal's decision, the FCA published a final notice confirming its decision to impose a fine of £8 million on Canada Inc.

117. [2013] EWCA Civ 1662

FCA v Da Vinci Invest Ltd. & Ors (August 12, 2015)[118]

Company Location: **Switzerland**

Exchange: **LSE**

Contract: **Contract for Difference (Equities)**

Time Period: **Aug. 2010 – Dec. 2010 and Feb. 2011 – July 2011**

Resolution: **£7,570,000** (Financial Penalty) and imposition of permanent injunctions restraining market abuse[119]	Related Actions: **N/A**

- The High Court affirmed the FCA's decision to impose permanent injunctions and penalties against Da Vinci Invest Ltd., individual traders and an entity linked to the traders, for engaging in layering activity in violation of section 118(5) of FSMA. The traders used algorithmic trading to repeatedly place a series of orders on the LSE and immediately and automatically place corresponding orders to stimulate the movement of the price of the shares. The traders took advantage of the price by buying and selling, then canceling the opposite orders.
- The FCA found that this trading strategy created a false or misleading impression as to the supply and demand for those shares and enabled the traders to trade those shares at an artificial price.
- The FCA took action to stop the abuse in July 2011 and applied for an interim injunction restraining the defendants from committing market abuse and freezing the company's assets. This case was the first time the FCA had asked the High Court to impose a permanent injunction restraining market abuse and a penalty.
- The High Court highlighted that a violation of section 118(5) of FSMA *"focuses attention on the likely perception of other parties, not the state of mind of the person whose behavior is under consideration."*
- Four of the five defendants were incorporated or resident abroad in Switzerland, the Seychelles and Hungary, demonstrating the FCA's ability and determination to stamp out abusive market practices wherever they may occur in UK markets.

118. [2015] EWHC 2401 (Ch)

119. This payment was to be apportioned between the defendants as follows: Da Vinci Invest Limited – £1.46 million; Mineworld Limited – £5 million; Szabolcs Banya – £410,000; Gyorgy Szabolcs Brad – £290,000; and Tamas Pornye – £410,000.

Ofgem Actions

Engie Global Markets (September 5, 2019)[120]

Company Location: **France**

Wholesale markets: **Gas**

Time Period: **June 2016 – Aug. 2016**

Resolution: **£2.1 million** (Financial Penalty)	Related Actions: **N/A**

- Ofgem concluded that Engie Global Markets ("EGM"), acting through a trader working in the name of and on behalf of EGM, had engaged in "spoofing" to manipulate wholesale gas prices for the purpose of increasing trading profits.
- Ofgem found that EGM engaged in market manipulation in relation to the month ahead contract for the delivery of natural gas at the National Balancing Point on the OTC wholesale energy market for the UK, in violation of Article 5 of REMIT (prohibition of market manipulation).
- Ofgem acknowledged that while EGM had some preventative measures in place, these measures were inadequate at the time to detect and prevent the breaches of REMIT.
- By cooperating and settling this investigation early, EGM qualified for a 30 percent discount. In determining the financial penalty, Ofgem also noted the measures EGM subsequently put in place to prevent such a breach recurring.

InterGen (April 15, 2020)[121]

Company Location: **United Kingdom**

Wholesale markets: **Electricity**

Time Period: **Oct. – Nov. 2016**

Resolution: **£37.3 million** ■ £12,791,000 (Restitution) ■ £24,500,000 (Financial Penalty)	Related Actions: **N/A**

- Ofgem concluded that InterGen staff manipulated the market in winter 2016, when they deliberately sent misleading signals to National Grid to boost profits, by falsely claiming that some of InterGen's power stations would not be generating during the critical "darkness peak" evening period when demand is highest. The company also deliberately sent misleading signals to National Grid about its power plants' capabilities.
- Ofgem's investigation found that as a result of the misleading information provided by InterGen staff, National Grid paid the company high prices to generate electricity during those hours.
- Ofgem found InterGen's behavior breached Article 5 of REMIT.
- The investigation also uncovered weaknesses in InterGen's procedures, management systems and internal controls with respect to REMIT compliance.
- By cooperating and settling this investigation early, InterGen qualified for a 30 percent discount. Ofgem also noted the measures InterGen subsequently put in place to prevent such a breach recurring.

120. https://www.ofgem.gov.uk/publications-and-updates/ofgem-fines-engie-global-markets-egm-21-million
121. https://www.ofgem.gov.uk/publications-and-updates/ofgem-requires-intergen-pay-37m-over-energy-market-abuse

Recent Recognition

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'White Collar Practice Group of the Year'
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The Legal 500 UK, 2021

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Chambers USA, 2020

"The team is able to draw on an international office network, including practitioners in the UK, France and China, which enables the U.S. team to handle a variety of multi- jurisdictional cases."
The Legal 500 United States, 2020

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