

How CFTC's Agricultural Enforcement May Evolve Amid Crisis

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(May 22, 2020, 5:11 PM EDT) - On April 22, the U.S. Commodity Futures Trading Commission convened a meeting of its Agricultural Advisory Committee to discuss the coronavirus pandemic and its impact on agricultural commodity markets, which have experienced significant volatility in recent months.

Among other measures discussed at the meeting, CFTC Chairman Heath P. Tarbert announced that a new livestock markets task force is monitoring various markets in real time.

Beyond studying market forces, Tarbert made clear that the CFTC will be on the lookout for possible misconduct, "watching for any indication that prices are moving in an uneconomic manner relative to the underlying commodity's cash prices," and "monitoring to see if ... traders are attempting to manipulate futures prices through disruptions caused by supply and demand shocks."^[1]

While the CFTC's new measures follow calls from industry groups and political leaders since the start of the pandemic to investigate livestock and crop markets,^[2] they also represent a continuation of the agency's effort over the past year to signal a renewed focus on enforcement in the agricultural sector.

The CFTC oversees a wide range of markets, spanning energy, metals, interest rates, credit, cryptocurrencies and more, but Tarbert noted in a Jan. 22 op-ed that "making sure the agricultural sector can rely on futures prices and effectively hedge risk ... was originally — and always will be — the very cornerstone of the Commodity Exchange Act."^[3]

Similarly, when the CFTC Division of Enforcement published its most recent annual report on Nov. 25, 2019, Tarbert noted that the agency would expand its focus on enforcement in agricultural markets:

America is the breadbasket of the world. Market manipulation and similar wrongdoing inflicts real pain on farmers by denying them the fair value of their hard work and crops. It also hurts American families by raising the costs of putting food on the table. Protecting our agricultural markets from manipulation and abuse is a special focus for the CFTC.^[4]



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This statement, which received little attention from the media and industry at the time, can now be regarded as a proactive effort to position the CFTC to address the kind of volatility that agricultural markets are currently facing.

As the CFTC focuses greater attention on enforcement in agricultural markets, a look back at the agency's past actions in this sector may shed light on where its renewed focus will lead.

The agency has brought numerous enforcement actions involving agricultural markets in the past decade. Several of these actions — including the agency's high-profile case against Kraft Foods Group Inc. and Mondelez Global LLC — have involved claims of manipulation. The agency has also pursued agricultural enforcement actions involving several other types of misconduct.

This article provides a brief survey of the CFTC's recent enforcement activity in agricultural markets, and then offers a look ahead at enforcement tools and initiatives that may inform the CFTC's approach to agricultural matters in its next phase.

Recent CFTC Enforcement Actions in Agricultural Markets

The CFTC's enforcement actions in agricultural markets in recent years have involved claims of manipulation, spoofing, wash trades, fraud and other types of violations.

Manipulation

One of the CFTC's highest-profile manipulation cases in recent years involves the wheat market. In April 2015, the CFTC initiated the Kraft action alleging manipulation and attempted manipulation of the prices of wheat futures and cash wheat, among other violations.[5]

The case became an object of unusual attention in the courts and the media in August 2019 when a settlement of the action came undone after the CFTC made public statements on the matter that allegedly violated a confidentiality provision in the settlement.[6]

Notably, the chairman's Nov. 25, 2019, statement announcing the CFTC's focus on enforcement in agricultural markets expressed sentiments similar to those in the press release that followed the now-vacated settlement in Kraft, suggesting that the agency felt it should again emphasize its ongoing commitment in this area.[7]

The CFTC's other enforcement actions in recent years targeting manipulation in agricultural markets have included a series of actions against traders for attempted manipulation of wheat futures and options, imposing penalties ranging from \$125,000 to \$3.4 million and other remedial measures,[8] as well as actions against attempted manipulation in milk futures and other agricultural products.[9]

Spoofing

In 2010, the Dodd-Frank Wall Street Reform and Consumer Protection Act introduced a new provision on disruptive trading that prohibited spoofing, or entering a bid or offer with intent to cancel it before execution.[10] The CFTC Division of Enforcement has devoted significant resources in recent years to spoofing matters across a range of markets, and several of its recent cases have involved agricultural futures.[11]

In a September 2018 case, for example, a proprietary trading firm was fined \$1.5 million for spoofing in various agricultural futures markets, including cattle, wheat and soybeans.[12] Indeed, the CFTC's first-ever spoofing enforcement action, brought in 2013, involved corn, soybeans and wheat, among other commodities.[13]

Wash Trades

In agricultural markets, the CFTC has also brought enforcement actions involving wash trading — noncompetitive or prearranged futures transactions that give the appearance of trading in the market without incurring market risk.[14] The CFTC has brought actions involving wash trading in wheat, cocoa, corn, soybean and cotton.[15]

Fraud

The CFTC's enforcement efforts in agriculture have also targeted fraud. In a September 2018 case, for example, an Iowa introducing broker and its principals were ordered to pay \$11.9 million in restitution to farmers and a \$1.25 million penalty for fraud, unauthorized trading, and false statements that had resulted in losses to farmers across five states.[16] The CFTC has also pursued fraudulent activity in other cases involving agricultural products, such as cattle, wheat and soybean futures.[17]

Disclosure, Reporting and Position Limits

The CFTC's recent enforcement actions in agricultural markets have also included an action against a provisionally registered swap dealer for providing counterparties and a swap data repository with mid-market marks that concealed the company's full markup on certain complex swaps, in violation of external business conduct rules requiring swap dealers to disclose material incentives and conflicts of interest related to their swaps.[18]

Several enforcement actions involving agricultural markets have also targeted speculative position limit violations. Position limits set maximum positions that one party can hold or control in particular commodities.

These rules aim to protect against price volatility that may arise from excessive speculation, as well as market manipulation through tactics such as corners and squeezes, in which traders accumulate such large positions that they are able to influence prices. The CFTC has brought several cases in recent years involving violations of position limits and related reporting requirements.[19]

New Areas for Potential Enforcement Activity in Agriculture

Beyond the traditional areas of enforcement summarized above, the CFTC's renewed emphasis on agricultural markets may dovetail with new Division of Enforcement initiatives on specific types of misconduct as outlined below.

Misappropriation of Confidential Information

The Division of Enforcement noted in its recent annual report that it has a task force dedicated to matters involving insider trading or other misuse of confidential information:

This type of misconduct can include misappropriating confidential information, improperly disclosing a client's trading information, front running, or using confidential information to unlawfully prearrange trades.[20]

The Division has focused on energy markets in recent cases in this area, but misappropriation of confidential information may prove to be a topic of interest in agriculture as well.

Foreign Corruption

In March 2019, the CFTC Division of Enforcement announced that it will work alongside the U.S. Department of Justice to investigate foreign bribery and corruption relating to commodities markets, and the division issued an enforcement advisory on self-reporting and cooperation for violations of the Commodity Exchange Act involving foreign corrupt practices.

In announcing this initiative, Enforcement Director James McDonald noted several factual scenarios that could lead to CFTC enforcement in connection with foreign corrupt practices, including bribes "to secure business in connection with regulated activities like trading, advising, or dealing in swaps or derivatives," manipulated prices that are "the product of corruption" and result in false reporting to benchmarks, and corruption that "alter[s] the prices in commodity markets that drive U.S. derivatives prices." [21]

While the division's early work on foreign corruption may focus on oil and gas or other extractive industries, the agency may see fertile ground for this initiative in agricultural markets as well. [22]

Enforcement Tools and Initiatives That May Shape Agricultural Cases

In recent years, the CFTC has devoted significant resources to new initiatives intended to enhance its enforcement program. The initiatives below can be expected to drive the Division of Enforcement's work in agricultural markets as they have in other areas.

Data Analytics

The Division of Enforcement has recently emphasized its increasing use of data analytics. In the 2019 annual report, the division noted that it has "engaged in a multi-year project to enhance [its] ability to detect misconduct through the use of data analytics," and that it has "developed an ability to identify, in the trading data, forms of misconduct that [it] might otherwise have been unable to detect." [23]

The division's efforts to pursue Tarbert's focus on potential manipulation in agricultural markets, including its new livestock markets task force, will likely draw on these resources.

Whistleblower Program

In 2010, the Dodd-Frank Act created a new CFTC whistleblower program that provides for payment of monetary awards to eligible individuals who voluntarily disclose original information about violations of the CEA to the CFTC, leading to a successful enforcement action. [24]

The division's annual report noted that "the whistleblower program has now awarded a total of over \$100 million to deserving whistleblowers," and "Commission actions associated with those awards have resulted in judgments totaling more than \$800 million." [25]

The division can be expected to draw on information provided by whistleblowers in agricultural markets as it has in other areas.[26]

Self-Reporting and Cooperation

In addition to the whistleblower program, the Division of Enforcement relies on a set of policies and procedures to encourage self-reporting and cooperation in its investigations. The division announced its current version of this program in September 2017.

Since then, as noted in the division's most recent annual report, several significant matters have been "developed with the assistance of cooperating witnesses or corporate cooperation," and the past year included "three cases that arose out of self-reports." [27] Registrants and other participants in agricultural markets who identify potential wrongdoing should be aware of the division's self-reporting and cooperation program as well.[28]

Coordination With Other Agencies

The Division of Enforcement has placed great emphasis in recent years on "increasing coordination with other regulators and criminal authorities." [29] Its annual report noted that this past year the Division "filed more actions in parallel with criminal authorities (16) than in any prior year." [30] This continues a trend that gained prominence with multi-agency enforcement actions involving LIBOR, the FX markets, and other matters over the past decade.

In recent years, the Department of Justice has devoted significant resources to matters involving spoofing and manipulation in commodities markets,[31] with several high-profile investigations of traders and financial institutions.[32]

In October 2019, noting that the Fraud Section's Securities and Financial Fraud Unit now focuses on a broader range of matters, the Department of Justice renamed the unit the Market Integrity and Major Frauds Unit and established teams dedicated to five specific areas, one of which is commodities fraud.[33] This team works closely with the CFTC.[34]

The U.S. Securities and Exchange Commission and other regulators, both in the U.S. and abroad, have also worked closely with the CFTC on enforcement matters in recent years. Agricultural markets may prove to be an area in which the CFTC increasingly collaborates with these other agencies as well.

In addition, the CFTC announced during the April 22 AAC meeting that it "will soon appoint a CFTC Liaison to the U.S. Department of Agriculture for the first time," a step the CFTC believes "will ensure robust dialogue and continued coordination regarding matters of mutual interest." [35] This coordination may include market research and analysis in support of enforcement investigations.

Conclusion

The CFTC's stated intention to focus on manipulation and other forms of misconduct in agricultural markets represents both a new focus and a return to the heartland of the agency's mission. Registered firms and market participants will benefit from understanding the Division of Enforcement's recent actions and current initiatives, which may shape this area of enforcement during the current crisis and in the years ahead.

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[1] Heath P. Tarbert, Chairman, Commodity Futures Trading Comm'n, Opening Statement of Chairman Heath P. Tarbert Before the April 22 Agricultural Advisory Committee Meeting (Apr. 22, 2019), <https://www.cftc.gov/PressRoom/SpeechesTestimony/tarbertstatement042220>.

[2] See, e.g., Letter from Marty Smith, President, National Cattlemen's Beef Association to Donald J. Trump, President, United States (Apr. 8, 2020), <https://www.ncba.org/CMDocs/BeefUSA/Publications/NCBA%20letter%20to%20Pres%20Trump.pdf>; Claire Kelloway, Fern's AG Insider, Meat prices spike, cattle prices fall, and ranchers and lawmakers see market manipulation (Mar. 25, 2020), https://thefern.org/ag_insider/meat-prices-spike-cattle-prices-fall-and-ranchers-and-lawmakers-see-market-manipulation/; Ellyn Ferguson, Roll Call, Beef costs are up at stores, but futures are down. Senators want to know why (Mar. 31, 2020), <https://www.rollcall.com/2020/03/31/beef-costs-are-up-at-stores-but-futures-are-down-senators-want-to-know-why/>; Sen. Ben Sasse, KTIC, Sasse Urges CFTC to Fight Market Manipulation (Apr. 8, 2020), <https://kticradio.com/agricultural/sasse-urges-cftc-to-fight-market-manipulation/>.

[3] See Heath P. Tarbert, Am. Farm Bureau Fed'n, Making Derivatives Markets Work for American Agriculture (Jan. 22, 2020), <https://www.fb.org/viewpoints/making-derivatives-markets-work-for-american-agriculture>.

[4] Commodity Futures Trading Comm'n, FY2019 Division of Enforcement Annual Report (Nov. 25, 2019), <https://www.cftc.gov/media/3081/ENFAnnualReport112519/download> [hereinafter FY19 Report]; see also Press Release, Commodity Futures Trading Comm'n, CFTC Division of Enforcement Issues Annual Report for FY 2019 (Nov. 25, 2019), <https://cftc.gov/PressRoom/PressReleases/8085-19>.

[5] See Complaint, CFTC v. Kraft Foods Group, Inc., No. 15-cv-02881 (N.D. Ill. 2015).

[6] See Dave Michaels, Wall St. J., Market Regulator Heads Back to Court Against Kraft and Mondelez (Jan. 3, 2020), <https://www.wsj.com/articles/market-regulator-heads-back-to-court-against-kraft-and-mondelez-11578056400>; Lydia Beyoud, Bloomberg Law, Kraft's \$16 Million Settlement with CFTC Axed by Judge (Oct. 23, 2019), <https://news.bloomberglaw.com/banking-law/krafts-16-million-settlement-with-cftc-axed-by-judge>.

[7] At the time of publication, the CFTC appears to be on the verge of settling the case with Kraft and Mondelez for a second time, and the court has indicated that it may still sanction the agency for events relating to the original settlement. See Docket Nos. 377, 378, and 386, CFTC v. Kraft Foods Group, Inc., No. 15-cv-02881 (N.D. Ill. 2015) (minute entries dated Feb. 13-14, 2020 and Mar. 12, 2020).

[8] See, e.g., In re Flavin, CFTC No. 18-40 (Sept. 26, 2018) (imposing sanctions for attempt to manipulate the price of certain wheat futures and options); In re Grady, CFTC No. 18-41 (Sept. 26, 2018) (imposing

sanctions for attempt to manipulate the price of certain wheat futures and options); In re Lansing Trade Group, LLC, CFTC No. 18-16 (July 12, 2018) (imposing sanctions and requiring remedial measures to improve internal controls for attempted manipulation of the price of certain wheat futures and options and aiding and abetting attempted manipulation of the cash price of corn); Order, CFTC v. Moncada, No. 12-cv-08791 (S.D.N.Y. 2014) (imposing \$1.56 million in sanctions and trading and registration restrictions for attempted manipulation of the price of wheat futures).

[9] See, e.g., In re Ecoval Dairy Trade, Inc., CFTC No. 11-16 (July 19, 2011) (imposing sanctions for attempting to manipulate milk futures prices).

[10] See CEA Section 4c(a)(5), 7 U.S.C. §6c(a)(5).

[11] See, e.g., In re Crepeau, CFTC No. 19-05 (Jan. 31, 2019) (imposing monetary penalty and four-month suspension from trading for spoofing in soybean futures); In re Singhal, CFTC No. 18-11 (Apr. 9, 2018) (imposing sanctions for spoofing in wheat futures).

[12] In re Geneva Trading USA, LLC, CFTC No. 18-37 (Sept. 20, 2018).

[13] See In re Panther Energy Trading LLC and Michael J. Coscia, CFTC No. 13-26 (July 22, 2013).

[14] See CEA Section 4c(a)(2), 7 U.S.C. §6c(a)(2).

[15] See, e.g., In re Eagle Market Makers, Inc., CFTC No. 19-08 (June 28, 2019) (imposing sanctions for wash transactions in various agricultural commodities such as wheat and soybeans); In re SG Americas Securities, LLC, CFTC No. 16-33 (Sept. 28, 2016) (imposing sanctions and requiring remedial measures in connection with wash trades in agricultural commodities); In re Cargill de México S.A. De C.V., CFTC No. 15-34 (Sept. 24, 2015) (imposing sanctions and remedial measures for wash transactions involving corn, soybean, and wheat futures); Order, CFTC v. Kuen Cheol Song, No. 10-cv-02931 (S.D.N.Y. 2011) (imposing in sanctions and a ban from commodity-related activity for wash transactions in various commodities, including cotton, corn, soybean, and wheat futures).

[16] In re Kooima & Kaemingk Commodities, Inc., CFTC No. 18-39 (Sept. 26, 2018) (imposing more than \$13 million in total sanctions for fraud and other violations involving cattle futures).

[17] See, e.g., In re Harris, CFTC No. 19-20 (Sept. 9, 2019) (imposing sanctions for fraud and other violations involving cattle futures); In re Mayer, CFTC No. 18-18 (Aug. 10, 2018) (imposing sanctions for fraudulent trading scheme involving unauthorized trades in cattle and wheat, among other products); Complaint, CFTC v. Wurl, No. 15-cv-05585 (N.D. Ill. 2015) (complaint alleging fraud, misappropriation of customer funds, and issuance of false statements in connection with an investment pool that purported to trade futures and options for soybeans and other agricultural commodities, among other products).

[18] See In re Cargill, Inc., CFTC No. 18-03 (Nov. 6, 2017) (imposing \$10 million penalty against swap dealer for violations of Section 4s(h)(1) of the CEA and Commission Regulations 23.431(a) and (d), 45.4(d)(2), and 166.3).

[19] See, e.g., In re Elephas Investment Management Ltd., CFTC No. 19-09 (Jul. 2, 2019) (imposing sanctions for violating wheat futures position limits); In re CHS, Inc., CFTC No. 16-07 (Mar. 9, 2016) (imposing sanctions for failing to submit accurate statement of cash positions for corn and soybeans on Form 204); In re Eagle Market Makers Inc., CFTC No. 13-05 (Nov. 20, 2012) (imposing sanctions for

exceeding position limits in corn futures and related failure to supervise traders).

[20] FY19 Report, *supra* note 3, at 11.

[21] James M. McDonald, Director, CFTC Division of Enforcement, Remarks at the ABA's National Institute on White Collar Crime (Mar. 6, 2019), <https://www.cftc.gov/PressRoom/SpeechesTestimony/opamcdonald2>.

[22] For additional information on the CFTC's foreign corruption initiative, see Latham's prior article, CFTC Enters the Market for Anti-Corruption Enforcement (Mar. 20, 2019), https://wp.nyu.edu/compliance_enforcement/2019/03/21/cftc-enters-the-market-for-anti-corruption-enforcement/.

[23] *Id.* at 13. The CFTC also enacted new ownership and control reporting rules and related forms to enhance its identification of futures and swap market participants, aiming in part to "enable the Commission to better deter and prevent market manipulation; deter and detect abusive or disruptive practices ... and better perform risk-based monitoring and surveillance between related accounts." Commodity Futures Trading Comm'n, Ownership and Control Reports, Forms 102/102S, 40/40S, and 71, 78 Fed. Reg. 69178 (Nov. 18, 2013), <https://www.cftc.gov/sites/default/files/idc/groups/public/@Irfederalregister/documents/file/2013-26789a.pdf>.

[24] See Commodity Futures Trading Comm'n, History of the Whistleblower Program, <https://www.whistleblower.gov/overview#history>.

[25] FY19 Report, *supra* note 3, at 13-14.

[26] For additional information about the CFTC's whistleblower program, see Latham's prior article, Whistling a Common Tune, in Corporate Counsel (June 12, 2017), <https://www.law.com//corpcounsel/almID/1202789444933/Whistling-a-Common-Tune-> / or <https://www.lw.com/thoughtLeadership/whistling-common-tune>.

[27] FY19 Report, *supra* note 3, at 12.

[28] For additional information on this initiative, see Latham's article, CFTC Self-Reporting Policy Leaves Open Several Questions, in Law360 (Oct. 5, 2017), <https://www.law360.com/articles/966575/cftc-self-reporting-policy-leaves-open-several-questions> or <https://www.lw.com/thoughtLeadership/cftc-self-reporting-policy-several-questions>.

[29] FY19 Report, *supra* note 3, at 2.

[30] *Id.* at 4.

[31] See U.S. Department of Justice, Fraud Section Year in Review (2019), at 35 (noting that the Fraud Section's Market Integrity and Major Frauds Unit "employs data analysis and traditional law enforcement techniques to identify and prosecute complex fraud and price manipulation cases involving core U.S. commodities markets," with its "[c]ommodities prosecutors ... working to prevent deceptive and manipulative trading practices and promote efficient, fair markets for the public"), <https://www.justice.gov/criminal-fraud/file/1245236/download> [hereinafter DOJ 2019 Report];

see also U.S. Department of Justice, Fraud Section Year in Review (2018), at 17, <https://www.justice.gov/criminal-fraud/file/1123566/download>.

[32] See DOJ 2019 Report, *supra* note 29, at 34-36, 38, 43-44.

[33] See Assistant Attorney General Brian A. Benczkowski, Remarks at the Global Investigations Review Live (Oct. 8, 2019), <https://www.justice.gov/opa/speech/assistant-attorney-general-brian-benczkowski-delivers-remarks-global-investigations>.

[34] See DOJ 2019 Report, *supra* note 29, at 34.

[35] Heath P. Tarbert, Chairman, Commodity Futures Trading Comm'n, Opening Statement of Chairman Heath P. Tarbert Before the April 22 Agricultural Advisory Committee Meeting (Apr. 22, 2019), <https://www.cftc.gov/PressRoom/SpeechesTestimony/tarbertstatement042220>.