

# Court Rejects CFTC's Expansive Definition of Price Manipulation

On September 30, 2016, a New York federal court ruled in a U.S. Commodity Futures Trading Commission's ("CFTC") enforcement action against Donald R. Wilson and DRW Investments, LLC (collectively, "DRW"), rejecting the CFTC's recent controversial litigation position that a trader can be guilty of attempted price manipulation based upon futures contract orders entered with the intent to merely influence prices.<sup>1</sup> As we previously wrote in July, this position created significant uncertainty for market participants, especially larger traders whose normal order size could reasonably be expected to influence price.<sup>2</sup> The court's decision reaffirmed over 30 years of CFTC and judicial precedent, which has distinguished unlawful price manipulation from legitimate market activity by requiring proof of a specific intent to create an "artificial price," rather than intent to merely influence price. The decision represents a setback in this particular enforcement action as well as for the CFTC's overall effort to broaden its scope of its longstanding anti-manipulation authority.

## CFTC v. Wilson and DRW Investments, LLC<sup>3</sup>

A brief history of this case is helpful in understanding its significance. In November 2013, the CFTC brought the civil enforcement action, charging that DRW attempted to and did manipulate an exchange-traded interest rate swap futures contract by placing bids to influence its settlement price. In seeking to dismiss the claims against it at the pleadings stage, DRW did not deny that its trading conduct was intended to influence price. Instead, they argued that they lacked the requisite intent because their bids were not intended to create *artificial* prices; rather, the bids were based on their "own calculations and beliefs about value," and thus reflected a legitimate source of demand instead of an intent to manipulate. The court rejected DRW's motion citing a short-hand version of the CFTC's traditional four-part manipulation test characterizing the requisite intent as the intent to "influence market prices."

After the conclusion of discovery, DRW and CFTC both sought summary judgment. The CFTC, in its motion for partial summary judgment with respect to the *attempted* price manipulation claim asserted that, under the law of the case, it need only prove that defendants: (i) intended to *affect* the price of those contracts and (ii) took an overt act in furtherance of that intent. The CFTC maintained that both elements of this test were satisfied because DRW did not dispute that it "intentionally placed bids with the

<sup>1</sup> Memorandum and Order, *U.S. Commodity Futures Trading Comm'n v. Donald R. Wilson, Jr. and DRW Invs., LLC*, No. 13-7884 (S.D.N.Y. Sept. 30, 2016), ECF No. 139.

<sup>2</sup> For further information on this topic, please review *CFTC Presses Its Case to Expand Conduct Punishable As Manipulation* (July 26, 2016), available at [https://www.cliffordchance.com/briefings/2016/07/cftc\\_presses\\_its\\_casetoexpandconduc.html](https://www.cliffordchance.com/briefings/2016/07/cftc_presses_its_casetoexpandconduc.html)

<sup>3</sup> *U.S. Commodity Futures Trading Comm'n v. Donald R. Wilson, Jr. and DRW Invs., LLC*, No. 13-7884 (S.D.N.Y. filed Nov. 5, 2013).

intent to affect price.” In response, DRW argued that the CFTC’s position on the requisite intent standard runs counter to decades of precedent requiring a specific intent to create *artificial prices*. The CFTC’s position was also questioned by five key participants in the futures market, including futures exchanges, clearinghouses, and trade industry associations, which filed an *amicus curiae* brief in June 2016 expressing concern that under the CFTC’s looser interpretation of the requisite intent, there may be no way “to ensure that innocent trading activity not be regarded with the advantage of hindsight as unlawful manipulation.”

The court’s September 30, 2016 decision agreed with DRW and the *amici*, holding that the “CFTC’s interpretation is incorrect,” and that the CFTC must prove that there is an intent to cause artificial prices. That decision also partially rejected motions by both the CFTC and DRW to exclude testimony from experts that both parties had retained to testify at trial. By rejecting the motions for summary judgment and allowing this expert testimony, the court has put the case on track for a trial. That trial is likely to come down to the “battle of the experts,” which a former CFTC Commissioner has stated makes proving artificial price “a daunting task.”<sup>4</sup> A task made all the more difficult for the CFTC because one of DRW’s testifying experts, a former Chief Economist of the CFTC, has filed an expert report indicating that DRW’s bids were consistent with the true value of the contract and contributed to the price discovery function of the contract.

The court’s rejection of the CFTC’s new stance on intent, should provide some comfort to market participants concerned with the CFTC’s more aggressive recent approach to price manipulation. However, it does not affect proceedings that may be brought under the CFTC’s new Rule 180.1 (fraudulent manipulation) authority added pursuant to certain Dodd-Frank Act related statutory amendments. The CFTC has also begun using its Rule 180.1 authority to bring enforcement actions based on new, more aggressive theories of price manipulation, which these authors described in a publication earlier this year.<sup>5</sup>

## Contacts

**David Yeres**  
Senior Counsel

T: +1 212 878 8075  
E: david.yeres  
@cliffordchance.com

**Robert Houck**  
Partner

T: +1 212 878 3224  
E: robert.houck  
@cliffordchance.com

**Benjamin Berringer**  
Associate

T: +1 212 878 3372  
E: benjamin.berringer  
@cliffordchance.com

This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

Clifford Chance, 31 West 52nd Street, New York, NY 10019-6131, USA

© Clifford Chance 2016  
Clifford Chance US LLP

[www.cliffordchance.com](http://www.cliffordchance.com)

Abu Dhabi ■ Amsterdam ■ Bangkok ■ Barcelona ■ Beijing ■ Brussels ■ Bucharest ■ Casablanca ■ Doha ■ Dubai ■ Düsseldorf ■ Frankfurt ■ Hong Kong ■ Istanbul ■ Jakarta\* ■ London ■ Luxembourg ■ Madrid ■ Milan ■ Moscow ■ Munich ■ New York ■ Paris ■ Perth ■ Prague ■ Riyadh ■ Rome ■ São Paulo ■ Seoul ■ Shanghai ■ Singapore ■ Sydney ■ Tokyo ■ Warsaw ■ Washington, D.C.

\*Linda Widyati & Partners in association with Clifford Chance.

Clifford Chance has a best friends relationship with Redcliffe Partners in Ukraine.

<sup>4</sup> Bart Chilton, former Comm’r, CFTC, Speech before the Institutional Investors Carbon Forum: Moment of Inertia (Sept. 15, 2009), available at [www.cftc.gov/PressRoom/SpeechesTestimony/opachilton-26](http://www.cftc.gov/PressRoom/SpeechesTestimony/opachilton-26).

<sup>5</sup> For further discussion of this topic, please review *Freedom to Trade in the Age of Heightened Market Protection* (April 3, 2016), available at <https://corpgov.law.harvard.edu/2016/04/03/freedom-to-trade-in-the-age-of-heightened-market-protection/>