

CFTC DECLINES TO APPEAL SHARPLY WORDED REJECTION OF ITS BID TO EXPAND THE OFFENSE OF PRICE MANIPULATION

In December 2018, a New York federal court rejected an attempt by the U.S. Commodity Futures Trading Commission ("CFTC") to redefine the *scienter* requirement for market manipulation from an intent to create an artificial price to an intent to merely influence the price.¹ The Court's decision came in the long-running CFTC civil enforcement case against DRW Investments, LLC and its CEO.² The Court found that DRW believed that its bids were in line with market value and were placed with a desire to transact. The Court then concluded that where a trading pattern is supported by a legitimate economic rationale, it cannot be the basis for liability as a basis for price manipulation or attempted price manipulation under the CEA.

Following the decision, on December 3, 2018, CFTC Chair Christopher Giancarlo released a statement noting that the CFTC was "reviewing the decision and will analyze it carefully in considering next steps." That review concluded on February 27, 2019, when the CFTC announced that Chair "Giancarlo has decided that the agency will not appeal the district court's decision." The CFTC's decision not to appeal allows the CFTC to avoid the risk of an adverse appellate decision in what would likely be a weak appeal. Further, it suggests that the agency may be more cautious in pursuing the questionable policy of expanding the scope of price manipulation liability to include trading activity that is otherwise lawful and not fraudulent.

¹ For further information on this decision, please review U.S. Court Affirms Economic Realism and Rejects CFTC Bid to Expand the Offense of Price Manipulation (December 13, 2018), available at: https://www.cliffordchance.com/briefings/2018/12/u_s_court_affirmseconomicrealismandreject.html.

² 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_itscasetoexpandconduc.html; and *Court Rejects CFTC's Expansive Definition of Price Manipulation* (October 1, 2016), available at: https://www.cliffordchance.com/briefings/2016/10/court_rejects_cftcexpansivedefinitiono.html;

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