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When Is a Bid or Offer a 'Spoof'?

U.S. Supreme Court Denial of Cert Leaves Statute Vague

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In 2010, Congress expressly criminalized a type of trading activity on the commodity futures exchanges referred to as "spoofing." This new anti-spoofing statute greatly increased a prosecutor's power to crack down on traders who place and cancel orders at extremely high speeds through the use of powerful computer programs, supposedly in order to manipulate commodity futures prices and harm innocent investors. However, following the government's first criminal conviction for spoofing in *United States v. Coscia*, questions remain about what makes a commodity futures trader's conduct illegal instead of a legitimate trading strategy. Nonetheless, the Department of Justice (DOJ) and Commodity Futures Trading Commission (CFTC) recently have brought a substantial number of new cases against traders for violations of the anti-spoofing statute.

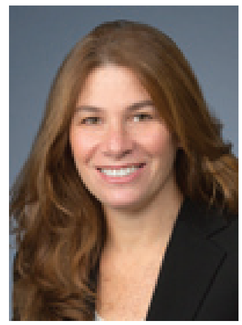
This article analyzes the confusion faced by commodity futures traders in assessing whether their trading strategies constitute illegal spoofing, which could land them in jail for up to 10 years, and examines whether the CFTC and Seventh Circuit have provided sufficient guidance on the distinction between spoofing and legitimate trading activity. It also explains why the Supreme Court's recent decision to not grant Coscia's petition for writ of *certiorari*, in which he argued that the anti-spoofing statute is unconstitutionally vague, will have significant consequences for the many spoofing actions currently pending before the courts, as well as for commodity futures trading in general.

The Anti-Spoofing Statute in Dodd-Frank

On July 21, 2010, President Obama signed into law the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank), Pub. L. No. 111-203, 124 Stat. 1376 (Jul. 21, 2010), which amended the Commodity Exchange Act and, for the first time, introduced a specific prohibition on a trading practice referred to as "spoofing." *See*, D. Deniz Aktas, "Spoofing," 33 Rev. Banking & Fin. L. 89, 89 (Fall 2013) (http://bit.ly/2ItUFMu). This anti-spoofing statute states: "It shall be unlawful for any person to engage in any trading practice, or conduct … [that] is, is of the character of, or is commonly known to the trade as, 'spoofing' (bidding or offering with the intent to cancel the bid or offer before execution)." 7 U.S.C. §6c(a)(5)(C).

Under Dodd-Frank, any "knowing" violation of the anti-spoofing statute is a felony punishable by up to 10 years in prison and a fine of not more than $1 million. 7 U.S.C. §13(a)(2).

Why, though, does the government care whether a trader engages in the practice of spoofing? The purported concern arises from the use of high frequency trading (HFT), which has dramatically increased in the past decade. *See*, "Securities Fraud," 54 Am. Crim. L. Rev. 1787, 1876-77 (Fall 2017). In general terms, HFT is conducted through supercomputers and algorithmic software that allow a firm



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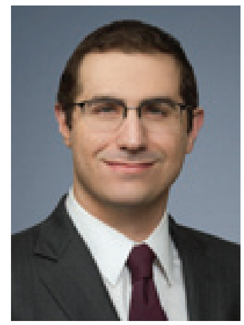

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to place, execute and cancel large volumes of trade orders within a matter of milliseconds. *See*, Rena S. Miller & Gary Shorter, "High Frequency Trading: Overview of Recent Developments," Congressional Research Service, 1-2 (Apr. 4, 2016) (http://bit.ly/2IwlPCc). According to the CFTC and the decisions in *United States v. Coscia*, (*see*, *United States v. Coscia*, 100 F. Supp. 3d 653 (N.D. Ill. 2015) (*Coscia I*) (http://bit.ly/2IqQdxV); *United States v. Coscia*, 866 F.3d 782 (7th Cir. 2017) (*Coscia II*) (http://bit.ly/2Itnp8b)), while HFT can be used to conduct legitimate trading, it can also be used to implement trading strategies that "*artificially move* the market price of a … commodity up or down," which a trader can then take advantage of to profit off of innocent investors. *Coscia II*, 866 F.3d at 787.

Consider the example of a hypothetical trader who purchased a small volume of soybean futures at a current market price of $1, but who then wants to sell his soybean futures at a higher price of $1.05 in order to make a profit. To accomplish this, the trader will place an order to sell his small volume of soybean futures at the desired $1.05 price and then, through HFT, the trader will place a series of large volume buy orders for soybean futures at

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incrementally increasing prices of $1.01, $1.02, and so on. These large volume buy orders create the appearance that there is high demand for soybean futures and eventually raise the price of soybean futures to the desired $1.05 level. The trader can then supposedly induce another market participant — who incorrectly believes demand is growing for soybean futures — into purchasing the trader's small volume of soybean futures at $1.05. The key to this trading strategy is that the trader must ensure that his large volume buy orders are not executed, otherwise he will have purchased soybean futures at an artificially increased price and reap no profit from this trading strategy. To avoid that result, the trader uses HFT and complex algorithms to *cancel* his large buy orders within milliseconds of achieving the desired upward market price effect. This type of trading strategy ostensibly manipulates market prices through the withdrawal of bids/offers before execution, harms investors, and threatens the integrity of the commodity futures markets. *See*, Press Release, CFTC, "CFTC Charges Chicago Trader Igor B. Oystacher and His Proprietary Trading Company, 3 Red Trading LLC, with Spoofing and Employment of a Manipulative and Deceptive Device while Trading E-Mini S&P 500, Copper, Crude Oil, Natural Gas, and VIX Futures Contracts," (Oct. 19, 2015), (http://bit.ly/2IsUUax) ("Spoofing seriously threatens the integrity and stability of futures markets because it discourages legitimate market participants from trading."). *But see*, James A. Overdahl & Kwon Y. Park, "The Exercise of Anti-Spoofing Authority in U.S. Futures Markets: Policy and Compliance Consequences," 36 No. 5 Futures & Derivatives L. Rep. 1, 9 (May 2016) (http://bit.ly/2IvkHPv) (Craig Pirrong, Professor of Finance at the University of Houston has "argued that the impact of spoofing conduct may be limited because the victims of spoofing tend to be sophisticated traders who quickly realize that they have been victimized and take prompt action to protect themselves from further damage").

Prior to Dodd-Frank, claims of price manipulation were difficult to prove and required the CFTC to show: "(1) that the respondent had the ability to influence market prices; (2) that the respondent specifically intended to influence market prices; (3) an artificial price existed; and (4) the respondent caused the artificial price." *In re DiPlacido*, CFTC No. 01-23, 2008 WL 4831204 (Nov. 5, 2008), *aff'd in relevant part*, *DiPlacido v. CFTC*, 364 Fed App'x 657 (2d Cir. 2009).

Post-Dodd-Frank, however, the anti-spoofing statute has dramatically reduced the burden of proof for the government and created a new claim that merely requires proof of an intent to spoof — that is, to place a "bid[] or offer[] with the intent to cancel the bid or offer before execution." 7 U.S.C. §6c(a)(5)(C); *see*, Meric Sar, Note, "Dodd-Frank and the Spoofing Prohibition in Commodities Markets," 22 Fordham J. Corp. & Fin. L. 383, 395-96 (2017) (http://bit.ly/2IwmHak) (anti-spoofing statute "lower[s] the *prima facie* case threshold in price manipulation claims involving spoofing since it does not require the showing of 'specific intent' and the existence of or the ability to cause artificial prices"). In other words, the act of simply submitting a bid or offer with the intent to cancel can itself constitute criminal conduct, even if the government cannot show that the trader specifically intended to influence market prices with the bid or offer, caused an artificial price, or even had the ability to influence market prices. Consequently, the anti-spoofing statute has greatly increased the government's ability to regulate and police the commodity futures exchanges.

Arguably the biggest challenge regarding the anti-spoofing statute, however, and what has caused substantial confusion among commodity traders, is distinguishing between HFT strategies that constitute illegal spoofing and HFT strategies that constitute legitimate trading activity.

The CFTC's Difficulty In Defining What Constitutes Illegal Spoofing

A vast amount of the trading conducted on commodity futures exchanges is performed through HFT. *See*, Petition for Writ of Certiorari at 6, *Coscia v. United States*, No. 17-1099, 2018 WL 741613 (U.S. Feb. 2, 2018) ("[B]y 2011, high-frequency trading accounted for approximately 65% of all commodity futures market activity." (citing Trial Transcript at 1143, *United States v. Coscia*, No. 14 CR 551 (N.D. Ill. Oct. 30, 2015) (expert testimony)). Many firms that engage in HFT cancel 90% or more of the orders that they submit. Def.'s Mot. to Dismiss at 20, *United States v. Coscia*, No. 14 CR 551 (N.D. Ill. Dec. 15, 2014) (quoting Mary L. Schapiro, Chairwoman of The SEC, "Speech at the Economic Club of New York: Strengthening Our Market Equity Structure" (Sept. 7, 2010) (http://bit.ly/2IqbjN6)). Indeed, HFT firms frequently employ well-recognized trading strategies that are not intended to manipulate market prices, but nonetheless involve placing orders that are *intended to be cancelled* if certain conditions are not met. For example, "fill-or-kill orders" are orders "which are programmed to cancel if not filled immediately" in full. *Coscia II*, 866 F.3d at 800. Specifically, fill-or-kill orders are designed to ensure that a commodity futures position is entered into at a desired price and quantity, or not at all. "Fill Or Kill - FOK," Investopedia (http://bit.ly/2IwnsQI) (last visited Apr. 19, 2018). Such orders are particularly useful for large volume orders, which, without the fill-or-kill requirement, might otherwise take a prolonged period of time to fill and, during that time, the price of a commodity could meaningfully change. *Id*. Congress, however, could not have intended for spoofing to mean *all* "bidding or offering with the intent to cancel the bid or offer before execution," as that essentially would criminalize substantial commodity futures trading strategies, such as fill-or-kill orders, which pre-Dodd-Frank were considered lawful, and would cripple the commodity futures exchanges. *See*, *United States v. Coscia*, 177 F. Supp. 3d 1087, 1092-93 (N.D. Ill. 2016) ("It would be unreasonable to believe that Congress had intended to criminalize all orders that are eventually canceled at any point, for any reason, under 7 U.S.C. §6c(a)(5)(C).").

Recognizing the problem that a literal reading of the anti-spoofing statute potentially could criminalize significant amounts of lawful trading activity, the CFTC initiated a rulemaking process in November 2010 and invited comment on "ways to more clearly distinguish the practice of spoofing from the submission, modification, and cancellation of orders that may occur in the normal course of business." See, Petition for Writ of Certiorari at 10-11, *Coscia v. United States*, No. 17-1099, 2018 WL 741613 (U.S. Feb. 2, 2018) (quoting Antidisruptive Practices Authority Contained in the Dodd-Frank Wall Street Reform and Consumer Protection Act, 75 Fed. Reg. 67301-02 (Nov. 2, 2010) (http://bit.ly/2rMrGgI)). The CFTC seemingly, however, had difficulty defining the precise meaning of spoofing in the statute and ultimately terminated its rule-making efforts. *See*, CFTC, Staff Roundtable on Disruptive Trading Practices, 64 (Dec. 2, 2010) (http://bit.ly/2IKhAqj) ("I think it was a mistake in the statute, frankly, to talk about spoofing because I really don't know what spoofing is …. I'm not sure [i]f the definition of spoofing can be agreed upon by the [10] people around this table."). Furthermore, although the anti-spoofing statute itself says that spoofing is "commonly known to the trade," the CFTC and industry participants struggled to identify any such "commonly known" definition of spoofing. *See*, *id*. at 171-72 ("[I]s there a common understanding or meaning to the terms … in [7 U.S.C. §6c(a)(5)], and the answer is, after this morning's conversation … no."). In fact, in March 2011, the CFTC settled on simply publishing proposed interpretive guidance on what qualifies as illegal spoofing. Antidisruptive Practices Authority, 76 Fed. Reg. 14,943 (Mar. 18, 2011).

In May 2013, the CFTC issued its final interpretive guidance on the subject (Antidisruptive Practices Authority, 78 Fed. Reg. 31,890 (May 28, 2013) (http://bit.ly/2IJXufT)), which stated that "a spoofing violation will not occur when the person's intent when canceling a bid or offer before execution was to cancel such bid or offer as part of a legitimate, good-faith attempt to consummate a trade." *Id*. at 31,896. The problem with this guidance, however, is that it does nothing to explain *what* in fact qualifies as a legitimate, good-faith attempt to trade. Further confusing the issue, the CFTC guidance states that it "intends to distinguish between legitimate trading and 'spoofing' by evaluating all of the facts and circumstances of each particular case, including a person's trading practices and patterns." *Id*. No guidance is given, however, on *what particular facts or circumstances* make trading activity illegal spoofing, and no parameters are provided for when a person's trading practices cross the line from legitimate trading activity to spoofing. Moreover, after stating that the CFTC will consider a person's trading practices and patterns when determining whether spoofing actually occurred, the guidance nonetheless states that "even a *single* instance of trading activity can violate [the anti-spoofing statute]." *Id*. (emphasis added). Thus, how is a trader supposed to determine when his cancellation of even a single order, much less large volumes of orders through HFT, crosses the line and becomes illegal spoofing? The CFTC's guidance fails to answer this crucial question.

The CFTC's interpretive guidance does, however, offer the following four "non-exclusive" examples of "possible situations" for when market participants have engaged in spoofing: 1) Submitting or canceling bids or offers to overload the quotation system of a registered entity; 2) submitting or canceling bids or offers to delay another person's execution of trades; 3) submitting or cancelling multiple bids or offers to create an appearance of false market depth; and 4) submitting or canceling bids or offers with intent to create artificial price movements upwards or downwards. *Id*.

These examples suggest that the CFTC is focused on situations where a trader cancels orders with the intent to manipulate commodity futures markets. At the same time, however, the CFTC makes explicit in its guidance that "the [CFTC] does not interpret the CEA section 4c(a)(5) violations [on disruptive practices] as including *any manipulative intent requirement*." *Id*. at 31,892 (emphasis added). Thus, the CFTC's guidance states, on the one hand, that examples of spoofing include trading activity that was designed to manipulate markets, but, on the other hand, that the government need not prove a trader manipulated or even intended to manipulate markets in order to be found guilty of spoofing. *See*, Meric Sar, Note, "Dodd-Frank and the Spoofing Prohibition in Commodities Markets," 22 Fordham J. Corp. & Fin. L. 383, 395-96 (2017) (http://bit.ly/2IwmHak). This somewhat contradictory guidance does little to assure traders that they will not be found guilty of spoofing merely because they employ an HFT strategy that cancels some orders before their execution.

The CFTC's failure to define what specific conduct qualifies as spoofing, or to narrow the term's broad meaning in any material way, has led to significant confusion and concern among commodity futures traders about whether their trading strategies may result in civil or even criminal charges against them. *See*, Letter from Mary Ann Burns, Chief Operating Officer of the Futures Industry Association, to Brent J. Fields, Sec'y, SEC, 3 (Sept. 9, 2015) (http://bit.ly/2rPEPFI) ("Five years after the use of the term by Congress, there is still a high degree of uncertainty as to what exactly constitutes spoofing …."). The CFTC's approach, it seems, is to leave it to the courts to ultimately distinguish between what constitutes unlawful spoofing and legitimate trading activity.

Distinguishing Illegal Spoofing from Legitimate Trading Activity

The Seventh Circuit attempted to draw a distinction between illegal spoofing and legitimate trading activity in *Coscia II*, which was the first criminal spoofing case to go to trial and result in a conviction. Michael Coscia was a commodity futures trader who, starting in 2007, was the manager and sole-owner of Panther Energy Trading LLC (Panther Energy), an HFT firm. *Coscia I*, 100 F. Supp. 3d at 655. In 2013, the CFTC brought a civil enforcement action against both Panther Energy and Coscia for their alleged spoofing activity. *In the Matter of Panther Energy Trading LLC and Michael J. Coscia*, CFTC No. 13-26, 2013 WL 3817473 (Jul. 22, 2013). Panther Energy and Coscia settled with the CFTC on July 22, 2013, pursuant to a cease and desist order, in which they agreed to pay $1.4 million in disgorgement, a $1.4 million penalty, and also agreed to a one-year trading ban. *Id*. at 4-5.

Following this settlement, on Oct. 1, 2014, Coscia was indicted in the Northern District of Illinois on six counts of commodities fraud and six counts of spoofing. Indictment, *United States v. Coscia*, No. 14 CR 551, 2014 WL 10584583 (N.D. Ill. Oct. 1, 2014). According to the Indictment, from August 2011 through October 2011, Coscia developed and employed two computer programs, which allowed him to engage in spoofing on 17 different CME Group markets and three different ICE Futures Europe exchanges. *Coscia I*, 100 F. Supp. 3d at 655. Coscia allegedly used these computer programs to enter and cancel large-volume orders in milliseconds, in order to move market prices downward so that he could purchase futures contracts at lower than market prices. *Id*. He then allegedly used the computer programs to repeat the process in the opposite direction, in order to resell those same futures contracts at higher than market prices. *Id*. Coscia earned about $1.5 million in a two-month period as a result of this strategy. *Id*. On Nov. 3, 2015, following a seven-day jury trial, Coscia was convicted on all counts and sentenced to three years in prison. *See*, Press Release, DOJ, "High-Frequency Trader Convicted of Disrupting Commodity Futures Market in First Federal Prosecution of 'Spoofing'" (Nov. 3, 2015) (http://bit.ly/2IQmNg4). Coscia appealed his conviction to the Seventh Circuit, alleging, among other things, that the anti-spoofing statute was unconstitutionally vague. *Coscia II*, 866 F.3d at 785.

To satisfy the Due Process Clause of the Fifth Amendment, a "penal statute must define the criminal offense [1] with sufficient definiteness that ordinary people can understand what conduct is prohibited and [2] in a manner that does not encourage arbitrary and discriminatory enforcement." *Skilling v. United States*, 561 U.S. 358, 402-403 (2010) (quoting *Kolender v. Lawson*, 461 U.S. 352, 357 (1983)). If a statute does not satisfy both requirements, it is void for vagueness. *Id*. Addressing this first requirement, the Seventh Circuit, held that the anti-spoofing statute gave sufficient notice to Coscia of the prohibited conduct because the statute "contain[ed] a parenthetical definition" of spoofing, which made clear the term means "bidding or offering with the intent to cancel the bid or offer before execution." *Coscia II*, 866 F.3d at 791-93.

Moving to the second due process requirement, whether the statute encouraged arbitrary enforcement, the Seventh Circuit explained: "The Supreme Court has made clear that 'a plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others.'" *Id*. at 794 (quoting *Holder v. Humanitarian Law Project*, 561 U.S. 1, 18-19 (2010)). The court then ruled that Coscia could not challenge the statute on arbitrary enforcement grounds because his conduct fell "well within the provision's prohibited conduct: … he commissioned a program designed to pump or deflate the market through the use of large orders that were *specifically designed* to be cancelled if they ever risked actually being filled." *Id*. (emphasis in original).

Nonetheless, assuming *arguendo* that Coscia could challenge the statute on arbitrary enforcement grounds, the Seventh Circuit went on to explain why the anti-spoofing statute does not risk arbitrary enforcement. It held that spoofing "requires[] an intent to cancel the order *at the time it was placed*," whereas legal trades, like "fill-or-kill" orders, "are cancelled only following a condition subsequent to placing the order." *Id*. at 795 (emphasis in original). The court further explained: "The fundamental difference is that … orders placed in a spoofing scheme are never intended to be filled at all," while legal orders are intended to be filled until certain *conditions subsequent* to placing the orders occur. *Id*.

Interestingly, however, the language the circuit court relies on, "at the time [the order] was placed," is completely absent from the definition of spoofing contained in the statute. The statute only defines spoofing as any order placed with the "intent to cancel the bid or offer before execution," without reference to *when* that intent to cancel has to occur. 7 U.S.C. §6c(a)(5)(C); *see also*, Petition for Writ of Certiorari at 13, *Coscia v. United States*, No. 17-1099, 2018 WL 741613 (U.S. Feb. 2, 2018) (anti-spoofing statute "says nothing about whether the intent to cancel an order must be absolute or conditional") (emphasis in original). Thus, courts in other jurisdictions may not follow the Seventh Circuit and read such limiting language on the timing of one's intent to cancel into the anti-spoofing statute.

Furthermore, Coscia's computer programs only cancelled orders after one of three *conditions subsequently* occurred, which would seem to fall squarely within the Seventh Circuit's definition of lawful trades: "trades [that] are cancelled only following a condition subsequent to placing the order." *Coscia II*, 866 F.3d at 795. Coscia's computer programs would cancel orders only "(1) after the passage of time, [usually measured in milliseconds,] (2) if the small orders were filled, or (3) if a single large order was filled." *Id*. at 794; *see also*, Petition for Writ of Certiorari at 26, *Coscia v. United States*, No. 17-1099, 2018 WL 741613 (U.S. Feb. 2, 2018) (Coscia's "very orders at issue here … could be and were filled, and were programmed to cancel only upon the occurrence of certain conditions"). Nonetheless, the Circuit held that these three conditions were so restrictive that, "[r]ead together, these parameters clearly indicate an intent to cancel" at the time the orders were placed, "which was further supported by his actual trading record." *Coscia II*, 866 F.3d at 794. In other words, the Circuit did not find that Coscia intended to cancel any single order when it was placed, but instead *inferred* that he intended to cancel all of his large orders when they were placed, based on how restrictive the parameters were in Coscia's computer programs. *See*, Peter J. Henning, "Conviction Offers Guide to Future "Spoofing" Cases," *New York Times* (Nov. 9, 2015) (https://nyti.ms/2IPWpmy) ("The proof of intent comes from the design of a program, not what was in the mind of the person at the moment the orders are entered and canceled."). The Circuit agreed with the District Court that, because such a high percentage of Coscia's large orders were canceled — for example, 99.92% on the CME and 99.5% on the Intercontinental Exchange — and because designers of his computer programs testified that the programs were created to avoid large orders being filled and to manipulate market prices, there was "substantial evidence suggesting that [Coscia] never intended to fill [his] large orders." *Coscia II*, 866 F.3d at 797 (quoting *United States v. Coscia*, 177 F. Supp. 3d at 1091); *see also*, *id*. at 795-96 (reviewing statistical evidence and testimony showing that Coscia intended to cancel an unusually high proportion of his large orders). Thus, the Seventh Circuit affirmed Coscia's conviction. *Id*. at 803.

The Seventh Circuit's decision in *Coscia II*, although finding that the anti-spoofing statute was not void for vagueness, failed to provide any bright-line rules for high-frequency traders on when their computer programs cross the line from legitimate trading to illegal spoofing. For example, would a computer program that only implemented two of the three parameters for filling orders that Coscia's computer programs required be considered lawful? Similarly, would a computer program that canceled only 95% of all large orders on an exchange — instead of the over 99% of large orders that Coscia's programs cancelled — be legitimate? In markets where a substantial portion of all trading activity is performed through HFT, and where firms using HFT regularly cancel 90% or more of the orders they submit, answers to these questions are desperately needed. *See*, Letter from R.T. Leuchtkafer to Brent J. Fields, Sec'y, SEC, 4 (Sept. 4, 2015) (http://bit.ly/2rOVvNt) ("At what point does 'market making' become spoofing in this model? We can likely agree any firm posting an order it is 100% certain to cancel is over the line. … If I intend to cancel 99 times out of 100, is that a bona fide order? How about a 9-in-10 intent to cancel?"). The Seventh Circuit's decision is silent on where the line is to be drawn between legal and illegal trading for such computer-driven, HFT strategies, and consequently has left commodity futures traders largely in the dark on whether they are violating the anti-spoofing statute.

Increased Spoofing Prosecutions Following *United States v. Coscia*

In the aftermath of the Seventh Circuit's decision in *Coscia II*, the DOJ has brought a flurry of criminal cases against individuals for violations of the anti-spoofing statute. *See*, Jody Godoy, "DOJ, CFTC Spoofing Cases Show Cooperation Running High," Law360 (Jan. 29, 2018) (http://bit.ly/2rNdwMc); Complaint, *United States v. Mohan*, No. 4:18-MJ-80 (S.D. Tex. Jan. 26, 2018); Complaint, *United States v. Bases*, No. 18 CR 48 (N.D. Ill. Jan. 25, 2018); Complaint, *United States v. Vorley*, No. 18 CR 35 (N.D. Ill. Jan. 19, 2018); Complaint, *United States v. Thakkar*, No. 18 CR 36 (N.D. Ill. Jan. 19, 2018); Complaint, *United States v. Zhao*, No. 18 CR 24 (N.D. Ill. Jan. 11, 2018).

Likewise, the CFTC has brought several civil enforcement actions against individuals for their alleged spoofing, many of which are against the same individuals that the DOJ has criminally charged. *See*, Complaint, *CFTC v. Thakkar*, No. 1:18-cv-00619 (N.D. Ill. Jan. 28, 2018); Complaint, *CFTC v. Zhao*, No. 1:18-cv-00620 (N.D. Ill. Jan. 28, 2018); Complaint, *CFTC v. Mohan*, No. 4:18-cv-00260 (S.D. Tex. Jan 28, 2018); Complaint, *CFTC v. Vorley*, No. 1:18-cv-00603 (N.D. Ill. Jan. 26, 2018); Complaint, *CFTC v. Flotron*, No. 18-158 (D. Conn. Jan. 26, 2018). Additionally, on Jan. 29, 2018, the CFTC entered into civil settlements with three banks — Deutsche Bank, UBS and HSBC — for a total of $46.6 million in penalties for their alleged spoofing activity that was supposedly conducted in order to manipulate the precious metals markets. *See*, Dunstan Prial, "3 Banks To Pay Combined $47M in CFTC Spoofing Settlement," Law360 (Jan. 29, 2018) (http://bit.ly/2rMvDly). *But see*, Judgment of Acquittal, *United States v. Flotron*, No. 3:17-cr-00220 (JAM) (D. Conn. Apr. 25, 2018) (jury recently acquitted former UBS trader criminally charged with conspiracy to commit commodities fraud for alleged spoofing in precious metals market). These recent civil and criminal spoofing actions signal that, following Coscia's conviction, the CFTC and DOJ are committed to aggressively charging individuals for engaging in spoofing activity. Indeed, in the press release announcing these new spoofing actions, the CFTC Division of Enforcement Director James McDonald stated: "As these cases show, we will work hard to identify and prosecute the individual traders who engage in spoofing, but we will also seek to find and hold accountable those who teach others how to spoof, who build the tools designed to spoof, or who otherwise aid and abet the wrongdoing." Press Release, "CFTC Files Eight Anti-Spoofing Enforcement Actions against Three Banks (Deutsche Bank, HSBC & UBS) and Six Individuals," CFTC (Jan. 29, 2018) (http://bit.ly/2rUZgBh).

Significant confusion remains, however, among market participants about what does and does not constitute unlawful spoofing. *See*, James A. Overdahl & Kwon Y. Park, "The Exercise of Anti-Spoofing Authority in U.S. Futures Markets: Policy and Compliance Consequences," 36 No. 5 Futures & Derivatives L. Rep. 1, 10 (May 2016) ("[C]oncern [about the anti-spoofing statute's vagueness] has become even more pronounced since the conviction of Michael Coscia …. 'The conduct that is being prohibited just seems very hard to define,' says Stephen Obie, former acting director of the CFTC's Division of Enforcement.") (internal citation omitted). Moreover, whether other courts will even adopt the Seventh Circuit's requirement, that the intent to cancel an order exist "at the time it was placed," is unclear. *See*, *supra* p. 6.

On Feb. 2, 2018, Coscia submitted his petition for writ of *certiorari* to the U.S. Supreme Court, arguing, among other things, that the anti-spoofing statute is unconstitutionally vague. Petition for Writ of Certiorari at 13, *Coscia v. United States*, No. 17-1099, 2018 WL 741613 (U.S. Feb. 2, 2018). Coscia's petition, however, was denied by the Court on May 14, 2018. *Coscia v. United States*, No. 17-1099, 2018 WL 747023 (U.S. May 14, 2018).

Conclusion

The Supreme Court's decision to refrain from ruling on the vagueness of the anti-spoofing statute, or otherwise address the definition of spoofing, leaves traders, banks, and other market participants still highly uncertain about whether their HFT strategies may constitute illegal conduct that could result in substantial civil penalties and criminal sentences. Consequently, market participants and white-collar attorneys alike will need to pay close attention to how the many recently filed civil and criminal spoofing actions are ultimately decided, and also to whether the courts or CFTC will provide further guidance on this critical, yet highly contentious, statutory prohibition on spoofing.

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