CASE NO. 18-55815

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

U.S. COMMODITY FUTURES TRADING COMMISSION,

Plaintiff-Appellant,

vs.

MONEX CREDIT COMPANY, ET AL.,

Defendants-Appellees.

On Appeal from the United States District Court
for the Central District of California
Case No. 8:17-cv-01868-JVS-DFM

DEFENDANTS-APPELLEES' ANSWERING BRIEF

Neil A. Goteiner
C. Brandon Wisoff
Elizabeth A. Dorsi
Farella Braun + Martel LLP
235 Montgomery Street, 17th Floor
San Francisco, California 94104
Telephone: (415) 954-4400
Facsimile: (415) 954-4480

Attorneys for MONEX CREDIT COMPANY, MONEX DEPOSIT COMPANY, NEWPORT SERVICES CORPORATION, MICHAEL CARABINI and LOUIS CARABINI

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Defendants-Appellees Monex Credit Company and Monex Deposit Company are both California limited partnerships. Defendant-Appellee Newport Services Corporation is a California Sub-S corporation, has no parent corporation and no publicly held corporation owns 10% or more of its stock.

INTRODUCTION

The District Court properly ruled that the Commodity Futures Trading Commission ("CFTC"), which regulates derivatives and futures contracts, lacks jurisdiction to bring these claims against Monex.[1] The CFTC dodges its own published, and directly on-point, Interpretation example — expressly recognizing the "actual delivery" cash transactions at issue here as outside its jurisdiction — by burying sole reference to it in a footnote appearing 56 pages into its brief. The CFTC then misleads the Court by calling it a "proposed" example, despite knowing it incorporated the example verbatim into its Final Interpretation.

The CFTC then invents a fiction that Congress, with its Dodd-Frank amendments to the Commodity Exchange Act ("CEA"), silently expanded the CFTC's sales fraud jurisdiction from futures and derivatives to all cash commodity transactions in national commerce. The CFTC thus claims jurisdiction over the very "actual delivery" transactions that Congress expressly excepted in the same Dodd-Frank amendments and which its Interpretation example directly addresses. The CFTC's supposed "plain meaning" CEA §6(c)(1) reading would also give it sales fraud jurisdiction over virtually every commodity sale imaginable, including everyday grocery purchases.

[1] Appellees Monex Credit Company ("MCC"), Monex Deposit Company ("MDC"), Newport Services Corporation, Louis Carabini and Michael Carabini are collectively referred to as "Monex."

Because its jurisdictional overreach is so blatant and limitless, the CFTC seeks to enflame the Court with untrue sales fraud allegations that are irrelevant to the jurisdictional issues on appeal. Rule 12(b)(6) puts Monex at a disadvantage by preventing it from refuting those allegations here with extensive record evidence before the District Court on the related preliminary injunction and *Daubert* motions; but as a matter of law, the CFTC's jurisdictional assertions are meritless.

JURISDICTIONAL STATEMENT

Monex does not contest the CFTC's subject-matter or appellate jurisdiction statement.

ISSUES PRESENTED

1. Did the District Court correctly hold that financed retail commodity transactions in which, within 28-days, the seller: (a) physically delivers the entire quantity of the commodity in fungible bulk form to a third-party depository for the buyer to be held as collateral, and (b) transfers ownership title to that quantity of the commodity to the buyer, satisfy the Actual Delivery Exception under CEA §2(c)(2)(D)(ii)(III)(aa), 7 U.S.C. §2(c)(2)(D)(ii)(III)(aa)?

2. Did the District Court abuse its discretion in dismissing Counts 1, 2 and 4 of the Complaint with prejudice where the CFTC does not contest facts establishing the Actual Delivery Exception per its own Interpretation?

3. Did the District Court correctly hold that CEA §6(c)(1), 7 U.S.C. §9, applies only to frauds that manipulate or have the potential to manipulate market prices, and not to ordinary sales fraud for transactions excepted from CEA regulation?

STATUTES AND REGULATIONS

An addendum containing relevant statutes and regulations is appended to this brief.

STATEMENT OF THE CASE

The CFTC sued Monex alleging: (1) off-exchange transactions in violation of CEA §4(a), 7 U.S.C. §6(a) (Count 1); (2) fraud in violation of CEA §4b(a)(2)(A) and (C), 7 U.S.C. §6b(a)(2)(A), (C) (Count 2); (3) fraud in violation of CEA §6(c)(1) and Regulation 180.1(a)(1)-(3), 7 U.S.C. §9(1) and 17 C.F.R. §180.1(a)(1)-(3) (Count 3); and (4) failure to register as to financed transactions in violation of CEA §4d, 7 U.S.C. §6d (Count 4). ER664-70 ¶¶70-100. The CFTC also sought a preliminary injunction. ER637-40.

In Counts 1, 2, and 4, the CFTC's Complaint doesn't mention either the Actual Delivery Exception from its CEA §2 enforcement jurisdiction (7 U.S.C. §2(c)(2)(D)(ii)(III)(aa)) or its Interpretation on actual delivery (78 Fed. Reg.

52426). But the Complaint's allegations and incorporated documents[2] establish that Monex makes actual delivery consistent with its Interpretation, (discussed in section I.A.4 below), because within 28 days, Monex:

- delivers to an unaffiliated depository on the buyer's behalf the entire quantity of purchased metals in fungible bulk form, including any financed portion (ER163-64 ¶7.3; ER654 ¶39); and
- transfers title to that entire quantity of metals to the buyer (ER164 ¶7.4; ER654 ¶41).

For "short" transactions (Atlas commodity loans), the customer borrows commodities from MCC that are delivered to the depository within 28 days with title passing to the customer, at which time the customer sells the commodities to MDC and transfers title to MDC. ER173 ¶7. The CFTC doesn't assert that Monex exercises its rights over financed metals other than as agreed in the AAA. ER29 n.4.

In Count 3, under CEA §6(c)(1), the CFTC does not allege that Monex's supposed practices have the potential to impact market prices. While legally irrelevant here, the AAA refutes on its face the CFTC's allegations regarding Monex representing itself as a fiduciary, and omitting to disclose risks of spreads,

[2] The CFTC conceded below that Monex's Atlas Account Agreement ("AAA") (ER161-81) was properly considered for Monex's Rule 12(b)(6) motion. ER23-24 n.1; SER58 (10:14-24).

fees, margin calls, and leveraged investing. *E.g.*, ER163 ¶4.2, ER165 ¶12, ER170 ¶16, ER179 ¶36 (Monex not a fiduciary); ER164 ¶8, ER165 ¶9.3 (spreads and how to calculate break even points); ER163-64 ¶¶9.1, 9.2, 9.4 (account fees); ER173 ¶3, ER175 ¶16, ER179 ¶36.e (margin calls); ER163 ¶3, ER170 ¶17.d (risks of metals investment); ER166 ¶12, ER172 ¶3, ER179 ¶36.f (risk of investing with borrowed funds).

The District Court ordered simultaneous consideration of Monex's motion to dismiss and the CFTC's preliminary injunction motion. It thus had before it admissions on "actual delivery" from the CFTC's Rule 30(b)(6) witness, Deputy General Counsel Robert Schwartz, additionally showing that leave to amend Counts 1, 2 and 4, now requested on appeal, would be futile. The CFTC, through Mr. Schwartz, agreed that: (1) the depositories always have the metals to meet every customer position on any given day and the CFTC knows of no customer being unable to obtain fully paid-for metals, SER421 (30:15-17), SER453 (86:4-21); (2) Monex accounts daily to the depositories regarding each customer's ownership position and the CFTC knows of no accounting errors, SER442 (76:19-77:7), SER460 (94:5-8); (3) holding metals in fungible form is consistent with the CFTC's Interpretation, SER442 (76:23-77:11); (4) the depositories Monex uses are unaffiliated, recognized depositories, SER439 (72:15-73:1); (5) the CFTC has no reason to doubt customer ownership of metals to which title has been transferred,

SER432-35 (60:15-63:8); (6) the CFTC is unaware of Monex ever issuing a margin call without reason, SER448 (79:19-21); and (7) liquidation can usefully limit a customer's losses in falling markets, SER475 (111:15-112:6).

On May 1, 2018, the District Court found the alleged facts demonstrate that Monex complied with the Actual Delivery Exception and dismissed with prejudice Counts 1, 2, and 4. ER32. The District Court further found that CEA §6(c)(1) prohibits only fraud-based manipulation and dismissed Count 3 with leave to amend. ER40. The CFTC declined to amend (ER13-20) and the District Court subsequently dismissed Count 3 with prejudice and entered final judgment (ER8-9, 10-12).

SUMMARY OF ARGUMENT

In amendments to the CEA in the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"), Pub. L. No. 111-203, §742, 124 Stat. 1376 (2010), Congress rejected a CFTC proposal to give it jurisdiction over retail metals dealers, like Monex, who timely deliver financed, collateralized metal purchases to customers at a depository. Congress instead withheld those "actual delivery" transactions from CFTC jurisdiction in CEA §2 (as they always had been pre-Dodd-Frank). *See infra* section I.A.3. Indeed, Congress used Monex as the "actual delivery" example during its Dodd-Frank hearing. *E.g.*, SER204, SER218, SER221. The CFTC subsequently issued an Interpretation, including an on-point

example, recognizing these transactions as outside its jurisdiction. 78 Fed. Reg. 52426, 52429 (Aug. 23, 2013). The CFTC mentions that dispositive example here only in a footnote. The Interpretation states that "actual delivery" "will have occurred," where, as here, metals are delivered in fungible bulk form to an unaffiliated depository, with title transfer, notwithstanding that the metals may be leveraged and subject to margin. *Id.*

The CFTC refuses to accept Congress' rejection of its proposed jurisdiction over Monex and similar financed retail metals dealers. It has, in a series of cases including this one, asserted litigation positions to achieve indirectly what Congress denied it directly. *See infra* section I.A.5. First, it has distorted the Eleventh Circuit's decision in *CFTC v. Hunter Wise Commodities, LLC*, 749 F.3d 967 (11th Cir. 2014), to argue that "actual delivery" occurs only where customers have unfettered physical possession and control of metals — even before loan repayment. *Hunter Wise* held no such thing; it was instead a case where the metals dealers had no metals to sell or deliver. Another court previously rejected the CFTC's attempt to misuse *Hunter Wise*, noting that the CFTC's position would eliminate Congress' "actual delivery" exception. *See CFTC v. Worth*, 2014 WL 11350233 (S.D. Fla. Oct. 27, 2014).

The CFTC also asserts that — notwithstanding Congress' express jurisdictional rejection — it has CEA §6(c)(1) plenary anti-fraud jurisdiction over

not only these *financed* transactions, but over all interstate retail *cash* commodity transactions. Congress in Dodd-Frank, however, directed that §6(c)(1) anti-fraud provision only at frauds that can manipulate prices and markets. *See infra* sections II.A, II.G. It does not apply to ordinary sales fraud as alleged here, which is instead covered in CEA §4b and cabined to transactions for which Congress created CFTC jurisdiction in CEA §2. *See infra* sections II.D.2, II.E.

To achieve this unprecedented and almost infinite jurisdictional expansion, the CFTC urges the Court to focus only on the placement of a single "or" (between "deceptive" and "manipulative") in one phrase of one section of the entire CEA. But the CEA and Dodd-Frank amendments read as a whole, legislative history, the CFTC's contemporaneous public comments, and common sense all demonstrate that §6(c)(1) did not grant the CFTC expansive sales fraud jurisdiction over all cash commodity sales. Rather, Congress simply strengthened the CFTC's anti-manipulation authority by allowing it to pursue *fraud-based manipulation* under a standard of intent lower than §6(c)(3)'s specific intent to cause an artificial price. *See* 76 Fed. Reg. 41398, at 41404-05 (July 14, 2011) (ER101-14); *infra* sections II.G, II.H. In so doing, Congress put the CFTC on a statutory footing similar to other federal market regulators, including FERC, to police potentially manipulative frauds within their *existing* jurisdiction. *See* SER273; *infra* section II.I. Indeed,

Congress explicitly rejected CEA coverage for cash market "actual delivery" transactions as part of the same Dodd-Frank amendments.

Ultimately, the CFTC challenges a business model that it dislikes because it insists that retail commodity customers do not appreciate the risks of leveraged speculation and should trade only on regulated exchanges. The CFTC's inflammatory fraud allegations, while untrue, cannot create jurisdiction where none exists. The Court should affirm the judgment of the District Court which correctly saw this case as an extreme agency overreach.

STANDARD OF REVIEW

While the Court reviews the 12(b)(6) dismissal *de novo*, it considers not only alleged facts, but also documents incorporated by reference and matters subject to judicial notice. *Friedman v. AARP, Inc.*, 855 F.3d 1047, 1051 (9th Cir. 2017).

The Court reviews the District Court's decision to deny leave to amend with respect to Counts 1, 2 and 4 for abuse of discretion. *Alvarez v. Chevron Corp.*, 656 F.3d 925, 931 (9th Cir. 2011).

ARGUMENT

I. The District Court Correctly Dismissed Counts 1, 2, and 4 Because Monex Makes "Actual Delivery."

Congress decided that the CFTC's jurisdiction over retail commodity transactions "shall not apply to a contract of sale that results in actual delivery within 28 days[.]" 7 U.S.C. §2(c)(2)(D)(ii)(III)(aa) ("Actual Delivery Exception").

The District Court correctly determined that the allegations and incorporated documents establish such delivery.[3]

A. Monex Complies with the Actual Delivery Exception.

1. Monex's Delivery Satisfies The Exception's Plain Text.

Nothing in the CEA expressly defines "actual delivery." The plain text does not require delivery to a particular person, in any particular way, or free from encumbrances — it requires only that delivery be "actual." 7 U.S.C. §2(c)(2)(D)(ii)(III)(aa). "Actual" means "[e]xisting in fact; real." *Black's Law Dictionary* (10th ed. 2014) (SER479). "Delivery" means "[t]he formal act of voluntarily transferring something; esp., the act of bringing goods … to a particular person or place." *Id.* (SER480). Monex makes "actual delivery" because the metals exist in fact and, upon sale, are voluntarily delivered to independent

[3] Reversing position from below, the CFTC now leads with its CEA §6(c)(1) fraud arguments. Monex develops first the Actual Delivery Exception point to clarify the interplay between CEA §2 (which, for covered transactions, grants the CFTC jurisdiction over ordinary fraud via CEA §4b), and §6(c)(1) (which covers only frauds with market-impact potential). The CFTC's lack of jurisdiction makes its fraud claims irrelevant. *CFTC v. White Pine Trust Corp.*, 574 F.3d 1219, 1227 (9th Cir. 2009) (dismissing fraud claims because CEA §2 precluded jurisdiction); *CFTC v. Sterling Trading Grp., Inc.*, 605 F. Supp. 2d 1245, 1267 (S.D. Fla. 2009) (CFTC's jurisdiction "is not at all affected by whether Defendants committed the fraudulent practices"). Any supposed fraud can always be addressed under state law, but the CFTC has jurisdiction only over transactions covered by the CEA.

depositories for the buyer's benefit, subject to typical secured financing restrictions. *See* ER654 ¶39; ER163-64 ¶¶7.3, 7.4.[4]

The crux of the CFTC's "plain-text" argument is the Eleventh Circuit's inapposite decision in *Hunter Wise*, discussed in section I.A.5 below, and a third definition in Black's Law Dictionary of the combined term "actual delivery" *in a non-financing context*. Namely: "[t]he act of giving real and immediate possession to the buyer or the buyer's agent." *See* CFTC Br. 26, 46. The CFTC alleges that, under this definition, Monex's delivery is a "sham" because customer accounts are subject to margin calls and possible liquidation, and customers do not have personal possession and control of collateralized metals before loan repayment. *See id.* 12-13. But, as the District Court noted, these are normal security attributes of financed/leveraged/margined transactions to which the Actual Delivery Exception exclusively applies. ER29.

The CFTC's interpretation would thus read the words "margined," "leveraged," and "financed" out of the provision. 7 U.S.C. §2(c)(2)(D)(i) & (ii)(III)(aa); *see, e.g.*, *Black's Law Dictionary* (10th ed. 2014) ("Margin" is "[a] speculator's cash or securities deposited ***as collateral*** with a stockbroker."

[4] Monex's documentation is legally effective to transfer title with whatever liens are "explicitly agreed on by the parties." *See* Cal. Com. Code §2-401(2)(b). The AAA expressly provides that transfer of title to commodities shall pass when such commodities are designated for the customer at the depository. *See* ER164 ¶7.4.

(emphasis added)). The District Court correctly concluded that under the CFTC's reading, "every financed transaction would violate Dodd-Frank" and "the result would be to eliminate the Actual Delivery Exception from the CEA." ER29 (quoting *CFTC v. Worth Grp., Inc.*, 2014 WL 11350233, at *2); *see also Corley v. United States*, 556 U.S. 303, 314 (2009) ("[a] statute should be construed so that effect is given to all its provisions" (citation omitted)).

Congress gave the CFTC rulemaking authority only to lengthen the 28-day period, not to define "actual delivery."[5] No agency deference exists when a court must resolve the issue in litigation[6] and where the agency's litigation-specific position contradicts its published policy, and lacks legitimate statutory relevance. *See CFTC v. Am. Precious Metals, LLC*, 845 F. Supp. 2d 1279, 1286-87 (S.D. Fla. 2011) (no *Chevron* deference where CFTC's litigation position is inconsistent with its interim final rule); *FTC v. Invention Submission Corp.*, 965 F.2d 1086, 1089 (D.C. Cir. 1992) (courts reject an "agency's own appraisal of relevancy" where it is "obviously wrong").

[5] 7 U.S.C. §2(c)(2)(D)(ii)(III)(aa). Absent delegation, an agency's interpretive statements are "undeserving of substantial deference under *Chevron*." *Atchison, Topeka & Santa Fe Ry. Co. v. Pena*, 44 F.3d 437, 442 (7th Cir. 1994). Instead, courts test "the thoroughness, validity, and consistency of the agency's reasoning." *Id.* (citation omitted).

[6] *CFTC v. Zelener*, 373 F.3d 861, 867 (7th Cir. 2004) (citing *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649-50 (1990)).

For undefined terms, courts look to the statutory "context" and the agency's prior positions. *United States v. Maciel-Alcala*, 612 F.3d 1092, 1098 (9th Cir. 2010).

2. The Regulatory and Legislative Context Supports Monex.

Before express Dodd-Frank authorization, the CFTC regulated certain financed retail commodity transactions. The CFTC applied a functional approach to whether such transactions were actually futures contracts masquerading as cash transactions. In 1985, however, the CFTC's Office of General Counsel clarified in Interpretive Letter 85-2 that financed metals transactions resulting in prompt delivery to a third-party depository would ***not*** be subject to CFTC jurisdiction. SER286-87 & n.4.

The CFTC also did not assert jurisdiction over dealers who complied with the Model State Commodity Code ("Model Code"), which was drafted by state regulators with input from the CFTC and National Futures Association ("NFA").[7] The Model Code exempts from regulation financed retail metals transactions if, within a specified time, the purchased metals are: (i) physically delivered, (ii) in segregated or "fungible bulk form," (iii) to the customer or an independent depository on the purchaser's behalf, (iv) with document confirming title delivered to the customer by the depository, (v) even if the metals remain subject to agreed-

[7] SER210. The NFA works with the CFTC to protect futures investors. SER202.

upon "liens and encumbrances." Cal. Corp. Code §29531(b) (California adoption); SER293-94 §1.04(a)(2) (Model Code). Thus, pre-Dodd-Frank, Monex and other dealers using this depository model were always outside CFTC jurisdiction.[8]

Congress in the Dodd-Frank amendments used Monex as the model for "actual delivery" transactions that would *continue to be exempt* from CFTC jurisdiction. Those amendments resulted from *CFTC v. Zelener*, 373 F.3d 861 (7th Cir. 2004), which in the foreign currency field rejected the CFTC's open-ended functional approach to jurisdiction as creating uncertainty. *Id*. at 866-67. *Zelener* noted that the CFTC's approach wrongly permitted sales resulting in prompt delivery of ***physical commodities*** to be classified as "futures" contracts. *Id*. at 864. It explained: "In organized futures markets, people buy and sell contracts, not commodities." *Id*. at 865. With Dodd-Frank, Congress addressed *Zelener*'s concerns by more clearly defining which retail commodity arrangements would be treated as "future contracts" covered by the CEA.

To this end, Congress gave the CFTC *express* authority over retail transactions involving leverage, margin or financing, 7 U.S.C. §2(c)(2)(D)(i), *while simultaneously excepting* from the CEA and the CFTC's authority any such

[8] *See Linkenhoger v. Monex Int'l Ltd.*, 1998 WL 1551440 (CFTC Feb. 17, 1988), *available at* SER180-82; *Motzek v. Monex*, 1993 WL 176296 (CFTC May 24, 1993).

transactions, "that result[] in actual delivery within 28 days." *Id.* §2(c)(2)(D)(ii)(III)(aa).

The only public legislative discussion of this provision was the June 2009 hearing before the House Subcommittee on General Farm Commodities and Risk Management ("2009 Hearing"). SER188-231. Congress there addressed the scope of potential CFTC jurisdiction over financed retail commodity transactions after *Zelener*. SER192-93. Congress' stated concern was eliminating bucket shops and Ponzi schemers who had no metals to sell. *See* SER194, SER199, SER224-25.

First, NFA President Dan Roth testified about the NFA's proposed response to *Zelener* (which Congress ultimately adopted), stating that it should preserve the "1985 interpretative letter issued by the CFTC's Office of General Counsel, ***which Monex International and similar entities rely on***." SER204 (emphasis added); *see also* SER203-04. Roth specifically stated that the proposed legislation ***"would not affect Monex."*** SER218 (emphasis added).

Second, Philip Feigin, a Monex representative and former state regulator, presented testimony and documentation regarding Monex's Model Code delivery. SER205-06, SER208 (describing Monex's delivery), SER210-12 (describing how Model Code prohibited dealers who lacked physical commodities to deliver).

Third, CFTC Enforcement Director Stephen Obie described the authority the CFTC was seeking following *Zelener*. He confirmed that the CFTC was "not

looking at where tangible products are delivered." SER230. It instead wanted to reach "fraudsters and Ponzi schemers" and "swindlers" who had recently left the foreign exchange markets and entered the metals markets following *Zelener*. SER199, SER224. Obie never once contested Monex's decades-long delivery history presented to Congress as the model for "actual delivery."

Finally, Congressman Marshall expressed his view that if retailers complied with the Model Code, the CFTC could "go after the Ponzi schemes that are now popping up … and ***Monex and others who are … actually delivering would be okay and they wouldn't have to fool with you guys***." SER221 (emphasis added).[9]

3. Congress Rejected the CFTC's Proposed Alternative "Actual Delivery" Definition.

Congress declined the CFTC's request following the 2009 Hearing to define "actual delivery" the way the CFTC asserts here. Two months after the 2009 Hearing, then-CFTC Chairman Gensler sent Congress a "memo with recommendations to improve the [Dodd-Frank] legislation." SER234. Gensler's proposal defined "actual delivery" ***to preclude*** "delivery to a third party in a

[9] The CFTC now argues that the 2009 Hearing provides no insight into Congress' "actual delivery" intent, noting that Monex lobbied against CFTC oversight and claiming that Monex omitted supposed, but unspecified facts, before Congress. CFTC Br. 58. But when defining "actual delivery" in its own Interpretation, the CFTC referred market participants to this very Hearing to understand "actual delivery." *See infra* section I.A.4. This argument also ignores that everyone at the hearing — including the CFTC, which had twice investigated Monex — agreed that Monex complied with actual delivery under the *Zelener* fix. *See infra* n.13.

financed transaction where the commodity is held as collateral," and also reduced the 28-day delivery time to three days. SER240. A subsequent draft incorporating this proposed language came before and was adopted by the Senate on May 20, 2010. SER269 §742(bb)(v).

Congress, however, ultimately rejected the CFTC's proposal. *See* 7 U.S.C. §2(c)(2)(D)(ii)(III). Because "the final draft of [the] statute delete[d] language contained in an earlier draft, [the] court may presume that the earlier draft is inconsistent with ultimate congressional intention." *In re Town & Country Home Nursing Servs., Inc.*, 963 F.2d 1146, 1151 (9th Cir. 1991); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 442-43 (1987) ("Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language." (citation omitted)).

4. Monex Follows the CFTC's Public Interpretation.

The CFTC's litigation position contradicts its own Interpretation. In December 2011, the CFTC issued an interpretation and request for public comment regarding the meaning of "actual delivery." 76 Fed. Reg. 77670 (Dec. 14, 2011) (SER280-82). The CFTC subsequently incorporated this proposal into its final August 23, 2013 Interpretation. 78 Fed. Reg. 52426 (SER275-78).

To understand "actual delivery," the Commission directed market participants to the "legislative history of the new CEA section 2(c)(2)(D)(ii)(III)(aa) described above," and specifically to the 2009 Hearing. *See* 76 Fed. Reg. at 77671 n.12 (quoting the 2009 Hearing), 77672 (directing reader to legislative history to determine "Congress's intent when it enacted section 742(a) of the Dodd-Frank Act").

The Interpretation included specific examples of when "actual delivery" would or would not occur. Example 2 is on point:

> Actual delivery ***will have occurred*** if, within 28 days, the seller has: (1) Physically delivered the entire quantity of the commodity purchased by the buyer, including any portion of the purchase made using leverage, margin, or financing, whether in specifically segregated or fungible bulk form, into the possession of a depository other than the seller and its parent company, partners, agents, and other affiliates…; and (2) has transferred title to that quantity of the commodity to the buyer.

78 Fed. Reg. at 52428 (emphasis added). This example is unequivocal, admitting of no exceptions. As the CFTC explained:

> The Commission provides the following non-exclusive examples to illustrate how it ***will*** determine whether actual delivery has occurred within the meaning of new CEA section 2(c)(2)(D)(ii)(III)(aa). The Commission ***may also determine that actual delivery has occurred in circumstances beyond those described in the first two examples….***

Id. (emphasis added). Example 2, contrary to the CFTC's arguments here, permits delivery of financed or margined metals in fungible bulk form to unaffiliated

depositories.[10] Financing contemplates collateral, and margin contemplates margin calls. Fungible bulk delivery contemplates fractional interests in the whole by all customers, not unfettered physical possession and control by each customer.

It is this Example 2 that the CFTC hides in a footnote. Worse, the CFTC misrepresents that the example appeared only in "a *proposed* CFTC guidance document" in which "the Commission indicated that 'actual delivery' *can* occur." CFTC Br. 56-57 n.10 (emphasis added). The CFTC conceals that the proposed example was also copied verbatim in its Final Interpretation. *Compare* 76 Fed. Reg. at 77672 (Request for Comments), *with* 78 Fed. Reg. at 52428 (Final Interpretation). The CFTC then compounds its footnote misrepresentation; it asserts that actual delivery merely "can occur" under Example 2, whereas its Interpretation states unequivocally that actual delivery under the example "will have occurred."

The Interpretation further clarifies that, based on this example, "an agreement, contract, or transaction that results in 'physical delivery' within the meaning of section 1.04(a)(2)(i)-(iii) of the [Model Code] would ordinarily result in 'actual delivery'" absent a sham. 76 Fed. Reg. at 77672 n.25. Monex's delivery is, and for thirty years has been, Model-Code compliant. SER293-94 §1.04(a)(2); Cal. Corp. Code §29531(b).

[10] While Monex follows Example 2 by using independent depositories, the CFTC further explained that under appropriate circumstances even delivery to "an affiliate of the seller" could suffice. 78 Fed. Reg. at 52427.

5. The CFTC Mischaracterizes *Hunter Wise*.

The CFTC distorts *CFTC v. Hunter Wise Commodities, LLC*, 749 F.3d 967 (11th Cir. 2014), to jettison its own Interpretation. Defendants there "purported to transfer precious metals into or out of customers' accounts." *Id.* at 972. But defendants "owned no metals" and thus "had no metals to deliver." *Id.* at 973, 978. The Eleventh Circuit found that "actual delivery" requires the "real" and "immediate" "physical transfer" of the commodity, and that Hunter Wise instead engaged in naked accounting book-entries to transfer title to non-existent metals. *Id.* at 979-80. The court limited its analysis to these facts: "We need not define the precise boundaries of 'actual delivery' here, as we can say with confidence that the exception does not cover the sort of constructive delivery [the defendants] insist occurred." *Id.* at 979.

Hunter Wise did not hold that customers must have unfettered physical possession and control *before* repaying their loans. *Hunter Wise* is instead the paradigm of what Congress intended to stop with Dodd-Frank, a bucket shop or Ponzi scheme backed by no actual metals. SER194, SER224-25. *Hunter Wise* quoted with approval the CFTC's Interpretation that expressly allows seller delivery of the customer-owned metal to an unaffiliated depository. *See Hunter Wise*, 749 F.3d at 980.

In *CFTC v. Worth*, 2014 WL 11350233 (S.D. Fla. Oct. 27, 2014), the court rejected a similar CFTC attempt to misuse *Hunter Wise*. In that case, filed prior to *Hunter Wise*, the CFTC did ***not*** claim, as here, that physical delivery to a depository plus transferring title failed to accomplish actual delivery, notwithstanding liens and liquidations rights. SER537 ¶¶66-68 (Complaint). Rather, it complained only that on certain occasions the *Worth* defendants did not make depository delivery within 28 days, and in those instances lost their exception. SER538-39 ¶74. Indeed, the CFTC there confirmed that it "does not allege that there is anything violative with Worth's practice of making 'actual delivery' by physically delivering metal to a depository and allocating it to an account held in the customer's name." SER622. It stated that "ownership of metals is transferred directly from Worth to its customers" by delivery of the metals to the depository and title transfer. SER496; *see also* SER575 (monitor's report finding "actual delivery" satisfied).

But ***after*** *Hunter Wise* was decided, the CFTC reversed course and argued that even defendant's 28-day delivery was not "actual delivery" because customers lacked physical possession before loan repayment. When requesting leave to amend, the CFTC admitted that it was applying new, unpublished rules based on *Hunter Wise*:

> THE COURT: Is the amended complaint based upon this new decision [in *Hunter Wise*]?

> MR. CHU: That's correct, Your Honor.
> THE COURT: So what you're saying is all of the rules have changed in the middle of this thing?
> MR. CHU: Your Honor, yes, essentially the Eleventh Circuit decision which was rendered, yes.

SER649-50. The *Worth* court denied leave to amend, finding, *inter alia*, that the CFTC's new interpretation "would mean that, regardless of Worth's allocation procedures, recordkeeping, and whether it purchased physical metals at all, each and every financed transaction would violate Dodd-Frank." *Worth*, 2014 WL 11350233, at *2. The court also noted that the CFTC's new, unannounced position violated the defendant's constitutional right to fair notice. *See id.* at *3. That is also true here since, while the CFTC contends that "the rules have changed," its published Interpretation remains unchanged.

The CFTC also wrongly asserts that Monex's business model is similar to the program this Court found to involve off-exchange futures in a pre-Dodd-Frank decision. CFTC Br. 47, 53 (citing *CFTC v. Noble Metals Int'l, Inc.*, 67 F.3d 766 (9th Cir. 1995)). The CFTC cannot use *Noble Metals* to overturn the subsequent Actual Delivery Exception and its own Interpretation. Moreover, the CFTC's own *Noble Metals* appeal brief belies the comparison. SER32 ("…Noble never had sufficient quantities of metal to support its delivery obligations to customers."); SER34 n.14 (the metals "simply did not exist."). *Noble Metals*, like *Hunter Wise*, presents another example of what Congress addressed with its Dodd-Frank

amendments: a bucket shop with no physical commodities. For the CFTC to snipe at the District Court for considering the CFTC's revelatory *Noble Metals* appellate brief defines disingenuous.

Further, we don't have to look to *Noble Metals* to speculate how Monex would have fared pre-Dodd-Frank. As noted, the CFTC always treated Monex and similar Model Code compliant firms as outside its jurisdiction pre-Dodd-Frank when *Noble Metals* was decided. *Supra* section I.A.2 & n.8. That the CFTC doubles down on its mischaracterization of *Noble Metals*, a pre-Dodd-Frank case, while jettisoning its own current Interpretation, demonstrates the utter lack of support for its new, post-*Hunter Wise* agenda.

6. The CFTC's "Sham" Assertion is Frivolous.

The CFTC mislabels Monex delivery as a "sham," since that is the only Interpretation exception to Model Code delivery. 78 Fed. Reg. at 52428 & n.25. But, as the District Court noted, the CFTC's made-up sham factors, including margin calls and possible liquidation, are normal attributes of the transactions Congress excepted. ER29.

Nor can the CFTC avoid its Interpretation by pervasively mislabeling Monex a "trading platform" or "mimic futures exchange," and by insisting that Monex customers are speculating on prices with no intention of taking personal delivery from the depository. *E.g.*, CFTC Br. 3, 12-13, 24, 48-50. Congress'

Actual Delivery Exception does not turn on customer intent, speculation, or sophistication level.[11] It turns on whether physical 28-day delivery occurs, and the CFTC's Interpretation endorses fungible bulk-form depository delivery. The CFTC's "intent" argument would again read the words "leveraged" and "margined" out of the Actual Delivery Exception since purchasers using leverage or margin generally do so to speculate on price movements. The Model Code, on which Congress based its Actual Delivery Exception, specifically contemplates in its Preamble that the public will "trade and invest" in code-compliant instruments. SER289. Congress was comfortable excepting transactions that may involve speculative trading as long as real metals support each transaction. Indeed, the CFTC's amorphous "customer intent" standard (customers' intents are myriad) reintroduces the very uncertainty that *Zelener* and other decisions rejected and which Congress fixed with Dodd-Frank's clear 28-day delivery requirement. *Zelener*, 373 F.3d at 866 ("Nothing is worse than an approach that asks what the parties 'intended' or that scrutinizes the percentage of contracts that led to delivery *ex post*.").[12]

[11] There is no CEA "suitability" rule. *Wasnick v. Refco, Inc.*, 911 F.2d 345, 348 n.2 (9th Cir. 1990).

[12] *Accord Bank Brussels Lambert, S.A. v. Intermetals Corp.*, 779 F. Supp. 741, 749 (S.D.N.Y. 1991) (speculation in spot contracts not covered by CEA); *CFTC v. Fleury*, 2006 WL 8434784, at *7 (S.D. Fla. Sept. 6, 2006) (well established that

7. The Short/Commodity Loan Is Not a Sham.

The CFTC dislikes that at the end of a short (commodity loan) transaction there is a sale to "divest the investor of ownership." CFTC Br. 55 (quoting District Court, ER31 n.6). The CFTC asserts that: (1) no delivery occurs; (2) shorting permits speculation, requiring CEA protections (*id.* 13, 50, 52), and thus, (3) short transactions "are simply futures trades by another name" (*id.* 53). The CFTC again ignores that for the short, just like the long, Monex always delivers the metals to match every transaction and that the customer's "speculative intent" is irrelevant to "actual delivery."

First, the CFTC cannot transform Monex's "actual delivery" transactions into "book entry" transactions by repeatedly calling them so. The incorporated AAA includes a "Passage of Title" section that discloses exactly how actual delivery occurs for: (1) commodities borrowed by customers who want to sell short, and (2) commodities returned by customers who want to close out a short position. ER173 ¶7. Actual metals, not just accounting entries, back each stage of the transaction.

Second, the CFTC ignores that Monex disclosed to Congress during the 2009 Hearing that: (1) it offers commodity loans to short the market (SER208), and (2) the CFTC had conducted two investigations of Monex's Atlas program to

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CFTC doesn't regulate spot transactions even if customers are speculating without intention of ultimately taking personal delivery).

confirm that it did not involve off-exchange futures and instead made physical delivery of metals (SER213). The short transaction obviously gave no pause to either the Subcommittee, or its CFTC and NFA representatives, or to the CFTC over the prior decades.[13]

Third, the CFTC cannot challenge the District Court's observation that there is no customer delivery risk in a commodity loan/short transaction since it is the customer, not Monex, who is obliged (upon borrowing a commodity to sell short) to return (deliver) the commodity in kind to Monex. ER31 n.6.

Fourth, the CFTC's Interpretation not only permits fungible bulk delivery with title transfer, it recognizes how actual delivery can occur with title transfer where the dealer's metals *already exist* in the depository. 78 Fed. Reg. at 52428-29. "[T]he Commission may determine that actual delivery has occurred if a commodity is delivered to an affiliate of the seller or is already physically located at a depository[.]" *Id.* at 52427. Again, the CFTC is attempting to jettison its Interpretation in favor of its post-*Hunter Wise* litigation-only position.

[13] The CFTC complains about the District Court's reference to declaration and deposition testimony regarding the short. CFTC Br. 57 & n.11 (citing ER31 n.6). However, the same information appears in documents incorporated by reference or judicially noticeable. *Compare* ER119-20 ¶¶12-13 (Walker Decl.), *and* SER665-66 (Carabini Tr.), *with* ER173 ¶7 (account agreement describing short transactions), SER208 (Feigin disclosing short transaction to Senate Subcommittee), *and* SER213 (disclosing prior CFTC investigations).

B. The District Court Did Not Abuse Its Discretion in Dismissing Counts 1, 2, and 4 Without Leave to Amend.

The CFTC's new request on appeal to amend Counts 1, 2, and 4 comes "too late." *Alaska v. United States*, 201 F.3d 1154, 1163-64 (9th Cir. 2000). But the District Court nevertheless properly dismissed these counts with prejudice because the CFTC does not, and cannot, dispute that Monex always delivers metals consistent with the CFTC's unequivocal Interpretation, Example 2.

The admissions of the CFTC's Rule 30(b)(6) witness on actual delivery further prove the futility of any amendment. *See supra* at 6-7.

The CFTC's "Hail Mary," that it can allege Monex's lender agreements "require[] that it *never* transfer possession or control of the metal," is a red herring. *See* CFTC Br. 51 n.9.[14] Monex's lender arrangements have no legal relevance here because if Monex defaulted, its lenders could have no greater rights in customers' metals than does Monex. All incorporated documents recognize customers' ownership of their metals. A metals dealer, like any business, can always fail. If Monex failed, and lenders stepped in, Monex customers would be entitled to their equity in financed metals. The Actual Delivery Exception doesn't turn on this normal enterprise risk of any business. Indeed, if Monex failed within 28 days of a customer purchase, before it had a chance to make actual delivery, customers who

[14] This is not a "new" issue; it was raised and fully briefed in the preliminary injunction papers. *See* Dkt. 7-1 at 16-19; Dkt. 166 at 19-20.

purchased during that window may be left with no equity. But that did not stop Congress from excepting actual delivery transactions from the CEA. The CFTC is again making up supposed sham factors unsupported by authority or common sense.

C. The CFTC's *Ad Hoc* Actual Delivery Definition Violates Defendants' Due Process Rights.

The CFTC's new litigation-specific actual delivery standard violates Monex's due process rights. *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972) ("laws [must] give the person of ordinary intelligence a reasonable opportunity to know what is prohibited"); *Satellite Broad. Co. v. FCC*, 824 F.2d 1, 3 (D.C. Cir. 1987) (due process "preclude[s] an agency from penalizing a private party for violating a rule without first providing adequate notice of the substance of the rule"). While the District Court did not reach this issue, this Court can affirm on "any ground supported by the record." *Canyon County v. Syngenta Seeds, Inc.*, 519 F.3d 969, 975 (9th Cir. 2008).

Courts consistently vacate agency orders and dismiss complaints that are based on a "substantial change in [an] enforcement policy that was not reasonably communicated to the public." *Upton v. SEC*, 75 F.3d 92, 98 (2d Cir. 1996); *see also United States v. Chrysler Corp.*, 158 F.3d 1350, 1355-56 (D.C. Cir. 1998) (due process violated because agency action conflicted with its own interpretation). Courts must "review[] the regulations and other public statements issued by the

agency" to determine whether "a regulated party acting in good faith would be able to identify, with 'ascertainable certainty,' the standards with which the agency expects parties to conform." *Gen. Elec. Co. v. U.S. E.P.A.*, 53 F.3d 1324, 1329 (D.C. Cir. 1995); *see also Stoller v. CFTC*, 834 F.2d 262, 265-67 (2d Cir. 1987) ("subtle and refined … construction without some appropriate notice" insufficient).

The CFTC has never changed its Interpretation even though it claimed in *Worth* that "all of the rules have changed" after *Hunter Wise*. The CFTC's *Worth* flip-flop is not adequate warning; courts generally require agencies to make major rule changes through rulemaking not via *ad hoc* litigation positions. *See, e.g.*, *Gerstle v. Gamble-Skogmo, Inc.*, 478 F.2d 1281, 1294 & n.13 (2d Cir. 1973). This is particularly true when, as in *Worth*, the CFTC lost its motion. *See, e.g.*, *United States v. Hoyts Cinemas Corp.*, 256 F. Supp. 2d 73, 91 (D. Mass. 2003) (finding it "hard to consider the brief" in support of a motion that the government lost "as providing fair warning or 'notice'"), *vacated on other grounds*, 380 F.3d 558 (1st Cir. 2004).

Finally, ***after*** this enforcement action began, the CFTC issued a new December 2017 "proposed interpretation" of actual delivery for virtual currency transactions. The CFTC claims that this further evidences its "possession and

control" standard. CFTC Br. 47 n.8.[15] But this admission only confirms a due process violation. The proposed Interpretation debuts many of the same purported "sham" factors that the CFTC advances here, namely that a depository must have "entered into an agreement with the purchaser," and that the virtual currency be free from "liens ... resulting from the use of margin, leverage, or financing." SER314. Even then, the changes purport only to apply to virtual currency transactions, while the Interpretation that applies to Monex remains unchanged.

EEOC v. The Chicago Club, 86 F.3d 1423 (7th Cir. 1996), is instructive. That court questioned why the EEOC largely ignored its own prior interpretation exempting private clubs from its jurisdiction "in a case in which it is directly applicable." *Id*. at 1433. "The simple fact is that if we were to endorse EEOC's eviscerating interpretation of [the exclusion], no organization in the United States could meet the statutory definition of a bona fide private membership club." *Id*. at 1425. The court then asked the question proving the agency's attempt to nullify the exclusion: "If the Chicago Club isn't a private club, then what is?" *Id*. at 1437.

The CFTC, through its 30(b)(6) witness Deputy General Counsel Robert Schwartz, couldn't answer the corresponding question here when it admitted that it

[15] The CFTC initially told the District Court that this proposed virtual currency Interpretation was relevant here, before recanting its claimed reliance. *Compare* SER405 (8:24-9:7), *with* SER427-428 (54:17-56:6) (noting it should "[p]robably not" be applied here because "[i]t's a proposal and there are factual differences"). Apparently, the CFTC has now changed its position again on appeal.

can't "point to one company" that makes "actual delivery" under the CFTC's new post-*Hunter Wise* definition. SER470-71 (108:22-109:15). This further proves the CFTC's agenda to re-write the Actual Delivery Exception so that it no longer applies to financed metals held as collateral at a depository, in defiance of Congress' intent and its own Interpretation.

II. The District Court Properly Dismissed Count 3 For Lack of Manipulation Allegations After the CFTC Stood On Its Complaint.

The CFTC's (now) lead CEA §6(c)(1) argument further reveals its effort to defy Congress. The CFTC plucks the words: "any manipulative or deceptive device or contrivance" "in connection with … a contract for sale of a commodity, in interstate commerce" from §6(c)(1) out of context, and claims this language is an "unambiguous" exponential, virtually infinite, expansion of the CFTC's jurisdiction to police ordinary sales fraud for every cash commodity transaction in the nation. The CFTC tells the Court that it should stop with the supposed "plain language" of this one phrase, and ignore entirely the rest of the statute, its clear structure, history and all common sense.

A. The CFTC's §6(c)(1) Reading Leads to an Absurd Expansion of the CEA to Cover Ordinary Cash Commodity Sales.

The CFTC's jurisdictional grab is as breathtaking in scope as it is contrary to the CEA. The CFTC's mission is to prevent abusive practices "related to

derivatives and other products that are subject to the [CEA]."[16] The CFTC's jurisdiction is defined in and limited by CEA §2, 7 U.S.C. §2(a)(1), which is entitled "Jurisdiction of Commission," and applies to transactions "involving swaps or contracts of sale of a commodity for future delivery."

The only context in which the CFTC exercised any jurisdiction over cash commodity transactions pre-Dodd-Frank was limited to its anti-manipulation authority. That is because manipulation of cash markets and current prices necessarily disrupt and affect prices in futures markets over which the CFTC has jurisdiction. *See, e.g.*, 55 Fed. Reg. 39188, 39192 n.16 (Sept. 25, 1990) (noting cash transactions aren't "wholly outside the reach of the [CEA] for all purposes" citing CEA proscription against manipulation), relied upon in final Actual Delivery Interpretation, 78 Fed. Reg. 52428 n.24. For example, in *CFTC v. Reed*, the CFTC argued that under its anti-manipulation authority, it could exercise jurisdiction "over both futures contracts *and* certain conduct involving or affecting cash markets." 481 F. Supp. 2d 1190, 1196 (D. Colo. 2007); *see also CFTC v. Enron*, 2004 WL 594752 (S.D. Tex. Mar. 10, 2004) (exercising anti-manipulation jurisdiction over transactions in energy spot market); *United States v. Energy Reliant Servs., Inc.*, 420 F. Supp. 2d 1043, 1061-62 (N.D. Cal. 2006) (certain CEA

[16] U.S. CFTC Mission & Responsibilities, www.cftc.gov/About/MissionResponsibilities.

provisions "are concerned exclusively with transactions in futures contracts" but price manipulation provisions "are not so limited in scope"). The CFTC's sales fraud authority, untouched by Dodd-Frank, is found in CEA §4b, 7 U.S.C. §6b, and applies only to covered transactions (*i.e.*, transactions regulated by the CFTC). The CFTC concedes that its anti-fraud jurisdiction under section CEA §4b is limited to covered transactions under CEA §2 (and thus, post-Dodd-Frank, §4b doesn't cover actual delivery transactions).

The CFTC's anti-manipulation authority, by contrast, was (and still is) derived from §6(c), 7 U.S.C. §9, and can reach even cash market manipulation that threatens the CFTC's regulated futures markets. Pre-Dodd-Frank, §6(c) permitted the CFTC to suspend or revoke the registration for "any person (other than a regulated entity)" found to be:

> manipulating … the market price of any commodity, in interstate commerce, or for future delivery on or subject to the rules of any registered entity, or has willfully made any false or misleading statement of a material fact[.]

7 U.S.C. §9 (Supp. 2010). The CEA grants the CFTC this broad anti-manipulation authority, not because §6(c)(1) isn't bound by §2's jurisdictional limitations, as the CFTC now argues, but precisely because certain conduct in cash markets, including ***certain kinds of fraud***, can disrupt and distort prices in regulated futures markets.

Dodd-Frank did not change this general CEA structure. CEA §6(c)'s focus *pre*-Dodd-Frank closely parallels the *post*-Dodd-Frank language in §6(c)(1) (fraud-based manipulation), §6(c)(2) (false information), and §6(c)(3) (price-based manipulation). Yet the CFTC contends that with the placement of a single "or" Congress *sub silencio* gave the CFTC plenary authority and unprecedented sales fraud jurisdiction over all cash commodity sales. This claim is as interminable as it is improbable. Congress never designed the CEA for such a stretch.

The context of Dodd-Frank and its §6(c)(1) amendments was the 2008 collapse of financial markets based on fraudulently-manipulative schemes in derivatives and swaps. *See* ER88-90 (Senator Cantwell). The problem was that manipulation was too hard to prove — the CFTC was required to prove actual intent to manipulate even where the conduct underlying the manipulation was independently fraudulent. *See infra* section II.G.

Congress' solution was to lower the CFTC's civil liability burden of proof by adopting the SEC's Rule 10b-5 "recklessness" scienter standard for fraud-based manipulations. 76 Fed. Reg. at 41404-05. The language "deceptive *or* manipulative device or contrivance" in §6(c)(1) is Congress' recognition that the CFTC doesn't have to show that a fraudulent ("deceptive") actor specifically intended to cause manipulation. It is enough if an actor, when employing any deceptive device, recklessly disregarded the manipulative impact or risk of his/her

actions. *See infra* sections II.G, II.H. It is these kinds of frauds, which are covered in §6(c)(1) and to which Rule 180.1 and its lower scienter standard applies.

"Other Manipulation," based on *non-fraudulent* conduct, is covered in §6(c)(3), 7 U.S.C. §9(3), which bears that very title. These non-fraud based manipulations are covered instead by Rule 180.2 and still require proof of actual manipulative intent, so as to prevent lawful conduct without bad intent from being penalized even if it has manipulative impact.[17] *See infra* section II.D.1.

Congress did not, as the CFTC argues, silently give the CFTC new plenary anti-fraud authority over all cash commodity transactions that have no potential impact on national commodity or futures markets.[18] To the contrary, Congress expressly excluded that CFTC authority for cash market "actual delivery" transactions under CEA §2 as part of the same Dodd-Frank amendments. But the CFTC's §6(c)(1) reading would give it anti-fraud jurisdiction over all commodity sales regardless of whether they involve futures, leverage or financing, including pure cash and carry sales such as sales of grains and potatoes at grocery stores or gold coins at pawn shops. "[S]tatutory interpretations that lead to absurd results

[17] Criminal violations of these statutes still require specific intent regardless of whether fraud or non-fraud based. 7 U.S.C. §13(a)(2).

[18] The CFTC points to the latter portion of §6(c)(1), prohibiting misleading statements, as evidence that it's authorized to police general sales fraud. CFTC Br. 27. However, this language applies to cases involving the dissemination of fraudulent information to enable manipulation.

are to be avoided." *Ma v. Ashcroft*, 361 F.3d 553, 559 (9th Cir. 2004); *see also Saberi v. CFTC*, 488 F.3d 1207, 1212 (9th Cir. 2007) (*de novo* review requires "rejecting those constructions that are contrary to clearly expressed congressional intent or that frustrate the policy that Congress sought to implement" (citations omitted)). Courts require a clear Congressional statement of intent to institute such a fundamental jurisdictional enlargement; but instead all Congressional and CFTC pre-litigation statements are to the contrary. *See infra* sections II.F, II.G.

B. A Statute's Plain Meaning Comes from the Statute as a Whole, Not From Piecemeal Reading as the CFTC Proposes.

Just the single word "or" in one phrase of §6(c)(1) provides no basis for the CFTC's plain meaning interpretation. Courts instead read statutory provisions as a cohesive whole. *See Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000); *Commissioner of Internal Revenue v. Engle*, 464 U.S. 206, 223 (1984) (The "true meaning of a single section of a statute…, however precise its language, cannot be ascertained if it be considered apart from related sections" (citation omitted)). In this context, the CFTC's assertion is anything but plain.

As the District Court noted, the statutory canon that "[t]erms connected by a disjunctive must ordinarily be given separate meanings" "is not steadfast." ER35 (citing *De Sylva v. Ballentine*, 351 U.S. 570, 573 (1956)). In *Ballentine*, the Supreme Court noted that "the word 'or' is often used as a careless substitute for

the word 'and'; that is, it is often used in phrases where 'and' would express the thought with greater clarity." 351 U.S. at 573.[19] Given this potential ambiguity, the Court considered the statute holistically, and concluded that the term "and" more accurately captured Congress' intent. *Id.* at 573-74; *see also United States v. Maris*, 987 F. Supp. 865, 867 (D. Or. 1997) (construing unambiguous statutory provision permitting toll collection "for admission to the area or for the use of outdoor recreational sites" in the conjunctive based on consideration of the complete statutory scheme).

In *CFTC v. Kraft Foods Grp., Inc.*, 153 F. Supp. 3d 996 (N.D. Ill. 2015), the court rejected a similar CFTC attempt to expand its §6(c)(1) jurisdiction by reading "manipulative" and "deceptive" disjunctively. *Kraft*, a manipulation case, rejected the CFTC's literal disjunctive reading that §6(c)(1) covered manipulation absent deception, as leading to absurd results. 153 F. Supp. 3d at 1010. The conclusion should be the same here where the CFTC argues the inverse — that §6(c)(1) covers deception without manipulative potential — since otherwise the CFTC's sales fraud jurisdiction over cash commodities would be essentially limitless.

[19] *See also Mizrahi v. Gonzales*, 492 F.3d 156, 164 (2d Cir. 2007) ("we cannot conclude simply from the use of the word 'or' that Congress has directly spoken to the precise question at issue" (citations omitted)); *United States v. Scrimgeour*, 636 F.2d 1019, 1024 (5th Cir. 1981) (rejecting disjunctive interpretation of "or" because the conjunctive "comports with accepted principles of statutory construction and is supported by the underlying congressional intent").

The District Court thus correctly examined the entirety of the CEA, its structure, purpose and legislative history. *See* ER35; *see also Unification Church v. INS*, 762 F.2d 1077, 1085-86 (D.C. Cir. 1985) (evaluating "legislative history to see whether reading the 'or' … in its usual disjunctive connotation would be demonstrably at odds with the will of Congress" after noting precedents warning that courts should "not rush to conclude that legislators always intend the word 'or' to be in the disjunctive").[20]

C. The CFTC's Interpretation Ignores the CEA's Statutory Scheme.

The CFTC ignores the CEA's basic structure. As this Court has explained, CEA §2 is labeled "Jurisdiction of Commission," with other substantive provisions flowing from that jurisdictional grant. *White Pine*, 574 F.3d at 1223-24. The CFTC there brought an anti-fraud action against a foreign currency options trader claiming that it had jurisdiction under both §2 and a substantive prohibition contained in 7 U.S.C. §6c(b) prohibiting "fraud and misrepresentation in the solicitation or offering of options." *Id*. at 1223. The Court held that the CFTC lacked jurisdiction, stating that "all roads lead back to section 2 of the Act" and that other substantive provisions of the commodities laws "do not confer

[20] *See also Pub. Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 455 (1989) ("Looking beyond the naked text for guidance is perfectly proper when the result it apparently decrees is difficult to fathom or where it seems inconsistent with Congress' intention, since the plain-meaning rule is 'rather an axiom of experience than a rule of law….'").

jurisdiction on the CFTC by themselves." *Id.* at 1223, 1227.[21] Thus, the CFTC's jurisdiction comes from §2, not from §6(c)(1) by itself. *Id.* at 1223. It is only where cash market "devices and contrivances" can potentially disrupt the CFTC's jurisdictional markets in §2 that the CFTC's manipulation authority in §6(c)(1) comes into play.[22]

It makes no difference that *White Pine* was decided before Dodd-Frank. When Congress as part of the Dodd-Frank amendments (§741) overruled *White Pine*'s result of no jurisdiction over pooled foreign currency transactions, Congress' legislative fix was ***to amend §2*** to include CFTC jurisdiction over those transactions. ER98. And §2 is still entitled "Jurisdiction of Commission."

D. The CFTC's Reading Would Nullify Contemporaneous Amendments to, and Render Superfluous Portions of, the Same Statute.

Congress with Dodd-Frank amended not just §6(c)(1), but also reformatted much of §6(c), as well as portions of §2. When statutory provisions are "enacted at the same time and form part of the same Act, the duty to harmonize them is

[21] This Court also held that §13a-1, which provides that courts "shall have jurisdiction to entertain" actions seeking to enjoin violations of the commodities laws, is not a jurisdictional grant, but statement of available relief. 574 F.3d at 1223 & n.3.

[22] *White Pine* also noted that Commission regulations (such as Rule 180.1 invoked here) are irrelevant without independent jurisdiction: "regulations, of course, cannot go beyond the jurisdictional limits of the statute." 574 F.3d at 1223.

particularly acute." *US W. Commc'ns, Inc. v. Hamilton*, 224 F.3d 1049, 1053 (9th Cir. 2000).

1. The CFTC's Reading Renders §6(c)(3) Superfluous.

The CFTC's reading would render wholly duplicative the "***Other Manipulation***" provision in §6(c)(3) (emphasis added). If §6(c)(1) independently covers both all ordinary sales fraud (with the word "deceptive") and manipulation (instead of just fraud-based manipulation), there would, as the District Court noted, be no need for §6(c)(3), which also covers manipulation but without the word "deceptive." ER36-37.

The CFTC first misdirects the Court by arguing that because §6(c)(3) does not address fraud, it "cannot render Section 6(c)(1)'s anti-fraud language superfluous." CFTC Br. 39. Nobody said the CFTC's reading renders **§6(c)(1)** superfluous; the District Court wrote precisely the opposite: it renders **§6(c)(3)** superfluous. ER37.

The CFTC next argues there is nothing wrong with "overlap" of its anti-manipulation authority in the two sections. CFTC Br. 38-39. The problem is nullification, not overlap. Section 6(c)(3) serves no purpose if both stand-alone fraud *and* manipulation in all forms were already covered in §6(c)(1). *See Colautti v. Franklin*, 439 U.S. 379, 392 (1979) ("a statute should be interpreted so as not to render one part inoperative"); *Kungys v. United States*, 485 U.S. 759, 778 (1988)

(Scalia, J., plurality opinion) (it is a "cardinal rule of statutory interpretation that no provision should be construed to be entirely redundant").

Moreover, the sections do not *actually* "overlap" as the CFTC now asserts. As the CFTC recognized in its own rulemaking, Section 6(c)(1) (which refers to "deceptive") covers fraud-based manipulation with its lower 10b-5 recklessness intent standard, whereas §6(c)(3) (without reference to "deceptive") covers non-fraud based manipulation, which still requires proof of specific manipulative intent. *See* 76 Fed. Reg. at 41400, 41409 ("Rule 180.1 prohibits fraud and fraud-based manipulations" with "potential to affect cash commodities, futures, or swaps markets"), 41407 (Rule 180.2 "covers non-fraud based manipulation").

It was the CFTC's "overlap" argument that the *Kraft* court rejected when the CFTC subsequently argued it could prosecute even non-fraud based manipulation under §6(c)(1) because of that section's disjunctive language. *Kraft* noted that the CFTC treats §6(c)(3), as well as the related criminal provision in §9(a)(2), as distinct, not as overlapping. 153 F. Supp. 3d at 1007, 1010 n.4; *see also* 76 Fed. Reg. at 41399, 41407-08 (recklessness standard does not apply to "non-fraud based manipulation" under §6(c)(3) and Rule 180.2); Phillip McBride Johnson *et al.*, *Derivatives Regulations* §5.05[3], at 341 (2018 Supp.).

The CFTC's regulatory distinction between fraud-based manipulation in §6(c)(1) and non-fraud based manipulation in §6(c)(3) undermines its current

"plain meaning" construction. It now reads the word "or" between "deceptive" and "manipulative" in §6(c)(1) to give it authority over both ordinary deceit without manipulative potential and manipulation. But if the word "manipulative" is thus read alone, that same word appears both in §6(c)(1) and §6(c)(3). Yet, the CFTC's regulations treat "manipulative" as covering different conduct in the two provisions. Normally, the same term used in related provisions must be construed consistently. *Mohasco Corp. v. Silver*, 447 U.S. 807, 826 (1980). This further evidences that the word "deceptive" relates to the word "manipulative" in §6(c)(1) so as to cover frauds with manipulative potential, whereas the word "manipulative" alone in §6(c)(3) covers "other," *i.e.* non-fraud based manipulation, consistent with the CFTC's regulatory statements.

2. The CFTC's Reading Also Nullifies the Actual Delivery Exception and §4b.

Congress would not exempt from the Commission's broad CEA §4b anti-fraud jurisdiction retail financed transactions with 28-day delivery, while in the same Dodd-Frank amendments allow the CFTC to circumvent that exemption by asserting wholly duplicative fraud claims under §6(c)(1). The point of the Actual Delivery Exception was to preserve the jurisdictional exemption that Monex and similar Model Code-compliant firms enjoyed pre-Dodd-Frank. The CFTC's reading would nullify and make superfluous §2(c)(2)(D)(iii)'s exception's specific application to §4b, and should be rejected. It's even more implausible that

Congress would nullify a simultaneously enacted section by silently overturning decades of regulatory history and authorities excluding cash commodities from CFTC jurisdiction, and by extending CFTC jurisdiction to *all* retail cash commodity transactions, *whether financed or not*. The CFTC's violence to the fundamental structure of CEA and its history, explains why the CFTC must push its meritless no actual delivery arguments on appeal.

The CFTC's interpretation goes beyond nullifying the contemporaneous Actual Delivery Exception. It renders superfluous the entire anti-fraud provisions of CEA §4b which have long been the CFTC's anti-fraud tool. If §6(c)(1) covered routine sales fraud for all interstate cash commodity sales, the CFTC could not only police transactions expressly exempted by §2, it could ignore §4b's fraud provisions entirely even as to transactions expressly covered by §2. The CFTC would be unbound by §4b's fraud provisions, and longstanding §4b case law, if §6(a)(1) gave it plenary sales fraud jurisdiction over all commodity transactions, covered or not by the CEA.

The CFTC's reading thus also violates the statutory maxim that specific statutory provisions, such as application of the precise §2(c) exemption to sales fraud under §4b, control the more general §6(c)(1), and not the other way around.

"Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment."[23]

The CFTC's only response is that its interpretation would just partially nullify the CEA. CFTC Br. 38 (arguing that persons covered by CEA §2 also have registration and reporting requirements in §§4(a) and 4(b)). The CFTC thus claims that the Actual Delivery Exception precludes merely its "regulatory" jurisdiction under CEA §§4(a) and 4(b) (7 U.S.C. §§6(a) & 6(b)), and that it still has "enforcement" jurisdiction under other CEA provisions such as §6(c)(1).

The CFTC has it backwards: section 2(c)(2)(D)(iii), entitled "Enforcement," grants the CFTC expressly enumerated and limited enforcement powers (those in 7 U.S.C. §§6(a), 6(b) and 6b) over retail commodity transactions that fail to qualify for the Actual Delivery Exception. 7 U.S.C. §2(c)(2)(D)(iii). It states that such non-exempted transactions will then be treated "as if" futures contracts for CFTC "enforcement" *of those specific* CEA provisions. *Id*. It nowhere states or implies that the CFTC has enforcement authority under other CEA provisions for retail commodity transactions that are not treated "as if" futures contracts. Nor does the CFTC answer the larger question of why Congress would nullify, or render

[23] *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976) ; *see also Am. Fed'n of Gov't Emps., Local 2782 v. FLRA*, 702 F.2d 1183, 1187 (D.C. Cir. 1983) (courts should reject agency interpretations that deprive a statutory provision of virtually all effect absent "legislative history of exceptional clarity").

superfluous, *any* portions of the CEA, when Congress specifically excepted actual delivery transactions from CEA fraud jurisdiction while noting that Monex wouldn't have "to fool with" the CFTC. SER221.

Indeed, if Congress had meant what the CFTC now argues, it would have done so explicitly as it did in a similar, immediately preceding section applicable to leveraged, margined or financed currency transactions. Congress stated, similar to the Actual Delivery Exception, that such transactions are covered for specified purposes, unless they result in "actual delivery," within 2 days. 7 U.S.C. §§2(c)(2)(C)(i)(I)(bb) & (II)(bb)(AA). It then stated that transactions not resulting in actual delivery will be treated "as if" future contracts for purposes of 7 U.S.C. §§6(b) and 6b (CEA §§4(b) and 4b). *Id.* §2(c)(2)(C)(iv). But then, unlike with the similar language in the Actual Delivery Exception, Congress also stated: "This subparagraph shall not be construed to limit any jurisdiction that the Commission may otherwise have under any other provision of this chapter [*i.e*, the CEA] over an agreement, contract, or transaction that is a contract of sale of a commodity for future delivery." *Id*. §2(c)(2)(C)(v). No similar savings language appears in the Actual Delivery Exception. Even this language suggests only possible additional coverage for "future delivery" contracts, not for "actual delivery" contracts that are instead excepted as resembling cash sales.

E. Significant Differences in CEA §§4b and 6(c)(1) Prove They Address Different Conduct.

Comparing the structure and language of §§4b and 6(c)(1) further demonstrates that the statutory provisions address different, not the same, conduct. Prior to Dodd-Frank, the CEA already addressed sales practice fraud in §4b, entitled "Contracts designed to defraud or mislead," which Dodd-Frank made applicable to financed retail transactions not resulting in actual delivery. Section 4b makes it unlawful *inter alia* "to cheat or defraud" any "person" in regulated "contracts." 7 U.S.C. §6b(a)(2)(A), (C). It thus focuses on sales fraud directed at *customers* in relation to individual contracts, *i.e.*, sales practice fraud.

Dodd-Frank §753, which amended CEA §6(c), by contrast was entitled "Anti-Manipulation Authority," and five of the statute's next eight subheadings mention "manipulation." As noted, §6(c), even prior to Dodd-Frank, addressed market manipulation of exempted cash products that could impact regulated markets. *Supra* section II.A. Amended §6(c) is expressly called "Prohibition regarding manipulation and false information." Section 6(c)(1), at issue here, is entitled "Prohibition Against Manipulation," and the following §6(c)(2), not at issue here, is called "Prohibition Against False Information." While §4b addresses "cheating" customers in individual "contracts," in contrast §6(c) generally, and §6(c)(1) particularly, talks in broader market-type terms of deceptive or manipulative "devices or contrivances." And Congress expressly prohibited the

CFTC from requiring market participants to disclose nonpublic information "material to the *market price, rate, or level* of the commodity transaction." 7 U.S.C. §9(1) (emphasis added). This is the language of fraudulent manipulation, not of sales practice fraud.

Monex is not using these statutory headings and phrases to negate the plain meaning of the statute, as the CFTC complains, CFTC Br. 35, because plain meaning requires more than focusing on a single phrase. Rather, these very clear differences provide yet another tool to read the statute harmoniously as a whole. *See INS v. Nat'l Ctr. for Immigrants' Rights, Inc.*, 502 U.S. 183, 189 (1991) ("[T]he title of a statute or section can aid in resolving an ambiguity in the legislation's text.").

F. That Congress Mentions Only "Manipulation" in the Private Right of Action Section Proves Monex's Point.

The CFTC argues that Congress more clearly limited coverage to manipulation when it wanted to, pointing to contemporaneous amendment of CEA §22's private rights of action provision to cover "any manipulative," but not deceptive, "device or contrivance." CFTC Br. 27-28 (quoting 7 U.S.C. §25(a)(1)(D)(i)). Monex agrees that these amendments occurred contemporaneously with the §6(c)(1) amendments, but a comparison of the two sections further disproves the CFTC's §6(c)(1) argument.

CEA §22 provides a private right of action against "[a]ny person … who violates this chapter," (the CEA), and makes that person "liable for actual damages resulting from one or more of the [specified] transactions." 7 U.S.C. §25. Private persons can bring §4b fraud claims arising out of transactions covered in §2 (*e.g.*, retail commodity transactions that do not comply with the Actual Delivery Exception) because they are violations of the CEA and are enumerated transactions in §22(a)(1)(B). They may also bring §6(c)(1) manipulation claims under §22(a)(1)(D)(1), which covers "any manipulative device or contrivance in contravention of such rules and regulations as the Commission shall promulgate" for contracts of sale referred to in subsection (a)(1)(B) (*i.e.*, swaps or futures). 7 U.S.C. §25(a)(1)(D)(1). Private persons may not, however, bring non-manipulation sales fraud claims involving actual delivery cash commodities because such sales are not covered by the CEA, nor are they enumerated transactions under §22(a)(1)(B) because they are not futures or swap transactions. Congress sensibly provided no §22 private right of action for conduct — cash commodity sales fraud — outside the CEA.

The CFTC's contrary interpretation — that §6(c)(1) covers routine fraud in all cash commodity transactions but that there is no corresponding private right of action for those violations in §22 — is illogical. The CFTC assumes that Congress purposefully withheld a §22 private right for its purported §6(c)(1) sales fraud

violation, even though Congress granted a §22 private right for §6(c)(1) manipulation-based violations and §4b sales fraud violations. Nothing suggests that Congress would single out supposed sales fraud violations of §6(c)(1) for *no* §22 private right of action, even though, according to the CFTC, they are violations of "this chapter." A more reasonable interpretation is that Congress successfully mirrored §6(c)(1) coverage in §22, which Congress intended only to extend to fraud-based manipulation, with its amended lower proof standards, and not to ordinary sales fraud which §22 already addressed for covered transactions.

G. Contemporary Congressional Statements Confirm That Section 6(c)(1) Is Limited To Frauds with Manipulative Potential.

The legislative record further proves that Congress intended with §6(c)(1) only to augment the CFTC's existing manipulation authority, not to rewrite the CEA to give the CFTC plenary fraud jurisdiction over all cash commodity sales. Even if the CFTC's plain text reading were correct, and it is not, it could never overcome this irrefutable fact. *Carson Harbor Village, Ltd. v. Unocal Corp.*, 270 F.3d 863, 877 (9th Cir. 2001) ("We will resort to legislative history, even where the plain language is unambiguous, where the legislative history clearly indicates that Congress meant something other than what it said." (citations omitted)).

Prior to Dodd-Frank, the CEA already prohibited knowingly "manipulating or attempting to manipulate … the market price of any commodity, in interstate commerce[.]" 7 U.S.C. §9(3). But this provision required proof of specific intent

to manipulate, making CFTC enforcement all but impossible. SER328-29 (CFTC Chairman Gensler); SER273 (Senator Cantwell introducing §753); ER88 (same).

Congress' purpose in CEA §6(c)(1) was to protect "the integrity of markets," not to address retail consumer fraud. SER273. The §6(c)(1) amendments and the Commission's Rule 180.1 were thus meant only to "augment the Commission's *existing* authority to prohibit fraud and manipulation." 76 Fed. Reg. at 41401 (emphasis added). This augmentation was necessary since, as the provision's sponsor Senator Cantwell pointed out, "In the 35 years of its history, the CFTC has only successfully prosecuted one single case of manipulation." SER273. With the §6(c) amendments, Congress permitted a general civil manipulation or recklessness standard for fraud-based manipulation under §6(c) (the same standard as under SEC Rule 10b-5) as an alternative to the criminal manipulation scienter element under CEA §9(a)(2). 76 Fed. Reg. at 41401, 41404; 17 C.F.R. §180.1.[24]

No legislative history supports the CFTC's argument that Congress intended, by incorporating 10b-5 manipulation scienter standards into §6(c)(1), to

[24] As Senator Cantwell, described: "when bad actors like Enron … manipulate commodities prices, it means that Americans pay more for commodities like oil, … and natural gas. Unfortunately, current law does not protect our economy with a tough enough standard to prevent, deter, and enforce illegal market manipulation in critical commodity futures markets." ER88. Congress borrowed from the SEC's anti-manipulation doctrine to catch "***only those*** who attempt to affect the market or prices by artificial means unrelated to the natural forces of supply and demand." *Id.* (emphasis added); *see also* SER273 (Senator Cantwell, introducing §753 in 2010 using same language regarding limits on SEC anti-manipulation authority).

radically expand CFTC jurisdiction over ordinary sales fraud in all cash commodity sales. In a floor speech, Senator Lincoln explained that Dodd-Frank §753 is a "new anti-manipulation provision … addressing fraud-based manipulation, including manipulation by false reporting." ER98. "Importantly, this new enforcement authority … supplements, and does not supplant, its existing anti-manipulation authority[.]" *Id.*; *see also* ER88 (Senator Cantwell noting the amendment gives "the CFTC the same anti-manipulation standard currently employed by the SEC," meaning the "recklessness" standard that courts use under SEC §10(b)); SER273 (noting it was important to have a strong "law on the books against manipulation."); *id.* ("I hope my colleagues will support this strong antimanipulation standard being inserted into the Commodity Exchange Act.").

Underlining this Congressional focus, Senator Cantwell noted that the Energy Policy Act granted the "same anti-manipulation authority to [FERC] … as a result of the Enron market manipulation…." *Id.*; *see infra* section II.I (addressing FERC's anti-manipulation authority).

That Congress imported SEC 10b-5 scienter standards and scienter law for manipulation enforcement does not mean, as the CFTC argues, that it imported the whole of 10b-5 law for all purposes so as to enlarge the CFTC's jurisdiction beyond recognition. To push its jurisdictional creation, the CFTC ignores fundamental differences between the SEC and the CFTC, and between securities

and commodities markets. The CFTC first ignores the obvious coverage differences between the CEA and the Securities and Exchange Act that created the SEC. While the SEC has historically had broad jurisdiction over all securities, the CFTC has more limited jurisdiction over commodity futures contracts, not over commodities generally or cash sales. The CFTC also ignores fundamental differences between the markets that the different agencies regulate. In efficient securities markets, false statements (fraud) are generally presumed to have an impact on prices for the entire market. *See generally Basic, Inc. v. Levinson*, 485 U.S. 224 (1988) (adopting "fraud-on-the-market" theory). Ordinary sales fraud in commodity markets (a misrepresentation or omission to a customer buying bars of gold) has no such presumed or actual market-wide impact, and therefore is irrelevant to a participant's manipulation capability. Indeed, while security markets operate in a full-disclosure regime, commodity markets do not. Commodity traders are generally permitted to use their own inside information for their own profit. 76 Fed. Reg. at 41403; Mot. to Take Judicial Not. ("MJN"), Ex. A 96:19-97:21. The CFTC points to no policy, logic or legislative history suggesting, let alone stating, that Congress, by adopting 10b-5's scienter for fraud-based manipulations, intended to import all of 10b-5 and related case law, much of which could not possibly apply to the CEA, so as to radically expand CFTC jurisdiction.

Equally important as what Congress did say with the §6(c) amendments is what Congress did not say: *i.e.*, that it was interminably expanding CFTC fraud jurisdiction to cover all cash commodity sales in the nation. Such an explosive increase of an agency's historically limited authority would require clear Congressional statements,[25] in contrast to the CFTC's notion of Congress expanding agency jurisdiction through wished-for subtexts.[26]

H. The CFTC's Contemporaneous Statements Disavowed The Broad §6(c)(1) Fraud Jurisdiction It Now Claims.

Importantly, the CFTC itself recognized these limitations during its public rulemaking proceedings to implement its augmented manipulation authority in CEA §6(c).[27] Before issuing its Rule 180.1 Interpretation, CFTC Commissioners questioned CFTC Counsel Mark Higgins regarding the scope of §6(c)(1)'s anti-fraud provision. He explained that §6(c)(1) augments the CFTC's authority by permitting the CFTC to prosecute "market manipulation by fraud" without needing

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[25] *Brown & Williamson*, 529 U.S. at 160 ("We are confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion").

[26] *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001) ("Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions — it does not, one might say, hide elephants in mouseholes.").

[27] Tellingly, the CFTC itself never mentioned §6(c)(1) as an independent jurisdictional grant when it commented to the public six-months later concerning its Dodd-Frank §2(c)(2)(D) jurisdictional authority over retail commodity transactions. 76 Fed. Reg. at 77671 n.7.

to prove specific intent to manipulate market prices (price-based manipulation), as previously required. MJN Ex. A 101:7-102:5. In other words, if one committed fraud for some purpose other than to manipulate markets, but with reckless disregard of its potential market impact, then new §6(c)(1) would apply. *Id.*; *see also id.* 98:7-11. Higgins thus defined "fraud" as a "term of art" that differs from the common law definition: "Here, fraud in the preamble we propose to mean any conduct that impairs, obstructs, *or defeats a well-functioning market or the integrity of the market*." *Id.* 109:2-5 (emphasis added). Moreover, he twice confirmed that fraud under §6(c)(1) had to be in connection with a "jurisdictional product." *Id*. 101:3-5, 111:22-112:3-17 (paraphrasing the Supreme Court's interpretation of the scope of SEC §10(b)'s "in connection with" language in *SEC v. Zanford*, 535 U.S. 813 (2002): "So long as the fraud coincides with the SEC jurisdictional transaction, there is that sufficient nexus[.]").

Then, in its July 14, 2011 Final Interpretation on the scope of §6(c), the CFTC expressly rejected as "misplaced" any concerns that the use of the term "commodity" in Rule 180.1 would apply "to virtually every commercial transaction in the economy." 76 Fed. Reg. at 41401. It assured market participants that it still:

> expects to exercise its authority under §6(c)(1) to cover transactions related to the futures or swaps markets, or prices of commodities in interstate commerce, or where the fraud or manipulation *has the*

> *potential to affect cash commodity, futures, or swaps markets or participants in these markets*.

Id. (emphasis added). The Commission also referred to subsection G of its Interpretation, which clarified that "in connection with" means in connection with futures contracts. *Id.* at 41405-06. The CFTC's litigation assertion — that these statements reflect only the CFTC's enforcement "intent," and not the scope of its authority — is belied by its Interpretation:

> As to the concerns [expressed in public comments] regarding increased costs from the Commission's ***purported*** expansion of its authority to cover a plethora of routine cash market transactions in all areas of the economy, with respect to the scope of final Rule 180.1 … the Commission intends to exercise its authority under 6(c)(1) to cover transactions related to the futures or swaps markets, or prices of commodities in interstate commerce, or where the fraud or manipulation has the potential to affect cash commodities, futures, or swaps markets or participants in these markets. Thus, concerns about purported increased costs are misplaced in that ***they rest on an incorrect assumption about the scope of the Commission's expanded authority.***

Id. at 41409 (emphasis added). Thus, the CFTC made clear that its enforcement "intent" derived from its understanding concerning "the scope" of its authority.

The CFTC's misinterpretation here also ignores CFTC Director of Enforcement David Meister's contemporaneous presentation to the Commissioners leading to adoption of Rule 180.1, a presentation that focused on fraudulent market manipulation and didn't discuss ordinary sales fraud. *See, e.g.*, SER322-23 & SER340 (Meister), SER328-29 (Chairman Gensler). Indeed, Meister could not

think of a hypothetical that "suggested a distinction or difference between fraud and fraud based manipulation."[28] SER340. If §6(c)(1) and Rule 180.1 were meant to cover routine sales misrepresentations, instead of frauds that recklessly impact market prices, those hypotheticals would abound.[29]

Thus, the CFTC assured the public that the Rule addresses fraud-based manipulation, not sales fraud. The Rule itself is entitled "Prohibition on the employment, or attempted employment, of manipulative *and* deceptive devices." 7 C.F.R. §180.1 (emphasis added). The Rule's bookends in sections (a)(1) and (4) clearly apply only to manipulation. While the intermediary provisions in (a)(2) and (3) could be read more broadly, they must be construed in relation to the statute and Rule as a whole, including the CFTC's own public assurances, to mean fraud with manipulative potential. And no agency rule can go beyond what the statute intended. *White Pine*, 574 F.3d at 1223.

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[28] Similarly, in 2010, Higgins was only able to identify fraud-based manipulation claims as a type of case that the CFTC could bring under §6(c)(1) that it couldn't bring under its prior anti-manipulation authority. MJN Ex. A 101:7-102:5.

[29] The CFTC did append a footnote using fraudulent metals dealers as an example to the text explaining that the Rule was focused on frauds that have the potential to affect prices. *See* 78 Fed. Reg. at 41401 & n.37. The clear import was that only fraudulent practices that could qualitatively or quantitatively disrupt markets are covered. The CFTC was investigating such a manipulative scheme in the silver markets at the time Higgins made his 2010 presentation. MJN Ex. A at 12:6-14:16. Although the CFTC waived any manipulation theory by standing on Count 3 without amendment, it now belatedly makes that argument: that the "scale" of "[t]his case plainly qualifies" as one "that may negatively impact cash commodity markets and participants." CFTC Br. 42.

The CFTC is thus entitled to no *Chevron* deference. Even accepting the CFTC's "plain reading" spin of §6(c)(1), the CFTC's position would violate Congressional intent. *See Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982) (if literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters, those intentions must be controlling); *Chevron U.S.A., Inc. v. Nat. Res. Defense Council, Inc.*, 467 U.S. 837, 843 n.9 (1984).[30] This is especially true here, where the CFTC announcement contradicts its litigation position. *See Cardoza-Fonseca*, 480 U.S. at 446 n.30 ("An agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is entitled to considerably less deference than a consistently held agency view." (internal quotations omitted)); *Am. Precious Metals*, 845 F. Supp. 2d at 1287.

I. Amendments to FERC's Parallel Anti-Manipulation Authority Confirm Monex's Interpretation.

Before Dodd-Frank, Congress granted anti-manipulation authority to FERC that was also modeled on SEC 10b-5. The CFTC points to these regulations as support for its interpretation that §6(c)(1) covers fraud absent manipulative potential. CFTC Br. 41. But FERC's interpretation of its parallel authority in the Energy Policy Act further supports Monex.

[30] *See also King v. Burwell*, 135 S. Ct. 2480, 2495 (2015) (no *Chevron* deference where interpretation inconsistent with Congressional intent with deep political implications).

FERC sensibly interpreted its authority over "any manipulative or deceptive device or contrivance," 15 U.S.C. §717c-1, as requiring a jurisdictional nexus:

> Had Congress intended to expand the Commission's jurisdiction so significantly as to give it anti-manipulation authority over such transactions as first sales of imported natural gas, intrastate sales of electric energy, retail sales of electric energy or energy sales by governmental entities, we believe it would have done so explicitly.

71 Fed. Reg. 4244, 4248 (¶20) (Jan. 26, 2006). FERC thus clarified that an entity is subject to the Commission's authority only if the:

> entity engages in manipulation and the conduct is found to be "in connection with" a jurisdictional transaction…. Absent such nexus to a jurisdictional transaction, however, fraud and manipulation in a non-jurisdictional transaction (such as a first or retail sale) is not subject to the new regulations.

Id. at 4247-48 (¶16); *see also id.* at 4249 (¶22) ("the entity must have intended to affect, or have acted recklessly to affect, a jurisdictional transaction").

Thus, while FERC included general "catch all" anti-fraud language in its final regulation and declined requests to limit its authority solely to actual manipulation, it emphasized that it is only fraud affecting the energy market and jurisdictional products that is implicated. *Id.* (¶25) (FERC will "police all forms of fraud and manipulation that affect natural gas and electric energy transactions and activities the Commission is charged with protecting"). The CFTC's claim that it can regulate ordinary sales fraud disconnected from its jurisdictional products and markets finds no support in FERC's regulations.

J. The CFTC's Cited §6(c)(1) Cases Are Inapposite.

The CFTC string cites three cases which supposedly give it sales fraud jurisdiction over Monex via §6(c)(1). *See* CFTC Br. 22 n.6, 45. Each of those cases involved no "actual delivery." Those courts thus addressed transactions deemed to be futures contracts squarely within CFTC jurisdiction; they did not address whether §6(c)(1) could apply to cash transactions not covered by the CEA, let alone nullify an express §2 exception. In *CFTC v. Southern Trust Metals, Inc.*, 894 F.3d 1313 (11th Cir. 2018), the court simply assumed without analysis that §6(c)(1)'s reach coexisted with §4b's, but that issue was not before the court because without actual delivery §4b clearly applied. *Id.* at 1325-26. Indeed, defendant there nowhere argued that §6(c)(1) could not apply if there was "actual delivery." Br. for Appellants, *CFTC v. S. Trust Metals, Inc.*, 2017 WL 835125, at *37-40 (11th Cir. Jan. 4. 2017). The district court in *Hunter Wise* similarly assumed without explanation that §6(c)(1) applied to the frauds at issue, but it had already found liability under §4b for lack of actual delivery. *CFTC v. Hunter Wise Commodities, LLC*, 21 F. Supp. 3d 1317, 1346-48 (S.D. Fla. 2014). In the Eleventh Circuit opinion, the court expressly declined to consider whether §6(c)(1) gave the CFTC an "independent" jurisdictional basis since the CFTC already had jurisdiction for lack of actual delivery under §2(c)(2)(D). *Hunter Wise*, 749 F.3d at 981.

Only one of the CFTC's cases confronted directly the scope of §6(c)(1), and it did so only in the context of no actual delivery virtual currency transactions. *CFTC v. McDonnell*, 287 F. Supp. 3d 213 (E.D.N.Y. 2018) and 2018 WL 4090784 (E.D.N.Y. Aug. 28, 2018). Importantly, the *McDonnell* defendant was *pro se* and the CFTC neglected to present the court with the relevant legislative and regulatory history. *See* SER106-08.

The CFTC will likely point to *CFTC v. My Big Coin Pay, Inc.*, 2018 WL 4621727 (D. Mass. Sept. 26, 2018), another virtual currency case decided after this appeal. Again, there were no claims of actual delivery, the court addressed the provision's legislative history in cursory fashion, and didn't address the statutory or regulatory context of §6(c)(1). *Id.* at *5.

Finally, the CFTC cites the Illinois district court's decision in the Parties' prior subpoena enforcement action, despite that court having explicitly stated that it "need not consider the matter of whether the CFTC independently has authority to investigate Monex under Section 6 of the Act." *CFTC v. Monex Deposit Co.*, 2014 WL 7213190, at *9 (N.D. Ill. Dec. 17, 2014). The Seventh Circuit never mentioned §6(c)(1). *Monex*, 824 F.3d 690 (7th Cir. 2016).

The issue presented here — whether Congress intended with §6(c)(1) to grant the CFTC ordinary sales fraud jurisdiction over all cash commodity sales in the nation, including those expressly excepted in §2 as part of the same Dodd-

Frank amendments — is an issue of first impression. To ask the question, we submit, is to answer it.

K. The CFTC Cannot Salvage its §6(c)(1) Claim by Suggesting that Monex Threatens a "Big" Fraud.

Pervading its brief is the CFTC's strawman about Monex's allegedly large and far-reaching fraud, which is as untrue as it is irrelevant to the jurisdictional issues. CFTC Br. 1, 6-9, 44-45.

The CFTC waived its newly concocted appeal theory, that the alleged fraud does have the potential to impact commodity markets (*id.* 42), when it stood on Count 3 and asked the District Court to enter final judgment. *Lacey v. Maricopa Cnty.*, 693 F.3d 896, 928 (9th Cir. 2012); ER13-20.

If the CFTC is asking the Court to trust its prosecutorial discretion to go after only "big" frauds, the CFTC only has prosecutorial discretion where it has jurisdiction. Courts do not allow overbroad interpretations based on government assurances of more limited enforcement. The CFTC's statutory reading gives it antifraud authority over essentially all cash commodity sales, a patently unreasonable result. *See Marinello v. United States*, 138 S. Ct. 1101, 1108 (2018) (rejecting overbroad interpretation of tax code notwithstanding government suggestion that it would exercise prosecutorial discretion); *McDonnell v. United States*, 136 S. Ct. 2355, 2372-73 (2016) (refusing to construe statute broadly "on the

assumption that the Government will use it responsibly" (internal quotation omitted)).

CONCLUSION

This Court should affirm the District Court's order.

Dated: October 15, 2018

FARELLA BRAUN + MARTEL LLP

By: /s/ Neil A. Goteiner
Neil A. Goteiner

Attorneys for MONEX CREDIT COMPANY, MONEX DEPOSIT COMPANY, NEWPORT SERVICES CORPORATION, LOUIS CARABINI and MICHAEL CARABINI

STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, Appellees hereby state that they do not know of any related cases pending in this Court.

Dated: October 15, 2018

FARELLA BRAUN + MARTEL LLP

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Attorneys for MONEX CREDIT COMPANY, MONEX DEPOSIT COMPANY, NEWPORT SERVICES CORPORATION, LOUIS CARABINI and MICHAEL CARABINI

CERTIFICATION OF COMPLIANCE PURSUANT TO FRAP 32(g) AND NINTH CIRCUIT RULE 32-1

Pursuant to Federal Rule of Appellate Procedure ("FRAP") 32(g) and Ninth Circuit Rule 32-1, I certify that the attached Brief of Defendants-Appellees complies with FRAP(a)(5)-(6) and Ninth Circuit Rule 32-1(a), as it is in 14-point proportionally-spaced Times New Roman font, and contains 13,988 words, exclusive of the portions of the brief excepted by FRAP 32(f), as counted by the word processing program used by counsel.

Dated: October 15, 2018

FARELLA BRAUN + MARTEL LLP

By: /s/ Neil A. Goteiner
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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on October 15, 2018.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: October 15, 2018 FARELLA BRAUN + MARTEL LLP

By: /s/ Neil A. Goteiner
Neil A. Goteiner

Attorneys for MONEX CREDIT COMPANY, MONEX DEPOSIT COMPANY, NEWPORT SERVICES CORPORATION, LOUIS CARABINI and MICHAEL CARABINI

ADDENDUM

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STATUTES:

CEA Section 2(a),
7 U.S.C. § 2(a) (2012)

(a) Jurisdiction of Commission; Commodity Futures Trading Commission

(1) Jurisdiction of Commission

(A) In general

The Commission shall have exclusive jurisdiction, except to the extent otherwise provided in the Wall Street Transparency and Accountability Act of 2010 (including an amendment made by that Act) and subparagraphs (C), (D), and (I) of this paragraph and subsections (c) and (f), with respect to accounts, agreements (including any transaction which is of the character of, or is commonly known to the trade as, an "option", "privilege", "indemnity", "bid", "offer", "put", "call", "advance guaranty", or "decline guaranty"), and transactions involving swaps or contracts of sale of a commodity for future delivery (including significant price discovery contracts), traded or executed on a contract market designated pursuant to section 7 of this title or a swap execution facility pursuant to section 7b-3 of this title or any other board of trade, exchange, or market, and transactions subject to regulation by the Commission pursuant to section 23 of this title. ***

CEA Section 2(c)(2)(A),
7 U.S.C. § 2(c)(2)(A) (2012)

(2) Commission jurisdiction

(A) Agreements, contracts, and transactions traded on an organized exchange

This chapter applies to, and the Commission shall have jurisdiction over, an agreement, contract, or transaction described in paragraph (1) that is--

(i) a contract of sale of a commodity for future delivery (or an option on such a contract), or an option on a commodity (other than foreign currency or a security or a group or index of securities), that is executed or traded on an organized exchange;

(ii) a swap; or

(iii) an option on foreign currency executed or traded on an organized exchange that is not a national securities exchange registered pursuant to section 6(a) of the Securities Exchange Act of 1934.

CEA Section 2(c)(2)(C),
7 U.S.C. § 2(c)(2)(C) (2012)

(C)

(i)

(I) This subparagraph shall apply to any agreement, contract, or transaction in foreign currency that is--

(aa) offered to, or entered into with, a person that is not an eligible contract participant (except that this subparagraph shall not apply if the counterparty, or the person offering to be the counterparty, of the person that is not an eligible contract participant is a person described in any of item (aa), (bb), (ee), or (ff) of subparagraph (B)(i)(II)); and

(bb) offered, or entered into, on a leveraged or margined basis, or financed by the offeror, the counterparty, or a person acting in concert with the offeror or counterparty on a similar basis.

(II) Subclause (I) of this clause shall not apply to--

(aa) a security that is not a security futures product; or

(bb) a contract of sale that--

(AA) results in actual delivery within 2 days; or

(BB) creates an enforceable obligation to deliver between a seller and buyer that have the ability to deliver and accept delivery, respectively, in connection with their line of business.

***

(iv) Sections 6(b) and 6b of this title shall apply to any agreement, contract, or transaction described in clause (i) of this subparagraph as if the agreement, contract, or transaction were a contract of sale of a commodity for future delivery.

(v) This subparagraph shall not be construed to limit any jurisdiction that the Commission may otherwise have under any other provision of this chapter over an agreement, contract, or transaction that is a contract of sale of a commodity for future delivery.

CEA Section 2(c)(2)(D),
7 U.S.C. § 2(c)(2)(D) (2012)

(D) Retail commodity transactions

(i) Applicability

Except as provided in clause (ii), this subparagraph shall apply to any agreement, contract, or transaction in any commodity that is--

(I) entered into with, or offered to (even if not entered into with), a person that is not an eligible contract participant or eligible commercial entity; and

(II) entered into, or offered (even if not entered into), on a leveraged or margined basis, or financed by the offeror, the counterparty, or a person acting in concert with the offeror or counterparty on a similar basis.

(ii) Exceptions

This subparagraph shall not apply to--

***

(III) a contract of sale that--

(aa) results in actual delivery within 28 days or such other longer period as the Commission may determine by rule or regulation based upon the typical commercial practice in cash or spot markets for the commodity involved; ***

***

(iii) Enforcement

Sections 6(a), 6(b), and 6b of this title apply to any agreement, contract, or transaction described in clause (i), as if the agreement, contract, or transaction was a contract of sale of a commodity for future delivery.

***

CEA Section 4b,
7 U.S.C. § 6b (2012)

Contracts designed to defraud or mislead

(a) Unlawful actions

It shall be unlawful--

(1) for any person, in or in connection with any order to make, or the making of, any contract of sale of any commodity in interstate commerce or for future delivery that is made, or to be made, on or subject to the rules of a designated contract market, for or on behalf of any other person; or

(2) for any person, in or in connection with any order to make, or the making of, any contract of sale of any commodity for future delivery, or swap, that is made, or to be made, for or on behalf of, or with, any other person, other than on or subject to the rules of a designated contract market--

(A) to cheat or defraud or attempt to cheat or defraud the other person;

(B) willfully to make or cause to be made to the other person any false report or statement or willfully to enter or cause to be entered for the other person any false record;

(C) willfully to deceive or attempt to deceive the other person by any means whatsoever in regard to any order or contract or the disposition or execution of any order or contract, or in regard to any act of agency performed, with respect to any order or contract for or, in the case of paragraph (2), with the other person; ***

***

CEA Section 6(c),
7 U.S.C. § 9 (2012)

Prohibition Regarding Manipulation and False Information

(1) Prohibition against manipulation

It shall be unlawful for any person, directly or indirectly, to use or employ, or attempt to use or employ, in connection with any swap, or a contract of sale of any commodity in interstate commerce, or for future delivery on or subject to the rules of any registered entity, any manipulative or deceptive device or contrivance, in contravention of such rules and regulations as the Commission shall promulgate by not later than 1 year after July 21, 2010, provided no rule or regulation promulgated by the Commission shall require any person to disclose to another person nonpublic information that may be material to the market price, rate, or level of the commodity transaction, except as necessary to make any statement made to the other person in or in connection with the transaction not misleading in any material respect.

***

(3) Other Manipulation

In addition to the prohibition in paragraph (1), it shall be unlawful for any person, directly or indirectly, to manipulate or attempt to manipulate the price of any swap, or of any commodity in interstate commerce, or for future delivery on or subject to the rules of any registered entity.

***

CEA Section 22,
7 U.S.C. § 25 (2012)

(a) Actual damages; actionable transactions; exclusive remedy

(1) Any person (other than a registered entity or registered futures association) who violates this chapter or who willfully aids, abets, counsels, induces, or procures the commission of a violation of this chapter shall be liable for actual damages resulting from one or more of the transactions referred to in subparagraphs (A) through (D) of this paragraph and caused by such violation to any other person--

(A) who received trading advice from such person for a fee;

(B) who made through such person any contract of sale of any commodity for future delivery (or option on such contract or any commodity) or any swap ; or who deposited with or paid to such person money, securities, or property (or incurred debt in lieu thereof) in connection with any order to make such contract or any swap;

(C) who purchased from or sold to such person or placed through such person an order for the purchase or sale of--

(i) an option subject to section 6c of this title (other than an option purchased or sold on a registered entity or other board of trade);

(ii) a contract subject to section 23 of this title; or1

(iii) an interest or participation in a commodity pool; or

(iv) a swap; or

(D) who purchased or sold a contract referred to in subparagraph (B) hereof or swap if the violation constitutes--

(i) the use or employment of, or an attempt to use or employ, in connection with a swap, or a contract of sale of a commodity, in interstate commerce, or for future delivery on or subject to the rules of any registered entity, any manipulative device or contrivance in contravention of such rules and regulations as the Commission shall promulgate by not later than 1 year after July 21, 2010; or

(ii) a manipulation of the price of any such contract or swap or the price of the commodity underlying such contract or swap.

***

REGULATIONS:

CFTC Rule 180.1,
17 C.F.R. § 180.1 (2018)

Prohibition on the employment, or attempted employment, of manipulative and deceptive devices

(a) It shall be unlawful for any person, directly or indirectly, in connection with any swap, or contract of sale of any commodity in interstate commerce, or contract for future delivery on or subject to the rules of any registered entity, to intentionally or recklessly:

(1) Use or employ, or attempt to use or employ, any manipulative device, scheme, or artifice to defraud;

(2) Make, or attempt to make, any untrue or misleading statement of a material fact or to omit to state a material fact necessary in order to make the statements made not untrue or misleading;

(3) Engage, or attempt to engage, in any act, practice, or course of business, which operates or would operate as a fraud or deceit upon any person;

(4) Deliver or cause to be delivered, or attempt to deliver or cause to be delivered, for transmission through the mails or interstate commerce, by any means of communication whatsoever, a false or misleading or inaccurate report concerning crop or market information or conditions that affect or tend to affect the price of any commodity in interstate commerce, knowing, or acting in reckless disregard of the fact that such report is false, misleading or inaccurate. Notwithstanding the foregoing, no violation of this subsection shall exist where the person mistakenly transmits, in good faith, false or misleading or inaccurate information to a price reporting service.

(b) Nothing in this section shall be construed to require any person to disclose to another person nonpublic information that may be material to the market price, rate, or level of the commodity transaction, except as necessary to make any statement made to the other person in or in connection with the transaction not misleading in any material respect.

(c) Nothing in this section shall affect, or be construed to affect, the applicability of Commodity Exchange Act section 9(a)(2).

CFTC Rule 180.2,
17 C.F.R. § 180.2 (2018)

It shall be unlawful for any person, directly or indirectly, to manipulate or attempt to manipulate the price of any swap, or of any commodity in interstate commerce, or for future delivery on or subject to the rules of any registered entity.

TREATISE:

Phillip McBride Johnson *et al.*, *Derivatives Regulations* §5.05[3] (2018 Supp.)

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Successor Edition

to

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2018 Cumulative Supplement

PHILIP McBRIDE JOHNSON

THOMAS LEE HAZEN
Cary C. Boshamer Distinguished Professor of Law
The University of North Carolina at Chapel Hill

SUSAN C. ERVIN

CHARLES R. MILLS

This supplement supersedes all previous supplements.

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