



Spoofting / Market Manipulation: Legal Developments & Defense Strategies



9 December 2020

Panelist Bios

Sasha Wass QC

6KBW College Hill

A barrister who has been involved in some of the UK's most notable and high-profile financial crime cases. Sasha is routinely engaged by defendants as well as prosecutors, and has represented UK law enforcement (SFO and FCA) in several significant recent trials. These include acting for the SFO against Kweku Adoboli, a UBS trader convicted of perpetrating a \$2 billion banking fraud, one of Britain's largest-ever crimes.

Nate Muyskens

Greenberg Traurig

Washington, DC-based co-chair of GT's Global White Collar Criminal Defense Practice. Nate represents companies and individuals in investigations, prosecutions, regulatory enquiries, and civil proceedings. He was one of the leaders of the defense team in *US v. Flotron*, a case which resulted in the first ever acquittal in a criminal spoofing trial.

Barry Vitou

Greenberg Traurig

Co-chair of GT's White Collar Criminal Defense Practice and head of its London office's White Collar Defense & Special Investigations Practice. Barry is an expert in defending multinational corporate defendants in investigations and contentious litigation brought by UK and US law enforcement agencies, including the SFO, FCA, the DOJ and SEC.

Dr. Emre Carr

FTI Consulting

A New York-based economist specializing in financial markets and regulations. Dr. Carr is a recognized authority on financial, accounting, economic and governance issues, especially those relating to high-frequency trading in futures and equity markets. He is regularly asked to testify on behalf of both law enforcement and defendants in US and international courts.

Josh Ray

Rahman Ravelli

An English solicitor and US-qualified lawyer, Josh is head of the firm's US-facing business crime practice group and has substantial experience defending individuals accused of market manipulation offenses. He is the co-author of a forthcoming book on white collar criminal litigation in the US and UK, which is scheduled to be published by the American Bar Association in 2021.

Neil Williams

Rahman Ravelli

A highly experienced criminal defense solicitor, Neil is an expert in corporate crime and regulatory investigations who specializes in cross-border, global bribery and corruption cases. He regularly defends executives involved in internal investigations and has recognized expertise in cases involving cross-border tax fraud.

What is Spoofing?

- Submitting bids or offers with the intent to cancel the order before execution
- A “classic” spoof →

1

Price	Offers	Bids
\$1000.50	30	
\$1000.40	20	
\$1000.30	10	
\$1000.20	10	<i>best offer</i>
\$1000.10		
\$1000.00		
\$999.90		
\$999.80	<i>best bid</i>	40
\$999.70		80
\$999.60		20
\$999.50		10
\$999.40		30

Trader A places “real” bid for 40 lots, becoming the new best bid

2

Price	Offers	Bids
\$1000.50	80	
\$1000.40	70	
\$1000.30	60	
\$1000.20	60	<i>best offer</i>
\$1000.10		
\$1000.00		
\$999.90		
\$999.80	<i>best bid</i>	40
\$999.70		80
\$999.60		20
\$999.50		10
\$999.40		30

Trader A enters “spoo” offers of 50 lots each at four lowest price levels

3

Price	Offers	Bids
\$1000.50	80	
\$1000.40	70	
\$1000.30	60	
\$1000.20	60	<i>best offer</i>
\$1000.10		
\$1000.00		
\$999.90		
\$999.80		
\$999.70		80
\$999.60		20
\$999.50		10
\$999.40		30

Anticipating a price drop, Trader X crosses the spread and fills Trader A’s bid

4

Price	Offers	Bids
\$1000.50	30	
\$1000.40	20	
\$1000.30	10	
\$1000.20	10	<i>best offer</i>
\$1000.10		
\$1000.00		
\$999.90		
\$999.80		
\$999.70		80
\$999.60		20
\$999.50		10
\$999.40		30

Trader A cancel’s “spoo” orders



Overlapping Enforcement Regimes

- US→
 - Commodity Exchange Act §§ 6c(a)(5)(C), 9(a)
 - Exchange Act §§ 9(a), 10(b); SEC Rule 10b-5
 - Wire Fraud (18 U.S.C. § 1343), Commodities Fraud (18 U.S.C. § 1348), RICO (18 U.S.C. § 1963)

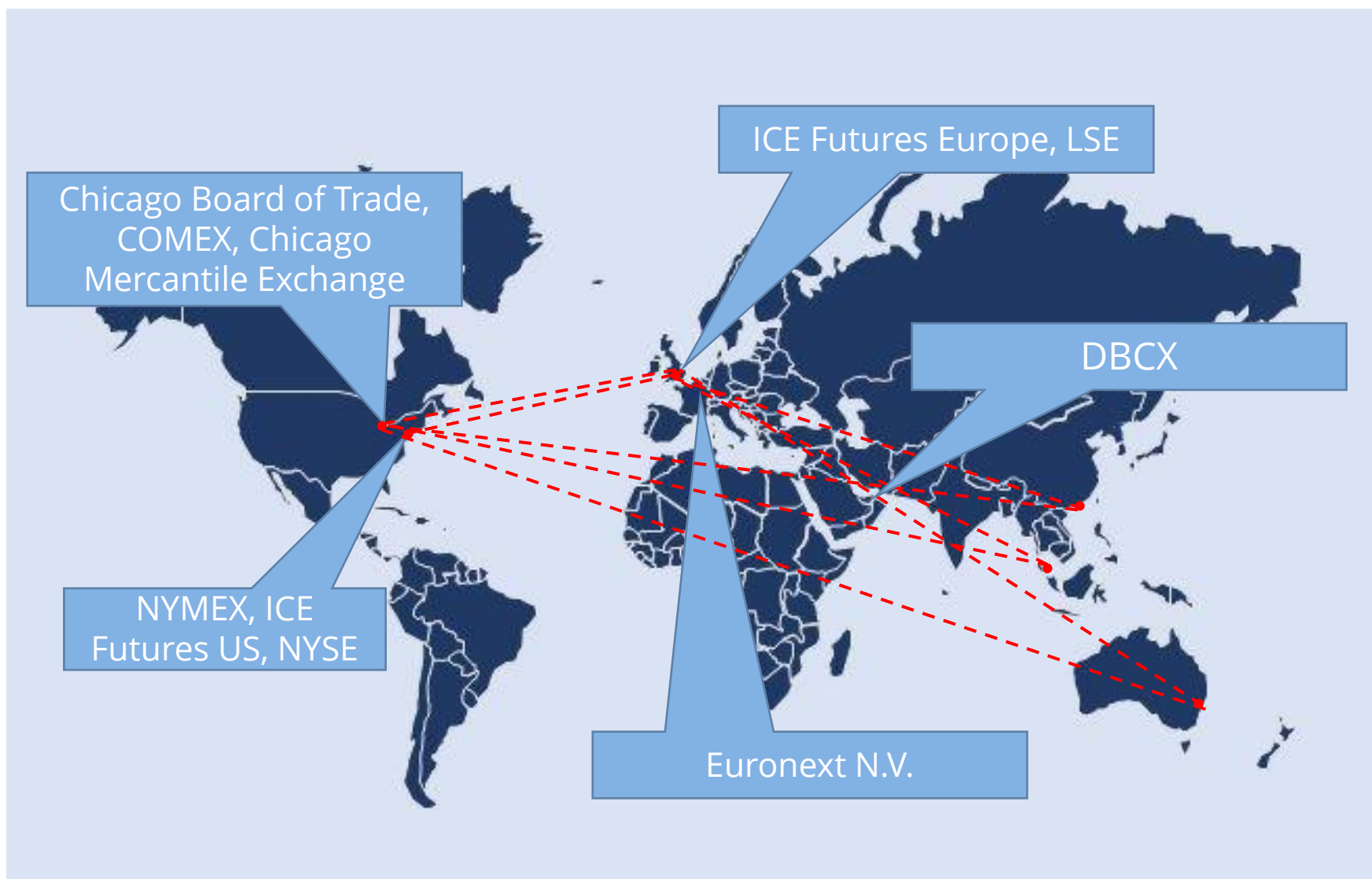
- UK→
 - Financial Services Act 2012 sec. 89, 90
 - Fraud Act 2006 sec. 2
 - Market Abuse Regulation Art. 15

- EU→
 - Regulation No. 596/2014
 - Regulation on Wholesale Energy Market Integrity and Transparency (REMIT) Art. 5

Public and Private Market Regulators



Global Jurisdiction



Key Regional Regulators



Dubai Gold & Commodities Exchange (DBCX)

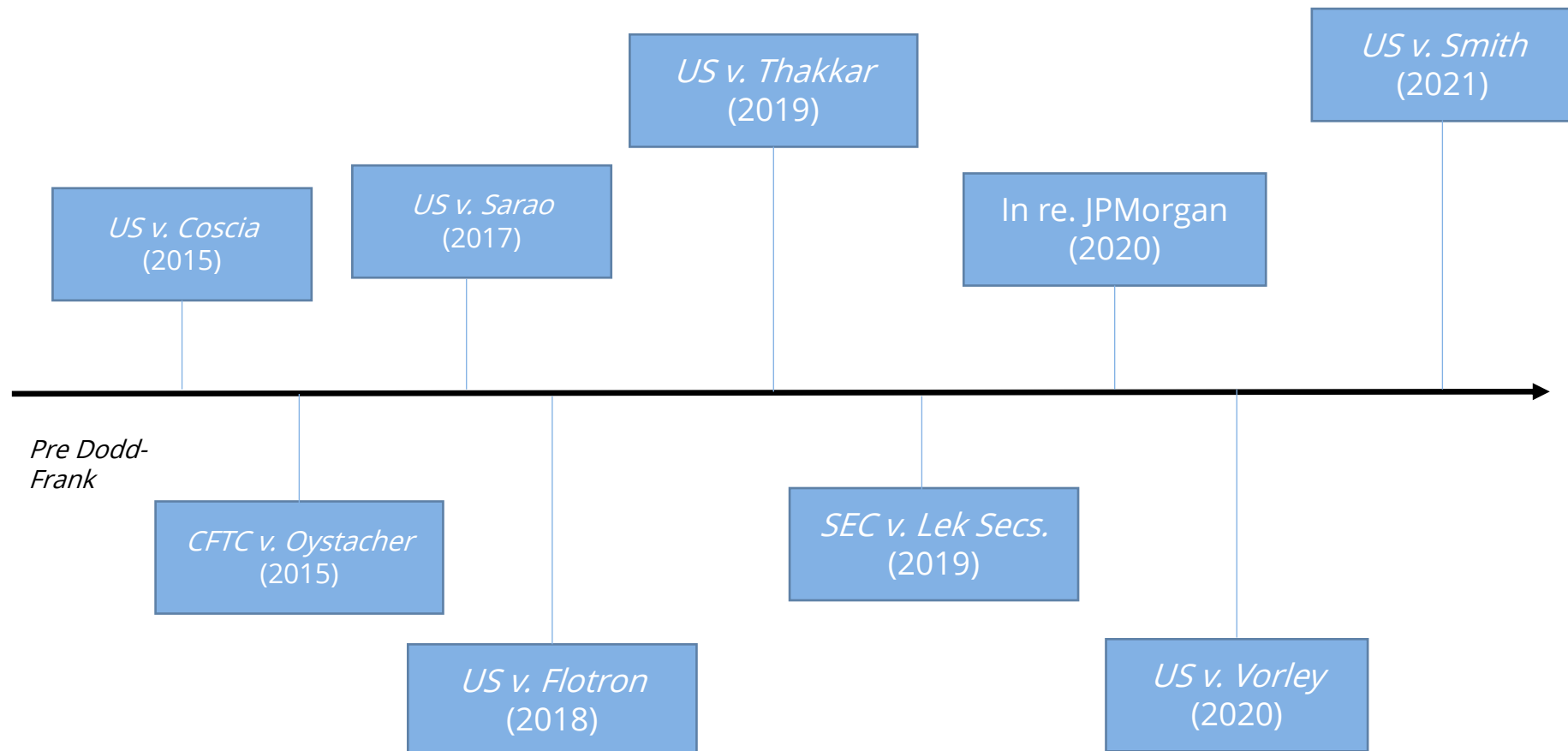
- A subsidiary of Dubai Multi Commodities Centre (DMCC), a strategic initiative of Dubai's government
- 267 Members from the Middle East, India, US, UK, EU
- Allows trading in futures tied to currencies, equities, oil and gas, metals
- Prohibits spoofing in bylaws (§D.3(h))
- Robust internal investigation and sanction functions



Netherlands Authority for the Financial Markets (AFM)

- The Dutch equivalent of the SEC/FCA, responsible for regulating conduct on financial markets in the Netherlands
- Empowered to enforce EU Market Abuse Regulation (MAR) with monetary penalties, trading bans, and injunctions
- Oversees trading on Euronext Amsterdam, a major futures trading hub
- Works in tandem with the Dutch Public Prosecutor on market activity that violates Dutch Penal Code

Evolution of Spoofing Prosecutions in the US





The British Regulatory Approach

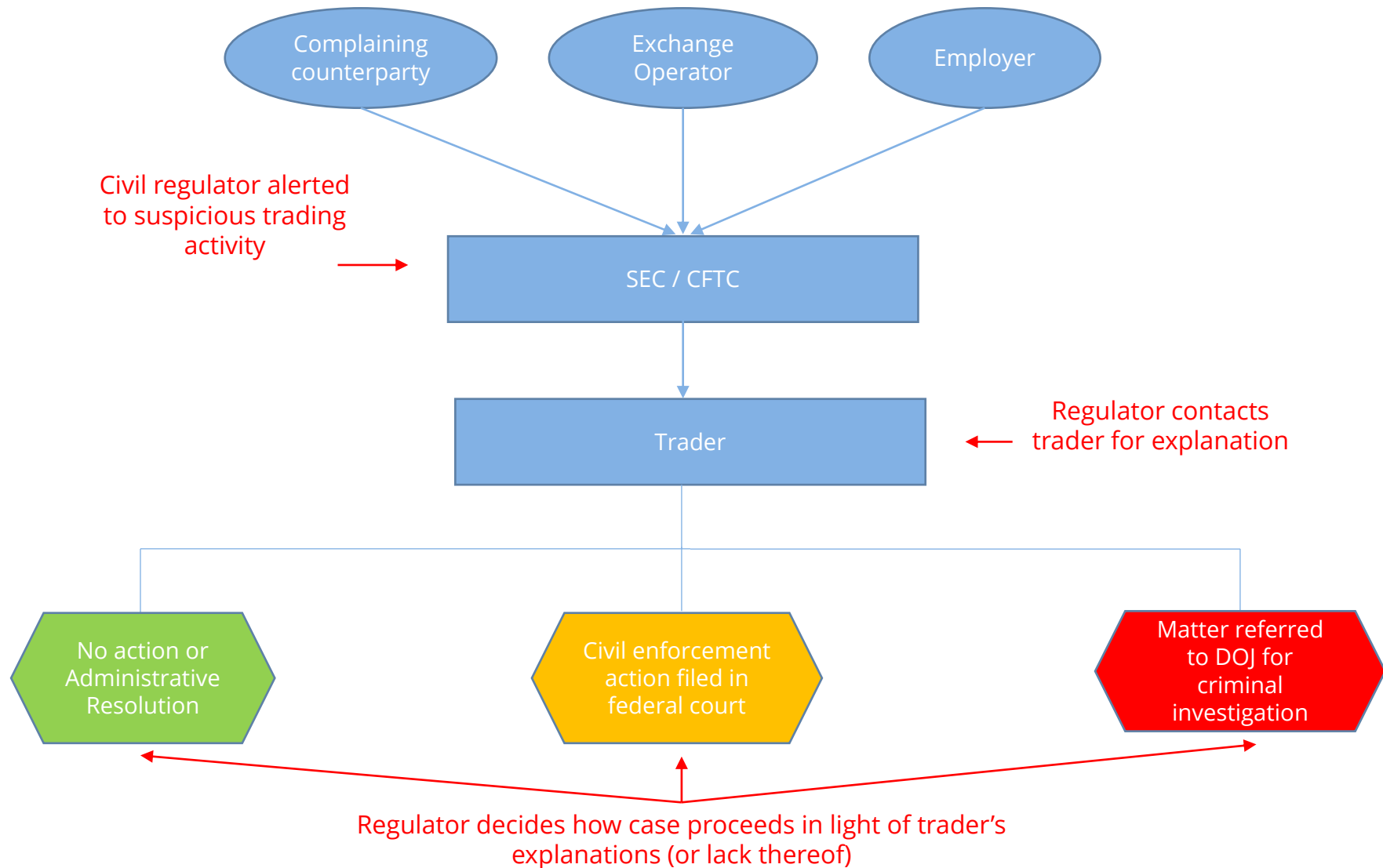
- FSA v Swift Trade (2011)
- FCA v. Michael Coscia (2013)
- FCA v Da Vinci Invest Limited (2015)
- Ofgem v Engie Global Markets (2019)
- FCA v Corrado Abbattista (2020)



Market Manipulation in the EU

- Regulation 596/2014
 - A focus on cross-market manipulation between spot and derivative trading
- Spotlight on manipulation in the energy sector
 - 2019 guidance from ACER
- Euronext N.V. →
 - Operates 5 derivatives markets (Amsterdam, Brussels, Lisbon, Oslo, Paris) and 6 securities markets (+Dublin)
 - Implements a “harmonized Rule Book” in all jurisdictions, with regional variations imposed by national market authorities
 - Spoofing prohibited by Rule 8104(1)(iv)

Steps in a Typical Spoofing Investigation





Lessons learned from the Flotron Acquittal

- Importance of DOJ's charging theory
 - Spoofing v. commodities fraud
 - § 371 v. § 1349
- DOJ's core evidence
- Challenging the "victims"
- Undermining DOJ's co-operators
- Using the law's ambiguities to challenge intent
- Advantages of a Speedy Trial



Poking Holes in the Government's Theories

- What is “fake” liquidity?
- Man v. machine
 - Is it fraud to anticipate a counterparty's reaction?
 - Can a computer program be “tricked”?
- Slicing and dicing trade data
- Questionable loss calculations
- “Fair value” v. “market value”
- Alternative explanations for trade data patterns



Unique Challenges for Defendants in Spoofing Cases

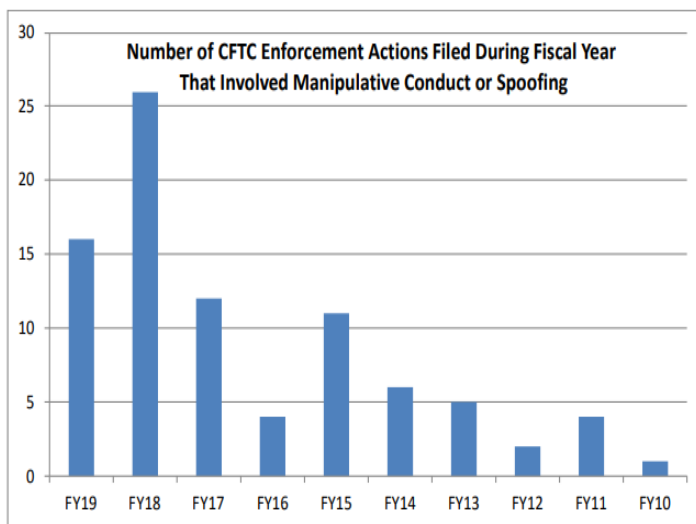
- How to process / analyze voluminous trade and market data
- Explaining complex trading strategies to juries
- A “battle of experts” to prove / disprove intent from data analysis
- Obtaining a “victim’s” trading algorithm
- Overcoming difficult chats



“Non-Traditional” Spoofing Theories

- CFTC’s “vacuuming” theory against Hard Eight Futures LLC
- Stand-alone spoofs?
- *SEC v. Lek Securities*
- *SEC v. Chen*
- *US v. Smith*

What to Expect from the New Administration



Monetary Relief Ordered In CFTC Enforcement Actions

Fiscal Year	Total Monetary Relief Ordered
FY19	\$1,321,046,710
FY18	\$947,278,038
FY17	\$412,816,307
FY16	\$1,292,310,528
FY15	\$3,202,940,849
FY14	\$3,272,978,947
FY13	\$1,772,109,976
FY12	\$931,942,825
FY11	\$498,527,486
FY10	\$201,563,915
FY09	\$275,674,718



Takeaways for Traders and Trading Firms

- Preserve contemporaneous evidence of trading strategies
- Understand what trading patterns regulators are looking for
- Anyone trading on US or UK markets is subject to enforcement action there, regardless of physical location
- The US government will target even solo traders and small trading firms located overseas
- Beware of taking affirmative steps to avoid order execution
- Be cognizant of order/fill ratios
- Be wary of discussing trade strategies with other market participants