

# EXPANDING THE REACH OF THE COMMODITY EXCHANGE ACT'S ANTITRUST CONSIDERATIONS

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## I. INTRODUCTION

Many of the world's largest banks have, over the past few years, paid billions of dollars to settle multiple civil and criminal government enforcement actions and private lawsuits alleging that bank employees conspired with their competitors to stifle competition in the derivatives markets and fix the benchmarks for, among other things, interest rates and foreign exchange rates that serve as critical reference points and price components to everything from trillions of dollars in consumer loans to financial derivatives.<sup>1</sup> Derivatives, so named because their value derives from a reference asset, rate, or other item,<sup>2</sup> include futures contracts, which are agreements to purchase or sell commodities for delivery in the future at prices that are determined at the initiation of the contracts,<sup>3</sup> and swaps, which are agreements to swap (exchange) payment streams at regular intervals based on different factors or

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1. For an illustrative, but not exhaustive, list of the settlements for such actions, see *infra* Tables 1–12.

2. See Kelly S. Kibbie, *Dancing with the Derivatives Devil: Mutual Funds' Dangerous Liaison with Complex Investment Contracts and the Forgotten Lessons of 1940*, 9 HASTINGS BUS. L.J. 195, 196 n.1 (2013) ("Derivatives are broadly defined as financial instruments whose value is derived from other variables (referred to as 'reference assets' or 'underliers').").

3. See Jerry W. Markham, *Manipulation of Commodity Futures Prices—The Unprosecutable Crime*, 8 YALE J. ON REG. 281, 282 n.1 (1991).

formulas.<sup>4</sup> Over-the-counter (“OTC”), meaning not traded on an exchange,<sup>5</sup> derivatives have been a lucrative business for large, global banks, which have tended to dominate many derivatives markets, sometimes even to the point of oligopoly.<sup>6</sup>

By forming cartels to rig benchmarks that served as components of the prices of derivatives, banks could reduce the amounts they had to pay their trading counterparties, such as pension funds, municipalities, and university endowment funds, or increase the amount their counterparties had to pay them.<sup>7</sup> For example, in a typical fixed-for-floating interest rate swap, one person pays a fixed interest rate at regular intervals in exchange for a floating interest rate that resets periodically based on a benchmark interest rate, such as a specified percentage above the U.S. dollar London interbank offered rate (“LIBOR”).<sup>8</sup> Accordingly, moving LIBOR up or down would correspondingly increase or decrease the amount that the counterparty paying the floating leg of an interest rate swap would have to pay.<sup>9</sup> Even moving LIBOR by a small amount, such as one basis point—or one hundredth of a percent (0.01%)—can significantly impact swap payment amounts.<sup>10</sup> Although many people are aware of how LIBOR and other benchmark interest rates affect the payment amounts in connection with trillions of dollars in home loans, student loans, and credit card debt,<sup>11</sup>

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4. MICHAEL DURBIN, *ALL ABOUT DERIVATIVES* 29-33 (rev. 2d ed. 2011).

5. See ANDREW M. CHISHOLM, *DERIVATIVES DEMYSTIFIED: A STEP-BY-STEP GUIDE TO FORWARDS, FUTURES, SWAPS AND OPTIONS 1* (2d ed. 2010).

6. See *infra* Part III.A.

7. See *In re LIBOR-Based Fin. Instruments Antitrust Litig.*, 935 F. Supp. 2d 666, 682-83 (S.D.N.Y. 2013); Press Release, European Comm’n, Antitrust: Commission Fines Banks €1.49 Billion for Participating in Cartels in the Interest Rate Derivatives Industry (Dec. 4, 2013), [http://europa.eu/rapid/press-release\\_IP-13-1208\\_en.htm](http://europa.eu/rapid/press-release_IP-13-1208_en.htm) (“The levels of these benchmark rates may affect either the cash flows that a bank receives from a counterparty, or the cash flow it needs to pay a counterparty under interest-rate derivatives contracts.”).

8. See *Adjustable Rate and Home Equity Conversion Mortgages—Additional Index*, 72 Fed. Reg. 40,048, 40,049 (July 20, 2007) (to be codified at 24 C.F.R. pt. 203 and 206) (providing the definition of a swap and giving an example of an interest rate swap); 31 SAMUEL WILLISTON & RICHARD A. LORD, *A TREATISE ON THE LAW OF CONTRACTS* § 78:18 (4th ed. 2009) (describing an interest rate swap).

9. See *Gelboim v. Bank of Am. Corp.*, 823 F.3d 759, 765 (2d Cir. 2016).

10. For example, a derivatives trader could make as much as \$3 million due to moves of one basis point in LIBOR. Philip Stafford et al., *ICAP Agrees to Pay £55m to Settle Libor Claims*, *FIN. TIMES* (Sept. 25, 2013), <https://www.ft.com/content/885dc438-2522-11e3-9b22-00144feab7de>.

11. Sharon E. Foster, *Harm to Competition and the Competitive Process: A Circular Charade in the LIBOR Antitrust Litigation*, 10 *BYU INT’L L. & MGMT. REV.* 91, 91-92 (2014) (“Libor is an interest rate benchmark used by about 75% of interest rate sensitive financial products around the world. Control of the benchmark equates to control of the price of interest.”); Liam Vaughan, *Libor Lowballing Never Ended as Global Probes Accelerated*, *BLOOMBERG* (Dec. 7, 2014, 7:01 PM), <http://www.bloomberg.com/news/articles/2014-12-08/libor-lowballing-never-ended-as-global-probes-accelerated> (“Libor is used in more than an estimated \$300 trillion of securities, from

the public is understandably less informed about the role of benchmark interest rates in calculating the payment streams for interest rate swaps and other interest rate derivatives. But make no mistake, the markets for derivatives are an important part of the global economy. The market for OTC interest rate derivatives is enormous, with OTC interest rate derivatives contracts totaling \$384 trillion in 2015 (\$289 trillion of which were swaps) and representing seventy-eight percent of the OTC derivatives market.<sup>12</sup>

During the relevant time, LIBOR was supposed to represent the average interest rate at which a designated panel of banks could borrow unsecured funds in the interbank market in London.<sup>13</sup> Panels of banks with approximately eleven to eighteen members submitted LIBOR numbers each day that were supposed to reflect the rate at which the banks could borrow unsecured funds in the interbank market in the relevant currency.<sup>14</sup> LIBOR and related benchmark interest rates are issued daily for multiple currencies, including U.S. dollar, euro, and yen, in fifteen tenors (durations for interest rates), ranging from overnight to twelve months, with one, three, and six months being the most common tenors referenced in LIBOR-indexed derivatives and transactions.<sup>15</sup> Under the rules that governed LIBOR submissions at the time, each panel bank was to independently submit an interest rate based upon its own knowledge of market conditions and its ability to borrow. The submissions were to remain confidential until after LIBOR was computed and published, at which point all sixteen individual submissions would be published with the final daily rate.<sup>16</sup> Although the various LIBOR interest rates were set jointly, the banks were horizontal competitors in selling and buying derivatives and other financial instruments that were premised, to some extent, on LIBOR.<sup>17</sup> As a result, the benchmark interest rate-rigging conspiracies and schemes by banks

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interest-rate swaps to mortgages and student loans.”).

12. MONETARY & ECON. DEP'T, BANK FOR INT'L SETTLEMENTS, STATISTICAL RELEASE: OTC DERIVATIVES STATISTICS AT END-DECEMBER 2015, at 3 (2016), [http://www.bis.org/publ/otc\\_hy1605.pdf](http://www.bis.org/publ/otc_hy1605.pdf).

13. *Gelboim*, 823 F.3d at 764.

14. The U.S. dollar LIBOR having a panel of sixteen banks. *Id.* at 765.

15. *See In re RP Martin Holdings Ltd.*, CFTC No. 14-16, 2014 WL 2003211, at \*3 (May 15, 2014).

16. *Gelboim*, 823 F.3d at 765-66. From 1986 to February 1, 2014, LIBOR was set under the auspices of the British Bankers' Association (“BBA”) a private trade association for the financial-services sector in the United Kingdom. *See id.* at 765; *In re RP Martin Holdings*, 2014 WL 2003211, at \*3 n.3.

17. *Gelboim*, 823 F.3d at 766.

violated U.S. antitrust laws through “the warping of market factors affecting the prices for LIBOR-based financial instruments.”<sup>18</sup>

From approximately 2005 to 2012, employees at several of the world’s largest banks and interdealer brokers conspired internally, with their co-workers, and externally, with employees at competing banks and interdealer brokers, to rig LIBOR and other benchmark interest rates of various tenors and currencies by coordinating their submissions to panels that set those rates.<sup>19</sup> The employees communicated through emails, electronic instant messages, and telephone calls, with the electronic communications containing many abbreviations, trader jargon, misspellings, grammatical errors, varying degrees of capitalization, and, in some cases, expletives.<sup>20</sup> Derivatives traders routinely asked LIBOR submitters at their own banks and competing banks to change the interest rates that would be submitted to LIBOR-setting panels.<sup>21</sup> The traders would seek to fix LIBOR rates and other benchmarks when they had derivatives trading positions that were scheduled to reset and whose payment amounts were tied to the benchmarks.<sup>22</sup> Additionally, during the financial crisis, some bank LIBOR submitters artificially lowered LIBOR rates out of fear that submitting high rates would indicate the banks that employed them could not borrow unsecured funds from other banks at low interest rates and, therefore, were on shaky financial footing.<sup>23</sup>

One of the most active conspirators in rigging LIBOR and related benchmark interest rates was Tom A.W. Hayes, who was the senior yen trader for the Tokyo office of the Swiss bank, UBS AG (“UBS”), and later for Citibank, during much of the relevant time period.<sup>24</sup> Hayes is

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18. *Id.* at 776.

19. See DAVID HOU & DAVID SKEIE, FED. RESERVE BANK OF N.Y., STAFF REPORT NO. 667, LIBOR: ORIGINS, ECONOMICS, CRISIS, SCANDAL, AND REFORM 6-10 (2014), [https://www.newyorkfed.org/medialibrary/media/research/staff\\_reports/sr667.pdf](https://www.newyorkfed.org/medialibrary/media/research/staff_reports/sr667.pdf); Ben Protess & Mark Scott, *Guilty Plea and Big Fine for Bank in Rate Case*, N.Y. TIMES, Feb. 7, 2013, at B1.

20. See Michael Corkery & Ben Protess, *Banks Admit Scheme to Rig Currency Price*, N.Y. TIMES, May 21, 2015, at A1; Lorcan Roche Kelly & Suzi Ring, *The Most Cringeworthy Chat Messages from the Deutsche Bank Libor Transcripts*, BLOOMBERG (Apr. 23, 2015, 9:39 AM), <http://www.bloomberg.com/news/articles/2015-04-23/the-most-cringeworthy-chat-messages-from-the-deutsche-bank-libor-transcripts>.

21. Brooke Masters, *Errant Banks Perfect the Waiting Game*, FIN. TIMES (May 27, 2016), <https://next.ft.com/content/6f786722-2400-11e6-aa98-db1e01fab0c>.

22. See, e.g., *In re ICAP Eur. Ltd.*, CFTC No. 13-38, 2013 WL 5409329, at \*16-18, \*33-34 (Sept. 25, 2013).

23. HOU & SKEIE, *supra* note 19, at 6.

24. In the CFTC settlements with UBS, Citibank, and other entities, Hayes is not named but simply referred to as the “Senior Yen Trader” at UBS or Citibank depending on the period referenced. See, e.g., *In re UBS AG*, CFTC No. 13-09, 2012 WL 6642376, at \*12 (Dec. 19, 2012). Hayes’s identity was revealed, however, during his criminal trial and in news reports on the

currently serving an eleven-year prison sentence in the United Kingdom for rigging benchmark interest rates during his time at UBS and Citibank.<sup>25</sup> Examples of electronic conversations that Hayes had with employees at interdealer brokers and competing banks, which were made public in settlements between government authorities and UBS, Citibank, and other financial institutions, illustrate how the bank and interdealer broker employees colluded to rig benchmark interest rates. For example, on January 19, 2007, Hayes communicated with a trader at a competitor bank: “hi . . . , *bit cheeky but* if you know who sets your libors and you aren’t the other way I have some *absolutely massive [three-month LIBOR] fixes*. . . . *Anytime i [sic] can return the favour let me know as the guys here are pretty accommodating to me.*”<sup>26</sup> The trader at the competitor bank responded: “I will try my best.”<sup>27</sup> On April 20, 2007, Hayes asked a trader at a competitor bank: “*i [sic] know i [sic] only talk to you when i [sic] need something but if you could ask your guys to keep [the three-month LIBOR] low wd [sic] be massive help as long as it doesn’t interfere with your stuff*. . . . *mate did you manage to spk [sic] to your cash boys?*”<sup>28</sup> The other trader responded to Hayes: “*yes u [sic] owe me*. . . .”<sup>29</sup> Then, on June 29, 2007, Hayes contacted the same trader: “*if you could go high from monday [sic] for next week that wld be graet [sic] as i [sic] have 1.5 [trillion] notional fixings in [six-month LIBOR] next week! ie [sic] 75 [million Japanese yen] a [basis] point.*”<sup>30</sup> The trader replied: “*wow ok then.*”<sup>31</sup> As one last example,<sup>32</sup> on

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benchmark interest rate-rigging scandal. See, e.g., David Enrich & Jean Eaglesham, *Clubby London Trading Scene Fostered Libor Rate-Fixing Scandal*, WALL ST. J. (May 2, 2013, 7:37 AM), <http://www.wsj.com/articles/SB10001424127887323296504578396670651342096>; Lindsay Fortado, *Libor Trader Tom Hayes Denied Appeal*, FIN. TIMES (Mar. 8, 2016), <https://next.ft.com/content/d4b7b30e-e52b-11e5-bc31-138df2ae9ee6#myft:notification:daily-email>; Liam Vaughan, *Don’t ‘Put It in Writing,’ Hayes Told Colleague at Citigroup*, BLOOMBERG (Nov. 3, 2015, 8:49 AM), <http://www.bloomberg.com/news/articles/2015-11-03/don-t-put-it-in-writing-hayes-told-colleague-at-citigroup>.

25. Masters, *supra* note 21.

26. *In re UBS AG*, 2012 WL 6642376, at \*16.

27. *Id.*

28. *Id.* at \*17.

29. *Id.*

30. *Id.*

31. *Id.*

32. Indeed, this Article only provides a small sampling of the types of inappropriate chat messages, emails, and recorded conversations by bank and interdealer broker employees in connection with the benchmark rate-rigging scandals. For further examples of such communications, see the various settlement agreements between the CFTC and banks *infra* notes 489-504 and accompanying text; and see also ERIN ARVEDLUND, OPEN SECRET: THE GLOBAL BANKING CONSPIRACY THAT SWINDLED INVESTORS OUT OF BILLIONS 36-45 (2014); and BRANDON L. GARRETT, TOO BIG TO JAIL: HOW PROSECUTORS COMPROMISE WITH CORPORATIONS 250-52 (2015).

September 18, 2008, Hayes shared a communication with a Deutsche Bank trader, who also was the yen LIBOR submitter, “you got any ax on [six-month yen LIBOR] fix tonight?”<sup>33</sup> The Deutsche Bank trader-submitter responded, “absolutely none but I can help.”<sup>34</sup> Hayes asked, “*can you set low as a favor for me?*”<sup>35</sup> The trader-submitter answered, “*done,*” to which Hayes said, “*i’ll [sic] return favour when i [sic] can just ask.*”<sup>36</sup>

The misconduct was not limited to Hayes. In an electronic chat on March 22, 2005, a Deutsche Bank U.S. dollar LIBOR submitter explained how he would be willing to manipulate benchmark interest rates for a trader in New York:

[I]f you need something in particular in the libors i.e. you have an interest in a high or a low fix let me know and there’s a high chance i’ll [sic] be able to go in a different level. Just give me a shout the day before or send an email from your blackberry first thing.<sup>37</sup>

One trader with the Royal Bank of Scotland summed up the situation as such: “It’s just amazing how Libor fixing can make you that much money . . . it’s a cartel now in London.”<sup>38</sup> In another instant message conversation, a LIBOR submitter at the Royal Bank of Scotland agreed to accommodate an internal request for lower LIBOR submissions and then compared himself to “a whores [sic] drawers” because he moved his LIBOR submissions up and down depending on the LIBOR rate requests that he received.<sup>39</sup>

Although many of the participants of the benchmark rate-rigging schemes worked for global systemically important banks, or their affiliates, two London-based interdealer brokers, ICAP Europe Limited (“ICAP”) and RP Martin Holdings Limited (“RP Martin”), played pivotal roles in facilitating the benchmark rate-rigging cartels.<sup>40</sup> Interdealer brokers did not sit on the panels that determine benchmark

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33. *In re Deutsche Bank AG*, CFTC No. 15-20, 2015 WL 1874880, at \*16 (Apr. 23, 2015).

34. *Id.*

35. *Id.*

36. *Id.*

37. Press Release, Dep’t of Justice, Deutsche Bank’s London Subsidiary Agrees to Plead Guilty in Connection with Long-Running Manipulation of LIBOR (Apr. 23, 2015), <https://www.justice.gov/opa/pr/deutsche-banks-london-subsidiary-agrees-plead-guilty-connection-long-running-manipulation>.

38. Ben McLannahan, *US Court Opens Door over Libor Claims*, FIN. TIMES (May 23, 2016), <https://next.ft.com/content/874120ce-2135-11e6-aa98-db1e01fab0c>.

39. Dealbook, *The Things Traders Say, R.B.S. Edition*, N.Y. TIMES (Feb. 6, 2013, 9:32 AM), [http://dealbook.nytimes.com/2013/02/06/the-things-traders-say-r-b-s-edition/?\\_f=0](http://dealbook.nytimes.com/2013/02/06/the-things-traders-say-r-b-s-edition/?_f=0).

40. See *In re RP Martin Holdings Ltd.*, CFTC No. 14-16, 2014 WL 2003211, at \*4-5 (May 15, 2014); *In re ICAP Eur. Ltd.*, CFTC No. 13-38, 2013 WL 5409329, at \*5-8 (Sept. 25, 2013).

interest rates, but they interacted with employees at different banks on a daily basis in their capacity as interbank intermediaries, that assist banks in finding buyers and sellers for financial products at other investment banks or dealers, which made them ideal conduits for market information for their bank clients.<sup>41</sup> As a result, interdealer brokers such as ICAP and RP Martin were perfectly situated to help their favored bank clients manipulate benchmark interest rates by asking LIBOR-rate submitters at other panel banks to move their benchmark interest rate submissions up, down, or hold them steady.<sup>42</sup> To benefit the derivatives trading positions of Hayes, who was one of RP Martin's most important clients, RP Martin brokers encouraged submitters on panel banks to skew their yen LIBOR submissions in exchange for beer, sandwiches, and even entertainment in Las Vegas.<sup>43</sup> Hayes gained the loyalty and cooperation of RP Martin brokers by making payments to them via "wash trades" (illegal under both U.S. securities and derivatives laws)<sup>44</sup> in which Hayes would be the opposing counterparty on identical trades with others that resulted in a financial nullity for the counterparties but that generated significant commissions for RP Martin yen brokers.<sup>45</sup>

The RP Martin brokers and Hayes openly discussed payoffs in the form of commissions from wash trades in exchange for the RP Martin brokers helping Hayes manipulate LIBOR by influencing the LIBOR submissions of other banks.<sup>46</sup> In one recorded telephone call on September 18, 2008, Hayes promised to pay an RP Martin broker with wash trades commissions worth \$50,000, or even \$100,000, if the RP Martin broker helped to keep the six-month yen LIBOR low.<sup>47</sup> Specifically, Hayes said:

Mate, right, listen. I don't care right just get me any f\*cking trade which pays you basically today, mate. If if [sic] you keep [six-month

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41. Kara Scannell et al., *Court Papers Reveal Libor Broker Called Banks 'Sheep,'* FIN. TIMES (U.K.), Sept. 26, 2013, at 19; Stafford et al., *supra* note 10; Philip Stafford, *Q&A: Interdealer Brokers*, FIN. TIMES (Sept. 25, 2013), <https://www.ft.com/content/038943a6-25bb-11e3-8ef6-00144feab7de>.

42. *In re RP Martin Holdings*, 2014 WL 2003211, at \*2, \*18; James Moore & Oliver Wright, *'Let's Discuss Kickbacks over Lunch': Tory Donor's Firm Fined £55m over Libor Fixing*, INDEPENDENT (UK) (Sept. 25, 2013), <http://www.independent.co.uk/news/business/news/lets-discuss-kickbacks-over-lunch-tory-donors-firm-fined-55m-over-libor-fixing-8839198.html>.

43. See Caroline Binham & Gina Chon, *RP Martin Fined \$2.3m in Libor Probe*, FIN. TIMES (May 15, 2014), <https://next.ft.com/content/e6aa5f8c-dc2a-11e3-a33d-00144feabdc0>.

44. See Gregory Scopino, *Do Automated Trading Systems Dream of Manipulating the Price of Futures Contracts? Policing Markets for Improper Trading Practices by Algorithmic Robots*, 67 FLA. L. REV. 221, 265-68 (2015).

45. *In re RP Martin Holdings*, 2014 WL 2003211, at \*12-13.

46. *Id.*

47. *Id.* at \*12.

LIBOR] unchanged today, yeah . . . I will f\*cking do one humongous deal with you. All right? . . . Like a 50,000 buck deal, whatever . . . I need you to keep it as low as possible. All right? If you do that . . . I'll pay you, you know, \$50,000, \$100,000, whatever it whatever [sic] you want. All right?"<sup>48</sup>

After receiving that call on September 18, 2008, from Hayes, the RP Martin yen broker contacted a yen LIBOR submitter at another bank and asked him to lower his yen LIBOR submission for the day: "*if you could get [six-month yen LIBOR submission] a little lower today, I've got, um, someone that's going to do a huge trade with me today if the if the [sic] [six-month yen LIBOR] don't [sic] go up too much.*"<sup>49</sup> Needless to say, this was not how yen LIBOR submissions were supposed to be determined. As this Article discusses, above, a bank's yen LIBOR submission was supposed to represent the rate at which the bank could borrow unsecured funds in yen in the interbank market.

Hayes also was an important client of the interdealer broker ICAP, and brokers at ICAP likewise helped Hayes collude with other banks to rig benchmark interest rates. ICAP brokers communicated on a daily basis with the banks that participated in the yen LIBOR panel and offered to buy LIBOR submitters at banks Indian curries, champagne, and steak in exchange for help rigging yen-denominated benchmark interest rates for the benefit of Hayes's trading positions.<sup>50</sup> For example, on October 23, 2006, one ICAP broker told another broker: "[I]f possible keep [three-month LIBOR] the same and get [six-month LIBOR] as high as you can. My guy has an enormous fix on Wednesday in [six-month LIBOR] and will want it as high as possible."<sup>51</sup> One yen broker at ICAP, who named himself, "Lord Libor," told his supervisor that he should be compensated for help rigging LIBOR, saying, "How about some form of performance bonus per quarter from your . . . bonus pool to me for the libor service."<sup>52</sup> The supervisor suggested that he take his subordinate to lunch: "As for kickbacks etc., we can discuss that at

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48. *Id.*

49. *Id.* at \*13.

50. See *In re ICAP Eur. Ltd.*, CFTC No. 13-38, 2013 WL 5409329, at \*9-11 (Sept. 25, 2013) (describing email exchanges between Hayes, referred to as "Senior Yen Trader," and other brokers at the bank); *ICAP Libor Rigging Scandal Emails: Curry or Ferrari, M'Lord?*, TELEGRAPH (U.K.) (Sept. 25, 2013, 4:28 PM), <http://www.telegraph.co.uk/finance/libor-scandal/10334143/ICAP-Libor-rigging-scandal-emails-Curry-or-Ferrari-Mlord.html>. ICAP brokers also helped rig benchmark interest rates for traders at other banks, although Hayes was clearly one of their most important clients during the relevant time. *In re ICAP Eur. Ltd.*, 2013 WL 5409329, at \*12-13.

51. Lina Saigol & Gina Chon, *Libor: The Email Trail*, FIN. TIMES (Sept. 25, 2013), <https://www.ft.com/content/cefd67a0-25df-11e3-ae8-00144feab7de>.

52. *In re ICAP Eur. Ltd.*, 2013 WL 5409329, at \*16-17.

lunch and I will speak to [Hayes, the Senior Yen Trader at UBS] about it next time when he comes up for a chat.”<sup>53</sup> Lord Libor’s demands appear to have been met, as later he began receiving regular quarterly payments of more than £5000.<sup>54</sup> As the examples have shown, ICAP brokers would, inter alia, ask employees at LIBOR panel banks—either LIBOR submitters or those who knew the LIBOR submitters—to skew their rate submissions.<sup>55</sup> In short, ICAP brokers frequently coordinated with derivatives traders at yen LIBOR panel banks to manipulate the official yen LIBOR fixings for certain tenors by getting panel banks to make yen LIBOR submissions at rates that would benefit the positions of derivatives traders who, like Hayes, were ICAP’s clients.<sup>56</sup> During the relevant time, ICAP received two million euros in brokerage fees from Hayes.<sup>57</sup> By colluding with other banks and interdealer brokers to fix the benchmark interest rates that served as components of the prices of interest rate swaps and other derivatives, the competitor banks and their interdealer broker accomplices had engaged in a horizontal price-fixing cartel.<sup>58</sup> Such cartels are strictly prohibited under U.S. antitrust laws.<sup>59</sup>

Cartels involving some of the world’s largest banks also are accused of stifling competition in the market for credit default swaps—which are swaps “whose payoffs are derived from the occurrence or non-occurrence of a ‘credit event’ of some reference entity or entities, such as the bankruptcy of an identified corporation”<sup>60</sup>—and of rigging

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53. *Id.* at \*17.

54. Kara Scannell et al., *Court Papers Tell How ‘Lord Libor’ Wanted More*, FIN. TIMES (Sept. 25, 2013), <https://www.ft.com/content/abd442f0-2600-11e3-8ef6-00144feab7de>.

55. *In re ICAP Eur. Ltd.*, 2013 WL 5409329, at \*12-14, \*33-34.

56. *Id.* at \*34.

57. Caroline Binham et al., *‘Lord Libor’ Trio Put ICAP at Heart of Rate-Rigging Scandal*, FIN. TIMES, Sept. 24, 2013, at 1.

58. *Gelboim v. Bank of Am. Corp.*, 823 F.3d 759, 771 (2d Cir. 2016) (“LIBOR forms a component of the return from various LIBOR-denominated financial instruments, and the fixing of a component of price violates the antitrust laws.”); see Foster, *supra* note 11, at 102 (“LIBOR manipulation determines price by collusive, nonfree market agreements—it is horizontal price fixing.”); Sharon E. Foster, *LIBOR Manipulation and Antitrust Allegations*, 11 DEPAUL BUS. & COM. L.J. 291, 292 (2013).

59. See 1 JULIAN O. VON KALINOWSKI, ANTITRUST COUNSELING AND LITIGATION TECHNIQUES § 7.04[1] (rev. ed. 2016) (“Agreements among competitors to fix prices are illegal per se regardless of whether the set price is a maximum or minimum, a stabilized price, an element of price, a method of pricing, a price to bid, a price set by a settlement agreement, a joint selling arrangement, or a rate-making agreement.”); see also Simon Twigden et al., *LIBOR Claims: A Silver Bullet or a Nuclear Assault?*, 7 DISP. RESOL. INT’L 55, 59 (2013) (“Cartels are considered the most egregious form of illegal conduct under competition law.”). Additionally, if competition as to one component of a price is removed by collusive conduct, this is viewed as improperly “extinguishing one form of competition among the sellers.” *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 649 (1980) (per curiam).

60. Timothy E. Lynch, *Derivatives: A Twenty-First Century Understanding*, 43 LOY. U. CHI.

another interest rate benchmark, the International Swaps and Derivatives Association (“ISDA”) fix (collectively “ISDAfix”),<sup>61</sup> as well as benchmarks for foreign exchange (“forex”) rates<sup>62</sup> and the prices of gold and silver.<sup>63</sup> Government authorities across the globe have brought civil and criminal actions against the perpetrators of these schemes, generally invoking antifraud and antitrust statutes.<sup>64</sup>

The first government regulator to investigate and pursue financial entities that were rigging benchmark rates was the Commodity Futures Trading Commission (“CFTC”),<sup>65</sup> the U.S. regulator of the markets for futures, swaps, and other derivatives pursuant to the Commodity Exchange Act (“CEA”).<sup>66</sup> The CFTC settled the first LIBOR benchmark rate-rigging case with Barclays in 2012.<sup>67</sup> At the time of this writing, nine financial entities have reached settlements with the CFTC for rigging LIBOR and related benchmark interest rates, and six have settled with the CFTC for rigging forex benchmark rates.<sup>68</sup> To be sure, British, Swiss, Japanese, and European Union authorities, not to mention the U.S. Department of Justice (“DOJ”), have also reached settlements with banks and other financial entities for rigging these benchmarks,<sup>69</sup> but the CFTC has been at the forefront of efforts to investigate and

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L.J. 1, 22 (2011).

61. See, e.g., *Alaska Elec. Pension Fund v. Bank of Am. Corp.*, 175 F. Supp. 3d 44, 51-52 (S.D.N.Y. 2016).

62. See, e.g., *In re Foreign Exch. Benchmark Rates Antitrust Litig.*, 74 F. Supp. 3d 581, 586-88 (S.D.N.Y. 2015); Corkery & Protess, *supra* note 20; Press Release, Dep’t of Justice, Five Major Banks Agree to Parent-Level Guilty Pleas (May 20, 2015), <https://www.justice.gov/opa/pr/five-major-banks-agree-parent-level-guilty-pleas>.

63. See Jonathan Stempel, *Deutsche Bank Settles U.S. Gold, Silver Price-Fixing Litigation*, REUTERS (U.K.) (Apr. 14, 2016, 6:24 PM), <http://uk.reuters.com/article/uk-deutsche-bank-lawsuit-metals-idUKKCN0XB2B8>.

64. Press Release, Dep’t of Justice, *supra* note 62.

65. The CFTC is the equivalent to the Securities and Exchange Commission (“SEC”), but it regulates the markets for futures, options on futures, commodity options, swaps, and certain other derivatives. See generally 2 PHILIP MCBRIDE JOHNSON & THOMAS LEE HAZEN, DERIVATIVES REGULATION § 4.03 (3d ed. 2004). Congress created the CFTC under the appropriately named Commodity Futures Trading Commission Act of 1974, Pub. L. No. 93-463, 88 Stat. 1389 (codified in scattered sections of the U.S.C.). See 135 CONG. REC. 20350-51 (1989) (statement of Rep. Smith). Like the SEC, the CFTC can bring civil enforcement actions against those who violate the CEA and the regulations promulgated thereunder. *Enforcement: Office of the Director*, U.S. COMMODITY FUTURES TRADING COMM’N, <http://www.cftc.gov/LawRegulation/Enforcement/OfficeofDirectorEnforcement> (last visited Dec. 31, 2016).

66. Commodity Exchange Act, Pub. L. No. 74-675, 49 Stat. 1491 (1936) (codified as amended at 7 U.S.C. §§ 1-27f (2012)).

67. See *In re Barclays PLC*, CFTC No. 12-25, 2012 WL 2500330, at \*26-36 (June 27, 2012).

68. See *infra* Tables 1-2.

69. Caroline Binham & Alex Barker, *Euribor Fines Reveal Vital Pieces to Scandal’s Puzzle*, FIN. TIMES (Dec. 4, 2013), <https://next.ft.com/content/4bd70d1e-5ce8-11e3-a558-00144feabdc0>.

civily prosecute misconduct involving benchmarks that serve as components of the prices of derivatives.

The existence of rampant benchmark rigging has caused authorities and commentators to consider if the existing laws and regulations need to be changed, or new paradigms considered, to better prevent and combat benchmark rate-rigging and other cartel-like, anticompetitive conduct in the financial markets.<sup>70</sup> At present, the primary civil enforcement tools that the CEA gives the CFTC include provisions granting the agency broad authority to bring enforcement actions against fraud-based wrongdoing and derivatives market price manipulation.<sup>71</sup> Although the cartels came to light several years after the U.S. Congress passed the Dodd-Frank Act of 2010 (“Dodd-Frank Act”), an overlooked provision of that Act could be an effective tool to address the problem of anticompetitive conduct that affects the prices of swaps and other derivatives. Specifically, Congress amended the CEA to add section 4s(j)(6), labeled “Antitrust Considerations,” which prohibits swap dealers<sup>72</sup> and major swap participants<sup>73</sup> (collectively “swap entities”) from “adopt[ing] any process or tak[ing] any action that results in any unreasonable restraint of trade; or impos[ing] any material anticompetitive burden on trading or clearing.” The purpose of this Article is to analyze existing civil enforcement action provisions in the CEA, and the regulations promulgated thereunder, to determine whether

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70. See, e.g., Andrew Verstein, *Benchmark Manipulation*, 56 B.C. L. REV. 215, 250-71 (2015).

71. See *infra* Part V.

72. See 7 U.S.C. § 1a(49)(A) (2012) (defining the term “swap dealer” as “any person who (i) holds itself out as a dealer in swaps; (ii) makes a market in swaps; (iii) regularly enters into swaps with counterparties as an ordinary course of business for its own account; or (iv) engages in any activity causing the person to be commonly known in the trade as a dealer or market maker in swaps”). There are currently 105 business entities that are provisionally registered as swap dealers. See *Swap Dealer (SD) and Major Swap Participant (MSP) Directory*, NAT’L FUTURES ASS’N, <https://www.nfa.futures.org/nfa-registration/NFA-directories.HTML> (follow “Swap Dealer (SD) and Major Swap Participant (MSP) Directory” hyperlink) (last visited Dec. 31, 2016). Included on the list of registered swap dealers are many business entities affiliated with the world’s largest global banks, including Bank of America, BNP Paribas, Deutsche Bank, Goldman Sachs, J.P. Morgan, and Morgan Stanley. *Id.*

73. See 7 U.S.C. § 1a(33)(A) (defining the term “major swap participant” as including “any person who is not a swap dealer,” but who either “maintains a substantial position in swaps for any of the major swap categories as determined by the [CFTC]” or “whose outstanding swaps create substantial counterparty exposure that could have serious adverse effects on the financial stability of the United States banking system or financial markets”). As a general matter, major swap participants include “entities like the hedge fund [Long Term Capital Management] and AIG’s financial products subsidiary.” 156 CONG. REC. S5922 (daily ed. July 15, 2010) (written statement of Sen. Lincoln). At one point they were two provisionally registered major swap participants, but both withdrew their registration when they fell below the minimum swaps trading threshold to require registration.

these statutory and regulatory provisions are likely to be an effective means to combat anticompetitive conduct in the markets for swaps and other derivatives. To properly evaluate the status quo, one must scrutinize section 4s(j)(6), and the (more or less) identically-worded CFTC Regulation 23.607,<sup>74</sup> which was promulgated to implement section 4s(j)(6), as well as the CEA's existing enforcement authority. To be clear, Regulation 23.607 did not take effect until June 14, 2012, and therefore was not an available enforcement tool for the CFTC when most of the conduct in the benchmark rate-rigging scandals took place.<sup>75</sup> Indeed, the CFTC has not yet, at the time of this writing, brought an enforcement action under section 4s(j)(6) and Regulation 23.607. But in deciding how best to protect the financial markets from such schemes in the future, one must determine whether section 4s(j)(6) and Regulation 23.607 are likely to help the CFTC to address anticompetitive conduct in the markets for derivatives or whether the CFTC needs additional, or different, tools to do so. This analysis inevitably must be conducted with an eye toward what has been revealed about the benchmark rate-rigging cartels and other recent examples of anticompetitive conduct by derivatives dealers and traders. Given the concentrated, even oligopolistic nature of some markets for derivatives,<sup>76</sup> the possibility that a handful of dominant derivatives market participants could collude to harm competition (or attempt to harm competition) in the future is real. Thus, analyzing the tools that Congress has given the CFTC that can be used to combat anticompetitive conduct is an important endeavor.

At first glance, the antitrust considerations in section 4s(j)(6) and Regulation 23.607 seem to hold promise because their language appears broader than that found in existing antitrust law prohibitions. For example, section 4s(j)(6) explicitly prohibits the imposition of material anticompetitive burdens,<sup>77</sup> which is a phrase that is not used in existing antitrust law, but which appears to even forbid anticompetitive conduct that would not reach the level of creating unreasonable restraints of trade or other traditional antitrust harms. Unfortunately, however, section 4s(j)(6) and Regulation 23.607 only apply to the 100 or so business organizations that are CFTC-regulated swap entities.<sup>78</sup> As a result, section 4s(j)(6) and Regulation 23.607 cannot be used to punish wrongdoing by natural persons who are employees of swap entities,

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74. 17 C.F.R. § 23.607 (2016).

75. See Swap Dealer and Major Swap Participant Recordkeeping, Reporting, and Duties Rules, 77 Fed. Reg. 20,128 (Apr. 3, 2012) (to be codified at 17 C.F.R. pts. 1, 3, 23).

76. See *infra* Part III.A.

77. See 7 U.S.C. § 6s(j)(6) (2012).

78. See *infra* Part VII.C.

affiliates of swap entities that are not themselves swap entities, and other independent business organizations and individuals that are not CFTC-regulated swap entities, such as interdealer brokers. These are significant gaps. Because the benchmark-rigging scandals involved business organizations and natural persons that were not CFTC-regulated swap entities, section 4s(j)(6) and Regulation 23.607 would not have been entirely effective at combatting the benchmark-rigging cartels if they had been in effect when the relevant conduct occurred.

In addition, further analysis reveals that antifraud and antimanipulation claims are imperfect vehicles with which to combat anticompetitive conduct because both require proof of something that is not necessary for proving most traditional antitrust causes of action.<sup>79</sup> Antifraud claims require proof of a misrepresentation and price manipulation claims require proof that the perpetrator acted with the specific intent to create an artificial price.<sup>80</sup> But one can harm competition (or engage in conduct with such a propensity) without making misrepresentations, and most antitrust causes of action do not focus on intent, but on the effects of the allegedly anticompetitive conduct on the relevant market. While the specific facts of the benchmark rate-rigging cases have been amenable to civil enforcement under antifraud and antimanipulation legal theories, there is no guarantee that future anticompetitive schemes in the markets for derivatives will fall within the ambit of those two types of causes of action. Therefore, because fraud-based and price manipulation claims most probably cannot reach all types of misdeeds that are prohibited by the antitrust laws, the availability of a broad antitrust cause of action would be a useful expansion of the CFTC's existing enforcement regime.

Accordingly, the CFTC would benefit from having the scope of section 4s(j)(6) and Regulation 23.607 expanded to reach all persons—without regard to whether they are swap entities—who cause, or attempt to cause, unreasonable restraints of trade or material anticompetitive burdens in the markets for derivatives. Because it is unlikely in the current political climate that Congress will act to expand a Dodd-Frank Act provision such as section 4s(j)(6),<sup>81</sup> the CFTC should use its existing authority to promulgate a regulation that would expand the reach of the

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79. See *infra* Part VII.D.

80. See *infra* notes 459-63 and accompanying text.

81. See Peter Schroeder, *GOP Chairman: Banks Are Facing 'Regulatory Waterboarding,'* HILL (Mar. 15, 2016, 11:57 AM), <http://thehill.com/policy/finance/273044-hensarling-vows-dodd-frank-replacement> (explaining that House Financial Services Committee Chair Jeb Hensarling “accused the Obama administration of engaging in ‘regulatory waterboarding’ when it comes to monitoring banks” when he stated, “I will not rest until Dodd-Frank is ripped out by its roots and tossed on the trash heap of history”).

antitrust considerations in Regulation 23.607 to cover any person who engaged in conduct that harmed competition (or had the propensity to do so) in the markets for derivatives. Doing so would be an incremental, structural improvement in the CFTC's existing enforcement regime.

Part II of this Article provides an overview of the CEA and the regulations promulgated thereunder, with an emphasis on the explicit references to antitrust principles and considerations in the CEA and CFTC Regulations.<sup>82</sup> Part III provides a brief overview of U.S. antitrust laws and jurisprudence, with an emphasis on section 1 of the Sherman Act of 1890.<sup>83</sup> Part III also discusses the applicability of antitrust law in addressing concerns related to the oversight of systemically important banks, many of which are CFTC-regulated swap dealers; additionally, Part IV discusses some antitrust laws and systemically important banks.<sup>84</sup> Part V describes the two primary existing types of enforcement actions that the CFTC can bring to combat misconduct in the markets for swaps and derivatives: fraud-based causes of action and price manipulation claims.<sup>85</sup> Part VI analyzes the language of section 4s(j)(6) and its implementing rule, CFTC Regulation 23.607.<sup>86</sup> Part VII explains why the status quo is imperfect and why section 4s(j)(6) and Regulation 23.607 are insufficient to prevent conduct that harms competition (or has the propensity to harm competition) in the swaps market.<sup>87</sup> Part VII argues, *inter alia*, that the CFTC's existing enforcement arsenal—antifraud and price manipulation claims, supplemented with section 4s(j)(6) and Regulation 23.607—is too narrow. As mentioned, antifraud and price manipulation claims are unlikely to reach all antitrust harms, and because Regulation 23.607 only applies to swap entities, many categories of market participants, such as brokers, are beyond the reach of Regulation 23.607.

The Article concludes that Regulation 23.607 as currently written likely will be an ineffective tool to combat anticompetitive behavior in the markets for derivatives and that the CFTC should expand the reach of the CEA's antitrust considerations by promulgating a regulation that broadly prohibits any person from taking any action that results in unreasonable restraints of trade or imposes material anticompetitive burdens on the derivative markets.<sup>88</sup> This is the first article to thoroughly

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82. *See infra* Part II.

83. *See infra* Part III.

84. *See infra* Parts III–IV.

85. *See infra* Part V.

86. *See infra* Part VI.

87. *See infra* Part VII.

88. *See infra* Part VIII.

scrutinize the text of the Dodd-Frank Act's antitrust considerations for swap entities and the first article to argue for a regulation that would provide the CFTC with broad civil enforcement authority pursuant to the CEA's antitrust considerations.

## II. ANTITRUST CONSIDERATIONS IN THE COMMODITY EXCHANGE ACT

Congress passed the Dodd-Frank Act, which former President Obama signed on July 21, 2010, to address shortcomings in the existing financial regulatory framework that had become apparent during the financial crisis, including, but not limited to, the lack of regulatory oversight for the OTC derivatives markets.<sup>89</sup> Title VII of the Dodd-Frank Act<sup>90</sup> amended the CEA,<sup>91</sup> which is the law that regulates futures, options on futures, commodity options, and certain other derivatives, to establish a comprehensive new regulatory framework for swaps and security-based swaps.<sup>92</sup> Under the Dodd-Frank Act, the CFTC received authority to regulate swaps,<sup>93</sup> and the SEC received regulatory authority over security-based swaps.<sup>94</sup> “Generally, swaps are derivative financial products that have underlying assets that, inter alia, are commodities, interest rates, government securities, and broad-based security indices.”<sup>95</sup> Security-based swaps, on the other hand, are based on single securities, loans and reference assets, or narrow-based security indices.<sup>96</sup>

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89. See 156 CONG. REC. S5820 (daily ed. July 14, 2010) (statement of Sen. Merkley) (“I rise to address the Dodd-Frank financial reform bill and to share the reasons it makes a great deal of sense to restore the lane markers and traffic signals to our financial system—lane markers and traffic signals that were ripped away carelessly, thoughtlessly over the course of a decade and led to the economic house of cards that melted down last year, doing enormous damage to America’s working families. . . . What really happened? It can be summed up in two words: irresponsible deregulation.”); see also 156 CONG. REC. S5905 (daily ed. July 15, 2010) (statement of Sen. Stabenow).

90. Title VII of the Dodd-Frank Act is entitled the Wall Street Transparency and Accountability Act of 2010, Pub. L. No. 111-203, 124 Stat. 1641 (codified as amended in scattered sections of the U.S.C.).

91. Commodity Exchange Act, Pub. L. No. 74-675, 49 Stat. 1491 (1936) (codified as amended at 7 U.S.C. §§ 1–27f (2012)).

92. See Lynch, *supra* note 60, at 13 n.48; Seema G. Sharma, *Over-the-Counter Derivatives: A New Era of Financial Regulation*, 17 LAW & BUS. REV. AM. 279, 281-82 (2011).

93. See *CFTC Glossary*, U.S. COMMODITY FUTURES TRADING COMM’N, <http://www.cftc.gov/consumerprotection/educationcenter/cftcglossary/index.htm> (providing the definition of a “swap”) (last visited Dec. 31, 2016).

94. See Sharma, *supra* note 92, at 282; *CFTC Glossary*, *supra* note 93 (providing the definition of a “security-based swap”).

95. Gregory Scopino, *Regulating Fairness: The Dodd-Frank Act’s Fair Dealing Requirement for Swap Dealers and Major Swap Participants*, 93 NEB. L. REV. 31, 40 (2014).

96. See 7 U.S.C. § 1a(35)(A) (defining a “narrow-based security index” as, inter alia, one that consists of nine or fewer securities). The term, “broad-based security index,” is not defined in the CEA, but CFTC Regulation 41.1(c) defines it as any group or index of securities that is not narrow-

Congress created the CFTC in 1974,<sup>97</sup> modeling the agency after the SEC<sup>98</sup> and granting the new agency broad rulemaking authority.<sup>99</sup>

As part of its comprehensive regulatory scheme for swaps transactions under the CEA, the Dodd-Frank Act also created two new types of regulated intermediaries; namely, the aforementioned swap entities (for example, swap dealers and major swap participants).<sup>100</sup> Because there are no provisionally registered major swap participants, discussion concerning the CFTC Regulations governing these two newly-created categories of intermediaries will focus on swap dealers. The vast majority of provisionally registered swap dealers are banks.<sup>101</sup> Accordingly, the CFTC's Dodd-Frank Act mandated regulations for swap dealers are modeled on bank regulations.<sup>102</sup> More precisely, swap dealers are, generally speaking, *large* banks or bank affiliates, as the swap dealer registration requirement does not kick in until an entity engages in at least \$8 billion notional in swaps in one year.<sup>103</sup> The

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based. 17 C.F.R. § 41.1(c) (2013); see also Arthur W.S. Duff & David Zaring, *New Paradigms and Familiar Tools in the New Derivatives Regulation*, 81 GEO. WASH. L. REV. 677, 689 (2013) (“Title VII [of the Dodd-Frank Act] splits oversight of the derivatives market between the CFTC and SEC, although the division is rather uneven—the CFTC’s purview reaches the broader swath of current and future products. The SEC has been given responsibility over ‘security-based swaps,’ which include instruments that reference nine or fewer securities. All other swaps are subject to CFTC oversight.” (footnotes omitted)); NORA M. JORDAN ET AL., *ADVISING PRIVATE FUNDS: A COMPREHENSIVE GUIDE TO REPRESENTING HEDGE FUNDS, PRIVATE EQUITY FUNDS AND THEIR ADVISERS* § 4:6 (2016-2017 ed. 2016) (“The Dodd-Frank Act amended the Commodity Exchange Act to include an expansive definition of the term “swap.”).

97. *History of the CFTC: CFTC History in the 1970s*, U.S. COMMODITY FUTURES TRADING COMM’N, [http://www.cftc.gov/About/HistoryoftheCFTC/history\\_1970s](http://www.cftc.gov/About/HistoryoftheCFTC/history_1970s) (last visited Dec. 31, 2016).

98. Michael S. Sackheim, *Administrative Enforcement of the Federal Commodities Laws by the Commodity Futures Trading Commission*, 12 SETON HALL L. REV. 445, 445 (1982) (describing the CFTC as “an independent federal regulatory agency modeled in the image of the [SEC]”).

99. See 7 U.S.C. § 12a(5).

100. Business Conduct Standards for Swap Dealers and Major Swap Participants with Counterparties, 75 Fed. Reg. 80,638, 80,638-39 (proposed Dec. 22, 2010) (to be codified at 17 C.F.R. pts. 23, 155) (stating that Congress enacted the Dodd-Frank Act “to reduce risk” by, inter alia, “[p]roviding for the registration and comprehensive regulation of swap dealers and major swap participants”). The Dodd-Frank Act also created two SEC-regulated types of financial intermediaries—“security-based swap dealers” and “major security-based swap participants.” However, analysis of SEC regulation of security-based swap entities is beyond the scope of this Article.

101. See Swap Dealer and Major Swap Participant Recordkeeping, Reporting, and Duties Rules, 77 Fed. Reg. 20,128, 20,195 & n.193 (Apr. 3, 2012) (to be codified at 17 C.F.R. pts. 1, 3, 23).

102. See *id.* at 20,129 (“[T]he [CFTC] observes that many of its final regulations are modeled on prudential regulations and supervision. Thus the two regimes would be broadly consistent.”).

103. 17 C.F.R. § 1.3(ggg)(4) (2016). The trigger amount is supposed to decline to \$3 billion in December 2017. There is some political opposition to allowing that to happen, however. In December of 2015, “Congress passed non-binding instructions to the [CFTC directing the agency to] propose a rule maintaining the swap dealer threshold at \$8 billion a year or higher.” Neil Roland, *Congress Directs CFTC to Keep \$8 Billion Swap Dealer Threshold Rather Than Let It Fall*, MLEX

\$8 billion notional in swaps threshold requirement for being considered a swap dealer may very well be a large part of why no individuals have registered as swap dealers.<sup>104</sup>

Pursuant to the Dodd-Frank Act's amendments to the CEA, swap entities, just like other categories of market participants (such as commodity trading advisors and commodity pool operators),<sup>105</sup> must register with the CFTC.<sup>106</sup> The CFTC has delegated administration of its registration function to the National Futures Association ("NFA")—the self-regulatory organization ("SRO") for the U.S. derivatives industry that oversees the registration of intermediaries in the markets for derivatives.<sup>107</sup> One difference between swap entities and other categories of CFTC-regulated intermediaries is that the CEA does not require the associated persons ("APs")—that is, derivatives salespeople and the supervisors of salespeople<sup>108</sup>—of swap entities to register.<sup>109</sup> Some of the banks (or their affiliates) that have settled lawsuits with U.S. and foreign authorities for manipulating benchmark interest rates or forex benchmark rates also are provisionally registered with the CFTC as swap dealers.<sup>110</sup>

With the Dodd-Frank Act, Congress expressly sought to subject the behavior of swap entities to an interwoven network of internal and external business conduct standards and rules.<sup>111</sup> For example, section 731 of the Dodd-Frank Act added section 4s to the CEA, which

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(Jan. 28, 2016), <http://mlexmarketinsight.com>.

104. See *Swap Dealer (SD) and Major Swap Participant (MSP) Directory*, *supra* note 72. The word, "person," for purposes of the CEA and CFTC Regulations includes individuals and business entities. See 7 U.S.C. § 1a(38); 17 C.F.R. § 1.3(u). Technically, because a swap dealer is defined as "any person" that meets certain requirements (including the requirement of engaging in at least \$8 billion notional in swaps), an individual could, theoretically, fall within the ambit of the swap dealer definition, but that has not happened thus far.

105. See, e.g., 7 U.S.C. § 6(k), (m).

106. *Id.* § 6s(a)(1).

107. See Registration of Swap Dealers and Major Swap Participants, 77 Fed. Reg. 2613, 2619 (Jan. 19, 2012) (to be codified at 17 C.F.R. pts. 1, 3, 23, 170) ("[T]he [CFTC] intends to delegate its full registration authority under the CEA and its regulations to NFA with respect to applicants for registration, and registrants, as [a swap dealer or major swap participant]."); Performance of Registration Functions by National Futures Association with Respect to Swap Dealers and Major Swap Participants, 77 Fed. Reg. 2708, 2709 (Jan. 19, 2012) (providing a CFTC Notice and Order "authorizing NFA . . . to perform the full range of registration functions under the CEA and the [CFTC's] regulations with regard to [Swap Dealer]s and [Major Swap Participant]s" (footnote omitted)).

108. See 7 U.S.C. § 1a(4)(A); 17 C.F.R. § 1.3(aa).

109. Dual and Multiple Associations of Persons Associated with Swap Dealers, Major Swap Participants and Other Commission Registrants, 78 Fed. Reg. 20,788, 20,788 (Apr. 8, 2013) (to be codified at 17 C.F.R. pts. 3, 23).

110. See *infra* Table 10.

111. Scopino, *supra* note 95, at 47.

describes the business conduct standards for swap entities.<sup>112</sup> The Dodd-Frank Act's business conduct standards for swap dealers include, inter alia, a prohibition on fraud and manipulation,<sup>113</sup> a requirement to disclose to counterparties "information about the material risks and characteristics of [swaps],"<sup>114</sup> and a duty "to communicate in a fair and balanced manner based on principles of fair dealing and good faith."<sup>115</sup> Section 4s(j) requires swap entities to comply with specific, enumerated duties.<sup>116</sup> For example, swap entities must monitor their trading in swaps to prevent violations of applicable position limits.<sup>117</sup> Likewise, swap entities must "establish robust and professional risk management systems."<sup>118</sup> On April 3, 2012, the CFTC published in the *Federal Register* final regulations for Part 23 of the CFTC's Regulations to implement, inter alia, the Internal Business Conduct Standards mandated by section 4s(f), (g), and (j) of the CEA.<sup>119</sup>

Numerous provisions in the CEA, including some that were added to the statute by the Dodd-Frank Act, explicitly refer to antitrust law and principles. Section 3(b) of the CEA<sup>120</sup> states that it is the purpose of the CEA, inter alia, "to promote responsible innovation and fair competition among boards of trade, other markets and market participants."<sup>121</sup> Section 15(b) of the CEA states as follows:

The [CFTC] shall take into consideration the public interest to be protected by the antitrust laws and endeavor to take the least anticompetitive means of achieving the objectives of this chapter, as

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112. See Business Conduct Standards for Swap Dealers and Major Swap Participants with Counterparties, 77 Fed. Reg. 9734 (Feb. 17, 2012) (to be codified at 17 C.F.R. pts. 4, 23).

113. 7 U.S.C. § 6s(h)(1)(A).

114. *Id.* § 6s(h)(3)(B)(i).

115. *Id.* § 6s(h)(3)(C); Business Conduct Standards for Swap Dealers and Major Swap Participants with Counterparties, 77 Fed. Reg. at 9805. For an in-depth discussion of the fair dealing rule, see Scopino, *supra* note 95.

116. As mentioned previously, the Dodd-Frank Act also amended the securities laws to impose similar duties on security-based swap dealers and major security-based swap participants. See, e.g., 15 U.S.C. § 78o-10(j)(6) (2012) (listing antitrust considerations for security-based swap entities). But, analysis of the regulation of security-based swap entities is beyond the scope of this Article. The anticompetitive conduct described in the beginning of this Article was done by swap dealers and their accomplices (as opposed to security-based swap dealers) and primarily affected the markets for swaps and other derivatives that are regulated by the CFTC (as opposed to the markets for security-based swaps and other types of securities that are regulated by the SEC). There have been no reports of the SEC participating in any of the benchmark rate-rigging investigations or settlements.

117. 7 U.S.C. § 6s(j)(1)(A).

118. *Id.* § 6s(j)(2).

119. Swap Dealer and Major Swap Participant Recordkeeping, Reporting, and Duties Rules, 77 Fed. Reg. 20,128, 20,128 (Apr. 3, 2012) (to be codified at 17 C.F.R. pts. 1, 3, 23).

120. 7 U.S.C. § 5(b).

121. *Id.*

well as the policies and purposes of this chapter, in issuing any order or adopting any [CFTC] rule or regulation . . . , or in requiring or approving any bylaw, rule, or regulation of a contract market or registered futures association.<sup>122</sup>

In short, section 15(b) of the CEA directs the CFTC to look to federal antitrust laws, statutes, and jurisprudence to guide its analysis of competition issues arising under the CEA.<sup>123</sup> The few cases addressing section 15(b) have held that the CFTC is not bound to adopt or approve the least competitive means as long as it has considered fully the competitive implications of its actions and those of any alternative course of action in implementing its objective.<sup>124</sup> Additionally, other sections of the Dodd-Frank Act, although not explicitly referring to the antitrust laws and principles, sought to enhance competition in the OTC swaps markets by requiring “that most swaps trade on open and competitive platforms” that are similar to exchanges, but called swap execution facilities (“SEFs”),<sup>125</sup> that offer impartial access to all market participants.<sup>126</sup>

As with any regulatory regime, certain features of the U.S. regulation of futures and other derivatives serve to limit competition to some extent.<sup>127</sup> For example, generally speaking, to place trades on the

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122. *Id.* § 19(b). Section 15 of the CEA is labeled “[c]onsideration of costs and benefits and antitrust laws.” *Id.* § 19.

123. See 1 JOHNSON & HAZEN, *supra* note 65, § 2.12 (stating that section 15(b) of the CEA directs “the [CFTC] to ‘take into consideration the public interest to be protected by the antitrust laws as well as the policies and purposes of [the CEA] in issuing any order or adopting any [CFTC] rule or regulation, or in requiring or approving any bylaw, rule, or regulation of a contract market’” (quoting *Commodity Futures Trading Commission Act of 1974: Hearings on H.R. 11955 Before the H. Comm. on Agric.*, 93d Cong. 183 (1974))).

124. See, e.g., *Am. Stock Exch., Inc. v. CFTC*, 528 F. Supp. 1145, 1152 (S.D.N.Y. 1982); *Rosenthal v. Bagley*, 450 F. Supp. 1120, 1124-25 (N.D. Ill. 1978).

125. A SEF is a trading system or platform created by the Dodd-Frank Act “in which multiple participants have the ability to execute or trade swaps by accepting bids and offers made by multiple participants in the facility or system, through any means of interstate commerce.” 7 U.S.C. § 1a(50).

126. See Core Principles and Other Requirements for Swap Execution Facilities, 78 Fed. Reg. 33,476 (June 4, 2013) (to be codified at 17 C.F.R. pt. 37); see also DENNIS KELLEHER ET AL., BETTER MKTS., POLICY BRIEF, STOPPING WALL STREET’S DERIVATIVES DEALERS CLUB: WHY THE CFTC MUST ACT NOW TO PREVENT ATTEMPTS TO UNDERMINE DERIVATIVES TRADING REFORMS THAT THREATEN SYSTEMATIC STABILITY AND HARM CONSUMERS 2 (2016), <http://www.bettermarkets.com/sites/default/files/Better%20Markets%20Policy%20Brief%20-%20Stopping%20Wall%20Street%E2%80%99s%20Derivatives%20Dealers%20Club.pdf> (“These reforms were intended to end the large dealers’ oligopolistic control over the swaps market and introduce greater competition and pre-trade price transparency, ultimately strengthening the swaps marketplace, reducing systemic risk and lowering costs for all market participants in the process.”).

127. This is common to regulation in general, and financial regulation in particular. See Lawrence J. White, *Financial Regulation and the Current Crisis: A Guide for Antitrust*, in COMPETITION AS PUBLIC POLICY 65, 67 (Charles T. Compton et al. eds., 2010) (“[T]here has been a longstanding tension between the operation of financial regulation and the promotion of

futures and other derivatives exchanges, a person must either have access to those markets through a CFTC registrant or be one.<sup>128</sup> Further, the CEA requires that most trading in futures contracts must take place on CFTC-regulated exchanges, officially called designated contract markets (“DCMs”).<sup>129</sup> With few exceptions, only a member of a DCM can actually place trades on that DCM, which means that, as a practical matter, most persons must place trades on DCMs through futures brokers—i.e., futures commission merchants (“FCMs”)—that are members of DCMs.<sup>130</sup> The exchange-trading requirement dates back to the beginning of federal regulation of futures trading with the Grain Futures Act of 1922 (“Grain Futures Act”).<sup>131</sup> The belief was that moving all trading onto federally regulated futures exchanges would curb market manipulation schemes and other improper trading practices because the DCMs, in their role as SROs, would police their own markets for misconduct.<sup>132</sup> Section 5 of the CEA describes the regulatory obligations of exchanges—in the form of twenty-three “[c]ore [p]rinciples”—both initially upon receiving a designation as a contract market and on an ongoing basis thereafter.<sup>133</sup>

The core principles were a product of the Commodity Futures Modernization Act of 2000 (“CFMA”), which was designed to implement a “principles-based” regulatory framework for exchanges, trading platforms, and clearinghouses regulated by the CFTC.<sup>134</sup> The CFMA amended the CEA to require DCMs and clearinghouses—called,

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competition.”).

128. See Gregory Scopino, *Preparing Financial Regulation for the Second Machine Age: The Need for Oversight of Digital Intermediaries in the Futures Markets*, 2015 COLUM. BUS. L. REV. 439, 467 & n.102.

129. See 1 JOHNSON & HAZEN, *supra* note 65, § 1.04[1].

130. See *id.* § 1.06[1].

131. See 2 *id.* § 3.02[1].

132. See Jerry W. Markham, *Super Regulator: A Comparative Analysis of Securities and Derivatives Regulation in the United States, the United Kingdom, and Japan*, 28 BROOK. J. INT’L L. 319, 339-41 (2003); see also 1 JOHNSON & HAZEN, *supra* note 65, § 1.04[3] (stating that, for an applicant seeking to receive CFTC approval to be a DCM “[t]he most important focus . . . is on the ability of an applicant for contract market designation to show that it has adequately provided for the prevention of conduct that would interfere with the ability of the market to reflect true economic conditions”); Scopino, *supra* note 128, at 467-68.

133. See 7 U.S.C. § 7(d)(1)(A)(i) (2012).

134. Commodity Futures Modernization Act of 2000, Pub. L. No. 106-554, 114 Stat. 2763A-398 (codified as amended in scattered sections of the U.S.C.); see, e.g., Core Principles and Other Requirements for Designated Contract Markets, 77 Fed. Reg. 36,612 36,665 (June 19, 2012) (to be codified at 17 C.F.R. pts. 1, 16, 38); 1 JOHNSON & HAZEN, *supra* note 65, § 1.17; 23 JERRY W. MARKHAM & THOMAS LEE HAZEN, *BROKER-DEALER OPERATIONS UNDER SECURITIES AND COMMODITIES LAW* § 2:43, Westlaw (database updated 2015); Thomas Lee Hazen, *Disparate Regulatory Schemes for Parallel Activities: Securities Regulation, Derivatives Regulation, Gambling, and Insurance*, 24 ANN. REV. BANKING & FIN. L. 375, 390-94 (2005).

“derivatives clearing organizations” (“DCOs”)—to meet the requirements laid out by the core principles.<sup>135</sup> Although the Dodd-Frank Act changed a great deal about how derivatives are regulated, it left the core principles largely intact and, as will be discussed in greater detail below, even expanded their use to govern new categories of market platforms. Each core principle imposes a specific duty or duties upon those subject to its strictures.<sup>136</sup> For example, Core Principle 4 for DCMs states that exchanges must “have the capacity and responsibility to prevent manipulation [and] price distortion . . . through market surveillance, compliance, and enforcement practices and procedures.”<sup>137</sup> Core Principle 9 states that “[t]he board of trade shall provide a competitive, open, and efficient market and mechanism for executing transactions that protects the price discovery process of trading in the centralized market of the board of trade.”<sup>138</sup> Further, DCMs themselves adopt rules requiring their members to comply with the core principles and CFTC Regulations.<sup>139</sup>

The CEA has similar core principles for DCOs. For example, Core Principle D for DCOs dictates that each DCO “ensure that the derivatives clearing organization possesses the ability to manage the risks” of its business.<sup>140</sup> Core Principle P requires DCOs to “establish and enforce rules to minimize conflicts of interest in the decision-making process of the derivatives clearing organization.”<sup>141</sup> To ensure compliance with the core principles, the CFTC periodically conducts examinations of DCMs, DCOs and other business entities that operate derivatives market infrastructure, and, based on the results of the examinations, makes recommendations concerning how the derivatives market infrastructure providers could better meet their obligations under the relevant core principles.<sup>142</sup>

The CFMA’s original core principles for exchanges and clearinghouses required those entities to give thought to antitrust

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135. See Hazen, *supra* note 134, at 394.

136. See, e.g., 7 U.S.C. § 7(d)(4).

137. *Id.*

138. *Id.* § 7(d)(9).

139. See, e.g., CHI. BOARD OF TRADE, CHICAGO BOARD OF TRADE RULEBOOK §§ 534, 539.A, <http://www.cmegroup.com/rulebook/CBOT/I/5/5.pdf>; see also Scopino, *supra* note 128, at 468 & n.109 (“CME Group is a Chicago-based corporation that owns several major DCMs, including the Chicago Mercantile Exchange (‘CME’), New York Mercantile Exchange (‘NYMEX’), and Chicago Board of Trade (‘CBOT’).”).

140. 7 U.S.C. § 7a-1(c)(2)(D).

141. *Id.* § 7a-1(c)(2)(P).

142. See *Rule Enforcement Reviews of Designated Contract Markets*, U.S. COMMODITY FUTURES TRADING COMM’N, <http://www.cftc.gov/IndustryOversight/TradingOrganizations/DCMs/dcmruleenf> (last visited Dec. 19, 2016); see also Scopino, *supra* note 44, at 238-40.

considerations before adopting any rules or taking any actions. The Dodd-Frank Act slightly modified the wording of these antitrust considerations core principles.<sup>143</sup> For example, Core Principle 18 for DCMs originally stated that “[u]nless necessary or appropriate to achieve the purposes of [the CEA, DCMs] shall endeavor to avoid—(A) adopting any rules or taking any actions that result in any unreasonable restraint of trade, or (B) imposing any material anticompetitive burden on trading on the contract market.”<sup>144</sup> The Dodd-Frank Act moved DCM Core Principle 18 to 19 and changed the wording, to state that “[u]nless necessary or appropriate to achieve the purposes of [the CEA], the board of trade *shall not*—(A) *adopt* any rule or taking [sic] any action that result in any unreasonable restraint of trade; or (B) impose any material anticompetitive burden on trading on the contract market.”<sup>145</sup> Thus, the Dodd-Frank Act provides that exchanges “shall not” engage in the activities prohibited by subsection (A) and (B), whereas the CFMA of 2000 had stated DCMs must “endeavor to avoid” doing so.<sup>146</sup> The move by Congress from “shall endeavor to avoid” to “shall not” seems to point toward a desire for greater observation of, or stricter adherence to, antitrust considerations by exchanges.

Under the CFMA, Core Principle N for DCOs stated as follows:

Unless appropriate to achieve the purposes of [the CEA], the derivatives clearing organization shall avoid—(i) adopting any rule or taking any action that results in any unreasonable restraint of trade; or (ii) imposing any material anticompetitive burden on trading on the contract market.<sup>147</sup>

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143. See 7 U.S.C. § 7a-1(c)(2)(N).

144. *Id.* § 7(d)(18) (2000) (current version at *id.* § 7(d)(19) (2012)).

145. *Id.* § 7(d)(19) (2012) (emphasis added).

146. See Core Principles and Other Requirements for Designated Contract Markets, 77 Fed. Reg. 36,612, 36,657 (June 19, 2012) (to be codified at 17 C.F.R. pts. 1, 16, 38) (“The Dodd-Frank Act renumbered former Core Principle 18 as Core Principle 19, and in all other respects, maintained the statutory text of the core principle. As noted in the DCM NPRM, the Commission believed that the existing guidance to this Core Principle remained appropriate. Accordingly, other than to codify the statutory text of Core Principle 19 into proposed § 38.1000, the Commission did not propose any amendments to the pre-existing guidance under part 38.”); see also Core Principles and Other Requirements for Designated Contract Markets, 75 Fed. Reg. 80,572, 80,601 (Dec. 22, 2010) (to be codified at 17 C.F.R. pts. 1, 16, 38) (“Current Core Principle 18 governs the antitrust obligations of DCMs. The Dodd-Frank Act renumbered this core principle as Core Principle 19, but in all other respects the statutory text of the core principle is the same. The Commission believes that the existing guidance to this Core Principle remains appropriate.” (footnote omitted)). This disregards the change from “endeavor to avoid” to “shall not.”

147. Commodity Futures Modernization Act of 2000, Pub. L. No. 106-554, 114 Stat. 2763A-398 (codified as amended in scattered sections of the U.S.C.).

Under the CFMA, the wording of Core Principle N was slightly different from the DCM's then-Core Principle 18, which said "unless necessary or appropriate" and "shall endeavor to avoid." The Dodd-Frank Act amended Core Principle N to "conform[] the standard for DCOs with the standard applied to DCMs under Core Principle 19"<sup>148</sup> by changing the wording of Core Principle N to state that "[u]nless *necessary or appropriate* to achieve the purposes of [the CEA], a derivatives clearing organization shall *not* (i) adopt any rule or take any action that results in any unreasonable restraint of trade; or (ii) impose any material anticompetitive burden."<sup>149</sup> In short, the Dodd-Frank Act stated that a DCO could violate the strictures of subsections (i) or (ii) of Core Principle N if *necessary or appropriate*—as opposed to prior wording that doing so would be permissible only if it was "appropriate." It is hard to see this as much of a change, however, because if an action is absolutely *necessary* to achieve the purposes of the CEA, then it probably also would be considered *appropriate* to take that action, regardless of the anticompetitive impact that action might have. The Dodd-Frank Act also changed "shall avoid" to "shall not." Lastly, subsection (ii) was modified to prohibit a DCO from imposing any material anticompetitive burden—period. Under the CFMA, subsection (ii) of Core Principle N prohibited clearinghouses from imposing "any material anticompetitive burden *on the contract market*" (i.e., on the futures exchange).<sup>150</sup> The elimination of the prepositional phrase, "on the contract market," broadens the scope of subsection (ii) of Core Principle N. Additionally, CEA section 5b(c)(3) states that a DCO "may request the [CFTC] to issue an order concerning whether a rule or practice of the applicant is the least anticompetitive means of achieving the objectives, purposes, and policies of this chapter."<sup>151</sup>

The Dodd-Frank Act also amended the CEA to establish core principles to govern newly created categories of market infrastructure entities—the (aforementioned) SEFs and swap data repositories ("SDRs").<sup>152</sup> The core principles for SEFs and SDRs reference antitrust considerations. For example, Core Principle 1 ("Antitrust Considerations") for SDRs states that "[u]nless necessary or appropriate

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148. Derivatives Clearing Organization General Provisions and Core Principles, 76 Fed. Reg. 69,334, 69,407 (Nov. 8, 2011) (to be codified at 17 C.F.R. pts. 1, 29, 39, 140).

149. 7 U.S.C. § 7a-1(c)(2)(N).

150. *Id.* § 7(d)(19)(B) (emphasis added).

151. *Id.* § 7a-1(c)(3).

152. SDRs as registered entities created by the Dodd-Frank Act "that collect[] and maintain information or records with respect to transactions or positions in, or the terms and conditions of, swaps entered into by third parties for the purpose of providing a centralized recordkeeping facility for swaps." *Id.* § 1a(48).

to achieve the purposes of this chapter [of the CEA], a swap data repository shall not (A) adopt any rule or take any action that results in any unreasonable restraint of trade; or (B) impose any material anticompetitive burden on the trading, clearing, or reporting of transactions.”<sup>153</sup> Likewise, Core Principle 11 for SEFs states that “[u]nless necessary or appropriate to achieve the purposes of this chapter [of the CEA], the swap execution facility shall not (A) adopt any rules or tak[e] any actions that result in any unreasonable restraint of trade; or (B) impose any material anticompetitive burden on trading or clearing.”<sup>154</sup> The congressional focus on the continued viability of the antitrust laws—for new categories of market entities or otherwise—is not entirely surprising. Indeed, section 6 of the Dodd-Frank Act (labeled “Antitrust Savings Clause”) states that “[n]othing in [the Dodd-Frank Act], or any amendment made by this Act, shall be construed to modify, impair, or supersede the operation of any of the antitrust laws, unless otherwise specified.”<sup>155</sup>

The Dodd-Frank Act also amended the CEA to allow the CFTC to promulgate regulations that explicitly outline to DCMs, DCOs, SEFs, and SDRs the specific manner in which they must act to comply with core principles.<sup>156</sup> This was a change from the CFMA, which was a deregulatory statute that was, at least partially, premised on the idea of regulating by open-ended principles and not prescriptive rules.<sup>157</sup> The CFTC adopted regulations to implement the antitrust considerations core principles, but these regulations largely just replicate the language in the CEA. For example, CFTC Regulation 49.19 states that, “[u]nless necessary or appropriate to achieve the purposes of the [CEA], a

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153. *Id.* § 24a(f)(1).

154. *Id.* § 7b-3(f)(11). This provision of the Dodd-Frank Act appears to have a typographical error in that it uses the word, “taking,” where it should be “take.”

155. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, § 6, 124 Stat. 1376, 1390 (2010) (codified at 12 U.S.C. § 5303 (2012)). Congressman John Conyers, Jr. also stated that the Dodd-Frank Act was not intended to repeal or limit the antitrust laws. 156 CONG. REC. E1347-48 (daily ed. July 15, 2010) (statement of Rep. John Conyers, Jr.).

156. *See, e.g.*, 7 U.S.C. § 7a-1(c)(2)(ii) (“Subject to any rule or regulation prescribed by the Commission, a derivatives clearing organization shall have reasonable discretion in establishing the manner by which the derivatives clearing organization complies with each core principle.” (emphasis added)); *id.* § 7b-3(f)(1)(B) (providing similar language for SEFs); *id.* § 24a(a)(3)(B) (“Unless otherwise determined by the Commission by rule or regulation, a swap data repository . . . shall have reasonable discretion in establishing the manner in which the swap data repositories complies with the core principles in this section.” (emphasis added)).

157. *See, e.g.*, Brooksley Born, *Foreword: Deregulation: A Major Cause of the Financial Crisis*, 5 HARV. L. & POL’Y REV. 231, 237 (2011); Brian M. McCall, *Gambling on Our Financial Future: How the Federal Government Fiddles While State Common Law Is a Safer Bet to Prevent Another Financial Collapse*, 46 ARIZ. ST. L.J. 1347, 1393-94 (2014).

registered [SDR] shall avoid adopting any rule or taking any action that results in any unreasonable restraint of trade; or imposing any material anticompetitive burden on trading, clearing, or reporting swaps.”<sup>158</sup> Similarly, Regulation 39.23 states that “[u]nless necessary or appropriate to achieve the purposes of the [CEA], a [DCO] shall not adopt any rule or take any action that results in any unreasonable restraint of trade, or impose any material anticompetitive burden.”<sup>159</sup>

Additionally, the Dodd-Frank Act gave the CFTC the authority to specifically delineate the scope, and meaning, of the antitrust consideration core principles by granting the CFTC explicit rulemaking authority in connection with the core principles for DCMs. For example, CEA section 5(d)(1)(A) states that to be designated as a contract market and maintain a designation, “a board of trade [must] comply with any core principle . . . and any requirement that the [CFTC] may impose by rule or regulation pursuant to [CEA section 8a(5)].”<sup>160</sup> Likewise, CEA section 5(d)(1)(B) states that DCMs shall have reasonable discretion in complying with the core principles “[u]nless otherwise determined by the [CFTC] by rule or regulation.”<sup>161</sup>

Unfortunately, the CFTC has not used that authority to provide much by way of guidance about the antitrust consideration core principles. Take, for instance, Appendix B to Part 38, which is labeled, “Guidance on, and Acceptable Practices in, Compliance with Core Principles,”<sup>162</sup> and Appendix B to Part 37, which governs SEFs, has the same title.<sup>163</sup> Neither Appendix provides much guidance, both merely restate the language of the antitrust considerations core principles and refer to CEA section 15(b). For example, the subsection (a)—“Guidance”—for Core Principle 19 for DCMs in Appendix B to Part 38 states as follows:

An entity seeking designation as a contract market may request that the [CFTC] consider under the provisions of section 15(b) of the [CEA], any of the entity’s rules, including trading protocols or policies, and including both operational rules and the terms or conditions of products listed for trading, at the time of designation or thereafter. The [CFTC] intends to apply section 15(b) of the [CEA] to its

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158. 17 C.F.R. § 49.19(b) (2016).

159. *Id.* § 39.23.

160. 7 U.S.C. § 7(d)(1)(A). Sections 5(d)(1)(A) and 8a(5) of the CEA are codified at 7 U.S.C. §§ 7(d)(1)(A) and 12a(5), respectively.

161. *Id.* § 7(d)(1)(B).

162. 17 C.F.R. § 38, app. B, at 764 (2016).

163. *Id.* § 37, app. B, at 725. There is no such appendix to Part 39, which governs DCOs.

consideration of issues under this core principle in a manner consistent with that previously applied to contract markets.<sup>164</sup>

Subsection (b)—“Acceptable Practices”—is left blank, with nothing more than the bracketed word “Reserved.”<sup>165</sup> Appendix B of Part 37 uses identical language in its respective subsections (a) and (b).<sup>166</sup> The first antitrust considerations core principles, which governed DCMs and DCOs, were products of the CFMA of 2000, but unfortunately “there is little legislative history to provide guidance in the many interpretive questions that may arise” under the CFMA.<sup>167</sup> The CFTC, for example, does not appear to have ever stated that the strictures of section 15(b) of the CEA’s required the CFTC to reject a DCM’s proposed rule or policy. It is like a circle of nothingness—one thing points to another but none of them has any content.

As mentioned, the Dodd-Frank Act also expanded the CFTC’s regulatory authority over swap entities to include consideration of the antitrust laws, under the theory that the small group of “too big to fail” financial institutions whose behavior significantly contributed to the financial crisis also had the potential to harm competition in the financial sector<sup>168</sup> (Congress also may have believed that the traditional U.S.

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164. *Id.* § 38, app. B, at 771.

165. *Id.* The opening of Appendix B states that, “[w]here provided, acceptable practices meeting selected requirements of core principles are set forth in paragraph (b) following guidance” and that “[t]he acceptable practices are for illustrative purposes only and do not state the exclusive means for satisfying a core principle.” *Id.* § 38, app. B, at 764.

166. *Id.* § 37, app. B, at 725.

167. 1 JOHNSON & HAZEN, *supra* note 65, § 1.17; *see also id.* at 315 n.8 (“Many commentators have decried the sparse legislative history of the [CFMA].” (quoting Mark D. Young, *Twenty Questions on the Commodity Futures Modernization Act*, 34 REV. SEC. & COMMODITIES REG. 89, 92 (2001))).

168. 156 CONG. REC. E1347 (daily ed. July 15, 2010) (statement of Rep. John Conyers, Jr.). (“But ‘too big’ also places our nation at significant risk in another respect—and that is the risk of harm to competition, when a marketplace becomes concentrated in the hands of so few competitors that consumers no longer have meaningful choice, and the healthy influence of competition on price, quality, and innovation is lost. It is therefore essential that the antitrust laws, the laws protecting our economic freedoms against monopolization, anticompetitive restraints of trade, and undue market concentration remain in place. They are needed to ensure that the heightened regulatory supervision the new law contemplates, as well as our response to any future financial system emergency, do not inadvertently lead to an even more concentrated marketplace—with companies that are even bigger, with more market power, and with less incentive to be responsive to the consumers they are supposed to serve, and leaving less opportunity for new entry and innovation.”); *see also* MATTHEW P. HENDRICKSON ET AL., SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP & AFFILIATES, GEORGETOWN AND FORDHAM GLOBAL ANTITRUST LAW SYMPOSIA FOCUS ON TRENDS IN CARTEL ENFORCEMENT, MERGER CONTROL, IP AND FINANCIAL SERVICES 2 (Sept. 16, 2014), [https://www.skadden.com/sites/default/files/publications/Georgetown\\_and\\_Fordham\\_Global\\_Antitrust\\_Law\\_Symposia.pdf](https://www.skadden.com/sites/default/files/publications/Georgetown_and_Fordham_Global_Antitrust_Law_Symposia.pdf) (“Miguel de la Mano, director general for the Internal Market of the [European Commission], argued that a lack of oversight by antitrust regulators contributed to the 2008 financial crisis, and that government responses, although

authorities had not adequately dealt with anticompetitive behavior in the financial sector in the years leading up to the financial crisis). Specifically, section 4s(j)(6) states as follows:

Unless necessary or appropriate to achieve the purposes of this chapter, a swap dealer or major swap participant shall not—(A) adopt any process or take any action that results in any unreasonable restraint of trade; or (B) impose any material anticompetitive burden on trading or clearing.<sup>169</sup>

Regulation 23.607 was part of a group of regulations that the CFTC promulgated to implement section 4s(j) of the CEA, which was added to that statute by section 731 of the Dodd-Frank Act.<sup>170</sup> Regulation 23.607 (Antitrust Considerations) states as follows:

- (a) No swap dealer or major swap participant shall adopt any process or take any action that results in any unreasonable restraint of trade, or impose any material anticompetitive burden on trading or clearing, unless necessary or appropriate to achieve the purposes of the Commodity Exchange Act.
- (b) Consistent with its obligations under paragraph (a) of this section, each swap dealer and major swap participant shall adopt policies and procedures to prevent actions that result in unreasonable restraint of trade, or impose any material anticompetitive burden on trading or clearing.<sup>171</sup>

Proposed Regulation 23.607 was published in the *Federal Register* on November 23, 2010; the final rule, which the CFTC adopted as proposed, was published in the *Federal Register* on April 3, 2012, with an effective date of June 14, 2012.<sup>172</sup> In the notice of proposed rulemaking, the CFTC stated that Regulation 23.607 “would implement [the stated] prohibitions by requiring that the swap dealer or major swap participant adopt policies and procedures that would prevent unreasonable restraint of trade or the imposition of a material

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necessary, have created market imbalances between large and small firms—including the fact that only institutions ‘too big to fail’ can rely on taxpayer subsidies.”).

169. 15 U.S.C. § 78o–10(j)(6) (2012).

170. See Regulations Establishing and Governing the Duties of Swap Dealers and Major Swap Participants, 75 Fed. Reg. 71,397, 71,397 (proposed Nov. 23, 2010) (to be codified at 17 C.F.R. pt. 23); *id.* at 71,398 (“Section 731 of the Dodd-Frank Act amends the CEA by inserting after section 4r a new section 4s that sets forth registration and regulatory requirements, including a variety of business conduct standards and duties, with which swap dealers and major swap participants must comply to maintain registration as a swap dealer or major swap participant.”).

171. 17 C.F.R. § 23.607 (2016).

172. Swap Dealer and Major Swap Participant Recordkeeping, Reporting, and Duties Rules, 77 Fed. Reg. 20,128 (Apr. 3, 2012) (to be codified at 17 C.F.R. pts. 1, 3, 23).

anticompetitive burden on trading or clearing.”<sup>173</sup> In the final rule release, the CFTC stated that Regulation 23.607 both (1) “prohibit[s] SDs and MSPs from adopting any process or taking any action that results in any unreasonable restraint of trade or imposes any material anticompetitive burden on trading or clearing, unless necessary or appropriate to achieve the purposes of the CEA,” and (2) “require[s] SDs and MSPs to adopt policies and procedures to prevent such actions.”<sup>174</sup> The Securities Industry and Financial Markets Association (“SIFMA”) argued that Regulation 23.607 did more than simply require SDs and MSPs to adopt policies and procedures for compliance with the regulation, but “impos[ed] a blanket prohibition” against violating the rule “(unless necessary or appropriate to achieve the purposes of the CEA).”<sup>175</sup> “SIFMA expressed the concern that, given the counterparty rescission and private right of action provisions of the CEA, this prohibition could introduce additional private liability that is unnecessary in light of the enforcement authority of the [CFTC] and antitrust authorities and existing private rights of action under the antitrust laws.”<sup>176</sup> The CFTC was not swayed by SIFMA’s arguments: “Having considered SIFMA’s comments, the [CFTC] is adopting the rule as proposed. The blanket prohibition in [Regulation] 23.607(a) is taken directly from the statutory provision and appropriately implements the prohibition in section 4s(j)(6) of the CEA.”<sup>177</sup>

One matter worth noting is that Regulation 23.607, like section 4s(j)(6) and the antitrust considerations core principles throughout the CEA, does not make any reference to prohibiting *attempts* to adopt any process or take any action that results in unreasonable restraints of trade or *attempts* to impose material anticompetitive burdens on clearing or trading. This is different from many other CEA provisions that explicitly target both successful and attempted improper conduct. For example, CFTC Regulation 180.1(a)(1) broadly makes it unlawful to, inter alia, “[u]se or employ, or attempt to use or employ, any manipulative device, scheme, or artifice to defraud.”<sup>178</sup>

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173. Regulations Establishing and Governing the Duties of Swap Dealers and Major Swap Participants, 75 Fed. Reg. at 71,401.

174. Swap Dealer and Major Swap Participant Recordkeeping, Reporting, and Duties Rules, 77 Fed. Reg. at 20,144.

175. *Id.*

176. *Id.*

177. *Id.*

178. 17 C.F.R. § 180.1(a)(1) (2014).

### III. BRIEF ANTITRUST LAW OVERVIEW

Given that at least eight provisions of the CEA are explicitly concerned with safeguarding the interests protected by the antitrust laws, such as prohibiting actions that result in unreasonable restraints of trade or impose material anticompetitive burdens in the markets for derivatives,<sup>179</sup> a brief overview of U.S. antitrust law is helpful to put the numerous references in the CEA to antitrust principles in the proper context.<sup>180</sup> “Antitrust law is the law of competition. Competition in the marketplace generally improves the lives of consumers by expanding output and reducing the price of products and services, as well as by increasing quality and innovation.”<sup>181</sup> Generally speaking, the term, “monopoly,” refers to circumstances in which the relevant market is dominated by a single firm.<sup>182</sup> An oligopoly is a situation in a market or industry in which there are few participants.<sup>183</sup> With monopolies, wealth is transferred from consumers to producers, with the monopolists obtaining supranormal profits<sup>184</sup> and having less “pressure to innovate or otherwise be efficient.”<sup>185</sup>

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179. See 7 U.S.C. § 5(b) (2012) (stating that the purpose of the CEA is to promote “fair competition”); *id.* § 6s(j)(6) (listing antitrust considerations for swap entities); *id.* § 7(d)(19) (listing antitrust considerations through core principle for designated contract markets); *id.* § 7a-1(c)(3) (providing the “least anticompetitive means” language); *id.* § 7a-1(c)(2)(N) (listing antitrust considerations core principle for derivatives clearing organizations); *id.* § 7b-3(f)(11) (listing antitrust considerations core principle for swap execution facilities); *id.* § 19(b) (requiring the CFTC to consider antitrust laws); *id.* § 24a(f)(1) (listing antitrust considerations core principle for swap data repositories).

180. See, e.g., Barak Orbach, *How Antitrust Lost Its Goal*, 81 *FORDHAM L. REV.* 2253, 2254 (2013) (“U.S. competition laws are known as ‘antitrust’ because they were designed as measures against the nineteenth-century trusts.”). To emphasize, this is only meant to be a brief, concise overview of some of the primary concepts in U.S. antitrust law. As mentioned above, the primary objectives of this Article are (1) to analyze the Antitrust Considerations in the CEA and CFTC Regulations, and (2) to propose a mechanism through which those Antitrust Considerations could serve as the theoretical basis for civil enforcement actions targeting anticompetitive conduct in the derivatives markets.

181. Christopher R. Leslie, *Antitrust Law as Public Interest Law*, 2 *U.C. IRVINE L. REV.* 885, 886 (2012).

182. See *Oxbow Carbon & Minerals LLC v. Union Pac. R.R. Co.*, 926 F. Supp. 2d 36, 41 (D.D.C. 2013).

183. See 1 *KALINOWSKI*, *supra* note 59, § 7.04[4].

184. ERNEST GELLHORN ET AL., *ANTITRUST LAW AND ECONOMICS IN A NUTSHELL* 73 n.9 (5th ed. 2004).

185. *Id.* at 73; see 3 *FREDERICK K. GRITNER*, *WEST’S FEDERAL ADMINISTRATIVE PRACTICE* § 3002 (2016) (“The owners of a monopoly have the power, as a group, to set prices, exclude competitors, and control the market in the relevant geographic area. U.S. antitrust laws prohibit monopolies and any other practices that unduly restrain competitive trade. These laws are based on the belief that equality of opportunity in the marketplace and the free interactions of competitive forces result in the best allocation of the economic resources of a nation. Moreover, it is assumed that competition enhances material progress in production and technology while also preserving

The federal antitrust laws are largely encompassed in several key statutes.<sup>186</sup> The first federal antitrust statute enacted was the Sherman Act of 1890 (“Sherman Act”).<sup>187</sup> The Sherman Act has two sections: section 1 prohibits agreements, combinations, or conspiracies that unreasonably restrain trade,<sup>188</sup> and section 2 prohibits monopolizations, attempted monopolizations, and conspiracies to monopolize.<sup>189</sup> In 1914, Congress passed the Federal Trade Commission Act (“FTC Act”) and the Clayton Act.<sup>190</sup> Section 5 of the FTC Act, which can only be enforced by the Federal Trade Commission (“FTC”), prohibits unfair methods of competition, which include antitrust violations.<sup>191</sup> Judicial precedent has generally interpreted section 5 of the FTC Act as covering violations of the Sherman and Clayton Acts.<sup>192</sup> The Clayton Act prohibits certain specific kinds of conduct.<sup>193</sup> For example, section 3 of the Clayton Act addresses the potential anticompetitive harm of exclusive-dealing and tying arrangements, which also are potentially violative of the Sherman and FTC Acts.<sup>194</sup> Because section 1 is directed at unreasonable restraints of trade from *contracts*, *combinations*, and *conspiracies*, it only targets group conduct; that is, conduct by two or more persons.<sup>195</sup> Section 2, however, can be invoked to combat

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democratic, political, and social institutions.”).

186. See 10A WILLIAM MEADE FLETCHER, FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS § 4981 (rev. vol. 2011).

187. Royce Zeisler, Note, *Chevron Deference and the FTC: How and Why the FTC Should Use Chevron to Improve Antitrust Enforcement*, 2014 COLUM. BUS. L. REV. 266, 271-72.

188. Section 1 of the Sherman Act states that “[e]very contract, combination . . . , or conspiracy, in restraint of trade or commerce . . . is declared to be illegal.” 15 U.S.C. § 1 (2012).

189. Section 2 of the Sherman Act states that “[e]very person who shall monopolize, or attempt to monopolize, . . . or conspire with any other person . . . to monopolize any part of the trade or commerce . . . shall be deemed guilty of [violating the antitrust laws]. *Id.* § 2; see Leslie, *supra* note 181, at 887-88.

190. Clayton Act, ch. 323, 38 Stat. 730 (1914) (codified as amended at 15 U.S.C. §§ 12-27 (2012)); Federal Trade Commission Act, ch. 311, 38 Stat. 717 (1914) (codified as amended at 15 U.S.C. §§ 41-58).

191. See 15 U.S.C. § 45(a)(1)-(2); Zeisler, *supra* note 187, at 270-83.

192. See 1 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 1:23 (4th ed.); Jesse W. Markham, Jr., *Lessons for Competition Law from the Economic Crisis: The Prospect for Antitrust Responses to the “Too-Big-to-Fail” Phenomenon*, 16 FORDHAM J. CORP. & FIN. L. 261, 297-98 (2011).

193. See Foster, *supra* note 11, at 95 (“The Clayton Act is broad and leaves much of its practical effect to judicial interpretation.”).

194. Section 3 of the Clayton Act is codified at 15 U.S.C. § 14, and section 5 of Federal Trade Commission Act is codified at 15 U.S.C. § 45.

195. See Julie K. Robberson, *Antitrust Law—Supreme Court Holds That a Wholly-Owned Subsidiary Is Incapable of Conspiring with Its Parent Corporation Under Section 1 of the Sherman Act*: *Copperweld Corp. v. Independence Tube Corp.*, 59 TUL. L. REV. 781, 782 (1985); Joseph R. Coker, Comment, *Saving Otter Tail: The Essential Facilities Doctrine and Electric Power Post-Trinko*, 33 FLA. ST. U. L. REV. 231, 234 (2005).

anticompetitive behavior by a single person or entity, (that is, a monopolist or attempted monopolist) or by several persons or entities.<sup>196</sup> The U.S. Supreme Court has stated that “[a]ntitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise” and that “[t]hey are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is fundamental to the protection of our fundamental personal freedoms.”<sup>197</sup> This Article primarily focuses on section 1 of the Sherman Act (and, as discussed above, the CEA’s antitrust considerations).<sup>198</sup>

Examples of types of actions that have been held to violate U.S. antitrust laws include bid rigging,<sup>199</sup> group boycotts,<sup>200</sup> tying arrangements and bundled discounts,<sup>201</sup> horizontal price fixing,<sup>202</sup> and market division by competitors.<sup>203</sup> Under antitrust law, it is not necessary to establish actual competitive harm, just the probability.<sup>204</sup> Remedies for antitrust violations can include damages, injunctions prohibiting specific conduct, divestiture from (or dissolution of) certain lines of business, and, in rare cases, the breakup of a company, not to mention criminal sanctions.<sup>205</sup>

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196. Michael A. McCann, *American Needle v. NFL: An Opportunity to Reshape Sports Law*, 119 YALE L.J. 726, 728 n.6 (2010).

197. *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 610 (1972).

198. As part of its plea deal with the DOJ to settle a case involving allegations that it participated in a cartel of banks to rig foreign currency exchange rates, Citigroup paid \$925 million, which was “the largest single fine ever imposed for a violation of the Sherman Act.” Corkery & Proffess, *supra* note 20 (describing how bankers colluded to rig foreign exchange benchmarks via chatrooms named, “the cartel,” and “the mafia,” and made comments such as, “the less competition the better”).

199. Bid rigging is per se illegal under the antitrust laws. *See* 1 KALINOWSKI, *supra* note 59, § 7.04[2][e].

200. *See* *FTC v. Superior Court Trial Lawyers’ Ass’n*, 493 U.S. 411, 435-36 (1990); *Klor’s, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 212-14 (1959).

201. *See* *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 21-23 (1979). For more about tying arrangements, see Samuel Noah Weinstein, *United States v. Microsoft Corp.*, 17 BERKELEY TECH. L.J. 273, 276 (2002).

202. As mentioned, horizontal price fixing is strictly prohibited. *See* 1 KALINOWSKI, *supra* note 59, § 7.04[1] (“Furthermore, because price is such a sensitive issue, a horizontal agreement may be inferred from certain kinds of independent conduct, from some kinds of information exchanges coupled with other conduct, and from certain types of price signaling in industries susceptible to cooperative oligopoly.”); *see also id.* § 7.04[2][d] (“Price may have many material components, including discounts, credit terms, trade-in allowances, and down payments. Agreements to fix material components of price have been held to constitute illegal price fixing.”).

203. *See* *Leslie*, *supra* note 181, at 890.

204. *FTC v. Ind. Fed’n of Dentists*, 476 U.S. 447, 457-58 (1986); *Chi. Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918).

205. *See* Robert E. Litan, *Antitrust and the New Economy*, 62 U. PITT. L. REV. 429, 433 (2001) (“Normally speaking, there should be a presumption in favor of conduct remedies in antitrust cases, since company breakups are much like the death penalty of antitrust: they should be reserved for the most serious situations where abuse has occurred and there is no other way to restore effective

The antitrust laws can be enforced by the Antitrust Division of the DOJ, the FTC, the states, and private plaintiffs.<sup>206</sup> Only the DOJ can bring criminal antitrust actions.<sup>207</sup> The broad array of persons and entities that can enforce the antitrust laws, from private individuals to state attorneys general, creates a beneficial “competition” for antitrust enforcement that “mitigates problems” associated with (among other things) “agency capture” and ensures that there are “many sets of eyes on potential problems.”<sup>208</sup> As a practical matter, however, private civil antitrust enforcement has been greatly limited in recent years by the expansion of the use of rule of reason, as opposed to per se, standards for evaluating antitrust claims (discussed in more detail below), enhanced pleading requirements under *Bell Atlantic Corp. v. Twombly*,<sup>209</sup> and antitrust injury requirements for private plaintiffs.<sup>210</sup>

The U.S. Supreme Court has held that (potentially) anticompetitive conduct must be judged under one of two (possibly three) standards: per se or rule of reason.<sup>211</sup> A “narrow category of conduct” has been held to be per se illegal, while most types of conduct are judged under a “more permissive” rule of reason standard that involves detailed analysis of the purportedly anticompetitive conduct and its effects.<sup>212</sup> Rule of reason review typically results in “nearly all conduct” escaping liability.<sup>213</sup> In

competition to the market.”); Robert Pitofsky, *Antitrust at the Turn of the Twenty-First Century: The Matter of Remedies*, 91 GEO. L.J. 169, 171 (2002) (“On the civil side, much antitrust remedy law consisted of imposing cease and desist orders. The guilty firm was told that its behavior violated the law and was required to discontinue the behavior that was the subject of the enforcement action and perhaps some similar though not identical behavior.”); Spencer Weber Waller, *The Past, Present, and Future of Monopolization Remedies*, 76 ANTITRUST L.J. 11, 13-16 (2009).

206. Leslie, *supra* note 181, at 889.

207. *Id.*

208. See Max Huffman & Daniel B. Heidtke, *Behavior Exploitation Antitrust in Consumer Subprime Mortgage Lending*, 4 WM. & MARY POL’Y REV. 77, 97-98 (2012) (quoting commentators who have referred to the “decentralized and largely uncoordinated” enforcement of antitrust laws in the United States as being a “crazy quilt of enforcement mechanisms”); see also Michael Skapinker, *Bankers Still Need a ‘Bashing’—As Do the Rest of Us*, FIN. TIMES (Jan. 6, 2016), <https://next.ft.com/content/5d211618-b3a4-11e5-b147-e5e5bba42e51> (arguing that “[b]ecause regulators sometimes fail to do what they should” other parts of government and society, such as “legislative committees, the media, consumers, campaigners [and] researchers” need to monitor global banks and other large businesses for wrongdoing).

209. 550 U.S. 544, 564-70 (2007).

210. See Jesse W. Markham, Jr., *Sailing a Sea of Doubt: A Critique of the Rule of Reason in U.S. Antitrust Law*, 17 FORDHAM J. CORP. & FIN. L. 591, 610-13 (2012); C. Paul Rogers III, *The Incredible Shrinking Antitrust Law and the Antitrust Gap*, 52 U. LOUISVILLE L. REV. 67, 68-80 (2013); A. Benjamin Spencer, *Understanding Pleading Doctrine*, 108 MICH. L. REV. 1, 28 (2009).

211. *The Supreme Court 2009 Term—Leading Cases*, 124 HARV. L. REV. 179, 400-01 (2010).

212. *Id.* at 400-01; see *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997) (“[M]ost antitrust claims are analyzed under a ‘rule of reason . . . .’”).

213. *The Supreme Court 2009 Term—Leading Cases*, *supra* note 211, at 401; see also Thomas C. Arthur, *A Workable Rule of Reason: A Less Ambitious Antitrust Role for the Federal Courts*, 68

recent years, the Court appears to have sometimes applied a “quick look” rule of reason standard “that foregoes the original rule’s extensive inquiry by shifting the burden of proof on the defendant to provide evidence that certain presumptively anticompetitive acts did not create economic harm in violation of section 1.”<sup>214</sup> The general trend in modern antitrust law jurisprudence has been for courts to expand the scope of conduct that is analyzed by the permissive rule of reason standard, and to narrow the set of conduct considered per se illegal.<sup>215</sup>

Generally speaking, conduct that falls within the ambit of a per se rule is deemed to be illegal without the need for significant analysis into the objectives and effects of the conduct.<sup>216</sup> Importantly, however, a court must determine that the conduct in question is of the type that is governed by the per se rule. For example, horizontal agreements among competitors to fix prices, whether to eliminate a type of discount or otherwise, are per se illegal,<sup>217</sup> as are horizontal agreements among competitors to divide territory or markets.<sup>218</sup> Even more, horizontal price-fixing agreements are illegal, regardless of the mechanism used to implement them.<sup>219</sup> Because price fixing is a per se violation of the Sherman Act, an agreement by competitors to fix prices is illegal regardless of the market share of the conspirators or the likelihood that the price-fixing agreement would actually harm competition because the law bans price-fixing agreements regardless of “whether or not the

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ANTITRUST L.J. 337, 349-50 (2000); Roger D. Blair & D. Daniel Sokol, *The Rule of Reason and the Goals of Antitrust: An Economic Approach*, 78 ANTITRUST L.J. 471, 474 (2012); Andrew I. Gavil, *Moving Beyond Caricature and Characterization: The Modern Rule of Reason in Practice*, 85 S. CAL. L. REV. 733 (2012); Markham, *supra* note 192, at 264-65.

214. *The Supreme Court 2009 Term—Leading Cases*, *supra* note 211, at 401.

215. *Chi. Bd. of Trade v. United States*, 246 U.S. 231, 238-41 (1918) (holding that the futures exchange rule did not violate antitrust laws); Rogers, *supra* note 210, at 73-80 (discussing how the scope of per se rules narrowed and the scope of rule of reason widened); *see also* Markham, *supra* note 192, at 264 (referring to “the ever-narrowing reach of modern antitrust law” and that “[a]s currently interpreted by the courts, U.S. antitrust law is a shadow of its original self”).

216. *See* 54 AM. JUR. 2D *Monopolies, Restraints of Trade, and Unfair Trade Practices* § 50 (2009) (“Certain restraints of trade are unreasonable per se and therefore illegal under section 1 of the Sherman Act, without the necessity of an elaborate inquiry into the precise harm that they have caused or the business excuse for their use. Some types of restraints of trade have such a predictable and pernicious anticompetitive effect, and such limited potential for procompetitive benefit, that they are deemed unlawful per se.” (footnotes omitted)).

217. *See Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 649 (1980) (per curiam).

218. *Palmer v. BRG of Ga.*, 498 U.S. 46, 49 (1990).

219. *See United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223 (1940) (“[T]he machinery employed by a combination for price-fixing is immaterial.”). The antitrust laws have been construed to prohibit schemes that result in an “anticompetitive effect either of the violation or of the anticompetitive acts made possible by the violation.” *Brunswick Corp. v. Pueblo Bowl-O-Mat*, 429 U.S. 477, 489 (1977).

[conspiring] firms have any hope of success.”<sup>220</sup> Put simply, an agreement to fix prices, without more, constitutes a violation,<sup>221</sup> as it is “immaterial whether the agreements were ever actually carried out, whether the purpose of the conspiracy was accomplished in whole or in part or whether the effort was made to carry the object of the conspiracy into effect.”<sup>222</sup> All price-fixing agreements are strictly “banned because of their actual or potential threat to the central nervous system of the economy.”<sup>223</sup> More tellingly, “[e]ven though the members of the price-fixing group were in no position to control the market, to the extent that they raised, lowered, or stabilized prices they would be directly interfering with the free play of market forces”<sup>224</sup> because “interference with the setting of price by free market forces is unlawful per se.”<sup>225</sup> “Prices are fixed when they are agreed upon,” but this is interpreted broadly, such that “[p]rice fixing . . . is more than the establishment of uniform prices [b]ecause any interference with the setting of prices by free market forces is unlawful, conspirators do not have to adopt rigid prices in order to be guilty of price fixing.”<sup>226</sup> Therefore, even if prices are not fixed inflexibly, but within a range, or even maintained or stabilized, that is still price fixing.<sup>227</sup> For example, setting minimum or maximum prices is price fixing.<sup>228</sup> Additionally, a credit-fixing agreement, in which a group of companies abandons prior practice of establishing credit for retailers but instead demands payments in cash in advance or on delivery is price fixing.<sup>229</sup> Even more, agreements to fix

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220. *Israel Travel Advisory Service, Inc. v. Israel Identity Tours, Inc.*, 61 F.3d 1250 (7th Cir. 1995); see *Socony-Vacuum Oil Co.*, 310 U.S. at 226.

221. *Socony-Vacuum Oil Co.*, 310 U.S. at 180, 224-25 n.59 (1940); *United States v. Trenton Potteries Co.*, 273 U.S. 392, 402 (1927); *Nash v. United States*, 229 U.S. 373, 378 (1913); *United States v. Flom*, 558 F.2d 1179, 1183 (5th Cir. 1977).

222. *Plymouth Dealers’ Ass’n of No. Cal. v. United States*, 279 F.2d 128, 132 (9th Cir. 1960) (quoting *Trenton Potteries Co.*, 273 U.S. at 402). In addition to proving the existence of an agreement to fix prices, the government also must prove that one or more of the conspirators’ activities was in or affected commerce. *United States v. Cargo Serv. Stations, Inc.*, 657 F.2d 676, 683-84 (5th Cir. 1981); *United States v. Koppers Co.*, 652 F.2d 290, 295-96 n.6 (2d Cir. 1981).

223. *Socony-Vacuum Oil Co.*, 310 U.S. at 226 n.59.

224. *Id.* at 221.

225. *United States v. Container Corp. of Amer.*, 393 U.S. 333, 337 (1969).

226. 54 AM. JUR. 2D *Monopolies, Restraints of Trade, and Unfair Trade Practices* § 70 (2009); see *id.* § 98 (“A restraint is horizontal if it is imposed by agreement among competitors.”).

227. *Id.* § 70.

228. *Id.*

229. *Id.*; see *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 648-50 (1980) (per curiam) (explaining that credit is a component of the price of a product and, therefore, an agreement to eliminate credit is a form of per se unlawful price fixing); *Knevelbaard Dairies v. Kraft Foods, Inc.*, 232 F.3d 979, 987-89 (9th Cir. 2000) (stating that a scheme to manipulate a benchmark that measured bulk cheese auction prices, which was used as a component of the government-mandated minimum price for milk, would constitute an anticompetitive conspiracy that harmed milk buyers);

or rig a component of a price constitute price fixing.<sup>230</sup> This proposition holds true for conspiracies and agreements to rig benchmark interest rates and forex benchmark rates that serve as components to the prices of derivatives and other financial instruments.<sup>231</sup> In some instances, “trade associations and industry institutes that perform[] legitimate functions” have been used to facilitate illegal price-fixing schemes by “serv[ing] as cartel organizers and enforcers.”<sup>232</sup>

Beyond horizontal price-fixing cartels, mechanisms that involve competitors communicating or joining together is viewed with suspicion under the antitrust laws. For example, “joint ventures among competitors are of antitrust concern because they ‘provide for an opportunity for participants to discuss and agree on anticompetitive terms, or otherwise collude anticompetitively, as well as a greater ability to detect and punish deviations that would undermine the collusion.’”<sup>233</sup> The U.S. government generally is suspect of regular, direct competitor exchanges of price information and prosecutes, such actions as price fixing.<sup>234</sup> “[P]rivate standard-setting by associations comprising firms with horizontal and vertical business relations is permitted . . . under the antitrust laws only on the understanding that [the standard-setting] will be conducted in a nonpartisan manner offering procompetitive benefits.”<sup>235</sup> The lesson from these principles is that trade groups and

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*Ice Cream Liquidation, Inc. v. Land O’Lakes, Inc.*, 253 F. Supp. 2d 262, 272-73 (D. Conn. 2003) (stating that a conspiracy to inflate the price of butter, which was a component of minimum milk prices, would constitute an anticompetitive conspiracy that harmed milk buyers); *see also* *Sugar Inst., Inc. v. United States*, 297 U.S. 553, 597-602 (1936) (holding that cartels can violate the antitrust laws by using otherwise legal, cooperative activity to effectuate price fixing conspiracies).

230. *See Knevelbaard Dairies*, 232 F.3d at 987-89; *Ice Cream Liquidation, Inc.*, 253 F. Supp. 2d at 272-73.

231. *See, e.g.,* *Gelboim v. Bank of Am. Corp.*, 823 F.3d 759, 771 (2d Cir. 2016) (examining LIBOR and related interest rate-rigging); *Alaska Elec. Pension Fund v. Bank of Am. Corp.*, 175 F. Supp. 3d 44, 51-52 (S.D.N.Y. 2016) (examining ISDAfix benchmark interest rate-rigging); *In re Foreign Exch. Benchmark Rates Antitrust Litig.*, 74 F. Supp. 3d 581, 586-88 (S.D.N.Y. 2015) (examining forex benchmark rate-rigging).

232. *Leslie*, *supra* note 181, at 890; *see* 54 AM. JUR. 2D *Monopolies, Restraints of Trade, and Unfair Trade Practices* § 99 (“The rule that horizontal agreements among competitors involving territorial or customer restrictions are illegal per se is applicable to an agreement among a group of competitors who comprise a cooperative association.” (footnote omitted)). For a discussion of joint ventures and antitrust law, *see* Gregory J. Werden, *The Application to the Sherman Act to Joint Ventures: The Law After American Needle*, 12 SEDONA CONF. J. 251, 254-60 (2011); and Thomas A. Piraino, Jr., *The Antitrust Analysis of Joint Ventures After the Supreme Court’s Dagher Decision*, 57 EMORY L.J. 735, 767-78 (2008); and *see also* 1 LOUIS ALTMAN & MALLA POLLACK, CALLMANN ON UNFAIR COMPETITION, TRADEMARKS, AND MONOPOLIES § 4:38 (4th ed.).

233. WILLIAM M. HANNAY, CORPORATE COMPLIANCE SERIES: DESIGNING AN EFFECTIVE ANTITRUST COMPLIANCE PROGRAM § 1:42 (2015-2016) (quoting FED. TRADE COMM’N & DEPT. OF JUST., ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS § 3.31(b) (2000)).

234. *See, e.g.,* *N. Tex. Specialty Physicians v. FTC*, 528 F.3d 346, 356-68 (5th Cir. 2008).

235. *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 506-07 (1988); *see also*

professional associations are not immune from antitrust liability, even if the groups and associations also serve some legitimate purposes. For example, attorney bar association minimum fee schedules for legal services can constitute illegal price fixing under the Sherman Act.<sup>236</sup>

#### IV. ANTITRUST LAW AND SYSTEMICALLY IMPORTANT BANKS

A bank is systemically important if, because of its size, complexity or interconnectedness with other financial institutions, its failure would cause significant disruption to the financial system.<sup>237</sup> Systemically important banks also have been colloquially referred to as banks that are too big to fail.<sup>238</sup> The U.S. banking sector consolidated significantly when banks failed during the financial crisis, which resulted in the formation of a small group of global, systemically important banks.<sup>239</sup> The markets for many types of OTC swaps and derivatives are dominated by oligopolies<sup>240</sup> that consist of a handful of large, swap-

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Broadcom Corp. v. Qualcomm Inc., 501 F.3d 297, 308-10 (3d Cir. 2007) (discussing some procompetitive benefits of private standard-setting).

236. See, e.g., Goldfarb v. Va. State Bar, 421 U.S. 773, 781-83, 788-92 (1975) (holding that county bar association's minimum fee schedule recommending minimum amounts to be charged by attorneys for title examinations constituted illegal price fixing); United States v. Or. State Bar, 385 F. Supp. 507, 516-17 (D. Or. 1974); cf. FTC v. Superior Court Trial Lawyers' Ass'n, 493 U.S. 411, 435-36 (1990) (holding that court-appointed criminal defense lawyers in private practice who had engaged in a boycott to receive higher compensation had engaged in an unreasonable restraint of trade).

237. See *Addressing SIFIs*, FIN. STABILITY BOARD, <http://www.fsb.org/what-we-do/policy-development/systematically-important-financial-institutions-sifis> (last visited Dec. 31, 2016); see also Sharon E. Foster, *Systemic Financial-Service Institutions and Monopoly Power*, 60 CATH. U. L. REV. 357, 370-72 (2011) (defining systemic financial-service institutions).

238. Andru E. Wall, *The 2009 Stress Tests: A Model for Periodic Transparent Examinations of the Largest Bank Holding Companies*, 128 BANKING L.J. 291, 332 n.82 (2011) ("Systemically important is a more precise term than 'too big to fail' as an institution's failure could have catastrophic results not just because of its size, but also because of its complexity or interconnectedness with other financial institutions.").

239. See Donald I. Baker, *From Philadelphia National Bank to Too Big to Fail: How Modern Financial Markets Have Outrun Antitrust Law as a Source of Useful Structural Remedies*, 80 ANTITRUST L.J. 353, 362 (2015) (noting that, as a result of consolidations in the banking industry, "we can now see how these very big mergers were creating fewer players that really mattered, thereby facilitating cartel-like understandings among LIBOR, foreign exchange, and other index traders that would come to light later"); Arthur E. Wilmarth, Jr., *A Two-Tiered System of Regulation Is Needed to Preserve the Viability of Community Banks and Reduce the Risks of Megabanks*, 2015 MICH. ST. L. REV. 249, 252-54, 256-57 ("The financial crisis of 2007-2009 and its aftermath have accelerated a consolidation trend that has transformed the U.S. banking system during the past three decades.").

240. Carl T. Bogus, *The New Road to Serfdom: The Curse of Bigness and the Failure of Antitrust*, 49 U. MICH. J.L. REFORM 1, 91 (2015) ("Banking has become a true oligopoly in the United States."); Jonathan R. Macey & James P. Holdcroft, Jr., *Failure Is an Option: An Ersatz-Antitrust Approach to Financial Regulation*, 120 YALE L.J. 1368, 1387 (2011) ("[Seventy-seven percent] of banking assets are held by 1.4% of banks.").

dealing banks.<sup>241</sup> Several of the banks that have been implicated in the benchmark-rigging scandal are institutions (or their affiliates) that have been designated by regulatory authorities as systemically important (too big to fail).<sup>242</sup> While the too big to fail problem generally has been viewed as not—in and of itself—also being an antitrust problem,<sup>243</sup> bank mergers that occurred when financial institutions failed during the financial crisis ended up causing some markets to be dominated by a few large business entities, which made it easier for “cartel-like” practices to occur.<sup>244</sup> Concerns about the oligopolistic structure of the market for

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241. Katy Burne, *CFTC to Propose Swaps Anonymity*, WALL ST. J., Feb. 17, 2015, at C3 (“Five banks—Barclays PLC, Citigroup Inc., Deutsche Bank AG, Goldman Sachs Group Inc. and J.P. Morgan Chase & Co.—handle 65% of all client trading in interest-rate swaps, according to researcher Greenwich Associates.”); see Michael Greenberger, *Diversifying Clearinghouse Ownership in Order to Safeguard Free and Open Access to the Derivatives Clearing Market*, 18 *FORDHAM J. CORP. & FIN. L.* 245, 251 (2013) (“When Dodd-Frank passed, 90% of swaps were traded through the world’s ten largest banks; swaps trading generated approximately \$60 billion in revenue a year for these banks. . . . [T]he five largest commercial banks—JP Morgan Chase, Bank of America, Citigroup, Goldman Sachs, and HSBC—accounted for approximately 96% of the total banking industry’s notional amounts and 85% of the industry’s net credit exposure in the derivatives market.” (footnotes omitted)); see also KELLEHER ET AL., *supra* note 126, at 1 (“Today, just four Wall Street dealers—the broker arms of the largest banks on Wall Street that intermediate client trading—still control more than 90 percent of the U.S. [over-the-counter] derivatives markets, which have a notional value of almost \$200 trillion.”); Byungkwon Lim & Aaron J. Levy, *Contractual Framework for Cleared Derivatives: The Master Netting Agreement Between a Clearing Customer Bank and a Central Counterparty*, 10 *PRATT’S J. BANKR. L.* 509, 509 (2014) (“[T]he OTC derivatives market is dominated by a limited number of ‘highly interconnected’ dealers. . . .” (quoting JAMES K. JACKSON & RENA S. MILLER, *CONG. RESEARCH SERV.*, R42961, *COMPARING G-20 REFORM OF THE OVER-THE-COUNTER DERIVATIVES MARKETS* 7 (2013))).

242. See *infra* notes 239-40 and accompanying text and Tables 1–12.

243. See, e.g., Baker, *supra* note 239, at 362 (arguing that antitrust law is an inappropriate vehicle to address too big to fail concerns but noting that “we can now see how these very big mergers were creating fewer players that really mattered, thereby facilitating cartel-like understandings among LIBOR, foreign exchange, and other index traders that would come to light later”); Markham, *supra* note 192, at 305-16 (arguing that, while antitrust law could address some issues associated with Too-Big-to-Fail institutions, “antitrust law alone is not the cure”). But see Bogus, *supra* note 240, at 81-85; Foster, *supra* note 237, at 359 (“[A]nother financial crisis can be mitigated through the application of antitrust law. . . .”); Sharon E. Foster, *Too Big to Fail—Too Small to Compete: Systemic Risk Should Be Addressed Through Antitrust Law but Such a Solution Will Only Work if It Is Applied on an International Basis*, 22 *FLA. J. INT’L L.* 31, 50-61 (2010); Macey & Holdcroft, *supra* note 240, at 1392 (“Rather, our view is that breaking up the banks is fully justified on the grounds that such a breakup would make the economy safer and more stable by limiting or eliminating the proclivity of regulators and elected officials to engineer massive bailouts of the largest financial institutions whenever a financial crisis appears. We recognize, however, that our plan involves a sea change in the current U.S. approach to antitrust policy.”).

244. Baker, *supra* note 239, at 372 (“[B]y becoming so few in number, these big institutions have enhanced the ability of their employees to engage in the nefarious quasi-conspiratorial manipulation of LIBOR, foreign exchange, and the other key indices—which determine the prices at which numerous lenders and borrowers have dealt with each other around the globe.”); see also Albert A. Foer & Don Allen Resnikoff, *Antitrust, Competition Policy, and ‘Too Big to . . .’*, 15 *J. BANKING REG.* 299, 300 (2014) (arguing that “the Antitrust Division [of the U.S. Department of

OTC swaps and other derivatives date back to at least 2009.<sup>245</sup> At the time of this writing, there are 105 provisionally registered swap dealers and no major swap participants,<sup>246</sup> but, despite that fact, the markets for specific categories of OTC swaps and other derivatives tend to be highly concentrated, with five or so swap-dealing banks representing ninety percent or more of certain markets in some cases.<sup>247</sup> Notwithstanding the recent trend towards bank consolidation, many OTC derivative markets

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Justice] be consulted on all matters that are likely to substantially affect the structure of the financial services industry, including the economic implications of the undue concentration of economic power”). For a general discussion of how the banks consolidated during the financial crisis and antitrust issues related to consumer banking, see David Cho, *Banks “Too Big to Fail” Have Grown Even Bigger*, WASH. POST, Aug. 28, 2009, at A1, noting that four banks—J.P. Morgan Chase, Citigroup, Wells Fargo, and Bank of America—“issue one of every two mortgages and about two of every three credit cards.”

245. For example, in 2009, “Theo Lubke, who headed the Federal Reserve Bank of New York’s efforts to reform the private derivatives market” stated that “[i]t is simply unacceptable in today’s environment that the design and structure of the OTC derivatives market can be controlled by a handful of large dealers.” Matthew Leising & Shannon D. Harrington, *Goldman Sachs Hires N.Y. Fed’s Lubke, Point Man on Swaps Reform*, BLOOMBERG, Dec. 15, 2010; see ROBERT E. LITAN, INITIATIVE ON BUS. & PUB. POLICY AT BROOKINGS, THE DERIVATIVES DEALERS’ CLUB AND DERIVATIVES MARKET REFORM: A GUIDE FOR POLICY MAKERS, CITIZENS AND OTHER INTERESTED PARTIES 13-17 (2010), [https://www.brookings.edu/wp-content/uploads/2016/06/0407\\_derivatives\\_litan.pdf](https://www.brookings.edu/wp-content/uploads/2016/06/0407_derivatives_litan.pdf); Matthew Leising, *Fed Seeks End to Wall Street Lock on OTC Derivatives*, BLOOMBERG, May 6, 2009; Matthew Leising & Shannon D. Harrington, *Wall Street Dominance of Swaps Must End, Brokers Say*, BLOOMBERG, Mar. 16, 2010; see also Karen Brettell, *Banks More Open to Futures as Derivatives Rules Set In*, REUTERS (Oct. 31, 2012, 3:00 PM), <http://www.reuters.com/article/us-futures-exchanges-swaps-idUSBRE89U1F720121031> (“Many of the world’s largest banks that dominate the \$648 trillion privately traded derivatives markets have been resistant to attempts to launch competing listed products, in order to protect lucrative profits associated with their effective oligopoly in over-the-counter credit, interest rate, and equity derivatives markets.”).

246. See *Swap Dealer (SD) and Major Swap Participant (MSP) Directory*, *supra* note 72 (providing a link to a spreadsheet that lists provisionally registered swap dealers and major swap participants). To put the 105 number in some context, several major banks have multiple entities that are provisionally registered swap dealers. For example, Goldman Sachs has 9 swap dealer affiliates, and 11 if you count two business entities affiliated with J. Aron & Company, which is the commodities risk management division of Goldman Sachs. See *id.*

247. OFFICE OF THE COMPTROLLER OF THE CURRENCY, QUARTERLY REPORT ON BANK TRADING AND DERIVATIVE ACTIVITIES: THIRD QUARTER 2015, at tbl. 1-12 (2015), <https://www.occ.gov/topics/capital-markets/financial-markets/derivatives/dq315.pdf>. Some interpretations of market data view the biggest four dealers—J.P. Morgan Chase, Citibank, Goldman Sachs, and Bank of America—as controlling as much as ninety-one percent of the U.S. OTC derivatives markets. KELLEHER ET AL., *supra* note 126, at 1 n.3 (referencing data from the third quarter of 2015 Office of the Comptroller of the Currency (OCC) report on bank derivative activities). The International Swaps and Derivatives Association (ISDA) has argued that “the OCC measure covers only institutions based in the U.S. so does not take account of the global nature of derivatives activity,” which makes the report incomplete because “only six of the fourteen most active global [OTC] derivatives dealers . . . are based in the U.S.” DAVID MENGLER, INT’L SWAPS & DERIVATIVES ASS’N, ISDA RESEARCH NOTES: CONCENTRATION OF OTC DERIVATIVES AMONG MAJOR DEALERS 1-2 (2010); see also *id.* at 2 (also noting that the OCC quarterly reports “do not capture the U.S. activities of non-U.S. dealers”). ISDA contended that this market structure resulted in a “‘loose oligopoly’ in which effective collusion is impossible.” *Id.*

have been highly concentrated for some time. For example, about a decade ago, in the first quarter of 2005, five banks accounted for ninety-five percent of the total notional amount of derivatives in the banking system, with the largest twenty-five banks accounting for ninety-nine percent of derivatives in the system.<sup>248</sup> Similarly, a 2012 analysis of the market for credit default swaps and other credit derivatives stated that “[t]he credit derivatives market shows a very high degree of concentration and that high level of concentration has persisted since 1998,” which “raises the possibility of collusion, market manipulation, and monopolistic pricing practices.”<sup>249</sup>

The Appendix to this Article contains several tables that illustrate the extent to which financial institutions that have settled government enforcement actions or private lawsuits alleging benchmark rate-rigging conspiracies or other antitrust violations also are (1) systemically important banks or (2) provisionally registered swap dealers.<sup>250</sup> The tables in the Appendix show that several large banks appear to be recidivists, insofar as anticompetitive conduct is concerned, having settled multiple private lawsuits or government enforcement actions concerning anticompetitive conduct in the markets for derivatives.<sup>251</sup>

While several of the world’s largest banks and their accomplices were being investigated by global authorities in connection with rigging LIBOR and related interest rate benchmarks, different employees at many of those same banks also were rigging forex rate benchmarks.<sup>252</sup> The opaque forex market is dominated by the currency traders from a few large banks, with Deutsche Bank, Citibank, Barclays, and UBS accounting for more than half of the market.<sup>253</sup> As with bank

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248. OFFICE OF THE COMPTROLLER OF THE CURRENCY, QUARTERLY REPORT ON BANK TRADING AND DERIVATIVE ACTIVITIES: FIRST QUARTER 2005, at 1 (2005), <https://www.occ.gov/topics/capital-markets/financial-markets/derivatives/dq105.pdf> (“Holdings of derivatives continue to be concentrated in the largest banks.”). In the first quarter of 2005, the banks with the most derivative contracts were (in order) J.P. Morgan Chase Bank NA, Bank of America NA, Citibank National Association, Wachovia Bank National Association, and HSBC Bank USA National Association. *Id.* at tbl. 10.

249. Donald R. van Deventer, *The Credit Default Swap Market and Anti-Trust Considerations*, KAMAKURA CORP. (Jan. 19, 2012, 3:22 AM), <http://www.kamakuraco.com/Blog/tabid/231/EntryId/371/The-Credit-Default-Swap-Market-and-Anti-Trust-Considerations.aspx>.

250. See *infra* Tables 9–11.

251. See *infra* Tables 7, 9, 12.

252. See, e.g., *In re Barclays Bank PLC*, CFTC No. 15-24, 2015 WL 2445059, at \*2 (May 20, 2015) (“[S]ome of this conduct occurred during the same period that Barclays was on notice that the CFTC and other regulators were investigating attempts by certain banks to manipulate [LIBOR] and other interest rate benchmarks.”); *In re UBS AG*, CFTC No. 15-06, 2014 WL 6068389, at \*2 (Nov. 11, 2014); *In re Citibank, N.A.*, CFTC No. 15-03, 2014 WL 6068386, at \*2 (Nov. 11, 2014).

253. Daniel Schafer et al., *Forex in the Spotlight*, FIN. TIMES, Feb. 17, 2014, at 9; see Verstein, *supra* note 70, at 238 (“The interbank tier [of the forex market] is essentially an invitation only

manipulation of benchmark interest rates, the scale of those impacted by the forex benchmark rigging is potentially enormous because the rigging of forex benchmarks manipulated the currency exchange rates that were used to settle billions of dollars in currency trades, thereby harming “almost every company and individual in the financial markets.”<sup>254</sup>

Unlike LIBOR and other benchmark interest rates, banks rigged forex benchmarks that were determined based on actual currency trades that were executed on Thomson Reuter’s electronic brokerage during a two-minute window every day,<sup>255</sup> as opposed to being set by submissions from banks that were selected to be members of interest rate-setting panels. Accordingly, to rig forex rate benchmarks, banks coordinated their trading activity in different currencies with the objective of moving the value of those currencies up or down.<sup>256</sup> In the forex benchmark scandal, traders at different banks communicated in chatrooms to share information about client orders for foreign currencies and coordinate trades to move the forex benchmark rates between several different currencies, such as the U.S. dollar to the British pound, or the euro to the dollar.<sup>257</sup> The chatrooms had names such as the Cartel, the Bandits’ Club, and the Mafia.<sup>258</sup> Some of the chatrooms were invitation only and, in deciding whether to invite other forex traders, chatroom participants openly discussed whether the prospective chatroom member would “add huge value to this cartel.”<sup>259</sup>

Forex cartel members in the U.S. dollar-Brazilian real market agreed to jointly boycott local Brazilian currency brokers. In a chat from

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market. . . . The result is striking: the top four banks conduct 50.4% of customer volume. In the spot market (market for immediate delivery), ninety-eight percent of market share goes to ten firms. Crucially, only transactions in the interdealer market count in determining currency benchmarks.” (footnote omitted).

254. Steve Mufson & Jonnelle Marte, *5 Big Banks to Pay More Than \$5 Billion to Settle Charges*, WASH. POST, May 21, 2015, at A12. Plaintiffs in the private Foreign Exchange Benchmark Rates Antitrust Litigation include a municipal board, pension plans, investment funds, and the like, all of whom purchased forex-related financial instruments priced at or by the WM/R Fix. *In re Foreign Exch. Benchmark Rates Antitrust Litig.*, 74 F. Supp. 3d 581, 586 (S.D.N.Y. 2015).

255. Verstein, *supra* note 70, at 235 (“The leading benchmarks of foreign currency exchange are derived from a tiny subset of trades. Specifically, the leading benchmarks are derived from trades mostly executed by a dozen sophisticated intermediaries during a narrow band of time, that are consciously submitted or omitted based on the effect on the benchmark.”).

256. *In re Foreign Exch. Benchmark Rates Antitrust Litig.*, 74 F. Supp. 3d at 587.

257. Chad Bray, *The Things Traders Say, Foreign Exchange Addition*, N.Y. TIMES: DEALBOOK (Nov. 12, 2014, 9:31 AM), [http://dealbook.nytimes.com/2014/11/12/the-things-traders-say-foreign-currency-exchange-edition/?\\_r=0](http://dealbook.nytimes.com/2014/11/12/the-things-traders-say-foreign-currency-exchange-edition/?_r=0).

258. See Mark Odell, *Trader Transcripts: ‘If You Ain’t Cheating, You Ain’t Trying,’* FIN. TIMES (May 20, 2015), <https://www.ft.com/content/eac637ae-feb-11e4-84b2-00144feabdc0>.

259. *In re JPMorgan Chase Bank, N.A.*, CFTC No. 15-04, 2014 WL 6068387, at \*5 (Nov. 11, 2014).

October of 2009, a Royal Bank of Canada trader wrote, “everybody is in agreement in not accepting a local player as a broker,” and a Barclays forex trader responded, “yes, the less competition the better.”<sup>260</sup> In one electronic chat among employees of J.P. Morgan Chase, Citibank, and UBS concerning whether to invite a trader from Barclays Bank to join the forex benchmark “cartel,” the chat participants wondered if the Barclays trader would not talk about the cartel with others.<sup>261</sup> The UBS trader emphasized that this was an important issue because he did not “want other numpty’s in mkt [sic] to know” about the cartel.<sup>262</sup>

The rigging of forex benchmark rates worked as such: one trader in the cartel would build a large position in a currency and unload it during the fixing period in an attempt to move prices, while traders from other banks would join in with their own trades in the same direction, with coordination achieved through chatroom conversations.<sup>263</sup> Because the forex benchmarks were determined by trades executed on a specific venue during a two-minute closing period (i.e., the specified time period during which an average price is produced), cartel members were able to manipulate the forex benchmarks by engaging in a practice known as “banging the close” in which they bought or sold a large amount of currency during the closing period when the forex benchmark rates were fixed.<sup>264</sup> Additionally, forex cartel members also would front run, or trade ahead, of customer currency orders, which meant that bank forex traders would trade their banks’ own proprietary positions before executing their customers’ large market-moving orders for trades so that the bank could take positions to its benefit at the detriment of the customer.<sup>265</sup> Lastly, forex cartel members would seek to push the market by “painting the screen” by placing “fake orders”—i.e., orders for currencies that were not actually executed (or intended to be executed)—with other banks to create the illusion of trading activity in a given direction to move rates prior to the closing period.<sup>266</sup>

Based on the description of it, painting the screen appears to be a form of spoofing (i.e., placing orders for trades with the intent to cancel

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260. Odell, *supra* note 258.

261. *Foreign Exchange Benchmark Case*: In re Barclays Bank PLC *Examples of Misconduct in Private Chat Room*, COMMODITY FUTURES TRADING COMM’N (May 20, 2015), <http://www.cftc.gov/idc/groups/public/@newsroom/documents/file/xfbarclysmisconduct052015.pdf>.

262. Bray, *supra* note 257.

263. *In re Foreign Exch. Benchmark Rates Antitrust Litig.*, 74 F. Supp. 3d 581, 587-88 (S.D.N.Y. 2015); Corkery & Protess, *supra* note 20.

264. *In re Foreign Exch. Benchmark Rates Antitrust Litig.*, 74 F. Supp. 3d at 588; Odell, *supra* note 258.

265. *In re Foreign Exch. Benchmark Rates Antitrust Litig.*, 74 F. Supp. 3d at 587-88.

266. *Id.* at 588.

them before they are executed, which is illegal under the CEA).<sup>267</sup> Indeed, all three of these trading practices referenced above—front running, banging the close, and spoofing/painting the screen—are illegal under the laws governing securities and markets for derivatives if performed by traders acting on their own.<sup>268</sup> Here, however, because these trading strategies were performed jointly in collusion with forex market competitors (i.e., by competing banks acting as a unified trading bloc), the conspiracy constituted a horizontal price-fixing cartel and therefore would run afoul of U.S. antitrust laws.<sup>269</sup>

The largest antitrust fines ever obtained by the DOJ were the more than \$5 billion in fines that were levied in 2015 against five of the world's largest banks—namely, J.P. Morgan Chase, Barclays, Citigroup, UBS, and the Royal Bank of Scotland—in connection with the banks' settlement of allegations that they had formed a cartel to rig foreign exchange benchmark rates.<sup>270</sup> The DOJ required five banks to agree to parent-level guilty pleas for rigging forex benchmark rates.<sup>271</sup> Four of the banks pleaded guilty to violating section 1 of the Sherman Act.<sup>272</sup> UBS pleaded guilty to one count of wire fraud because its rigging of forex benchmark rates was found to violate its earlier non-prosecution agreement for rigging benchmark interest rates.<sup>273</sup> The demand for parent-level guilty pleas was a change in DOJ policy compared to the settlements connected with the rigging of LIBOR and related benchmark interest rates. There, for example, foreign subsidiaries of Deutsche Bank, the Royal Bank of Scotland, and UBS—namely, DB Group Services UK Limited, UBS Securities Japan Company Limited, and RBS Securities

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267. See Gregory Scopino, *Preventing Spoofing: From Social Norms to Criminal Prosecutions*, 84 U. CINN. L. REV. (forthcoming 2016) (manuscript at 18-21).

268. Gregory Scopino, *The (Questionable) Legality of High-Speed "Pinging" and "Front Running" in the Futures Markets*, 47 CONN. L. REV. 607, 674-75 (2015).

269. *In re Foreign Exch. Benchmark Rates Antitrust Litig.*, 74 F. Supp. 3d at 596. The District Court for the Southern District of New York was ruling on a motion to dismiss and assumed, for purposes of that motion, that the allegations in the complaint were true. The complaint alleged, inter alia, that forex traders at several of the world's largest banks used various electronic communications platforms to share market-sensitive information with rivals, including price information as well as volume and direction of customer orders, before the forex benchmark rate fixings, and agreed in chatrooms and instant messages to engage in collusive trading strategies to manipulate the forex benchmark rates determined at such fixings. *Id.* at 587-88.

270. See Press Release, Dep't of Justice, *supra* note 62; see also *Record Fines for Currency Market Fix*, BBC NEWS (May 20, 2015), <http://www.bbc.com/news/business-32817114>. In total, the five banks paid about \$5.7 billion to settle the foreign exchange rate-rigging case. See Dean Starkman & Jim Puzanghera, *5 Global Banks to Pay \$5.7 Billion in Fines over Currency Manipulation*, L.A. TIMES (May 20, 2015, 6:01 PM), <http://www.latimes.com/business/la-fi-banks-criminal-fines-20150521-story.html>.

271. Press Release, Dep't of Justice, *supra* note 62.

272. *Id.*

273. *Id.*

Japan Limited—each pleaded guilty to wire fraud, as opposed to the parent companies of the banks.<sup>274</sup> The CFTC also reached settlements with the six banks that settled forex benchmark rate-rigging allegations with the DOJ.<sup>275</sup> For several of those banks, participation in the scheme to rig forex benchmark rates violated earlier settlements that had resolved cases involving accusations that they had rigged benchmark interest rates.<sup>276</sup> For UBS, it was the third criminal settlement in six years.<sup>277</sup>

Even more, twelve global banks, in conjunction with Markit Group Limited—a market data and information provider—and ISDA—a trade association for swaps market participants—agreed in 2015 to pay approximately \$1.9 billion to settle antitrust allegations that they acted to prevent competition in the market for credit default swaps.<sup>278</sup> Further, in 2016, Deutsche Bank became the first global bank to settle a private antitrust lawsuit alleging an anticompetitive conspiracy by global banks to rig the benchmarks for gold and silver.<sup>279</sup> Deutsche Bank's settlement

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274. See Press Release, Dep't of Justice, *supra* note 37; Press Release, Dep't of Justice, RBS Securities Japan Ltd. Sentenced for Manipulation of Yen LIBOR (Jan. 6, 2014), [http://www.justice.gov/atr/public/press\\_releases/2014/302785.pdf](http://www.justice.gov/atr/public/press_releases/2014/302785.pdf); Press Release, Dep't of Justice, UBS Securities Japan Co. Ltd. to Plead Guilty to Felony Wire Fraud for Long-Running Manipulation of LIBOR Benchmark Interest Rates (Dec. 19, 2012), [http://www.justice.gov/atr/public/press\\_releases/2012/290478.pdf](http://www.justice.gov/atr/public/press_releases/2012/290478.pdf).

275. See *infra* Table 2. Prudential banking regulators also have fined banks for improprieties associated with forex trading. See *infra* Tables 3–4.

276. For example, Barclays and UBS admitted that their involvement in a cartel to rig foreign exchange rates violated their earlier settlements regarding the rigging of benchmark interest rates. Aruna Viswanatha, *Banks Pay \$5.6 Billion to Settle U.S. Probe*, WALL ST. J., May 21, 2015, at 1.

277. Mufson & Marte, *supra* note 254, at A12.

278. See *infra* Table 7. More specifically, “[a] dozen of Wall Street’s biggest banks agreed . . . to settle accusations that they conspired to prevent competition in the credit-derivatives markets” by allegedly delaying credit derivatives “from being openly traded on exchanges, where prices would be more transparent.” Katy Burne, *Swaps Suit Payout Is Windfall for Funds*, WALL ST. J., Jan. 11, 2016, at C3; see also Karen Brettell, *Banks’ Pressure Stalls Opening of US Derivatives Trading Platform*, REUTERS (Aug. 27, 2014, 2:02 PM), <http://www.reuters.com/article/usa-derivatives-banks-idUSL1N0QWIT220140827> (“The first interdealer trading platform aimed at opening up credit derivatives markets to new competition has hit roadblocks due to resistance from some banks that dominate such trading, according to several people familiar with the situation. . . . Several hedge fund managers that had planned to join [a competing] credit platform received phone calls from multiple banks that indicated that they would stop trading with them or send them unfavorable pricing if they joined an interdealer venue.”); Katy Burne, *Banks Finalize \$1.86 Billion Credit-Swaps Settlement*, WALL ST. J. (Oct. 1, 2015, 11:14 AM), <http://www.wsj.com/articles/wall-street-banks-in-credit-swaps-settlement-1443708335> [hereinafter Burne, *Banks Finalize \$1.86 Billion Credit-Swaps Settlement*].

279. Stempel, *supra* note 63 (“The plaintiffs accused Deutsche Bank of conspiring with Bank of Nova Scotia (BNS.TO), Barclays Plc (BARC.L), HSBC Holdings Plc (HSBA.L) and Société Générale (SOGN.PA) to manipulate prices of gold, gold futures and options, and gold derivatives through twice-a-day meetings to set the so-called London Gold Fixing. They also accused Deutsche Bank, HSBC, and ScotiaBank of a similar conspiracy to manipulate silver prices by rigging the

of the private U.S. antitrust lawsuit comes two years after Barclays was fined by U.K. authorities after it was revealed that a Barclays trader had manipulated the London Gold Fix.<sup>280</sup> At the time, the repeated instances of benchmark-rigging conspiracies prompted the EU's then competition commissioner, Joaquin Almunia, to suggest that "perhaps manipulation [of benchmarks] is not the exception but the rule."<sup>281</sup> Again, as the Appendix to this Article illustrates, during the past few years, many of the same large banks, including Deutsche Bank and Barclays, appear to have been involved in several different cartels to fix benchmark rates or otherwise stifle competition in the markets for derivatives.<sup>282</sup>

The all-too-common banker schemes to rig benchmark rates and stifle competition raise more than just antitrust law issues. Systemic risk has been defined as circumstances in which an exogenous shock simultaneously causes or contributes to the failure of multiple significant financial institutions.<sup>283</sup> Banker misconduct has been so pervasive that banking regulators have stated that, because the corporate culture inside many global banks appears to condone unethical and illegal conduct for the sake of profits, bank culture is one source of systemic risk.<sup>284</sup> Regulators also have stated that the repeated instances of misconduct justify increased scrutiny of financial entities and stiffer punishments for errant banks.<sup>285</sup> William C. Dudley, president of the Federal Reserve

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daily Silver Fix.”).

280. See Daniel Schäfer et al., *Barclays Fined £26m for Trader's Gold Rigging*, FIN. TIMES (May 23, 2014), <https://next.ft.com/content/08cafa70-e24f-11e3-a829-00144feabdc0> (stating that the London Gold Fix “is used by everyone from central banks to jewelers and gold miners to set a reference price for bullion”); see also Ralph Atkins & Henry Sanderson, *Swiss Regulator Probes Banks' Possible Precious Metals Collusion*, FIN. TIMES (Sept. 28, 2015), <https://next.ft.com/content/4f35c914-65ba-11e5-9846-de406ccb37f2>.

281. Schäfer et al., *supra* note 280 (alteration in original).

282. See *infra* Tables 1–12.

283. Hal S. Scott, *The Reduction of Systemic Risk in the United States Financial System*, 33 HARV. J.L. & PUB. POL'Y 671, 673 (2010).

284. See *Poor Bank Culture a Stability Risk; Work Needed—Fed's Dudley*, REUTERS (Nov. 5, 2015, 8:48 AM), <http://www.reuters.com/article/usa-fed-dudley-idUSL1N1301J620151105> (“The culture within big banks remains a possible source of financial instability seven years after the worst crisis since the Great Depression, and more work is needed to reform the underlying causes of Wall Street misconduct, a top Federal Reserve official said.”). In an October 2014 meeting with bankers, Michael C. Dudley, President and CEO of the Federal Reserve Bank of New York, stated that “[a]n ‘apparent lack of respect for law, regulation and the public trust’ persists” that reflects “deep-seated cultural and ethical failures,” and that “the consequences of cultural and ethical failures in [large, complex and interconnected firms] are also more severe and harmful to the economy.” William C. Dudley, Pres. & CEO, Fed. Reserve Bank of N.Y., Remarks at the Workshop on Reforming Culture and Behavior in the Financial Services Industry (Oct. 20, 2014), <https://www.newyorkfed.org/newsevents/speeches/2015/dud151105.html>.

285. Christopher Condon, *Fed's Tarullo Warns Banks to Curb Culture of Bad Behavior*, BLOOMBERG (Oct. 20, 2014, 12:00 PM), <http://www.bloomberg.com/news/2014-10-20/fed-s-tarullo-says-wall-street-misconduct-disturbingly-regular.html> (“If banks do not take more effective

Bank of New York, has stated that repeated banker misconduct is grounds for breaking up a (presumably unmanageably large) bank.<sup>286</sup>

## V. EXISTING OFFENSES UNDER THE CEA

To determine if the CFTC needs additional authority to combat anticompetitive conduct, one must first understand the scope of the CFTC's existing enforcement arsenal. By and large, there are two main categories of wrongdoing under the CEA (and regulations promulgated thereunder): (1) fraudulent activity and (2) manipulative and disruptive trading practices.<sup>287</sup> The prohibitions against manipulative and disruptive trading practices also, generally speaking, seek to combat anticompetitive activity,<sup>288</sup> but the underlying causes of action differ in

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steps to control the behavior of those who work for them, there will be both increased pressure and propensity on the part of regulators and law enforcers to impose more requirements, constraints, and punishments,' [Governor of the Federal Reserve Daniel Tarullo] said in the text of his remarks."); *see also id.* ("Where there is significant incidence of behavior that violates laws or regulations, or runs afoul of supervisory guidance, then we will need to consider some combination of tougher sanctions, additional regulation, or more intrusive supervisory oversight,' [Tarullo] said."); Sam Fleming & Chris Giles, *The City of London Faces More Than 'a Few Bad Apples,'* FIN. TIMES (Oct. 27, 2014, 11:09 PM), <http://www.ft.com/intl/cms/s/0/db35a3b4-7914-11e4-b518-00144feabdc0.html> (stating that some proposals to address repeated bank misconduct included "tougher penalties on staff who breach internal guidelines, more intrusive electronic surveillance of trading floors, and more established procedures for protecting whistleblowers" along with "harsher regulation, including imposing higher capital charges on firms that fall foul of rules").

286. *See* Ryan Tracy & Victoria McGrane, *Fed Tells Banks to Shape Up or Break Up*, WALL ST. J., Oct. 21, 2014, at C1 ("Mr. Dudley raised the specter of breaking up big banks, saying if firms don't prove they can comply with the law 'the inevitable conclusion will be reached that your firms are too big and complex to manage effectively. In that case, financial-stability concerns would dictate that your firms need to be dramatically downsized and simplified so they can be managed effectively.'"); *see also* Editorial, *How Bankers Are Paid Is Now Everyone's Business*, FIN. TIMES (Nov. 17, 2014), <http://www.ft.com/intl/cms/s/0/4d72a5a8-6e52-11e4-bffb-00144feabdc0.html> (stating that the bank forex benchmark rate-rigging scandal has "left shareholders, customers and regulators wondering how to stop banks from repeating such appalling practices" and that "[i]n the end, banks may only regain the confidence of regulators and customers once they have been split into smaller, more coherent units").

287. 1 JOHNSON & HAZEN, *supra* note 65, § 1.15[1] ("The principal focuses of the [CEA] and the overall regulatory scheme, however, can be categorized generally as (1) protection of the markets from manipulative or other anticompetitive behavior and (2) protection of the users of the market from improper conduct by their agents and fiduciaries."). Note that the CFTC, in bringing civil enforcement actions against alleged violators of CEA antifraud provisions, does not have to prove reliance. *See* Prohibition on the Employment, or Attempted Employment, of Manipulative and Deceptive Devices and Prohibition on Price Manipulation, 76 Fed. Reg. 41,398 41,403 (July 14, 2011) (to be codified at 17 C.F.R. pt. 180).

288. *See* Sharon Brown-Hruska, *Market Manipulation in the Energy Markets*, FUTURES & DERIVATIVES L. REP., Nov. 2003, at 1 ("[M]anipulation is treated in a similar fashion to a violation of our antitrust laws. . . . Proof of manipulation involves elements similar to those found in antitrust law . . ."); Jerry W. Markham et al., *Market Manipulation—From Star Chamber to Lone Star*, FUTURES & DERIVATIVES L. REP., Nov. 2003, at 7 ("The concept of monopoly was related to the focus on the manipulation of prices.").

some ways from traditional antitrust law causes of action. The CFTC's Division of Enforcement investigates and civilly prosecutes alleged violations of the CEA and CFTC Regulations.<sup>289</sup>

#### A. Market Manipulation and Disruptive Trading Practices

A discussion of market power manipulation,<sup>290</sup> also known as price manipulation,<sup>291</sup> is a good place to begin a discussion of enforcement causes of action under the CEA because preventing price manipulation has been one of the primary purposes of the federal regulation of futures and other derivatives since the U.S. government began overseeing these markets in 1922 with the Grain Futures Act.<sup>292</sup> From the beginning of U.S. regulation of futures markets, federal law has outlawed manipulation without defining it.<sup>293</sup> As a result of the lack of a concrete statutory definition, the legal theories underlying price manipulation claims have largely been shaped by judicial decisions, which have acknowledged that “[t]he methods and techniques of manipulation are limited only by the ingenuity of man.”<sup>294</sup> Throughout much of the history of U.S. derivatives regulation, federal law and regulators largely have been viewed as ineffective at preventing and punishing manipulation.<sup>295</sup> Under current law, section 9(a)(2) of the CEA prohibits any person from manipulating the price of a commodity in interstate commerce, a futures contract, or a swap.<sup>296</sup> “[C]lassic market manipulation” schemes, which commonly were referred to as “corners” or “squeezes,” had clear parallels to conduct that would run afoul of the

289. *Enforcement: Office of the Director*, *supra* note 65.

290. See Craig Pirrong, *Energy Market Manipulation: Definition, Diagnosis, and Deterrence*, 31 ENERGY L.J. 1, 3-6 (2010) (distinguishing types of “market power manipulations” from “fraud-based manipulations”).

291. Some sources use the phrases, “market-power manipulation,” or “market manipulation,” while others use the phrase, “price manipulation” to focus on the fact that manipulative schemes distort the price or prices of financial products. See Prohibition on the Employment, or Attempted Employment, of Manipulative and Deceptive Devices and Prohibition on Price Manipulation, 76 Fed. Reg. at 41,407 (using the phrase, “price manipulation”).

292. See Markham, *supra* note 3, at 298-303; Comment, *The Delivery Requirement: An Illusory Bar to Regulation of Manipulation in Commodity Exchanges*, 73 YALE L.J. 171, 171 n.2 (1963); see also Scopino, *supra* note 44, at 259-60.

293. 23A JERRY W. MARKHAM & THOMAS LEE HAZEN, *BROKER-DEALER OPERATIONS UNDER SECURITIES AND COMMODITIES LAW* § 9:17.50, Westlaw (database updated 2015).

294. *Cargill, Inc. v. Hardin*, 452 F.2d 1154, 1163 (8th Cir. 1971).

295. See generally Markham, *supra* note 3.

296. 7 U.S.C. § 13(a)(2) (2012). Section 6(c) and (d) of the CEA authorizes the CFTC to file a complaint and impose, inter alia, civil monetary penalties and cease and desist orders if the CFTC believes that a person has manipulated or attempted to manipulate the market price of any commodity, futures contract, or swap (or has violated any of the provisions of the CEA). See 7 U.S.C. §§ 9(4)(A), (10)–(11), 13b.

antitrust laws, in that corners and squeezes generally involved circumstances in which a person (or persons) bought or otherwise controlled all or a substantial portion of the deliverable supplies of a commodity and the related futures contracts for a particular delivery date.<sup>297</sup>

To succeed on a claim for price manipulation, the CFTC must show that: (1) the defendant had the ability to influence market prices, (2) an artificial price existed, (3) the defendant caused the artificial price, and (4) the defendant specifically intended to cause the artificial price.<sup>298</sup> “An artificial price is a price that ‘does not reflect basic forces of supply and demand.’”<sup>299</sup> To satisfy the specific intent element, the CFTC must prove that the defendant “acted (or failed to act) with the purpose or conscious object of causing or effecting a price or price trend in the market that did not reflect the legitimate forces of supply and demand.”<sup>300</sup> Some authors have called intent the “essence”<sup>301</sup> and even the “determinative element”<sup>302</sup> of a price manipulation claim.

As mentioned, it has been noted that market manipulation claims share some characteristics with antitrust claims. For example, under CEA section 6c(a), the CFTC may enjoin any person who “is restraining trading,” and “[t]his phraseology suggests a nexus between manipulation and the forms of activity proscribed by the federal antitrust laws.”<sup>303</sup> Other commentators have observed the connection between the price manipulation cause of action under the CEA and causes of action brought pursuant to the antitrust laws.<sup>304</sup> For example, a leading

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297. 13 JERRY W. MARKHAM, *COMMODITIES REGULATION: FRAUD, MANIPULATION, & OTHER CLAIMS* § 15:8, Westlaw (database updated 2016) (explaining “Market-Power Manipulations”); Markham et al., *supra* note 288.

298. *CFTC v. Paron Energy Inc.*, 875 F. Supp. 2d 233, 244 (S.D.N.Y. 2012).

299. *Id.* at 246 (quoting *In re Soybean Futures Litig.*, 892 F. Supp. 1025, 1044 (N.D. Ill. 1995)).

300. *Id.* at 249 (quoting *In re Energy Transfer Partners Nat. Gas Litig.*, No. 4:07-cv-3349, 2009 WL 2633781, at \*5 (S.D. Tex. Aug. 26, 2009)).

301. 23A MARKHAM & HAZEN, *supra* note 293, § 9:17:50 (stating that the element of intent is “the essence of a manipulation claim”).

302. 3 JOHNSON & HAZEN, *supra* note 65, § 5.05[1] (quoting *Great W. Food Distribs., Inc. v. Brannan*, 201 F.2d 476, 479 (7th Cir. 1953)); George A. Davidson, *Squeezes and Corners: A Structural Approach*, 40 BUS. LAW. 1283, 1289 (1985) (“In practice, the only important issue is intent.”).

303. 1 JOHNSON & HAZEN, *supra* note 65, § 1.15[2].

304. *See, e.g.*, Craig Pirrong, *Commodity Market Manipulation Law: A (Very) Critical Analysis and A Proposed Alternative*, 51 WASH. & LEE L. REV. 945, 968 (1994) (“Parallel to the structure of an antitrust case, the demonstration of causation in manipulation cases has proceeded in two steps: (1) definition of the relevant market and (2) presentation of evidence that the accused manipulator had the ability to affect price in the market as defined.”); Benjamin E. Kozinn, Note, *The Great Copper Caper: Is Market Manipulation Really a Problem in the Wake of Sumitomo Debacle?*, 69 FORDHAM L. REV. 243, 256 (2000) (“Generally, ‘market power’ is the exercise of ‘monopoly

derivatives law treatise characterizes price manipulation as “the elimination of effective price competition in a market for cash commodities or futures contracts (or both) through the domination of either supply or demand and the exercise of that domination intentionally to produce artificially high or low prices.”<sup>305</sup> Additionally, the treatise states the following:

Price manipulation is kindred to the exercise of monopoly power to dictate prices that would be unachievable in a truly competitive environment. The existence of price manipulation is largely a factual question involving determinations whether the requisite domination or monopoly exists, whether an artificial price is caused by the exercise of that power and whether the dominant party specifically intended to bring about that artificial price.<sup>306</sup>

Notwithstanding the similarities between price manipulation and antitrust causes of action, the two types of claims have important differences. First, historically, price manipulation claims generally have been limited to conduct related to trading activity, whereas the antitrust laws have not been restricted to those circumstances. Second, price manipulation claims involve an overriding focus on whether the defendant (or defendants) specifically intended to cause an artificial price (or prices),<sup>307</sup> whereas antitrust claims typically eschew evidence related to a defendant’s intent and instead focus on the market effects of the potentially anticompetitive conduct.<sup>308</sup> Additionally, further

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power,’ a concept derived from antitrust laws.” (quoting STEPHEN CRAIG PIRRONG, *THE ECONOMICS, LAW, AND PUBLIC POLICY OF MARKET POWER MANIPULATION* 18-19 (1996)).

305. 3 JOHNSON & HAZEN, *supra* note 65, § 5.02[3].

306. *Id.*

307. *See* Davidson, *supra* note 302, at 1289.

308. *See, e.g.,* A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc., 881 F.2d 1396, 1402 (7th Cir. 1989) (“Stripping intent away brings the real economic questions to the fore at the same time as it streamlines antitrust litigation. . . . [T]he evidence offered to prove intent will be even more ambiguous than the economic data it seeks to illuminate.”); RICHARD A. POSNER, *ANTITRUST LAW: AN ECONOMIC PERSPECTIVE* 188-91 (1976) (discounting the probative value of intent evidence in antitrust actions); *see also* Times-Picayune Pub. Co. v. United States, 345 U.S. 594, 614 (1953) (“Since the requisite intent is inferred whenever unlawful effects are found . . . the contracts may yet be banned by § 1 [of the Sherman Act] if unreasonable restraint was either their object or effect.” (citations omitted)). As mentioned, horizontal price-fixing schemes and other cartel-like behaviors (for example, as exhibited by bankers rigging financial benchmarks) are most appropriately combatted through application of the antitrust laws. *See* Thomas B. Nachbar, *The Antitrust Constitution*, 99 IOWA L. REV. 57, 110 (2013) (“[I]ntent has not featured prominently in many modern antitrust cases, perhaps because intent is largely irrelevant to the market effects of a particular restraint.”). Intent is, however, relevant to civil antitrust claims for conspiracies to monopolize and attempts to monopolize, as well as for criminal antitrust actions. *See* Maurice E. Stucke, *Is Intent Relevant?*, 8 J.L. ECON. & POL’Y 801, 808-17 (2012). Some commentators disagree with the modern trend to consider intent evidence as relatively unimportant in most civil antitrust claims. *See id.* at 817-48. But even if one accepts that intent has some degree of relevance

illustrating the CEA's emphasis on ensuring that the prices of derivatives be determined by the interactions of buyers and sellers in competitive markets, the CEA prohibits wash trading, which is the name given to taking both sides of prearranged, noncompetitive trades in futures and other derivatives (also referred to as "self dealing" or "self trading").<sup>309</sup> Additionally, market manipulation claims require proof that the price of a derivative was artificial, whereas antitrust claims do not have any such requirement. Antitrust claims judged under a rule of reason standard only have to show that the conduct in question has a probability of harming competition,<sup>310</sup> which typically translates to evidence that consumers were harmed either by supracompetitive prices or reduced output.<sup>311</sup> Even more, in situations involving per se violations of the antitrust laws, such as price-fixing agreements and horizontal group boycotts, there is no need to prove that the conduct in question had any effect on prices.<sup>312</sup> This is because activities that constitute per se violations are conclusively presumed to be unreasonable under the theory that such activities are highly likely to reduce or restrict competition.<sup>313</sup> Therefore, the antitrust laws broadly prohibit conduct that is likely, and in some cases conclusively presumed, to restrain or reduce competition (and thereby likely lead to, inter alia,

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to all civil antitrust claims (and not just to conspiracies and attempts to monopolize), price manipulation claims require proof of *specific* intent, which generally is much more difficult to prove. The specific intent to cause an artificial price in a futures contract or derivative is the "determinative element" of a price manipulation claim. 3 JOHNSON & HAZEN, *supra* note 65, § 5.05[1] (quoting *Great W. Food Distribs., Inc. v. Brannan*, 201 F.2d 476, 479 (7th Cir. 1953)); see *CFTC v. Parmon Energy Inc.*, 875 F. Supp. 2d 233, 244 (S.D.N.Y. 2012).

309. 7 U.S.C. § 6c(a)(1)–(2) (2012). The CFTC has stated that "the common denominator of the specific abuses prohibited in Section 4c(a) . . . is the use of trading techniques that give the appearance of submitting trades to the open market while negating the risk or price competition incident to such a market." *In re Collins*, CFTC No. 77-15, 1986 WL 66165, at \*7 (Apr. 4, 1986). In addition to section 4c(a) of the CEA, CFTC Regulation 1.38, 17 C.F.R. § 1.38, also makes it unlawful for anyone to enter into certain kinds of transactions that are considered noncompetitive or believed to facilitate noncompetitive trading. See *Scopino*, *supra* note 44, at 263-68.

310. *F.T.C. v. Ind. Fed'n of Dentists*, 476 U.S. 447, 457-58 (1986); *Bd. of Trade of Chi. v. United States*, 246 U.S. 231, 238 (1918).

311. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 477, 489 (1977); *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 9 (1984); *Arizona v. Maricopa County Medical Soc.*, 457 U.S. 332, 343-48 (1982); see *Virgin Atlantic Airways Ltd. v. British Airways PLC*, 257 F.3d 256, 264 (2d Cir. 2001); John E. Lopatka & William H. Page, *Who Suffered an Antitrust Injury in the Microsoft Case?*, 69 GEO. WASH. L. REV. 829, 832 (2001).

312. *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958) (due to their "pernicious effect on competition and the lack of any redeeming value" some types of business arrangements "are conclusively presumed to be unreasonable" and therefore per se violations); *United States v. McKesson & Robbins, Inc.*, 351 U.S. 305, 309-10 (1956); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 226 n.59 (1940).

313. *N. Pac. Ry. Co.*, 356 U.S. at 5; see *NCAA v. Bd. Of Regents of Univ. of Okla.*, 468 U.S. 85, 100-103 (1984) (stating that courts can presume harm from price fixing).

supracompetitive prices), whereas market manipulation claims are more exacting and require proof of an actual harmful price effect (in other words, that an artificial price did, in fact, exist).

### B. Antifraud Claims

Another of the primary purposes of the CEA and regulations promulgated thereunder is to protect investors in the markets for futures and other derivatives from fraud.<sup>314</sup> As a general matter, the law uses the concept of fraud as a broad catch-all to capture conduct that works an injustice upon another without constituting actual theft or some other specific type of legal wrong.<sup>315</sup> The CEA and CFTC Regulations have several antifraud provisions.<sup>316</sup> Generally speaking, to establish liability for fraud in a civil enforcement action, the CFTC must prove “three elements: (1) the making of a misrepresentation, misleading statement, or a deceptive omission; (2) scienter; and (3) materiality.”<sup>317</sup> Fraud is more than just making bald-faced lies, as relevant judicial precedent holds that fraud includes deceptive omissions, such as failing to mention one’s unsuccessful track record in derivatives trading.<sup>318</sup> Proving that the defendant acted with a culpable mental state—that is, scienter—can be satisfied by showing that the defendant acted recklessly or intentionally.<sup>319</sup> Recklessness has been defined as highly unreasonable

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314. See 2 JOHNSON & HAZEN, *supra* note 65, § 3.02[2][B]; 13 MARKHAM, *supra* note 297, § 17A:1.10 (discussing the background and history of the first federal commodity futures antifraud provisions); Scopino, *supra* note 128, at 459-61.

315. See Samuel W. Buell, *The Upside of Overbreadth*, 83 N.Y.U. L. REV. 1491, 1548-49 (2008) (“Legal prohibitions on fraud are exceedingly open textured, often consisting of no more than the edict, ‘Do not defraud others.’”) [hereinafter Buell, *The Upside of Overbreadth*]; Samuel W. Buell, *What Is Securities Fraud?*, 61 DUKE L.J. 511, 520-25 (2011). The extremely broad scope that legal systems have given to the concept of fraud dates back hundreds of years. See Buell, *The Upside of Overbreadth*, *supra*, at 1549 n.228 (citing, inter alia, Twyne’s Case (1601) 76 Eng. Rep. 809, 815-16 (K.B.)).

316. See, e.g., 7 U.S.C. §§ 6b, 6o (2012); 17 C.F.R. § 33.10 (2016) (prohibiting fraud in connection with commodity options transactions).

317. CFTC v. R.J. Fitzgerald & Co., 310 F.3d 1321, 1328 (11th Cir. 2002); see also Scopino, *supra* note 268, at 655-56.

318. See CFTC v. Risk Capital Trading Grp., 452 F. Supp. 2d 1229, 1245-46 (N.D. Ga. 2006) (finding that failure to disclose investing track record in which the overwhelming majority of customers had lost their investments was a material factual omission); CFTC v. Commonwealth Fin. Grp., 874 F. Supp. 1345, 1353 n.10 (S.D. Fla. 1994) (“Plaintiffs suggest that it amounts to a misrepresentation when salespeople emphasize the profits enjoyed by Commonwealth customers without mentioning any of the losses. The Court agrees.”); Scopino, *supra* note 128, at 461.

319. Prohibition on the Employment, or Attempted Employment, of Manipulative and Deceptive Devices and Prohibition on Price Manipulation, 76 Fed. Reg. 41,398 41,404 (July 14, 2011) (to be codified at 17 C.F.R. pt. 180); see Scopino, *supra* note 44, at 234 n.55, 250. Scienter also is an essential element of a securities fraud claim under SEC Rule 10b-5, which is the primary antifraud provision of the securities laws. See Randall W. Bodner et al., *Corporate Scienter After*

conduct that departs so greatly from the standard of care that it is “very difficult to believe the actor was not aware of what he or she was doing.”<sup>320</sup> It can be difficult for the CFTC to prove that a defendant acted with a culpable mental state in some circumstances, including, but not limited to, circumstances involving high-speed, automated trading systems.<sup>321</sup> To ensure that futures trading professionals do not deceive their customers, section 4o(1)(B) of the CEA imposes fraud liability under a negligence standard, without requiring scienter, to commodity trading advisors, commodity pool operators, and their APs.<sup>322</sup>

The CEA also has “Price Reports Clauses”<sup>323</sup> that provide for a somewhat unusual fraud-based market manipulation cause of action that prohibits disseminating or spreading false rumors or reports about crop or market information.<sup>324</sup> For example, section 9(a)(2) of the CEA makes the following act unlawful:

Any person . . . knowingly to deliver or cause to be delivered for transmission through the mails or interstate commerce by telegraph, telephone, wireless, or other means of communication false or misleading or knowingly inaccurate reports concerning crop or market information or conditions that affect or tend to affect the price of any commodity in interstate commerce.<sup>325</sup>

A claim for false reporting requires the CFTC to show that (1) a defendant knowingly transmitted or delivered market reports or market information through interstate commerce; (2) the reports or information were knowingly false, misleading, or inaccurate; and (3) the reports or information affected or tended to affect the price of a commodity in interstate commerce.<sup>326</sup> The Price Reports Clauses “prohibit misleading

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Janus, 44 SEC. REG. & L. REP. (BNA) 1639, 1639 (2012) (“Scienter—or a culpable mental state—is an essential element of any Rule 10b-5 securities fraud claim, including when the claim is against a corporation.”).

320. Prohibition on the Employment, or Attempted Employment, of Manipulative and Deceptive Devices and Prohibition on Price Manipulation, 76 Fed. Reg. at 41,404 (citing *Drexel Burnham Lambert Inc. v. CFTC*, 850 F.2d 742, 748 (D.C. Cir. 1988)).

321. See Scopino, *supra* note 44, at 250-52.

322. 7 U.S.C. § 6o(1)(B) (2012); see *Commodity Trend Serv., Inc. v. CFTC*, 233 F.3d 981, 993 (7th Cir. 2000) (stating that 7 U.S.C. § 6o(1)(B) “does not require a showing of scienter”); *Messer v. E.F. Hutton & Co.*, 847 F.2d 673, 677 (11th Cir. 1988) (stating that 7 U.S.C. § 6o(1)(B) “does not require proof of scienter”).

323. Verstein, *supra* note 70, at 262-63.

324. Scopino, *supra* note 268, at 657-58.

325. 7 U.S.C. § 13(a)(2).

326. See *CFTC v. Atha*, 420 F. Supp. 2d 1373, 1380 (N.D. Ga. 2006) (citing *United States v. Valencia*, 394 F.3d 352, 354-55 (5th Cir. 2004)); Scopino, *supra* note 268, at 658 (“False reports claims have most of the hallmarks of standard fraud claims except that the misrepresentations are not typically targeted at select people, but instead are generally sent to an exchange or market information provider, and then communicated to the market as a whole.”).

price reports, quite apart from whether anyone was misled.”<sup>327</sup> In its settlements with banks accused of manipulating LIBOR, the CFTC has referred to the prohibition on false reports pursuant to section 9(a)(2).<sup>328</sup> In particular, the CFTC argued that the banks made false, misleading, and knowingly inaccurate reports concerning the cost of borrowing unsecured funds (which is what LIBOR purports to represent) in violation of section 9(a)(2).<sup>329</sup> While section 9(a)(2) uses the word, “knowingly,” in connection with the dissemination of false, misleading, or inaccurate reports, the CFTC in 2011 used authority granted to the agency in the Dodd-Frank Act<sup>330</sup> to promulgate a rule that prohibits recklessly disseminating false, misleading, or inaccurate reports that affect or tend to affect the price of a commodity.<sup>331</sup>

Additionally, in 2010, Congress included in the Dodd-Frank Act statutory language granting the CFTC the same broad prohibition against fraud-based manipulation.<sup>332</sup> The Dodd-Frank Act amended section 6(c)(1) of the CEA<sup>333</sup> by inserting language into the CEA that tracks the SEC’s catch-all prohibition against deceptive and manipulative devices—section 10(b) of the CEA.<sup>334</sup> Section 10(b) provided the SEC with its basis for promulgating SEC Rule 10b-5,<sup>335</sup> its broad, multi-

327. Verstein, *supra* note 70, at 262.

328. See Scopino, *supra* note 268, at 658-60; Verstein, *supra* note 70, at 264 & n.257.

329. Press Release, U.S. Commodity Futures Trading Comm’n, CFTC Orders UBS to Pay \$700 Million Penalty to Settle Charges of Manipulation, Attempted Manipulation and False Reporting of LIBOR and Other Benchmark Interest Rates (Dec. 19, 2012), <http://www.cftc.gov/PressRoom/PressReleases/pr6472-12>; see also *In re* UBS AG, CFTC No. 13-09, 2012 WL 6642376, at \*45-50 (Dec. 19, 2012) (treating the making of false, misleading, or knowingly inaccurate reports as a violation under section 9(a)(2) of the CEA).

330. See 7 U.S.C. § 9(1)(C).

331. CFTC Regulation, 17 C.F.R. § 180.1(a)(4) (2014). The rule states that it is unlawful to: 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.

*Id.*; see Prohibition on the Employment, or Attempted Employment, of Manipulative and Deceptive Devices and Prohibition on Price Manipulation, 76 Fed. Reg. 41,398 41,398 (July 14, 2011) (to be codified at 17 C.F.R. pt. 180).

332. See Scopino, *supra* note 268, at 663-66.

333. 7 U.S.C. § 9; Scopino, *supra* note 268, at 663-64.

334. Prohibition on the Employment, or Attempted Employment, of Manipulative and Deceptive Devices and Prohibition on Price Manipulation, 76 Fed. Reg. at 41,399 (“The language of CEA section 6(c)(1), particularly the operative phrase ‘manipulative or deceptive device or contrivance,’ is virtually identical to the terms used in section 10(b) of the Securities Exchange Act of 1934.”).

335. 17 C.F.R. § 240.10b-5 (2014).

purpose tool for combatting fraud and manipulation.<sup>336</sup> On July 7, 2011, the CFTC unanimously voted to adopt final Rule 180.1,<sup>337</sup> which implements “the statutory prohibition under CEA section 6(c)(1) against using or employing ‘any manipulative or deceptive device or contrivance’ 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.”<sup>338</sup> The CFTC modeled Rule 180.1 after Rule 10b-5.<sup>339</sup>

Courts have construed schemes involving securities manipulation as a form of fraud by construing the word, “manipulative,” as “virtually a term of art when used in connection with securities markets,” and finding that “[i]t connotes intentional or willful conduct designed to deceive or defraud investors by controlling or artificially affecting the price of securities.”<sup>340</sup> In particular, the U.S. Supreme Court has stated that “[t]he term refers generally to practices, such as wash sales, matched orders, or rigged prices, that are intended to mislead investors by artificially affecting market activity.”<sup>341</sup> That is, “[t]he gravamen of manipulation is deception of investors into believing that the prices at which they purchase and sell securities are determined by the natural interplay of supply and demand, not rigged by manipulators.”<sup>342</sup> Under relevant decisional law, trading activity can “constitute[] an implied

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336. See Prohibition on the Employment, or Attempted Employment, of Manipulative and Deceptive Devices and Prohibition on Price Manipulation, 76 Fed. Reg. at 41,399.

337. See 17 C.F.R. § 180.1; Prohibition on the Employment, or Attempted Employment, of Manipulative and Deceptive Devices and Prohibition on Price Manipulation, 76 Fed. Reg. at 41,398 (reporting the adoption of CFTC Rule 180.1); Press Release, U.S. Commodity Futures Trading Comm’n, Open Meeting on Five Final Rule Proposals under the Dodd-Frank Act (July 7, 2011), [http://www.cftc.gov/PressRoom/Events/opaevent\\_cftcdoddfrank070711](http://www.cftc.gov/PressRoom/Events/opaevent_cftcdoddfrank070711) (showing a unanimous vote on antimanipulation rules). The new antifraud and antimanipulation provisions became effective on August 15, 2011. Prohibition on the Employment, or Attempted Employment, of Manipulative and Deceptive Devices and Prohibition on Price Manipulation, 76 Fed. Reg. at 41,398. The CFTC had issued its notice of proposed rulemaking on October 26, 2010, which was published in the *Federal Register* on November 3, 2010. *Id.*

338. Prohibition on the Employment, or Attempted Employment, of Manipulative and Deceptive Devices and Prohibition on Price Manipulation, 76 Fed. Reg. at 41,399; see generally Rosa M. Abrantes-Metz et al., *Revolution in Manipulation Law: The New CFTC Rules and the Urgent Need for Economic and Empirical Analyses*, 15 U. PA. J. BUS. L. 357 (2013).

339. See Prohibition on the Employment, or Attempted Employment, of Manipulative and Deceptive Devices and Prohibition on Price Manipulation, 76 Fed. Reg. at 41,399 (“Given the similarities between CEA section 6(c)(1) and Exchange Act section 10(b), the [CFTC] deems it appropriate and in the public interest to model final Rule 180.1 on SEC Rule 10b-5.”).

340. *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 199 (1976).

341. *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 476 (1977).

342. *Gurary v. Winehouse*, 190 F.3d 37, 45 (2d Cir. 1999); see also *Schultz Inv. Advisors, Inc.*, Exchange Act Release Nos. 33-8650, 34-53029, 87 SEC Docket 4, 8-9 (Dec. 28, 2005) (imposing a \$100,000 fine and disgorgement of profits for a marking the close scheme).

misrepresentation in violation of Rule 10b-5 and section 10(b)” because “[c]onduct itself can be deceptive’ and liability under Section 10(b) and Rule 10b-5 does not require ‘a specific oral or written statement.’”<sup>343</sup> In this manner, courts have construed market manipulation schemes that use trading activity to distort the price (or prices) of securities as fraudulent conduct.<sup>344</sup> To the extent that the CFTC (in filing civil enforcement actions) and courts follow this line of securities law precedent with new Regulation 180.1, then the CFTC will be able to use a fraud-on-the-market (that is, fraud-based manipulation) legal theory to combat market manipulation. Congress appears to like using fraud-based causes of action to target energy market manipulation—it granted both the Federal Energy Regulatory Commission (“FERC”) and the FTC with the authority to combat fraud-based manipulative schemes with language that mirrors section 10(b) of the CEA and SEC Rule 10b-5.<sup>345</sup>

## VI. ANALYZING THE RELEVANT STATUTORY AND REGULATORY TEXT

The decision by Congress to use the Dodd-Frank Act to amend the CEA in a way that empowered the CFTC to police swap entities for anticompetitive conduct was consistent with the overall objectives of the CEA to promote fair and competitive markets for derivatives, as well as with specific provisions of the CEA that reference antitrust considerations. In analyzing whether CEA section 4s(j)(6) and the more or less identically-worded Regulation 23.607(a) will be effective in combating anticompetitive conduct in the markets for derivatives, the appropriate starting point is an examination of the text of those provisions.

Judge Denise Cote of the Southern District of New York appears to have written the only judicial decision interpreting the language of section 4s(j)(6) of the CEA. In 2014, Judge Cote authored a decision in

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343. *VanCook v. SEC*, 653 F.3d 130, 141 (2d Cir. 2011) (alteration in original) (citing and quoting *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 158 (2008)).

344. *See* Scopino, *supra* note 268, at 670-75.

345. *See* Theodore A. Gebhard & James F. Mongoven, *Prohibiting Fraud and Deception in Wholesale Petroleum Markets: The New Federal Trade Commission Market Manipulation Rule*, 31 ENERGY L.J. 125, 127-36 (2010); Shaun Ledgerwood & Dan Harris, *A Comparison of Anti-Manipulation Rules in U.S. and EU Electricity and Natural Gas Markets: A Proposal for a Common Standard*, 33 ENERGY L.J. 1, 4-10 (2012); Allison Murphy et al., *The FERC Enforcement Process*, 35 ENERGY L.J. 283, 313-16 (2014). The CFTC is probably the only government agency that has authority to bring fraud-based manipulation claims involving conduct in the financial markets for energy derivatives (as opposed to the markets for electricity and physical energy products, such as oil). *See, e.g.*, Anthony E. Ghee, *FERC Does Not Have Anti-Manipulation Authority in Financial Markets*, 18 FORDHAM J. CORP. & FIN. L. 379, 390-401 (2013). *But see* Gebhard & Mongoven, *supra*, at 137-39.

the *In re Credit Default Antitrust Litigation* case that interpreted section 4s(j)(6) (and the corresponding language in the securities laws).<sup>346</sup> Judge Cote wrote “the antitrust considerations provisions impose a duty to avoid actions that could have antitrust implications even if those actions fall short of actually violating the antitrust laws.”<sup>347</sup> Judge Cote added, “[i]n other words, the antitrust considerations provisions impose on dealers obligations above and beyond what the antitrust laws themselves require.”<sup>348</sup> The decision dealt with the antitrust considerations provisions only briefly, in response to an unsuccessful argument by the banks that those provisions protected them from the application of the antitrust laws.<sup>349</sup> This Part scrutinizes the language of section 4s(j)(6) and Regulation 23.607(a) to a greater degree than Judge Cote’s decision required, with the goal of understanding the reach, and likely effectiveness, of these provisions.

At the outset, one observes that both Regulation 23.607(a) and section 4s(j)(6) use the word “shall.” Generally, use of the word “shall” in statutes is normally (that is, in the absence of legislative history to the contrary) construed as being mandatory and thereby imposing an enforceable duty on the party or parties to whom the statute is directed.<sup>350</sup> The repeated use of the word “any” (which means “[o]ne, some, every, or all without specification”)<sup>351</sup> in section 4s(j)(6) of the CEA and Regulation 23.607 is evidence of an intent for this provision to have a broad scope. For example, the mandate that swap entities not “take *any* action that results in an unreasonable restraint of trade” ensures that every action causing such a result<sup>352</sup>—an unreasonable

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346. No. 13md2476 (DLC), 2014 WL 4379112 (S.D.N.Y. Sept. 4, 2014).

347. *Id.* at \*17.

348. *Id.*

349. *Id.* at \*16-17.

350. See, e.g., *Ala. Dep’t of Pub. Safety v. Barbour*, 5 So. 3d 601, 610 (Ala. Civ. App. 2008); *Stewart v. Tunxis Serv. Center*, 676 A.2d 819, 823-24 (Conn. 1996); *Bergman v. Monarch Constr. Co.*, 925 N.E.2d 116, 120 (Ohio 2010); *Commonwealth v. Baker*, 690 A.2d 164, 167 (Pa. 1997); *State ex rel. Kern v. Santucci*, 494 S.E.2d 911, 913-14 (W. Va. 1997).

351. *Any*, THE AMERICAN HERITAGE COLLEGE DICTIONARY (3d ed. 1993). Further, the *Oxford English Dictionary* indicates the following with respect to the word “any”:

With a preceding negative (explicit or implicit) it denies of a person or thing, without limitation as to *which*, and thus, constructively, of *every* being or thing of the kind. It thus becomes an emphatic negative, with its unqualified or uncompromising scope brought into prominence; = None at all; none of any kind, quantity, or number, even the minutest; not even one; as ‘I could not think of any thing else,’ ‘he was forbidden to enter any house,’ ‘to prevent any loss.’

*Any*, OXFORD ENGLISH DICTIONARY (2d ed. 1989), [www.oed.com/oed2/00009997](http://www.oed.com/oed2/00009997).

352. As a verb, which is how the word is used here, “result” means “[t]o arise as a consequence, effect, or outcome of some action, process, or design; to occur as a result to; to end or conclude in a specified manner.” *Result*, OXFORD ENGLISH DICTIONARY ONLINE, <http://www.oed.com.proxy.library.cornell.edu/view/Entry/164062?rskey=yXvdjC&result=2#eid> (last visited Dec.

restraint of trade —is prohibited.<sup>353</sup> Likewise, the requirement that swap entities not “impose *any* material anticompetitive burden on trading or clearing” prohibits the imposition of every type of anticompetitive burden that is above a certain materiality threshold.<sup>354</sup>

Thus, it appears that, with section 4s generally and 4s(j)(6) in particular, Congress intended to impose a significant new regulatory regime over swap entities that would not permit any type of actions that are harmful to market participants or investors from slipping through the cracks. For instance, with the Dodd-Frank Act, Congress did not just prohibit fraudulent and manipulative acts by swap entities,<sup>355</sup> as is the case with some other categories of market participants,<sup>356</sup> Congress even dictated that swap dealers and major swap participants must communicate with their counterparties in a fair and balanced manner<sup>357</sup> and not adopt any process or take any action that results in an unreasonable restraint of trade.<sup>358</sup> As mentioned, the CFTC implemented many of the requirements of section 4s by promulgating the regulations in Part 23 of Title 17 of the *Code of Federal Regulations*, which only apply to swap entities.<sup>359</sup>

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31, 2016). As a noun, “result” means “[t]he effect, consequence, or outcome of some action, process, or design.” *Result*, OXFORD ENGLISH DICTIONARY ONLINE, <http://www.oed.com.proxy.library.cornell.edu/view/Entry/164061?rsk=yXvdjC&result=1&isAdvanced=false#eid> (last visited Dec. 31, 2016).

353. Absent, of course, those actions that would be “necessary or appropriate to achieve the purposes of the [CEA].” 17 C.F.R. § 23.607(a) (2016).

354. Again, subject to the “necessary or appropriate” exception. *Id.*

355. 7 U.S.C. § 6s(h)(1)(A) (2012).

356. *See id.* § 6o(1)(B) (“(1) It shall be unlawful for a commodity trading advisor, associated person of a commodity trading advisor, commodity pool operator, or associated person of a commodity pool operator, by use of the mails or any means or instrumentality of interstate commerce, directly or indirectly . . . (B) to engage in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or participant or prospective client or participant.”); *see also* *Commodity Trend Serv., Inc. v. CFTC*, 233 F.3d 981, 993 (7th Cir. 2000) (stating that the language of 7 U.S.C. § 6o(1)(B) “focuses upon the effect a CTA’s ([commodity trading advisor’s]) conduct has on its investing customers rather than the CTA’s culpability, and so does not require a showing of scienter”); *Messer v. E.F. Hutton & Co.*, 847 F.2d 673, 677 (11th Cir. 1988) (stating that [7 U.S.C.] “Section 6o(1)(B) does not require proof of scienter”).

357. *See* *Scopino*, *supra* note 95, at 41–47 (stating, *inter alia*, that CEA Section 4s(h)(3)(C) directed the CFTC to promulgate a fair dealing rule for SDs and MSPs, which the CFTC did with Regulation 23.433); *see also* 7 U.S.C. § 6s(h)(3)(C) (codifying Commodity Exchange Act § 6s(h)(3)(C)); CFTC Regulation, 17 C.F.R. § 23.433 (2016). As of yet, no lawsuits have been brought invoking the fair dealing rule by alleging violations of section 4s(h)(3)(C) and Regulation 23.433, but, with time, as such cases are brought, the federal courts will begin providing an interpretive gloss to these new statutory and regulatory provisions.

358. 7 U.S.C. § 6s(j)(6).

359. *See supra* Part II.

### A. Adopting Any Process or Taking Any Action

One clause of Regulation 23.607(a) corresponds with identical language in section 4s(j)(6) in stating that “[n]o swap [entity] shall adopt any process or take any action that results in any unreasonable restraint of trade.”<sup>360</sup> The word “adopt” means, inter alia, “to accept formally and put into effect.”<sup>361</sup> The word “process” means, inter alia, “[t]hat which goes on or is carried on; a continuous action, or series of actions or events; a proceeding; . . . a course or mode of action, a procedure.”<sup>362</sup> Likewise, the word “action” means, inter alia, “[s]omething done or performed, a deed, an act.”<sup>363</sup> Collectively, the words “adopt,” “process,” and “action” are easily open to broad construction, which means that swap entities should not, as a general matter, be able to defend unreasonable restraints of trade by arguing that they had not taken an action or adopted a process.

As mentioned, the prohibition against unreasonable restraints of trade mirrors a bedrock prohibition from the country’s antitrust laws. As discussed above, the Sherman Act states that “[e]very contract, combination . . . , or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.”<sup>364</sup> Courts have interpreted section 1 of the Sherman Act as only barring *unreasonable* restraints of trade, notwithstanding the fact that the statutory provision contains no such limitation.<sup>365</sup> Congress, in using the phrase, “unreasonable restraint of trade,” in CEA section 4s(j)(6) (which the CFTC included Regulation 23.607(a)) that mirrors, in relevant part, a term of art from section 1 of the Sherman Act, likely intended for this

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360. 17 C.F.R. § 23.607(a) (2016); see 7 U.S.C. § 6s(j)(6).

361. *Adopt*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/adopt> (last visited Dec. 31, 2016). “Adopt” is also defined as, inter alia, “[t]o take and follow” as in “a course of action,” and “to vote to accept” as in “to adopt a resolution.” *Adopt*, THE AMERICAN HERITAGE COLLEGE DICTIONARY, *supra* note 351.

362. “Process” is defined as “[a] series of actions, changes, or functions bringing about a result,” and “[a] series of operations performed in the making or treatment of a product.” *Process*, THE AMERICAN HERITAGE COLLEGE DICTIONARY, *supra* note 351. “Process” also can mean “[t]he formal commencement of any legal action; the mandate, summons, or writ by which a person or thing is brought into court for litigation.” *Process*, OXFORD ENGLISH DICTIONARY ONLINE, <http://www.oed.com.proxy.library.cornell.edu/view/Entry/151794?rskey=vFeiQO&result=1#eid> (last visited Dec. 31, 2016).

363. “Action” can also mean “[a] legal process, a lawsuit,” and “[a] share in a joint-stock company.” *Action*, OXFORD ENGLISH DICTIONARY ONLINE, <http://www.oed.com.proxy.library.cornell.edu/view/Entry/1938?rskey=pD6gPU&result=1#eid> (last visited Dec. 31, 2016).

364. 15 U.S.C. § 1 (2012).

365. See *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997) (“Although the Sherman Act, by its terms, prohibits every agreement ‘in restraint of trade,’ this Court has long recognized that Congress intended to outlaw only unreasonable restraints.”).

provision to be applied in a similar manner.<sup>366</sup> Accordingly, federal courts tasked with interpreting this clause should look to jurisprudence under section 1 of the Sherman Act. At a minimum, antitrust judicial precedent makes clear that the establishment of, and participation in, a horizontal price-fixing cartel is an unreasonable restraint of trade.<sup>367</sup> Importantly, however, section 4s(j)(6) and Regulation 23.607(a) are broader in scope than Sherman Act section 1 because section 1 requires a contract, combination, or conspiracy, whereas section 4s(j)(6) and Regulation 23.607(a) is triggered if a swap entity “adopts any process” or “takes any action” that results in an unreasonable restraint of trade.<sup>368</sup> As mentioned, the “adopt any process or take any action” clause is extremely broad.<sup>369</sup> Accordingly, courts interpreting section 4s(j)(6) and Regulation 23.607 should keep that fact in mind when examining section 1 of the Sherman Act precedent, because section 4s(j)(6) and Regulation 23.607 appear to reach a broader range of facts and circumstances.

Also noteworthy is the fact that this clause targets any action that *results* in any unreasonable restraint of trade. Courts have interpreted similar provisions in the CEA and securities laws as focusing on the results of people’s actions, regardless of their intentions, thereby allowing such claims to proceed without having to prove scienter, i.e., a culpable mental state consisting of intentional or reckless conduct.<sup>370</sup> Therefore, in analyzing whether a swap dealer violated section 4s(j)(6) and Regulation 23.607(a), the issue should not be whether the alleged perpetrator intended to restrain trade, but whether the conduct in question had the likelihood of causing that result.<sup>371</sup> This is, as mentioned, consistent with civil antitrust causes of action, which generally focus less on intent than on market outcomes.<sup>372</sup>

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366. See 156 CONG. REC. S3348 (daily ed. May 6, 2010) (statement of Sen. Cantwell).

367. See 1 JULIAN VON KALINOWSKI ET AL., ANTITRUST LAWS AND TRADE REGULATION: DESK EDITION § 2.03[2][b][i] (2nd ed. 2016) (explaining that horizontal price fixing is per se illegal under the antitrust laws).

368. See *In re Credit Default Swaps Antitrust Litig.*, No. 13md2476 (DLC), 2014 WL 4379112, at \*17 (S.D.N.Y. Sept. 4, 2014) (“For example, whereas the antitrust laws criminalize ‘contract[s], combination[s] . . . or conspirac[ies], in restraint of trade . . . among the several States, or with foreign nations,’ . . . the antitrust considerations provisions more broadly forbid ‘adopt[ing] any process or tak[ing] any action that results in any unreasonable restraint of trade.’”).

369. See *supra* Part VI.A.

370. See 7 U.S.C. § 6o (2012); 15 U.S.C. § 77k (2012).

371. This would be consistent with the fact that, as mentioned, under antitrust law, it is not necessary to establish actual competitive harm, just the probability. *FTC v. Ind. Fed’n of Dentists*, 476 U.S. 447, 457-58 (1986); *Chi. Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918).

372. See 1 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶113 (2d ed. 2000).

### B. Imposing Any Material Anticompetitive Burden

Regulation 23.607(a) dictates that swap entities not “impose any material anticompetitive burden on trading or clearing.” The term of art, “material anticompetitive burden,” is not used in antitrust law. Accordingly, the meaning of the phrase, “material anticompetitive burden,” is ripe for interpretation by the federal courts or further definition, via a rulemaking, by the CFTC. Generally speaking, “anticompetitive conduct” is viewed as “[a]n act that harms or seeks to harm the market or the process of competition among businesses, and that has no legitimate business purpose.”<sup>373</sup> The concept of materiality has been the subject of a significant amount of decisional law, both under the CEA and under U.S. securities laws, although typically in the context of circumstances involving fraud on investors.<sup>374</sup> In such circumstances, a statement is material if “there is a substantial likelihood that a reasonable investor would consider it important in making an investment decision.”<sup>375</sup> As a general matter, “material,” means, *inter alia*, “having real importance.”<sup>376</sup> Given the existing decisional law and common understanding of the word, courts should be capable of analyzing the facts of particular cases and determining if the anticompetitive burden in question is “material.” As an initial matter, “impose” can mean to put or place authoritatively or commandingly.<sup>377</sup> “Burden” generally means “[a] load of labour, duty, [or] responsibility”<sup>378</sup> which could be compared with the word “restraint” in the previous clause of Regulation 23.607. As mentioned, there is substantial decisional law on what constitutes an unreasonable restraint of trade,<sup>379</sup> but even if the word “restraint” were taken in the colloquial

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373. *Anticompetitive Conduct*, BLACK'S LAW DICTIONARY (9th ed. 2009).

374. *See, e.g.*, CFTC v. Rolando, 589 F. Supp. 2d 159, 168-69 (D. Conn. 2008) (discussing materiality of misrepresentations).

375. CFTC v. Rosenberg, 85 F. Supp. 2d 424, 447 (D.N.J. 2000); *see* CFTC v. R.J. Fitzgerald & Co., 310 F.3d 1321, 1328-29 (11th Cir. 2002).

376. *Material*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/material> (last visited Dec. 31, 2016).

377. *See Impose*, OXFORD ENGLISH DICTIONARY ONLINE, <http://www.oed.com.proxy.library.cornell.edu/view/Entry/92591?rskey=5zEfdX&result=2&isAdvanced=false#eid> (last visited Dec. 31, 2016). “Impose” is also defined as “[t]o establish or apply as compulsory; levy” and “[t]o apply or make prevail by or as if by authority.” *Impose*, THE AMERICAN HERITAGE COLLEGE DICTIONARY, *supra* note 351, at 682 (providing the word “dictate” as a synonym).

378. *Burden*, OXFORD ENGLISH DICTIONARY ONLINE, <http://www.oed.com.proxy.library.cornell.edu/view/Entry/24885?rskey=oRESeD&result=1&isAdvanced=false#eid> (last visited Dec. 31, 2016).

379. “Burden” also can be defined as, *inter alia*, “[a] duty or responsibility” and “[s]omething that hinders or oppresses,” as in “a burden on interstate commerce.” *Burden*, BLACK'S LAW DICTIONARY, *supra* note 365. Two synonyms for the word “burden” are “responsibility” and “encumbrance.” *Burden*, THESAURUS.COM, <http://www.thesaurus.com/browse/burden> (last visited

sense,<sup>380</sup> it would appear to be a greater limitation (on trade or the markets, etc.) than a burden. For section 4s(j)(6) and Regulation 23.607 purposes, the burden needs to be *material* and *anticompetitive*, as discussed above, and it also needs to be on *trading* or *clearing*.<sup>381</sup>

“Trading” refers to circumstances in which market participants—traders—buy, sell, or execute agreements, contracts, or transactions by placing and accepting bids and offers with other participants.<sup>382</sup> As mentioned, OTC trading refers to situations in which a derivative contract is not traded on a formal exchange, but instead bilaterally between counterparties.<sup>383</sup> Overall, in U.S. markets, many types of derivatives must be traded on a DCM or SEF.<sup>384</sup>

In addition to the exchange-trading requirements in the CEA and CFTC Regulations, many types of trades in futures, swaps, and other derivative contracts also must be cleared with a CFTC-regulated derivatives clearing organization.<sup>385</sup> As mentioned, “clearing” refers to several different functions performed by DCOs, which are colloquially known as clearinghouses, clearing associations, or central counterparties.<sup>386</sup> Clearing is “a process that commences at the point of execution of a trade and ends at maturity and settlement or termination.”<sup>387</sup> Clearing involves the daily matching of trades (that is, each long position must be matched with a short position), collecting and maintaining performance margin requirements, monitoring open risk positions, and settling accounts on a daily basis<sup>388</sup>:

A clearinghouse is either a department within a futures exchange or a separate corporation that provides a “financial guarantee” to a trade. Clearinghouses exist to ensure the financial integrity of

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380. “Restraint” means a “restriction” or “limitation.” *Restraint*, OXFORD ENGLISH DICTIONARY ONLINE, <http://www.oed.com.proxy.library.cornell.edu/view/Entry/164011?rskey=VwWRJl&result=1#eid> (last visited Dec. 31, 2016).

381. See *supra* Part VI.B.

382. See, e.g., 7 U.S.C. § 1a(15)(A) (2012) (defining “trading facility”).

383. See *CFTC Glossary*, *supra* note 93 (providing the definition of the term “over-the-counter”).

384. See 7 U.S.C. § 6(a).

385. Swaps subject to a CFTC clearing requirement are described in Part 50 of the Commission’s Regulations. For an explanation of the clearing requirement for swaps under section 2(h) of the CEA, see Clearing Requirement Determination Under Section 2(h) of the CEA, 77 Fed. Reg. 74,284, 74,284 (Dec. 13, 2012) (to be codified at 17 C.F.R. pts. 39, 50).

386. 1 JOHNSON & HAZEN, *supra* note 65, § 1.05.

387. GORDON F. PEERY, THE POST-REFORM GUIDE TO DERIVATIVES AND FUTURES 102 (2012).

388. THE CHICAGO BOARD OF TRADE HANDBOOK OF FUTURES AND OPTIONS 59 (2006) [hereinafter CBOT HANDBOOK OF FUTURES AND OPTIONS]; 1 JOHNSON & HAZEN, *supra* note 65, § 1.05.

futures and options contracts traded on futures exchanges. They do this by committing substantial capital as guarantors for futures and options transactions.<sup>389</sup>

A clearinghouse becomes—typically through novation of the derivative contract—the buyer to each seller and the seller to each buyer.<sup>390</sup> In fact, “the substitution of the clearinghouse for the original parties to each derivative contract improves market liquidity and facilitates entry and exit from the market because, with a central counterparty, one need not search for the original buyers and sellers to liquidate open derivative positions.”<sup>391</sup>

Therefore, with this understanding of trading and clearing, Regulation 23.607 prohibits swap entities from placing material anticompetitive burdens on trading—the buying and selling of swaps—and clearing—the post-trade matching and guaranteeing of trades.<sup>392</sup>

### C. *Unless Necessary or Appropriate*

One common theme in the antitrust considerations in the CEA—including section 4s(j)(6) and Regulation 23.607—is that unreasonable restraints of trade and material anticompetitive burdens are permitted if they are necessary or appropriate to achieve the purposes of the CEA.<sup>393</sup> The word “necessary” means “[a]bsolutely essential” and “[n]eeded to achieve a certain result or effect; requisite.”<sup>394</sup> To achieve something means to accomplish it successfully.<sup>395</sup> Therefore, an action is necessary

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389. CBOT HANDBOOK OF FUTURES AND OPTIONS, *supra* note 388, at 59. The *CBOT Handbook of Futures and Options* refers to clearinghouses and clearing from the perspective of futures and options, but the description is generally accurate in regard to swaps as well. Further, the CEA, 7 U.S.C. § 1a(15)(A), and CFTC Regulation, 17 C.F.R. § 1.3(d), define “derivatives clearing organization” as an entity that (1) enables each party of a derivative contract to substitute the DCO’s credit for the credit of the counterparties; (2) arranges for the settlement or netting of the derivative contracts on a multilateral (as opposed to bilateral) basis; or (3) provides services that mutualize or transfer among clearing members the credit risk arising from such derivative contracts.

390. PEERY, *supra* note 387, at 102.

391. 1 JOHNSON & HAZEN, *supra* note 65, § 1.05[1].

392. Professor Greenberger maintains that “conflicts of interest . . . allowed SDs to stifle competition for clearing services and to charge unnecessarily high transaction fees to users of swaps.” Greenberger, *supra* note 241, at 247.

393. See *supra* note 179 (listing the multiple provisions of the CEA that are concerned with safeguarding the interests protected by the antitrust laws).

394. *Necessary*, THE AMERICAN HERITAGE COLLEGE DICTIONARY, *supra* note 351. Another definition of “necessary” is “[t]hat is needed” as well as “[i]ndispensable, vital, essential; requisite.” *Necessary*, OXFORD ENGLISH DICTIONARY ONLINE, <http://www.oed.com.proxy.library.cornell.edu/view/Entry/125629?rskey=CckoKw&result=1#eid> (last visited Dec. 31, 2016).

395. The word “achieve” has been defined as follows: “[t]o perform or carry out with success; accomplish” or “[t]o attain with effort or despite difficulty” or “[t]o accomplish something successfully.” *Achieve*, AMERICAN HERITAGE COLLEGE DICTIONARY, *supra* note 351.

to achieve the purposes of the CEA if specific provisions of the CEA compel or mandate the action. On the other hand, “appropriate” is less restrictive, generally meaning “[s]pecially fitted or suitable” and “proper.”<sup>396</sup> Use of the word “appropriate” in this clause seems to envision a kind of balancing in which one analyzes particular anticompetitive conduct by weighing the extent to which conduct harms competition against the degree to which the conduct achieves the other purposes of the CEA. A person found to be engaging in anticompetitive conduct probably would bear the initial burden of showing exactly how the anticompetitive conduct in question is “appropriate” in light of the other purposes of the CEA, with the CFTC having the opportunity to try to rebut that showing. Of course, the CFTC could help market participants and clarify things greatly by promulgating rules that specifically enumerated the kinds of anticompetitive actions that are “appropriate” to achieve the other purposes of the CEA.

Overall, the repeated inclusion of such “necessary or appropriate” clauses in the CEA antitrust considerations provisions makes sense, in that certain aspects of financial regulation—for example, minimum capital requirements—also inevitably lessen competition. That is, not everyone can simply begin performing the role of various regulated entities, from derivatives clearing organizations to FCMs—only those who can afford to meet the various regulatory requirements can do so. But while the “necessary or appropriate” clause is a limitation on the application of the enforcement mechanism of the antitrust considerations provisions of CEA section 4s(j)(6) and Regulation 23.607, it is by no means a blank check to violate those provisions specifically or the antitrust laws generally. Indeed, the idea that anticompetitive conduct is permissible if necessary or appropriate to achieve other purposes of a regulatory statute such as the CEA is consistent with decisional law concerning the implied preemption of antitrust laws in highly regulated parts of the economy.<sup>397</sup>

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396. *Appropriate*, OXFORD ENGLISH DICTIONARY ONLINE, <http://www.oed.com.proxy.library.cornell.edu/view/Entry/9870?rkey=akw5pV&result=1#eid> (last visited Dec. 31, 2016). Another dictionary defines the word “appropriate” as “[s]uitable for a particular person, condition, occasion, or place; fitting.” *Appropriate*, THE AMERICAN HERITAGE COLLEGE DICTIONARY, *supra* note 351.

397. Preemption of the antitrust laws by implication is disfavored. *See United States v. Nat’l Ass’n of Sec. Dealers, Inc.*, 422 U.S. 694, 719-20 (1975) (stating that implied exemption of federal antitrust laws is permissible only when there is “a convincing showing of clear repugnancy between the antitrust laws and the regulatory system”); *Silver v. N.Y. Stock Exch.*, 373 U.S. 341, 357 (1963). More importantly, Congress clearly intended for the antitrust laws to apply in full force to the commodity futures, swaps, and derivative markets. *See, e.g.*, 156 CONG. REC. E1347-48 (daily ed. July 15, 2010) (statement of Rep. John Conyers, Jr.).

The extent to which anticompetitive conduct would be deemed “appropriate” to achieve the other purposes of the CEA depends on what those purposes are and how broadly they would be construed by the CFTC and courts. The purposes of the CEA, outlined in section 3, are as follows:

- [P]roviding a means for managing and assuming price risks, discovering prices, or disseminating pricing information through trading in liquid, fair and financially secure trading facilities. . . .
- [D]eter[ring] and prevent[ing] price manipulation or any other disruptions to market integrity . . . .
- [E]nsur[ing] the financial integrity of all transactions subject to this [Act] and the avoidance of systemic risk . . . .
- [P]rotect[ing] all market participants from fraudulent or other abusive sales practices and misuses of customer assets . . . .
- [P]romot[ing] responsible innovation and fair competition among boards of trade, other markets and market participants.<sup>398</sup>

Absent CFTC Regulations specifying what is considered “appropriate” to achieve the purposes of the CEA, a person engaging in anticompetitive conduct in the U.S. derivative markets would presumably have to show how their anticompetitive conduct achieved one or more of these other purposes of the CEA and whether there were any less anticompetitive means of achieving those purposes.

In conclusion, Judge Cote’s intuition—that section 4s(j)(6) of the CEA “impose[s] a duty to avoid taking actions that could have antitrust implications, even if those actions fall short of actually violating the antitrust laws”<sup>399</sup>—appears correct in that section 4s(j)(6) prohibits unreasonable restraints of trade without requiring a combination or conspiracy and, even more, prohibits not just restraints of trade, but also material anticompetitive burdens. That said, the fact that the antitrust considerations provisions in the CEA use a well-known antitrust term of art—unreasonable restraint of trade—indicates that the type of conduct prohibited by the CEA’s antitrust considerations provisions should be informed (although not controlled) by existing antitrust law precedent. Indeed, the broad wording of the antitrust considerations in section 4s(j)(6) and Regulation 23.607 appears capable of being construed to support a broad range of antitrust law-based CFTC enforcement actions, but for the fact that these provisions only apply to swap entities.

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398. 7 U.S.C. § 5(a)–(b) (2012).

399. *In re Credit Default Swaps Antitrust Litig.*, No. 13md2476 (DLC), 2014 WL 4379112, at \*17 (S.D.N.Y. Sept. 4, 2014).

## VII. BEYOND SECTION 4S(J)(6) AND REGULATION 23.607: THE NEED FOR A BROADER ANTITRUST CAUSE OF ACTION

Both the antitrust laws and the CEA are concerned with ensuring that prices are determined through transparent, competitive market forces. As discussed above, the antitrust laws aim, *inter alia*, to prevent monopolists from charging supra-competitive prices, and the CEA's prohibitions against price manipulation and wash trading aim to prohibit, *inter alia*, schemes to cause artificial prices in futures, swaps, and other derivatives.<sup>400</sup> The regulatory framework for the derivatives markets is premised on the idea that the price discovery function works best in open, fair, and competitive markets.<sup>401</sup> Additionally, the CEA directs the CFTC to consider the U.S. antitrust laws when taking actions,<sup>402</sup> and contains recurring requirements that the entities providing the major infrastructure for the derivatives markets—such as exchanges and clearinghouses—to avoid harming competition.<sup>403</sup> In the aftermath of the financial crisis, Congress understandably sought to prevent anticompetitive conduct in the U.S. markets for swaps by making sure that the Dodd-Frank Act contained a prohibition against anticompetitive behavior by large swap-dealing banks and other important participants in the swaps markets.<sup>404</sup> As discussed above,<sup>405</sup> several years after the

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400. *See supra* note 305 and accompanying text.

401. For example, Core Principle 9 states that an exchange “shall provide a competitive, open, and efficient market and mechanism for executing transactions that protects the price discovery process of trading in the centralized market of the board of trade.” 7 U.S.C. § 7(d)(9); *see also* Scott D. O’Malia, Comm’r, U.S. Commodity Futures Trading Comm’n, Keynote Address at the State of the Industry 2014 Conference, Commodity Markets Council, We Can Do Better-It’s Time to Review Our Rules and Make Necessary Changes (Jan. 27, 2014), <http://www.cftc.gov/PressRoom/SpeechesTestimony/opaomalialia-32> (“[T]he Commission must protect the essential price discovery and hedging function of the futures and swaps markets.”). Likewise, the fact that businesses, consumers, and even other markets participants can rely on the price discovery function of futures exchanges has long been touted as one of the benefits of derivatives markets. *See* William L. Stein, *The Exchange-Trading Requirement of the Commodity Exchange Act*, 41 VAND. L. REV. 473, 484 (1988) (“National and international businesses rely on prices discovered on exchanges to reflect an equilibrium between supply and demand, not other artificial factors. . . . Moreover, businesses rely on the prices discovered on the exchanges as being a reflection of the opinions and expectations of a broad base of knowledgeable market participants.”). Moreover, the CEA explains that derivatives transactions are “affected with a national public interest by providing a means for managing and assuming price risks, discovering prices, or disseminating pricing information through trading in liquid, fair and financially secure trading facilities” and that the purpose of the CEA is “to promote responsible innovation and fair competition among boards of trade, other markets and market participants.” 7 U.S.C. § 5(a)–(b).

402. 7 U.S.C. § 19(b).

403. *See, e.g., id.* § 7(d)(19) (listing requirements for DCMs); *id.* § 7a-1(c)(2)(N) (listing requirements for DCOs).

404. *Id.* § 6s(j)(6).

405. *See supra* Part III.A.

passage of the Dodd-Frank Act, the swaps market is still heavily dominated by a handful of large, dealer banks,<sup>406</sup> many of which have rigged benchmarks for, inter alia, interest rates and foreign currencies that affect the prices of OTC swaps and other derivatives.<sup>407</sup> Accordingly, for the reasons discussed below, although Congress had the correct instinct to amend the CEA in 2010 to add section 4s(j)(6) in effort to prevent anticompetitive cartels in the financial markets, the CFTC's existing enforcement regime could be improved with the addition of a broader prohibition against anticompetitive conduct in the markets for derivatives.<sup>408</sup>

#### A. *The CFTC Has the Requisite Authority*

As a normative matter, Congress would amend the CEA to allow for a broad prohibition against anticompetitive conduct in the markets for derivatives because, inter alia, the limited nature of the grant of antitrust enforcement authority in section 4s(j)(6) of the CEA probably will severely limit that provision's usefulness as an enforcement tool. Although congressional action would be preferred, unfortunately, it is unlikely in the current political climate that Congress will act to expand a Dodd-Frank Act provision, such as section 4s(j)(6).<sup>409</sup> Therefore, the CFTC should use its existing authority under the CEA to promulgate a regulation that would expand the reach of the antitrust considerations in Regulation 23.607.<sup>410</sup>

The CEA gives the CFTC sufficient authority for the agency to promulgate a broad regulation prohibiting anticompetitive conduct in the U.S. derivative markets. The CEA is littered with antitrust considerations provisions that warn against unreasonable restraints of

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406. KELLEHER ET AL., *supra* note 126, at 2; Matthew Leising, *Defusing Derivatives*, BLOOMBERG QUICKTAKE (June 21, 2016, 7:51 PM), <http://www.bloombergtake.com/quicktake/derivatives-regulatio> ("Critics say the new trading structure isn't as competitive as the government first hoped.") In April of 2010 (a few months before the Dodd-Frank Act was signed into law), Robert E. Litan of the Brookings Institution argued that, for financial reform of the derivatives markets to be effective, it would need to break the dominance that a handful of dealer banks on the OTC derivatives markets, but he warned that doing so would be difficult because "the major dealer banks have strong financial incentives and the ability to delay or impede changes to the status quo." See LITAN, *supra* note 245, at 4, 28-32. Litan recommended that antitrust authorities be ready to address "abuses by dealers and/or entities they control or in which they have significant financial interest." *Id.* at 10-11.

407. See *infra* Tables 1-6.

408. See *infra* Part VII.A-E.

409. See, e.g., Schroeder, *supra* note 81.

410. As mentioned, the analyses and conclusions expressed in this Article are those of the author and do not reflect the views of other members of DSIO, other CFTC staff, the CFTC itself, or the United States.

trade and material anticompetitive burdens.<sup>411</sup> The repetition of these antitrust considerations is evidence of a strong desire by Congress to ensure that participants in U.S. derivative markets avoid harming the competitive process. Lastly, the fact that some forms of misconduct that are prohibited by the CEA, such as market manipulation and noncompetitive prearranged trades, are analogous to antitrust law violations, shows that a broad prohibition of anticompetitive conduct in the markets for derivatives would be consistent with the overall statutory framework that is governing these markets. Taken as a whole, these references to antitrust concerns in the statutory architecture show that one of the primary objectives of the CEA is to protect free and fair competition in the markets for swaps and other derivatives, which would support the argument that the CFTC has authority to promulgate a broad regulation prohibiting any person from restraining competition in the markets for derivatives.

Admittedly, market participants could launch a legal challenge to any CFTC-promulgated regulation broadly prohibiting anticompetitive conduct in the markets for swaps, futures, and other derivatives. The challengers' argument likely would be that Congress could have given the CFTC broad antitrust authority but instead limited the scope of the antitrust considerations to swap entities, and that any attempt by the CFTC to expand the reach of those antitrust considerations would contradict the intent of Congress.<sup>412</sup> The argument would be, in short, that the specific provision in section 4s(j)(6) limiting antitrust enforcement authority to swap entities trumps the general nature of provisions such as sections 3(a) and 3(b) that do not explicitly mention antitrust considerations.

While it is impossible to predict how a court would rule on any challenge to a CFTC-promulgated regulation that broadly prohibited any person from violating the antitrust considerations, one could argue that courts should view the statute holistically, and that certain provisions of the CEA clearly allow for the CFTC to promulgate a regulation to

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411. See, e.g., 7 U.S.C. § 6s(j)(6) (antitrust considerations for swap entities); *id.* § 7(d)(19) (antitrust considerations core principle for designated contract markets); *id.* § 7a-1(c)(2)(N) (antitrust considerations core principle for derivatives clearing organizations); *id.* § 7b-3(f)(11) (antitrust considerations core principle for swap execution facilities); *id.* § 19(b) (CFTC must consider antitrust laws); *id.* § 24a(f)(1) (antitrust considerations core principle for swap data repositories).

412. See Christopher J. Walker, *Inside Agency Statutory Interpretation*, 67 STAN. L. REV. 999, 1060 (2015) (describing “the familiar *Chevron* two-step approach, under which a reviewing court defers to an agency’s interpretation of a statute it administers if, at step one, the court finds ‘the statute is silent or ambiguous’ and then, at step two, determines that the agency’s reading is a ‘permissible construction of the statute’”) (citing *Chevron v. NRDC*, 467 U.S. 837, 842-43 (1984)).

protect competition in the markets. Taken together, CEA sections 3(a), 3(b), 8a(5), and 15(b) provide the CFTC with authority to promulgate such a regulation. More specifically, sections 3(a) and 3(b) show that Congress wanted a regulatory framework for the markets that enabled market participants to efficiently and effectively manage price risks and discover prices while competing fairly with one another. If financial institutions repeatedly form cartels to rig the prices of financial instruments, managing price risks, and even the price discovery function of the markets for derivatives, will be much less effective and efficient. Such misconduct is hardly the “fair competition” that Congress wanted in the markets, as evidenced by section 3(b), and, even more, financial cartels would threaten to undermine confidence about the integrity of the markets. While the language of sections 3(a), 3(b), and 15(b) might be somewhat ambiguous, modeling a regulation after the text of the antitrust considerations for swap entities and infrastructure providers would be a reasonable way for the agency to achieve the objectives described in sections 3(a), 3(b), and 15(b) in the face of repeated collusive schemes to rig the prices of derivatives.<sup>413</sup> Importantly, nothing in the CEA would appear to prohibit the CFTC from addressing harmful anticompetitive conduct by promulgating a regulation or regulations based on the text of the statutory antitrust considerations.

Accordingly, the CFTC could argue that such a regulation is supported by the language of several provisions of the CEA and reasonably necessary to achieve the objectives of, *inter alia*, sections 3(a) and 3(b). The CFTC could argue that, in the years since Congress passed the Dodd-Frank Act, the risk for potential anticompetitive conduct appears to be greater than previously had been believed, as evidenced by the numerous collusive schemes that have been discovered and the fact that the markets for some types of swaps and other derivatives remain highly concentrated, thereby making collusion easier than in less concentrated markets. Promulgating a regulation to broadly prohibit anticompetitive conduct would be particularly appropriate if, after studying the situation in light of recent events, the CFTC determined that such a regulation would protect the price discovery function of the markets and promote fair competition among derivatives market participants who are trying to manage their price risks.

By promulgating a regulation to prohibit any person from engaging in anticompetitive conduct in the markets it regulates, the CFTC would

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413. That is, responding to repeated instances of harmful anticompetitive conduct in the markets by promulgating a regulation modeled after the antitrust considerations provisions in the CEA pursuant to the authority provided in sections 3(a), 3(b), 8a(5), and 15(b) would be a “permissible construction” of the CEA.

be fulfilling its congressionally-delegated responsibility under sections 3(a) and 3(b) to ensure that market participants are competing fairly with each other and that people and businesses can use the markets for derivatives to manage price risks. This would not be the first time that the CFTC has promulgated regulations that were not required under a strict reading of the CEA's language. In the past, the CFTC has promulgated regulations that went beyond the scope of the literal text of the Dodd-Frank Act's amendments to the CEA when the agency has believed that doing so was permitted by a reasonable interpretation of the CEA and reasonably necessary to achieve the objectives of the statute.<sup>414</sup> Finding that Congress, with the CEA, granted the CFTC authority to promulgate a regulation prohibiting any person from violating the antitrust considerations would be consistent with the principle that Congress should broadly delegate authority to agencies with technical expertise because expert agencies are in a better position, vis-à-vis Congress and the courts, to understand how best to address potential and actual problems in markets that they regulate.<sup>415</sup>

#### *B. The Antitrust Considerations Core Principles Are Insufficient*

In addition to section 4s(j)(6), the CEA has antitrust considerations core principles for providers of derivatives market infrastructure.<sup>416</sup> These core principles are insufficient, by themselves, to prevent

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414. See, e.g., *Investment Company Institute v. CFTC*, 720 F.3d 370, 377 (D.C. Cir. 2013) (affirming grant of summary judgment in favor of agency in connection with challenge to the promulgation of regulations rescinding certain exemptions for market intermediaries despite the fact that agency's action was not explicitly required by the Dodd-Frank Act); Confirmation, Portfolio Reconciliation, Portfolio Compression, and Swap Trading Relationship Documentation Requirements for Swap Dealers and Major Swap Participants, 77 Fed. Reg. 55,904, 55,905 (Final Rule, Sept. 11, 2012) (promulgating final rules despite objections that many of the specific provisions in the rules were not required by the Dodd-Frank Act and that such provisions are not "reasonably necessary" to achieve the goals of the CEA); Core Principles and Other Requirements for Swap Execution Facilities, Fed. Reg. 33,483-84 (Final Rule, June 4, 2013) (responding to commenter argument that the minimum trading functionality requirement was not mandated by the Dodd-Frank Act by stating that the regulations were consistent with the relevant statutory provisions and promoted the goals provided in section 733 of the Dodd-Frank Act).

415. See Joseph A. Grundfest, *Disimplying Private Rights of Action Under the Federal Securities Laws: The Commission's Authority*, 107 HARV. L. REV. 963, 962, 1018 (1994) (stating, in regards to the SEC, that "Congress created the [SEC] as an expert agency with the capacity to address significant problems affecting the nation's securities markets" and that Congress "wanted to establish an agency that would specialize in securities-related matters and build expertise not easily captured within the legislature"); David B. Spence & Frank Cross, *A Public Choice Case for the Administrative State*, 89 GEO. L.J. 97, 135-37 (2000); Daniel T. Deacon, *Administrative Forebearance*, 125 YALE L.J. 1548, 1553 (2016); see generally Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 442, 444 (1987) (describing the post-New Deal tendency to give federal agencies "a large measure of autonomy").

416. See *supra* Part II.

anticompetitive conduct in the markets for derivatives. Indeed, the benchmark rate-rigging scandals have occurred while the statutory antitrust considerations core principles were in effect governing the behavior of DCMs and DCOs. (As mentioned in Part II, the Dodd-Frank Act created new regulated categories of market infrastructure providers, SEFs and SDRs, and added antitrust considerations core principles to govern them). The fact that the antitrust considerations core principles did not prevent the anticompetitive conduct discussed in this Article is not entirely surprising. First, the antitrust considerations core principles for DCMs, DCOs, and SEFs have no impact on swaps and other derivatives that are not traded or cleared on those DCMs, DCOs, and SEFs, as was (and still is) the case for some types of OTC derivatives during the relevant time period. Indeed, as mentioned in the beginning of this Article, OTC derivatives are those that are traded OTC, which means not traded on organized exchanges, such as DCMs.<sup>417</sup> Second, the core principles require DCMs, DCOs, SEFs, and SDRs, all of which have self-regulatory functions, not to take any actions that result in unreasonable restraints of trade or impose material anticompetitive burdens in the markets for derivatives, and this directive would seem to require DCMs, DCOs, SEFs, and SDRs to implement rules and procedures to prevent anticompetitive conduct by members on their facilities. But an enforcement regime that relies solely on each individual DCM, DCO, SEF, and SDR to avoid taking any actions that result in unreasonable restraints of trade or that impose material anticompetitive burdens on the markets will be unable to capture anticompetitive behavior by market participants that are not DCMs, DCOs, SEFs, or SDRs. This is the same problem that limits the usefulness of section 4s(j)(6), which prohibits anticompetitive conduct but only covers the 100 or so swap entities in existence.

As mentioned above, the CFTC generally enforces compliance with core principles by market infrastructure providers through periodic examinations, followed by recommendations as to how the market infrastructure providers could better meet the requirements of the core principles.<sup>418</sup> Even assuming that the antitrust considerations core principles implicitly require DCMs, DCOs, SEFs, and SDRs to implement internal rules prohibiting their members from engaging in anticompetitive conduct, on the grounds that in some circumstances a DCM, DCO, SEF, or SDR could be viewed as indirectly taking an action that resulted in an unreasonable restraint of trade or material

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417. See *supra* note 5 and accompanying text.

418. See *supra* notes 133-78 and accompanying text.

anticompetitive burden by failing to have rules and procedures that would prevent anticompetitive conduct by their members, a regulatory gap would still exist because the internal rules of any given DCM, DCO, SEF, and SDR would fail to capture anticompetitive conduct that occurs across multiple DCMs, DCOs, SEFs, SDRs, and elsewhere. For example, suppose that a particular DCM promulgated an internal rule prohibiting anticompetitive conduct by its members in language identical to the antitrust considerations core principle. The DCM's internal rule would not reach anticompetitive conduct that stretches across multiple DCMs or DCOs. While it is beneficial to have each DCM, DCO, SEF, and SDR promulgate internal rules to prohibit anticompetitive conduct, such individual rules would be ineffective against broader anticompetitive schemes that stretch across multiple exchanges, clearinghouses, and markets. With each individual DCM, DCO, SEF, and SDR monitoring for anticompetitive conduct only on their own facilities, broader schemes that involve conduct on multiple venues and platforms will fall through the cracks. This is a regulatory gap that the CFTC could fill by promulgating a broad, CFTC-enforced prohibition against anticompetitive conduct (and attempted anticompetitive conduct).

The antitrust considerations core principles also are insufficient because, while it is important to have SROs and market infrastructure providers with self-regulatory functions police markets for improper and abusive conduct, history has shown that a regime that relies on market infrastructure providers and SROs alone—without parallel enforcement authority by a government regulator—is much less likely to be effective for a variety of reasons, not the least of which is that exchanges and market infrastructure providers could be hesitant to take actions that might displease their members or negatively impact their profitability.<sup>419</sup> Accordingly, the CEA and CFTC Regulations contain their own prohibitions against price manipulation and fraud, as opposed to simply requiring DCMs, DCOs, SEFs, and SDRs to promulgate their own internal rules against such improper conduct. To provide real deterrence, language mirroring that of the antitrust considerations core principles needs to be contained in a regulation that is enforced by the federal regulator for these markets. The best way to ensure that the objectives of the antitrust consideration provisions are met is for the

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419. History provides a lesson in this regard. The Grain Futures Act, which relied primarily on exchange self-regulation to prevent market manipulation and other wrongdoing, was a failure. See Markham, *supra* note 3, at 303-08; Charles R.P. Pouncy, *The Scianter Requirement and Wash Trading in Commodity Futures: The Knowledge Lost in Knowing*, 16 CARDOZO L. REV. 1625, 1629 n.18 (1995).

CFTC to promulgate a unified, broadly-worded prohibition against actions that result in unreasonable restraints of trade and material anticompetitive burdens.

*C. The Focus on Swap Entities Is Overly Narrow*

By their terms, section 4s(j)(6) of the CEA and Regulation 23.607(a) only apply to swap entities, i.e., swap dealers and major swap participants.<sup>420</sup> This means that, for the CFTC to state a claim under Regulation 23.607(a), the agency must prove that the defendants are swap entities. As a result, the CFTC can only enforce Regulation 23.607 against the 105 business entities that are provisionally registered swap entities.<sup>421</sup> This limitation is similar to section 4o of the CEA, which is an antifraud provision that only applies to commodity pool operators (“CPOs”), commodity trading advisors (“CTAs”), and their associated persons (“APs”).<sup>422</sup> The CFTC could not (successfully) bring a civil enforcement action against a person under section 4o unless that person was a CPO, CTA, or AP of such.<sup>423</sup> Because of the limited scope of section 4s(j)(6) and Regulation 23.607, even business entities that are other types of CFTC registrants, such as FCMs, CPOs, CTAs, and introducing brokers, do not fall within the ambit of section 4s(j)(6) and Regulation 23.607. The same is true for non-swap entity business organizations that are affiliates or subsidiaries of swap entities.

As discussed above, anticompetitive conduct can be facilitated by other types of market participants, such as interdealer brokers or trade associations.<sup>424</sup> Indeed, the tables in the Appendix show that some of the business entities that have settled government enforcement actions and private lawsuits involving anticompetitive conduct in the markets for derivatives are not swap entities.<sup>425</sup> Some of the perpetrators are not even CFTC registrants. For example, the conspiracies to rig LIBOR and related benchmark interest rates relied on the participation of several interdealer brokers, and the business entities in question, ICAP and two RP Martin-affiliated business entities, were not CFTC registrants.<sup>426</sup> And

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420. 17 C.F.R. § 23.607(a) (2016); see 7 U.S.C. § 6s(a) (2012).

421. See *Swap Dealer (SD) and Major Swap Participant (MSP) Directory*, *supra* note 72.

422. See 7 U.S.C. § 6o.

423. In certain circumstances, the CFTC could potentially use the CEA’s controlling person liability provision. See *infra* notes 437-42 and accompanying text.

424. See *supra* notes 56-80 and accompanying text.

425. See *infra* Tables 1–12.

426. See *infra* Tables 1, 10. Some other ICAP affiliates have registered as SEFs. See *Trading Organizations: Swap Execution Facilities (SEFs)*, U.S. COMMODITY FUTURES TRADING COMM’N, <http://sirt.cftc.gov/SIRT/SIRT.aspx?Topic=SwapExecutionFacilities> (last visited Dec. 31 2016).

in the *In re Credit Default Swaps Antitrust Litigation* private lawsuit, which resulted in a \$1.86 billion settlement for plaintiffs, one of the settling defendants was a derivatives market trade association; another was a provider of market data.<sup>427</sup> Further, in reaching settlements with government authorities in benchmark interest rate-rigging cases, some banks have attributed misconduct to foreign subsidiaries that are not CFTC registrants.<sup>428</sup> Of the three Barclays business entities that have settled benchmark interest rate-rigging cases with the CFTC, only one was a swap dealer.<sup>429</sup>

As mentioned, Regulation 23.607 was not in effect when much of the conduct in question occurred and therefore could not have been used to combat many of those misdeeds, but the facts of the benchmark rate-rigging scandals and the list of entities that settled benchmark rate-rigging cases in the tables in the Appendix show that, because section 4s(j)(6) and Regulation 23.607 only apply to swap entities, they are unlikely to capture all participants in derivatives market cartels.<sup>430</sup> Thus, while Congress may have believed in 2010, when it passed the Dodd-Frank Act and added section 4s(j)(6) to the CEA, that a prohibition that only targeted anticompetitive conduct by swap entities would be sufficient to protect the markets, recent history has shown that a broader prohibition is needed.

Further, *de minimis* dealers—swap-dealing financial institutions that engage in less than \$8 billion notional in swaps trading—also fall beyond the scope of Regulation 23.607.<sup>431</sup> The *de minimis* limit is supposed to remain at \$8 billion notional in swaps until December 2017, at which point the threshold is supposed to fall to \$3 billion.<sup>432</sup> One could easily imagine a circumstance in which three provisionally registered swap dealers (with each dealer transacting in greater than \$8 billion notional in swaps annually) entered into a cartel to fix benchmark interest rates with two *de minimis* dealers (each with as much as \$7.9 billion notional in swaps annually), two interdealer brokers, and a trade association. In such circumstances, more than half of the cartel would be beyond the reach of Regulation 23.607. Indeed, even expanding Regulation 23.607 to cover all CFTC registrants would be overly narrow because some of the misconduct in the benchmark rate-rigging scandals

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427. See *infra* Table 7 (listing ISDA and two Market-affiliated entities as among those that settled private U.S. lawsuits).

428. See *infra* Table 10.

429. See *infra* Table 10.

430. See *infra* Tables 1–12.

431. See CFTC Regulation, 17 C.F.R. § 1.3(ggg) (2016).

432. Political pressure is being applied on the CFTC by members of Congress to keep the *de minimis* threshold at \$8 billion. See Roland, *supra* note 103.

has been perpetrated by business entities and bank employees that do not appear to fit within the scope of any existing registrant category. As mentioned, the interdealer brokers who settled LIBOR-rigging cases with the CFTC, ICAP, and two RP Martin business entities, were not CFTC registrants.<sup>433</sup> Likewise, the definition of AP covers derivatives salespeople and their supervisors,<sup>434</sup> but it is unclear if that definition would capture all of the bank LIBOR submitters and other bank employees who were involved in the benchmark rate-rigging conspiracies. Therefore, the best approach would be for the CFTC to promulgate a regulation mirroring the language of the antitrust considerations that would prohibit all persons—regardless of CFTC registration status—from engaging in actions that result in unreasonable restraints of trade or material anticompetitive burdens in the markets for derivatives.

The requirement that one engage in a minimum of \$8 billion notional in swaps annually before being considered a swap dealer has another consequence in that this threshold appears to have prevented individuals (natural persons) from becoming swap dealers. Thus far, in any event, it would seem that there have not been any individuals who have otherwise met the definition of swap dealer and also engaged in more than \$8 billion notional in swaps annually, as no individuals have registered as swap dealers.<sup>435</sup> Add this to the fact that section 4s(j)(6) and Regulation 23.607 do not apply to the APs or principals of swap entities,<sup>436</sup> and the existing regime appears to be squarely focused on targeting large financial institutions (swap entities) rather than the individuals who cause those institutions to engage in anticompetitive conduct. Admittedly, the same is true of the status quo: as is evident from the tables in the Appendix to this Article, the CFTC has not gone after a single individual in connection with the schemes to rig LIBOR (and related benchmark interest rates), forex benchmark rates, or ISDAfix.<sup>437</sup> The CFTC has been chronically underfunded,<sup>438</sup> and this

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433. See *infra* Table 10.

434. See 17 C.F.R. § 1.3(aa).

435. See *supra* note 104 and accompanying text.

436. Dual and Multiple Associations of Persons Associated with Swap Dealers, Major Swap Participants and Other Commission Registrants, 78 Fed. Reg. 20,788, 20,788 (Apr. 8, 2013) (to be codified at 17 C.F.R. pts. 3, 23) (“Although APs of other [CFTC] registrants are generally required to register with the [CFTC], APs of SDs and MSPs are not required to register as such.” (footnotes omitted)).

437. See *infra* Tables 1–5.

438. See Alan Pyke, *Key Dodd-Frank Agency Is Being Undermined by Budget Cuts*, THINK PROGRESS (Nov. 3, 2013), <http://thinkprogress.org/economy/2013/11/03/2881191/key-dodd-frank-agency-undermined-budget-cuts>.

might be impairing the agency's ability to bring numerous enforcement actions against the employees of business entities accused of illegal market conduct. David Meister, a former director of the CFTC's Division of Enforcement, stated in an interview in 2013 that, as a result of the CFTC's inadequate funding, the agency had, on at least one occasion, only brought an enforcement action against a business entity (namely, J.P. Morgan Chase) and not gone after the individual employees responsible for the business entity's illegal actions.<sup>439</sup>

The focus on business entities, both in section 4s(j)(6) and in enforcement policy, is unfortunate because unless actual individuals are held accountable for corporate wrongdoing, executives will be tempted to simply let the business entities that employ them take the fall for their wrongdoing.<sup>440</sup> The need to hold individuals liable is also important because "[w]hile the culture of organizations is of central importance, culture is the product of individual behaviour."<sup>441</sup> Even more, this focus contradicts an emerging trend in this area to hold individual employees accountable for the wrongdoing that is perpetrated by their financial institution employers pursuant to the employees' orders and actions.<sup>442</sup> Indeed, civil and criminal U.S. government authorities have recently evidenced a desire to target individuals within business entities who break the law to provide for accountability and deterrence to the actual human culprits of corporate wrongdoing.<sup>443</sup>

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439. See Jean Eaglesham, *CFTC Backs Off, Lacking Funding*, WALL. ST. J., Nov. 1, 2013, at C1.

440. See Caroline Binham & Philip Stafford, *FCA Hits First Individuals with Libor Fines*, FIN. TIMES (Jan. 22, 2015), <http://www.ft.com/intl/cms/s/0/fe5732ae-a227-11e4-aba2-00144feab7de.html> ("The UK financial watchdog has fined and banned the former chief executive and former chief compliance officer of interdealer broker RP Martin in its first penalties for named individuals over the Libor scandal."). Note that these punishments not only applied to individuals but also to individuals who worked at an interdealer broker (a non-swap entity). See *id.* Therefore, even the business entity that had engaged in cartel-like behavior would be beyond the reach of Regulation 23.607.

441. JOHN KAY, *OTHER PEOPLE'S MONEY: THE REAL BUSINESS OF FINANCE* 260 (2015).

442. In September of 2015, the U.S. Department of Justice emphasized the importance of holding individual corporate executives and employees responsible if they directed their corporations and business entities to violate the law. Memorandum from Sally Quillian Yates, Deputy Att'y Gen., U.S. Dep't of Justice, to Assistant Att'y Gen., Antitrust Div. et al., *Individual Accountability for Corporate Wrongdoing* (Sept. 9, 2015), <http://www.justice.gov/dag/file/769036/download>; see Matt Apuzzo & Ben Protess, *Justice Dept. Sets Its Sights on Executives*, N.Y. TIMES, Sept. 10, 2015, at A1; Gretchen Morgenson, *Fixing Banks by Fining the Bankers*, N.Y. TIMES, Feb. 7, 2016, at BU1.

443. For example, some have criticized the SEC, which, like the CFTC, can bring civil enforcement actions to combat wrongdoing in the securities markets, for failing to civilly prosecute high-level executives of banks and financial entities and hold them accountable for misconduct that occurred during the financial crisis. See David Dayen, *The SEC Nails a Minnow While the Whales Go Free*, NEW REPUBLIC (Aug. 6, 2013), <https://newrepublic.com/article/114188/fabrice-tourre>

One CEA provision could, however, help the CFTC to target individuals who cause swap entities to violate section 4s(j)(6) and Regulation 23.607. Section 13(b)<sup>444</sup> of the CEA provides for what has invariably been called “control person” or “controlling person” liability.<sup>445</sup> Under section 13(b), controlling person liability applies if the individual had “general control” over the primary violator (for example, in a business organization, such as a swap entity, that violated a CEA provision(s)), and the individual either lacked good faith or knowingly induced the acts constituting the violation.<sup>446</sup> “A fundamental purpose of section 13(b) is to allow the [CFTC] to reach behind the corporate entity to the controlling individuals of the corporation and to impose liability for violations of the [CEA] directly on such individuals as well as on the corporation itself.”<sup>447</sup>

Unfortunately, however, controlling person liability is far from a complete solution to the fact that section 4s(j)(6) and Regulation 23.607 only apply to swap entities. First, it is unclear if a court would find that all of the different bank employees involved in the benchmark rate-rigging conspiracies who were LIBOR-rate submitters, derivatives traders, vice presidents, and the like, had general control over their banks for purposes of controlling person liability. Many of the judicial decisions analyzing controlling person liability were relatively easy cases, involving individuals who were owners or chief executive officers (CEOs) of the business organizations that had violated the CEA under their explicit direction.<sup>448</sup> As such, it is difficult to predict with certainty how courts would rule regarding control person liability for the different

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goldman-sachs-trial-sec-nails-minnow; Michael A. Santoro, *Big Fish, Little Fish, and the S.E.C.*, NEW YORKER (Aug. 2, 2013), <http://www.newyorker.com/news/news-desk/big-fish-little-fish-and-the-s-e-c>. *But see* David Woodcock, *Individuals in the Cross Hairs? What This Means for Directors?*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (Mar. 17, 2016), <https://corpgov.law.harvard.edu/2016/03/17/individuals-in-the-cross-hairs-what-this-means-for-directors> (arguing that, rather than being a new initiative, “the SEC’s focus on individuals had actually been quite commonplace over the years”).

444. 7 U.S.C. § 13c(b) (2012).

445. *See, e.g.*, CFTC v. So. Trust Metals, Inc., 180 F. Supp. 3d 1124, 1131 (S.D. Fla. 2016) (discussing “control person liability”); CFTC v. Commonwealth Fin. Grp., Inc., 874 F. Supp. 1345, 1356-58 (S.D. Fla. 1994) (discussing “controlling person liability”).

446. *So. Trust Metals, Inc.*, 180 F. Supp. 3d at 1131 (citing, *inter alia*, CFTC v. R.J. Fitzgerald & Co., 310 F.3d 1321, 1334 (11th Cir. 2002)).

447. CFTC v. PMC Strategy, LLC, 903 F. Supp. 2d 368, 379 (W.D.N.C. 2012) (quoting *In re JCC, Inc.*, CFTC No. 89-4, 1994 WL 183817, at \*10 (May 12, 1994)). Congress passed section 13(b) in 1982 at the request of CFTC who noted that, at the time, although the CEA held business organizations liable for the acts of their employees and agents, the opposite was not true. 13 MARKHAM, *supra* note 297, § 4:23.

448. *See, e.g.*, *So. Trust Metals, Inc.*, 180 F. Supp. 3d at 1131 (involving the founder, CEO, director, and largest shareholder); *PMC Strategy, LLC*, 903 F. Supp. 2d at 379 (involving the CEO who “was responsible for all of the corporation’s acts”).

bank employees involved in the benchmark rate-rigging scandals. For the CFTC, bringing a civil enforcement action against individual bank employees for their banks' violations of section 4s(j)(6) and Regulation 23.607 under a controlling person liability legal theory would represent additional litigation risks for the agency. The CFTC could very well succeed in such efforts, but the need to meet the requirements of controlling person liability could be obviated if the CFTC simply promulgated a broad regulation prohibiting any person from causing unreasonable restraints of trade or material anticompetitive burdens in the markets for derivatives because in those circumstances the bad actors would be directly, not vicariously, liable for their actions.

Even more problematic, because section 4s(j)(6) and Regulation 23.607 only govern *swap* entities, these provisions do not address anticompetitive behavior by market participants that trade in derivatives other than swaps, such as futures and options. The OTC swaps market is not the only part of the derivatives trading landscape where the markets are moderately or highly concentrated, or where consolidation is decreasing the number of business entities operating in certain capacities in the markets and thereby increasing the risk for collusive behavior by dominant market participants.<sup>449</sup> For instance, recent years have seen the number of FCMs—that is, futures brokers—decrease in number, from 189 in February of 2005 to 72 in January of 2016.<sup>450</sup> The CEA and CFTC Regulations provide the regulatory framework and rules for the markets for swaps *and* other types of derivatives, so it is unsound to allow a regulatory gap that would prevent the markets for other types of derivatives from receiving the same type of protections from anticompetitive conduct as are afforded the swaps markets. The CFTC should promulgate a rule that prohibits anticompetitive conduct by any

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449. See, e.g., Philip Stafford, *Tullett Prebon-ICAP Deal Sparks Oil Trading Competition Concerns*, FIN. TIMES (June 7, 2016), [https://next.ft.com/content/0edc14f0-2c7e-11e6-bf8d-26294ad519fc#axzz4AxPzbSL4?ftcamp=engage%2Femail%2Fnewsletters%2Fsmart\\_brief%2Fsmartbriefnewsletterscontrafcf%2Fauddev&segid=0800933](https://next.ft.com/content/0edc14f0-2c7e-11e6-bf8d-26294ad519fc#axzz4AxPzbSL4?ftcamp=engage%2Femail%2Fnewsletters%2Fsmart_brief%2Fsmartbriefnewsletterscontrafcf%2Fauddev&segid=0800933).

450. See *Financial Data for FCMs*, U.S. COMMODITY FUTURES TRADING COMM'N, <http://www.cftc.gov/MarketReports/FinancialDataforFCMs/index.htm> (last visited Dec. 31, 2016) (providing links to lists of the existing FCMs—such as Goldman Sachs & Co., Goldman Sachs Execution & Clearing LP, Citigroup Global Markets Inc., Credit Suisse Securities (USA) LLC, BNP Paribas Prime Brokerage Inc., and BNP Paribas Securities Corp.—and their related financial data, with the most recent list containing information as of January 31, 2016); Gregory Meyer & Philip Stafford, *Futures Brokers Feel Strain from Low Interest Rates and Red Tape*, FIN. TIMES (Apr. 12, 2015), <https://www.ft.com/content/28749888-e0b7-11e4-a4e2-00144feab7de> (“Three quarters of assets held by US registered brokers on behalf of their customers—ranging from framers to fund managers—are concentrated with the 10 biggest industry players, including Goldman Sachs, JP Morgan Chase and Société Générale.”).

person, even if the person is not a swap entity, and in any market for derivatives, even if those derivatives are not swaps.

Of course, one alternative solution would be to broaden the scope of persons categorized as swap entities by expanding the definitions of the terms, swap dealer, and major swap participant. Classifying more persons as swap entities would correspondingly cause more persons to fall within the ambit of Regulation 23.607. This would be an inappropriate and clumsy way to address the issue, however, because the CEA subjects swap entities to a host of regulatory requirements concerning recordkeeping, swap data reporting, and more.<sup>451</sup> Thus, although widening the concept of swap entities would subject more persons to Regulation 23.607, it also would subject them to many other statutory and regulatory requirements. If the problem is the prevalence of anticompetitive conspiracies in the markets for derivatives, the best solution is to broaden the scope of liability for anticompetitive conduct, not regulate more business organizations as swap entities. Indeed, the concept of what constitutes a swap entity would have to be contorted a great deal to be made broad enough to capture, for example, the interdealer brokers that have settled benchmark rate-rigging cases, such as ICAP and RP Martin.

Lastly, Regulation 23.607 is overly limited in its scope because the regulation does not, by its terms, address *attempts* to adopt any process or take any action that results in an unreasonable restraint of trade or impose any material anticompetitive burden on clearing or trading. In practice, this deficiency might be mitigated somewhat by the fact that, generally speaking, the antitrust laws have been interpreted as not requiring proof of harm to competition but a probability that such harm would occur.<sup>452</sup> Additionally, courts might construe Regulation 23.607 as applying to attempts to take actions that result in unreasonable restraints of trade or impose material burdens on the markets, despite the lack of explicit language to that effect,<sup>453</sup> given that, by and large, when

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451. See *supra* Part II (summarizing the regulatory requirements on swap entities).

452. *FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 457-58 (1986); *Chi. Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918).

453. For example, the SEC's primary tools to combat fraud and market manipulation, section 10(b) of the Securities Exchange Act and Rule 10b-5, do not mention attempts to employ a manipulative or deceptive device, but courts have interpreted them as covering attempts. See *SEC v. Seaboard Corp.*, 677 F.2d 1297, 1298-1301 (9th Cir. 1982) (reversing grant of summary judgment against individual accused of attempting to manipulate stock prices through trading on an initial public stock offering); *Kuehnert v. Texstar Corp.*, 412 F.2d 700, 704 (5th Cir. 1969) ("In the first place, we are not convinced of any difference in substance between a successful fraud and an attempt. The statutory phrase 'any manipulative or deceptive device,' 15 U.S.C. § 78j(b), seems broad enough to encompass conduct irrespective of its outcome.").

the law prohibits successfully completing a specific act, attempts to successfully complete that act also are unlawful.<sup>454</sup> Despite these two facts, however, the lack of an explicit prohibition against attempts to cause unreasonable restraints of trade and material anticompetitive burdens raises the possibility of a gap in the existing regulatory framework. As such, the CFTC's promulgation of a broad rule explicitly prohibiting both successful and attempted material, anticompetitive conduct in the markets for derivatives would be a structural improvement to the current law and regulations.

*D. Antifraud and Antimanipulation Do Not Equal Antitrust*

Another reason that the CFTC should promulgate a broad rule prohibiting anticompetitive conduct in the markets for derivatives is because the current CFTC enforcement approach has been to characterize the collusive banker and trader conduct as a form of fraud or a scheme to manipulate the prices of swaps and other derivatives. While those two kinds of claims have worked well for the CFTC so far, they are imperfect vehicles for targeting anticompetitive behavior.<sup>455</sup> The CFTC's reliance on fraud-based manipulation and price manipulation claims is understandable because, aside from section 4s(j)(6) (which prohibits anticompetitive conduct by entities that meet the criteria necessary to be considered regulated swap entities) and specific prohibitions targeting particular types of disruptive trading practices, the CFTC generally only has the authority to combat schemes to manipulate the prices of derivatives by bringing fraud-based manipulation or market-power price manipulation civil enforcement actions.<sup>456</sup> Although

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454. See generally GIDEON YAFFE, ATTEMPTS: IN THE PHILOSOPHY OF ACTION AND THE CRIMINAL LAW (2010); Gideon Yaffe, *Criminal Attempts*, 124 YALE L.J. 92, 95 (2014) ("For good reason, attempts to commit crimes are themselves crimes in every mature legal system. A bungled robbery, a missed shot, a beating that fails to kill despite the perpetrator's best effort, a would-be rape fought off by the intended victim, a smuggling stopped at the border, and many more failed efforts besides possess the marks of wrongful conduct . . ."). Professor Yaffe primarily addresses criminal wrongdoing, but the same principle generally applies to misconduct in the financial markets that is also punished civilly. For example, attempts to manipulate financial markets and attempts to defraud customers in those markets, as with successful market manipulations and fraudulent schemes, are properly the subject of civil enforcement actions by financial regulators.

455. Again, as mentioned previously, much of the misconduct in the bank benchmark-rate-rigging cases occurred before June 14, 2012, when Regulation 23.607 went into effect, so the CFTC could not have brought claims pursuant to Regulation 23.607 for pre-June 14, 2012 conduct. See Swap Dealer and Major Swap Participant Recordkeeping, Reporting, and Duties Rules, 77 Fed. Reg. 20,128, 20,128 (Apr. 3, 2012) (to be codified at 17 C.F.R. pts. 1, 3, 23).

456. Although section 4s(j)(6) and Regulation 23.607 provide the CFTC with the authority to combat anticompetitive conduct by the 105 entities that are provisionally registered as swap dealers and major swap participants, but this is a small subset of the participants in the swaps and derivative markets. There also are provisions of the CEA and CFTC Regulations that prohibit specific types of

the law generally conceptualizes fraud, price manipulation, and antitrust claims as relatively broad, open-textured prohibitions against certain types of misconduct, the harms that antifraud and antimanipulation legal theories seek to redress are distinct from those that are of central concern to antitrust law.<sup>457</sup> Generally speaking, fraud is conceptualized as employing “means of appropriating property and similar interests of others without violating the basic prohibition on theft,”<sup>458</sup> and price manipulation speaks to situations in which traders engage in activities with the specific intent to distort the prices of derivative financial instruments,<sup>459</sup> whereas antitrust law’s overarching objective is to protect competition, not individual competitors.<sup>460</sup> Put another way, antitrust actions frequently focus on whether competition in the markets has been restrained or prevented, or is likely to be restrained or prevented.<sup>461</sup> Fraud, on the other hand, often involves examining whether other people have been tricked or misled.<sup>462</sup> Lastly, price manipulation cases require analysis into whether a trader or other market participant intended to cause the prices of derivatives to deviate from the prices that would have existed under normal market forces and therefore become artificial.<sup>463</sup>

In keeping with the fact that different purposes and theories underlie these distinct types of claims, antifraud, antimanipulation, and antitrust causes of action are not interchangeable.<sup>464</sup> Fraud claims are not ideal mechanisms to combat price-fixing cartels and other antitrust violations because such claims generally require proof of a misrepresentation, whereas a misrepresentation is not required for an antitrust claim.<sup>465</sup> More importantly, fraud claims are ineffective tools

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disruptive trading practices, such as wash trading (self-dealing).

457. See *supra* Part V.A for a discussion of market manipulation causes of action, and *supra* Part V.B for a discussion of antifraud legal theories, as compared to antitrust legal theories. This is not to say, of course, that there is not some measure of overlap. That is, some types of conduct could violate several of these prohibitions.

458. Buell, *The Upside of Overbreadth*, *supra* note 315, at 1548.

459. Markham, *supra* note 3, at 356-57.

460. *Brown Shoe Co. v. United States*, 370 U.S. 294, 319-20 (1962).

461. See *supra* Part III.

462. See *supra* Part V.B.

463. See *supra* Part V.A.

464. See *infra* Table 1.

465. See *CFTC v. R.J. Fitzgerald & Co., Inc.*, 310 F.3d 1321, 1328 (11th Cir. 2002) (describing the elements of fraud in the markets for futures and other derivatives). In certain circumstances, failing to disclose information can constitute a misrepresentation. See *CFTC v. Risk Capital Trading Grp., Inc.*, 452 F. Supp. 2d 1229, 1245-46 (N.D. Ga. 2006) (finding that failure to disclose investing track record in which the overwhelming majority of customers had lost their investments was a material factual omission); *CFTC v. Commonwealth Fin. Grp., Inc.*, 874 F. Supp. 1345, 1353 n.10 (S.D. Fla. 1994) (“Plaintiffs suggest that it amounts to a misrepresentation when salespeople emphasize the profits enjoyed by Commonwealth customers without mentioning any of the losses. The Court agrees.”). Some commentators believe that deception should not be able to provide the

against conduct that materially harms competition in the markets for derivatives but that does not involve deceit, misrepresentations, or other deceptive acts.<sup>466</sup> Likewise, price manipulation claims require evidence that the defendant specifically intended to cause an artificial price in swap, futures contract, or other derivative, and intent—let alone the *specific intent*<sup>467</sup> to affect a price—is widely considered to be of little importance in most civil antitrust claims, which focus on the market effects of the anticompetitive conduct in question.<sup>468</sup> Even more, the difficulty in proving, among other things, specific intent has made price manipulation claims so hard for the CFTC to successfully litigate that

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basis for antitrust claims. See 3B PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 782b (2d ed. 2002); Note, *Deception as an Antitrust Violation*, 125 HARV. L. REV. 1235, 1241-44 (2012). In any event, while the facts of some antitrust cases might happen to involve acts of deception, proof of deceit or a misrepresentation is not required to state a civil antitrust claim.

466. For example, Professor Andrew Verstein is correct in arguing that the price reports clauses of the CEA are an excellent mechanism to combat the submission of false reports that impact benchmark interest rates. See Verstein, *supra* note 70, at 262-63. But cartels of swap dealing banks and/or other large oligopolistic derivative market participants could engage in antitrust violations without submitting false reports. See KELLEHER ET AL., *supra* note 126, at 6-7, 13-14 (alleging that swap dealing banks are engaging in anticompetitive conduct by, inter alia, threatening not to extend credit to market participants who entered dealer-only swap trading platforms, to preserve their dominance in the markets for swaps).

467. See Scopino, *supra* note 44, at 257-58 (“Specific intent is a mental state that exists when people desire to accomplish a specific result with their actions, as opposed to simply intending to do the underlying actions. . . . Specific intent is generally considered a difficult mental state to prove, as it involves ratcheting up the degree of specificity required in connection with proving what the defendant allegedly intended to do.” (footnotes omitted)).

468. See, e.g., *A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc.*, 881 F.2d 1396, 1402 (7th Cir. 1989); POSNER, *supra* note 308, at 188-91 (discounting the probative value of intent evidence in antitrust actions); see also *Times-Picayune Pub. Co. v. United States*, 345 U.S. 594, 614 (1953) (“[T]he requisite intent is inferred whenever unlawful effects are found, . . . the contracts may yet be banned by § 1 [of the Sherman Act] if unreasonable restraint was either their object or effect.” (citations omitted)). As mentioned, horizontal price-fixing schemes and other cartel-like behaviors (for example, as exhibited by bankers rigging financial benchmarks) are most appropriately combatted through application of the antitrust laws. See Nachbar, *supra* note 308, at 108. (“[I]ntent has not featured prominently in many modern antitrust cases, perhaps because intent is largely irrelevant to the market effects of a particular restraint.”). Even if one accepts that intent has some degree of relevance to all civil antitrust claims (and not just to conspiracies and attempts to monopolize), price manipulation claims require proof of *specific intent*, which generally is much more difficult to prove. The specific intent to cause an artificial price in a futures contract or derivative is the “determinative element” of a price manipulation claim. 3 JOHNSON & HAZEN, *supra* note 65, § 5.05[1] (quoting *Great W. Food Distribs., Inc. v. Brannan*, 201 F.2d 476, 479 (7th Cir. 1953)); see *CFTC v. Parnon Energy Inc.*, 875 F. Supp. 2d 233, 244 (S.D.N.Y. 2012). But making specific intent the most essential element in antitrust claims would threaten to relegate the market effects of anticompetitive behavior to a secondary, or ancillary, role in such causes of action, which seems unwise given the importance of understanding the allegedly improper conduct’s effect on competition. Such a determination can only be made pursuant to an economic analysis of the relevant market, including the barriers to entry to the market, the effects of defendant’s behavior on competition, and the like.

price manipulation has been called “unprosecutable crime,”<sup>469</sup> which makes price manipulation claims a poor tool for combating just about any kind of misconduct by derivative market participants.<sup>470</sup> Unlike antitrust law violations, price manipulation claims historically have been restricted to conduct associated with trading activity. Further, price manipulation claims require proof that the price (or prices) of a derivative is artificial, whereas proof that an actual price effect is not needed to prove a violation of the antitrust laws. Instead, antitrust claims require proof that the activities in question either are likely to harm competition—and consequently likely to injure consumers—or fall within the ambit of a *per se* violation (in which case they are conclusively presumed unreasonable regardless of any price impact). For the reasons stated above, analysis of the existing enforcement tools that are available to the CFTC reveals the existence of regulatory gaps that could be filled by the promulgation of a broad rule prohibiting any person from causing unreasonable restraints of trade or material anticompetitive burdens in the markets for derivatives. Such a prohibition also would be consistent with existing CEA provisions and CFTC regulations, which seek to protect the price discovery function of the markets for derivatives.<sup>471</sup> For example, neither fraud nor price manipulation legal theories would be likely to be effective at combatting situations in which a group of swap dealers and their accomplices engaged in a horizontal group boycott—a *per se* violation of the antitrust laws—to prevent other competitors from entering the market for a particular type of swap or financial instrument.

The CFTC could, of course, try to fit unlawful anticompetitive conduct that does not involve swap entities into enforcement actions grounded in fraud or price manipulation but applying antifraud or price manipulation legal theories to instances of misconduct that involve harm to competition (and therefore are better targeted with antitrust claims) runs the risk of distorting the precedent and legal doctrine. For example, a judge analyzing what is supposed to be a fraud case will inevitably look for evidence of deceit or similar trickery, not harm to competition. But deceit likely would be an ancillary issue, at best, in circumstances where several financial institutions conspired to boycott derivatives market competitors or otherwise block competitors from entering the market for particular types of swaps.

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469. See Markham, *supra* note 3, at 356.

470. Congress gave the CFTC broad authority to combat fraud-based manipulation in large part because of difficulties associated with pursuing price manipulation claims. See Scopino, *supra* note 268, at 655-60.

471. See *supra* Part II.

This is not to say that there is anything wrong with the government's approach in going after the banks that rigged benchmark rates in recent years. The CFTC is correct in using the legal tools available—fraud-based manipulation and price manipulation claims—to stop the rigging of benchmarks that impact the prices of swaps and derivatives in circumstances where the facts support such causes of action. Indeed, the CFTC's settlements with banks over the manipulation of benchmark interest rates show that fraud-based and price manipulation claims were appropriate based on the facts of those cases as revealed in the settlements. But that might not always be the case because, as explained above, one can engage in behavior that violates the antitrust laws without violating prohibitions against fraud and price manipulation.<sup>472</sup> Both of the existing CFTC approaches—fraud-based manipulation and price manipulation claims—require proof of matters that are largely irrelevant to some antitrust legal theories—misrepresentations and specific intent. As such, using antitrust causes of action under the CEA would provide for a more straightforward and direct paradigm for bringing CFTC civil enforcement actions to stop collusive schemes by bankers to rig financial benchmarks and standards that wholly or partially determine the value of derivative financial products.

The CFTC, which was the first agency to launch a full-scale investigation into the rigging of benchmark interest rates, has proven itself in recent years as being a small but aggressive regulator with both the willingness and capability to launch large-scale, complicated investigations and enforcement actions against entities that (allegedly) scheme to manipulate and distort the prices of swaps and derivatives.<sup>473</sup> One potential problem is that the CFTC has been chronically underfunded and therefore might not have the resources to devote to antitrust-style enforcement actions.<sup>474</sup> The CFTC's lack of funding is not a new problem, however, and the agency has managed to bring groundbreaking market manipulation cases despite this handicap.

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472. See *supra* Part VII.

473. In 2008, the CFTC became the first regulator to begin investigating whether banks were rigging benchmark interest rates. See Richard Blackden, *Libor Scandal Ripples Across the Atlantic*, TELEGRAPH (UK) (July 12, 2012, 3:47 PM), <http://www.telegraph.co.uk/finance/comment/9395403/Libor-scandal-ripples-across-the-Atlantic.html>; *Timeline: Libor-fixing Scandal*, BBC NEWS (Feb. 6, 2013, 11:51 AM), <http://www.bbc.com/news/business-18671255>; see also Editorial, *Another Banking Scandal*, N.Y. TIMES, Nov. 22, 2013, at A28 (stating that the CFTC “emerged from the financial crisis as the most aggressive market regulator”).

474. See Lauren Tara LaCapra, *U.S. Commodities Regulator Has Lonely Oil Department*, REUTERS (May 19, 2016, 1:29 PM), <http://www.reuters.com/article/us-finance-summit-cftc-oil-idUSKCN0YA2HO>.

Further, armed with a broad regulation mirroring the antitrust considerations language in the CEA, the CFTC might bring many of the same enforcement actions as it has in the past, only without the need to shoehorn cartel-like conduct by bankers, brokers, and others into a price manipulation claim (that requires proof of specific intent) or characterize such conduct as a form of fraud (that requires proof of a misrepresentation). In short, the CFTC could target anticompetitive conduct in the markets for derivatives in a more intellectually honest—and appropriate—manner by using language derived from the antitrust considerations provisions. Accordingly, the financial markets would be better off if the CFTC used the full extent of its authority under the CEA to promulgate a broad regulation prohibiting any person from engaging in anticompetitive conduct in the markets for derivatives.

*E. One More Set of Eyes (with Expertise) Could Help*

As mentioned, the broad array of persons and entities that can enforce the antitrust laws, from private individuals to state attorneys general, is beneficial because it reduces the possibility that harms to competition will escape notice or punishment as might be the case if antitrust enforcement was confined to one agency, which might become captured or fail to spot specific problematic actions. Instead, the existing U.S. antitrust legal framework assures that there are “many sets of eyes on potential [antitrust] problems.”<sup>475</sup> Cognitive regulatory capture has been described as circumstances in which regulators “internalis[e], as if by osmosis, the objectives, interests and perception of reality of the vested interest they are meant to regulate and supervise in the public interest.”<sup>476</sup> The potential for regulatory agency capture or missed opportunities by banking (and other) regulators is not just an imagined problem.<sup>477</sup> In particular, officials with the Federal Reserve Bank of

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475. Huffman & Heidtke, *supra* note 208, at 97-98 (quoting commentators who have referred to the “decentralized and largely uncoordinated” enforcement of antitrust laws in the United States as being a “crazy quilt of enforcement mechanisms”); *see also* Skapinker, *supra* note 208 (arguing that “[b]ecause regulators sometimes fail to do what they should” other parts of government and society, such as “legislative committees, the media, consumers, campaigners [and] researchers” need to monitor global banks and other large businesses for wrongdoing).

476. *See* Arthur E. Wilmarth, Jr., *Turning a Blind Eye: Why Washington Keeps Giving in to Wall Street*, 81 U. CIN. L. REV. 1283, 1417-28 (2013) (alteration in original) (quoting William H. Buiter, *Central Banks and Financial Crises* 106 (presented at the Federal Reserve Bank of Kansas City’s symposium on “Maintaining Stability in a Changing Financial System,” Aug. 21-23, (2008)), <http://www.lse.ac.uk/fmg/workingPapers/discussionPapers/fmgdps/dp619.pdf>).

477. *See* James Kwak, *Cultural Capture and the Financial Crisis*, in PREVENTING REGULATORY CAPTURE: SPECIAL INTEREST INFLUENCE AND HOW TO LIMIT IT 71, 75-80 (Daniel Carpenter & David A Moss eds., 2014); Lawrence G. Baxter, “Capture” in *Financial Regulation: Can We Channel It Toward the Common Good?*, 21 CORNELL J.L. & PUB. POL’Y 175, 181-88

New York knew in 2007 that banks were probably manipulating their LIBOR submissions, but rather than notify criminal authorities or publicize suspected benchmark interest rate-rigging schemes, they simply notified their counterparts with the Bank of England to suggest that the process for setting LIBOR needed to be reformed.<sup>478</sup> The British authorities did not act on the revelations of benchmark rate-rigging until the CFTC began investigating and pursuing the matter.<sup>479</sup> Some have blamed the failure of British regulators to combat benchmark-rigging schemes earlier on regulatory capture, as evidenced by the United Kingdom's "light touch" approach to financial regulation that was then in vogue.<sup>480</sup> Likewise, concerns have been raised about the possibility of

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(2011).

478. See HOU & SKEIE, *supra* note 19, at 7; Neil Barofsky, *The Geithner Doctrine Lives on in the Libor Scandal*, FIN. TIMES (U.K.), Feb. 8, 2013, at 7 (referring to Geithner and the "captured regulations who had blindly advanced bankers' self-serving calls for a 'light touch' before the crisis"); Ben Protess, *House Panel Questions Geithner on His Handling of Barclays' Rate-Rigging*, N.Y. TIMES, July 26, 2012, at B5; Jia Lynn Yang & Danielle Douglas, *Under Geithner, N.Y. Fed Was Quiet About Barclays*, WASH. POST, July 25, 2012, at A1 (stating that "regulators at the [CFTC] and the Justice Department worked largely without the Fed's help to build a case against Barclays," which was the first bank charged with rigging benchmark interest rates, and "culminated in a massive scandal rocking the banking industry on both sides of the Atlantic"); Shahien Nasiripour, *Geithner Grilled over Libor Revelation*, FIN. TIMES (July 25, 2012), <https://next.ft.com/content/c3dc960a-d67d-11e1-bd9c-00144feabdc0> ("The New York Fed has previously said it was aware of potential rigging in 2007, but the April 2008 call serves as the earliest indication made public that banks were submitting dishonest information to the panel that determines the London interbank offered rate."); *Timeline: Libor-fixing Scandal*, *supra* note 473 (detailing dates when U.S. and U.K. authorities were alerted to, or discussed, the fact that banks might not be submitting accurate Libor numbers).

479. See Blackden, *supra* note 466; *Timeline: Libor-fixing Scandal*, *supra* note 473.

480. See Philip Augar, Opinion, *The Forex Debacle—A Scandal to End All Scandals*, FIN. TIMES, Nov. 13, 2014, at 9; ("Regulators now understand that light-touch regulation is no way to run a market and are getting tough in the questions they ask and the deterrents they impose."); Brooke Masters et al., *Osborne Brings down the Curtain on Era of Light-Touch Regulation*, FIN. TIMES, Feb. 5, 2013, at 1 ("George Osborne comprehensively jettisoned the City tradition of self-regulation yesterday with announcements on sweeping reforms that will further restrict the banking industry's ability to chart its own fate. . . . The crackdown shows how the Libor scandal and mis-selling of products have stripped the banks of any remaining trust they enjoyed among politicians."); Floyd Norris, *Rethinking 'Light-Touch' Regulation; High & Low Finance*, INT'L N.Y. TIMES, May 30, 2014, at 15; Ian Macwhirter, *We Are Paying Every Day for Grand Theft Banking*, HERALD (SCOTLAND) (Nov. 12, 2014), [http://www.heraldscotland.com/opinion/13189161.We\\_are\\_paying\\_every\\_day\\_for\\_grand\\_theft\\_banking](http://www.heraldscotland.com/opinion/13189161.We_are_paying_every_day_for_grand_theft_banking); Jill Treanor, *Farwell to the FSA—And the Bleak Legacy of the Light-Touch Regulator*, GUARDIAN (Mar. 23, 2013, 8:06 PM), <https://www.theguardian.com/business/2013/mar/24/farewell-fsa-bleak-legacy-light-touch-regulator>; Liam Vaughan & Gavin Finch, *Rigged Libor Shows Flaw of Self-Regulation*, TREASURY & RISK (Dec. 13, 2012), <http://www.treasuryandrisk.com/2012/12/13/rigged-libor-shows-flaw-of-self-regulation>; see also *New Face, Same Problems*, ECONOMIST (Jan. 30, 2016), <http://www.economist.com/news/britain/21689608-veteran-takes-over-troubled-banking-regulator-new-face-same-problems> ("The FSA's 'light touch' was much trumpeted during the financial boom of the early 2000s but proved wanting when a host of banks ran into trouble in 2007 and 2008."). Although the days of "light touch" regulation in the United Kingdom are supposed to be in the past, in early 2016 the

U.S. banking regulators being captured.<sup>481</sup> To be clear, the fact that a regulatory agency is captured does not mean that the regulators act with evil motives, as other reasons, such as international competition to be global financial centers, can lead regulators to establish regulatory frameworks that are accommodating to the regulated industry.<sup>482</sup> Although the CFTC is not immune from possible capture, having the CFTC also monitor the markets for OTC swaps and other derivatives for anticompetitive conduct would lessen the possibility that regulatory capture would cause illegal, collusive conduct to escape notice because there would be one additional agency that industry would have to capture, and there would be one more “set of eyes” checking for potential harms to competition in these markets.

In light of the broad array of potential plaintiffs that can bring civil antitrust claims, adding the CFTC to this mix is an incremental step, but one that would be efficient and potentially provide significant benefits to antitrust enforcement in the financial markets. Empowering the CFTC to bring civil enforcement actions under the antitrust considerations in section 4s(j)(6) and elsewhere in the CEA would be more efficient than the current system, in which the DOJ and FTC are the only federal agencies that enforce the antitrust laws because the CFTC, as the primary regulator of the markets for swaps and other derivatives, is most likely to be the first agency to detect—and the best agency to comprehend the full implications of—anticompetitive behavior in the markets it regulates. Giving the CFTC broad antitrust authority is warranted because, from an institutional perspective, the CFTC is the agency that is in the best position to assess the facts of a given case and select the most suitable type of enforcement action—antifraud, price

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Financial Conduct Authority was called “weak, toothless, and anemic”—among other things—by members of Parliament. See Rozi Jones, *FCA Called “Weak, Toothless and Anaemic” in MP Debate*, FIN. REP. (UK) (Feb. 3, 2016), <http://www.financialreporter.co.uk/finance-news/fca-called-weak-toothless-and-anaemic-in-mp-debate.html>.

481. See Jake Bernstein, *Federal Reserve Announces Sweeping Review of Its Big Bank Oversight*, PROPUBLICA (Nov. 20, 2014, 5:15 PM), <https://www.propublica.org/article/bill-gives-senate-power-to-approve-new-york-fed-president>; Ian Katz & Matthew Boesler, *Fed Weighs Steps to Prevent ‘Regulatory Capture’ by Banks*, BLOOMBERG (Apr. 20, 2015, 11:49 AM), <http://www.bloomberg.com/news/articles/2015-04-20/fed-said-to-weigh-steps-to-prevent-regulatory-capture-by-banks> (quoting Cornell Law Professor Robert Hockett as stating that “cognitive capture [is] like a kind of Stockholm Syndrome where you identify with or come to see through the eyes of the party you’re regulating”).

482. See Wilmarth, Jr., *supra* note 476, at 1393-98; see also *id.* at 1418-19 (“[F]inancial regulators are inclined to identify with the views and experience of industry officials because (i) regulators ‘operate within a relatively narrow, insulated and expertise-based’ field of work that they share with ‘sophisticated repeat players’ in the financial industry, and (ii) regulators and industry officials frequently have similar educational and professional backgrounds and are therefore ‘likely to share social, educational, or experiential ties.’”).

manipulation, or antitrust—for the circumstances. The current, limited scope of the CFTC’s antitrust enforcement authority increases the risk that misconduct like the cartels to rig benchmark interest rates or stifle competition in the credit default swaps market will not be detected, investigated, or stopped.

Given that the antitrust laws already can be enforced by the DOJ, FTC, states, and private citizens, the addition of one more federal agency—the CFTC—to the two existing federal antitrust regulators (the DOJ and FTC) in circumstances involving the markets for derivatives is a reasonable, incremental improvement to the existing regulatory framework. The concept of having more than one federal agency with overlapping authority (to varying degrees) to bring enforcement actions to combat particular types of wrongdoing is not without precedent. For example, as mentioned, Congress granted the CFTC, FERC, and FTC the ability to bring fraud-based market manipulation claims—modeled after Rule 10b-5—to combat manipulative schemes in the energy markets.<sup>483</sup> Having another agency monitoring the markets for derivatives for anticompetitive conduct also is beneficial because, as mentioned previously, antitrust decisional law in recent years has increased the obstacles that private plaintiffs must overcome to pursue antitrust claims, thereby reducing the ability of private litigation to play a role in curbing anticompetitive behavior.<sup>484</sup>

A regulation permitting civil enforcement actions based on the language in section 4s(j)(6) of the CEA and the antitrust considerations core principles also could provide the CFTC with grounds for using flexible injunctive remedies that are appropriate in antitrust cases. Because the CEA grants the CFTC broad authority to seek injunctions for statutory and regulatory violations,<sup>485</sup> civil enforcement actions brought pursuant to the authority of the CEA’s antitrust considerations could seek antitrust-style injunctive remedies for anticompetitive conduct, such as ordering the breakup of a large financial entity (or entities).<sup>486</sup> This would be consistent with antitrust law jurisprudence,

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483. See *supra* notes 324-31 and accompanying text.

484. See discussion *supra* notes 210-28 and accompanying text; see also Rogers, *supra* note 210, at 73-80.

485. See 7 U.S.C. § 13a-1 (2012). See generally 13A JERRY W. MARKHAM, COMMODITIES REGULATION: FRAUD, MANIPULATION, & OTHER CLAIMS § 25:4, Westlaw (database updated 2016) (explaining “CFTC Injunctive Actions”).

486. Generally speaking, there has been some discussion by U.S. banking regulators, such as Dallas Federal Reserve Bank President Richard Fisher and Minneapolis Federal Reserve President Neel Kashkari, about the possibility of breaking up “too big to fail” banks on the grounds that they represent systemic risk to the financial system, but there has not been discussion of breaking up banks as a remedy to anticompetitive conduct in the derivatives markets. See Binyamin Appelbaum,

which generally indicates that the breakup remedy—although rare—is available. Remedies such as the breakup of a company or the mandatory divestiture of certain business lines have not been used in fraud-based and price manipulation cases brought under the CEA.<sup>487</sup> Thus, another advantage of having the CFTC promulgate a broad regulation prohibiting anticompetitive conduct is that it could provide the grounds for antitrust-style injunctive remedies to address activities that result in unreasonable restraints of trade or impose material anticompetitive burdens in the derivative markets.<sup>488</sup>

In sum, the CEA's existing enforcement regime has regulatory gaps because situations involving harmful, anticompetitive conduct in the U.S. derivative markets that lack evidence of specific intent to create artificial prices, that do not involve misrepresentations, and that are not committed by one of the 105 swap entities are beyond the CFTC's reach. In these situations, the anticompetitive conduct would neither be captured by the CEA's antifraud or antimanipulation prohibitions nor by section 4s(j)(6) and Regulation 23.607. The CFTC could refer a case to the DOJ, FTC, or even a state to bring an antitrust action in such circumstances, but it likely would take time and resources to try to convince another part of government to act, with no guarantee that one would do so. More importantly, such a referral process seems inefficient and unnecessary. This approach would require the CFTC to combat most anticompetitive conduct (conduct not committed by swap entities) only with the help of another part of the government, even though numerous provisions of the CEA clearly show that Congress wanted to prohibit unreasonable restraints of trade and material anticompetitive burdens in the markets that the CFTC regulates.

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*Federal Reserve Executive Says Banks 'Are Still Too Big to Fail,'* N.Y. TIMES, Feb. 17, 2016, at B1; Christopher Matthews, *Break Up the Banks! Dallas Fed President Calls for the End of "Too Big to Fail,"* TIME (Mar. 22, 2012), <http://business.time.com/2012/03/22/break-up-the-banks-dallas-fed-president-calls-for-the-end-of-too-big-to-fail>; Neil Roland, *Fed's Kashkari Plan Could Have 'Significant Impact' on U.S. Banking Policy, Experts Say,* MLEX (Feb. 24, 2016), <http://mlexmarketinsight.com>; see also Richard W. Fisher, President & Chief Exec. Officer, & Harvey Rosenbaum, Exec. Vice President & Dir. of Research, Fed. Reserve Bank of Dallas, Presentation at the Federal Reserve Bank of Chicago Fifteenth Annual International Banking Conference: Break Up the Big Banks: The Key to Economic Prosperity and Improved Financial Stability (Nov. 16, 2016), <https://www.dallasfed.org/assets/documents/news/speeches/121115rosenblum.pdf>.

487. Antitrust-style injunctive remedies also are presumably available under CFTC civil enforcement actions brought pursuant to Regulation 23.607 but, as mentioned, that regulation only applies to registered swap entities, which limits its applicability.

488. To be clear, the CEA does not allow for treble damages as is the case with the antitrust laws, but the CEA grants federal courts with authority to provide a broad range of equitable relief to require persons and entities that are violating the CEA or CFTC Regulations to bring their behavior into compliance. See 7 U.S.C. § 13a-1(a)-(c).

The need for preventing anticompetitive conduct in the derivative markets would not be much of a concern if cartel-like behavior was rare in these markets, but that is not the case. In addition to the fact that the U.S. markets for many categories of OTC swaps and other derivatives are oligopolistic, serious concerns regarding the problematic culture and incentives in banking<sup>489</sup> and other financial institutions make it possible, if not likely, that the collusive, anticompetitive behavior revealed in the benchmark rate-fixing scandals will arise again to trouble the markets for derivatives in the future, albeit quite possibly in a somewhat different form.<sup>490</sup> Given that the markets for swaps and other derivatives are vitally important to the economy, it is essential that U.S. authorities ensure that these markets are free from conduct that harms competition. Accordingly, the time has come for the CFTC to promulgate a regulation that broadly prohibits anticompetitive conduct by participants in the U.S. markets for futures, swaps, and other derivatives.

### VIII. CONCLUSION

In recent years, global regulatory and competition authorities have uncovered multiple schemes in which groups of banks colluded to rig benchmarks for the purpose of (among other things) benefitting the banks' trading positions in swaps and other derivatives. The benchmark rigging was facilitated by the fact that the markets for many types of OTC swaps and other derivatives are highly concentrated and dominated by a small group of banks and other institutions.<sup>491</sup> Longstanding problems involving the incentives and corporate culture inside banks and other financial entities, along with concerns about the capture of banking regulators, make it possible, if not likely, that banks or other market participants could engage in new, anticompetitive schemes in the markets for derivatives in the future. Accordingly, it would be an incremental, structural improvement to the current antitrust regulatory framework if the CFTC promulgated a regulation

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489. See *supra* Part II.A.

490. For example, banks could engage in other types of conduct in derivatives markets that could potentially raise concerns about anticompetitive conduct or monopoly power. See, e.g., Henry Sanderson et al., *JP Morgan Rattles Traders with LME Aluminum Stockpile*, FIN. TIMES (Mar. 17, 2016), <https://next.ft.com/content/ee2dec66-eb72-11e5-bb79-2303682345c8#myft:notification:daily-email> (“JP Morgan Chase is holding more than half of the aluminum on the London Metal Exchange, [the world’s largest options and futures markets on base and other metals] a multibillion-dollar position that has rattled rival traders and raised questions in London’s tight-knit metal market about its influence on prices. The bank’s \$2bn-plus physical stockpile of aluminum . . . has been blamed by many traders for pushing up the price of near-term contracts that are about to expire, even though the industry is in its seventh year of a major supply glut.”).

491. See *supra* Part VII.D.

enabling it to bring civil enforcement actions against any person that engages in conduct, or attempts to engage in conduct, that results in unreasonable restraints of trade or imposes material anticompetitive burdens on the derivative markets.<sup>492</sup>

The central purpose of the CEA is to ensure that the markets for derivatives are transparent, fair, and competitive so that they can serve their price discovery function. The CEA's concern for competition is evident from the fact that the statute prohibits noncompetitive, prearranged wash trades and, more importantly, market manipulation, which is analogous in many respects to forms of anticompetitive conduct that are prohibited by the antitrust laws. Numerous other provisions of the CEA, however, also refer to the antitrust laws and seek to prevent anticompetitive conduct in derivative markets. The totality of the CEA provisions that reference antitrust principles and considerations provide the CFTC with sufficient authority to promulgate a regulation prohibiting anticompetitive conduct in the markets for derivatives.

The U.S. antitrust laws have proven to be effective tools to combat anticompetitive conduct in a wide array of markets. Recognizing this fact, Congress included in the Dodd-Frank Act a provision—section 4s(j)(6) of the CEA—that empowered the CFTC to promulgate a rule to prohibit anticompetitive conduct by swap entities. But the scope of section 4s(j)(6), and its implementing Regulation 23.607, is too narrow to effectively police the derivative markets for anticompetitive conduct because there are only 100 or so provisionally registered swap entities, which means that many market participants are beyond the reach of section 4s(j)(6) and Regulation 23.607.

As the U.S. government's primary regulator of, and expert on, the markets for derivatives, the CFTC is in the best position to spot problematic, anticompetitive conduct in the markets that it regulates. Unfortunately, at present, the CFTC can only attack horizontal price-fixing cartels and other types of anticompetitive conduct by non-swap entities if the cartel participants engage in activities that fit within the ambit of fraud-based claims or market-power price manipulation claims.<sup>493</sup> But these two types of claims are poorly suited for addressing some types of anticompetitive conduct, given that fraud-based claims require proof of a misrepresentation and price manipulation claims require proof that the defendant acted with the specific intent to cause an artificial price. Antitrust claims do not require proof of either a misrepresentation or a defendant's specific intent to cause an

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492. *See supra* Part VII.

493. *See supra* Part VII.D.

artificial price. Indeed, a person could engage in anticompetitive conduct that would be prohibited by the antitrust laws without making misrepresentations or without acting with the specific intent to cause an artificial price.

Accordingly, the CFTC should draft a broad regulation prohibiting persons from taking any actions, or attempting to take any actions, that result in unreasonable restraints of trade or impose material anticompetitive burdens on the markets for derivatives. The regulation should cover any person—not just swap entities—that engages, or attempts to engage, in the prohibited conduct.<sup>494</sup> The CFTC would be more than able to effectively use such broad antitrust authority because the agency already litigates complex market manipulation claims that bear many similarities to antitrust actions. This approach would be more efficient than requiring the DOJ's Antitrust Division or the FTC to develop the expertise needed to understand the markets for OTC swaps and other derivatives. The time has come for the CFTC to have the ability to bring civil enforcement actions against anyone who causes, or attempts to cause, unreasonable restraints of trade or imposes, or attempts to impose, material anticompetitive burdens on the markets for derivatives.

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494. *See supra* note 445 and accompanying text.

## APPENDIX

*TABLE 1: SETTLEMENTS WITH THE CFTC FOR ALLEGEDLY RIGGING LIBOR AND RELATED INTEREST RATE BENCHMARKS*<sup>495</sup>

No.	Entity Name(s)	Period of Alleged Misconduct	Settlement Amount (in millions)	Settlement Date
1	Barclays PLC, Barclays Bank PLC, & Barclays Capital Inc.* <sup>496</sup>	At least 2005 to at least 2009	\$200	June 27, 2012
2	Citibank, N.A., Citibank Japan Ltd. & Citigroup Global Markets Japan Inc.* <sup>497</sup>	Spring 2008 to August 2010	\$175	May 25, 2016
3	Deutsche Bank AG* <sup>498</sup>	At least 2005 to early 2011	\$800	Apr. 23, 2015
4	ICAP Europe Limited <sup>499</sup>	At least October 2006 to at least January 2011	\$65	Sept. 13, 2013
5	Lloyds Banking Group plc & Lloyds Bank plc* <sup>500</sup>	Mid-2006 to 2009	\$105	July 28, 2014
6	Rabobank <sup>501</sup>	At least mid-2005 to early 2011	\$475	Oct. 29, 2013
7	Royal Bank of Scotland Group Plc & RBS Securities Japan Limited* <sup>502</sup>	From at least mid-2006 to 2010	\$325	Feb. 6, 2013
8	RP Martin Holdings Limited & Martin Brokers (UK) Ltd. <sup>503</sup>	At least September 2008 to at least August 2009	\$1.2	May 15, 2014
9	UBS AG & UBS Securities Japan Co. Ltd.* <sup>504</sup>	At least January 2005 to at least June 2010	\$700	Dec. 19, 2012

495. Press Release, U.S. Commodity Futures Trading Comm'n, CFTC Orders Citibank, N.A. and Japanese Affiliates to Pay \$175 Million Penalty for Attempted Manipulation of Yen LIBOR and Euroyen TIBOR, and False Reporting of Euroyen TIBOR and U.S. Dollar LIBOR (May 25, 2016), <http://www.cftc.gov/PressRoom/PressReleases/pr7372-16>. Asterisk (\*) indicates that one or more of the financial entities listed is a provisionally registered swap dealer or an affiliate of a provisionally registered swap dealer.

496. *In re* Barclays PLC, CFTC No. 12-25, 2012 WL 2500330, at \*1-2, \*26 (June 27, 2012).

497. *In re* Citibank, N.A., CFTC No. 16-17, 2016 WL 3035031, at \*1, \*17 (May 25, 2016).

498. *In re* Deutsche Bank AG, CFTC No. 15-20, 2015 WL 1874880, at \*1, \*27 (Apr. 23, 2015).

499. *In re* ICAP Eur. Ltd., CFTC No. 13-38, 2013 WL 5409329, at \*1, \*36 (Sept. 25, 2013).

500. *In re* Lloyds Banking Grp. plc, CFTC No. 14-18, 2014 WL 378395, at \*1, \*19 (July 28, 2014).

501. *In re* Cooperatieve Centrale RaiffeisenBoerenleenbank B.A., CFTC No. 14-02, 2013 WL 5872872, at \*1, \*37 (Oct. 29, 2013).

502. *In re* Royal Bank of Scotland plc, CFTC No. 13-14, 2013 WL 485759, at \*1, \*28 (Feb. 6, 2013).

503. *In re* RP Martin Holdings Ltd., CFTC No. 14-16, 2014 WL 2003211, at \*1, \*24 (May 15, 2014).

504. *In re* UBS AG, CFTC No. 13-09, 2012 WL 6642376, at \*1, \*51 (Dec. 19, 2012).

TABLE 2: FINANCIAL ENTITIES THAT SETTLED WITH THE CFTC FOR ALLEGEDLY RIGGING FOREIGN EXCHANGE RATE BENCHMARKS<sup>505</sup>

No.	Entity Name	Period of Alleged Misconduct	Settlement Amount (in millions)	Date of Settlement
1	Barclays Bank PLC <sup>506</sup>	2009–2012	\$400	May 20, 2015
2	Citibank, N.A. <sup>507</sup>	2009–2012	\$310	Nov. 11, 2014
3	HSBC Bank plc <sup>508</sup>	2009–2012	\$275	Nov. 11, 2014
4	J.P. Morgan Chase Bank, N.A. <sup>509</sup>	2010–2012	\$310	Nov. 11, 2014
5	Royal Bank of Scotland plc <sup>510</sup>	2009–2012	\$290	Nov. 11, 2014
6	UBS AG <sup>511</sup>	2009–2012	\$290	Nov. 11, 2014

TABLE 3: FEDERAL RESERVE SETTLEMENTS WITH BANKS ON MAY 20, 2015 IN CONNECTION WITH FOREX TRADING IMPROPRIETIES FROM 2008 TO 2013<sup>512</sup>

No.	Entity Name	Fine (in millions)
1	Bank of America	\$205
2	Barclays Bank PLC	\$342
3	Citigroup Inc.	\$342
4	J.P. Morgan Chase & Co.	\$342
5	Royal Bank of Scotland	\$274
6	UBS AG	\$342

505. See Press Release, U.S. Commodity Futures Trading Comm'n, *supra* note 495. All of the financial entities listed in Table 2 are provisionally registered swap dealers or affiliates of provisionally registered swap dealers.

506. *In re* Barclays Bank PLC, CFTC No. 15-24, 2015 WL 2445059, at \*1, \*13 (May 20, 2015).

507. *In re* Citibank, N.A., CFTC No. 15-03, 2014 WL 6068386, at \*1, \*10 (Nov. 11, 2014).

508. *In re* HSBC Bank plc, CFTC No. 15-07, 2014 WL 6068390, at \*1, \*12 (Nov. 11, 2014).

509. *In re* JPMorgan Chase Bank, N.A., CFTC No. 15-04, 2014 WL 6068387, at \*1, \*10 (Nov. 11, 2014).

510. *In re* Royal Bank of Scotland plc, CFTC No. 15-05, 2014 WL 6068388, at \*1, \*9 (Nov. 11, 2014).

511. *In re* UBS AG, CFTC No. 15-06, 2014 WL 6068389, at \*1, \*10 (Nov. 11, 2014).

512. Press Release, Fed. Reserve Bd. (May 20, 2015), <http://www.federalreserve.gov/newsevents/press/enforcement/20150520a.htm>. All of the financial entities listed in Table 3 are provisionally registered swap dealers or affiliates of provisionally registered swap dealers.

**TABLE 4: OFFICE OF THE COMPTROLLER OF THE CURRENCY  
SETTLEMENTS IN NOVEMBER OF 2014 IN CONNECTION  
WITH FOREX TRADING IMPROPRIETIES  
FROM 2008 TO 2013<sup>513</sup>**

<i>No.</i>	<i>Entity Name</i>	<i>Fine (in millions)</i>
1	Bank of America	\$250
2	Citibank, N.A.	\$350
3	J.P. Morgan Chase Bank, N.A.	\$350

**TABLE 5: FINANCIAL ENTITIES THAT SETTLED WITH THE CFTC  
FOR ALLEGEDLY RIGGING ISDAFIX<sup>514</sup>**

<i>No.</i>	<i>Entity Name(s)</i>	<i>Time Period of Alleged Misconduct</i>	<i>Settlement Amount (in millions)</i>	<i>Settlement Date</i>
1	Barclays PLC, Barclays Bank PLC, & Barclays Capital Inc. <sup>515</sup>	At least January 2007 to June 2012	\$115	May 20, 2015
2	Citibank N.A. <sup>516</sup>	January 2007 to January 2012	\$250	May 25, 2016

513. See Press Release, U.S. Commodity Futures Trading Comm'n, *supra* note 495; Press Release, Office of the Comptroller of the Currency, OCC Fines Three Banks \$950 Million for FX Trading Improperities (Nov. 12, 2014), <https://occ.gov/news-issuances/news-releases/2014/nr-occ-2014-157.html>. All of the financial entities listed in Table 4 are provisionally registered swap dealers or affiliates of provisionally registered swap dealers.

514. Press Release, Office of the Comptroller of the Currency, *supra* note 513. All of the financial entities listed in Table 5 are provisionally registered swap dealers or affiliates of provisionally registered swap dealers.

515. *In re* Barclays PLC, CFTC No. 15-25, 2015 WL 2445060, at \*1, \*18 (May 20, 2015).

516. *In re* Citibank, N.A., CFTC No. 16-16, 2016 WL 3035030, at \*1, \*19 (May 25, 2016).

*TABLE 6: FINANCIAL ENTITIES THAT SETTLED (IN 2016) A PRIVATE U.S. LAWSUIT ALLEGING THAT DEFENDANTS HAD RIGGED ISDAFIX FROM JAN. 1, 2006 TO JAN. 31, 2014*<sup>517</sup>

<i>No.</i>	<i>Entity Name(s)</i>	<i>Settlement Amount (in millions)</i>
1	Bank of America Corp.	\$52
2	Barclays PLC	\$30
3	Citigroup Inc.	\$42
4	Credit Suisse Group AG	\$50
5	Deutsche Bank AG	\$50
6	JPMorgan Chase & Co.	\$50
7	Royal Bank of Scotland plc	\$50

*TABLE 7: FINANCIAL ENTITIES THAT SETTLED (IN 2015) A PRIVATE U.S. LAWSUIT ALLEGING RESTRAINT OF COMPETITION IN THE CREDIT DEFAULT SWAPS MARKET FROM JANUARY 1, 2008, TO DECEMBER 31, 2013*<sup>518</sup>

<i>No.</i>	<i>Entity Name(s)</i>
1	Bank of America Corp. & Bank of America, N.A.* <sup>519</sup>
2	Barclays PLC*
3	BNP Paribas SA*
4	Citigroup Inc., Citibank, N.A., & Citigroup Global Markets Inc.*
5	Credit Suisse Group AG*
6	Deutsche Bank AG*
7	Goldman Sachs Group Inc.*
8	HSBC Bank PLC & HSBC Bank USA, N.A.*
9	JPMorgan Chase & Co. & JPMorgan Chase Bank, N.A.*
10	Morgan Stanley*
11	Royal Bank of Scotland PLC & Royal Bank of Scotland NV*
12	UBS Group AG & UBS Securities N.V.*
13	International Swaps and Derivatives Associations (ISDA)
14	Markit Group Ltd. & Markit Group Holdings Ltd.

517. Bob Van Voris, *BofA, Other Banks Pay \$324M to Resolve Rate-Rigging Claims*, CHARLOTTE OBSERVER (May 4, 2016, 2:51 PM), <http://www.charlotteobserver.com/news/business/banking/article75591222.html>; Zacks Equity Research, *Major Banks Sued for ISDAfix Rigging, Settle Cases for \$324M*, YAHOO! FIN. (May 4, 2016), <http://finance.yahoo.com/news/major-banks-sued-isdafix-rigging-193007650.html>. All of the financial entities listed in Table 6 are provisionally registered swap dealers or affiliates of provisionally registered swap dealers.

518. See Burne, *Banks Finalize \$1.86 Billion Credit-Swaps Settlement*, *supra* note 278; see also *In re Credit Default Swaps Antitrust Litig.*, 13md2476 (DLC), 2016 WL 2731524, at \*1 (S.D.N.Y. Apr. 14, 2016); *In re Credit Default Swaps Antitrust Litig.*, No. 13md2476 (DLC), 2014 WL 4379112, at \*1 n.2 (S.D.N.Y. Sept. 4, 2014); *In re Credit Default Swaps Antitrust Litig. Settlement*, GARDEN CITY GRP. LLC, <http://www.cdsantitrustsettlement.com/index.php> (last visited Dec. 31, 2016).

519. Asterisk (\*) indicates that the financial entity is a provisionally registered swap dealer or an affiliate of one.

**TABLE 8: FINANCIAL ENTITIES THAT SETTLED LEGAL BENCHMARK-RIGGING CASES WITH EUROPEAN COMMISSION IN 2013 FOR BEHAVIOR THAT ALLEGEDLY OCCURRED FROM 2005 TO 2010<sup>520</sup>**

<i>No.</i>	<i>Entity Name</i>	<i>Settlement Amount (in millions)</i>
1	Barclays PLC* <sup>521</sup>	0 (whistleblower credit)
2	Citigroup Inc.*	€70
3	Deutsche Bank AG*	€725
4	JPMorgan Chase & Co.*	€79.9
5	Royal Bank of Scotland Group*	€391
6	RP Martin Holdings Ltd.	€247,000
7	Société Générale*	€227
8	UBS AG*	0 (whistleblower credit)

**TABLE 9: SYSTEMICALLY IMPORTANT BANKS THAT SETTLED CFTC, EUROPEAN COMMISSION, OR PRIVATE LEGAL ACTIONS INVOLVING ALLEGATIONS OF BENCHMARK RIGGING OR RESTRAINING COMPETITION<sup>522</sup>**

<i>No.</i>	<i>Entity Name</i>
1	Bank of America
2	Barclays
3	BNP Paribas
4	Citigroup
5	Credit Suisse
6	Deutsche Bank
7	Goldman Sachs
8	HSBC
9	JPMorgan Chase
10	Morgan Stanley
11	Royal Bank of Scotland
12	Société Générale
13	UBS

520. European Commission Press Release IP/13/1208, *supra* note 7; *see also* Vanessa Mock & David Enrich, *EU Fines 6 Firms on Rates*, WALL ST. J., Dec. 5, 2013, at C1. Financial entities involved in the case that were not part of the settlement include HSBC Holdings PLC, ICAP PLC, and Crédit Agricole SA. *See id.*

521. Asterisk (\*) indicates that the financial entity is a provisionally registered swap dealer or an affiliate of one.

522. *See* FIN. STABILITY BD., 2015 UPDATE OF LIST OF GLOBAL SYSTEMICALLY IMPORTANT BANKS (G-SIBS) at 2 (2015), <http://www.fsb.org/wp-content/uploads/2015-update-of-list-of-global-systemically-important-banks-G-SIBs.pdf>. Note that all of the financial entities listed above are provisionally registered swap dealers or affiliates of provisionally registered swap dealers.

TABLE 10: REGISTRATION STATUS OF FINANCIAL ENTITIES THAT SETTLED BENCHMARK-RIGGING CASES WITH THE CFTC<sup>523</sup>

No.	Entity Name	NFA ID No.	Benchmark Rate-Rigging Case	Registration Status
1	Barclays PLC	0443033	ISDAfix; LIBOR	None
2	Barclays Bank PLC	0209452	ISDAfix; LIBOR; forex	Swap Dealer
3	Barclays Capital Inc.	0228758	ISDAfix; LIBOR	Futures Commission Merchant; Commodity Pool Operator; Commodity Trading Advisor
4	Citibank, N.A.	0187177	ISDAfix; forex; LIBOR	Swap Dealer
5	Citibank Japan Ltd.	0443420	LIBOR	None
6	Citigroup Global Markets Japan Inc.	0443456	LIBOR	None
7	Deutsche Bank AG	0210678	LIBOR	Swap Dealer
8	HSBC Bank plc	0209445	Forex	Swap Dealer
9	ICAP Europe Limited	0468262	LIBOR	None
10	JPMorgan Chase Bank, N.A.	0229152	Forex	Swap Dealer
11	Lloyds Banking Group plc	0467813	LIBOR	None
12	Lloyds Bank plc	0466833	LIBOR	Swap Dealer
13	Rabobank	0469701	LIBOR	None
14	Royal Bank of Scotland plc	0272448	Forex; LIBOR	Swap Dealer
15	RBS Securities Japan Limited	0458078	LIBOR	None
16	RP Martin Holdings Limited	0477360	LIBOR	None
17	Martin Brokers (UK) Ltd.	0468662	LIBOR	None
18	UBS AG	0338960	LIBOR; forex	Swap Dealer
19	UBS Securities Japan Co. Ltd.	0454358	LIBOR	None

523. See *Background Affiliation Information Center*, NAT'L FUTURES ASS'N, <https://www.nfa.futures.org/basicnet/Welcome.aspx> (last visited Dec. 31, 2016) (search by NFA ID Number for each entity). For information on NFA ID Numbers, see *NFA Directories*, NAT'L FUTURES ASS'N, <https://www.nfa.futures.org/nfa-registration/nfa-directories.html> (last visited Dec. 31, 2016).

*TABLE 11: PROVISIONALLY REGISTERED SWAP DEALERS THAT SETTLED A BENCHMARK-RIGGING CASE WITH THE CFTC OR EUROPEAN COMMISSION (OR WHOSE AFFILIATES HAVE DONE SO)<sup>524</sup>*

<i>No.</i>	<i>Entity Name(s)</i>
1	Bank of America, N.A.
2	Barclays Bank PLC
3	BNP Paribas SA
4	Citibank, N.A., Citigroup Energy Inc., Citigroup Global Markets Inc., & Citigroup Global Markets Limited
5	Credit Suisse International & Credit Suisse Securities Europe Limited
6	Deutsche Bank AG
7	Goldman Sachs & Co., Goldman Sachs Bank USA, Goldman Sachs DO Brasil Banco Multiplo SA, Goldman Sachs Financial Markets LP, Goldman Sachs International, Goldman Sachs Japan Co. Ltd., Goldman Sachs Mexico Casa de Bolsa SA DE CV, Goldman Sachs Mitsui Marine Derivative Products LP, Goldman Sachs Paris Inc. Et. CIE, J Aron & Company, & J Aron & Company Singapore PTE
8	HSBC Bank PLC, HSBC Bank USA, N.A.
9	JPMorgan Chase Bank, N.A., JPMorgan Securities LLC, JPMorgan Securities PLC, & JPMorgan Ventures Energy Corporation
10	Lloyds Bank PLC
11	Morgan Stanley & Co. International PLC, Morgan Stanley & Co. LLC, Morgan Stanley Bank International Limited, Morgan Stanley Bank, N.A., Morgan Stanley Capital Group Inc., Morgan Stanley Capital Products LLC, Morgan Stanley Capital Services LLC, Morgan Stanley Derivative Products Inc., Morgan Stanley Case de Bolsa SA DE CV, & Morgan Stanley MUFG Securities Co. Ltd.
12	Royal Bank of Scotland PLC
13	Société Générale SA & Société Générale Newedge UK Limited
14	UBS AG

524. See *Swap Dealer (SD) and Major Swap Participant (MSP) Directory*, *supra* note 72.

*TABLE 12: FINANCIAL ENTITIES THAT, EITHER BY THEMSELVES OR IN CONJUNCTION WITH AFFILIATED BUSINESS ENTITIES, SETTLED THREE OR MORE LEGAL ACTIONS ALLEGING BENCHMARK RIGGING AND/OR OTHER ANTICOMPETITIVE CONDUCT INVOLVING DISTINCT FINANCIAL PRODUCTS AND/OR MARKETS<sup>525</sup>*

<i>No.</i>	<i>Entity Name</i>	<i>No. of Distinct Financial Products or Markets</i>	<i>Settlement Case Descriptions</i>
1	Barclays PLC	4	LIBOR and/or related interest rate benchmarks; foreign exchange benchmarks; ISDAfix benchmark; credit default swaps antitrust.
2	Citibank, N.A.	4	LIBOR and/or related interest rate benchmarks; foreign exchange benchmarks; ISDAfix benchmark; credit default swaps antitrust.
3	Deutsche Bank AG	3	LIBOR and/or related interest rate benchmarks; ISDAfix benchmark; credit default swaps antitrust.
4	JPMorgan Chase & Co.	4	LIBOR and/or related interest rate benchmarks; foreign exchange benchmarks; ISDAfix benchmark; credit default swaps antitrust.
5	Royal Bank of Scotland Group Plc	4	LIBOR and/or related interest rate benchmarks; foreign exchange benchmarks; ISDAfix benchmark; credit default swaps antitrust.
6	UBS AG	3	LIBOR and/or related interest rate benchmarks; foreign exchange benchmarks; credit default swaps antitrust.

525. This Table seeks to identify which financial entities settled three or more government enforcement actions or lawsuits involving allegations that the financial entities in question had participated in separate cartels to rig distinct benchmarks or otherwise engage in activities that restrained competition in distinct markets. For example, a financial entity that settled enforcement actions with three different countries involving the rigging on LIBOR-related interest rate benchmarks would not appear on this chart if all three settlements involved the same activities, i.e., the rigging of LIBOR-related interest rate benchmarks. On the other hand, a financial entity would appear on this Table if it had settled one government enforcement action involving allegations that it manipulated LIBOR and similar interest rate benchmarks, another government enforcement action involving allegations that it had manipulated foreign exchange benchmarks, a private lawsuit concerning the alleged rigging of ISDAfix, and a private lawsuit involving alleged restraint of trade in the credit default swaps market.

See *supra* Tables 1–9. Note that all of the financial entities listed in Table 12 are provisionally registered swap dealers or affiliates of provisionally registered swap dealers.

FIGURE 1: THREE BROAD CATEGORIES OF WRONGDOING



Although conduct that violates antifraud, price manipulation, and antitrust claims overlaps to some extent, there are important differences among these categories of misconduct. *Fraud* is a broad catch-all that covers any means of misappropriating another person's money, property, or other interests without violating the basic prohibition against theft. Generally speaking, under the U.S. antitrust laws, *unlawful anticompetitive conduct* involves acts that harm competition (or that have the propensity to harm competition), such as when firms that normally would be competitors band together and agree to fix prices, boycott specific firms, or divide sales territories or allocate customers. *Price manipulation* claims target conduct that causes the prices of futures, swaps, and other derivatives to become artificial, which means that the prices do not reflect the natural interplay of supply and demand. The price manipulation circle is smaller than the others because price manipulation claims have been narrowly construed as only applying to actions in which the perpetrators specifically intended to make the prices of derivatives artificial.