

The CFTC: Armed And Dangerous

February 13, 2014 | [Financial Regulation](#), [Government Investigations](#), [The GEE Blog](#)



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By Trace Schmeltz | Matt Taibbi, a well-respected journalist who covers the commodities world, recently remarked about the commodities market that, “Certain people always win and certain people always lose.” “[How Markets Are Rigged Against You](#),” *CBC Business News*, Dec. 9, 2013. Matt was referring to a variety of phenomena, including several recent high profile cases involving allegations that large banks have rigged the LIBOR market, the currency market, and even the metals market. See, e.g., “[Goldman Sachs Creating Artificial Shortages of Metals Rigging](#).” Real or perceived market manipulation threatens the commodities markets—threatening the very fabric of an American capitalism that is largely based on our access to grains, oil, metals, and other valuable commodities. Recently, Congress has provided the Commodity Futures Trading Commission with new tools to address the very concerns that Taibbi has articulated. As a result of these tools and a more aggressive prosecutorial attitude, 2014 looks to be the year in which the CFTC comes out of its role as the sleepy kid-brother to the Securities and Exchange Commission and makes some big cases of its own. Indeed, Section 753 of Dodd-Frank amended the Commodity Exchange Act § 6(c) to give the CFTC anti-manipulation enforcement authority similar to that of the SEC under § 10(b) of the Securities Exchange Act. In adopting Rule 180.1, which was in turn modeled after SEC Rule 10b-5, the Commission announced that it “will be guided, but not controlled, by the substantial body of judicial precedent applying the comparable language of SEC Rule 10b-5.” Rule 180.1 will give the CFTC the type of heavy-weapon the SEC has in Rule 10b-5, allowing the CFTC to pursue not only manipulation, but attempts to manipulate markets. The rule also reaches not only conduct in connection with a purchase or sale, but also prohibits deceptive devices or contrivances in connection with any swap, cash contract, or futures contract. Thus, the new rule applies to conduct or attempted conduct in connection with activities well beyond the purchase or sale of a covered instrument (e.g., all of the payment and other obligations under a swap). Indeed, in late 2013, then CFTC Enforcement Director Meister emphasized that Rule 180.1 means that the Commission is “now better armed than ever” with “a powerful new tool” to combat market manipulation. Along with this new authority, the CFTC has Commission has prioritized coordination with criminal authorities, something with which white collar and securities practices around the country are quite familiar. Over the past several years, lawyers who have traditionally considered themselves securities lawyers have donned the white collar hat

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largely because of the frequency with which SEC civil investigations have a criminal counterpart. Now, the CFTC reports that 93% of its “major fraud cases” have a parallel criminal case. Indeed, the Such coordination may enable the Commission to focus its budget-constrained efforts on actions against institutions, while other authorities pursue criminal investigations against individuals. Indeed, the CFTC’s LIBOR-related investigations were conducted with the Department of Justice, the Federal Bureau of Investigation, as well as Dutch, Japanese, and UK agencies. See “ [Three Former Traders Charged in Libor Case](#),” *New York Times’ Dealbook*, Jan. 13, 2014 ; “ [Rabobank to Pay \\$475 Penalty](#),” CFTC Press Release, Oct. 29, 2013. The CFTC is even expected to utilize Rule 180.1 to pursue insider trading. In its rule release, the Commission recognized that, while derivative markets have operated and will continue to operate in a way that allows for market participants to trade on the basis of lawfully obtained material nonpublic information, the “misappropriation” theory of insider trading could be the basis of a valid claim under the Commodity Exchange Act. In doing so, the CFTC explained that trading on the basis of material nonpublic information “in breach of a pre-existing duty (established by another law or rule, or agreement, understanding, or some other source), or by trading on the basis of material nonpublic information that was obtained through fraud or deception” would violate Rule 180.1. One such example would be an employee using her employer’s information to trade swaps or futures in violation of a confidentiality agreement in her employment contract. In short, the CFTC is armed and dangerous. It is time for commodities lawyers to team up with their white collar brothers and sisters when the CFTC comes knocking—the same way the securities lawyers have for the last several years.