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# REGULATORY NON-COMPLIANCE & INCREASED RISK OF CRIMINAL ENFORCEMENT UNDER THE CEA

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## WHY IT MATTERS NOW

- May 9, 2025 – Executive Order 14294 – “Fighting Overcriminalization in Federal Regulations.”
  - Required each federal agency to identify regulations enforceable by criminal penalty.
  - Commodity Futures Trading Commission (CFTC) – the Commodity Exchange Act (CEA).
  - Willful violation of the CEA or any CFTC regulation the violation of which is made unlawful is a **felony** punishable by up to ten years’ imprisonment.

## ROADMAP OF DISCUSSION

- Identify the Criminal Provisions of the CEA.
- Walk through CEA provisions that are predicates to criminal liability under 7 U.S.C. § 13(a)(5).
- Analysis of why DOJ has used CEA to charge cases only involving fraud and manipulation and not purely regulatory offenses under 7 U.S.C. § 13(a)(5).
- Discuss why that could change.
- Analysis of why non-compliance with CEA will increase exposure to criminal liability on traditional fraud and manipulation theories even if DOJ elects not to charge 13(a)(5).

## THE CEA'S CRIMINAL FRAMEWORK – AT A GLANCE

- The CEA contains multiple felony provisions, including:
  - Fraud, 7 U.S.C. § 13(a)(1).
  - Price manipulation, 7 U.S.C. § 13(a)(2).
  - False statements in registration applications, 7 U.S.C. § 13(a)(3).
  - Fraud/false statements directed at registered entities, 7 U.S.C. § 13(a)(4).
  - Abuses of office by CFTC employees, 7 U.S.C. § 13(c), (d).
  - Willful violations of the CEA or CFTC regulations, 7 U.S.C. § 13(a)(5).

## FRAUD AND MANIPULATION - SCIENTER

- In addition to 18 U.S.C. § 1343 (wire fraud) and § 1348 (commodities fraud), commodities fraud may be charged under the CEA as a violation of 7 U.S.C. § 13(a)(1) or 17 C.F.R. § 180.1 (incorporated through 7 U.S.C. § 13(a)(5)).
- The elements are: 1) misrepresentation or deception, 2) materiality, and 3) scienter (defined to require willfulness and intent to defraud).
- Scienter for traditional “lying” is an intent to cheat or deceive.
- Second Circuit in *Phillips* upheld the following jury instruction for FX manipulation: “an act is manipulative if it is designed to deceive or defraud others by sending a false pricing signal to the market.” A mixed motive is sufficient: “if there are two purposes for a transaction, one of which is legitimate, and if the transaction would have been done at the same time and in the same manner for the legitimate purpose, it is not manipulative even if the defendant also had an intent to deceive or to send a false price signal into the market. On the other hand, if the transaction would not have been done at the same time and in the same manner, except for the intent to mislead, then the transaction is manipulative.” 155 F.4th 102,125 (2d Cir. 2025).
- *Phillips* held that specific intent exists when defendant has a mixed motive: “the intent element for specific intent crimes, such as commodities fraud, can usually be satisfied even if the defendant has multiple reasons for taking an action, so long as one reason is the intent to deceive.” *Id* at 226.
- The false reporting provisions require a “knowingly” mens rea. *United States v. Valencia*, 394 F.3d 352 (5th Cir. 2004).

## FRAUD AND MANIPULATION - MATERIALITY

- When charged as a wire fraud, the materiality standard in commodities fraud cases is whether the misrepresentation is “capable of influencing” the intended victim, not whether it actually influenced that victim. *United States v. Johnson*, 945 F.3d 606, 614 (2d Cir. 2019).
- Under the CEA, the standard is “whether a reasonable investor would have been influenced by the misrepresentation, not whether the targets of the misrepresentation . . . were in fact influenced.” *Phillips*, 155 F.4th at 130.

## 7 § 13(a)(5) – WILLFUL VIOLATIONS

- Section 13(a)(5) makes it a crime for **“any person willfully to violate any other provision of this Act, or any rule or regulation thereunder,** the violation of which is **made unlawful** or the observance of which is required under the terms of this Act.”
- Knowledge is a **defense:**
  - “[N]o person shall be subject to imprisonment under this paragraph for the violation of any rule or regulation **if such person proves that he had no knowledge of such rule or regulation.”**

# BREADTH OF POTENTIAL PREDICATES

Table 1 - CEA Predicates for Criminal Liability

#	7 U.S.C. Section (§)	Description
1	2(a)(1)(C)(v)(IV)	Unlawful extension of credit by a Futures Commission Merchant
2	2(e)	Off-exchange trading of swaps
3	2(h)(1)(A)	Illegal execution of uncleared swaps
4	6(a)	Off-exchange futures trading
5	6(b)	Position limit violations
6	6d(a)	Acting as an unregistered Futures Commission Merchant
7	6d(b)	Mishandling of customer receipts
8	6d(f)(1)	Accepting funds from a swaps customer without registration as a Futures Commission Merchant
9	6d(f)(6)	Misuse of funds belonging to a Futures Commission Merchant
10	6d(g)	Acting as an unregistered Introducing Broker
11	6e	Acting as an unregistered Floor Broker
12	6h	False representation as being a member of a registered entity
13	6i	Reports of deals in excess of trading limits
14	6k	Acting as an unregistered Associated Person
15	6m	Acting as an unregistered Commodity Trading Advisor
16	6o	Fraud by Commodity Trading Advisor, Commodity Pool Operator, and Associated Person
17	6s	Acting as an unregistered Swap Dealer
18	6t	Large swap trader reporting violations
19	7a-1	Acting as an unregistered Derivatives Clearing Organization
20	9	Use of a manipulative device
21	12b	Violations of trading bans
22	24a	Acting as an unregistered swap data repository

## DOJ'S HISTORICAL PROSECUTION POSTURE

- *United States v. Reliant Energy*, 420 F.Supp.2d 1043 (N.D. Cal. 2006).
  - “[G]overnment’s premiere criminal prosecution under the criminal provision” of the CEA.
- Criminal commodity fraud and manipulation traditionally a supplement to federal mail and wire fraud statutes.
- Department of Justice (DOJ) spoofing initiative.
  - Trading *actus reus* gives rise to liability under a litany of statutes.

## DIFFICULTIES WITH PURELY REGULATORY CASES

There have been no prosecutions under 7 U.S.C. § 13(a)(5) absent fraud or manipulation. Why?

- Predicate regulatory offenses unlikely to offer **economic loss** or **sympathetic victims** to a prosecutor.
- Difficult to obtain conviction on a technical, regulatory theory due to the **willfulness element**.

## DON'T ASSUME "IT CAN'T HAPPEN"

However, novel criminal theories can and do emerge when **priorities shift**.

- *Reliant Energy*: first reported criminal manipulation case decades after enactment of the CEA.
- Market shocks or perceived compliance failures could catalyze a shift toward more aggressive CEA criminal prosecution.

## HOW NONCOMPLIANCE PUTS FIRMS ON THE RADAR

- **CFTC whistleblower program**
  - Whistleblowers can obtain 10-30% of monetary sanctions that the agency recovers, incentivizing tips about off-channel communications, position limit violations, and data reporting failures.
- **Routine examinations**
  - Examinations conducted by the regulatory arms of the CFTC and the National Futures Association can unearth conduct resulting in referral to the CFTC's Division of Enforcement and, potentially, to a criminal enforcer.

## DOJ CORPORATE PROSECUTION FACTORS

The DOJ *Justice Manual*<sup>2</sup> instructs prosecutors to consider “the corporation’s history of misconduct, including prior . . . **regulatory enforcement actions** against it” and “the adequacy and effectiveness of the corporation’s **compliance program**” in determining whether to charge a corporation or to enter into a resolution with the corporation.

<sup>2</sup> *Justice Manual*, U.S. Dep’t of Justice, Title 9: Criminal, No. 9-28.300 (last updated May 2024) (“Principles of Federal Prosecution of Business Organizations”).

## REGULATORY BREACHES AS EVIDENCE OF INTENT

- Certain violations can be viewed as **probative of criminal intent** in market abuse theories.
- Example:
  - **Position limit violation** → conspicuous confidence in a trader's market view → inference of **insider trading**.
- Non-compliance with **communication rules** can color the way in which a prosecutor interprets an otherwise innocuous exchange.
- Examples:
  - Trader taking a conversation "off the desk" to his personal device.

## SENTENCING EXPOSURE: ENHANCEMENTS

The U.S. Sentencing Guidelines<sup>3</sup> include a **four-level enhancement** for certain categories of associated persons who were in **violation of CFTC regulations** at the time of the defense. See U.S.S.G. § 2B1.1(b)(20) (Nov. 1, 2025).

- *United States v. Wilkinson*, 986 F.3d 740 (7th Cir. 2021): Four-level enhancement upheld because defendant acted as an **unregistered commodity pool operator** when engaged in criminal conduct.

<sup>3</sup> See U.S.S.G. § 2B1.1(b)(20) (Nov. 1, 2025).

## COMPLIANCE AS RISK MITIGATION

### **Methods of Deterrence and Avoidance of Enforcement:**

- Robust compliance with position limits and recordkeeping obligations.
- Careful supervision of trading activity.
- Documented improvements to compliance processes.
- Strategic disclosure.

## BOTTOM LINE

Noncompliance under the CEA **is not “merely regulatory.”**

- Increases exposure to criminal enforcement **directly** and through traditional fraud and manipulation theories.
- Best, most effective defense is maintaining a diligent, well-documented compliance program.

