

## What You Need To Know About United States Of America V. Michael Coscia

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This week, we have posted about two commodity enforcement trends ([here](#) and [here](#)). Yesterday, Judge Harry D. Leinenweber of the United States District Court for the Northern District of Illinois issued his opinion on the defendant's motion to dismiss in the matter of the *United States of America v. Michael Coscia*, Case No. 14 CR 551. The decision is not remarkable, insofar as it is a motion to dismiss that takes the allegations of the criminal indictment as true, but it is instructive. Following are a few of the pertinent highlights.

### The Commodity Exchange Act's Anti-Spoofing Provision is not void for vagueness.

Coscia had argued that 7 U.S.C. §§ 6(c)(a)(5)(C) and 13(a)(2) were void, under the Due Process Clause of the United States Constitution, because they failed to provide a person of ordinary intelligence with fair notice of what constitutes "spoofing." Judge Leinenweber disagreed with the defendant, holding that, among other things, the Commodity Futures Trading Commission (CFTC) had issued proposed guidance, "approximately five months before the alleged trades took place," suggesting "some degree of consensus" within the futures trading industry as to what constitutes spoofing. (Op. at 9.) In particular, the court quoted the CFTC as stating, "[i]n the view of the Commission, a . . . 'spoofing' violation requires that a person intends to cancel a bid or offer before execution . . . [L]egitimate, good-faith cancellation of partially filled orders would not violate [the statute]." (Op. at 9 (modification in original) (citing 76 Fed. Reg. at 14, 947)). The court went on to find that, because the Indictment alleges that Coscia "placed orders with the intent to cancel, not with the intent to fill them under certain conditions," that his conduct clearly fits within that prohibited by the statute. (Op. at 10-11.) Coscia attempted to distinguish his conduct by noting the existence of "Fill or Kill" orders on some exchanges. The court, without citing to any authority, attempted to distinguish "Fill or Kill" orders (which others have suggested are used by [high-frequency traders in order to manipulate the market](#) by arguing that such orders "are not entered with the intent to cancel." (Op. at 12.) Here, the court has exposed the weakness of the Government's case. The fact that exchanges even had Fill or Kill orders suggests that entering a number of orders with the expectation that, if they are not immediately filled, they will be

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killed, is, in fact, legitimate. Further, evidence suggests large market makers and others used this tool for the **purpose** of stacking the bid in a market. There is a very fine distinction between entering Fill or Kill orders with the intent to consummate them or with the intent that they will expire without consequence. This, certainly, will be a focus at trial.

## **Commodities Fraud Under 18 U.S.C. § 1348.**

Coscia also argued that counts of his Indictment alleging commodities fraud under § 1348 failed because, among other things: (i) the statute is impermissibly vague, and (ii) the Indictment fails to allege that he had made any affirmative or implied misrepresentations to the market. The interesting argument here concerns the lack of statements to the market, so we address only that argument. In rejecting Coscia's argument that the government could not sustain a claim against him under § 1348 because he had not made statements to the market, the court noted that the Seventh Circuit has not yet ruled on this issue. Accordingly, the court relied on precedent from the Second Circuit. Perhaps unsurprisingly, the Second Circuit has held that "false representations or material omissions are not required" for a § 1348 claim. (Op. at 15.) In so holding, the Second Circuit has adopted, effectively, a § 10(b)(5) rubric for analyzing such claims. According to the Second Circuit and Judge Leinenweber, his § 1348 claim will stand "as long as there is '(1) fraudulent intent, (2) [a] scheme or artifice to defraud, and (3) [a] nexus with a security.'" (Op. at 15-16.) Ultimately, the government will have to prove that Coscia intended to manipulate market prices through his high-frequency trading. Apparently, there is evidence that he had specific computer programs designed for this very purpose. Coscia, on the other hand, will have to offer expert testimony that his programs had legitimate market purposes. For example, he might argue that he had these programs designed in order to emulate a popular Fill or Kill order-type that was available legitimately in the market. Or, he may argue that, because so many other very large, well-established, traders were stacking the bid with such orders (unchecked by the exchanges), it appeared to be acceptable behavior in the market. This would possibly negate his criminal intent. What he argues and how a jury reacts remains to be seen. We will continue to follow this matter and keep you updated.