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The Resurrection of CFTC Administrative Enforcement Proceedings: Efficient Justice or a Biased Forum?

BY DAN M. BERKOVITZ

The author is a partner in the law firm Wilmer, Cutler, Pickering, Hale and Dorr, LLP, and served as General Counsel of the CFTC from 2009-2013.

Summary

In the wake of the broad new enforcement authority provided to the Commodity Futures Trading Commission ("CFTC" or "Commission") in the Dodd-Frank Reform and Consumer Protection Act ("Dodd-Frank"), and severe constraints on agency enforcement resources, the Director of the CFTC's Division of Enforcement ("Division") recently stated that the Division intends to increasingly rely on the CFTC's administrative enforcement process, as opposed to filing a complaint in federal court, to prosecute violations of the Commodity Exchange Act ("CEA").[1] The Division Director explained that the "overwhelming reason for this change is [the agency's lack of] resources,"[2] including its "bandwidth for discovery-intense litigation,"[3] but added that the administrative process would also allow the Commission to develop its expertise and the case law with respect to the new statute and regulations.[4]

The resurrection of the CFTC's administrative enforcement process would depart from the CFTC's recent approach to contested enforcement cases. For more than a decade the Division has filed contested cases exclusively in federal court—the last contested enforcement case filed before a CFTC administrative law judge ("ALJ") was in 2001, when the Commission charged Anthony J. DiPlacido with manipulation and attempted manipulation of electricity futures contracts on five occasions in 1998.[5] Although the Division has never publicly explained its rationale for avoiding the administrative process during this period, it is generally believed that the Division's track record in its administrative forum as well as the higher profile of cases filed in federal court were key factors.[6]

Similar statements by Securities and Exchange Commission ("SEC") officials signaling the SEC's intent to rely more on the administrative enforcement process have provoked criticism that administrative pro-

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ceedings are inherently unfair due to the absence of the procedural rights that defendants have in federal court, and that an agency cannot both be a prosecutor and an unbiased judge based on the same underlying facts. "These in-house proceedings, which provide far less discovery than does litigation in federal courts and do not operate under the traditional rules of evidence, provide an undeniable 'insider' advantage to the SEC," two critics wrote in a recent op-ed in the *The Washington Post*.[7] Noting the SEC's favorable track record in its recent administrative proceedings, U.S. District Court Judge Jed Rakoff cautioned that the SEC's administrative process is "unlikely … to lead to as balanced, careful, and impartial interpretations as would result from having those cases brought in federal court."[8]

Concerns regarding the fairness of the agency administrative enforcement process are not new. Shortly after the Commission was first established, former CFTC Chairman William T. Bagley wrote:

> **An inherent and pervasive "undue process" exists at the CFTC and all comparable agencies when the Commission itself is a rule maker, policeman, grand jury, prosecutor, judge and jury with *de novo* powers in the same case at virtually the same time. The agency has "heard" your case at least three and perhaps more times before you have a hearing. The minds of men are simply not supple enough to judge a defendant's culpability fairly when vindication of the Commission's own prosecution and reputation are also at stake in an adversarial proceeding.[9]**

This article first describes the Commission's administrative process for contested enforcement cases, including noting where the Commission's procedures are similar to or differ from those available in a federal court proceeding. This article then traces the CFTC's use (and disuse) of the administrative enforcement process, from the time when the administrative process was the exclusive means available to the agency for prosecuting violations of the CEA, through the current period when the agency has forsaken the use of this process in contested enforcement proceedings. The agency's prior experience with the administrative process indicates that despite the absence of discovery in agency proceedings, these proceedings can take years to resolve, particularly in cases involving complex factual and legal issues, such as cases involving allegations of manipulation. Moreover, rather than exhibiting any "home-court" advantage for the Division, the Commission's decisions in these complex cases often failed to develop the law or make findings in accordance with the positions taken by the Division.

Finally, the article examines the extent to which defendants in CFTC administrative proceedings may be able to challenge the fairness of administrative proceedings as well as the agency's ability to use such proceedings to develop the law as the agency desires.[10] Although the courts have traditionally afforded deference to administrative agency determinations in adjudicatory proceedings on questions within the agency's area of expertise, a number of judges have recently questioned the wisdom of this doctrine, particularly as it applies to administrative legal interpretations made in enforcement actions. The more aggressively the CFTC attempts to use the administrative enforcement process to interpret and apply its new statutory authorities, the more likely that this traditional doctrine will be re-examined.

The Administrative Enforcement Process

The CFTC's administrative enforcement authority is statutorily based in Section 6(c) of the CEA. If the Commission has "reason to believe that any person (other than a registered entity) is violating or has violated [the CEA], or any rule, regulation or order" promulgated thereunder, Section 6(c)(4) authorizes the Commission to serve a complaint upon that person, which "shall … contain a description of the charges against the person … [and] … a notice of hearing that specifies the date and location of the hearing regarding the complaint."[11] Section 6(c)(4)(C) authorizes the Commission to hold the hearing itself or to designate an ALJ to conduct the hearing. Section 6(c)(10) also authorizes the Commission to impose sanctions for violations. Based on the evidence received during the hearing, the Commission may prohibit a person from trading on a registered entity, suspend or revoke the registration of any person, or assess civil penalties for the violations, up to the maximum amounts specified in the statute.[12] A person subject to any such sanctions imposed by the Commission may seek judicial review of the Commission's determinations in the U.S. Court of Appeals.

The Commission's Rules of Practice for conducting adjudicatory hearings in enforcement actions are

set forth in Part 10 of the Commission's regulations. In accordance with CEA Section 6(c)(4)(B), an adjudicatory proceeding is commenced when the Division files a complaint and notice of hearing with the CFTC's Office of Proceedings.[13] The complaint must state the Commission's legal authority and jurisdiction to conduct the hearing, and the alleged violations of law and the facts upon which the alleged violations are based with sufficient specificity so as to "permit a specific response to each allegation."[14]

Following the service of the complaint and notice of a hearing, the respondent must file an answer as to whether the respondent admits, denies, or does not have and is unable to obtain sufficient information to admit or deny each allegation.[15] The answer must include a statement of facts supporting each affirmative defense.[16] The failure to file an answer within 20 days may result in a default judgment against the respondent.[17]

Upon the filing of a complaint the Commission's Office of Proceedings will assign an ALJ to conduct a hearing. Until 2012, the Commission employed two full-time ALJs to conduct its adjudicatory hearings, which generally consisted of both enforcement cases and certain reparations cases involving claims for amounts greater than $30,000.[18] In 2012, however, due to the declining adjudicatory caseload, the Commission eliminated its two full-time ALJs and determined it would use "borrowed, detailed or retired ALJs as needed to manage the proceedings formerly handled by the permanent ALJs."[19]

The ALJ is responsible for the conduct of the proceeding. The ALJ may administer oaths and affirmations, issue subpoenas, receive relevant evidence and make evidentiary rulings, examine witnesses, hold pre-hearing conferences, and rule on all motions.[20] ALJs are independent from the Division – they may not be responsible to or under the supervision of any person performing an investigatory or prosecutorial function.[21] Similarly, an ALJ may not be advised by any person performing an investigatory or prosecutorial function with respect to the same or a factually related proceeding, except as witness or counsel.[22]

Ex parte communications are prohibited during an adjudicatory hearing.[23] An ex parte communication is defined as an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given. A party or other person that may be adversely affected by a proceeding may not make an ex parte communication that is relevant to the merits of the proceeding to any Commissioner, ALJ, or other Commission employee involved in the decisional process.[24]

An ALJ may hold one or more pre-hearing conferences to determine the extent to which issues can be clarified, certain facts may be admitted or stipulated, documents authenticated, the number of witnesses limited, evidentiary objections considered, testimony filed, and the conduct of the hearing expedited.[25] The ALJ also determines whether any other persons should be permitted to intervene in or be heard during the proceeding.[26]

Pre-hearing discovery under the Commission's administrative process is more limited than in federal court under the Federal Rules of Civil Procedure ("Federal Rules"). Generally, although the Commission's rules provide for each party to disclose to the other party or parties certain information regarding the legal theories and factual information upon which it intends to rely, respondents do not have a right to submit interrogatories or take the depositions of witnesses or potential witnesses, except in limited circumstances. Unlike a trial in federal court, where a party may have the opportunity to take the deposition of a witness prior to trial, the CFTC's adjudicatory hearing may be the first—and only—opportunity for the respondent to examine a witness and the basis for the witness's testimony.

The Commission's Rules of Practice require the parties to file a prehearing memorandum that discloses basic information about the case they intend to present. The prehearing memorandum must set forth an outline of the party's case or defense; the legal theories upon which the party will rely; the identity and geographic location of each witness other than an expert witness, along with a brief summary of the witness's expected testimony; and a list of documents that the party intends to introduce at the hearing, along with any copies thereof which the other parties do not already have and to which they do not have reasonably ready access.[27] With respect to expert witnesses that a party intends to call, the party must identify each such witness and his or her qualifications, provide a list of any publications authored by the witness within the preceding ten years, a list of all cases in which the witness has testified as an expert within the preceding four years, a "complete statement of all opinions to be expressed by the witness and the basis or reasons for those opinions," and a list of documents, data, or other written material considered by the witness in forming his or her opinion.[28]

The Division also must disclose certain information to the respondents prior to the hearing. The Division must make available and permit the respondents to make copies of all documents that were produced pursuant to subpoenas issued by the

Division or otherwise obtained by the Division from persons outside the Commission; the subpoenas or other written requests for such documents; and all transcripts, investigative testimony and all exhibits to those transcripts.[29] There are several exceptions to these disclosure requirements. The Division may withhold documents that would disclose the identity of a confidential source, confidential investigatory techniques or procedures. The Division may also withhold information that would disclose the market positions, business transactions, trade secrets, or names of customers of any persons other than the respondents, unless such information is relevant to the resolution of the proceeding.[30] Information that is privileged from disclosure under other provisions of law also may be withheld.[31]

All parties have specific disclosure obligations with respect to witness statements.[32] Each party must make available to the other party any statement in its possession of any person whom the party expects to call that relates to the anticipated testimony. This obligation covers transcripts of investigative interviews, depositions, trial or other testimony given by the witness, written statements signed by the witness, and substantially verbatim notes of interviews with the witness. The Division must produce witness statements prior to the scheduled hearing date, at a time designated by the ALJ. The respondent must produce its witness statements at the close of the Division's case at the hearing.

The ALJ, upon motion by any party, or upon his or her own initiative, may direct each party to serve upon the other parties a list of documents that they intend to introduce at the hearing. The ALJ may also then direct that each other party file and serve a response disclosing any objections to the authenticity or admissibility of such documents, along with the legal and factual grounds for such objections. After affording each party an opportunity to file briefs as to the authenticity or admissibility of the documents, the ALJ may rule as to whether the documents that are objected to shall be admitted.[33]

In contrast to the Federal Rules, which generally permit oral depositions or written interrogatories of any person, including parties, the CFTC's Rules of Practice permit depositions or interrogatories only when a prospective witness will be unable to attend or testify at a hearing due to "age, illness, infirmity, imprisonment or on the basis that he is or will be outside of the United States at the time of the hearing", the testimony is material, and "it is necessary to take his deposition in the interests of justice."[34] A party seeking to take the deposition of a witness must apply in writing to the ALJ for an order to take the deposition.[35] A deposition may then be used at the hearing, provided that the witness is unable to testify at the hearing, the testimony was taken under oath, and the other parties had a reasonable opportunity to cross-examine the witness at the time the statement was made.[36]

Rule 10.68 authorizes any party to apply to the ALJ for the issuance of a subpoena requiring a person to testify at the hearing, or to produce "specified documentary or tangible evidence (subpoena duces tecum) at any designated time or place."[37] Another party may move to quash or limit the production, or for a protective order to limit the use or disclosure of such information. The ALJ may deny the application, or impose conditions upon the required production, if he or she considers the request "unreasonable, oppressive, excessive in scope, or unduly burdensome," or may issue a protective order upon a showing of good cause.[38]

Although the ALJ may issue a subpoena to compel the attendance of a witness or the production of documents, the Commission does not have independent authority to impose sanctions for refusal to obey an administrative subpoena. Rather, the Commission may apply to federal court to order such person to appear before the ALJ or the Commission to provide testimony or produce documents, and the failure to obey such order of the court may lead to sanctions for contempt.[39]

Similar to the Federal Rules, however, the procedures for taking an oral deposition of a witness are the same as if the witness were testifying at the hearing. The witness is subject to both direct and cross-examination and the testimony shall be recorded verbatim. Objections to testimony, evidence or the conduct of the parties may be raised for a later ruling by the ALJ, and, if the parties agree, objections to matters testified to in the deposition may also be made at the hearing, even if the objection was not raised during the deposition.[40]

In order to narrow the issues to be determined at the hearing, prior to the hearing either party may request another party for "admission of the truth of any facts relevant to the pending proceeding." If the other party objects, "the reasons therefor shall be stated."[41]

With respect to the conduct of the hearing, the Rules of Practice provide that "Every party is entitled to due notice of hearings, the right to be represented by counsel, and the right to cross-examine witnesses, present oral and documentary evidence, submit rebuttal evidence, raise objections, make arguments and move for appropriate relief."[42] The ALJ may ensure that the evidence presented is relevant

to the proceeding, and may limit cross-examination to the subject matter of the direct examination and matters affecting the credibility of the witness.[43] Although Commission Rule 10.66(c) provides the ALJ with discretion to permit cross-examination as to any matter that is relevant to the issues in the proceeding, without regard to the scope of direct examination,[44] the Commission has indicated this should be the exception rather than the rule. In upholding ALJ rulings limiting the scope of cross-examination, the Commission has approvingly referenced Federal Rule of Evidence 611(b), stating that "[c]ross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness."[45]

Commission Rule 10.67 provides a broad standard for the admissibility of evidence: "Relevant, material, and reliable evidence shall be admitted. Irrelevant, immaterial, unreliable and unduly repetitious evidence shall be excluded."[46] A party that objects to the introduction of evidence must "timely and briefly" state the grounds for the objection. Although the Commission is not bound to follow the Federal Rules of Evidence in its adjudicatory hearings, it nonetheless looks to the Federal Rules of Evidence as "guidance and support" in determining whether certain evidence is admissible.[47] Thus, for example, the Commission has followed Federal Rule of Evidence 701 with respect to the admissibility of the opinion of a lay witness,[48] and Federal Rule of Evidence 702 with respect to the testimony of an expert witnesses.[49] The Commission also has adopted the "Brady rule," which imposes a duty upon the Division to provide to the respondent "all material of which it aware that is arguably exculpatory as to either guilt or punishment."[50]

Interlocutory review by the Commission of an ALJ's ruling is available only in "extraordinary circumstances."[51] Circumstances in which the Commission, in its discretion, may grant interlocutory review include appeals from an adverse ruling on a motion to disqualify an ALJ, appeals from rulings suspending an attorney or denying intervention or limited participation, and appeals from rulings requiring the appearance of a Commission or other government agency employee or the production of Commission records.[52] The Commission may also consider interlocutory review where the ALJ certifies to the Commission that the ruling sought to be appealed involves a controlling question of law or policy, immediate appeal may materially advance the ultimate resolution of the issues, and subsequent reversal of the ruling would cause unnecessary delay or expense to the parties.[53]

Following the conclusion of the hearing, the parties may file proposed findings of fact and conclusions of law, as well as supporting briefs. Oral argument also may be held at the discretion of the ALJ. After the parties have filed their proposed findings of fact, conclusions of law, and supporting briefs, the ALJ will issue his or her initial decision, which is to be based on the record of the proceeding.[54]

In order to prevail, the Division must demonstrate that the charges "are supported by the weight of the evidence."[55] The "weight of the evidence" standard is equated with the "preponderance of the evidence" standard – i.e., a finding of liability must be supported by the preponderance of the evidence.[56]

Any party may appeal an ALJ decision, dismissal, or other final disposition to the Commission.[57] The Commission also may determine to review an initial decision on its own initiative.[58] The Commission ordinarily will consider the whole record on review, but may limit the issues to those presented in the briefs for appeal.[59] In reviewing a matter on appeal, the Commission will determine sanctions *de novo* rather than defer to the assessment of the ALJ.[60] The Commission also may choose to grant a motion to hold oral argument.[61] If neither party appeals the initial decision or order and the Commission does not undertake review on its own initiative or stay the decision, then the decision becomes final 30 days after it is issued.[62] If the proceeding results in an order for the imposition of a civil penalty, the suspension of trading privileges, or the suspension or revocation of a registration, a person may seek judicial review of the order in the U.S. Court of Appeals.[63]

CFTC Use of the Administrative Process

From the passage of the Commodity Exchange Act in 1936 to the passage of the Commodity Futures Trading Commission Act in 1974 ("1974 Act"), which replaced the Commodity Exchange Authority within the Department of Agriculture with the independent, five-member Commission to administer and enforce the CEA, the administrative process was the only avenue for the agency to bring civil actions for violations of the CEA. During this period, the suspension or revocation of a person's trading privileges on a designated contract market was the sole sanction available to the agency for civil violations of the CEA by non-exchange personnel.

The 1974 Act authorized the Commission to impose civil penalties for violations of the CEA through its administrative proceedings and to bring actions

in federal court to enjoin violations.[64] The 1974 Act, however, did not provide the federal courts with authority to impose civil penalties for past violations. That authority remained solely with the Commission until 1992, when Congress amended the CEA to authorize the Commission to seek and for the courts to impose "upon a proper showing," in actions brought by the Commission under Section 6c for injunctive relief, civil penalties for violations of the CEA.[65] Thus, only within the past twenty years has the Division had the ability to choose which forum—administrative or judicial—in which to pursue civil penalties for violations of the CEA.

Initially, therefore, the law of manipulation was developed through judicial review of administrative cases involving suspensions of trading privileges. In these early judicial cases, such as *General Foods Corp. v. Brannan*,[66] *Great Western Food Distributors, Inc. v. Brannan*,[67] *Volkart Bros., Inc. v. Freeman*,[68] and *Cargill, Inc. v. Hardin*,[69] the courts interpreted the CEA *de novo* – without according the agency's position any particular deference.

These judicial decisions did not always reach the result or produce the legal standard for manipulation sought by the agency. For example, in *General Foods Corp. v. Brannan*, the court held, contrary to the agency's position, that the respondents' large purchases of rye for the purpose of stabilizing the market did not constitute an unlawful attempt to manipulate or corner the market. The court stated that "the common criteria usual in manipulation or corner cases are deceit, trickery through the spreading of false rumors, concealment of position, the violation of express anti-manipulation controls, or other forms of fraud. None of these elements are claimed or shown to exist in the instant situation."[70] In *Volkart*, the Fifth Circuit held that a trader's exploitation of a natural squeeze or corner would not constitute manipulation: "In brief, before the order punishing the petitioners can be sustained, it must appear not only that they profited from a squeeze, but that they intentionally brought about the squeeze by planned action."[71]

After the agency sought unsuccessfully to have the *Volkart* ruling overturned through legislation, it turned to the administrative process to reconcile the conflicting judicial precedents and set forth its view of the appropriate standard.[72] In 1977, in *In re Hohenberg Bros.*, the Commission established the two elements of attempted manipulation: "An attempted manipulation requires only an intent to affect the market price of the commodity and some overt act in furtherance of that intent."[73] The Commission also held that a dominant or controlling position in the market is not a prerequisite for manipulation or attempted manipulation, nor is a profit motive.[74]

Several years later, in 1982, in *In the Matter of Indiana Farm Bureau Coop. Ass'n*, the Commission elaborated on the element of intent necessary to support a finding of manipulation. "It must be proven," the Commission wrote, "that the accused 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 influencing futures prices in the particular market at the time of the alleged manipulative activity."[75] The Commission approvingly cited the holdings in both *General Foods* and *Volkart*, stating that it is permissible for traders to seek the best price, even in a congested market, "as long as their trading activity does not have as its purpose the creation of 'artificial' or 'distorted' prices." The Commission thus held that where a squeeze arises from natural conditions, and is not intentionally created by a long, "manipulative intent may not be inferred where a long does not exacerbate the congestion itself."[76]

In 1987, in *In the Matter of Cox*, the Commission reviewed both the judicial and administrative precedents and set forth the four-part test that has become the standard for finding manipulation under CEA Section 9(a)(2): (1) that the accused had the ability to influence market prices; (2) that they specifically intended to do so; (3) that artificial prices existed; and (4) that the accused caused the artificial prices.[77] The four-part test has been viewed by many as creating an insurmountable hurdle for the Division of Enforcement in proving a manipulation case, largely due to the difficulty in demonstrating the existence of artificial prices and causality.[78] As a result of these concerns regarding the four-part test, in the Dodd-Frank Act Congress amended CEA Section 6(c) to also prohibit the use of "any manipulative or deceptive device or contrivance," based on similar language in Section 10(b) of the Securities and Exchange Act of 1934. Although the Commission's new anti-manipulation authority has yet to be tested, either in federal court or before the agency, it is widely believed that, based on the precedents interpreting similar language in the securities laws, it will be easier for the Division to meet its burden of proof under the SEC-based standard than under the precedents governing CEA Section 9(a)(2).

The last contested case that the Division brought before an administrative judge was *In the Matter of Anthony J. DiPlacido*, which was filed in 2001,

and concerned manipulative conduct occurring in 1998. Since the early 2000s, the Commission has filed all of its contested enforcement cases in federal court. Because these cases are filed in federal court under Section 6c of the CEA, they have sought both injunctive and other equitable relief as well as the imposition of civil penalties. [79]

Despite the general impression that the administrative enforcement process proceeds much more quickly than federal court litigation due to the absence of pre-hearing discovery, the CFTC's previous experience indicates that the administrative process can be lengthy, particularly in complex cases involving detailed factual issues and significant legal issues. A 1995 study by the General Accounting Office on administrative enforcement cases before the agency during the years 1989 through 1993 found that it took an average of 24 months from issuance of complaint and notice of hearing to initial decision, and then another 24 months from initial decision to appeal decision.[80] Complex cases have taken significantly longer. The Commission issued its opinion in the *DiPlacido* case approximately 7 years after the complaint was filed. Other contested major manipulation cases brought before the agency in the 1970s and 1980s also took many years to resolve: *Hohenberg* took 6 years, *In the Matter of Abrams* took 7 years, *Indiana Farm Bureau* 8 years, and *Cox* 16 years.[81] Moreover, with the exception of the *DiPlacido* case, in each of these other lengthy manipulation cases the Commission either dismissed or affirmed the ALJ's dismissal of the complaint. At least with respect to the complex manipulation cases that the Commission has faced in the past, the record does not support either the view that the administrative process quickly or efficiently resolves such cases or that the Division of Enforcement enjoys any particular "home court" advantage when bringing a complex case to the Commission through the adjudicatory process.[82]

Judicial Review

Administrative Procedures

The courts have generally rejected due process challenges to the particular administrative procedures used by the CFTC in its adjudications. The courts have held that the CFTC must provide the basic requirements of due process—such as timely notice, an opportunity to be heard before an impartial judge, and an opportunity for cross-examination—but have refused to require the same procedures that are available in a federal court proceeding, or even to second-guess the particular procedures employed by the agency. In *Silverman v. CFTC*, the Seventh Circuit Court of Appeals rejected the claim that the failure to permit discovery was a denial of due process.[83] "There is no basic constitutional right to pretrial discovery in administrative proceedings," the court stated. "The Administrative Procedure Act contains no provision for pretrial discovery in the administrative process … and the Federal Rules of Civil Procedure for discovery do not apply to administrative proceedings."[84] The court noted, however, that the due process clause "does insure the fundamental fairness of the administrative hearing," which includes a "fair trial, conducted in accordance with fundamental principles of fair play and applicable procedural standards established by law."[85] In *Gimbel v. CFTC*, the Seventh Circuit elaborated that due process requires both timely notice and a meaningful opportunity to be heard, but found that the instant case Commission's adjudicatory hearing process had provided both.[86] The Ninth Circuit also has ruled "'there is no basic constitutional right to pretrial discovery in [Commission] proceedings.'"[87]

The Commission's procedural discretion is not without limits. In *Lloyd Carr & Co. v. CFTC*, the ALJ refused to reopen the hearing to permit the testimony of a witness who was delayed due to a snowstorm and arrived at the hearing one minute late.[88] The Second Circuit held that "Although an ALJ has wide latitude in the conduct of a hearing … administrative convenience or even necessity cannot override the constitutional requirements of due process."[89] The court found "the ALJ abused his discretion in failing to reopen the hearing when the first witness arrived one minute after the hearing was closed."[90] Hence, although the agency has substantial discretion as to the procedures to be used in the conduct of an administrative hearing, courts may step in where the agency's procedures may affect the fundamental fairness of the proceeding.

Findings of Fact

Prior to the passage of the Dodd-Frank Act, the CEA included a standard for judicial review of factual findings in enforcement cases. Section 6(c) provided that "the findings of the Commission as to the facts, if supported by the weight of the evidence, shall [be] conclusive."[91] The courts interpreted this standard to be upheld the Commission's findings must be supported by "the weight—or preponderance—of the evidence."[92] The courts also generally

followed the elaboration of this standard that the Seventh Circuit set forth in *Great Western Foods*:

> **[T]he function of this court is something other than that of mechanically reweighing the evidence to ascertain in which direction it preponderates; it is rather to review the record with the purpose of determining whether the finder of fact was justified, i.e. acted reasonably, in concluding that the evidence, including the demeanor of the witnesses, the reasonable inferences drawn therefrom and other pertinent circumstances, supported his findings.[93]**

In the Dodd-Frank Act, Congress amended CEA Section 6(c) by including the new fraud-based anti-manipulation authority and reorganizing the statutory language regarding the administrative enforcement process from one long paragraph into eleven subsections. Congress did not include in the revised section the previous language establishing the standard of review. Thus, CEA Section 6(c) no longer contains an explicit standard of judicial review for Commission factual findings.

It is not clear, however, that the deletion of the "weight of the evidence" standard from CEA Section 6(c) will change the approach of the courts in reviewing agency findings of fact. In the absence of an explicit standard of review within the CEA, a court would likely turn to the standard of review in the Administrative Procedure Act ("APA") that applies to agency on-the-record adjudications. With respect to factual determinations, Section 706 of the APA provides that "The reviewing court shall … hold unlawful and set aside agency action, findings, and conclusions found to be … (E) unsupported by substantial evidence … or otherwise reviewed on the record of an agency hearing provided by statute … ."[94] APA caselaw indicates that the "substantial evidence" standard is distinct from the "weight of the evidence" standard. For example, the D.C. Circuit has stated that substantial evidence under Section 706 can be "something less than the weight of the evidence… . At a minimum however a decision is not supported by substantial evidence unless there is 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'"[95]

This articulation of the "substantial evidence" standard of review in the APA does not appear to significantly differ from the standard of review articulated in *Great Western Foods* and other CFTC cases, where the courts have declined to reweigh the evidence themselves in order to determine where the preponderance lies, but rather will "review the record with the purpose of determining whether the finder of fact was justified, i.e. acted reasonably, in concluding that the evidence . . supported his findings."[96] There is no indication that Congress intended the deletion of the explicit "weight of the evidence" standard for judicial review in Section 6(c) to affect the burden of proof in the underlying proceedings. Thus, presumably, the Commission still must determine that the weight or preponderance of the evidence supports a finding of liability, and that these findings will continue to be reviewed by the courts for reasonableness.

Sanctions

The courts will generally review sanctions imposed by the Commission within its authority "only for an abuse of discretion, asking whether [the sanction] is rationally related to the offense."[97] Under this standard, "as long as an agency has 'articulate[d] a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made' … [the court] will uphold its choice of sanctions."[98]

Questions of Law

In *DiPlacido*, the Second Circuit set forth the standard of review for legal issues commonly used by the courts of appeal: "Our review of the Commission's legal judgments is plenary," but the court also stated that under the doctrine announced by the Supreme Court in *Chevron U.S.A., Inc. v. Natural Res. Defense Council* it would defer to the agency's judgments within its area of expertise: "[W]here a question implicates Commission expertise, we defer to the Commission's decision if it is reasonable."[99]

Not all judges have enthusiastically embraced this deferential standard. In *Elliott v. CFTC*, the Seventh Circuit set forth what it termed two standards of review.[100] "If the question presented is 'of the sort that courts commonly encounter, de novo review is proper.' … On the other hand, if the Commission's decision was peculiarly within its area of expertise, we apply a deferential standard and will affirm so long as the decision is reasonable." The court cautioned, however, that determining which standard to apply to a particular question is "no easy matter," and that courts "should not automatically abandon heightened review" simply because the matter is within the agency's expertise. "When the agency

diet is food for the courts on a regular basis, there is little reason for judges to subordinate their own competence to administrative expertness." Noting that courts "have applied the deferential standard to Commission determinations of the evidence necessary to prove violations of the [CEA] … as well as Commission rules," the court found that the question of the whether the conduct at issue constituted non-competitive trading on the Chicago Board of Trade was appropriately within the agency's area of expertise rather than the court's, and accorded the agency's determination deference.[101]

Writing in dissent, Judge Easterbrook scoffed at the notion that the Commission had any special expertise to decide this type of issue. "Ever since Congress began to establish independent agencies in 1887, it has been customary to refer to a commission's 'expertise.' This is a figure of speech, an honorific, rather than a description of commissioners' backgrounds and skills. It would be more accurate to call commissioners of the CFTC (and other agencies) 'specialists.' … Only one of the four Commissioners who participated in the order under review had any experience in the trading pits, and he dissented from the decision under consideration."[102]

Judge Easterbrook's challenge to the notion of Commission "expertise" that should trigger a more deferential standard of review in administrative enforcement cases reflects an unease with deferring to an administrative agency in the adjudicatory context that is similar to Judge Rakoff's recent criticisms of the administrative enforcement process as a means for the development and interpretation of the law. Other judges have expressed a similar concern. U.S. District Judge Lewis Kaplan, also of the Southern District of New York, recently noted the concern that application of *Chevron* deference to the SEC's interpretations of the securities laws in administrative proceedings will "increase the role of the Commission in interpreting the securities laws to the detriment or exclusion of the long standing interpretive role of the courts."[103] "These concerns are legitimate," Judge Kaplan wrote, "whether born of self-interest or of a person assessment of whether the public interest would be served best by preserving the important interpretive role of Article III courts in construing the securities laws – a role the courts have performed since 1933."[104]

Supreme Court Justice Eugene Scalia also recently expressed concerns regarding the doctrine of deference as it applies to executive branch interpretations of statutes that contemplate both criminal and civil enforcement. Writing in dissent to the denial of certiorari in *Whitman v. United States*, Justice Scalia disputed the notion that any deference should apply to executive branch interpretations of criminal statutes: "The rule of lenity requires interpreters to resolve ambiguities in criminal laws in favor of defendants," Justice Scalia stated, as well as "vindicates the principle that only the legislature may define crimes and fix punishments. Congress cannot, throughout ambiguity, effectively leave that function to the courts—much less to the administrative bureaucracy."[105] Justice Scalia' expansive language indicates he that he is questioning not only the doctrine of deference as it applies to criminal statutes, but also to administrative enforcement of laws that can be enforced either civilly or criminally. Justice Scalia concluded his dissent by stating he would be receptive to granting certiorari "when a petition properly presenting the question comes before us."[106]

Hence, although the courts have typically granted deference to the Commission's legal judgments within its area of expertise, a number of judges may be reluctant to apply the doctrine in circumstances—such as in the adjudicatory rather than rule-making context—where they believe the courts are at least as well-suited to interpret and apply the law as the agency. In light of these concerns, it is by no means a foregone conclusion that the Commission will continue to be afforded *Chevron* deference in cases involving aggressive interpretations or applications of the Dodd-Frank law made in the course of agency adjudications.

Conclusion

The agency's prior experience with the administrative enforcement process indicate that, despite the absence of discovery for litigants, it could take many years to resolve complex contested cases. Further, the Commission's decisions in contested manipulation cases often did not produce the results desired by the Division of Enforcement. However, many of these cases occurred several decades ago. It has been well over a decade since the Division of Enforcement sought to litigate a contested enforcement case through the agency's administrative hearing process. If the Division indeed resurrects the administrative enforcement process for contested cases, the Commission and interested parties in the agency's administrative proceedings will have an opportunity to raise anew issues concerning appropriate hearing procedures, standards of proof, and the scope and role of judicial review.

NOTES

1. Jean Eaglesham, *CFTC Turns Toward Administrative Judges*, Wall St. J., Nov. 9, 2014.
2. *Id.*
3. Stephanie Russell-Kraft, *Cash-Strapped CFTC Faces Troubled Return To Admin Court*, Law360, Nov. 14, 2014.
4. Stephanie Russell-Kraft , *CFTC Plans More Administrative Actions, Criminal Crackdowns,* Law360, Nov. 7, 2014. ("We have a host of new provisions under Dodd-Frank that need to have a precedent developed.").
5. *In the Matter of Anthony J. DiPlacido*, Comm. Fut. L. Rep. (CCH) P30,970 (CFTC, Nov. 5, 2008).
6. *See, e.g.*, Michael Schroeder, *If You've Got a Beef With a Futures Broker, This Judge Isn't For You—In Eight Years at the CFTC, Levine Has Never Ruled in Favor of an Investor*, Wall St. J., Dec. 13, 2000.
7. Mark Cuban and Thomas Melsheimer, *It is time to rein in the SEC*, Washington Post, Dec. 19, 2014.
8. Judge Jed S. Rakoff, *Is the S.E.C. Becoming a Law Unto Itself?*, PLI Securities Regulation Institute Keynote Address, Nov. 5, 2014 ("the S.E.C. won 100% of its internal administrative hearings in the fiscal year ended September 30, 2014, whereas it won only 61% of its trials in federal court during the same period.").
9. William T. Bagley, *Introduction: A New Body of Law in an Era of Industry Growth*, 27 Emory L.J. 849, 851 (1978).
10. For a discussion of constitutional issues raised in connection with administrative enforcement proceedings, including the use of ALJs to adjudicate cases, see Geoffrey F. Aronow, *Back to the Future: The Use of Administrative Proceedings at the CFTC and SEC,* 35 Futures and Derivatives L. Rep. 1 (Jan./Feb. 2015).
11. CEA §6(c)(4), 7 U.S.C. §9(4) (2014).
12. CEA §6(c)(10), 7 U.S.C. §9(10) (2014).
13. 17 C.F.R. §10.21.
14. 17 C.F.R. §10.22(a). The complaint also must notify the respondent of its right to a hearing and specify the time required under Regulation 10.23 for filing an answer. Regulation 10.22 also specifies the manner of service of process for the complaint. Regulation 10.12 specifies the service and filing requirements for filings subsequent to the complaint.
15. A statement of lack of information has the same effect as a denial; any allegation not expressly denied shall be deemed to be admitted. 17 C.F.R. §10.23(b)(1).
16. 17 C.F.R. § 10.23(b)(2).
17. 17 C.F.R. §10.23(c).
18. 17 C.F.R. § 12.26(c) (2009); CFTC, President's Budget and Performance Plan, Fiscal Year 2013 60 (Feb. 2012).
19. *Id.*
20. 17 C.F.R. § 10.8.
21. 17 C.F.R. § 10.9(a)
22. 17 C.F.R. § 10.9(b). This prohibition does not apply to the members of the Commission.
23. 17 C.F.R. § 10.10.
24. Similarly, a Commissioner, ALJ, or other Commission employee involved in the decisional process may not make to any interested person outside the Commission an ex parte communication that is relevant to the merits of the proceeding. Regulation 10.10 also specifies procedures for the handling of ex parte communications, including providing notice to all parties in the proceeding, placing the communication in the public record of the proceeding, and potential sanctions for knowing violations of the prohibition.
25. 17 C.F.R. § 10.41.
26. Any person whose interests may be affected substantially by the proceeding may petition the ALJ to intervene as a party to the proceeding. To grant a petition to intervene as a party the ALJ must determine: (1) a substantial interest of the person seeking to intervene may be adversely affected by the proceeding; (2) the intervention will not materially prejudice the rights of any party; (3) participation as a party is otherwise consistent with the public interest; and (4) that leave to be heard would be inadequate to protect the person's interest. 17 C.F.R. § 10.33.
27. 17 C.F.R. § 10.42(a)(1).
28. A party must also provide any such documents, data, or other written information that the other parties do not already have in their possession and to which they do not have reasonably ready access 17 C.F.R. § 10.42(a)(2). These procedures in Regulations 10.42(a)(1) and 10.42(a)(2) are not applicable to rebuttal evidence. 17 C.F.R. § 10.42(a)(3).
29. 17 C.F.R. § 10.42(b)(1).
30. The Division may also withhold information obtained from a domestic or foreign governmental entity or from a foreign futures authority that is either not relevant to the proceeding or that was provided on the condition that it not be disclosed or that it be disclosed only by the Commission or a representative of the Commission as evidence in an enforcement or other proceeding. 17 C.F.R. § 10.42(b)(2).
31. 17 C.F.R. § 10.42(b)(3).
32. 17 C.F.R. § 10.42(c). The Division's obligations to produce witness statements under Rule 10.42(c) "generally accords with Rule 26.2 of the Federal Rules of Criminal Procedure, which

places in the Federal Rules the substance of the Jenks Act, 18 U.S.C. 3500." Rules of Practice, 63 Fed. Reg. 55784, 55787 (Oct. 19, 1988). Under "the rule set forth in *Jencks v. United States*, 353 U.S. 657 (1957) and codified in 18 U.S.C. § 3500 (1994) … a criminal defendant 'is entitled to relevant and competent reports and statements in possession of the Government touching the events and activities as to which a Government witness has testified at the trial.' *First Guaranty*, [1980-1982 Transfer Binder] P 27,258 at 46,102." *In the Matter of Schiller and Chesrow*, Comm. Fut. L. Rep. (CCH) P29,141, (CFTC, Sept. 3, 2002).

33. 17 C.F.R. § 10.42(f). The Commission's Rule 10.42(f) is modeled after Federal Rule of Civil Procedure 26(a)(3)(C). Rules of Practice, *supra*, at 55,787.
34. 17 C.F.R. § 10.44(a).
35. The application must include: (1) the name and address of the witness; (2) the specific matters concerning which the witness is expected to testify and their relevance; (3) the reasons why the deposition should be taken, supported by affidavits and a physician's certificate, where appropriate; (4) the time when, the place where, and the person before whom the deposition will be taken; (5) a specification of the documents any materials which the deponent is expected to produce; and (6) application for any subpoena.. 17 C.F.R. § 10.44(b).
36. 17 C.F.R. § 10.44(f)-(g) (2014); *In the Matter of Global Minerals & Metals Corp., et al*., Comm. Fut. L. Rep. (CCH) P29,555 (CFTC, Aug. 4, 2003).
37. 17 C.F.R. § 10.68(a). The requesting party must show the general relevance of the testimony or evidence being sought.
38. 17 C.F.R. § 10.68(c). In determining whether to grant a protective order, the ALJ "shall weigh the harm resulting from disclosure against the benefits of disclosure."
39. CEA §§ 6(c)(5)-(9), 7 U.S.C. §§ 9(5)-(9) (2014).
40. 17 C.F.R. § 10.44(e), (f).
41. 17 C.F.R. § 10.42(e).
42. 17 C.F.R. § 10.66 (b).
43. *Id*.
44. 17 C.F.R. § 10.66(c).
45. *In re Reddy*, Comm. Fut. L. Rep. (CCH) P27,271 (CFTC, Feb. 4, 1998), quoted approvingly in *In the Matter of Anthony J. DiPlacido*, *supra* note 5. In *Reddy*, the Commission also stated, "a party is guaranteed only 'an opportunity for effective cross-examination,' and the trier of fact may properly exercise discretion to impose reasonable limits on the scope of cross-examination." (additional citations omitted).
46. 17 C.F.R. § 10.67(a).
47. *In the Matter of Anthony J. DiPlacido*, *supra* note 6.
48. *In the Matter of Zuccarelli*, Comm. Fut. L. Rep. (CCH) P27,597 (CFTC, Apr. 15, 1999) ("With respect to the opinion of a lay witness, we are guided by Federal Rule of Evidence 701 … ."). Rule 701 provides: "If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue."
49. *In the Matter of Brian W. Ray*, Comm. Fut. L. Rep. (CCH) P41,914 (CFTC, Feb 18, 2011) ("As an administrative agency, the Commission is not bound by the Federal Rules of Evidence as to the admissibility of expert witnesses … Nevertheless, the Commission has considered those rules for guidance in determining whether certain evidence is admissible… . Under those rules, expert testimony must be both reliable and relevant. To be reliable, ' the reasoning or methodology underlying the testimony [must be] scientifically valid.' *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 592-3 (1993). To be relevant, the evidence must be applicable 'to the facts in issue.' *Id*. at 593."). *See also In re Ashman*, Comm. Fut. L. Rep. (CCH) P27,336 (CFTC, Apr. 22, 1998) (citing Fed. R. Evid. 702 and stating expert witness testimony is permitted when it "will assist the trier of fact to understand the evidence or to determine a fact in issue").
50. *In the Matter of First Guaranty Metals*, Comm. Fut. L. Rep. (CCH) P21,074 (CFTC, Jul. 2, 1980). In *First Guaranty Metals*, the Commission explained that the Brady rule "is not a discovery rule rather it is a rule of fairness and minimum prosecutorial obligation" and therefore a matter of due process. *See also In the Matter of Bilello*, Comm. Fut. L. Rep. (CCH) P27,345 (CFTC, Apr. 23, 1998); *Brady v. Maryland*, 373 U.S. 83 (1963). Although the Supreme Court has not ruled on whether the Brady rule applies to civil cases, *Demjanjuk v. Petrovsky*, 10 F.3d 338, 353 (6th Cir. 1993), four other federal agencies—the SEC, the Federal Maritime Commission, the Federal Deposit Insurance Commission, and the Federal Energy Regulatory Commission—also follow the Brady rule, although not in an identical manner. *See* Note, *Hold Fast the Keys to the Kingdom: Federal Administrative Agencies and the Need for Brady Disclosure*, 95 Minn. L. Rev. 1424, 1425 (2011).
51. 17 C.F.R. § 10.101. *See, e.g.*, *In the Matter of Global Minerals & Metals Corp.*, Comm. Fut. L. Rep. (CCH) P28,655 (CFTC, Oct. 3, 2001).
52. 17 C.F.R. § 10.101(a)(1)-(4).
53. 17 C.F.R. § 10.101(a)(5).

54. 17 C.F.R. § 10.84.
55. *In the Matter of Ray*, Comm. Fut. L. Rep. (CCH) P31, 914 (CFTC, Feb. 18, 2011); *see also In the Matter of Mayer*, Comm. Fut. L. Rep. (CCH) P28, 935 (CFTC, Feb. 28, 1998).
56. *In the Matter of Ray*, *supra* ("in applying the weight or preponderance of the evidence standard … "); *see also Reddy v. CFTC*, 191 F.3d 109, 117 (2d Cir. 1999) ("However, our role in reviewing the Commission finding of preponderance is narrow.").
57. 17 C.F.R. § 10.102. Notice of appeal must be filed within 15 days after service of the initial decision or other order terminating the proceeding. Regulation 10.102 also specifies the procedures and requirements for filing cross-appeals and briefs. In determining to permit cross-appeals by either party, the Commission noted that cross appeals have long been permitted under Federal Rule of Appellate Procedure 4(a)(3) "with no apparent abridgement of any party's right to due process." Rules of Practice, *supra* note 32, at 53,790.
58. 17 C.F.R. § 10.105.
59. 17 C.F.R. § 10.104(a).
60. *In the Matter of Grossfeld*, Comm. Fut. L. Rep. (CCH) P26,921 (CFTC, Dec. 10, 1996).
61. 17 C.F.R. § 10.103. Interviews with former Commission staff indicate that the Commission last held an oral argument in the late 1990s.
62. 17 C.F.R. § 10.84(c)(2).
63. CEA § 6(c)(11), 7 U.S.C. § 9(11) (2014). Timely appeal of an initial decision by an ALJ to the Commission is "mandatory as a prerequisite to seeking judicial review" of any final decision. 17 C.F.R. § 10.102(f).
64. P.L. 93-463, Commodity Futures Trading Commission Act of 1974.
65. P.L. 102-546, Futures Trading Practices Act of 1992, Sec. 221.
66. 170 F.2d 220 (7th Cir. 1948)
67. 201 F.2d 476 (7th Cir. 1953).
68. 311 F.2d 52 (5th Cir. 1962).
69. 452 F.2d 1154 (8th Cir. 1971).
70. *General Foods Corp. v. Brannan*, 170 F.2d 220 (7th Cir. 1948). "The Seventh Circuit's decision in this case did not sit well with the government, who viewed it as allowing price stabilizing and pegging of prices through futures trades in order to protect the price of a cash position." Jerry W. Markham, *Law Enforcement and the History of Financial Market Manipulation* 102 (M.E. Sharpe, 2014).
71. 311 F.2d at 59.
72. *See generally* Jerry W. Markham, *Manipulation of Commodity Futures Prices—The Unprosecutable Crime*, 8 Yale Journal on Regulation 281, 352-358 (1991). At the time, commenters viewed the agency's use of administrative enforcement process positively: "It is within the context of its own administrative enforcement and disciplinary proceedings, however, that the Commission is able to best articulate its jurisdictional and legislative philosophy and to exhibit to the professional community and investing public its ability to policy the commodity industry." Michael S. Sackheim, *Administrative Enforcement of the Federal Commodities Laws by the Commodity Futures Trading Commission*, 12 Seton Hall L. Rev. 445, 447 (1982) (citations omitted).
73. *In the Matter of Hohenberg Bros.*, Comm. Fut. L. Rep. (CCH) P20,271 (CFTC, Feb. 18, 1977).
74. The Commission concluded, however, that the evidence before it did not support a finding of attempted manipulation and dismissed the complaint. *Id.*
75. *In the Matter of Indiana Farm Bureau Coop. Ass'n,* Comm. Fut. L. Rep. (CCH) P21,796 (CFTC, Dec. 17, 1982).
76. *Id.* The Commission also dismissed the complaint. "This holding appeared to signal that the CFTC was adopting, and even extending, the *Volkart* decision that the CEA had sought to overturn by legislation." Markham, *The Unprosecutable Crime*, *supra* note 72, at 189.
77. The Commission also found the Division had not met its burden of proof and dismissed the complaint. *In the Matter of Cox*, Comm. Fut. L. Rep. (CCH) P23,786 (CFTC, July 15, 1987).
78. Professor Markham termed the *Cox* case a "regulatory disaster," Markham, *History of Manipulation*, *supra* note 70, at 191, and has argued that the CFTC, through its interpretations, "effectively nullified the manipulation prohibition." Markham, *The Unprosecutable Crime*, *supra* note 72, at 285.
79. *See, e.g.*, *CFTC v. Wilson*, 13 Civ 7884 (S.D.N.Y. filed Nov. 6, 2013) (complaint alleging manipulation and attempted manipulation of three-month interest rate swap futures contracts); *CFTC v. Optiver*, 08-CIV 6560 (S.D.N.Y. complaint filed July 24, 2008, final consent order filed April 19, 2012) (complaint alleging manipulation of the settlement price of crude oil, heating oil, and gasoline futures contracts); *CFTC v. Parnon Energy, Arcadia Petroleum Ltd. And Arcadia Energy (Suisse)* , 11 Civ. 3543 (S.D.N.Y. complaint filed May 24 2011; final consent order filed August 4, 2014) (complaint alleging manipulation and attempted manipulation of the price of crude oil futures contract spreads).
80. U.S. General Accounting Office, Administrative Law Judges, Comparison of SEC and CFTC Programs, GAO/GGD-96-27 (Nov. 1995). During this period ALJs issued 46 initial decisions and the Commission ruled on 48 appeals of ALJ decisions. In 14 of these cases the Commission

reduced the sanction imposed by the ALJ, and in 4 of the appeals the Commission increased the sanction. Only one of the cases reviewed by GAO during this period involved manipulation. *Id.*

81. *In the Matter of Abrams*, Comm. Fut. L. Rep. (CCH) P26,479 (CFTC, Jul. 31, 1995). Following the Commission's dismissal of the complaint in *Cox*, one of the targets of the Commission's investigation, George Frey, filed a request for attorney's fees under the Equal Access to Justice Act. In 1991, the court dismissed Frey's appeal of the Commission's denial of attorney's fees, finally concluding the case slightly more than 20 years after the conduct at issue occurred. *Frey v. CFTC*, 931 F.2d 1171 (7th Cir. 1991).
82. Professor Markham notably has concluded that the Commission's adjudicatory decisions in manipulation cases was a major reason for its difficulty in successfully prosecuting manipulation, "The small number of cases brought and the very small number of respondents who have been subject to significant sanctions, particularly in contested cases, suggest that manipulation is virtually an unprosecutable crime. This is due to the difficulty of meeting the standards of manipulation articulated by the CFTC." Markham, *The Unprosecutable Crime*, *supra* note 72, at 356.
83. *Silverman v. CFTC*, 549 F.2d 28 (7th Cir. 1977).
84. *Id.* at 33 (internal citations omitted).
85. *Id.*
86. *Gimbel v. CFTC*, 872 F.2d 196 (2d Cir. 1989). Similarly, the Second Circuit has stated that "fundamental fairness requires a fair trial in a fair tribunal … with fair notice of the matters at issue and an opportunity to cross-examine witnesses." *Piccolo v. CFTC*, 388 F.3d 387, 391 (2d Cir. 2004) (upholding Commission Order summarily affirming Exchange disciplinary action against trader for throwing first punch in brawl outside Exchange).
87. *Graham v. CFTC*, 1988 U.S. App. LEXIS 22152 (9th Cir. 1988), *quoting Chapman v. CFTC*, 788 F.2d 408, 419 (7th Cir. 1986). *See also McClelland v. Andrus*, 606 F.2d 1278, 1285 (D.C. Cir. 1979) ("The extent of discovery that a party engaged in an administrative hearing is entitled to is primarily determined by the particular agency; both the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure are inapplicable and the Administrative Procedure Act fails to provide expressly for discovery; further courts have consistently held that agencies need not observe all the rules and formalities applicable to courtroom proceedings.").
88. *Lloyd Carr & Co. v. CFTC*, 567 F.2d 1193 (2d Cir. 1977).
89. *Id.* at 1196 (citation omitted).
90. *Id.* at 1197. The Commission had argued that any evidence that would have been produced would not have affected the outcome.
91. 7 U.S.C. § 9 (2008).
92. *Reddy v. CFTC*, 191 F.3d 109, 114 (2d Cir. 1999). *See also Haltmier v. CFTC*, 554 F.2d 556, 560 (2d Cir. 1977) ("The 'weight of evidence' means 'the preponderance' or 'greater weight of the evidence'" (citation omitted)).
93. *Great Western Foods*, *supra* note 67, at 479-80; *Reddy*, *supra; Haltmier*, *supra*; *Silverman*, *supra* note 83.
94. 5 U.S.C. §706(E).
95. *Airport Shuttle Service, Inc., v. Interstate Commerce Comm'n*, 676 F.2d 836, 840 (D.C. Cir. 1982); see also , *McHenry v. Bond*, 668 F.2d 1185, 1190 (11th Cir. 1982) ("It is something more than a scintilla of evidence, but something less than the weight of the evidence.").
96. *See* note 93 and accompanying text, *supra, quoting Chevron, U.S.A., Inc. v. Natural Res. Defense Council*, 467 U.S. 837, 844 (1984).
97. *Monieson v. CFTC*, 996 F.2d 852, 858 (7th Cir. 1993).
98. *Reddy v. CFTC*, 191 F.3d 109, 124 (2d Cir. 1999), *quoting Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 43 (1983) and *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962); *see also DiPlacido v. CFTC, 364 Fed. Appx.*, 657 (2d Cir. 2009). .
99. *DiPlacido*, *supra*, at 661. In *Cargill v. Hardin*, *supra* note 69, the defendant argued that the CEA's "weight of the evidence" standard was "considerably more stringent" than the APA's "substantial evidence" test. In response, the Eighth Circuit endorsed the standard of review set forth by the Seventh Circuit in *General Foods Corp. v. Brannan*.; *see also Wilson v. CFTC*, 322 F.3d 555 (8th Cir. 2003).
100. *Elliott v. CFTC*, 202 F.3d 926 (7th Cir. 2000).
101. *Id*., at 932.
102. *Id*., at 940, Easterbrook, J. dissenting.
103. *Chau v. SEC*, ___F. Supp.3d ___(S.D.N.Y.) 2014 WL 6984236.
104. *Id.*
105. *Whitman v. U.S.,* 574 U.S. ___ (2014) (denial of petition for writ of certiorari, Scalia, J. dissenting)
106. *Id.*