

CFTC Decides Not to Appeal the DRW Ruling

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In a recent [announcement](#), the CFTC indicated it would not appeal its district court loss in *CFTC v. DRW*, stating, “After careful consideration of the issues, as well as discussion with agency staff and Commissioners, Chairman Giancarlo has decided the agency will not appeal the district court’s decision.”

In 2013, the CFTC filed a complaint against principal trading firm DRW Investments, LLC (“DRW”) and its principal, alleging price manipulation of a various interest rate swaps futures contract in 2011, specifically the IDEX Three-Month Interest Rate Swap Future (the “Three-Month Contract”). The CFTC alleged that DRW’s bidding practices in the Three-Month Contract created artificial daily settlement prices. The Commission based this assertion primarily upon the fact that the bids in question were higher than the corresponding rates in the contemporaneous over the counter (“OTC”) swap market. DRW argued its bids were not only a truer indication of the fair value of the future, but contributed to a more accurate valuation. Cleared futures contracts are marked to market daily with a corresponding exchange in variation margin payments, while uncleared OTC swaps generally do not involve such margin payments. DRW identified this difference and entered bids to reflect the variance.

District Court Judge Richard Sullivan agreed with DRW, writing in his November 30, 2018 opinion, “there can be no dispute that a cleared interest rate swap contract is economically distinguishable from, and therefore not equivalent to, an uncleared interest rate swap, even when the two contracts otherwise have the same price point, duration, and notional amount.” *CFTC v. Wilson*, No. 13 Civ. 7884.

Judge Sullivan’s comprehensive opinion was notable in its criticism of the CFTC’s case, stating the CFTC provided “no evidence or explanation that ... settlement prices were artificially high.” *Id.* The intent to affect market prices, on its own, is insufficient to show manipulation, a market participant must intend to cause, or cause in fact, an artificial price. Rather than being manipulative, DRW’s trading activity was simply a result of the firm’s understanding that the Three-Month Contract was not the economic equivalent of an OTC Swap. According to Judge Sullivan, “the so-called price distortion decried by the CFTC was simply a more accurate assessment of the fair market value of the... contract.”

While the CFTC’s statement announcing its decision not to appeal was brief, it also stressed the Commission’s intention to continue the vigorous enforcement of its anti-manipulation rules, and

litigate cases when necessary.

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