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THE ANTI-SPOOFING STATUTE: VAGUE AS APPLIED TO THE “HYPOTHETICALLY LEGITIMATE TRADER”

CATRIONA COPPLER*

New technology has made it easier for commodity traders to place larger trades faster. However, this rise in high frequency trading has resulted in an increase in market manipulation tactics. Recently, many traders have adopted manipulative strategies such as spoofing. Spoofing involves placing an order with intent to cancel the order before execution. Armed with the new anti-spoofing statute in the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act”), the government has cracked down on all trading activity that “is of the character of, or is commonly known to the trade as ‘spoofing.’” However, as the number of spoofing cases increase, many traders still fear that the anti-spoofing statute is impermissibly vague. Specifically, the broad-blanket provision that prohibits trading that “is of the character of” spoofing could encompass many legitimate trading activities. Additionally, the definition of spoofing itself is problematic because it does not explicitly state when the intent to cancel the order must arise.

In the first criminal spoofing case, United States v. Coscia, a district court held that the anti-spoofing statute was not impermissibly vague as applied to the defendant. This new precedent established that spoofing is not impermissibly vague in specific situations in which the intent to cancel is clearly manifest. In light of this decision, this Comment explores whether there are still situations in which the anti-spoofing statute remains impermissibly vague.

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This Comment begins by exploring the history of spoofing and the birth of the anti-spoofing statute. In doing so, it examines the impact that spoofing has on financial markets and business in general. It then explores those situations in which the anti-spoofing statute may still be considered impermissibly vague and recommends that the “is of the character of” language of the anti-spoofing statute be removed and that a new definition of spoofing be adopted.

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INTRODUCTION

The launch of the world’s first electronic securities market in 1969 marked the beginning of the transition to electronic markets. Since that time, more markets have become electronic, and technology has vastly

improved. Every day, billions of trades are being placed worldwide through algorithmic computer trading programs.\(^2\) As a result, traders seek to gain the upper hand by creating more sophisticated and faster computer programs to not only collect and analyze market data but also to place large trades at speeds that were once inconceivable. No longer does it take over a week to complete a trade; today, one can conduct a trade in as little as ten microseconds.\(^3\)

Unfortunately, as is the case with most technological innovation, these computer programs not only facilitate high frequency trading ("HFT"), but they also enable abusive trading practices.\(^4\) In fact, many HFT strategies rely on market manipulation.\(^5\) One such form of market manipulation thrust into the spotlight as a result of HFT is spoofing.\(^6\) Regulators have taken note and warn that they will not tolerate spoofing.\(^7\)

The Commodity Exchange Act ("CEA") defines spoofing as "bidding or offering with the intent to cancel the bid or offer before execution."\(^8\) However, spoofing can most easily be explained through the following example.\(^9\) In hypothetical Market A, the current market price is $10 per share. Trader C places an order in Market A to buy 100 shares at $9 per share. However, because this is below the current market price, no one is willing to sell at such a low price, and as a result, Trader C’s order does not execute. But, this non-transaction is not the end of the story because Trader C is a seasoned trader and has a few (illegal) tricks up his sleeve.

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2. Andrew J. Keller, Robocops: Regulating High Frequency Trading After the Flash Crash of 2010, 73 OHIO ST. L.J. 1457, 1458 (2012) (stating algorithmic trading accounts for sixty to seventy percent of daily trades on today’s U.S. financial exchanges); see also Adler, supra note 1, at 164 (stating markets today have a daily volume exceeding one billion orders).
3. Adler, supra note 1, at 163.
4. Id. at 167.
5. Id.
7. See Gregory Meyer, CFTC Accuses 3Red Trading of ‘Spoofing’ Markets, FIN. TIMES (Oct. 19, 2015, 7:02 PM), http://www.ft.com/intl/cms/s/0/cb98026a-767c-11e5-933d-efedc3c11c89.html#axzz45R1RqIT4 (quoting Aitan Goelman, CFTC Director of Enforcement saying, “[s]poofing seriously threatens the integrity and stability of futures markets because it discourages legitimate market participants from trading. The CFTC is committed to prosecuting this conduct and is actively co-operating with regulators around the world in this endeavour”).
9. See Adler, supra note 1, at 171–72, for an additional example of spoofing.
Trader C places 500 sell orders at $10.01, which is just above the market price. Because this $10.01 order is above the market price, no buyers will fill the order. However, this increase in supply will ultimately result in decreased demand, which will cause the market price to drop.\(^\text{10}\) This means that competitors will lower the price at which they are willing to sell shares from the previous market price of $10 to $9. Consequently, Trader C’s initial buy order of one hundred shares at $9 will execute. Happy that he was able to successfully buy at such a low price, Trader C will then cancel the 500 sell orders, the market will correct itself, and the market price will return to $10 per share. If Trader C wants to be especially deceptive, he can then sell the 100 shares that he previously purchased for $9 per share at $10 per share, which would result in a profit of $100.

Spoofing is not a “vanishingly small or infrequent practice.”\(^\text{11}\) In fact, each week, numerous complaints are filed alleging spoofing trading practices.\(^\text{12}\) The problem, however, is that the definition of spoofing is not clear.\(^\text{13}\) Specifically, the mens rea requirement of “intent to cancel the bid or offer before execution” is problematic.\(^\text{14}\) The inherent difficulty in proving intent, paired with the fact that almost ninety percent of trades are cancelled as a result of legal trade practices, could result in confusion and legal trading practices being mistaken for and classified as spoofing.\(^\text{15}\) Due to the forecasted increase in enforcement actions against spoofers, this ambiguity in the anti-spoofing statute could lead to major problems.\(^\text{16}\)

In the first criminal spoofing case, United States v. Coscia,\(^\text{17}\) a district court...
court held that the anti-spoofing statute is not void for vagueness as applied to the defendant, Michael Coscia.\textsuperscript{18} Coscia was convicted of six counts of spoofing for utilizing computer programs to place and then immediately cancel large orders to create a false impression of the number of contracts available and fraudulently induce others to react to the deceptive market information that he created.\textsuperscript{19} However, what if there are some situations in which the spoofing statute is impermissibly vague? Is it possible that this vagueness could result in legal trading practices being mistaken for and classified as spoofing?

To answer these questions, this Comment will begin by offering a brief history of the anti-spoofing statute to show how it came to be what it is today. In doing so, it will explain exactly what spoofing is and its impact on not only financial markets but also on business as well. Next, this Comment will examine the situations in which the anti-spoofing statute may be considered impermissibly vague. To do this, it will first explain what constitutes impermissible vagueness and examine other criminal statutes that have been challenged as impermissibly vague. It will apply this analysis specifically to spoofing and argue that in the context of Fill or Kill ("FOK") orders and pinging, the anti-spoofing statute is impermissibly vague. In light of these problems, this Comment will recommend that the "is of the character of" spoofing provision of the anti-spoofing statute be removed and that Congress adopt a new definition for spoofing.

II. THE CREATION AND EVOLUTION OF THE ANTI-SPOOFING STATUTE AND WHY IT MATTERS

A. A Look Back in Time: Spoofing Pre-Dodd-Frank Act

Before the enactment of the Dodd-Frank Act, the U.S. Commodity Futures Trading Commission ("CFTC") penalized spoofing through two CEA provisions, Section 4c(a)(2)(B) and Section 9(a)(2).\textsuperscript{20} Section 4c(a)(2)(B) made it unlawful to "offer to enter into, enter into, or confirm the execution of a transaction" that "is used to cause any price to be reported, registered, or recorded that is not a true and bona-fide price."\textsuperscript{21}
Section 9(a)(2) prohibited a trader from causing the transmission of "false or misleading or knowingly inaccurate reports concerning crop or market information or conditions that affect or tend to affect the price of any commodity in interstate commerce." 22

For example, in Bunge Global Markets, 23 the government charged traders with entering orders for soybean futures contracts in the pre-open session 24 for the sole purpose of determining the depth of support for soybean futures at specific price levels. 25 While the court did not explicitly classify the trading activity as spoofing, it found that the traders clearly were attempting to spoof the market. 26 The traders entered electronic orders for soybean futures contracts with no intention of allowing the orders to be executed, and they ultimately cancelled them prior to open. 27 The traders moved the Indicative Opening Price 28 by entering orders above or below the prevailing bid or offer. 29 The court found that by placing these orders, the traders caused prices to be reported that were not "true and bona fide" in violation of Section 4c(a)(2)(B). 30 Furthermore, the traders violated Section 9(a)(2) because the orders constituted false, misleading, or knowingly inaccurate reports concerning market information that affected or tended to affect the price of soybeans. 31

B. Spoofing Today

Congress enacted the Dodd-Frank Act in 2010. 32 The Dodd-Frank Act's

22. Id.
24. Pre-open session refers to the period of activity that occurs before the regular market session regularly begins. During this period, traders usually watch the market to determine which direction the market will move during the regular session. Pre-Market, INVESTOPEDIA, http://www.investopedia.com/terms/p/premarket.asp (last visited Apr. 3, 2016).
28. The Indicative Opening Price is the "probable price at which the market will open or re-open, given the current book and order activity," which is calculated based on orders in the book during the pre-open session. Indicative Opening Price, CME GROUP, http://www.cmegroup.com/confluence/display/EPICSANDBOX/Indicative+Opening+Price (last visited Apr. 3, 2016).
30. Id. at *8.
31. Id. at *9.
32. Aktas, supra note 20, at 89; Histed, supra note 26, at 3 (stating the Dodd-Frank Act became effective in July 2011).
primary function was to introduce various new reforms for regulating the financial industry and to create new federal crimes related to fraud and misrepresentation made by individuals engaging in derivatives trading, futures contracts, and swaps.\textsuperscript{33} Specifically, the Dodd-Frank Act amended Section 4c(a) of the CEA to add three types of prohibited transactions that were “disruptive of fair and equitable trading.”\textsuperscript{34} These additions gave the CFTC a “bigger arsenal of weapons” to fight disruptive trading practices.\textsuperscript{35} Included in this “arsenal” is the anti-spoofing statute.\textsuperscript{36} This statute prohibits individuals from engaging in any conduct that “is, is of the character of, or is commonly known to the trade as, ‘spoofing’.”\textsuperscript{37}

However, the new anti-spoofing statute gave birth to confusion and fear that the anti-spoofing statute would capture legal trading behavior.\textsuperscript{38} As a result, in 2013, the CFTC offered guidance on which activities it would classify as spoofing.\textsuperscript{39} The CFTC emphasized that “legitimate, good-faith cancellation or modification of orders” would not constitute spoofing.\textsuperscript{40} It then provided four specific examples of acts that would constitute spoofing, including

(i) Submitting or cancelling bids or offers to overload the quotation system of a registered entity;
(ii) Submitting or cancelling bids or offers to delay another person’s execution of trades;
(iii) Submitting or cancelling multiple bids or offers to create an appearance of false market depth; and
(iv) Submitting or cancelling bids or offers with intent to create artificial price movements upwards or downwards.\textsuperscript{41}

The CFTC stated that to distinguish between legitimate trading and spoofing, it would examine the market context, the person’s trading

\textsuperscript{34} Kluchenek, supra note 20, at 120.
\textsuperscript{35} Id. (internal quotation and citation omitted); see also Matthew Leising, Market Cops Got Power to Pursue Spoofers After Years of Failure, BLOOMBERG (May 14, 2015, 5:00 AM), http://www.bloomberg.com/news/articles/2015-05-14/market-cops-got-power-to-pursue-spoofers-after-years-of-failure (quoting former CFTC Commissioner Jill Sommers saying that “[e]veryone on the commission, including myself, agreed we needed broader authority in this area” . . . [the goal was] “to not have such a high bar when it came to proving manipulation”).
\textsuperscript{36} See Kluchenek, supra note 20.
\textsuperscript{39} See generally id.
\textsuperscript{40} Id. at 31896.
\textsuperscript{41} Id.
activity, and other relevant facts and circumstances.\textsuperscript{42} It is also interesting to note that the CEA does not require a pattern of activity; rather, a single instance of trading activity can violate the CEA so long as that “activity is conducted with the prohibited intent.”\textsuperscript{43}

\textbf{C. The First Criminal Spoofing Conviction: United States v. Coscia}

Michael Coscia began his career as a commodity futures trader in 1998 and, since 2007, has served as the principal of Panther Energy Trading LLC (“Panther”).\textsuperscript{44} In 2011, Coscia “developed and implemented a HFT strategy that allowed him to enter and cancel large-volume orders in a matter of milliseconds.”\textsuperscript{45} Coscia used this strategy to create a “false impression regarding the number of contracts available in the market and fraudulently induce other market participants to react to the deceptive market information that he created.”\textsuperscript{46} As a result of this scheme, Coscia reaped approximately $1.5 million in profits in less than three months.\textsuperscript{47}

The government charged Coscia under the anti-fraud provisions of the Fraud Enforcement and Recovery Act\textsuperscript{48} and the anti-spoofing statute.\textsuperscript{49} After unsuccessfully challenging the anti-spoofing statute for being too vague, the jury ultimately convicted Coscia of six counts of spoofing.\textsuperscript{50}

\textbf{D. Spoofing’s Impact on Financial Markets and Business}

On May 6, 2010, the E-mini Standard & Poor’s (“E-mini S&P”) market\textsuperscript{51} dramatically plummeted, causing steep declines in other

\textsuperscript{42}. \textit{Id.}
\textsuperscript{43}. \textit{Id.}
\textsuperscript{44}. United States v. Coscia, 100 F. Supp. 3d 653, 654 (N.D. Ill. 2015).
\textsuperscript{45}. \textit{Id.} at 655.
\textsuperscript{46}. \textit{Id.; see also} Panther Energy Trading LLC, CFTC No. 13-26, 2013 WL 3817473, at *2–3 (July 22, 2013) (stating that Coscia’s strategy sought to give the market the false impression that there was significant buying interest, which suggested that prices would soon rise, thus raising the likelihood that other market participants would buy the orders that Coscia was offering to sell); Brian Louis & Janan Hanna, \textit{Swift Guilty Verdict in Spoofing Trial May Fuel New Prosecutions in U.S.}, BLOOMBERG BUS. (Nov. 3, 2015, 6:00 PM), http://www.bloomberg.com/news/articles/2015-11-03/commodities-trader-coscia-found-guilty-in-first-spoofing-trial.
\textsuperscript{47}. \textit{Coscia}, 100 F. Supp. 3d at 655.
\textsuperscript{48}. \textit{Id.; see also} 18 U.S.C. § 1348 (2014).
\textsuperscript{49}. \textit{Coscia}, 100 F. Supp. 3d at 653.
\textsuperscript{50}. \textit{Id.} at 653, 658–59; Louis, \textit{supra} note 46.
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markets. The E-mini S&P market quickly declined three percent and another 1.7 percent after fifteen seconds elapsed. Other markets suffered declines of approximately five to six percent with some suffering much larger declines. In less than thirty minutes, $1 trillion of securities market values dissipated. Luckily, the markets were able to quickly recover.

After a short time, it became clear that the deceptive and fraudulent trading of one trader, Navidner Sarao, greatly contributed to this market decline. The government accused Sarao of utilizing a manipulative scheme that involved numerous “aggressive” spoofing tactics, which helped to precipitate a multimillion-dollar plunge in the value of U.S. shares. This event came to be known as the “Flash Crash” and serves as a warning of the devastating impact spoofing can have on markets.

To understand why spoofing is so problematic, it is necessary to understand what futures markets are and why they exist. Futures markets are markets in which participants can buy and sell commodities and their future delivery contracts. Futures contracts are agreements in which both parties agree to buy and sell a particular asset of specific quantity at a predetermined price. Futures market prices are determined directly by hedger and speculator demand for and supply of these future markets.

The two greatest benefits of futures markets are risk-shifting and price

53. Id.
54. Id.
57. Complaint, supra note 52, at 2.
59. See Korsmo, supra note 56, at 526–27 (comparing the “Flash Crash” to the “Black Monday” crash of October 19, 1987 in which markets fell more than twenty percent in a single day).
discovery. Risk-shifting occurs when a hedger uses futures contracts to shift the price of a risk to another. This risk arises because producers have no way of knowing with certainty at the time they plant crops what price they will receive for those crops at harvest time. Futures markets help to eliminate this risk by allowing producers to sell output at a price fixed in advance. This opportunity to “hedge” increases social welfare by enabling a more optimal allocation of risk.

Price discovery on the other hand is defined as “the use of futures prices to determine expectations of (future) cash market prices.” Price discovery facilitates the allocation of resources by providing a basis for producers’ production plans and users’ consumption plans. Price discovery therefore helps inform those individuals making production, storage, and processing decisions.

Spoofing is problematic for two reasons. First, spoofing creates artificial market conditions that benefit the individual spoofer’s interests while harming other market participants. These artificial market conditions include false prices, demand and output. Spoofers create artificial demand when they feign interest in buying or selling at a certain price. This artificial demand causes other traders to move the market in a way that is favorable to the spoofer, which results in artificial prices in that market. Artificial prices interfere with the ability of futures markets to provide a

65. Edwards & Edwards, supra note 63, at 344.
66. Id.
67. Id. at 345.
69. Edwards & Edwards, supra note 63, at 345.
70. Yang et. al., supra note 68, at 280.
71. Aktas, supra note 20.
74. Id. But see Edwards & Edwards, supra note 63, at 348 (noting welfare losses may not be very substantial because (1) artificial prices rarely last long and (2) people using futures prices for planning purposes typically plan for a broader period of time, which means it is unlikely artificial prices would be used for planning purposes).
useful price discovery tool.\textsuperscript{75} When prices are incorrect, producers and users of futures markets cannot accurately predict future prices.\textsuperscript{76} As a result, businesses are unable to make correct managerial decisions.\textsuperscript{77} 

Second, spoofing undermines confidence in the market.\textsuperscript{78} Spoofing may affect the public’s perception of the fairness of futures markets.\textsuperscript{79} This false confidence-boosting could result in traders weighing the potential losses due to a manipulated market far more heavily than the possible gains from being on the right side of the manipulation.\textsuperscript{80} As a result of this cost-benefit analysis, traders might have more incentive to not participate in the futures markets at all.\textsuperscript{81} In fact, in China, many hypothesize that recent declines in Chinese stocks are in part a result of increased spoofing and market manipulation practices.\textsuperscript{82} Decreased market participation could serve to lower the liquidity, meaning that the futures markets would find it more difficult to facilitate the purchase or sale of assets without causing drastic changes in that asset’s price.\textsuperscript{83} If investors lose faith in the markets, they will take business overseas.\textsuperscript{84}

\textsuperscript{75} Id.; see Keller, \textit{supra} note 2, at 1466 (stating that there is little incentive to risk capital in markets where pricing is uncertain).

\textsuperscript{76} Edwards & Edwards, \textit{supra} note 63, at 346–48; see also Bradley Hope, \textit{As ‘Spoof’ Trading Persists, Regulators Clamp Down}, \textit{WALL ST. J.} (Feb. 22, 2015, 10:34 PM), \url{http://www.wsj.com/articles/how-spoofing-traders-dupe-markets-1424662202} (quoting Benjamin Blander, a managing member of a Chicago trading firm. He stated that “spoofing is extremely toxic for the markets . . . [and that] [a]nything that distorts the accuracy of prices is stealing money away from the correct allocation of resources.”).

\textsuperscript{77} Edwards & Edwards, \textit{supra} note 63, at 346–48.

\textsuperscript{78} See Keller, \textit{supra} note 2, at 1476 (emphasizing that HFT impacts investors’ confidence in the markets’ ability to provide accurate pricing information and causes the public to perceive HFT as propagating a rigged game).

\textsuperscript{79} Edwards & Edwards, \textit{supra} note 63, at 350; see also Matt Levine, \textit{Regulators Bring a Strange Spoofing Case}, \textit{BLOOMBERG VIEW} (Oct. 21, 2015, 4:48 PM), \url{http://www.bloombergview.com/articles/2015-10-21/regulators-bring-a-strange-spoofing-case} (explaining that people begin doubting their ability to make money when they are often caught on the wrong side of a trade).

\textsuperscript{80} Edwards & Edwards, \textit{supra} note 63, at 350.


\textsuperscript{82} \textit{China Market}, \textit{supra} note 73 (stating that while spoofing may have contributed to recent declines in Chinese stocks, the main cause is probably a pullback by leveraged investors).

\textsuperscript{83} Edwards & Edwards, \textit{supra} note 63, at 350–51.

\textsuperscript{84} Portia Crowe, \textit{Traders Have Been ‘Spoofing’ the Market and Now Regulators are Finally Catching on}, \textit{BUS. INSIDER} (Apr. 21, 2015, 4:13 PM), \url{http://www.businessinsider.com/what-is-spoofing-the-market-2015-4}. 
The relocation of businesses overseas is problematic because investments in financial markets increase the amount of capital in the economy of the country where it is invested. When capital increases, labor productivity and Gross Domestic Product ("GDP") also increase. An increased GDP results in rising output, which in turn results in higher wages and increased employment. Simply put, investment in financial markets results in an increase in labor, productivity, income, and employment. If investors lose faith in U.S. markets, they will take their business elsewhere. There would be a decrease in capital and, in turn, result in decreased GDP, which means less labor, productivity, income, and employment. In other words, if people lose faith and exit U.S. markets, the economy will suffer.

III. THE ANTI-SPOOFING STATUTE IS STILL IMPERMISSIBLY VAGUE IN MANY CONTEXTS

A. The Void for Vagueness Doctrine

The First Amendment and the Due Process Clause of the Fourteenth Amendment provide avenues for anyone to challenge "vague" laws. A law can be void for vagueness if it "fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement." The "void for vagueness" doctrine helps prevent innocent people from becoming trapped by laws that do not provide fair warning. The Constitution does not permit Congress to "set a net large enough to catch all possible offenders, and [it] leave[s] it to the courts to step inside and say

86. Id.
87. Id. (explaining that approximately two-thirds of GDP goes to labor as wages, salaries, and fringe benefits).
88. Id.
89. See id. (explaining the benefits of foreign investments on the host economy).
90. See id.
who could be rightfully detained, and who should be set at large.  

However, when the government must prove intent, these requirements "do much to destroy any force in the argument that application of the [statute] would be so unfair that it must be held invalid." A requirement of scienter mitigates a statute's vagueness by ensuring that only those aware of their unlawful conduct face punishment. That is not to say that it is impossible to raise such a challenge when the government must prove intent; rather, there is just an especially heavy burden to succeed on such challenges.

One must examine vagueness challenges to statutes that do not involve First Amendment freedoms in the light of facts of the case at hand. The following cases examine situations in which statutes have succeeded under the void for vagueness doctrine.

i. Statutes Deemed Impermissibly Vague

Courts have held that statutes are impermissibly vague when there is no clear definition of the proscribed conduct. For example, in Stoller v. CFTC, the government charged Stoller with placing virtually simultaneous sale and repurchase transactions at substantially the same price. The CFTC alleged that these trades constituted "wash sales" that fell within the prohibitory language of Section 4c(a)(2)(A) of the CEA. The court held that the statute was impermissibly vague because the term "wash sale" was not defined in the CEA, in any applicable regulations, or in any interpretive releases.

95. United States v. Cherry, 938 F.2d 748, 754 (7th Cir. 1991) (internal quotations omitted).
96. United States v. Gaudreau, 860 F.2d 357, 360 (10th Cir. 1988).
97. See, e.g., Kramer v. Price, 712 F.2d 174 (5th Cir. 1983) (finding the statute to be impermissibly vague despite the fact that the statute had an intent requirement).
98. United States v. Mazurie, 419 U.S. 544, 550 (1975); accord Coscia, 100 F. Supp. 3d at 658 (citing Chicago v. Morales, 527 U.S. 41, 60 (1999)) (“Because First Amendment rights are not at stake, the Court must assess whether the statute is unconstitutional as applied to Coscia’s conduct . . . [and] not to the conduct of the ‘hypothetically legitimate traders’ who voiced concerns about the [anti-spoofing] statute’s applicability . . . .”)
99. See generally Stoller v. CFTC, 834 F.2d 262 (2d Cir. 1987).
100. Id.
101. Id. at 264.
102. Id. at 262–63; see also 7 U.S.C. § 6c(a)(2)(A) (2014) (prohibiting a transaction that “is, of the character of, or is commonly known to the trade as, a ‘wash sale’ or ‘accommodation trade,’ or is a fictitious sale”).
103. Stoller, 834 F.2d at 265 (citing 7 U.S.C. § 6c(a)(2)(A)(i)) (stating that a transaction that “is, of the character or, or is commonly known . . . as, a ‘wash sale’” is
Additionally, when statutes are not so well defined that they can be interpreted to encompass other acts, courts have also found those statutes to be impermissibly vague. In *Balthazar v. Superior Court of Massachusetts*, the court held that a Massachusetts law prohibiting "unnatural and lascivious acts" was impermissibly vague in the context of the fellatio and oral-anal contact that the petitioner was alleged to have had. The court held that there was a diversity of conduct that could conceivably fall under the terms "unnatural" and "lascivious." Additionally, because there are acts that are less natural and more universally condemned than the acts of the petitioner, the petitioner could have reasonably believed that the statute was aimed at acts other than his own. As a result, the court found that this statute was vague as applied to the petitioner.

When the language of a statute itself is not obviously unclear, a statute may still be impermissibly vague if it does not provide a standard for enforcement. In *Chicago v. Morales*, the court found an ordinance—that prohibited criminal street gang members from loitering with one another or with another person in any public place—to be impermissibly vague. The court stated that the uncertainty did not arise because of the prohibited and not providing an actual definition of wash sale); see also D.C. v. City of St. Louis, 795 F.2d 652 (8th Cir. 1986) (finding an ordinance that prohibited cross-dressing and indecent or lewd conduct to be impermissibly vague because the language was too vague to enforce when the ordinance did not define those words, and decisions of Missouri state courts failed to constitute narrow judicial interpretation).

104. See generally *Balthazar v. Superior Court of Mass.*, 573 F.2d 698 (1st Cir. 1978); see also *Coates v. City of Cincinnati*, 402 U.S. 611, 621 (1971) (holding that the ordinance was impermissibly vague when it was so imprecise that no standard of conduct was specified and that it therefore encompassed many types of conduct).

105. 573 F.2d 698 (1st Cir. 1978).

106. MASS. GEN. LAWS ANN. Ch. 272, § 35 (West 2016) ("Whoever commits any unnatural and lascivious act with another person shall be punished by a fine . . . or by imprisonment."); see also *Balthazar*, 573 F.2d at 699 (stating the principal witness testified that she performed "an act of fellatio and put her tongue on petitioner's backside").

107. *Balthazar*, 573 F.2d at 701.

108. Id. (providing the example of "a range of sado-masochistic behavior").

109. Id. at 702.

110. See *Chicago v. Morales*, 527 U.S. 41, 54 (1999); see also *Cunney v. Bd. of Tr. of Grand View*, 660 F.3d 612, 622 (2d Cir. 2011) (finding a zoning law impermissibly vague when the law clearly demonstrated that a reasonable enforcement officer could interpret the law differently, and, as a result, the law provided enforcement officers with the "unfettered latitude" in making compliance determinations).


112. Id. at 45-46; see also Chicago Municipal Code § 8-4-015 (1992) (stating that whenever a police officer reasonably believes a criminal street gang member is loitering in a public place, the police officer should order him or her to disperse and that if the gang member fails to comply, he or she will be in violation of the ordinance).
normal meaning of "loitering" but rather which loitering the ordinance covered.\textsuperscript{113} The court held that the statute failed to distinguish between innocent conduct and conduct threatening harm.\textsuperscript{114} Therefore, the ordinance was vague "not in the sense that it require[d] a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct [had been] specified at all."\textsuperscript{115} As a result, the ordinance provided police officers with absolute discretion to determine which activities constitute loitering.\textsuperscript{116}

In cases in which the government must prove intent, it is much more difficult to succeed on a vagueness challenge.\textsuperscript{117} However, in two cases, courts held the statutes were impermissibly vague despite the fact that the statutes had an intent requirement. In \textit{Kramer v. Price},\textsuperscript{118} the court held that the intent element did not save a statute from vagueness when both the conduct that must be motivated by intent and the standard by which that conduct also remains vague.\textsuperscript{119} Similarly, in \textit{Record Head Corp. v. Sachan},\textsuperscript{120} an action for declaratory and injunctive relief, the court held a drug paraphernalia ordinance with an intent requirement to be impermissibly vague.\textsuperscript{121} While the ordinance enumerated various factors one should consider, none of those factors helped to define the necessary intent.\textsuperscript{122} Further, the factors, which were both "general and unweighted," seemed to exacerbate the vagueness by inviting inquiry into areas of doubtful relevance rather than making the prohibited conduct any more

\begin{itemize}
\item \textsuperscript{113} Morales, 527 U.S. at 57 (explaining that the definition of loitering in this ordinance is "to remain in any one place with no apparent purpose" and asking how a person was to know if he or she had an "apparent purpose").
\item \textsuperscript{114} Id.
\item \textsuperscript{115} Id.
\item \textsuperscript{116} Id. at 61, 71 (Breyer, J., concurring) ("The ordinance is unconstitutional, not because a policeman applied this discretion wisely or poorly in a particular case, but rather because the policeman enjoys too much discretion in every case. And if every application of the ordinance represents an exercise of unlimited discretion, then the ordinance is invalid in all its applications."); \textit{see also} Hunt v. City of L.A., 638 F.3d 703, 712 (9th Cir. 2011) (holding the statute impermissibly vague when it lacked clear guidance and left determinations to the subject judgment of police officers).
\item \textsuperscript{117} \textit{See} United States v. Gaudreau, 860 F.2d 357, 360 (10th Cir. 1988).
\item \textsuperscript{118} 712 F.2d 174, 178 (5th Cir. 1983) (finding Texas Harassment Statute, Tex. Penal Code Ann. § 42.07 to be impermissibly vague because it did not construe the terms "annoy" and "alarm" in a manner that lessened those words' inherent vagueness).
\item \textsuperscript{119} Id. at 178 (holding that whatever the petitioner's intent may have been, if she was unable to determine the underlying conduct proscribed by the statute, the statute was impermissibly vague).
\item \textsuperscript{120} 682 F.2d 672 (7th Cir. 1982).
\item \textsuperscript{121} Id. at 678.
\item \textsuperscript{122} Id. at 677.
\end{itemize}
clear.123

ii. The Rule of Lenity

When a criminal statute is ambiguous, the rule of lenity requires courts to resolve the ambiguity in favor of the defendant.124 It is a tool of statutory construction, which means that it "is to be used [only] to choose between possible meanings if a statute is ambiguous, not to determine whether the statute is ambiguous in the first place."125 The rule of lenity provides that (1) fair warning shall be given to the public about what constitutes a crime and (2) legislatures, and not courts, should define criminal activity.126

The touchstone of the rule of lenity is "statutory ambiguity."127 Under this rule, a statute is not ambiguous merely because it is possible to articulate a construction narrower than the articulation the government urges.128 Rather, courts reserve lenity "for those situations in which a reasonable doubt persists about a statute's intended scope even after resorting to" an analysis of the "language and structure, legislative history, and motivating policies of that statute."129

In United States v. Thompson/Center Arms Co.,130 the court applied the rule of lenity to resolve an ambiguity in the term "making" a firearm.131 The National Firearms Act ("NFA") provided that the term "make" included manufacturing, putting together, altering, or otherwise producing a firearm.132 However, the provision did not expressly address the question of whether a rifle could be made by the aggregation of finished parts that

123. Id.

124. Whitman v. United States, 135 S. Ct. 352, 353 (2014); Elliot Greenfield, A Lenity Exception to Chevron Deference, 58 BAYLOR L. REV. 1, 10 (2006) ("The rule of lenity complements the vagueness doctrine by providing that when a criminal statute is ambiguous, rather than vague, courts should resolve the ambiguity in the favor of the narrower scope of criminal liability.").


126. United States v. Bass, 404 U.S. 336, 348 (1971); see also id., at 12 ("It is the legislature, not the Court, which is to define a crime, and ordain its punishment.").


128. Id. at 103; see also Greenfield, supra note 124, at 15 (stating the rule of lenity is only applicable if there is "grievous ambiguity or uncertainty") (internal quotations and citations omitted).

129. Moskal, 498 U.S. at 109 (internal quotations omitted) (quoting Bifulco v. United States, 447 U.S. 381, 387 (1980)); see also United States v. Granderson, 511 U.S. 39, 54 (1994) (applying the rule of lenity when the "text, structure, and history" failed to establish that the government’s position was unambiguously correct).


131. Id. at 518.

132. Id. at 509.
one could readily assemble into a rifle.\textsuperscript{133} The court rejected the government's interpretation—that assembly is not necessary—in favor of the defendant's construction that assembly was required.\textsuperscript{134} In reaching this decision, the court examined the language and structure of the statute, congressional intent, and legislative history.\textsuperscript{135}

In the context of spoofing, if the anti-spoofing statute is found to be impermissibly vague, courts will most likely apply the rule of lenity.\textsuperscript{136} Otherwise, the broad anti-spoofing statute would not provide the defendant notice of the charges against him or her.\textsuperscript{137} To reduce the error, courts would adopt a narrower definition of spoofing to the benefit of the defendant.\textsuperscript{138}

\textit{iii. Void for Vagueness Doctrine, the Rule of Lenity, and Coscia}

In determining whether the anti-spoofing statute was impermissibly vague, the court in \textit{Coscia} undertook a similar analysis to those described above.\textsuperscript{139} Because the anti-spoofing statute includes a definition of spoofing, the court easily distinguished this case from \textit{Stoller}.\textsuperscript{140} The court attempted to prove that the anti-spoofing statute does not encompass other activities by distinguishing spoofing from FOK orders and partial fill orders.\textsuperscript{141}

The court, however, did not consider the issue of whether the statute provided a clear standard for enforcement.\textsuperscript{142} The court bypassed this step because, in its view, it was clear that Coscia entered the orders with intent.

\begin{footnotes}
\begin{footnote}{133.} Id.\end{footnote}
\begin{footnote}{134.} Id. at 510–18.\end{footnote}
\begin{footnote}{135.} See id. at 513–17.\end{footnote}
\begin{footnote}{136.} But see The New Rule of Lenity, 119 Harv. L. Rev. 2420, 2420 (2006) (explaining that the rule of lenity has been applied inconsistently, randomly, or not at all).\end{footnote}
\begin{footnote}{137.} See Ellen S. Podgor et al., \textit{White Collar Crime Hornbook Series: The Rule of Lenity} 17 (1st ed. 2013) (“A rationale for using the rule of lenity is that a defendant should be provided with due process (notice) of the charges against him or her.”).\end{footnote}
\begin{footnote}{138.} Id.\end{footnote}
\begin{footnote}{139.} See United States v. Coscia, 100 F. Supp. 3d 653, 656–59 (N.D. Ill. 2015) (determining whether the anti-spoofing statute was vague as applied to Coscia).\end{footnote}
\begin{footnote}{140.} Compare id. at 658–59 (anti-spoofing statute contained a definition of spoofing), with Stoller v. CFTC, 834 F.2d 262, 265 (2d Cir. 1987) (noting that the CEA does not contain a definition of “wash sale”).\end{footnote}
\begin{footnote}{141.} Compare Coscia, 100 F. Supp. 3d at 658 (ruling that spoofing does not encompass other trading activities), with Balthazar v. Superior Court of Mass., 573 F.2d 698 (1st Cir. 1978) (holding that the law was impermissibly vague because it was not defined well enough that it could be interpreted to encompass other acts).\end{footnote}
\begin{footnote}{142.} See Coscia, 100 F. Supp. 3d at 658.\end{footnote}
\end{footnotes}
to cancel.\textsuperscript{143} This intent was apparent because Coscia frequently entered and cancelled large-volume orders in a matter of milliseconds.\textsuperscript{144} Furthermore, Coscia enlisted the help of a computer programmer to design two computer programs, which helped him detect the conditions in which his strategy would work best.\textsuperscript{145} The court inferred from these trading patterns and computer programs that Coscia placed orders with the intent to cancel.\textsuperscript{146} The court, therefore, did not have to consider the issue of enforcement because “[a] plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others.”\textsuperscript{147}

The court also did not apply the rule of lenity.\textsuperscript{148} However, this non-application is not clearly erroneous as courts often inconsistently or randomly apply the rule of lenity, if they apply it at all.\textsuperscript{149} Furthermore, the rule of lenity applies only when a statute is ambiguous and, in \textit{Coscia}, the court found the statute to be unambiguous.\textsuperscript{150}

Assuming that the court in this instance was correct, are there other instances in which courts may find the anti-spoofing statute impermissibly vague? To answer this question, the following section will consider situations of the “hypothetical legitimate trader[s]” referenced in \textit{Coscia}.\textsuperscript{151} As demonstrated below, there are many instances in which courts may find this anti-spoofing statute impermissibly vague.

\section*{B. How the Anti-Spoofing Statute is Impermissibly Vague}

The anti-spoofing statute is problematic for four reasons. First, it makes illegal any conduct that “is, is of the character of, or is commonly known to
the trade as 'spoofing'.”  

However, the statute itself does not state exactly what is “of the character of” spoofing. As a result, this statutory silence could arguably indicate that many legal trading activities could fall under the ambit of the anti-spoofing statute or that enforcers would have the broad discretion of determining which conduct constitutes spoofing.

Second, the definition of spoofing itself is vague. There is no accepted meaning of spoofing in the futures markets. As a result, regulators can give the term any meaning. Without a clear definition, there cannot be a “clear line between lawful and unlawful activity[,]” which means that an innocent trader cannot know exactly what conduct actually constitutes spoofing.

Additionally, the statute does not specify whether the intent to cancel is required to be present at the time the original order was placed. The anti-spoofing statute merely states that there must be “intent to cancel the bid or offer before execution.” In 

153. See id.
155. Coscia Mot. to Dismiss Mem., supra note 13, at 10–11 (citing the CFTC Open Meeting on the Twelfth Series of Proposed Rulemakings Under the Dodd-Frank Act 12 (Feb. 24, 2011)) (quoting former-Commissioner Jill Sommers stating, “[w]hen the draft language of [the provision] was first discussed among Commission staff, it was my view and the view of others [at the CFTC] that the language was too vague” and former Commissioner Scott O’Malia referring to the statutory prohibitions as “admittedly vague”).
157. Filler & Markham, supra note 154 (explaining the history of the definition of “spoofing”).
158. Id.
However, because the statute does not explicitly state that intent must be present when the order was initially placed, traders may be liable for spoofing if they initially place orders with the intent to execute, but in a matter of seconds, change their minds and decide to cancel the order. For example, consider a trader who places a sell order of 500 shares but then quickly changes his mind and decides to cancel the order. In this situation, the trader is not attempting to manipulate the market, but such a large order will inadvertently impact the market, causing prices to either increase or decrease. The trader may not have intended to at first cancel the orders, but after he placed the offer, he then intended to cancel the offer before execution for no outwardly apparent reason. So, while the trader has the necessary intent, does such conduct fall under the anti-spoofing statute? The answer is unclear. No other cases have addressed this issue. This vagueness indicates that a legitimate trader may not understand exactly what conduct falls under the anti-spoofing statute.

Third, the anti-spoofing statute is problematic because of the way that regulators prove spoofing has occurred. In all previous spoofing cases, the CFTC has heavily relied on circumstantial evidence of trading patterns to establish an intent to cancel. This practice exists because there is rarely any other evidence that the government can use to demonstrate the necessary intent. For example, in Panther Energy Trading LLC, the CFTC relied on the fact that Panther frequently placed small sell orders at or near the best price and then placed large buy orders at progressively

161. See United States v. Coscia, 100 F. Supp. 3d 653, 658 (N.D. Ill. 2015) (holding that Coscia entered large-volume orders that he immediately cancelled before they could be filled by other traders).
162. See Matt Levine, Regulators Not Happy with Guy Whose Algorithm Tricked Some Other Algorithms, DEALBREAKER (July 22, 2013, 3:41 PM), http://dealbreaker.com/2013/07/regulators-not-happy-with-guy-whose-algorithm-tricked-other-algorithms/ (“If you put an order knowing there is a 98% chance that you'll cancel it before execution, do you intend to cancel it before execution?”).
164. See Gregory Scopino, The (Questionable) Legality of High-Speed “Pinging” and “Front Running” in the Futures Markets, 47 CONN. L. REV. 607, 666–67 (2015) (“Most individuals don’t write an e-mail... saying they intend to manipulate prices, but that is currently what the law requires the [CFTC] to prove: ‘specific intent’ to manipulate.”); see also Hartman, supra note 163, at 201 (suggesting that traders document the purpose of particular trading strategies to combat a spoofing charge if one is brought in the future).
higher prices that were ultimately cancelled to increase the likelihood that market participants would buy the original small sell order as proof of Panther’s intent to cancel the orders before execution. However, there was no other indication that the government used other means to establish the requisite intent. Similarly, in CFTC v. Moncada, the court held that “the most compelling inference one might draw from the trading records is that Moncada was indeed trying to manipulate the market.”

This reliance on trading patterns to demonstrate intent could result in seriously discriminatory enforcement. Many instances in which traders frequently place and then cancel large orders may be mistaken for spoofing. In fact, such behavior is quite commonplace. High-speed traders cancel an estimated ninety-five to ninety-eight percent of their trades. Relying on trading patterns alone cannot distinguish between these normal trading activities and spoofing.

The vagueness of the anti-spoofing statute along with its discriminatory enforcement generally indicates that the anti-spoofing statute may be impermissibly vague. The following examples look at specific trading activities to further demonstrate how the current anti-spoofing statute remains problematic.

i. Fill or Kill Orders

An FOK order instructs a brokerage to either (1) execute a transaction immediately and completely or (2) not execute it at all. The purpose of

166. Id. at *2-3.
167. See McCracken & Schleppegrell, supra note 156, at 8.
169. Id. at 616.
170. Lockwood, supra note 92, at 257.
171. See Ivy Schmerken, Spoofing and the Flash Crash – Six Things You Need to Know, FLEXADVANTAGE BLOG (May 12, 2015), http://flextrade.com/spoofing-and-the-flash-crash-six-things-you-need-to-know/ (“If you cancel repetitively, it could be considered that you are manipulating the market . . .”); Hartman, supra note 159, at 8 (suggesting market participants that anticipate frequently cancelling orders carefully consider how regulators will view their cancellations and assess how strong an argument they can present to show they did not have the requisite intent to cancel orders before execution); see also Levine, supra note 79 (explaining that frequently canceling orders is not necessarily spoofing because if a trader is “frantically clicking his mouse all day,” then cancelling is not necessarily a pattern but could just be evidence that he changes his mind a lot).
172. See Hope, supra note 76 (quoting an alleged spoofer saying, “we are clicking in response to what we are seeing . . . [i]f we click quicker than most, it is a skill”).
173. Levine, supra note 162.
174. Patricia Chelley-Steeley, Noise and the Trading Mechanism: the Case of SETS, 11 EUROPEAN FIN. MGMT. 387, 391 n.6 (2005); see also David M. Weiss, III-B-7-g Fill or Kill (FOK Order), AFTER THE TRADE IS MADE: PROCESSING SEC.
this type of order is "to ensure that a position is entered at a desired price."\textsuperscript{175} On an average day, 1.56 percent of all orders entered in the market are FOK orders.\textsuperscript{176}

\textit{Coscia} distinguished FOK orders from spoofing because according to the court, traders place FOK orders with the intent that the trades be consummated.\textsuperscript{177} However, when a trader places these types of orders, he or she intends the orders to be cancelled if the order cannot be executed at the desired price. In other words, the intent the trade be carried out is conditional. Thus, at the time the trader places an order, both the intent to execute the trade and the intent to cancel the trade are present. Therefore, under the anti-spoofing statute, these types of orders can qualify as spoofing.

While the court in \textit{Coscia} distinguished FOK orders from spoofing, such a distinction may not be as clear in the real world.\textsuperscript{178} As mentioned, enforcement actions have tended to rely on trading patterns as proof of spoofing.\textsuperscript{179} Based on trading patterns alone, one could easily mistake this activity for spoofing as both strategies usually involve large quantities of stock. Additionally, the purpose of entering FOK orders is essentially the same reason that traders spoof; traders want to ensure that they enter a position at a desired price. Such a difference in the court's definition and real world application could result in confusion among traders. While it may be clear to a trader that he or she is entering a FOK order, to others it may not appear to be so clear. As a result, traders could be left wondering if they will be held liable for spoofing each and every time they enter this type of order. Therefore, in this respect, the anti-spoofing statute is impermissibly vague.

\textit{ii. Pinging}

Pinging is defined as placing "small test orders at various price levels


\textsuperscript{177} United States v. Coscia, 100 F. Supp. 3d 653, 657 (N.D. Ill. 2015).

\textsuperscript{178} See id. at 659 (stating that FOK orders are not entered with the intent to cancel).

[and] immediately cancelling those orders that are not instantly filled." In pinging, a trader will issue an order extremely fast, and if nothing happens, he or she will cancel the order. However, if something does happen, the trader learns hidden information that the trader can use to his or her advantage. As with FOK orders, this type of trading behavior is permissible because there is a chance that the order will execute before cancellation. However, traders immediately cancel the majority of these orders both before and after the trade has been detected.

As a result, it is unclear whether a trader that is pinging the market may be liable for spoofing under the anti-spoofing statute. Based off trading patterns alone, pinging can easily resemble spoofing. In both pinging and spoofing, traders quickly place and then quickly cancel orders. Additionally, both trading practices may occur very frequently. Therefore, based off trading patterns alone, it would be extremely difficult to distinguish pinging from spoofing.

Once the government can establish pinging is "of the character of" spoofing, it will then all come down to proving intent. Based on a Coscia-type argument, one can distinguish pinging from spoofing because, like FOK orders, pinging orders are entered with an intent to be consummated and are only cancelled if no one bites. But, traders cancel a majority of pinging orders before the trade executes. This scenario raises the following question: if you place an order that you are almost positive that you will cancel, are you placing this order with the intention of cancelling

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180. Scopino, supra note 164, at 613; see also Elvis Picardo, You’d Better Know Your High-Frequency Trading Terminology, INVESTOPEDIA, http://www.investopedia.com/articles/active-trading/042414/youd-better-know-your-highfrequency-trading-terminology.asp (last viewed Apr. 11, 2016) (explaining that pinging is like baiting because its sole purpose is to lure institutions with large orders to reveal their hand).

181. Id. at 613–14.

182. Id. at 622.

183. Id. at 612, 622; see also Filler & Markham, supra note 154, at 48–49 (noting that pinging is used to determine if there is a trader on the sidelines seeking “a better than existing market price”).

184. Filler & Markham, supra note 154, at 49.

185. Scopino, supra note 164, at 616; id. (highlighting that more than ninety percent of pinging orders are estimated to be canceled).

186. Filler, supra note 154, at 49 (asserting that there is a fine line between pinging and illegal conduct).

187. See Scopino, supra note 164, at 616 (emphasizing that a majority of pinging orders are cancelled).

188. See United States v. Coscia, 100 F. Supp. 3d 653, 659 (N.D. Ill. 2015).

189. Scopino, supra note 164, at 617.
it before execution? Again, the answer is unclear. Therefore, in the context of "pinging," the anti-spoofing statute is again arguably impermissibly vague.

IV. HOW TO RESOLVE THE ISSUE OF VAGUENESS

A. Eliminate the "is of the character of" Part of the Anti-Spoofing Statute

By its very nature, the anti-spoofing statute encompasses activities other than just spoofing. The anti-spoofing statute makes it illegal to engage in any conduct that "is, is of the character of, or is commonly known to the trade as 'spoofing'". As a result, this statute explicitly allows for liability for those trading practices that are similar to spoofing. However, this statute and CFTC interpretations do nothing to clarify which activities are "of the character of" spoofing. As explained above, a statute is impermissibly vague when it encompasses a broad range of activities so imprecise that it specifies no standard of conduct. This part of the anti-spoofing statute is therefore impermissibly vague.

Removing this part of the statute would limit the activities that this statute proscribes. This removal would therefore make it more clear exactly which activities fall under this category. The practice of pinging, which shares many characteristics of spoofing, would no longer be under threat of being illegal under this statute. Similarly, FOK orders would clearly fall out of the parameters of the statute. As a result, this anti-spoofing statute would no longer encompass as broad a range of activities as it does today. Rather, it would only impose liability for activities that are in fact spoofing.

B. A Better Definition of Spoofing

The definition of spoofing itself is impermissibly vague. Therefore, a

190. See Meyer, supra note 7 (quoting 3Red Trading’s chief compliance officer saying in light of spoofing accusations that “[t]he CFTC has oversimplified complex trading and is now trying to classify legitimate trading and risk management as a market infraction. We stand behind the trading at issue as it does not contradict available guidance nor violate the law.”).
194. See generally Scopino, supra note 164, at 648–50.
195. Coscia Mot. to Dismiss Mem., supra note 13, at 10–11 (citing CFTC Open Meeting on the Twelfth Series of Proposed Rulemakings Under the Dodd-Frank Act 12 (Feb. 24, 2011)) (quoting former Commissioner Jill Sommers as saying “[w]hen the draft language of [the provision] was first discussed among Commission staff, it was my view and the view of others [at the CFTC] that the language was too vague” and
new definition of spoofing could help resolve all issues of ambiguity. In an attempt to propose a better definition, this Comment will briefly explore how other financial institutions define spoofing.

The Chicago Mercantile Exchange ("CME"), in its new Rule 575, provides regulatory guidance on various types of prohibited disruptive trading practices, including spoofing.\textsuperscript{196} Rule 575 prohibits the type of activity CFTC identifies as spoofing, but it provides additional guidance.\textsuperscript{197} Rule 575 states that "all orders must be entered for the purpose of executing bona fide transactions" and that "no person shall enter or cause to be entered an order with the intent, at the time of order entry, to cancel the order before execution or to modify the order to avoid execution."\textsuperscript{198}

Among other things, the CME intends to consider the following: (1) the market participant's intent to create misleading market conditions, (2) the effect on other market participants, (3) the market participant's order entry and cancellation activity, and (4) the changes in prices that result from the entry of the order.\textsuperscript{199}

However, the Financial Industry Regulatory Authority ("FINRA")\textsuperscript{200} takes a different approach.\textsuperscript{201} FINRA Rule 5210 states the following:

No member shall publish or circulate, or cause to be published or circulated, any notice, circular, advertisement, newspaper article, investment service, or communication of any kind which purports to report any transaction as a purchase or sale of any security unless such member believes that such transaction was a bona fide purchase or sale of such security; or which purports to quote the bid price or asked price for any security, unless such member believes that such quotation

\textsuperscript{196} The CME is the world's leading and most diverse derivatives marketplace that is comprised of four exchanges: the Chicago Mercantile Exchange, Inc. ("CME"), the Chicago Board of Trade ("CBOT"), the New York Mercantile Exchange ("NYMEX"), and the Commodity Exchange, Inc. ("COMEX"). About CME Group, CME GROUP, http://www.cmegroup.com/company/ (last visited Oct. 22, 2015); see also Aguirre, supra note 159.


\textsuperscript{198} Id.

\textsuperscript{199} Id.

\textsuperscript{200} FINRA is "an independent, not-for-profit organization authorized by Congress to protect America's investors by making sure the securities industry operates fairly and honestly." About FINRA, FINRA, http://www.finra.org/about (last visited Oct. 22, 2015).

represents a bona fide bid for, or offer of, such security. Even though it is not explicitly stated, FINRA's rule essentially prohibits activities such as fictitious quoting, spoofing, and layering quotes.

Both CME and FINRA place an emphasis on whether the trader placed the order for the purpose of executing a bona fide transaction. Because the CFTC stated essentially the same thing in its guidance, it seems that a part of spoofing is to enter into an order with intent to not execute a bona fide transaction. Therefore, it would make sense to amend the anti-spoofing statute to include this aspect. Additionally, it would also help to clarify at what point the intent to cancel must arise. For this reason, this Comment recommends that the anti-spoofing statute be amended to adopt the CME's requirement that the intent arises at the time the trader enters his or her order.

This Comment recommends that Congress should redefine spoofing as the following: the act of placing a bid or order that, at the time of entry, was not intended to be executed as a bona fide transaction.

This definition would solve all of the problems listed above with the current definition of spoofing and help increase investor confidence. Namely, because the recommended definition requires that the trader did not intend to complete a bona fide transaction, it requires that the trader entered the orders with the intent to manipulate the market in some way rather than just intending to cancel the order. This newly defined mens rea requirement would reflect that there was some type of bad intent rather than merely an intent to cancel. As a result, occasions when traders innocently cancel orders would fall outside of the scope of this definition,

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202. Id.
204. See CME MRAN Rule 575, supra note 197; FINRA Manual Rule 5210, supra note 201.
absent proof that the traders are attempting to manipulate the market.

While this new definition of spoofing would help to clarify what spoofing is and thereby eliminate the issue of vagueness, some difficulties may still arise with this new definition. Most importantly, it still may be difficult to prove that a trader intended to enter into a bona fide transaction. However, it would be much easier to prove a bona fide transaction than an intent to cancel.

C. What this Narrower Definition of Spoofing Would Mean for Business

When it is clear precisely what conduct is proscribed by the anti-spoofing statute, traders can once again go about their normal trading activities without fear that they will accidently break the law. As a result, the markets will function as they are supposed to. Once again, the futures markets will be able to serve their purposes of risk-shifting and price discovery. Price discovery will be more accurate as there will be no artificial prices to prevent accurate prediction of future prices, which will facilitate speculation and, therefore, make it easier to make managerial predictions.

Additionally, a clear anti-spoofing provision could actually encourage market participation by increasing confidence in the markets. A recent Goldman Sachs Group study found that only eighteen percent of young adults trusted the stock market and that sixteen percent said that stocks are either too volatile or that the market is not fair. Such distrust is worrisome as these young adults are entering their prime saving years and they will soon become “the most important financial generation in America.” It is therefore important to rebuild confidence in these markets in order to encourage these young adults to invest in U.S.

209. See Sec. of Labor v. Lauritzen, 835 F.2d 1529, 1539 (7th Cir. 1987) (“People are entitled to know the legal rules before they act, and only the most compelling reason should lead a court to announce an approach under which no one can know where he stands until litigation has been completed. Litigation is costly and introduces risk into any endeavor; we should struggle to eliminate the risk and help people save the costs. Unless some obstacle such as inexperience with the subject, a dearth of facts, or a vacuum in the statute books intervenes, we should be able to attach legal consequences to recurrent factual patterns.”).


211. See Yang, supra note 68, at 280; id. at 345.


214. Id.
markets. Otherwise, the United States could face a severe "confidence crisis," which could result in consumers delaying their spending. This decreased spending and business investment could force the economy to sink into another recession. Therefore, it is vital that Congress quickly restore investor confidence by refurbishing the anti-spoofing statute.

One way of fostering confidence in markets is to make clear definitions of prohibited behaviors so that all people who want to be involved understand the rules. Clear rules also mean that the average person looking to become involved in financial markets would no longer fear being liable for a rule that he or she did not even understand in the first place. Clear rules would create targeted, specific enforcement. In plain terms, not only would the average person looking to become involved in the markets be able to understand the rules, but he or she would also not have to be in constant fear of accidentally breaking an unclear rule. According to Christopher Hehmeyer, the Chief Executive Officer of HTG Capital Partners LLC, "[t]he market’s desperate for clarity . . . the fact that there’s doubt creates confusion." A clear and unambiguous anti-spoofing statute would be a step in the right direction to providing clearer rules and rebuilding confidence in the markets.

More confidence in the futures markets would also mean that "farmers, ranchers, producers, commercial companies, municipalities, pension funds and others" could continue to use the futures markets to "lock in a price or a rate and focus on what they do best- innovating, producing goods and

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215. See Ripken, supra note 212, at 194–95 (explaining that without a “broad-based investor perception of legitimacy, people will not invest in the market” and will instead put their money somewhere else, perhaps even just “under their mattress”); Robert Prentice, Sarbanes-Oxley: The Evidence Regarding the Impact of SOX 404, 29 CARDOZO L. REV. 703, 712 (stating that when investor confidence in the capital markets was at record lows, the average trading volume dropped by fifty-four percent).


217. Id.

218. Id.; see also Mike Larson, Crisis of Confidence Latest Market Challenge, MONEY AND MKTS. (Sept. 18, 2015, 4:30 PM), http://www.moneyandmarkets.com/crisis-confidence-latest-market-challenge-73405#.ViRYetbsVAI (“[C]onfidence is a precious commodity. Once you lose it, it can be the biggest market killer of all.”).

219. Franklyn, supra note 206, at 35 (“[I]t is generally recognized that clear rules enable more efficient business planning which, in turn, should inure to the benefit of society.”).

220. See William Grayson Lambert, Focusing on Fulfilling the Goals: Rethinking How Choice-of-Law Regimes Approach Statutes of Limitations, 65 SYRACUSE L. REV. 491, 534 n.216 (2015) (noting that clear rules improve “the perception of the judicial system as a fair arbiter of disputes”); see also id. (“The clearer the rule, the better one can avoid it.”).

221. Harris, supra note 11.
services for the economy, and creating jobs," resulting in a better GDP and therefore a better economy.  

D. Change is Hard; Reform Is Unlikely

Unfortunately, there is little political will to change the anti-spoofing statute. Recently, the government has dramatically increased the number of cases it has brought against alleged spoofers. This increase in spoofing actions demonstrates that the government is confident that it can succeed on spoofing charges with the anti-spoofing statute as it currently stands. The Coscia case’s guilty verdict—which came only one hour of deliberation—furthered bolstered the government’s confidence. With one successful conviction, regulators are confident that there are no problems with the anti-spoofing statute as it stands. Absent a political will for change, it is unlikely that legislatures will undertake the arduous task of redefining spoofing.

However, the lack of political will does not mean that there is no hope for reform. In light of the first criminal conviction and the clear vagueness of the statute, market participants could start to become more invested and push for a clearer definition. Additionally, in the course of spoofing cases, the judicial process could serve to clarify what actually constitutes spoofing. These two forces could effectively work together to clarify what spoofing is. However, until there is a clarification on the definition of spoofing, government attorneys should practice prosecutorial discretion.

CONCLUSION

Recently, commodities trading activity, which may fall under the

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224. See Louis, *supra* note 50 (explaining the jury only deliberated for about an hour before finding Coscia guilty of spoofing).


226. *Id.* (quoting the President of the Futures Industry Association, Walter Lukken, asking for more clarification about what spoofing actually is in light of the first criminal spoofing conviction).

227. *But see id.* (quoting the Mr. Lukken as saying that clarification by enforcement is not the best way to clarify a regulation).

228. See WAYNE R. LAFAYE ET AL., CRIM. PROC., § 13.2(a): THE PROSECUTOR’S DISCRETION (3d ed. 2014) (stating that prosecutors can exercise their discretion when (1) there is not sufficient evidence, (2) the costs of prosecution would be excessive, (3) prosecution would cause undue harm to the offender, and (4) when the harm done by the offender can be corrected without prosecution).
classification of spoofing, has dramatically increased. As technology continues to evolve and traders are able to place ever larger orders even faster, there is a possibility that spoofing practices will increase even more. However, the current ambiguity and vagueness of the anti-spoofing statute could result in confusion as to what trading activities actually constitute spoofing. Even worse, the government could prosecute legal trading activities as spoofing. This over-prosecution could lead to confusion among traders and could cause traders to stop trading altogether or move to markets outside of the United States. For these reasons, Congress and the associated regulatory agencies must clarify the current anti-spoofing statute to resolve this problem of vagueness.