No. 19-933

# In the Supreme Court of the United States

MONEX DEPOSIT COMPANY, ET AL., PETITIONERS

*v.*

COMMODITY FUTURES TRADING COMMISSION

*ON PETITION FOR A WRIT OF CERTIORARI*
*TO THE UNITED STATES COURT OF APPEALS*
*FOR THE NINTH CIRCUIT*

**BRIEF FOR THE RESPONDENT IN OPPOSITION**


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## QUESTIONS PRESENTED

1. Whether Section 6(c)(1) of the Commodity Exchange Act (CEA), which prohibits the use of "any manipulative or deceptive device or contrivance" in connection with a contract of sale of any commodity in interstate commerce, 7 U.S.C. 9(1), prohibits conduct that is fraudulent but not "manipulative."

2. Whether the Commodity Futures Trading Commission's enforcement action against petitioners under Section 2(c)(2)(D) of the CEA, 7 U.S.C. 2(c)(2)(D), reflects a change in agency policy that violates petitioners' right to due process.

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## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-23a) is reported at 931 F.3d 966. The opinion of the district court (Pet. App. 25a-54a) is reported at 311 F. Supp. 3d 1173.

## JURISDICTION

The judgment of the court of appeals was entered on July 25, 2019. A petition for rehearing was denied on October 3, 2019 (Pet. App. 24a). On December 23, 2019, Justice Kagan extended the time within which to file a petition for a writ of certiorari to and including January 23, 2020, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

## STATEMENT

Petitioners operate an unregistered trading platform called "Atlas," on which customers can speculate

on precious-metal prices through leveraged transactions. Pet. App. 5a. In 2017, the Commodity Futures Trading Commission (CFTC or Commission) brought a civil action against petitioners, alleging that their operation of and representations about the Atlas platform violated several provisions of the Commodity Exchange Act (CEA), 7 U.S.C. 1 *et seq.* Compl. ¶¶ 1-2. The district court dismissed the complaint, concluding that the CFTC's allegations failed to state a claim for a violation of the CEA. Pet. App. 25a-54a. The court of appeals reversed and remanded. *Id.* at 1a-23a.

1. The CEA governs markets for commodity derivatives, including futures contracts and, to a lesser extent, the commodities that underlie them. See 7 U.S.C. 2(a)(1)(A). Futures are financial instruments in the form of standardized contracts to buy or sell a commodity at a specific price on a specific date in the future. *Leist* v. *Simplot*, 638 F.2d 283, 286 (2d Cir. 1980), aff'd, 456 U.S. 353 (1982). Unlike an ordinary sale of goods, however, futures trades rarely lead to actual delivery of a commodity. *Ibid.* Instead, the trader discharges his or her contractual obligations by executing a second contract that reverses the agreement to buy or sell. *Ibid.* Businesses use futures to hedge against price risks, *id.* at 287, while speculators use them to profit from price movements, *id.* at 288.

Futures trading can be risky because most such trades are highly leveraged. See 17 C.F.R. 1.55(b)(11). For a small initial deposit of collateral (called "margin"), a trader can enter a futures contract for a large amount of a commodity valued at many times that payment. *Leist*, 638 F.2d at 287. Small movements in the commodity's price therefore can lead to significant gains or losses. See U.S. Commodity Futures Trading Comm'n, *The Risks of*

*Buying Gold, Silver & Platinum*, http://www.cftc.gov/idc/groups/public/@cpfraudawarenessandprotection/documents/file/cppreciousmetalsfraudbrochure.pdf.

The CEA and the CFTC's implementing regulations establish important protections for futures markets and market participants. Pet. App. 7a. Commodity futures must be traded on regulated exchanges. 7 U.S.C. 6(a)(1). Those exchanges must conform to standards and requirements that are designed to achieve the prevention of market abuse, 7 U.S.C. 7(d)(12); financial stability, 7 U.S.C. 7(d)(21); cybersecurity, 17 C.F.R. 38.1051(a)(2); and disaster recovery, 17 C.F.R. 38.1051(a)(3). A futures broker must establish safeguards to prevent conflicts of interest, 7 U.S.C. 6d(c); segregate customer assets to protect them from the risk of the broker's bankruptcy, 7 U.S.C. 6d(a)(2); and employ only salespeople who register with the CFTC and meet strict proficiency requirements, 7 U.S.C. 6k(1).

a. Originally, the CEA did not govern, and the CFTC did not regulate, retail commodity transactions that are not futures contracts. Pet. App. 8a. In *CFTC* v. *Zelener*, 373 F.3d 861 (2004), the Seventh Circuit held that a leveraged transaction in foreign currency was not a futures contract despite being the economic "equivalent" of one, *id.* at 869. The court found the "economic effects" and "absence of 'delivery' (actual or intended)" to be legally irrelevant, so long as the contract itself formally described a cash-market transaction. *Id.* at 865-866 (emphasis omitted). That decision created a "so-called *Zelener* loophole, which allowed companies to offer commodity sales on margin without regulation," even when those "transactions mimic[ked] conventional futures trades long regulated by the CFTC." Pet. App. 15a.

Congress closed that loophole in two steps. First, in the CFTC Reauthorization Act of 2008, Pub. L. No. 110-246, Tit. XIII, § 13101(a), 122 Stat. 2189, Congress enacted Section 2(c)(2)(C) of the CEA, 7 U.S.C. 2(c)(2)(C). Section 2(c)(2)(C) provides that certain CEA provisions apply to leveraged retail foreign-currency transactions, with an exception for any transaction that "results in actual delivery within 2 days." 7 U.S.C. 2(c)(2)(C)(i)(I), (i)(II)(bb)(AA), and (ii)(I). Then, in the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), Pub. L. No. 111-203, § 742(a)(2), 124 Stat. 1732, Congress added Section 2(c)(2)(D) of the CEA, 7 U.S.C. 2(c)(2)(D). That provision extends the *Zelener* fix to all other commodities. See 7 U.S.C. 2(c)(2)(D)(i). Under Section 2(c)(2)(D), leveraged retail commodity transactions are subject to most aspects of futures regulation, including the requirement that the seller register as a futures commission merchant and conduct all trades on a regulated exchange. See 7 U.S.C. 2(c)(2)(D)(iii); see also 7 U.S.C. 1a(28)(A)(i)(I)(aa)(DD) (defining "futures commission merchant" to include persons "engaged in soliciting or in accepting orders for" Section 2(c)(2)(D) transactions). Similar to Section 2(c)(2)(C), Section 2(c)(2)(D) exempts any transaction that "results in actual delivery within 28 days." 7 U.S.C. 2(c)(2)(D)(ii)(III)(aa).

In 2013, the Commission issued a formal guidance document that explained how the agency would apply Section 2(c)(2)(D)'s "actual delivery" exception. See 78 Fed. Reg. 52,426 (Aug. 23, 2013). The Commission stated that it would look "beyond the four corners of contract documents" to determine whether actual delivery is occurring or is "simply a sham." *Id.* at 52,428. The guidance document thus prescribed a "functional approach," under which the Commission would consider

factors such as "the nature of the relationship between the buyer, seller, and possessor of the commodity"; "how the agreement, contract, or transaction is marketed, managed, and performed"; and the "physical location of the commodity * * * before and after execution." *Ibid.* The Commission cautioned that a "book entry" does not suffice if the seller has not "delivered the entire quantity of the commodity purchased by the buyer." *Ibid.*

b. The Dodd-Frank Act also created Section 6(c)(1) of the CEA. 7 U.S.C. 9(1). That provision makes it "unlawful for any person, directly or indirectly, to use or employ, or attempt to use or employ, in connection with * * * a contract of sale of any commodity in interstate commerce, * * * any manipulative or deceptive device or contrivance, in contravention of such rules and regulations as the Commission shall promulgate." *Ibid.* Both the phrase "'manipulative or deceptive device or contrivance,'" and the directive that the governing agency promulgate implementing regulations, "mirror[] § 10(b) of the Securities and Exchange Act." Pet. App. 8a.

Section 6(c)(1), however, contains an additional limitation on the CFTC's authority. Under that provision, the CFTC may not "require any person to disclose to another person nonpublic information that may be material to the market price, rate, or level of the commodity transaction," unless disclosure is "necessary to make any statement made to the other person in or in connection with the transaction not misleading in any material respect." 7 U.S.C. 9(1). Congress borrowed that language nearly verbatim from another anti-fraud provision in the CEA. See 7 U.S.C. 6b(b).

Consistent with its mandate under Section 6(c)(1), the Commission issued CFTC Rule 180.1, 17 C.F.R. 180.1.

The text of Rule 180.1 generally tracks the text of Securities and Exchange Commission (SEC) Rule 10b-5, the SEC's primary anti-fraud rule. Compare 17 C.F.R. 180.1, with 17 C.F.R. 240.10b-5. The CFTC drafted its rule that way because the two rules' enabling statutes are, in relevant part, "virtually identical." 76 Fed. Reg. 41,398, 41,399 (July 14, 2011). Thus, similar to SEC Rule 10b-5, CFTC Rule 180.1 prohibits "any untrue or misleading statement of a material fact" or "omi[ssion] to state a material fact necessary in order to make the statements made not untrue or misleading," or "any act, practice, or course of business, which operates or would operate as a fraud or deceit upon any person." 17 C.F.R. 180.1(a)(2)-(3).

2. Petitioners Monex Deposit Company, Monex Credit Company, and Newport Services (collectively, Monex) offer precious-metals trading to investors. Pet. App. 5a. Through the "Atlas" trading platform, investors can purchase those commodities in "leverage[d]" transactions—*i.e.*, by paying only a portion of the full sales price and financing the remainder through Monex. *Ibid.* The trading does not happen on any regulated exchange. Rather, "Monex controls the platform, acts as the counterparty to every transaction, and sets the price for every trade." *Ibid.*

In 2017, the Commission filed a complaint against Monex, asserting violations beginning on the effective date of the Dodd-Frank Act amendments in July 2011. Pet. App. 10a; see Compl. ¶ 1; Dodd-Frank Act § 754, 124 Stat. 1754. The complaint alleges that petitioners market the Atlas platform using direct comparisons to futures traded on regulated exchanges. D. Ct. Doc. 8-2, at

4 (Sept. 6, 2017).[1] As in futures trading, Atlas customers deposit "margin" equal to a fraction of the price of the metal that they "buy" or "sell." Compl. ¶ 28. Customers can then take "long" or "short" positions and place "stop" or "limit" orders. Compl. ¶ 29. For a "long" position, Monex records the trade in its books and sends the customer a document purporting to transfer title to a quantity of metal, though not to any specific physical metal. Compl. ¶ 41. In a "short" trade, Monex claims to "loan" the customer metals that the customer instantly sells back to Monex. Compl. ¶ 42. Regardless of the sequence, no metal changes hands. Compl. ¶ 39. Instead, it sits in Monex's chosen depository, subject to Monex's exclusive control, and customers have no right to take possession of it unless they terminate the contract by paying for the metal in full. Compl. ¶¶ 38-40. In substance, each transaction is a book entry, Compl. ¶¶ 41-42, and the sole item delivered is a paper trade confirmation, Compl. ¶ 30.

The Commission's complaint also alleges that petitioners systematically defraud their customers. Compl. ¶¶ 45-69. Although petitioners represent that Atlas transactions are a safe investment with significant upside, the program is designed so that customer losses are highly likely, and Monex stands to gain as a result of those losses. Compl. ¶¶ 1-4. Between July 16, 2011, and March 31, 2017, approximately 90% of leveraged Atlas accounts lost money. Compl. ¶ 2. Petitioners withhold that information, however, while touting the supposed profit potential and limited downside of trading on Atlas. Compl. ¶¶ 5, 59-63. They describe leveraged-metals

[1] The district court treated the documents referred to in the complaint as incorporated therein. D. Ct. Doc. 195, at 3 n.1 (May 1, 2018).

trading as a way to shield wealth from "inflation, deflation and other economic calamities," even though Monex unilaterally liquidates many customers' trading positions at a loss. Compl. ¶¶ 3, 50. And while sales representatives describe themselves "as fiduciaries who look out for the best interests of their customers," Monex is actually the counterparty to every transaction, sets the price of every trade, and compensates its sales staff based on trading volume, no matter how much money their customers lose. Compl. ¶ 3; see Compl. ¶¶ 3-5, 41-42.

3. The Commission first investigated Monex in early 2014, but petitioners contested the agency's jurisdiction to investigate. See *In re Application to Enforce an Admin. Subpoena of the U.S. Commodity Futures Trading Comm'n* v. *Monex Deposit Co.*, No. 14-6131, 2014 WL 7213190 (N.D. Ill. Dec. 17, 2014). The Seventh Circuit eventually ordered Monex to comply with the CFTC's subpoena. See *CFTC* v. *Monex Deposit Co.*, 824 F.3d 690 (2016). The following year, the Commission brought this civil enforcement action, alleging violations of Section 6(c)(1) and Rule 180.1's anti-fraud provisions, and of the registration and exchange-trading requirements that apply under Section 2(c)(2)(D). Pet. App. 10a.

Pursuant to Federal Rule of Civil Procedure 12(b)(6), petitioners moved to dismiss the CFTC's complaint for failure to state a claim. The district court dismissed all counts. Pet. App. 25a-54a. With respect to Section 6(c)(1), the court held that Congress had intended only to prohibit conduct that is "both manipulative and deceptive * * * , not one or the other." *Id.* at 47a. The court acknowledged that Section 6(c)(1)'s text "suggests" that Congress intended to prohibit conduct that is manipulative "or" deceptive, and that Congress had

borrowed that text from Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78j(b), which uses the term "or" disjunctively. Pet. App. 46a, 49a. The court nevertheless concluded that the statute "unambiguously forecloses the CFTC's interpretation" of Section 6(c)(1) as covering conduct that is either manipulative or deceptive. *Id.* at 51a. The court based that conclusion on Section 6(c)(1)'s title ("Prohibition against manipulation"), *id.* at 47a, the canon against superfluity, and legislative history, see *id.* at 46a-51a.

With respect to Section 2(c)(2)(D), the district court held that the actual-delivery exception covers petitioners' conduct. Pet. App. 32a. In the court's view, it was irrelevant whether petitioners "deprive customers of all control and authority over any metals that underlie their trading positions," *id.* at 36a (citation omitted), so long as "the commodities are actually there" in the seller's inventory and are not "non-existent," *id.* at 40a n.6.

4. The court of appeals reversed. Pet. App. 1a-23a.

The court of appeals rejected the district court's narrow construction of Section 6(c)(1). Pet. App. 18a-23a. The court held that Section 6(c)(1) "means what it says: the CFTC may sue for fraudulently deceptive activity, regardless of whether it was also manipulative." *Id.* at 19a. The court began with the proposition that, "[w]hen the word 'or' joins two terms, we apply a disjunctive reading." *Ibid.* While acknowledging that "there are exceptions" to that general rule, the court explained that "this is not an instance where a disjunctive meaning would produce absurd results and statutory context compels us to treat 'or' as if it were 'and.'" *Ibid.* The court further explained that Section 6(c)(1) "is a mirror image of § 10(b) of the Securities Exchange Act"—which this Court had construed to "authorize[] fraud-only claims"

before the Dodd-Frank Act was enacted—and that, "by copying § 10(b)'s language and pasting it in the CEA, Congress adopted § 10(b)'s judicial interpretations as well." *Id.* at 20a. The court also observed that a separate CEA provision refers specifically to "a 'manipulative device or contrivance,' suggesting that Congress knew how to require market manipulation when it sought to do so." *Ibid.* (citation omitted).

The court of appeals acknowledged petitioners' argument that a disjunctive construction of Section 6(c)(1) would render portions of other provisions superfluous, but it concluded that this "minimal" and "partial redundancy hardly justifies displacing otherwise clear text." Pet. App. 20a. The court also gave limited weight to Section 6(c)(1)'s title, noting that "headings are often under inclusive." *Ibid.* Finally, the court rejected petitioners' assertion that, under a literal reading of the statute, "even everyday grocery sales would be subject to the CFTC's enforcement power." *Id.* at 22a. The court noted both that the CEA's text "applies broadly to commodities in interstate commerce," and that this case involves only leveraged sales, to which the CEA frequently applies. *Ibid.*; see *id.* at 22a-23a.

The court of appeals also rejected the district court's construction of the term "actual delivery" in Section 2(c)(2)(D). Pet. App. 12a-18a. The court of appeals first explained that—consistent with the Eleventh Circuit's decision in *CFTC* v. *Hunter Wise Commodities, LLC*, 749 F.3d 967 (2014)—"the plain language" of the statute indicates "that actual delivery requires at least some meaningful degree of possession or control by the customer." Pet. App. 15a; see *id.* at 14a-15a. The court found that "the broader statutory context," including the Dodd-Frank Act's clear objective of "clos[ing] the so-

called *Zelener* loophole," bolstered that reading. *Id.* at 15a. The court also contrasted the term "actual delivery" in Section 2(c)(2)(D) with the bare term "delivery" in other CEA provisions, reasoning that "*actual* delivery must require more than simple title transfer." *Id.* at 16a. Finally, the court observed that, "even if the statute were ambiguous," it would find "the CFTC's [2013] interpretive guidance persuasive." *Id.* at 17a.

**ARGUMENT**

Petitioners contend (Pet. 17-32) that the Commission failed to state a claim for a violation of Section 6(c)(1) of the CEA, and that the application of Section 2(c)(2)(D) of the CEA to petitioners violates their rights under the Due Process Clause. The court of appeals correctly rejected the first argument as inconsistent with the plain statutory text, and its decision does not conflict with any decision of this Court or of any other court of appeals. Neither of the courts below addressed petitioners' due process challenge, which lacks merit in any event. In addition, because this case is currently in an interlocutory posture and arises on petitioners' motion to dismiss the CFTC's complaint, it would be a poor vehicle for considering the questions presented. Further review is not warranted.

1. Petitioners contend (Pet. 18-26) that the CEA's ban on "manipulative or deceptive conduct" covers only fraud that is paired with market manipulation. That contention lacks merit and does not warrant this Court's review.

a. The CEA authorizes the Commission to prohibit conduct in the commodities markets that is either "manipulative or deceptive." 7 U.S.C. 9(1). Conduct need not be both manipulative *and* deceptive to fall within the Commission's regulatory purview.

"[T]ime and again," this Court has instructed that "courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat'l Bank* v. *Germain*, 503 U.S. 249, 253-254 (1992). That includes both the specific provision at issue and the statutory context in which it appears. See *Robinson* v. *Shell Oil Co.*, 519 U.S. 337, 341 (1997). Here, all relevant indicia of Section 6(c)(1)'s meaning—text, context, and legislative history—support the Ninth Circuit's construction.

First, the phrase "any manipulative or deceptive device or contrivance," 7 U.S.C. 9(1), is unambiguous. The conjunction "or" "is almost always disjunctive." *United States* v. *Woods*, 571 U.S. 31, 45 (2013); see *Garcia* v. *United States*, 469 U.S. 70, 73 (1984) (explaining that the term "or" generally connects words that should "be given separate meanings"). And the word "any" underscores the absence of any further limitation on the provision's reach. See *Department of Hous. & Urban Dev.* v. *Rucker*, 535 U.S. 125, 131 (2002).

As petitioners observe (Pet. 24), on occasion "statutory context can overcome the ordinary, disjunctive meaning of 'or.'" *Encino Motorcars, LLC* v. *Navarro*, 138 S. Ct. 1134, 1141 (2018). But no evidence of atypical usage is present here. Petitioners note (Pet. 25) that "or" is sometimes used in a "doublet" between synonyms. But petitioners do not and could not plausibly argue that the terms "manipulative" and "deceptive" in the CEA are synonyms. The phrase "manipulative or deceptive device or contrivance" appears in Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78j(b), and has never been construed as a doublet. See *Santa Fe Indus., Inc.* v. *Green*, 430 U.S. 462, 476 (1977) (explaining that "[m]anipulation" is "virtually a term of art") (citation

omitted). Similarly, although the "distributive canon" acknowledges that, in a list with several antecedents and consequents, reading the term "or" disjunctively may be "linguistically impossible," *Encino Motorcars*, 138 S. Ct. at 1141, the distributive canon is inapplicable to the straightforward pairing of two terms—"manipulative or deceptive"—that is at issue here.

Second, statutory context confirms the plain meaning of the text. Under Section 6(c)(1), the Commission's rules may not require market participants to disclose certain information, except where disclosure is "necessary to make any statement made to the other person in or in connection with the transaction not misleading in any material respect." 7 U.S.C. 9(1). That prohibition of material omissions reflects a classic fraud principle, see Restatement (Second) of Torts § 551(2)(b) (1977), and borrows from another anti-fraud provision, Section 4b(b) of the CEA, 7 U.S.C. 6b(b). It would have made little sense for Congress to focus on fraudulent omissions if it did not intend to prohibit fraud (outside of market manipulation) in the first place. And another CEA provision addresses "manipulative device[s]" without mentioning fraud, underscoring that when Congress meant to address manipulation alone, it "knew how to do so." *Custis* v. *United States*, 511 U.S. 485, 492 (1994); see Pet. App. 20a.

The phrase "any manipulative or deceptive device or contrivance" had an established meaning when the Dodd-Frank Act was enacted. As noted, Section 10(b) of the Securities Exchange Act uses the identical formulation. 15 U.S.C. 78j(b). And by the time Congress enacted Section 6(c)(1), decades of case law had established that the phrase "manipulative or deceptive device" in Section 10(b) covers all forms of fraud. See, *e.g.*, *SEC* v.

*Zandford*, 535 U.S. 813, 820-825 (2002); *Chiarella* v. *United States*, 445 U.S. 222, 226 (1980); *Affiliated Ute Citizens of Utah* v. *United States*, 406 U.S. 128, 153-154 (1972); *SEC* v. *Texas Gulf Sulphur Co.*, 401 F.2d 833, 860-861 (2d Cir. 1968) (en banc), cert. denied, 394 U.S. 976 (1969). Congress is presumed to be "thoroughly familiar" with such "important precedents." *Cannon* v. *University of Chi.*, 441 U.S. 677, 699 (1979). As a result, "when judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its judicial interpretations as well." *Merrill Lynch, Pierce, Fenner & Smith Inc.* v. *Dabit*, 547 U.S. 71, 85 (2006) (citation, ellipses, and internal quotation marks omitted).

Third, Section 6(c)(1)'s sparse legislative history supports the same result. Senator Cantwell, who had introduced Section 6(c)(1) as an amendment to the proposed Dodd-Frank bill, explained that she had borrowed its language from Section 10(b) of the Securities Exchange Act so that "courts and the Commission" would "interpret the new authority in a similar manner." 156 Cong. Rec. 7534 (2010). Senator Cantwell recited the canon that, "when the Congress uses language identical to that used in another statute," it is presumed to intend the same meaning. *Ibid.* And she explained that courts could thus refer to "the 75 years" of "case law [that] ha[d] developed around th[ose] words." *Ibid.* Petitioners observe (Pet. 20-21) that the two floor statements mentioning Section 6(c)(1) discussed its anti-manipulation objective, without separately addressing fraud. But "[t]his Court has never required that every permissible application of a statute be expressly referred to in its legislative

history." *Moskal* v. *United States*, 498 U.S. 103, 111 (1990).

Finally, Congress authorized the CFTC to implement the CEA and to resolve any ambiguities the statute may contain. See 7 U.S.C. 9(1). Where a statute contains "an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation," those regulations should be "given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." *Chevron U.S.A. Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843-844 (1984). The CFTC's Rule 180.1 prohibits certain fraudulent conduct, including material misstatements and omissions and fraudulent business practices, without limiting that ban to conduct that involves market manipulation. 17 C.F.R. 180.1(a)(2)-(3).

b. Petitioners' contrary arguments primarily rely on various canons of statutory construction. None of those arguments can overcome the plain statutory text.

Petitioners' argument begins (Pet. 19) not with the statutory text but with the section headings. Although a section's heading may "shed light on some ambiguous word or phrase," it "cannot limit [its] plain meaning." *Brotherhood of R.R. Trainmen* v. *Baltimore & Ohio R.R.*, 331 U.S. 519, 529 (1947). Headings often do not "refer to all the matters which the framers of th[e] section wrote into the text." *Id.* at 528; see *Lawson* v. *FMR LLC*, 571 U.S. 429, 446-447 (2014). Indeed, the CEA contains numerous examples. See, *e.g.*, 7 U.S.C. 2(a) (titled "Jurisdiction of Commission; Commodity Futures Trading Commission," but with a section on principal-agent liability) (emphasis omitted); 7 U.S.C. 6b (titled "Contracts designed to defraud or mislead," but con-

taining nothing about contract design) (emphasis omitted); 7 U.S.C. 12a (titled "Registration of commodity dealers and associated persons; regulation of registered entities," but including the CFTC's general rulemaking authority) (emphasis omitted).

Section 6(c) itself illustrates this point. Titled "Prohibition regarding manipulation and false information," 7 U.S.C. 9 (emphasis omitted), Section 6(c) also includes the entirety of the CFTC's administrative enforcement authority for "any" CEA violation, and the appellate review procedures applicable to agency adjudications. See 7 U.S.C. 9(4)-(11). Particularly in that context, the "underinclusiveness" of Section 6(c)(1)'s title "is apparent." *Lawson*, 571 U.S. at 446.

Petitioners also contend (Pet. 21) that the court of appeals' construction of Section 6(c)(1) would render other CEA provisions superfluous. But the canon against surplusage applies only where a provision is "fairly capable of two interpretations," *Chickasaw Nation* v. *United States*, 534 U.S. 84, 94 (2001) (internal quotation marks omitted), which Section 6(c)(1) is not. In addition, as the court of appeals observed, the overlap here is "minimal" and "partial." Pet. App. 20a. Petitioners rely (Pet. 21 n.7) on an anti-fraud provision within Section 4b of the CEA, but only one subsection of Section 4b addresses fraud, see 7 U.S.C. 6b(a)(2)(A), while others address practices that are not necessarily fraudulent, see 7 U.S.C. 6b(a)(2)(D) and 6b(c)-(d). Petitioners also cite (Pet. 21 n.7) Section 4*o*(1), 7 U.S.C. 6*o*(1), which prohibits misrepresentations by certain CFTC registrants, but that provision is both broader and narrower than Section 6(c)(1)—broader because it does not always require proof of scienter, see *Commodity Trend Serv., Inc.* v.

*CFTC*, 233 F.3d 981, 993-994 (7th Cir. 2000), and narrower because it applies only to registrants. Petitioners also cite (Pet. 21 n.7) Section 4c(a)(7), 7 U.S.C. 6c(a)(7), but that specialized provision captures misconduct that Section 6(c)(1) may not, including entering a swap contract knowing, or in reckless disregard of the fact, that the counterparty is using it to defraud a third party. Petitioners elsewhere suggest (Pet. 20) that Section 6(c)(1)(A), 7 U.S.C. 9(1)(A), would also be superfluous because that subsection clarifies that unlawful manipulation includes false reports that affect the price of a commodity. But a false report made knowingly or recklessly, see *ibid.*, would not separately constitute fraud.

Petitioners next invoke (Pet. 22-23) the canon that ambiguous statutes will be read in a manner that renders them consistent with established principles of federalism. But the Commission's exercise of authority over fraud in leveraged transactions that closely resemble commodities-futures contracts does not "upset the usual constitutional balance of federal and state powers." *Gregory* v. *Ashcroft*, 501 U.S. 452, 460 (1991). That is particularly true since, as previously discussed, the SEC has long exercised similar jurisdiction over fraud in the securities markets under the identically worded language in Section 10b. And petitioners here are not charged with a "purely local" crime, *Bond* v. *United States*, 572 U.S. 844, 860 (2014); the CFTC has charged them with defrauding thousands of victims across the United States, using instrumentalities of interstate commerce. Compl. ¶¶ 1, 30; see 7 U.S.C. 9(1). Fraud in connection with interstate commerce is a paradigmatic example of conduct routinely governed by federal law. See, *e.g.*, 18 U.S.C. 1343 (wire fraud); 15 U.S.C. 45(a)(1) (pro-

hibiting "unfair or deceptive acts or practices in or affecting commerce"). And even if a "clear indication" of Section 6(c)(1)'s reach were necessary, *Bond*, 572 U.S. at 857, the CEA's use of the disjunctive "or" is unambiguous here. See pp. 11-15, *supra*.

Finally, petitioners invoke (Pet. 23) the rule of lenity. Even assuming that the rule of lenity extends to this civil context, it "only applies if, after considering text, structure, history, and purpose, there remains a grievous ambiguity or uncertainty in the statute, such that the Court must simply guess as to what Congress intended." *United States* v. *Castleman*, 572 U.S. 157, 172-173 (2014) (quoting *Barber* v. *Thomas*, 560 U.S. 474, 488 (2010)). Section 6(c)(1) contains no such "grievous ambiguity." *Ibid.*

c. Other than the district court's ruling in this case, petitioners identify no decision of any court that has adopted a different view of Section 6(c)(1). The decision below is consistent with numerous other decisions that have construed Section 6(c)(1) to encompass fraud. See, *e.g.*, *CFTC* v. *Southern Trust Metals, Inc.*, 894 F.3d 1313, 1325-1327 (11th Cir. 2018) (holding that misrepresentations in precious-metal sales violated Section 6(c)(1)), cert. denied, 139 S. Ct. 1464 (2019); *CFTC* v. *EOX Holdings L.L.C.*, 405 F. Supp. 3d 697, 709-712 (S.D. Tex. 2019) (holding that Section 6(c)(1) and Rule 180.1 prohibit insider trading); *CFTC* v. *Scott*, No. 18-cv-5802, 2019 WL 461125, at *1, *3 (W.D. Wash. Feb. 6, 2019) (holding that CFTC stated a claim under Section 6(c)(1) by alleging that the defendant had "accept[ed] customers' money and then prevaricat[ed] in various ways when their goods did not arrive"); *CFTC* v. *Atkinson*, No. 18-cv-23992, 2018 WL 9362257, at

*6-*8 (S.D. Fla. Nov. 16, 2018) (holding that "fraudulent solicitations" violated Section 6(c)(1)); *CFTC* v. *My Big Coin Pay, Inc.*, 334 F. Supp. 3d 492, 498 (D. Mass. 2018) (determining that "both Section 6(c)(1) and Regulation 180.1 explicitly prohibit fraud even in the absence of market manipulation"); *CFTC* v. *McDonnell*, 321 F. Supp. 3d 366, 367-368 (E.D.N.Y. 2018) (same); *CFTC* v. *Wilkinson*, No. 16-cv-6734, 2016 WL 8256406, at *2-*5 (N.D. Ill. Nov. 22, 2016) (holding that fraudulent misrepresentations violated Section 6(c)(1)); *CFTC* v. *Hunter Wise Commodities, LLC*, 21 F. Supp. 3d 1317, 1347 (S.D. Fla. 2014) (holding that "material misrepresentations and materially misleading omissions" violated Section 6(c)(1)).

Petitioners contend (Pet. 32-36) that this Court's review is nevertheless warranted because the court of appeals' construction of Section 6(c)(1) would apply to "*any and all* fraud in connection with the sale of a commodity," Pet. 35—which petitioners suggest is "anything sold in commerce," Pet. i—and because "there will be little opportunity for lower courts to further develop these issues," Pet. 36. Neither assertion is accurate. On the first point, although the CEA's definition of "commodity" is broad, it does not encompass every good sold in commerce. See 7 U.S.C. 1a(9). In addition, the court of appeals did not have before it a claim of fraud in connection with a non-leveraged commodity transaction. See Pet. App. 23a. On the second point, consistent with the CFTC's focus on serious fraud, defendants in Section 6(c)(1) cases frequently mount vigorous defenses through sophisticated counsel. See, *e.g.*, *Southern Trust Metals*, *supra*; *EOX Holdings*, *supra*; *Atkinson*, *supra*; *CFTC* v. *Powderly*, No. 17-cv-3262, 2018 WL 8343598 (N.D. Ill. Sept. 11, 2018); *CFTC* v.

*Slemmer*, No. 16-cv-80867, 2017 WL 4621796 (S.D. Fla. Aug. 16, 2017). There is no sound reason to believe that the Commission's enforcement activity will forestall further percolation of the question presented.

2. Petitioners do not challenge the court of appeals' separate holding that, based on the allegations in the Commission's complaint, the "actual delivery" exception in Section 2(c)(2)(D) is inapplicable here. See Pet. App. 18a. Instead, they contend (Pet. 26-36) that they are entitled to dismissal under Rule 12(b)(6) because "due process precludes applying" the court of appeals' construction of the statute "to Monex." Pet. 29 n.8. That contention lacks merit and does not warrant this Court's review.

a. The Due Process Clause requires "fair notice of what is prohibited." *FCC* v. *Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012) (citation omitted). Clear statutory text generally provides such notice. See *Bouie* v. *City of Columbia*, 378 U.S. 347, 352 (1964) (holding that due-process principles forbade "judicial construction" that penalized "conduct clearly outside" of statute's scope). But when a statute is ambiguous, a party may show that he or she reasonably relied on an agency pronouncement, though only for "actions which were" in fact "taken in good-faith reliance" on that pronouncement. *NLRB* v. *Bell Aerospace Co., Div. of Textron, Inc.*, 416 U.S. 267, 295 (1974).

Petitioners received various forms of notice about the scope of Section 2(c)(2)(D) and the Commission's understanding of the actual-delivery exception. Section 2(c)(2)(D) became effective on July 16, 2011, and the Commission has alleged that petitioners first violated the CEA on that date. Compl. ¶ 1. As the court of appeals concluded—in a holding that petitioners have not

separately challenged here—"'actual delivery' unambiguously requires the transfer of some degree of possession or control." Pet. App. 18a.

Two years after Section 2(c)(2)(D) was enacted, the Commission published guidance on how it would apply the actual-delivery exception. 78 Fed. Reg. at 52,426. That guidance indicated that the Commission would focus on factors that drew the Atlas platform into serious question: the physical location of the commodity before and after the transaction; the relationships among the buyer, seller, and possessor of the commodity; how the transaction is marketed; and whether a transaction is more than a book entry. *Id*. at 52,428. Here, the CFTC has alleged that the physical location of Atlas metal does not change after a transaction; that Monex retains control at all times; that only Monex has a relationship with the depository; that each transaction is just a book entry; and that Monex's "short" trades do not resemble sales at all. Compl. ¶¶ 38-42. If the Commission ultimately proves those allegations, petitioners could not reasonably have understood the 2013 guidance to endorse the legality of the Atlas platform.

Six months after the Commission issued the 2013 guidance, the Eleventh Circuit decided *CFTC* v. *Hunter Wise Commodities, LLC*, 749 F.3d 967 (2014). That decision, which the court of appeals followed here, see Pet. App. 14a-15a, explained that the phrase "'[a]ctual delivery' denotes 'the act of giving real and immediate possession to the buyer or the buyer's agent.'" *Hunter Wise*, 749 F.3d at 979 (brackets and citation omitted). The Eleventh Circuit observed that "constructive delivery" was insufficient and that, per the Commission's 2013 guidance, "a book entry purporting to show that delivery has been made or that the sale has been covered or

hedged would not suffice." *Id.* at 980. Even if petitioners had previously been uncertain about the scope of Section 2(c)(2)(D), the "judicial gloss" in *Hunter Wise* satisfied any fair-notice requirement. *United States* v. *Lanier*, 520 U.S. 259, 266 (1997).

Around the same time, the Commission began its investigation of Monex. *In re Application to Enforce an Admin. Subpoena of the U.S. Commodity Futures Trading Comm'n* v. *Monex Deposit Co.*, No. 14-6131, 2014 WL 7213190, at *1 (N.D. Ill. Dec. 17, 2014) (*In re CFTC Subpoena*), aff'd *sub. nom. CFTC* v. *Monex Deposit Co.*, 824 F.3d 690 (7th Cir. 2016). Early in that investigation, the CFTC's Division of Enforcement informed petitioners that it had "concerns about whether Monex really transfers possession and control of metals to retail customers" and about "the legitimacy of the 'short' trading positions Monex offers." 14-6131 D. Ct. Doc. 3, at 8, *In re CFTC Subpoena* (N.D. Ill. Aug. 8, 2014). Investigation-stage warnings can also satisfy the requirement of fair notice. See *General Elec. Co.* v. *EPA*, 53 F.3d 1324, 1329 (D.C. Cir. 1995). And if petitioners nevertheless *still* harbored misconceptions about the Commission's views, the subpoena-enforcement action ought to have disabused them: Repeatedly during that litigation, the Commission asserted that actual delivery requires the seller to transfer possession and control, and that Monex's purported delivery appeared to be a sham. See, *e.g.*, 15-1467 C.A. Doc. 25, at 32-33, *CFTC* v. *Monex Deposit Co.* (7th Cir. May 13, 2015); 14-6131 D. Ct. Doc. 48, at 2, *In re CFTC Subpoena* (N.D. Ill. Jan. 23, 2015); 14-6131 D. Ct. Doc. 27, at 4, *In re CFTC Subpoena* (N.D. Ill. Sept. 18, 2014). Petitioners knew that was the CFTC's view, and they contested that interpretation.

See, *e.g.*, 14-6131 D. Ct. Doc. 20, at 22 n.25, *In re CFTC Subpoena* (N.D. Ill. Sept. 4, 2014).

The CFTC in 2017 thus did not "reverse[] prior rulings" and retroactively subject Monex to a new construction of Section 2(c)(2)(D). *Fox Television*, 567 U.S. at 248. Nor did the agency apply a construction that was in tension with the plain meaning of the statute. See *United States* v. *Moss*, 872 F.3d 304, 310 (5th Cir. 2017); *PHH Corp* v. *Consumer Fin. Prot. Bureau*, 839 F.3d 1, 41 (D.C. Cir. 2016), vacated on reh'g en banc, 881 F.3d 75 (D.C. Cir. 2018); see also *Christopher* v. *SmithKline Beecham Corp.*, 567 U.S. 142, 157 (2012) (noting that "[t]he statute and regulations certainly do not provide clear notice"). Instead, since the enactment of Section 2(c)(2)(D), the CFTC has consistently indicated that petitioners' business practices do not fall within the actual-delivery exception, and it has filed enforcement actions against other firms that offer leveraged commodity transactions similar to those offered by petitioners.

b. In arguing that the CFTC is seeking retroactive application of a new construction of the CEA, petitioners largely rely (Pet. 29-32) on statements that predate the relevant statutory amendments, on a misreading of the 2013 guidance, and on a 2017 CFTC proposed interpretive rule. None of those sources suggests that petitioners were deprived of the constitutionally required fair notice.

First, petitioners' reliance (Pet. 29) on a 1985 guidance letter about whether certain sales amounted to futures transactions is irrelevant because the Dodd-Frank Act extended the CFTC's authority beyond futures transactions. See *CFTC* v. *Monex Deposit Co.*,

824 F.3d 690, 693 (7th Cir. 2016).[2] In a 2011 Federal Register release, the CFTC accordingly warned market participants that the 1985 letter "is not relevant to a determination of whether 'actual delivery' has occurred within the meaning of new CEA section 2(c)(2)(D)(ii)(III)(aa)." 76 Fed. Reg. 77,670, 77,671 n.20 (Dec. 14, 2011); see *Hunter Wise*, 21 F. Supp. 3d at 1344 (deeming it "highly unreasonable" for a metals dealer to rely on the 1985 letter after 2011).

Petitioners also rely (Pet. 30) on excerpts from a 2009 congressional subcommittee hearing, primarily comments by witnesses including Monex's own representative. But like anything else that preceded the Dodd-Frank Act, that hearing does not support petitioners' assertion that the CFTC misled them about a statute Congress passed a year later. At the time of the hearing, no bill yet existed, and nobody discussed the meaning of "actual delivery." See C.A. Doc. 35-1, at 191-234 (Oct. 24, 2018). Although Monex's representative urged the subcommittee not to extend the *Zelener* fix to metals, *id.* at 216-218, Congress instead chose to extend the actual-delivery requirement that had previously applied only to foreign currency under Section 2(c)(2)(C) of the CEA, 7 U.S.C. 2(c)(2)(C). See 7 U.S.C. 2(c)(2)(D).

Second, petitioners assert (Pet. 30) that the Commission's 2013 guidance approved "the precise form of delivery that Monex has utilized for more than 30 years." In fact, the cited example states that actual delivery occurs "if, within 28 days, the seller has * * * [p]hysically

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[2] In any event, the Commission long ago explained to Monex that its reliance on the 1985 letter was "misplaced" because there were "clear factual distinctions" between Monex and the entity addressed in the 1985 transaction. *Motzek* v. *Monex Int'l, Ltd.*, CFTC No. 93-R049, 1994 WL 233820, at *5 (June 1, 1994),

delivered the entire quantity of the commodity." 78 Fed. Reg. at 52,428. And the Commission's complaint here alleges that Monex delivered only trade confirmations. Compl. ¶¶ 30, 39-41. Moreover, petitioners do not claim that anything in the guidance supports their "short" trades, in which Monex purports to lend a customer metal that he or she instantly sells back. Compl. ¶ 42. The guidance also explains that delivery to a depository would not constitute "actual delivery" if there is "evidence indicating that the purported delivery is a sham," 78 Fed. Reg. at 52,428 n.25; and the complaint here alleges "sham delivery, not actual delivery." Pet. App. 18a.[3]

Finally, petitioners suggest (Pet. 31) that the CFTC's 2017 proposed (and now-finalized) guidance on actual delivery of virtual currency undermines the agency's prior positions. See 82 Fed. Reg. 60,335 (Dec. 20, 2017). But the 2017 guidance states that the Commission "will continue to follow the 2013 Guidance." *Id.* at 60,339. It also explains that the new interpretive rule was a response to "requests for guidance with regard to the meaning of the actual delivery exception in the specific context of virtual currency transactions." *Id.* at

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[3] Petitioners suggest (Pet. 30-31) that the CFTC's initial position in a different enforcement action involving a different business, *CFTC* v. *Worth Grp., Inc.*, No. 13-cv-80796, 2014 WL 11350233 (S.D. Fla. Oct. 27, 2014), reveals that the Commission once construed the 2013 guidance differently. But the Commission commenced that suit in 2013, and in 2014 the agency made clear its view that the Eleventh Circuit's reasoning in *Hunter Wise* was binding. See *id.* at *3. Petitioners do not explain how the Commission's position in *Worth* could have induced a justifiable belief in the legality of Monex's business practices—practices that began before the 2013 guidance and have continued long after the 2014 *Hunter Wise* decision.

60,337. Any requirements specific to virtual currency have no bearing on whether petitioners in 2011 had fair notice that their metals platform was unlawful.

c. Petitioners identify no decision of any other court of appeals that has found a due process violation based on the CFTC's application of Section 2(c)(2)(D), or in any analogous situation. Indeed, the court below did not address the question, perhaps because it understood that the Commission was *applying* its 2013 guidance rather than *departing* from it. See Pet. App. 17a-18a. Although petitioners briefly raised a due process argument in their court of appeals brief, see Pet. C.A. Br. 29-32, the fact that no court has considered the second question presented counsels strongly against this Court's review.

3. Review in these circumstances is particularly unwarranted because the court of appeals did not decide the merits of the CFTC's claims or of petitioners' due process defense, but simply reversed the district court's judgment granting petitioners' motion to dismiss and held that the CFTC's suit can go forward. The absence of a final judgment "of itself alone furnishe[s] sufficient ground for the denial" of a petition for a writ of certiorari. *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); see *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) (per curiam) (explaining that a case remanded to district court "is not yet ripe for review by this Court").

The current procedural posture would create an especially serious obstacle to this Court's review of the second question presented. As the court of appeals recognized, any affirmative defense of "actual delivery" does not, at a minimum, arise on the face of the CFTC's

complaint. Pet. App. 18a. And while petitioners assert (Pet. 32) that "Monex justifiably relied on * * * numerous agency representations that its business model was secure," the Commission's complaint does not support any claim of justifiable reliance. Indeed, the parties are currently litigating questions of reliance in the district court, and petitioners have argued that discovery is "necessary" to resolve them. D. Ct. Doc. 222, at 2 (Feb. 21, 2020). Because any determination that petitioners lacked fair notice would necessarily rely on factual matter outside the Commission's complaint, the second question presented is particularly unsuitable for review in the case's current procedural posture.

**CONCLUSION**

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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