



Kobre & Kim's Government Enforcement Defense Contacts



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Successfully Fighting a Spoofing or Market Manipulation Subpoena from the DOJ or the CFTC

Over the last two years, the Department of Justice (DOJ) and the Commodity Futures Trading Commission (CFTC) have increased their emphasis on pursuing market manipulation and spoofing offenders. Listed below are five potential methods which are often successful in fighting spoofing or market manipulation subpoenas.

The U.S. government has set its sights on market manipulation and “spoofing” among both traditional and digital currency traders, with both the Department of Justice (DOJ) and Commodity Futures Trading Commission (CFTC) ramping up the number and scope of their investigations over the last two years. Recently, the CFTC’s head of enforcement **confirmed** that the agency is considering action on market manipulation connected to the payment of bribes that could violate the Foreign Corrupt Practices Act.

For the trading firms and other market participants who could be in the government’s crosshairs, now is the time to plan how you will respond to a subpoena. For instance, recipients will often reflexively decide to cooperate with a subpoena, however, in certain cases, an aggressive strategy can have it quashed — compelling regulators to bear the associated fees and expenses.

Five potential methods are often successful in fighting these subpoenas:

1. Get the government to foot the bill.

Agencies must take reasonable steps to avoid imposing undue burden or expense on the person subject to the subpoena, irrespective of location. This is particularly true with respect

to witnesses who are not the primary subject of the agency’s inquiry. If an agency does not adhere to this safeguard, there may be avenues to recover the resulting attorney fees. Likewise, fee shifting may be available in the event the agency tries to enforce the subpoena in court but loses.

2. Show how the subpoena isn’t relevant.

Investigative subpoenas must be approved and issued by appropriate agency officials. For example, the CFTC may only issue subpoenas to persons outside the United States upon the specific approval of the agency’s top-level appointed commissioners. The absence of proper approvals may present good cause to object to a subpoena until it is issued properly.

3. Dissect the scope of the subpoena.

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All investigative subpoenas related to spoofing must be reasonably relevant to a valid agency inquiry, and cannot stray into a mere fishing expedition. Further, subpoenas issued to U.S. nationals and residents located abroad must follow a specific set of criteria: they must be “necessary” in the interest of justice; seek only information that is “not possible” to obtain “in any other manner”; and identify the “specified” documents or “particular” testimony sought. Subpoenas that go beyond these limitations may be objectionable or invalid.

4. Make sure the subpoena was properly served.

An appropriately approved and narrowly tailored subpoena must still be served properly. For traders and trading firms abroad, this typically means service in accordance with international standards and agreements, which can add many months to the process. An extraterritorial subpoena that is not properly served may not have a binding effect.

5. Recipients of objectionable subpoenas may seek affirmative relief.

Traders and trading firms confronted with an agency that is unwilling to acknowledge or compromise over an invalid subpoena may affirmatively seek a protective order or declaration limiting the subpoena or declaring it invalid.

Traders and trading firms that find themselves on the receiving end of a subpoena related to spoofing or market manipulation should not immediately assume that cooperation is the best or only way to respond. Before undertaking the burden, expense, and risk of engaging with the DOJ or the CFTC on their preferred terms, subpoena targets would be wise to consider alternate strategies.

About Kobre & Kim's Government Enforcement Defense Team

Kobre & Kim is an Am Law 200 firm focused exclusively on disputes and investigations that prides itself on serving as zealous and independent advocates in disputes involving government authorities or virtually any private litigant.

Our team, which includes more than twenty former U.S. government lawyers based globally, has served as lead counsel in the most prominent enforcement actions of recent times in the futures and derivatives space, with particular experience defending against allegations of market manipulation and disruptive trading brought by agencies such as the U.S. Securities and Exchange Commission cases and U.S. Commodity Futures Trading Commission.