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CFTC ENFORCEMENT

Are You Ready for the New CFTC Enforcement Regime?



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The recent news that the Commodity Futures Trading Commission (CFTC) is investigating the implosion of MF Global Holdings Ltd., as well as the (unproven) suggestion that MF Global may have used funds from customer accounts to cover its own debts, has brought new prominence to the Division of Enforcement of the CFTC, a body that is often overshadowed by its much larger sibling, the Securities and Exchange Commission (SEC).[1] Although the CFTC is hardly a new player in the regulatory arena, the 2010 passage of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank),[2] significantly expanded its authority over financial markets and complex financial instruments. Much of the CFTC's new authority - which is currently the subject of an extensive, years-long rulemaking process - is directed in significant part at market participants that may be less acquainted with the existing federal regulatory landscape than publicly held companies long subject to extensive SEC oversight.[3] For the market participants that are the focus of Dodd-Frank's derivative reforms - especially hedge funds and others trading in credit-default swaps

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The statements contained in this article do not necessarily represent the views of Ropes & Gray LLP or its clients and are not intended to constitute and do not constitute legal advice.

[1] *See* Susanne Craig et al., Many *Alarms Rang Before MF Global Crashed,* N.Y. Times DealBook Blog (November 2, 2011, 9:22 PM), http://dealbook.nytimes.com/2011/11102/many-alarms-rang-before-mf-global-crashed-in-ruins/.

[2] Pub. L. No. 111-203, 124 Stat. 1376 (2010).

[3] DealBook has reported that Jon Corzine, former Chairman of MF Global, actively (and successfully) lobbied against some of the CFTC's proposed Dodd-Frank rules which may have prevented MF Global's downfall. *See* Azam Ahmed & Ben Protess, *As Regulators Pressed Changes, Corzine Pushed Back, and Won*, N.Y. Times DealBook Blog (November 3, 2011, 8:56 pm), http://dealbook.nytimes.com/2011/11/03/as-regulators-pressed-changes-corzine-pushed-back-and-won/. If true, this news may increase the likelihood that some of the more controversial proposed rules are ultimately approved.

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and other over-the-counter derivatives – Dodd-Frank represents a new landscape of potential enforcement pitfalls that will need to be navigated carefully.

I. The Enforcement Landscape Before Dodd-Frank

Prior to the enactment of Dodd-Frank in 2010, the jurisdiction of federal enforcement officials over derivatives markets – and over swaps in particular – was often unclear, even after the Commodity Futures Modernization Act of 2000,[4] which was intended to provide further legal certainty in this area. Although the SEC generally had jurisdiction over securities, and the CFTC had jurisdiction over commodity futures,[5] many financial instruments, such as credit-default swaps (CDSs), could arguably be subjected to the jurisdiction of *both* agencies, leaving market participants guessing about who had enforcement authority and what were the rules of the road.[6]

The division of labor between the CFTC and the SEC was murky at times. In some instances, both the CFTC and the SEC claimed to have jurisdiction over an enforcement matter. In the mid 2000s, for example, both agencies – as well as the Federal Energy Regulatory Commission (FERC) – sought to investigate Brian Hunter, the former Amaranth Advisors natural gas trader whose trading of natural gas derivatives ultimately led to the sudden collapse of Amaranth's $6 billion fund. Highlighting the overlapping pre-Dodd-Frank enforcement regimes, FERC fined Hunter $30 million in April 2011; the SEC conducted an investigation which it eventually concluded without filing an enforcement action; and the CFTC filed an enforcement action, which is ongoing.

In other instances, it was not clear if either the CFTC or SEC had jurisdiction over the financial instrument at issue. For instance, the International Swaps and Derivatives Association claimed in 2006 that the SEC had no jurisdiction over CDSs, on the ground that CDSs were private contracts that did not trade on traditional exchanges. The defendants in *SEC* v. *Rorech* made a similar argument in unsuccessfully seeking to dismiss an enforcement action by the SEC.[7] Meanwhile, the CFTC claimed that it had no jurisdiction over CDSs because the Commodity Exchange Act excluded most over-the-counter (OTC) derivatives, including CDSs, from the CFTC's regulatory and enforcement jurisdiction.[8]

The question of which enforcement body was responsible for which instruments was further complicated by what each agency could afford to regulate effectively. When it came to resources alone, the CFTC was significantly outmatched, with a little more than 10% of the SEC's financial, staffing, and enforcement resources. In 2008, the SEC had a budget of $906.0 million and a staff of 3,868. The CFTC, by comparison, had a budget of $111.3 million and a staff of 465. The resources of the agencies' respective Divisions of Enforcement were equally disparate: The SEC's Division of Enforcement had a budget of $314.9 million and a staff of 1,209, whereas the CFTC's Division of Enforcement had a budget of $30.0 million and a staff of 119.[9]

The CFTC's relatively undersized budget often meant that its enforcement efforts were comparatively limited and focused on cases alleging price-based (rather than fraud-based) manipulation of commodities markets. At the same time, the CFTC's enforcement efforts, even in this narrow space, were largely unsuccessful, primarily because in most cases, the burden of proof faced by the CFTC was very difficult to meet. To successfully bring a case of market manipulation within its jurisdiction *before* Dodd-Frank, the CFTC had to show that (i) a defendant had the ability to influence market price, (ii) the defendant specifically intended to affect the market price and thereby create an ''artificial'' price, (iii) an artificial price existed, and (iv) the defendant caused the artificial price to occur.[10]

This standard was, in the recent words of one CFTC commissioner, ''nearly impossible'' to meet,[11] for two primary reasons: First, the CFTC has often been unable to establish that the defendant *specifically intended* to manipulate the market. Trading data alone was often insufficient to establish this level of scienter. Emails or voicemails establishing the trader's specific intent could, of course, be more persuasive, but such evidence has been generally hard to come by.[12] Second, the CFTC frequently could not show that the defendant's conduct caused an *artificial price* in the derivative or commodity in question. Neither of these two requirements exists under the longstanding fraud-based manipulation rule in the securities context, as Rule 10b-5 permits a finding of liability based on reckless conduct, not just conduct specifically intended to manipulate a market; and the SEC, at least, is not required to prove loss causation in enforcement actions.[13]

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[4] Pub. L. No. 106-554, 114 Stat. 2763.

[5] 7 U.S.C. § 2(a)(1)(A).

[6] *See* Kara Scannell et al., *Can Anyone Police the Swaps?*, Wall St. J., Aug. 31, 2006, *available at* http://online.wsj.com/article/SB115698777269950171.html.

[7] No. 09-4329, 673 F. Supp. 2d 217 (S.D.N.Y. 2009).

[8] Oral Testimony of Acting Chairman Walter Lukken Before the House Committee on Agriculture (Oct. 15, 2008), *available at* http://www.cftc.gov/ucm/groups/public/@newsroom/documents/speechandtestimony/opalukken-49.pdf.

[9] CFTC Fiscal Year 2009 President's Budget and Performance Plan, *available at* http://www.cftc.gov/ucm/groups/public/@aboutcftc/documents/file/2009budgetperf.pdf; SEC Fiscal Year 2009 Congressional Justification, *available at* http://www.sec.gov/about/secfy09congbudgjust.pdf.

[10] *See In re Cox*, [1986-1987 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 23,786, 1987 CFTC LEXIS 325, at 9, 1987 WL 106879, at *4 (CFTC July 15, 1987).

[11] Comm'r Bart Chilton, The Waiting: Statement Regarding Anti-Fraud and Anti-Manipulation Final Rules, Washington, DC (July 7, 2011), http://www.cftc.gov/PressRoom/SpeechesTestimony/chiltonstatement070711.html.

[12] In the CFTC's enforcement action against Brian Hunter, for example, Hunter moved to dismiss the CFTC's action on the ground that it had not adequately alleged that he specifically intended to affect market prices. The federal court rejected Hunter's argument, pointing to a string of instant messages from Hunter that could plausibly be interpreted to reflect Hunter's specific intent. *CFTC v. Amaranth Advisors, L.L.C.*, 554 F. Supp. 2d 523, 532-33 (S.D.N.Y. 2008). The CFTC action against Hunter is ongoing.

[13] *See Berko v. SEC*, 316 F. 2d 137, 143 (2d Cir. 1963) (reliance, loss causation, and damages not relevant in enforcement actions because ''[t]he Commission's duty is to enforce the remedial and preventive terms of the statute in the public interest, and not merely to police those whose plain violations have already caused demonstrable loss or injury''); *see also United States v. Davis*, 226 F.3d 346, 358 (5th Cir. 2000); *Slusser v.*

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Two recent cases decided before Dodd-Frank was signed into law illustrate the enforcement challenges faced by the CFTC. In *DiPlacido v. CFTC*, the CFTC's only successful price manipulation case to go to trial before Dodd-Frank,[14] an administrative law judge found that DiPlacido manipulated prices for electricity futures contracts based on DiPlacido's practice of buying contracts at prices higher than the lowest available price, and, importantly, based on taped conversations that revealed his intent to manipulate prices.[15] In *United States v. Radley*,[16] by contrast, a Texas federal court dismissed a criminal indictment charging four British Petroleum traders with conspiring to dominate the market for Texas Eastern Transmission Corporation propane and to establish artificially high prices for the commodity. The court held that the government could not show that the defendants, based on their trading activity alone, had *specifically intended* to create an artificial price in violation of the anti-manipulation rules. The *Radley* court further concluded that the Commodity Exchange Act's definition of ''manipulation'' was void for vagueness as applied to this case because the defendants' alleged tactic of placing multiple bids was not sufficient to show an ''artificial'' price, and rather reflected the ''legitimate forces of supply and demand.''[17]

To be sure, the measure of the CFTC's success before the enactment of Dodd-Frank is not solely the number of successful post-trial verdicts. Out-of-court settlements – from the $20 million settlement reached with the Hunt brothers in 1989[18] to the $1 million settlement with Moore Capital's Christopher Pia earlier this year[19] – are not uncommon. But significant budgetary constraints, jurisdictional ambiguity, and a nearly impossible burden of proof in manipulation cases combined to limit the CFTC's influence in the swaps and derivatives markets.

II. The Dodd-Frank Act

The Dodd-Frank Wall Street Reform and Consumer Protection Act, which was signed by President Obama on July 21, 2010, significantly expanded federal regulation of swaps and other derivatives. Among other things, Dodd-Frank enhanced the CFTC's and SEC's authority to bring actions alleging fraud in the swaps markets, established whistleblower protections and financial incentives to report information to regulators, required mandatory clearing of most swaps, and specifically prohibited the making of false statements to the CFTC. Dodd-Frank has also turned the CFTC, in particular, into a rulemaking juggernaut, with more than 50 proposed and final rules already issued as a result.

Dodd-Frank clears up much of the jurisdictional uncertainty engendered between the CFTC and SEC over the years, and now more clearly divides the world of derivatives regulation between the SEC and the CFTC, to help ensure complete and efficient regulatory coverage of swaps and other financial derivatives. In particular, Dodd-Frank provides that the CFTC will have jurisdiction over ''swaps'' and the SEC will have jurisdiction over ''security-based swaps,'' and provides detailed definitions of these two mutually exclusive terms.[20] In general, a ''security-based swap'' is a swap that is based on (i) a single security or loan, or a narrow-based security index, or (ii) the occurrence or nonoccurrence of an event relating to a single security or loan, or a narrow-based security index.[21] A ''narrow-based security index'' is, in general, an index (i) with 9 or fewer securities, (ii) for which one security comprises more than 30% of the index's weighting, or (iii) for which the five largest securities comprise more than 60% of the index's weighting.[22] By comparison, a ''swap,'' over which the CFTC has enforcement jurisdiction, is broadly defined to include (with some specified exceptions) any ''agreement, contract or transaction'' involving derivatives that does not qualify as a security-based swap.[23] The CFTC and SEC have jointly issued proposed rules that specify how particular swaps will be treated for enforcement purposes under Dodd-Frank. In general, the CFTC will be responsible for index-based CDSs, whereas the SEC will be responsible for single-name CDSs and narrow-based security index CDSs.[24]

A. Mandatory Clearing of Swaps and the End-User Exemption. Among other things, Dodd-Frank requires certain categories of swaps to be (i) cleared through derivative clearing organizations and executed on registered trading platforms, and (ii) reported to a registered swap data repository or the CFTC.[25] These requirements are administratively burdensome and impose substantial transaction costs on those market participants affected by them.[26]

There is, however, a limited exemption from these requirements for end-users who are ''hedging commercial

CFTC, 210 F.3d 783, 785 (7th Cir. 2000); *United States v. Haddy*, 134 F.3d 542, 549–51 (3d Cir. 1998).

[14] 364 F. App'x 657 (2d Cir. 2009).

[15] *Id.* at 661.

[16] 659 F. Supp. 2d 803 (S.D. Tex. 2009).

[17] *Id.* at 815–16.

[18] *See* Kurt Eichenwald, *2 Hunts Fined and Banned From Trades*, N.Y. Times, Dec. 21, 1989, *available at* http://www.nytimes.com/1989/12/21/business/2-hunts-fined-and-banned-from-trades.html.

[19] *See* Press Release, CTFC, Christopher L. Pia, Former Portfolio Manager for Hedge Fund Moore Capital Management, LLC, to Pay $1 Million Penalty to Settle CFTC Charges of Attempted Manipulation (July 25, 2011), *at* http://www.cftc.gov/PressRoom/PressReleases/pr6079-11.

[20] Dodd-Frank §§ 721, 761. Dodd-Frank also required the CFTC and FERC to execute a memorandum of understanding within 180 days of its enactment that addresses areas of the agencies' overlapping jurisdiction. *See* Dodd-Frank § 720. They have not yet done so.

[21] 15 U.S.C. § 78c(a)(68) (as added by § 761(a)(6) of the Dodd-Frank Act).

[22] *See id.* § 78c(a)(55)(B).

[23] 7 U.S.C. § 1a(47) (as added by § 721(a) of the Dodd-Frank Act).

[24] Further Definitions, 76 Fed. Reg. 29,818, 29,843-47 (proposed May 23, 2011).

[25] Dodd-Frank §§ 723, 731. Dodd-Frank also imposes margin and capital requirements for certain swap participants. *See* Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants, 76 Fed. Reg. 23,732 (proposed Apr. 28, 2011); Capital Requirements of Swap Dealers and Major Swap Participants, 76 Fed. Reg. 27,802 (proposed May 12, 2011). These requirements apply to ''major swap participants'' and ''swap dealers,'' which are discussed in Section II(B) of this article.

[26] *See generally* Michael Sackheim & Elizabeth M. Schubert, *Dodd-Frank Act Has Its First Birthday, But Derivatives End Users Have Little Cause to Celebrate*, 2 Harv. Bus. L. Rev. Online 1 (2011), http://www.hblr.org/?p=1493.

risk,''[27] which is subject to proposed rulemaking by the CFTC.[28] The proposed rule is designed to protect those commercial entities that seek to manage the ordinary course commercial risk of their business – for example, the airline that wants to hedge against an increase in fuel prices. As explained in a joint release by the CFTC and SEC,

> swap positions that are held for the purpose of speculation or trading are, for example, those positions that are held primarily to take an outright view on the direction of the market, including positions held for short term resale, or to obtain arbitrage profits. . . . [S]wap positions that are held for the purpose of investing are, for example, those positions that are held primarily to obtain an appreciation in value of the swap position itself, without regard to using the swap to hedge an underlying risk.[29]

Under the CFTC's proposed rules, end-users will be exempted from the mandatory clearing requirements if they (i) are not a financial entity, (ii) are using a swap to hedge or mitigate commercial risk, and (iii) certify to the CFTC that they are entitled to use the exemption and provide certain information in connection with that certification. This new regime raises a host of technical, practical, implementation, and compliance issues for end-users wishing to take advantage of the exemption and trade OTC swaps.

Given the prevailing view that excessive leverage was a cause of the 2008 financial crisis, the CFTC will likely consider pursuing enforcement actions against market participants that improperly seek to take advantage of the end-user exemption in order to avoid Dodd-Frank's mandatory clearing requirement. Because end-users are required to provide certifications to the CFTC that they are in compliance with the end-user exemption, the CFTC may pursue enforcement actions based on, among other things, false statements to the CFTC in violation of Section 6(c)(2) of the Commodity Exchange Act.

If implemented as proposed, compliance with the end-user exemption is a potential minefield for some market participants. Determining whether a swap is used by a non-financial entity for the purpose of hedging commercial risk or speculating will, in many instances, be highly complicated and open to significant debate.[30] Market participants who seek to take advantage of the end-user exemption will accordingly need to be especially careful about documenting and confirming their compliance with its requirements. Among many other things, end-users may wish to provide training and guidance to traders regarding mandatory clearing of swaps as well as the exemption requirements; consider setting up an internal hedging committee that ensures compliance with the new rules; and will likely want to prepare contemporaneous documentation regarding trades made for the purpose of hedging commercial risk. In the event the CFTC comes knocking, having a contemporaneous record of the purpose of the trade in question will likely be important.

B. Business Conduct Requirements for Major Swap Participants and Swap Dealers. Dodd-Frank also imposes a host of new business conduct requirements on market participants qualifying as ''major swap participants'' or ''swap dealers.''[31] The precise reach of these new requirements is not yet known because it is not clear who exactly will qualify as a ''major swap participant.'' Under Dodd-Frank, ''major swap participant'' is defined to include financial entities that are (i) ''highly leveraged relative to the amount of capital [they] hold[] and that [are] not subject to capital requirements established by an appropriate Federal banking agency,'' and (ii) ''maintain[] a *substantial position* in outstanding swaps in any major swap category'' determined by the CFTC.[32] What qualifies as a ''substantial position'' in outstanding swaps is addressed in a proposed CFTC rule that employs two tests to determine whether a position qualifies as ''substantial.'' The first test focuses exclusively on an entity's current uncollateralized exposure, whereas the second considers an entity's current uncollateralized exposure as well as an estimate of its potential future exposure. A position that satisfies either test would then be considered ''substantial.''[33]

The CFTC has estimated that roughly 50 entities in the U.S. may qualify as ''major swap participants'' under its proposed definition, though it acknowledges that it does not really know for certain how many organizations – and which organizations – will qualify.[34] In any

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[27] Commodity Exchange Act § 2(h)(7) (as amended by Dodd-Frank).

[28] *See* End-User Exception to Mandatory Clearing of Swaps, 75 Fed. Reg. 80,747 (proposed Dec. 23, 2010).

[29] Further Definitions, 75 Fed. Reg. 80,174, 80,195 n.128 (proposed Dec. 21, 2010).

[30] Four Congressmen have recently filed a bill to amend Dodd-Frank to confirm that all commercial end-users, including utilities, manufacturers, and airlines, would be exempt from Dodd-Frank's margin requirements. The proposed bill would not, however, excuse such market participants from Dodd-Frank's central clearing requirement. As a result, even if Dodd-Frank is amended as proposed, qualifying end-users who would like to trade over the counter and not be subject to the central clearing requirements would still be required to certify to the CFTC that they are hedging for commercial risk—and would accordingly still be subject to potential liability based on those certifications. *See* H.R. 2682, 112th Cong. (2011); *see also* Charles Abbott, *U.S. Lawmakers Say No to Margin on End Users' Swaps*, Reuters, July 29, 2011, *available at* http://www.reuters.com/article/2011/07/29/financial-regulation-margin-idUSN1E76S0RO20110729. The bill was recently sent to the full House. Evan Weinberger, *Bills On Derivatives Trading Rules Move To Full House*, Law360 (Nov. 30, 2011), http://www.law360.com/securities/articles/289571?nl_pk=36923fd4-f6bf-42e3-b8f6-5716a54f8288&utm_source=newsletter&utm_medium=email&utm_campaign=securities.

[31] *See* Dodd-Frank § 731.

[32] Dodd-Frank § 721(33) (emphasis added).

[33] *See* Further Definitions, 75 Fed. Reg. at 80,189. The Managed Funds Association has submitted lengthy comments with suggested changes to the definition of ''substantial position.'' Among other things, the Association contends that the amount by which a financial entity over-collateralizes its current positions should, for purposes of the ''substantial position'' test, offset its potential future exposure. *See* Letter from Stuart J. Kaswell to David A. Stawick and Elizabeth M. Murphy, (Feb. 22, 2011), *at* http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=27887&SearchText=Managed%20Funds.

[34] Regulations Establishing and Governing the Duties of Swap Dealers and Major Swap Participants, 75 Fed. Reg. 71,397, 71,402 (proposed Nov. 23, 2010). Under the CFTC's proposed definition, an entity would qualify as a ''major swap participant'' if (i) it maintains a ''substantial position'' in any one of a number of categories of swaps, (ii) its swaps create ''substantial counterparty exposure that could have serious adverse effectives on the financial stability of the United States banking system or financial markets, or (iii) it is a ''financial

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case, those entities that do end up qualifying as major swap participants will be subjected to registration, margin, and capital requirements, as well as heightened disclosure, business conduct, and suitability obligations. Major swap participants would, for example, be required to (i) keep detailed records regarding their counterparties, including information sufficient to ''[e]valuate the previous swaps experience, financial wherewithal and flexibility, trading objectives and purposes of the counterparty,''[35] (ii) disclose material information about the swaps at issue, including any potential conflicts of interest, and (iii) ''communicate in a fair and balanced manner based on principles of fair dealing and good faith.''[36] Major swap participants have additional responsibilities when engaging in transactions with federal or state agencies, ERISA plans, or endowments (known collectively as ''special entities'' under Dodd-Frank). Before engaging in a transaction with a special entity, a major swap participant must have a ''reasonable basis to believe'' that the special entity is represented by an independent person who is capable of adequately evaluating the risks of the proposed transaction.[37] Major swap participants must also establish detailed internal risk-management procedures and implement conflict-of-interest systems, among other things.[38]

The considerable imprecision and non-commercial nature of these proposed business conduct requirements will almost certainly lead to an increase in enforcement actions and private litigation involving major swap participants. A major swap participant's obligation to ''communicate in a fair and balanced manner based on principles of fair dealing and good faith,'' which the CFTC intends to apply broadly,[39] is far from specific or commercially practical. The CFTC's explanatory comment on this proposed requirement simply says that the rule would obligate major swap participants to ''(1) [p]rovide[] a sound basis for evaluating the facts with respect to any swap, (2) avoid[] making exaggerated or unwarranted claims, opinions, or forecasts, and (3) balance[] any statement that refers to the potential opportunities or advantages presented by a swap with a statement of corresponding risks.''[40] This requirement, if approved, will likely be refined significantly in the imperfect crucible of litigation and regulatory commentary before its parameters become well-known. And when there *is* litigation – likely involving substantial investment losses being viewed by adversaries and regulators in hindsight – the concept of ''fair dealing and good faith'' will as a practical matter likely prove daunting.

Likewise, a major swap participant's heightened obligations with respect to transactions with ''special entities'' will give the CFTC and SEC a new enforcement weapon in complicated cases involving governmental entities, such as the notorious case of Orange County, California's massive bet on ''inverse floaters'' and its subsequent bankruptcy in the mid 1990s.[41] In any case, depending on how many market participants actually qualify as ''major swap participants'' or, rather, simply act as counterparties to ''major swap participants,'' the CFTC's business-conduct requirements will likely significantly alter the nature of many derivatives transactions.

C. Whistleblower Rules. The CFTC has also approved final rules that provide for whistleblower bounties in cases resulting in recoveries exceeding $1 million.[42] The new rules, which are already prompting plaintiffs' law firms to actively recruit potential CFTC whistleblowers, track the whistleblower rules approved by the SEC in May,[43] and create strong incentives for employees to eschew internal compliance mechanisms and instead report misconduct directly to the CFTC in exchange for a possible financial bounty. And the bounty can be quite handsome. Although the rule identifies several factors to be considered in determining the amount of any award – including the significance of the information provided, the degree of assistance provided by the whistleblower, and the CFTC's interest in deterring violations of the provisions at issue – the award can equal 10% to 30% of the total collected by the CFTC. Potential CFTC whistleblowers need only look at the *qui tam* whistleblower context to see how life-changing such awards can be.

The whistleblower rules are especially notable for two reasons: First, like the SEC whistleblower program, the new CFTC whistleblower rules do not require whistleblowers to file internal reports with their employers before contacting the CFTC. In response to vocal criticism, the final version of the rules does include a provision establishing that internal reporting may increase the amount of the whistleblower bounty, though it remains to be seen whether that will actually encourage whistleblowers to address their complaints internally, thereby risking their original source status and allowing the company to remediate misconduct well be-

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entity'' that is ''highly leverage relative to the amount of capital such entity holds and that is not subject to capital requirements established by an appropriate Federal banking agency.'' Further Definitions, 75 Fed. Reg. at 80,185–86.

The SEC has proposed a corresponding rule defining ''major security-based swap participant,'' which largely tracks the CFTC's proposed definition of ''major swap participant.'' The only difference is the financial instrument at issue. *See id*. at 80,215.

[35] Business Conduct Standards for Swap Dealers and Major Swap Participants With Counterparties, 75 Fed. Reg. 80,638, 80,657 (proposed Dec. 22, 2010).

[36] *Id*. at 80,659.

[37] *Id.* at 80,660.

[38] Regulations Establishing and Governing the Duties of Swap Dealers and Major Swap Participants, 75 Fed. Reg. at 71,398.

[39] Business Conduct Standards for Swap Dealers and Major Swap Participants With Counterparties, 75 Fed. Reg. at 80,646.

[40] *Id*.

[41] The SEC did take administrative action under Section 17(a) of the Securities Act of 1933 against Merrill Lynch for its alleged role in the Orange County debacle, imposing a penalty of $2 million. *See* SEC, Order of Aug. 24, 1998, *available at* http://www.sec.gov/litigation/admin/337566.txt. For more information about the Orange County saga, see Leslie Wayne & Andrew Pollack, *The Master of Orange County; A Merrill Lynch Broker Survives Municipal Bankruptcy*, N.Y. Times, July 22, 1998, *available at* http://www.nytimes.com/1998/07/22/business/the-master-of-orange-county-a-merrill-lynch-broker-survives-municipal-bankruptcy.html?pagewanted=all&src=pm.

[42] Whistleblower Incentives and Protection, 76 Fed. Reg. 53,172 (Aug. 25, 2011) (to be codified at 17 C.F.R. pt. 165).

[43] Securities Whistleblower Incentives and Protections, 76 Fed. Reg. 34,300 (June 13, 2011) (to be codified at 17 C.F.R. pts. 240, 249).

fore the regulatory process runs its course and a bounty is calculated. Second, the rules, like their SEC counterparts, also permit those engaged in culpable conduct (but not convicted of that conduct) to receive whistleblower awards, giving rise to a significant potential moral hazard. Under the new whistleblower regime, a trader who is engaged in unlawful trading activity could actually profit from his misconduct by winning the race to the agency, reporting the misconduct, reaching a plea agreement in connection with the misconduct, and subsequently walking away with a hefty bounty.

D. The CFTC's Anti-Manipulation Rules. The CFTC has also implemented two new anti-manipulation rules, one of which could vastly expand its authority to police the swaps markets. The first of these rules adds little to the existing regulatory landscape: New Rule 180.2, which effectively codifies the pre-Dodd Frank anti-manipulation standard, covers overt market manipulation based on market power (which the CFTC calls ''non-fraud-based manipulation''), and is intended to apply to more traditional forms of manipulation such as corners and squeezes.[44] The CFTC will, however, still be required to show that the defendant acted with the specific intent to manipulate the price.[45]

The other new rule, Rule 180.1, represents a significant expansion of the CFTC's authority and is more in line with the fraud-based enforcement tools wielded by the SEC. In particular, Rule 180.1, makes it unlawful for any person, in connection with any swap, or contract of sale of any commodity in interstate commerce, or contract for future delivery on or subject to the rules of any registered entity, to intentionally or recklessly:

> (1) Use or employ, or attempt to use or employ, any manipulative device, scheme, or artifice to defraud;
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> (2) Make, or attempt to make, any untrue or misleading statement of a material fact or to omit to state a material fact necessary in order to make the statements made not untrue or misleading;
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> (3) Engage, or attempt to engage, in any act, practice, or course of business, which operates or would operate as a fraud or deceit upon any person; or
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> (4) Deliver, or cause to be delivered, or attempt to deliver or cause to be delivered . . . a false or misleading or inaccurate report concerning crop or market information or conditions that affect the price of any commodity in interstate commerce . . . .[46]

Rule 180.1 is modeled heavily on SEC Rule 10b-5 under the Securities Exchange Act, and the CFTC has made clear that it intends Rule 180.1 to be interpreted consistent with Rule 10b-5. The rule's precise scope nevertheless remains unclear. In particular, as described below, enforcement of Rule 180.1's terms could arguably extend a market participant's potential liability beyond that under Section 10(b) and Rule 10b-5.

Omissions. Like Rule 10b-5, Rule 180.1 permits liability in cases of omissions of material facts. Under Rule 180.1, like Rule 10b-5, an omission of a material fact may only lead to liability if there is also a breach of some ''preexisting duty'' to disclose. Although this ''preexisting duty'' requirement was apparently intended as a limitation on potential liability under Rule 180.1, it may not turn out to be so narrow. The CFTC's proposed new business conduct standards would obligate major swap participants to disclose to most counterparties significant information regarding the material risks of a particular swap.[47] The business conduct standards would thus obligate counterparties to share a variety of information about the risks of a particular swap before consummating a transaction. The failure to do so could then be treated by the CFTC as a material and actionable ''omission'' under Rule 180.1. Thus, actionable omissions under Rule 180.1 may encompass more conduct than one might have expected at first glance.

Attempts. Rule 180.1 explicitly extends liability to ''attempts'' to engage in fraudulent, deceptive or manipulative conduct. Rule 10b-5, by contrast, does not explicitly prohibit attempts. The SEC has, however, taken the position that Rule 10b-5 extends to attempts,[48] and some courts have suggested that 10b-5 liability – in both enforcement and private actions – does in fact extend to attempts, but only in *dicta*.[49] As a practical matter, it is not clear what exactly constitutes ''attempted'' fraud with respect to a security or swap – one either places the bid or makes the statement, or doesn't.[50] As a result, the precise meaning of ''attempt'' in Rule 180.1 will likely only be developed over time through case law.

'Purchase or Sale.' In a potentially significant deviation from Rule 10b-5's requirement that liability may only be incurred ''in connection with a purchase or sale,'' Rule 180.1 may permit liability in situations where there is a far more attenuated connection to a transaction. The CFTC's issuing release claims that the

[44] Section 747 of Dodd-Frank also expressly prohibits certain ''disruptive'' trading practices, including (i) violating bids or offers, (ii) intentionally or recklessly disregarding the orderly execution of transactions during the closing period, and (iii) ''spoofing (bidding or offering with the intent to cancel the bid or offer before execution).'' The CFTC has issued proposed interpretative guidance for this provision. Antidisruptive Practices Authority, 76 Fed. Reg. 14,943 (proposed Mar. 18, 2011).

[45] Prohibition on the Employment, or Attempted Employment, of Manipulative and Deceptive Devices and Prohibition on Price Manipulation, 76 Fed. Reg. 41,398, 41,407 (July 14, 2011) (to be codified at 17 C.F.R. pt. 180).

[46] *Id*. at 41,410. Manipulation of security-based swaps, rather than swaps, are the subject to Proposed SEC Rule 9j-1. *See* Prohibition Against Fraud, Manipulation, and Deception in Connection With Security-Based Swaps, 75 Fed. Reg. 68560 (proposed Nov. 8, 2010).

[47] Business Conduct Standards for Swap Dealers and Major Swap Participants With Counterparties, 75 Fed. Reg. 80,638, 80,658 (proposed Dec. 22, 2010) (to be codified at 17 C.F.R. pts. 23, 155).

[48] Mem. of Law in Support of Plaintiff's Motion for Summary Judgment Against Martino and CMA Noel Ltd., *SEC v. Martino*, No. 98-3446, 2003 WL 23951765 (S.D.N.Y. filed Feb. 5, 2003).

[49] *See, e.g.*, *SEC v. Martino*, 255 F. Supp. 2d 268, 287 (S.D.N.Y. 2003); *see also Kuehnert v. Texstar Corp.*, 412 F.2d 700, 704 (5th Cir.1969).

[50] In *SEC v. Sebbag*, No. 10-4241 (S.D.N.Y. filed May 26, 2010), the SEC charged Yonni Sebbag, the boyfriend of an administrative assistant at Disney, with securities fraud in connection with his sale of material nonpublic information concerning Disney's earnings to FBI agents posing as hedge fund traders. Sebbag had previously attempted to sell pre-release access to Disney's quarterly earnings to various hedge funds. The funds did not bite, but instead provided information to the FBI that helped it set up the sting. Thus, although the impetus of the SEC's enforcement action were Sebbag's *attempts* to sell material nonpublic information to hedge funds, the resulting charges against him were based upon his actual sale of that information to undercover agents.

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new rule applies during the ''pendency of a contract,'' and not just in connection with a purchase or sale.[51] The CFTC will thus likely take the position that Rule 180.1 could apply to a months- or years-old swap contract, so long as payments are still being made in connection with the contract.

Insider Trading. Rule 180.1 also permits liability for information that is not only misused but stolen. Thus, ''trading on the basis of material nonpublic information that was obtained through fraud or deception . . . may be in violation of final Rule 180.1.''[52] In tracking the language of the securities insider-trading provisions, the CFTC has sought to eliminate the two most troublesome requirements under its pre-Dodd-Frank anti-manipulation standard: Specific intent and artificial price. Rule 180.1 thus permits a determination of liability based upon a showing of recklessness alone; the absence of the incriminating email or voicemail will no longer be a high hurdle to a successful enforcement action. The CFTC also no longer needs to prove an effect on market price.

Rule 180.1 also tracks some of the more recent developments in 10b-5 cases by extending liability to trading based on material nonpublic information obtained through fraud or deception (as opposed to trading based on material nonpublic information lawfully obtained but then misused). In *SEC v. Dorozhko*, a computer hacker gained access to IMS Health Inc.'s Q3 2007 earnings release, and purchased 630 put options before the release was issued.[53] On appeal, in a significant expansion of 10b-5's application to insider trading, the Second Circuit held that computer hacking may be ''deceptive'' for purposes of Securities Exchange Act Section 10(b) even though the hacker did not breach a fiduciary duty.[54] Rule 180.1 is designed to extend liability to these precise circumstances.[55]

Private Right of Action. Section 753 of Dodd-Frank authorizes a private right of action against any person who violates Rule 180.1. The private right of action is arguably broader than that arising out of SEC Rule 10b-5, because it appears to extend liability to anyone who ''willfully aids, abets, counsels, induces, or procures the commission of a violation of'' Rule 180.1.[56] Nevertheless, standing to sue is likely limited to those who, according to the statute, ''purchased or sold'' a derivatives contract.[57] Furthermore, in contrast to the CFTC's burden in anti-fraud enforcement actions, it is likely that a private plaintiff will be required to prove reliance, loss causation, and damages.[58]

III. What's Next?

Although Dodd-Frank is more than a year old, a majority of its rules have yet to be finally adopted and the full extent of its regulatory sweep remains unknown. The CFTC has already finalized 22 Dodd-Frank rules, but it has at least 40 left to go. And the plodding pace of Dodd-Frank rulemaking – which will only worsen as the MF Global investigation consumes a significant portion of the CFTC's resources – generally injects even more uncertainty into the enforcement landscape.

Given the increasingly broad scope of the CFTC's enforcement authority under Dodd-Frank, budget, rather than jurisdiction, is likely to be the most significant check on the CFTC's enforcement abilities. As detailed above, the anti-fraud rule could be read to sweep in virtually any transaction involving derivatives. The new whistleblower rules could also prove an effective tool for generating potential enforcement actions, but only if the CFTC effectively publicizes the program, as the SEC – with its Office of the Whistleblower – has done; proves over time that it has the resources to investigate the claims; and, most importantly, demonstrates that it has the budget to pay out the sizeable awards that entice whistleblowers to come forward. Likewise, the CFTC's ability to conduct examinations of swap dealers and major swap participants for compliance with the Commodity Exchange Act and CFTC regulations will depend, in large part, on the resources at its disposal.

So, will the CFTC get the resources it wants? As of now, the agency's goal is to more than double its enforcement budget for Fiscal Year 2012, from $31.3 million and 68 staff members to $75 million and 235 staff

[51] Prohibition on the Employment, or Attempted Employment, of Manipulative and Deceptive Devices and Prohibition on Price Manipulation, 76 Fed. Reg. 41,398, 41,407 (July 14, 2011) (to be codified at 17 C.F.R. pt. 180) (''[F]inal Rule 180.1 reach[es] all manipulative or deceptive conduct in connection with the purchase, sale, solicitation, execution, *pendency*, or termination of any swap, or contract of sale of any commodity in interstate commerce, or contract for future delivery on or subject to the rules of any registered entity.'' (emphasis added)).

[52] *Id*. at 41,403.

[53] 606 F. Supp. 2d 321 (S.D.N.Y. 2008).

[54] *S.E.C. v. Dorozhko*, 574 F.3d 42 (2d Cir. 2009).

[55] Before Dodd-Frank, trading based on misappropriated information from a government source did not actually violate the Commodity Exchange Act. The most famous example of this was discussed in a 2010 speech by CFTC Chairman Gary Gensler. In the 1983 Eddie Murphy movie ''Trading Places,'' the Duke brothers sought to profit from trades in frozen orange juice futures by using a not-yet-public Department of Agriculture crop report. Eddie Murphy's character intercepts the report and uses it to turn a large profit and ruin the Duke brothers' fortune. In March 2010, shortly before Dodd-Frank was enacted, CFTC Chairman Gary Gensler observed that Murphy's (and the Duke brothers') conduct did not, in fact, violate the Commodity Exchange Act, a major deficiency in the law. Dodd-Frank and Rule 180.1 address this problem. *See* Testimony of Chairman Gary Gensler Before the House Committee on Agriculture Subcommittee on Farm Commodities and Risk Management (Mar. 3, 2010), at http://www.cftc.gov/PressRoom/SpeechesTestimony/opagensler-30.

[56] *See* 7 U.S.C. § 25(a)(1)(D) (as amended by Dodd-Frank) (''[a]ny person . . . who violates this chapter or who willfully aids, abets, counsels, induces, or procures the commission of a violation of this chapter shall be liable for actual damages . . . to any other person who purchased or sold a [futures] contract . . . or swap if the violation constitutes (i) [a violation of Rule 180.1] or (ii) a manipulation of the price of any such contract or swap or the price of the commodity underlying such contract or swap.''). By contrast, in *Central Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164 (1994), the Supreme Court held that a private plaintiff may not maintain an aiding and abetting suit under Section 10(b) of the Securities Exchange Act.

[57] 7 U.S.C. § 25(a)(1)(B), (D) (as amended by Dodd-Frank).

[58] *See* Prohibition of Market Manipulation, 75 Fed. Reg. 67,657, 67,660 (proposed Nov. 3, 2010) (to be codified at 17 C.F.R. pt. 180) (''Reliance, loss causation and damages are elements of private claims, but not enforcement actions brought by the CFTC or SEC. This is so because the government's duty is to enforce the remedial and preventative terms of the statute in the public interest, and not merely to police those whose violations have already caused demonstrable loss or injury.'').

members. That request seems unlikely to be granted, at least in full. This past summer, Republican House leaders actually proposed a $30 million *decrease* from the CFTC's overall 2011 budget of $202.7 million, while the Senate Committee on Appropriations authorized an overall increase of $37.7 million.[59] No matter what happens, the CFTC's budget will still be dwarfed by that of the SEC, whose Division of Enforcement is seeking a budget of $455.7 million and 1,432 staff members for Fiscal Year 2012.

The uncertainty over the CFTC's available resources to effectively regulate swaps markets raises a related question: Jurisdictional overlap with the SEC. Dodd-Frank has increased the number of cases in which the SEC, CFTC, FERC, and other agencies may have some interest. Cases that in previous eras fell primarily within the purview of the SEC's enforcement authority or lacked a clear enforcement mandate may also be of interest to the CFTC. For example, Bart Chilton, a Democratic CFTC commissioner, recently proposed that so-called high frequency traders be required to register with the CFTC, as part of an effort to prevent another May 6, 2010 ''Flash Crash.'' Chilton acknowledged that the SEC has already implemented circuit breaker rules that would stop trading when specific securities have rapid price fluctuations. But Chilton contended that the SEC's actions did not go far enough, and that the CFTC would be entitled to act separately in light of the effect of high-frequency trading on derivatives markets.[60]

The CFTC's Enforcement division is headed by David Meister, who was appointed in November 2010. Meister, a former federal prosecutor at the United States Attorney's Office for the Southern District of New York, has a traditional securities civil/criminal enforcement profile, and he has hit the ground running. In Fiscal Year 2011 (which ended September 30, 2011), the CFTC's Division of Enforcement filed a total of 99 enforcement actions, the highest number in agency history and a 74% increase over the prior fiscal year. The Division also opened more than 450 investigations in the same year – also a record[61] – and has taken the lead role in the expanding investigation related to the MF Global meltdown,[62] notwithstanding the fact that CFTC Chairman Gary Gensler has recused himself from participating in the investigation, reportedly because of a prior business relationship with former MF Global CEO Jon Corzine. It is also in the process of procuring new forensic technology capable of retrieving deleted messages off mobile devices that will enable it to gather even more evidence in connection with its investigations.[63] By all indications, Meister is, consistent with the CFTC's mandate, following in the footsteps of his former DOJ colleague and current Director of Enforcement at the SEC, Robert Khuzami, in pursuing a rigorous enforcement agenda that draws on many of the tools and techniques typically employed by United States Attorney's Offices. The aggressiveness of the Division's enforcement activities is especially significant given that many of the key CFTC Dodd-Frank regulations have not yet even been finalized. The level of enforcement activity will, as a result, almost certainly increase dramatically in coming years.

IV. Key Takeaways

So, what should market participants anticipate moving forward? Above all, they should expect a CFTC that is motivated to assert its enforcement authority in a variety of ways, including the increased use of subpoenas, examinations, and enforcement actions. To prepare for this new enforcement universe, market participants should consider taking a number of steps:

- *First*, market participants should ensure they have robust internal compliance programs, open and visible mechanisms for pinpointing potential regulatory violations, and well-defined programs for encouraging employees and others to report potential violations and rewarding them when they do so.

- *Second*, when they do discover serious misconduct, market participants should consider self-reporting to the CFTC and other entities. Although self-reporting is often anathema to companies, even informal communications with regulators can result in enormous benefits, including the quiet resolution of a matter that otherwise could have set off a firestorm of press coverage and shaken a company to its core.

- *Third*, market participants should prepare for an increase in private litigation arising out of alleged violations of the Commodity Exchange Act and CFTC regulations. Emboldened by the new regulatory regime instituted by Dodd-Frank, plaintiffs' lawyers will likely seek to test the limits of the whistleblower and anti-fraud rules, hoping to extend liability beyond the relatively well-defined parameters in securities fraud cases.

- *Fourth*, market participants seeking to take advantage of the end-user exemption for hedging commercial risk should develop internal processes for reviewing and documenting qualifying trades. Such processes and records will likely be useful in justifying use of the exemption if the CFTC raises questions.

- *Fifth*, market participants who may qualify as ''major swap participants'' should prepare internal policies and procedures that account for the proposed business conduct rules and provide clear direction to those interacting with counterparties.

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[59] Deborah Solomon, *Gensler's Struggles Mark Regulatory Challenges*, Wall St. J., July 19, 2011, *available at* http://online.wsj.com/article/SB10001424052702304567604576454364204190324.html; Press Release, U.S. Senate Committee on Appropriations, Summary: FY12 Financial Services & General Govt. Appropriations Bill (Sept. 14, 2011), *available at* http://appropriations.senate.gov/news.cfm?method=news.view&id=89d1bfeb-03bd-48f8-a22e-aa74c2900d9d.

[60] Bart Chilton, ''Moneyball,'' Speech before the Golden Networking High-Frequency Trading Leaders Forum 2011, Chicago, IL (Oct. 4, 2011), *available at* http://www.cftc.gov/PressRoom/SpeechesTestimony/opachilton-53.

[61] Press Release, CFTC, CFTC Releases Annual Enforcement Results, (Oct. 6, 2011), *available at* http://www.cftc.gov/PressRoom/PressReleases/pr6121-11.

[62] Ben Protess, *With MF Global Case Growing, Agency Expands Enforcement*, N.Y. Times DealBook Blog (Nov. 21, 2011, 5:42 PM), http://dealbook.nytimes.com/2011/11/21/with-mf-global-case-growing-agency-expands-enforcement/.

[63] Bibeka Shrestha, *CFTC Seeks Cellphone Hacking Tools To Aid Probes*, Law360 (Oct. 25, 2011), http://www.law360.com/securities/articles/280292/cftc-seeks-cellphone-hacking-tools-to-aid-probes.

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Dodd-Frank may have resolved some ambiguities regarding the applicability of federal law to various market instruments. But it has also created new ones. The precise contours of the CFTC's ability to successfully bring actions based on derivatives trading remains to be seen. What is certain, however, is that market participants will find themselves contending with a more active regulator, as the CFTC's moment in the enforcement sun has arrived.

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Peter focuses his practice on the areas of transactional and securities litigation as well as government enforcement, corporate governance, and director and officer representations. Known for guiding directors and officers as well as buyout, hedge, and venture capital firms through difficult situations, Peter regularly represents such clients in litigation, pre-litigation, and regulatory investigations. An experienced litigator, Peter has litigated contested merger transactions, including strategic, financial, and going private transactions, complex securities and corporate litigation matters, including the representation of the directors and officers of several public companies in securities class actions and breach of fiduciary duty actions. Peter has also handled a range of regulatory investigations, including investigations by the Securities and Exchange Commission, Department of Justice, and a number of state governments. A trusted counselor, Peter advises boards of directors and board committees on mergers and acquisitions and other strategic alternatives, as well as related-party transactions, internal investigations, and litigation. Peter also regularly advises private equity, hedge fund, and mutual fund clients on indemnification and general partner liability insurance matters.

Representative Clients and Matters

- **Covidien, Ltd:** Successfully represented Covidien Ltd. in defense of shareholder actions in Delaware and Minnesota challenging the $2.3 billion acquisition of ev3, Inc.
- **Millennium Management:** Representing Millennium International, Ltd. in an adversary proceeding in the Lehman Brothers bankruptcy case involving $38 million in swap collateral.
- **Special Committee of Affiliated Computer Services:** Part of deal and trial team that successfully represented the Special Committee of Affiliated Computer Services in the $6 billion acquisition of ACS by Xerox Corporation. Successfully represented Special Committee in numerous shareholder actions in Delaware and Texas.
- **Harvard Management Company:** Lead litigation counsel representing Harvard Management Company in litigation in California state court involving a real estate joint venture in Colorado. Also representing Harvard Management Company and five other large universities in creditor litigation arising out of the recapitalization of the Ginn resorts.
- **Large international investment company:** Successfully represented a large international investment company in shareholder litigation arising out of the bankruptcy of one of its portfolio companies within weeks of making a $10 million investment. Recovered 87.5% of the investment in the portfolio company.
- **BioForm Medical:** Successfully represented BioForm in shareholder litigation in California arising out of the acquisition of BioForm by Merz, GMBH. Successfully opposed a motion for preliminary injunction and merger closed.
- **Green Mountain Coffee Roasters:** Successfully represented Green Mountain in shareholder litigation arising out of the acquisition of Diedrich Coffee. Succeeded in opposing plaintiffs' motion for expedited discovery and merger closed.
- **M&A Advice:** Advises numerous private equity sponsors and public and private companies concerning fiduciary duties and transaction process in financial and strategic transactions.
- **Director and Officer and General Partnership Liability Insurance Advice:** Advises dozens of private equity sponsors, hedge fund and mutual fund complexes, and public and private companies concerning their indemnification protections and liability insurance coverage.
- **Genzyme Corporation:** Represented Genzyme before the First Circuit involving a coverage dispute with its directors and officers liability insurer, Federal Insurance Company. In the action, Genzyme sought to recover the amount of a shareholder class settlement arising from the cancellation of the company's tracking stock in a share exchange. The district court initially dismissed the action, but the First Circuit reversed the dismissal of Genzyme's complaint against Federal and remanded the action to the district court for an award of damages in Genzyme's favor.

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Steven S. Goldschmidt is counsel in the New York office of Ropes & Gray and a member of the firm's Government Enforcement and Securities Enforcement practice groups. Steven concentrates his practice on white-collar criminal defense and enforcement actions involving federal and state regulators and administrative agencies.

Steven has extensive experience representing corporate and individual clients in matters involving health care fraud and abuse, securities fraud, Foreign Corrupt Practices Act violations, anti-kickback violations, off-label marketing practices, antitrust abuse, and in response to Congressional investigations and federal and state regulatory inquiries. He has led numerous internal investigations for clients in the financial services, healthcare, insurance, entertainment, legal, retail products and other industries.

Steven has worked with clients to design and implement compliance programs and has advised clients about the compliance implications of the Dodd-Frank Wall Street Reform and Consumer Protection Act. He is a member of the firm's E-Discovery Committee and regularly advises clients in matters involving complex electronic discovery and information management. Steven also handles employment counseling and litigation.

Steven has served as counsel on numerous trials in federal and state court as well as before arbitration panels and administrative bodies.

Representative Clients and Matters

- Representing a major pharmaceutical company in a Department of Justice and FDA investigation that resulted in hundreds of thousands of dollars in restitution paid to the client;
- Representing a medical device manufacturer in a Department of Justice investigation and federal False Claims Act matter that resulted in closure of the government investigation and voluntary dismissal of the *qui tam* complaint;
- Conducting a compliance assessment for an international pharmaceutical company;
- Representing an international insurance broker in an SEC investigation of alleged violations of the Foreign Corrupt Practices Act;
- Representing a national hospital system in Department of Homeland Security, Department of Justice, and Congressional investigations of alleged healthcare fraud;
- Representing an international pharmaceutical company in wide-ranging Department of Justice, FDA and Congressional investigations into fraudulent marketing and promotional practices;
- Representing a financial services company in an SEC investigation of allegedly improper trading activities;
- Representing a prominent money manager in a securities arbitration;
- Representing an international law firm in a federal employment litigation that resulted in complete summary judgment in favor of the client.

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