

March 8, 2019

## CFTC Expands Enforcement Focus to Foreign Corrupt Practices

### Introduction

On March 6, 2019, at the American Bar Association’s National Institute on White Collar Crime, James McDonald, head of the U.S. Commodity Future Trading Commission’s (“CFTC”) Enforcement Division discussed the CFTC’s growing focus on cases involving violations of the Commodity Exchange Act (“CEA”) related to foreign corrupt practices, and announced a new self-reporting and cooperation advisory for related conduct.

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### Growing Focus on Foreign Corrupt Practices

In his remarks, McDonald warned of the CFTC’s heightened attention on foreign corrupt practices, as these practices could potentially affect the U.S. derivatives markets. He explained that these practices “might constitute fraud, manipulation, false reporting, or a number of other types of violations under the CEA, and thus be subject to enforcement actions brought by the CFTC.”<sup>1</sup>

The CFTC has not traditionally been involved in foreign corrupt practices cases, but foreign corrupt practices can fall under the CFTC’s purview in several ways. McDonald outlined a few examples, including (i) bribes employed to secure business in connection with regulated activities like trading, advising or dealing in swaps or derivatives; (ii) corrupt practices used to manipulate benchmarks that serve as the basis for related derivatives contracts; (iii) prices that are the product of corruption being falsely reported to benchmarks; and (iv) corrupt practices altering the prices in the commodity markets that drive derivatives prices.<sup>2</sup> Although not specifically mentioned in his remarks, one could also envision a scenario in which a payment is made to a foreign government official to obtain confidential government information to gain an advantage in the derivatives or commodities market that could violate both the CEA and the Foreign Corrupt Practices Act (“FCPA”).

Notably, McDonald stated that the Enforcement Division currently has open investigations into conduct involving potential foreign corrupt practices.

McDonald also cited the potential overlap between CEA provisions that encompass foreign corrupt practices and the enforcement of the FCPA by the Department of Justice (“DOJ”) and the Securities and Exchange Commission (“SEC”). In fact, he noted that the CFTC’s cooperation with the DOJ and SEC led to its interest in the foreign corrupt practices space, and that moving forward the agencies will continue to work closely to coordinate investigations and ensure they are “appropriately aimed at identifying and eliminating any gaps in our investigative and regulatory frameworks.” In addition, McDonald expressed the CFTC’s intent not to “pile onto” existing investigations, but rather to work in parallel with other enforcement authorities in order to avoid duplicative investigative efforts. In addition, the CFTC will ensure that any monetary penalties it issues “appropriately account for any imposed by any other enforcement body.”<sup>3</sup> For disgorgement or restitution, the CFTC will give “dollar-for-dollar credit” for payments made in related actions.<sup>4</sup>

<sup>1</sup> Press Release, CFTC, Remarks of CFTC Director of Enforcement James M. McDonald at the American Bar Association’s National Institute on White Collar Crime (Mar. 6, 2019), [https://www.cftc.gov/PressRoom/PressReleases/7884-19?utm\\_source=govdelivery](https://www.cftc.gov/PressRoom/PressReleases/7884-19?utm_source=govdelivery).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

## Self-Reporting and Cooperation Advisory

McDonald also announced new self-reporting and cooperation guidance, outlined in an Enforcement Advisory (the “Advisory”) released on the same day.<sup>5</sup>

The CFTC has given credit for self-reporting and cooperation when determining whether an enforcement action should be brought, the nature of the charges to seek, and the appropriate level of sanctions to impose. As stated in its press release, the Advisory “builds on that foundation to further incentivize individuals and companies to self-report misconduct, cooperate fully in CFTC investigations and enforcement actions, and appropriately remediate to ensure the wrongdoing does not happen again.”<sup>6</sup>

The Advisory applies to entities and individuals not registered (or required to be registered) with the CFTC that “timely and voluntarily disclose” foreign corrupt practices that violate the CEA, as well as cooperate with the Enforcement Division in the investigation and appropriate remediation of the conduct.<sup>7</sup> In such instances, the Enforcement Division will apply a presumption that it will recommend to the CFTC a resolution of no civil monetary penalty, absent any aggravating circumstances. In its evaluation of aggravating circumstances, the Enforcement Division will consider factors such as whether senior management or executives were involved; the misconduct was pervasive within the company; or the company or individual engaged in previous similar misconduct.<sup>8</sup>

Entities registered with the CFTC have existing self-reporting obligations, which include required reporting of any material noncompliance issues under the CEA, so cannot avail themselves of the protections provided under the Advisory. Nonetheless, the Advisory states that registrants are still eligible for a “substantial reduction in the civil monetary penalty” if they self-report and cooperate.<sup>9</sup>

## Looking Ahead

Market participants should be mindful of the CFTC’s regulatory reach and the possibility of enforcement actions related to foreign corrupt practices in the future. Identifying potential issues as early as possible can help in reducing, or avoiding entirely, the imposition of penalties and other sanctions in any enforcement action. In addition, the ramifications and potential benefits of self-reporting possible issues to the CFTC should be carefully considered with the benefit of appropriate counsel.

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<sup>5</sup> Enforcement Advisory: Advisory on Self Reporting and Cooperation for CEA Violations Involving Foreign Corrupt Practices (Mar. 6, 2019), <https://www.cftc.gov/sites/default/files/2019-03/enfadvisoryselfreporting030619.pdf>.

<sup>6</sup> Press Release, CFTC, CFTC Division of Enforcement Issues Advisory on Violations of the Commodity Exchange Act Involving Foreign Corrupt Practices (Mar. 6, 2019), [https://www.cftc.gov/PressRoom/PressReleases/7884-19?utm\\_source=govdelivery](https://www.cftc.gov/PressRoom/PressReleases/7884-19?utm_source=govdelivery).

<sup>7</sup> Enforcement Advisory.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*