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For the First Time CFTC Publishes Enforcement Manual

On May 8, 2019, the Commodity Futures Trading Commission's ("CFTC") Division of Enforcement ("DOE") issued its Enforcement Manual ("Manual") to the general public for the first time. Although the Manual does not create any rights or announce any new policies, it is the first time the CFTC has published its procedures for investigating potential violations of the Commodity Exchange Act ("CEA"), the CFTC Regulations and bringing enforcement actions in one comprehensive manual. It will serve as a valuable resource going forward for compliance officers, entities, and individuals subject to the CFTC's regulation of the U.S. derivative markets. As CFTC Director of Enforcement James McDonald stated, the Manual "aims to increase the level of clarity and transparency" in CFTC enforcement policies, which "should promote fairness, increase predictability, and enhance respect for the rule of law." In that sense, the Manual resembles the enforcement manual promulgated by the Securities and Exchange Commission, which addresses many of the same policy considerations.

The Manual details policies and procedures that govern the DOE's enforcement of the CEA and can serve as a road map for those confronting a possible investigation or enforcement action, of how CFTC's investigations proceed from beginning to end, from initial referral, through preliminary inquiry, formal order of investigation, settlement and/or case closure, and ultimately the potential for a "Wells" process and full-blown litigation or administrative proceeding. The Manual also details important CFTC enforcement policies and initiatives, including those related to the DOE's self-reporting and cooperation program, efforts to work in parallel with other civil and criminal agencies, the CFTC's Whistleblower program, and the Wells process.

Among the most notable provisions of the Manual are the following:

Self-Reporting, Cooperation, and Remediation

The Manual re-emphasizes the CFTC's existing initiative to incentivize cooperation in enforcement matters. The Manual reiterates that efforts to self-report misconduct, fully cooperate with the DOE's investigation, and appropriately remediate will be considered by the DOE in determining whether to bring an enforcement action and, if so, which charges and sanctions to impose. Indeed, the Manual confirms that the DOE may recommend a reduction to any civil monetary penalty commensurate with the degree of cooperation, and that recommendations for the most substantial reductions in civil monetary penalties will be reserved for individuals and entities that self-report misconduct, fully cooperate with the DOE's investigation, and remediate any wrongdoing.

Consistent with previous policy announcements, the Manual provides that the DOE's cooperation assessment focuses on (1) the value of the cooperation to the DOE's investigation; (2) the value of the cooperation to the CFTC's "law enforcement interests"; and (3) a balance of "the level of culpability and history of prior misconduct" with "the acceptance of responsibility, mitigation, and remediation."

Cooperating individuals and entities may be eligible to enter into a deferred prosecution agreement ("DPA") or non-prosecution agreement ("NPA") with the CFTC. The Manual provides clear guidance on the conditions that must be met for each of these respective agreements and the implications for violating a DPA or NPA, including the possibility of the DOE recommending an enforcement action to the CFTC against the individual or entity without limitation.

Cooperative Enforcement

The Manual states that cooperation with criminal authorities and foreign and domestic regulators is a "cornerstone" of the DOE's enforcement program. This is consistent with recent announcements by other U.S. agencies, including the Department of Justice's announcement that it will work cooperatively with other agencies to avoid "piling on" with duplicative prosecutions and penalties.

The Manual also underscores that the DOE may refer matters to other government agencies. This includes referring matters involving willful violations of the CEA and the Regulations, false statements to the CFTC, perjury, obstruction of justice, and other criminal matters to the Department of Justice for criminal prosecution.

Whistleblower Program

The CFTC’s Whistleblower Program incentivizes individuals to voluntarily report violations of the CEA to the CFTC by offering an award between 10% and 30% of the amount of monetary sanctions collected in the subsequent or related enforcement action.

The Manual sets forth the conditions of the Whistleblower Program, including eligibility requirements, reporting procedures, and award application instructions. Importantly, the Manual also describes the statutory and regulatory protections for whistleblowers—citing anti-retaliation and confidentiality provisions in the U.S. Code and Code of Federal Regulations—but warns that whistleblower-identifying information may be disclosed during the course of investigations and litigation through subpoenas, Freedom of Information Act (“FOIA”) requests, or other disclosure mechanisms.

The Wells Process

The DOE has the authority to inform an individual who may be named in an enforcement action of the nature of the allegations against them before the action is filed via a “Wells Notice.” The Manual sets forth factors that the DOE will consider when determining whether to issue a Wells Notice, including:

- whether the DOE has substantially completed its investigation of the potential Wells Notice recipient;
- whether immediate enforcement action is necessary;
- whether the Wells Notice would alert potential defendants to a possible asset freeze or otherwise put at risk funds that the recommendation is intended to protect;
- whether there is a parallel criminal investigation that may be adversely affected by providing a Wells Notice; and
- whether a response from the Wells Notice recipient would be useful to the DOE and CFTC in evaluating complicated factual, legal, or policy issues.

In addition, the Manual explains that Wells Notice recipients and others implicated by the investigation may choose to submit a written statement setting forth their views on any factual, legal, or policy matters relevant to the DOE’s investigation or proposed enforcement action. The Manual also provides helpful guidance on the mandatory filing requirements for such submissions and information about a Wells Notice recipient’s right to request a meeting with the DOE concerning its proposed recommendation to the CFTC.

Closing Investigations

The Manual articulates five factors that the DOE should consider in deciding whether to close an investigation: (1) the seriousness and scope of the conduct and potential violations; (2) the sufficiency and strength of the evidence; (3) the extent of potential harm if an action is not commenced; (4) the applicable statute of limitations; and (5) whether there are any prior enforcement actions by the CFTC or other authorities or criminal prosecutions of the individual or entity.

The DOE *may* send a Closing Letter to individuals and entities to notify them that it has decided to close an investigation as it relates to them and, therefore, not recommend an enforcement action against them to the CFTC. The Manual provides that the DOE will consider “the particular facts and circumstances of each case” when determining whether to send a Closing Letter, but makes clear that such a determination is entirely within the DOE’s discretion.

Implications for Regulated Individuals and Entities

The CFTC's publication of the Manual and Director McDonald's comments signal a focus on uniformity and predictability in enforcement actions across the DOE's multiple offices and teams. The Manual serves as an authoritative resource and offers important guidance when developing compliance programs, or determining whether to self-report potential misconduct. Finally, for individuals or entities subject to a DOE investigation, the Manual's detailed description of the various components of an enforcement action provides useful guidance and an opportunity to fully comply with the DOE's mandate for full cooperation and remediation.

Individuals and entities operating within the purview of the CFTC's enforcement authority should be mindful that the policies set forth in the Manual are subject to change. As the Manual states, it "will be periodically revised and updated." And, with CFTC Chairman J. Christopher Giancarlo's tenure coming to an end, it is possible that the new regime, currently expected to be led by CFTC Chairman-nominee Heath Tarbert, may determine to do so.