

CFTC Enters the Market for Anti-Corruption Enforcement

New enforcement advisory encourages reporting of foreign corrupt practices that the agency intends to pursue under the Commodity Exchange Act.

On March 6, 2019, the Division of Enforcement (Division) of the US Commodity Futures Trading Commission (CFTC or Commission) announced that it will work alongside the US Department of Justice (DOJ) and the US Securities and Exchange Commission (SEC) to investigate foreign bribery and corruption relating to commodities markets.¹ CFTC Enforcement Director James McDonald announced the agency's new interest in this area as the Division issued an enforcement advisory on self-reporting and cooperation for violations of the Commodity Exchange Act (CEA) involving foreign corrupt practices.²

For companies and individuals who participate in the markets for commodities and derivatives — or whose activities may impact those markets — the CFTC announcement adds a new dimension to an already crowded and complex landscape for anti-corruption enforcement. A range of industries, including energy, agriculture, metals, financial services, cryptocurrencies, and beyond, must now consider the CFTC and the CEA when assessing global compliance and enforcement risks relating to bribery and corruption. This article summarizes the new developments and outlines key considerations for industry participants and their legal and compliance teams.

Enforcement Director's Remarks

Announcing the Division's new focus on foreign corruption at the American Bar Association's National Institute on White Collar Crime, McDonald explained that "[c]ompanies and individuals engaging in foreign corrupt practices should recognize that this sort of misconduct 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."³ He added that the CFTC's "involvement in this space" arose "through conversations with our enforcement partners about factual scenarios known to them, to which we at the CFTC might be able to add our expertise about how those facts would affect American derivatives markets."⁴

Recognizing that the Foreign Corrupt Practices Act (FCPA) is enforced by the DOJ and SEC, McDonald noted that the CFTC "will not pile on to other existing investigations," but rather will "investigate in parallel with other enforcement authorities" to "avoid duplicative investigative steps," account for penalties imposed by other authorities, and give "credit for disgorgement or restitution payments in connection with other related actions."⁵

McDonald cited several examples of factual scenarios that could lead to CFTC enforcement in connection with foreign corrupt practices, including:

- “Bribes ... to secure business in connection with regulated activities like trading, advising, or dealing in swaps or derivatives”
- Manipulated prices that are “the product of corruption” and might result in false reporting to benchmarks
- Corruption that may “alter the prices in commodity markets that drive US derivatives prices”⁶

Notably, McDonald stated that the CFTC currently has “open investigations involving similar conduct.”⁷

New Enforcement Advisory on Foreign Corrupt Practices

In tandem with McDonald’s speech, the Division announced an expansion of its existing cooperation policy to address foreign corruption.

Previous enforcement advisories established the Division’s policy of exercising discretion to impose lesser penalties when appropriate to encourage cooperation in CFTC investigations. In January 2017, the Division issued two advisories outlining factors the Division considers in evaluating cooperation by companies and individuals.⁸ In September 2017, the Division updated its policy to place greater emphasis on self-reporting as a key first step, allowing full credit only when “the company or individual self-reports, fully cooperates, and remediates.”⁹ In those circumstances, the Division “will recommend the most substantial reduction in the civil monetary penalty that otherwise would be applicable.”¹⁰

The new advisory extends the benefits of self-reporting, cooperation, and remediation to violations of the CEA involving foreign corrupt practices.¹¹ For companies and individuals not registered with the CFTC, the Division will reward such cooperative steps by applying “a presumption that it will recommend to the Commission a resolution with no civil monetary penalty.”¹² The Division will still “require payment of all disgorgement, forfeiture, and/or restitution resulting from the misconduct at issue,” and it may decline to apply the presumption on penalties if it finds aggravating circumstances, such as company-wide misconduct or senior management involvement.¹³ The Division will “seek all available remedies — including, where appropriate, substantial civil monetary penalties — with respect to companies or individuals implicated in the misconduct that were not involved in submitting the voluntary disclosure.”¹⁴

While the new advisory applies only to companies and individuals who are not registered (or required to be registered) with the agency, it notes that CFTC registrants have “existing, independent reporting obligations” requiring them “to report any material noncompliance issues under the CEA, which would include any foreign corrupt practices that violate the CEA.”¹⁵ The advisory states that registrants who self-report, cooperate, and remediate may still receive a “substantial reduction in the civil monetary penalty,” but the “presumption of a recommendation of no civil monetary penalty will not apply.”¹⁶

In offering incentives for cooperation on foreign corruption, the CFTC’s new advisory parallels the DOJ Corporate Enforcement Policy implemented in April 2016 and further codified in November 2017.¹⁷ Under its program, the DOJ applies a presumption in favor of declination or reduced penalties for companies that voluntarily self-disclose FCPA violations and satisfy the DOJ’s requirements for cooperation and remediation.¹⁸ In the CFTC’s March 6 announcement, the Assistant Attorney General for the DOJ Criminal Division, Brian A. Benczkowski, stated that the DOJ “look[s] forward to working in parallel with the CFTC in cases involving foreign corrupt practices, as well as others.”¹⁹

A Novel Step That Extends Existing Enforcement Priorities

With responsibility for prosecuting FCPA violations residing with the DOJ and SEC, the CFTC has surprised many in the industry by announcing that it will devote precious enforcement resources to foreign corruption.²⁰ The Division's announcement indicates that it believes such conduct abroad "can distort prices and undermine the integrity of our markets here," implicating the CEA's anti-fraud and anti-manipulation provisions.²¹ McDonald also linked "combatting corrupt practices" to protecting markets, noting that "registrants and market participants who obey the law and do the right thing should not be placed at a disadvantage simply because their competitors choose to break the rules."²²

The CFTC's move into foreign corruption enforcement can thus be viewed as an extension of its focus on market integrity. In its 2018 annual report, the CFTC highlighted the fact that it brought more cases involving market integrity last year than ever before, and that some of those cases involved conduct across international borders.²³ The Commission has pursued a series of high-profile market manipulation and spoofing cases in recent years, in markets ranging from interest rates to energy to agriculture to metals.²⁴

Beyond markets, the Division has also displayed a commitment to broader economic integrity concerns, recently establishing a task force to ensure that CFTC registrants comply with applicable Bank Secrecy Act and anti-money laundering rules, including suspicious activity reporting and know-your customer programs.²⁵ The CFTC's new interest in foreign corruption extends these trends.

McDonald noted in his March 6 remarks that the CFTC has open investigations involving conduct relating to foreign corruption.²⁶ By announcing its new policy before bringing any cases, the Division may be signaling its commitment — to the market, other enforcement agencies, and subjects of investigations — to foster quicker resolutions of existing cases and prepare the field for a first action in this area.

Key Takeaways for Navigating the New Landscape

The CFTC's announcement leaves open how the agency will charge foreign corruption offenses under the CEA, what connection to US markets will be required, and whether such charges will fill any gaps in DOJ and SEC enforcement.²⁷ Nonetheless, the announcement makes clear that companies and individuals confronting a potential problem under the FCPA must now consider the CEA's regulatory requirements and broad anti-fraud and anti-manipulation provisions as well. In light of the CFTC's announcement, companies and individuals whose operations involve commodities or derivatives should bear in mind the following considerations:

- **Compliance and Training:** Companies should review their anti-corruption compliance and training programs to ensure that they provide appropriate guidance for business units and personnel who trade commodities and derivatives or who interact with government officials and government-owned enterprises in these markets.
- **Investigating Foreign Corruption:** If a potential incident of bribery or corruption has been detected, a company's analysis should include an assessment of any connections the incident may have to commodities, including physical commodity transactions, derivatives trading and clearing, and price reporting. In time, the CFTC may bring enforcement actions that provide guidance on how and when it will police foreign corruption. In the absence of such guidance, companies should think broadly about potential connections to commodities and the CEA.
- **Registrant Reporting:** Swap dealers, futures commission merchants, and other CFTC registrants confronting a potential incident of foreign corruption should consider their reporting obligations under

the CEA and CFTC regulations. The new advisory makes clear that the Division regards foreign corrupt practices as a subject of reporting duties. And while the presumption of no penalty does not apply for registrants, the new advisory notes that registrants may still receive substantial credit for reporting and cooperation.

- **Voluntary Self-Reporting:** Even when a company or individual does not have a regulatory duty to report an incident of foreign corruption to the CFTC, they should consider whether to self-report to the agency pursuant to the new advisory. In doing so, the company or individual must be prepared to anticipate and address the concerns of the CFTC in addition to those of the DOJ, SEC, and international authorities, and to cooperate with multiple agencies simultaneously.²⁸
- **Whistleblowing:** Companies should be aware that the Division's announcement serves as an invitation for whistleblowers to report foreign corruption to the CFTC. McDonald noted in his March 6 remarks that the CFTC's Whistleblower Office "remains open and ready for business," that it "issued a record number of whistleblower awards last year, with record payments to whistleblowers," and that the Whistleblower Program "applies to CEA violations involving foreign corrupt practices, just as it does in other areas."²⁹ The CFTC recently highlighted that this program is available to whistleblowers in foreign countries.³⁰ The Division has thus notified potential whistleblowers (and the attorneys who often represent them) that tips to the CFTC on foreign corruption may entitle whistleblowers to significant monetary awards.

Conclusion

The CFTC Division of Enforcement's announcement of its interest in investigating and prosecuting violations of the CEA involving foreign corrupt practices opens a new chapter in the complex landscape for foreign corruption compliance and enforcement. While the scope and impact of the CFTC's role in foreign corruption enforcement remains to be seen, companies and individuals who operate in the commodities and derivatives markets — whether or not they are registered with the CFTC — now face a new set of considerations when evaluating their global compliance programs, confronting any foreign corruption risks that may arise, and making decisions about self-reporting of potential violations.

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Endnotes

- 1 CFTC Press Release No. 7884-19, 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> (March Press Release).
- 2 Remarks by CFTC Enforcement Director James M. McDonald at the Am. Bar Ass'n Nat'l Institute on White Collar Crime (Mar. 6 2019), <https://www.cftc.gov/PressRoom/SpeechesTestimony/opamcdonald2> (McDonald Remarks).
- 3 Id. at 1.
- 4 Id.
- 5 Id. at 2.
- 6 Id. at 1.
- 7 Id.
- 8 CFTC Enforcement Advisory: Cooperation Factors in Enforcement Division Sanction Recommendations for Companies (Jan. 19, 2017), <https://www.cftc.gov/sites/default/files/idc/groups/public/@Irenforcementactions/documents/legalpleading/enfadvisorycompanies011917.pdf> (January 2017 Advisory for Companies); CFTC Enforcement Advisory: Cooperation Factors in Enforcement Division Sanction Recommendations for Individuals (Jan. 19, 2017), <https://www.cftc.gov/sites/default/files/idc/groups/public/@Irenforcementactions/documents/legalpleading/enfadvisoryindividuals011917.pdf> (January 2017 Advisory for Individuals). The January 2017 advisories supplemented and replaced previous statements regarding cooperation by companies in 2004 and 2007. See Jan. 2017 Advisory for Companies, at 1; Jan. 2017 Advisory for Individuals, at 1.
- 9 CFTC Enforcement Advisory: Updated Advisory on Self Reporting and Full Cooperation (Sept. 25, 2017), <https://www.cftc.gov/sites/default/files/idc/groups/public/@Irenforcementactions/documents/legalpleading/enfadvisoryselfreporting0917.pdf> (September 2017 Advisory).
- 10 Id. at 3. This credit is available for civil monetary penalties. The September 2017 Advisory noted that the company or individual must still “disgorge profits ... resulting from any violations.” Id.
- 11 CFTC 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>.
- 12 Id. at 1.
- 13 Id. at 1-2.
- 14 Id. at 2.
- 15 Id. at 1 n.1.
- 16 Id.
- 17 U.S. Dep't of Justice, Criminal Division, Fraud Section's FCPA Enforcement & Guidance (Apr. 5, 2016), <https://www.justice.gov/archives/opa/blog-entry/file/838386/download>. For additional information about the DOJ policy, please see our previous client alert, DOJ Expands and Codifies Policy Incentivizing Corporations to Voluntarily Self-Disclose FCPA Violations (Nov. 30, 2017), <https://www.lw.com/thoughtLeadership/DOJ-policy-corporations-voluntarily-self-disclose-FCPA-violations>.
- 18 United States Attorneys' Manual, Insert No. 9-47.120, FCPA Corporate Enforcement Policy, at 1 (Nov. 29, 2017), <https://www.justice.gov/criminal-fraud/file/838416/download> (Corporate Enforcement Policy).
- 19 March Press Release. In addition to the DOJ and SEC, the CFTC may also coordinate on foreign corruption matters with international regulators such as the UK Serious Fraud Office, the UK's key anti-corruption enforcement authority. See U.K. Serious Fraud Office, Matthew Wagstaff, Joint Head of Bribery & Corruption, speaking at The Lawyer's Managing Risk and Litigation 2018 Conference (Nov. 21, 2018), <https://www.sfo.gov.uk/2018/11/21/current-priorities-and-future-directions/> (noting that the SFO is “charged with investigating and prosecuting cases of serious or complex fraud, bribery and corruption and associated money laundering,” that this “remains, very clearly, our focus,” and that “it’s important that we work alongside other, similar, agencies, both here and abroad”).
- 20 In the most recent Congressional appropriations, the CFTC received a 7.6% budget increase – its first in several years – but the agency's total annual appropriation of \$268 million remains approximately 16% of the SEC's budget and less than 1% of the DOJ's budget. See Alison Noon, In Spending Plan, CFTC Gets Funding Boost, SEC Can Move, Law360 (Feb. 15, 2019), https://www.everycrsreport.com/files/20180502_R44938_776ac0838068ddc265bbe3404cd52faae7b3441d.pdf (reporting a total annual budget of \$268 million for the CFTC and \$1.675 billion for the SEC); Congressional Research Service, FY2018 Appropriations for the Department of Justice, at 2 (May 2, 2018) https://www.everycrsreport.com/files/20180502_R44938_776ac0838068ddc265bbe3404cd52faae7b3441d.pdf (“For FY2018, DOJ received a total of \$30.384 billion in funding through the annual appropriations process.”).
- 21 McDonald Remarks, at 1; March Press Release.
- 22 McDonald Remarks, at 2.

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- 23 “[F]rom 2009 to 2017, the CFTC, on average, brought about six [market integrity] cases per year,” but in 2018 filed 26 such cases. Speech of CFTC Enforcement Director James M. McDonald Regarding Enforcement Trends at the CFTC, NYU School of Law: Program on Corporate Compliance & Enforcement, at 3 (Nov. 14, 2018), <https://www.cftc.gov/PressRoom/SpeechesTestimony/opamcdonald1> (McDonald November 2018 Speech); see also CFTC, Annual Report of the Division of Enforcement, at 10 (Nov. 2018) (noting that recent market integrity cases have involved facts that “cross markets, cross exchanges, and even cross international borders”), https://www.cftc.gov/sites/default/files/2018-11/ENFAAnnualReport111418_0.pdf (CFTC 2018 Annual Report).
 - 24 The Division recently announced a task force on spoofing and manipulative trading to advance its work in such cases. CFTC 2018 Annual Report, at 5. The CFTC has also recently filed insider trading cases based on new authority embodied in the Dodd-Frank Act and related CFTC regulations. See, e.g., CFTC Press Release No. 7459-16, CFTC Orders Jon P. Ruggles to Disgorge More than \$3.5 Million in Trading Profits and Pay a \$1.75 Million Penalty for His Illegal Futures and Options Trading (Sept. 29, 2016), <https://www.cftc.gov/PressRoom/PressReleases/pr7459-16>. As the focus of another new task force, see CFTC 2018 Annual Report, at 6, insider trading and protection of confidential information may also be another avenue the Division explores in regard to foreign corrupt practices.
 - 25 See McDonald November 2018 Speech, at 6; CFTC 2018 Annual Report, at 6.
 - 26 McDonald Remarks, at 1.
 - 27 The Second Circuit recently cabined DOJ’s international reach under the FCPA in *United States v. Hoskins*, 902 F.3d 69, 97 (2d Cir. 2018) (holding that DOJ could not “expand the extraterritorial reach of the FCPA” using conspiracy and accomplice liability). The international reach of the CEA has also been the subject of recent judicial rulings, in the context of private causes of action under Section 22 of the CEA. See, e.g., *Choi v. Tower Research Capital LLC*, 890 F.3d 60, 66-68 (2d Cir. 2018) (holding that “plausible allegations that parties to a transaction subject to the CEA [had a meeting of the minds] in the United States suffice to overcome a motion to dismiss CEA claims on territoriality grounds”); *Loginovskaya v. Batratchenko*, 764 F.3d 266, 272-75 (2d Cir. 2014) (holding the “domestic transactions test” applied to CEA claims such that the “CEA creates a private right of action for persons anywhere in the world who transact business in the United States”); *In re North Sea Brent Crude Oil Futures*, 256 F. Supp. 3d 295, 309-10 (S.D.N.Y. 2017) (holding that a domestic transaction “is not alone sufficient to state a properly domestic claim” under the CEA where the claims are “so predominantly foreign” that individuals and entities would be “subject to multiple, and potentially incompatible laws”).
 - 28 For additional discussion of strategic considerations in cooperating with the CFTC Division of Enforcement, see our previous article, *CFTC Self-Reporting Policy Leaves Open Several Questions*, Law360 (Oct. 5, 2017), <https://www.law360.com/articles/966575/cftc-self-reporting-policy-leaves-open-several-questions>.
 - 29 McDonald Remarks, at 2. Over the past few years, the CFTC has issued several large whistleblower awards, including a recent award of \$2 million in March 2019 and the agency’s largest ever award of \$30 million in July 2018. See CFTC Press Release No. 7882, *CFTC Announces Whistleblower Award Totaling More Than \$2 Million* (Mar. 4, 2019), <https://www.cftc.gov/PressRoom/PressReleases/7882-19>; CFTC Press Release No. 7753-18, *CFTC Announces Its Largest Ever Whistleblower Award of Approximately \$30 Million* (July 12, 2018), <https://www.cftc.gov/PressRoom/PressReleases/7753-18>. The CFTC’s Whistleblower Program provides financial incentives to report misconduct by awarding eligible whistleblowers ten to thirty percent of total resulting penalties. For additional information, see our previous article, *Whistling a Common Tune: CFTC Finalizes Rule Amendments to Provide Greater Protection and Clarify Incentives for Whistleblowers*, Corporate Counsel (June 12, 2017), <https://www.lw.com/thoughtLeadership/whistling-common-tune>.
 - 30 In July 2018, the CFTC publicized an award of over \$70,000 to a whistleblower living in a foreign country, “signal[ing] to whistleblowers around the world that anyone with information about potential violations of the [CEA] can participate in the CFTC’s Whistleblower Program.” CFTC Press Release No. 7755-18, *CFTC Announces First Whistleblower Award to a Foreign Whistleblower* (July 16, 2018), <https://www.cftc.gov/PressRoom/PressReleases/7755-18>.