CFTC Is Latest Entrant to Anti-Corruption Enforcement

March 11, 2019

On March 6, 2019, Commodity Futures Trading Commission ("CFTC") Director of Enforcement James McDonald announced an initiative to pursue foreign corrupt practices that constitute violations of the Commodities Exchange Act ("CEA"), noting that the Enforcement Division already has open investigations involving such conduct. The same day, the Enforcement Division issued an Advisory encouraging companies and individuals not registered, nor required to be registered, with the CFTC ("non-registrants") who are nonetheless subject to the CFTC's enforcement power to voluntarily disclose foreign corrupt practices by establishing a presumption of no civil monetary penalty where the disclosure is followed by full cooperation and appropriate remediation in the absence of aggravating circumstances.[1]

It remains to be seen how much impact the CFTC's official entry into an already crowded enforcement space, along with its enhanced voluntary disclosure program, will have on scenarios where companies suspect or detect conduct that might violate both the CEA and the Foreign Corrupt Practices Act ("FCPA"). However, it will undoubtedly add another layer of complexity to a company's analysis of the costs and benefits of voluntarily disclosing such matters. It may also add complexity and costs to the investigation and resolution of those matters, depending on what type of cases the CFTC pursues and how closely it adheres to its commitment not to pile onto existing investigations by the Department of Justice ("DOJ") and the Securities and Exchange Commission ("SEC").

Foreign Corruption Initiative

In remarks at the American Bar Association's National Institute on White Collar Crime,[2] McDonald announced that foreign corrupt practices are now a CFTC enforcement priority and provided several examples of conduct that might violate the CEA and undermine domestic markets.[3] Although the CEA does not contain corruption-specific provisions, McDonald noted that foreign corrupt 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." By way of example, McDonald stated that bribes might be used to secure business involving swaps or derivatives or to manipulate benchmarks or benchmark-related pricing, thereby violating provisions in the CEA. He further noted that the CFTC already has "open investigations involving similar conduct."[4]

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[1] The CFTC's enforcement power extends beyond registrants for certain offenses. *See* 7 U.S.C. §§ 13(a), 13b. For example, the CFTC may enforce the prohibition against market manipulation against any individual, regardless of their registration status. *Id.* § 9. As noted in the Advisory, CFTC registrants have existing reporting obligations to the CFTC that, among other things, require them to report any material noncompliance issues under the CEA. *See, e.g.*, 17 C.F.R. § 3.3(e)(5).

[2] **https://www.cftc.gov/PressRoom/SpeechesTestimony/opamcdonald2**.

[3] The CFTC has exclusive jurisdiction over the CEA, which governs individuals and organizations involved with derivatives, futures, and swaps markets. 7 U.S.C. § 2(a)(1)(A) (2018).

[4] Prior to his CFTC appointment, McDonald served as an Assistant U.S. Attorney in the Public Corruption Unit of the U.S. Attorney's Office for the Southern District of New York.

Acknowledging that these scenarios might also violate the FCPA, McDonald emphasized that the CFTC would work closely with the DOJ and the SEC to "avoid duplicative investigative steps."[5] McDonald also stressed that the CFTC would not "pile onto" other investigations, would coordinate any penalties, and would provide "dollar-for-dollar credit" for disgorgement or restitution paid to resolve related actions.[6]

Enhanced Incentive for Corruption-Related Disclosures

In tandem with McDonald's remarks, the Enforcement Division announced an enhanced incentive for timely and voluntary disclosure of CEA violations involving foreign corruption.[7] Prior enforcement Advisories provided for a "substantial" reduction in civil monetary penalties where self-reporting was accompanied by full cooperation and appropriate remediation,[8] much like the FCPA Pilot Program that the DOJ implemented in April 2016. The new Advisory, which borrows heavily from the FCPA Corporate Enforcement Program the DOJ implemented in November 2017, goes one step further by establishing a presumption that the Enforcement Division will not recommend a civil monetary penalty where non-registrants "timely and voluntarily" disclose CEA violations involving foreign corruption. The presumption applies only if the disclosure is followed by "full cooperation and appropriate remediation," as those terms are defined in the 2017 Advisories. Further, the presumption applies only in the absence of "aggravating circumstances," which include but are not limited to the involvement of executive or senior management, the pervasiveness of the misconduct, and whether the company or individual has previously engaged in similar misconduct. Additionally, the Advisory makes clear that the Division will "still require payment of all disgorgement, forfeiture, and/or restitution resulting from the misconduct at issue." Both registrants and non-registrants that do not voluntarily disclose but nevertheless undertake "full cooperation and appropriate remediation" remain eligible for a "substantial" reduction in civil monetary penalty pursuant to the 2017 Advisories.

Implications and Areas to Watch

For more than a decade, one of the most consistent trends in the anti-corruption enforcement space has been the increasing multijurisdictional nature of both investigations and resolutions as a result of increased enforcement abroad. This trend has added significant complexity and often cost to investigating, if not resolving, corruption-related matters. The CFTC's greater prominence in this space may result in these same impacts being felt even where the enforcement is exclusively domestic. The CFTC's awareness of this risk no doubt underlies its commitment to closely coordinate with the DOJ and the SEC both with respect to investigations and the monetary aspects of any resolutions. The true test, however, will be how the CFTC exercises its discretion in this already crowded enforcement space.

Another significant question will be the type of conduct that will be subject to CFTC enforcement. In addition to the examples included in McDonald's remarks, such as violations of the CEA's price

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[5] In a panel following his speech, McDonald pointed to recent FCPA actions against the investment bank Société Générale and the hedge fund Och-Ziff Capital Management Group as examples of cases that might involve CFTC enforcement. McDonald did not suggest that either organization had actually violated the CEA, but that both companies had been involved in commodities markets and were subjects of DOJ FCPA cases.

[6] Indeed, following McDonald's announcement, Assistant Attorney General Brian A. Benczkowski noted that the DOJ "look[s] forward to working in parallel with the CFTC in cases involving foreign corrupt practices, as well as others." *See* **https://www.cftc.gov/PressRoom/PressReleases/7884-19**.

[7] **https://www.cftc.gov/sites/default/files/2019-03/enfadvisoryselfreporting030619.pdf**.

[8] **https://www.cftc.gov/sites/default/files/idc/groups/public/@lrenforcementactions/documents/legalpleading/enfadvisoryselfreporting0917.pdf**.

manipulation provisions,[9] other possibilities include efforts to conceal the payment of bribes by misrepresenting that funds were being invested in futures or swaps, which could potentially fall under a number of fraud-related provisions in the CEA.[10] Additionally, as in the FCPA context, entities registered with the CFTC are subject to recordkeeping requirements, meaning that an organization might also find itself in violation of the CEA if it fails to keep accurate records to conceal bribes.[11]

If you have any questions regarding the matters covered in this publication, please contact any of the lawyers listed below or your regular Davis Polk contact.

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[9] *See*, *e.g.*, 7 U.S.C. §§ 9(1), 9(3).

[10] *See*, *e.g.*, *id.* § 6o.

[11] See, *e.g.*, 17 CFR § 4.23.