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ENFORCEMENT TRENDS

Practical Implications of the CFTC's Enforcement Advisory on Foreign Corrupt Practices

By Kathleen McArthur and Aisling O'Shea, *Sullivan & Cromwell*

On March 6, 2019, the CFTC issued a new Enforcement Advisory, signaling for the first time its intention to become involved in investigations relating to foreign corrupt practices. Specifically, the March 2019 Advisory announced that the CFTC's Division of Enforcement will apply a presumption in favor of resolutions with no civil monetary penalty for certain companies and individuals who voluntarily disclose to the Division violations of the Commodity Exchange Act (CEA) involving foreign corrupt practices.

This presumption is available only for companies or individuals whose self-disclosure is followed by full cooperation and remediation, and it applies only to companies and individuals that are not (and are not required to be) registered with the CFTC. In addition, the presumption may not be available in matters involving aggravating circumstances related to the nature of the offender or the seriousness of the offense, including, but not limited to, the involvement of executive or senior level management of the company, misconduct that was pervasive within the company, or a prior history of the company or individual engaging in similar misconduct.

Although the March 2019 Advisory speaks of "foreign corrupt practices," it does not define that term and never refers expressly to the Foreign Corrupt Practices Act, likely because enforcement authority under the FCPA rests with the DOJ (for criminal violations of the statute) and the SEC (for civil violations of the statute by U.S. issuers). No provision of the FCPA confers jurisdiction on the CFTC to enforce the statute, and CFTC personnel have been clear in their public remarks that the agency does not seek to do so. Instead, the CFTC's announcement focuses on violations of the CEA (an area already within the CFTC's jurisdiction) that involve foreign corrupt practices.

The March 2019 Advisory might thus be viewed merely as an indication of the CFTC's enforcement priorities, rather than as an expansion of the agency's activities. However, the nature of the priorities that the Advisory has announced – which lie on the outer edges of the CFTC's regulatory authority, rather than at its core – suggests a more expansive view of the agency's enforcement agenda and foretells increased complexity in CFTC and FCPA enforcement matters on a number of fronts, as discussed below.

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Expanded CFTC Enforcement Agenda for Non-U.S. Conduct and Conduct in Cash Markets.

In connection with the announcement of the March 2019 Advisory, CFTC Enforcement Director James McDonald described a number of factual scenarios in which he anticipates the Advisory would be applicable, including (among others) the use of corrupt practices to manipulate benchmarks as well as the false reporting of prices (for cash market transactions) that are the product of corruption to relevant benchmarks. More expansively, McDonald observed that "corrupt practices in any number of forms might alter the prices in commodity markets that drive U.S. derivatives prices."

As its name suggests, the CFTC's core regulatory jurisdiction encompasses U.S. markets for commodity futures (and swaps, post-Dodd-Frank). However, the CFTC's anti-manipulation authority also extends to transactions in the spot (or "cash") commodities markets (*i.e.*, transactions to buy or sell the commodities (whether oil, gold, wheat or bitcoin) on which futures contracts are traded). This is so because manipulative conduct in the spot markets could influence prices for the products that lie at the core of the CFTC's regulatory authority (*i.e.*, futures and swaps).

The full scope of the CFTC's enforcement authority over conduct in the spot markets is the subject of a number of ongoing court battles, with the CFTC staking out expansive interpretations of its authority to pursue spot market conduct pursuant to the new anti-manipulation authority granted to it under Dodd-Frank, in CEA Section 6(c)(1).[1] As implemented by CFTC Rule 180.1, this provision of the CEA makes it unlawful for any person, in connection with a transaction in swaps, futures or a commodity covered by the CEA, to "knowingly or recklessly" (a) employ or attempt to employ "any manipulative device, scheme or artifice to defraud," (b) make any material misrepresentation (or omission), (c) "engage or attempt to engage, in any act, practice of course of business, which operates or would operate as a fraud or deceit upon any person" or (d) "deliver or cause to be delivered" a "false or misleading or inaccurate report" concerning crop or market information, or conditions that tend to affect the price of any commodity within the meaning of the statute.[2]

Critically, the scienter requirement for a violation of Rule 180.1 is mere recklessness. Many of the scenarios McDonald identified as areas where the March 2019 Advisory would be relevant appear to relate primarily to activity in the spot markets, suggesting that the Enforcement Division's intense focus on activity in those markets will continue.

The CFTC similarly has taken an expansive view of the extraterritorial application of the CEA, which does not explicitly provide for extraterritorial application, and the agency's authority to pursue conduct that occurs outside the United States.[3] Given that most FCPA cases concern at least some extraterritorial conduct, and given the different framework for analyzing the scope of the extraterritorial application of the FCPA, the CFTC's announcement that it intends to pursue CEA violations involving foreign corrupt practices is a signal that the CFTC intends to continue to push the territorial limits of the CEA.

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Increased Complexity of Self-Reporting Decisions

Companies with potential FCPA issues have long faced the question of whether and when to self-report to the DOJ and SEC. Since the implementation of the DOJ Pilot Program in 2016, followed by the formalization of the FCPA Corporate Enforcement Policy in 2017, the DOJ has attempted to provide clear incentives for companies to self-report.

While the SEC has not adopted an analogous policy, U.S. issuers that choose to disclose to the DOJ in an effort to obtain the benefits of the Corporate Enforcement Policy typically opt to self-disclose to the SEC as well, in order to ensure that both relevant authorities are on an equal playing field. The addition of the CFTC as a third potential authority for self-disclosure renders an already complicated question for companies far more complex.

As a threshold matter, the March 2019 Advisory is far less clear about its application than is the FCPA itself (which has never been praised as a model of clarity), so companies may have a difficult time making even a threshold determination as to whether disclosure to the CFTC should be considered. For example, a company may easily determine that it is a U.S. issuer, and accordingly that the SEC is among the authorities to which it should consider self-disclosing; it seems much harder for a company to determine, particularly at the outset of an inquiry, whether its corruption concerns might run afoul of the CEA.

Moreover, as a strategic matter, the injection of a potential third U.S. authority into an already crowded governmental line-up (particularly in light of the ever-increasing focus of foreign authorities on corruption issues) may make the decision to self-disclose, and everything that flows from that decision, much harder. To the extent CFTC registrants do not see a meaningful benefit to self-disclosure because the presumption against civil money penalties does not apply to them, they may choose not to make such disclosures in cases where the nexus between the foreign conduct and U.S. markets is not immediately clear.

See "What to Consider When Deciding Whether to Self-Disclose: An Interview With Steptoe's Lucinda Low" (Apr. 4, 2018).

Increased Complexity of FCPA Investigations

The lack of clarity in the March 2019 Advisory, and the potential expanded scope of U.S. enforcement related to foreign corruption, are likely to make scoping and conducting internal investigations much more complex for companies that believe they might be subject to the CFTC's enforcement of CEA violations that involve foreign corrupt practices.

First, as discussed above, the application of the March 19 Advisory remains unclear. The Advisory does not define "foreign corrupt practices," nor does it explicitly reference the FCPA (which itself never uses the term "foreign corrupt practices" other than in its title, but obviously sets forth the conduct that violates the statute). Some commentators have assumed that "foreign corrupt practices" as used in the March 2019 Advisory is synonymous with "violations of the FCPA," but this is far from clear. Companies conducting internal investigations or responding to requests that involve the CFTC's enforcement authority in this area should assume that any

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FCPA violation identified in the course of the investigation would be considered a "foreign corrupt practice" within the meaning of the March 2019 Advisory, but it is possible that the CFTC might concern itself with foreign corrupt practices conducted by persons and entities that fall outside the scope of the FCPA, such as offenses committed by foreign officials or instrumentalities of foreign governments. Similarly, the CFTC might seek to pursue matters that do not satisfy the FCPA's jurisdictional requirements.

Moreover, the CFTC's decision to enter the anti-bribery space adds a new layer of complexity to corruption-related investigations for companies and individuals whose activities intersect with U.S. and international commodities markets, because the CFTC's jurisdiction ultimately will rest on the existence of an underlying, independent violation of the CEA. As a result, investigations will need to consider all of the traditional questions that come up with respect to "core" FCPA conduct – the payment or offer to pay a thing of value to a foreign official in order to obtain or retain business, and, in the case of issuers, the accuracy of the books and records and adequacy of internal controls – and may also need to address complex questions of market structure and interrelationships between overseas markets and U.S. futures prices.

Consider, for example, a scenario in which a mining company paid bribes to secure access rights to a mining site. In order for the CFTC to assess whether the foreign corrupt practice (paying bribes for access rights) resulted in a violation of the CEA, it might seek to investigate whether the access rights were secured at below-market prices, such that sales of the commodity extracted at the site artificially suppressed market prices overall. Similarly, the CFTC might seek to investigate the extent to which entities connected to the site may have held positions that would have allowed them to benefit from the potential suppression of market prices.

Or, consider a scenario in which a market participant made corrupt payments to an official of a state-owned enterprise (SOE), in exchange for the official's agreement to reduce the supply of oil that the SOE made available to the market. In considering whether a violation of the CEA had occurred, the CFTC likely would seek to investigate, among other things, the positions the market participant held in instruments likely to appreciate as a result of rising oil prices and the materiality of the change in supply that occurred (or was anticipated) as a result of the payments. In this scenario, while the DOJ might only pursue a prosecution under the FCPA of the market participant who paid the bribes, the CFTC potentially could pursue an enforcement action against the official and the SOE.

These considerations will greatly expand the economic and factual complexity of corruption investigations.

See "Common Hang-Ups in Cross-Border Due Diligence and Investigations" (Jul. 11, 2018).

Increased Complexity of Settlement Payment Calculations

Practitioners and market participants also should expect that the CFTC's pursuit of matters involving foreign corrupt practices will bring increased complexity to the calculation of settlement payments, first in corruption-related matters, with potential

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follow-on effects in matters that do not involve corruption-related allegations.

Historically, nearly all negotiated resolutions of enforcement matters before the CFTC have been reached on the basis of a civil monetary penalty alone, and without any calculation of disgorgement, forfeiture or restitution. Indeed, according to data in the CFTC Enforcement Division's 2018 Annual Report, restitution and disgorgement payments amounted to scarcely 5 percent of aggregate monetary judgments imposed by the CFTC during the 2018 fiscal year. None of the most significant fraud and manipulation cases resolved in recent years (outside of retail fraud cases) have included disgorgement or restitution as a component of the resolution.

The March 2019 Advisory is clear, however, that in cases where the presumption is applied and a matter is resolved with no civil monetary penalty, the self-disclosing company or individual still would be required to pay "all disgorgement, forfeiture, and/or restitution resulting from the misconduct at issue." The March 2019 Advisory is silent regarding the extent to which payments made to other authorities will be credited in the CFTC's calculations, but McDonald has said publicly that "when the Division imposes disgorgement or restitution, [it] will give dollar-for-dollar credit for disgorgement or restitution payments in connection with other related actions." Similarly, the DOJ FCPA Corporate Enforcement Policy requires companies receiving declinations under the policy to disgorge all profits resulting from the misconduct. In approximately half of the declinations under the Pilot Program and Corporate Enforcement Policy, this requirement has been satisfied, or partially satisfied, by disgorgement to the SEC.

The focus on such payments (as well as criminal forfeiture payments, which the CFTC does not have authority to impose and which the DOJ historically has imposed more frequently in individual prosecutions than in corporate resolutions) in the March 2019 Advisory raises the question of how relevant calculations will play out in practice. We would expect that there will be a learning process, as enforcement practitioners within and outside of the CFTC become accustomed to considering and valuing disgorgement and restitution amounts under the CEA.

Insight into How the CFTC Will Apply Its Cooperation Policies for Registrants

In 2017, the CFTC Division of Enforcement published two advisories regarding cooperation and emphasizing the importance and benefits of self-reporting, when coupled with fulsome cooperation and remediation. In particular, the September 2017 Enforcement Advisory dangled the prospect of a declination of prosecution (*i.e.*, a resolution with no punitive outcome) for certain extraordinary circumstances, such as where misconduct is pervasive across an industry and the company is the first to self-report. In the time since the first cooperation advisory was announced, the CFTC has entered non-prosecution agreements with three individuals (in July 2017), and in November 2018 granted its first corporate declination to two affiliated entities, both of which were (and are) CFTC registrants. At the time, McDonald touted the CFTC's decision declining to prosecute the company as a benefit of the organization's decision to self-report and engage in fulsome cooperation and remediation.

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Curiously, the March 2019 Advisory seems to call into question whether a CFTC registrant ever could receive a declination in the future. In a two-sentence footnote, the Advisory explains that the presumption of no civil monetary penalty is not available to CFTC registrants, because "CFTC registrants have existing, independent reporting obligations to the Commission requiring them, among other things, to report any material noncompliance issues under the CEA, which would include any foreign corrupt practices that violate the CEA." Although the footnote does not specifically identify rules that would give rise to such obligations, it may be intended to refer to Chief Compliance Officer (CCO) reports that registered Swap Dealers and Futures Commission Merchants are required to file once a year, under Rule 3.3(e)(5). Among other things, those reports are required to address "any material noncompliance issues identified and the corresponding action taken,"[4] and Division of Enforcement Staff have previously stressed that disclosures made in an end-of-year CCO report are not sufficient to earn self-reporting credit. What has not previously been suggested is that the mere existence of such end-of-year CCO report obligations for CFTC registrants would prevent the possibility of any self-reporting credit ever being available to such entities.

Enforcement practitioners will be watching closely to see how the CFTC's use of declinations is applied going forward, in foreign corrupt practices matters and other matters before the Division of Enforcement.

Kathleen McArthur is a partner in Sullivan & Cromwell's Litigation Group and Co-Coordinator of the Commodities, Futures and Derivatives Group. Her practice focuses on regulatory enforcement proceedings, internal investigations and complex commercial litigation. She has represented companies in connection with internal investigations and a wide range of inquiries by the U.S. Commodity Futures Trading Commission, the U.S. Securities and Exchange Commission, the Federal Energy Regulatory Commission and the U.S. Department of Justice, as well as in inquiries by the CME, ICE and other exchanges and self-regulatory organizations.

Aisling O'Shea is a partner in Sullivan & Cromwell's Criminal Defense & Investigations Group and Co-Coordinator of the Firm's FCPA & Anti-Corruption practice. She focuses her practice on criminal defense, government investigations and the FCPA. She has represented individuals and companies in connection with internal investigations and investigations by the U.S. Department of Justice, U.S. Securities and Exchange Commission, U.S. Commodity Futures Trading Commission, various federal and state bank regulators, and various foreign authorities. Before joining Sullivan & Cromwell, O'Shea spent five years as a trial attorney in the Fraud Section of the U.S. DOJ's Criminal Division. Within the Fraud Section, she was a member of the FCPA Unit. O'Shea began her career as an associate at S&C, where she worked on complex financial investigations.

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[1] See, *e.g.*, CFTC v. Monex Credit Co., 311 F. Supp. 3d 1173 (C.D. Cal.) (Sept. 26, 2018), *appeal docketed*, No. 18-55815 (9th Cir. Aug. 30, 2018) (rejecting CFTC arguments that the agency

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is authorized to pursue ordinary fraud (in the absence of any manipulative conduct or intent) in otherwise unregulated cash commodity markets, under CEA Section 6(c)(1)); *CFTC v. My Big Coin*, No. CV 18-10077-RWZ, 2018 WL 4621727 (D. Mass. Sept. 26, 2018) (suggesting that the existence of U.S.-listed futures contracts in Bitcoin (a virtual currency) means that all virtual currencies are "commodities" within the scope of the CEA and agreeing that the CFTC had authority to pursue fraud claims in connection with a virtual currency (My Big Coin) that was not referenced by any U.S.-listed futures contracts).

[2] 17 C.F.R. § 180.1 (2018).

[3] *See, e.g., Br. for Amicus Curiae U.S. Commodity Futures Trading Comm'n, Prime Int'l Trading, Ltd., et al. v. BP PLC, et al.*, No. 13-md-02475 (ALC), 2d Cir. (Nov. 22, 2017) (arguing that, because commodities, like oil, "exist[] throughout the world in fungible form" wrongdoing with respect to such commodities "may originate anywhere and impact the U.S., causing harms" Congress authorized the CFTC to pursue as violations of the CEA).

[4] 17 C.F.R. §3.3(e)(5) (2018).

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