

August 14, 2020

# CFTC Continues Insider Trading Enforcement

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## **NYMEX and Two Ex-Staffers to Pay \$4M Fine in CFTC Settlement**

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### **SUMMARY**

On August 3, 2020, Judge Broderick of the Southern District of New York entered a consent order between the U.S. Commodity Futures Trading Commission (CFTC) and the New York Mercantile Exchange (NYMEX) along with two ex-NYMEX staffers—William Byrnes and Christopher Curtin—in which the parties agreed to pay a \$4 million dollar fine to the CFTC for disclosing derivatives trading information to a third-party broker.<sup>1</sup>

### **BACKGROUND**

In 2013, the CFTC filed suit against NYMEX, William Byrnes, Christopher Curtin, and Rob Eibschutz for violations of the Commodity Exchange Act (CEA) and CFTC regulations promulgated thereunder. The two ex-NYMEX employees—Byrnes and Curtin—were alleged to have violated Section 9(e)(1) of the CEA, 7 U.S.C. § 13(e)(1), and CFTC Regulation 1.59(d)(1)(ii), 17 C.F.R. § 1.59(d)(1)(ii), which generally make it unlawful for employees of regulated organizations such as NYMEX to disclose “material nonpublic” information in a manner inconsistent with the performance of their duties.

The CFTC alleged that Byrnes and Curtin misappropriated confidential information collected in the course of their employment, which generally included the identities of buyers and sellers; the prices, volumes and terms of commodities trades; and the trading strategies of NYMEX customers.<sup>2</sup> Byrnes and Curtin allegedly disclosed this information to a third-party broker—Eibschutz, who in return for the information would provide Byrnes and Curtin with meals, drinks, and entertainment.<sup>3</sup> While NYMEX publishes aggregate trade volume, it did not otherwise publish the types of information allegedly disclosed by Byrnes and Curtin.<sup>4</sup>

### SETTLEMENT

Following the denial of the parties' summary judgement motions, Byrnes, Curtin, and NYMEX, who the CFTC alleged was vicariously liable for its role as employer, agreed to a Consent Order with the CFTC that was entered by the Court on August 3, 2020. The Consent Order states that Byrnes and Curtin violated Section 9(e)(1) and Regulation 1.59(d)(1)(ii) by "willfully and knowingly disclosing for purposes inconsistent with the performance of their" duties, "material nonpublic information obtained through special access related to the performance of such duties."<sup>5</sup> The Consent Order describes the "material and nonpublic" information that was disclosed as "the identities of counterparties to specific options trades, whether a particular counterparty purchased or sold the option, whether it was a call or a put, the volume of contracts traded, the expiry, the strike price, and the trade price."<sup>6</sup>

The Consent Order imposes a \$4 million dollar fine on Defendants. Byrnes's portion of the fine is capped at \$300,000 and Curtin's portion is capped at \$200,000.<sup>7</sup> Thus, the exchange must pay at least \$3.5 million of the fine.<sup>8</sup> In the Complaint, the CFTC sought damages for each violation of the CEA, which could have resulted in a maximum penalty of over \$10 million dollars.<sup>9</sup>

In addition, the Consent Order permanently bans Byrnes and Curtin from trading commodity interests and registering with the CFTC.<sup>10</sup>

The Consent Order does not, however, resolve the CFTC's claims against Eibschutz, which remain pending in the SDNY.<sup>11</sup>

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### IMPLICATIONS

The *Byrnes* case reflects the type of enforcement activity the CFTC's Insider Trading "Task Force" has said it intends to pursue.<sup>12</sup> The Task Force was announced in September 2018, and the CFTC's Director of Enforcement has been clear that it is focused on cases involving misappropriation of confidential information and the CFTC has identified *Byrnes* as an example of this type of misconduct.<sup>13</sup>

Importantly, in their summary judgement briefing, Byrnes and Curtin argued that the information at issue did not qualify as nonpublic information.<sup>14</sup> They relied on fact witness and expert opinion testimony that traders on either side of a transaction, as well as brokers who were involved and other customers to whom a broker shopped the trade, could have disclosed at least some of the same type of trading details that Byrnes and Curtin were charged with disclosing, including by word of mouth and instant messaging.<sup>15</sup> The Court found that this testimony regarding potential incidental disclosures did not establish that the trading details were "disseminated in a manner which makes it generally available to the trading public."<sup>16</sup> The Court ruled that the CFTC was not required to prove a negative—that the information had never been disseminated—and relied on NYMEX's own policies, which define that information as "confidential," when finding that the trading details that Byrnes and Curtin disclosed were "material and nonpublic."<sup>17</sup>

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Moreover, *Byrnes* is the first time the CFTC has charged an exchange with violations of the CEA and CFTC regulations' proscriptions against disclosures of material nonpublic information by exchange employees.<sup>18</sup> In announcing the settlement, the CFTC noted that "commodity exchanges are responsible for violations of the CEA or CFTC regulations by their officials, employees, and agents within the scope of their employment or office," signaling that enforcement proceedings against exchanges for violations by employees are likely to continue.<sup>19</sup>

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ENDNOTES

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- 1 Consent Order, *U.S. Commodity Futures Trading Comm'n v. Byrnes*, No. 13-CV-1174 (VSB), ECF No. 226 (S.D.N.Y. Aug. 3, 2020) ("Consent Order").
- 2 *U.S. Commodity Futures Trading Comm'n v. Byrnes*, 2019 WL 4515209, at \*1 (S.D.N.Y. Sept. 19, 2019).
- 3 Complaint, *U.S. Commodity Futures Trading Comm'n v. Byrnes*, No. 13-CV-1174 (VSB), ECF No. 1, ¶ 40 (S.D.N.Y. Feb. 21, 2013) ("Compl.>").
- 4 Compl. ¶¶ 101, 105.
- 5 Consent Order ¶¶ 29-30.
- 6 *Id.* ¶ 22.
- 7 *Id.* ¶ 35.
- 8 *Id.*
- 9 Compl. pp. 21, 23-26.
- 10 Consent Order ¶ 33.
- 11 *Id.* at 1, n.1.
- 12 See CFTC FY2019 Div. of Enf. Annual Rep. at 12 & n.24.
- 13 See CFTC Release No. 7811-18, available at <https://www.cftc.gov/PressRoom/PressReleases/7811-18>.
- 14 See *Byrnes*, 2019 WL 4515209, at \*7.
- 15 *Id.* at \*7-9.
- 16 *Id.* at \*8.
- 17 *Id.* at \*2, 8.
- 18 See CFTC Release No. 8216-20, available at <https://www.cftc.gov/PressRoom/PressReleases/8216-20>.
- 19 *Id.*

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