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FCPA and the Commodity Exchange Act: A New Relationship

Posted by David Yeres, David DiBari, and Robert Houck, Clifford Chance US LLP, on Tuesday, April 2, 2019

Editor's note: David Yeres is senior counsel, and David DiBari and Robert Houck are partners at Clifford Chance US LLP. This post is based on a Clifford Chance memorandum by Mr. Yeres, Mr. DiBari, Mr. Houck, Brendan Stuart and Ben Peacock.

On March 6, 2019, the Enforcement Division of the U.S. Commodity Futures Trading Commission ("CFTC" or the "Commission") issued an Enforcement Advisory applicable to non-registered companies and individuals regarding its cooperation and self-reporting program specifically relating to violations of the Commodity Exchange Act ("CEA") that involve foreign corrupt practices (the "CFTC Foreign Corrupt Practices Advisory" or the "Advisory"). [1] The CFTC Foreign Corrupt Practices Advisory indicates a potential new front of the CFTC's enforcement program based on a novel application of the CEA. In recent remarks, the CFTC's Division of Enforcement Director has indicated that the Commission may bring enforcement actions in cases involving foreign corrupt practices under CEA provisions that are analogous to those contained in statutes enforced by the U.S. Securities and Exchange Commission ("SEC"). [2] In addition, the Advisory builds upon and incorporates the CFTC's January 2017 and September 2017 Enforcement Advisories, which promised meaningful reductions in penalties where a company or individual self-reports, fully cooperates, and takes remedial measures (see our January 2017 and September 2017 client briefings). And in keeping with the CFTC's stated desire to harmonize its enforcement regime with those of authorities holding concurrent jurisdiction, the Advisory echoes guidance that the U.S. Department of Justice ("DOJ") published in its November 2017 FCPA Corporate Enforcement Policy. [3]

The Advisory heralds an extension of the CFTC's enforcement program into extraterritorial conduct that has historically been within the purview of other U.S. authorities. The Foreign Corrupt Practices Act, which is enforced by the DOJ and the SEC, does not provide the CFTC with authority to pursue foreign bribery cases. Nor does the CEA grant such authority. However, CFTC Division of Enforcement Director James McDonald has signaled that the CFTC is exploring a new and potentially expansive theory of the CEA's reach, indicating that foreign conduct that somehow touches U.S. commodities and futures markets may be within the Enforcement

[1] 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.

[2] *See* James McDonald, Director of the Division of Enforcement, U.S. Commodity Futures Trading Commission, Remarks of CFTC Director of Enforcement James M. McDonald at the American Bar Association's National Institute on White Collar Crime (Mar. 6, 2019), https://www.cftc.gov/PressRoom/SpeechesTestimony/opamcdonald2.

[3] *See* U.S. Attorneys' Manual 9-47.120.

Division's purview. In remarks delivered the same day as the issuance of the Advisory, McDonald stated that foreign corrupt practices can constitute CEA violations such as fraud, manipulation, and false reporting, and can impact CFTC-regulated activities and markets. [4] McDonald further indicated that the CFTC believes that their anti-fraud authority permits them to police foreign bribes if they relate to commodities for which futures trade on U.S. markets, or that foreign bribes can lead to artificial prices of commodities or derivatives that implicate the CFTC's anti-manipulation authority. [5] And in a panel discussion following his remarks, when asked what conduct the Advisory would reach, McDonald pointed to Och-Ziff's resolution of Foreign Corrupt Practices Act violations, which included charges under fraud and books and records provisions.

As we have noted elsewhere, certain CEA provisions overlap with those contained in statutes enforced by the SEC. [6] The CFTC may therefore be contemplating bringing enforcement actions involving foreign corrupt practices under the CEA's own anti-fraud and recordkeeping provisions. This novel application of the CEA could potentially reach a wide range of conduct that lacks direct ties to the U.S. Any such application would need to satisfy the CEA's requirement that the conduct was in connection with a trade executed on a U.S. exchange, the purchase or sale of a commodity in interstate commerce (or for future delivery), or a swap.

However, any CFTC enforcement action premised on foreign corrupt practices brought pursuant to this expansive application could face challenges under the doctrine articulated in *Morrison v. National Australia Bank Ltd.* [7] concerning the extraterritorial effect of U.S. statutes.

Courts interpreting the CEA under *Morrison* in civil cases brought by private plaintiffs have found that Congress largely did not intend for the CEA to apply extraterritorially, and the CEA's application is generally limited to cases involving domestic exchanges and U.S. persons, though the Dodd-Frank Act did permit extraterritorial application to swaps transactions with a direct and significant impact on the United States. [8] The CFTC has previously articulated an expansive interpretation of "direct" effects as merely requiring "a reasonably proximate causal nexus." [9] Moreover, whether *Morrison* applies to actions brought by the CFTC, rather than by private plaintiffs, has yet to be judicially determined.

Recognizing the potential for simultaneous violation of the CEA and the Foreign Corrupt Practices Act, McDonald noted the CFTC's continued cooperation with other domestic enforcement authorities such as the DOJ and SEC. [10] In connection with that cooperation, McDonald advised that the CFTC would seek to avoid duplicative investigation, account for penalties imposed by other enforcement authorities, and provide dollar-for-dollar credit for disgorgement or restitution payments in connection with other related actions. [11]

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

[5] *Id.*

[6] *See* U.S. Market Manipulation: Has Congress Given the CFTC Greater Latitude than the SEC to Prosecute Open Market Trading as Unlawful Manipulation? It's Doubtful, *Futures and Derivatives Law Report*, Volume 38, Issue 6 (June 2018).

[7] 1 U.S. 247 (2010).

[8] *See, e.g. Sullivan v. Barclays PLC*, No. 13-cv-2811, 2017 WL 685570 (S.D.N.Y. Feb. 21, 2017); Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376, 1673 (2010).

[9] *See* Interpretive Guidance and Policy Statement Regarding Compliance With Certain Swap Regulations, 78 Fed. Reg. 45,292 at 45,300 (July 26, 2013).

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

[11] *Id*.

Notably, the Advisory states that, absent aggravating circumstances, the Enforcement Division "will apply a presumption that it will recommend to the Commission a resolution with no civil monetary penalty" where companies and individuals not registered or required to be registered timely and voluntarily disclose CEA violations involving foreign corrupt practices, fully cooperate, and appropriately remediate. [12] This presumption represents a welcome departure from past Enforcement Advisories, which, as we noted in our September 2017 briefing, lacked specific reduction targets. However, the presumption of a zero civil monetary penalty recommendation does not apply to CFTC registrants, which, as the Advisory provides, have existing and independent reporting obligations, which include CEA violations involving foreign corrupt practices. [13]Accordingly, CFTC registrants should continue to follow the guidance provided in prior Enforcement Advisories.

The Advisory provides that the Enforcement Division would still require payment of disgorgement, forfeiture, and/or restitution resulting from the misconduct, even if a civil monetary penalty is not required, and notes that the Enforcement Division will pursue available remedies, including civil monetary penalties, against violators not involved in submitting a voluntary disclosure. [14]

As to aggravating factors that could rebut the presumption of a resolution without a civil monetary penalty, the Advisory states that the Enforcement Division will consider: (1) whether executive or senior management of the company was involved, (2) whether the misconduct was pervasive within the company, and (3) whether the company or individual has previously engaged in similar misconduct. [15]

While announcing a potential expansion of the CFTC's enforcement program to foreign conduct typically covered by the DOJ and SEC, the Advisory also aligns with the Commission's trend of incentivizing voluntary disclosure and goal of enhancing its cooperation with other law enforcement agencies. In providing a presumption of no civil monetary penalty in appropriate cases, the CFTC continues to signal that self-reporting, cooperation, and remediation will be rewarded, presumably in the hopes that companies and individuals facing a potential violation conclude that the rewards of self-reporting outweigh the risks of detection. And in issuing the Advisory, the Commission continues its trend of bringing self-reporting, cooperation, and remediation requirements in line with other law enforcement agencies, particularly DOJ, in order to minimize conflicting incentives for companies and individuals navigating multiple self-reporting and cooperation regimes. Specifically, the Advisory tracks the DOJ's guidance through its November 2017 FCPA Corporate Enforcement Policy, which states that, absent aggravating circumstances, where a company satisfies self- disclosure, cooperation, and remediation requirements, there will be a presumption that DOJ will resolve the company's case through a declination (see our December 2017 client briefing). Remarking on the Advisory, DOJ Criminal Division Assistant Attorney General Brian Benczkowski indicated that companies ought to analyze the Advisory together with DOJ's FCPA Corporate Enforcement Policy and noted DOJ's continued work with the CFTC in cases involving foreign corrupt practices.[16]

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[12] 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

[13] *Id*.

[14] *Id*.

[15] *Id*.

[16] Press Release, 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.

The CFTC's intended role in the regulation of foreign corrupt practices alongside the DOJ and SEC will likely become clearer through future enforcement actions involving such practices that relate to CEA-covered commodities and futures markets. In the meantime, companies and individuals facing potential FCPA exposure would be well advised to consider whether any alleged foreign corrupt actions could have impacted U.S. commodity or derivatives markets or practices. If so, it may be beneficial for such companies and individuals to engage with the CFTC to take advantage of any available cooperation credit.