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MITIGATING THE RISKS OF CRIMINAL SANCTIONS DUE TO EMPLOYEE MISCONDUCT IN THE DERIVATIVES AND COMMODITIES MARKETS

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INTRODUCTION

In recent years, the U.S. Department of Justice ("DOJ") has pursued an increasing number of high-profile criminal investigations and prosecutions of domestic and international business organizations for misconduct by their employees within derivatives and commodities markets. Following regular referrals from the primary market regulatory authority, the U.S. Commodity Futures Trading Commission ("CFTC"), since 2020, a majority of the more serious resolved CFTC-covered market misconduct matters involving large business organizations have also resulted in severe DOJ criminal sanctions against the employer organization. Businesses can reduce this exposure by taking steps to identify, assess, and programmatically address compliance risk in their derivatives and commodities businesses and, if and when any compliance issues arise, respond promptly and fully in order to favorably position themselves in the event of any criminal investigation.[1] As discussed below, this requires familiarity not only with the relevant laws and regulations, but also with the organizational focus and charging approaches that the DOJ (as well as the CFTC) has taken, which one can glean from both published policies as well as analysis of certain recent case resolutions.

BACKGROUND

The enforcement agenda of the DOJ has for many years included a robust focus on criminal violations of the U.S. Commodity Exchange Act ("CEA").[2] While the CFTC is the primary civil enforcement authority for matters pertaining to trading

conduct within products and markets that the CEA covers, the DOJ has authority for investigating and criminally prosecuting willful violations of the CEA or CFTC rules or regulations promulgated under the CEA.[3] Accordingly, while the CFTC has no criminal prosecutorial authority, it regularly refers matters involving price manipulation (i.e. practices calculated to influence market prices and cause an artificial price), market abuse, and fraud to the DOJ.[4] Such referrals routinely include matters involving organizations based within, as well as outside, of the U.S.[5] In addition to reputational harm to a business, resolving criminal investigations often involves incurring financial penalties that, together with restitution, can be exceptionally large, sometimes totaling hundreds of millions of dollars. Beyond financial penalties, the DOJ increasingly, and now by policy, is seeking to impose burdensome independent oversight of business operations in the form of corporate monitorships. Separate from any monitorship, a criminal resolution can include onerous compliance obligations to be performed over several years, as well as collateral regulatory consequences.

Derivatives and commodities trading involves a vast array of products, markets, and market participants, and accordingly covered individuals and entities are subject to the CEA's prohibitions concerning criminal misconduct as well as certain general U.S. criminal antifraud provisions. These prohibitions reach futures and options contracts traded on regulated exchanges, and most swaps contracts, as well as interstate trading of traditional physical commodities (most agricultural products and precious metals), currencies and financial instruments.[6] The types of misconduct that have attracted the most rigorous investigation and prosecution include various forms of fraud and market abuse. For larger business organizations, criminal prosecution occurs predominantly where conduct was pervasive (involving a number of employees or over a prolonged period), compromised the integrity of markets, defrauded others, involved awareness of managers or woeful failures to prevent and detect misconduct, and where responses to regulatory investigations were misleading or materially incomplete.

In policing such misconduct, the CFTC has a history of cooperating with criminal authorities.[7] Notably, while derivatives and commodities market abuse and fraud have been prohibited and subject to criminal charges for many years, criminal prosecution by the DOJ was rare until after the 2002 creation of the Corporate Fraud Task Force (in 2009, replaced by the Financial Fraud Enforcement Task Force), comprised of several government authorities, including, among others, the DOJ, CFTC, and SEC.[8] The Task Force included a working group involving the Enforcement Directors of the CFTC and SEC as well as the head of the DOJ Criminal Division and the U.S. Attorney for the Southern District of New York.[9] Cooperation of those organizations on an ongoing basis and through successive task force initiatives has supported numerous and substantial criminal prosecutions in the area of derivatives and commodities market fraud and abuse.

Following a 2019 restructuring of the Securities and Financial Fraud Unit within the DOJ's Fraud Section, the renamed Market Integrity and Major Frauds Unit ("MIMF Unit") includes a dedicated Commodities Fraud team.[10] In announcing the reconfiguration, then-Assistant Attorney General Brian Benczkowski noted that the purpose of organizing dedicated teams within the

MIMF Unit was to maintain well-defined missions and facilitate the differing identification and investigation methodologies specific to each market, noting that like securities fraud, fraud in the commodities markets is often identifiable with assistance of data analytics.[11] U.S. Attorneys' offices in New York and Chicago are staffed with personnel that specialize in matters concerning fraud and abuse in the commodities and derivatives markets, reflecting the predominance of market activity in those jurisdictions, but numerous other U.S. Attorneys' offices have brought prosecutions as well.[12]

The recently increased level of CFTC-DOJ cooperation is reflected in the fact that more CFTC enforcement actions were filed with parallel criminal proceedings in 2019 and 2020 than in any prior year.[13] There were 16 such parallel actions filed in each of fiscal years 2019 and 2020.[14] And currently, most major CFTC investigations of fraud or market abuse are conducted in parallel with the DOJ.[15] In testimony to Congress in May 2019, then-CFTC Chair Christopher Giancarlo explained that he viewed criminal prosecutions as an important deterrent and emphasized that during his time as Chair there had been "more partnering with criminal law enforcement" than ever before.[16] The CFTC Division of Enforcement also emphasized in its 2019 Annual Report that cooperation with criminal authorities will remain an area of focus for the CFTC, as "there is no greater deterrent than the prospect of criminal prosecution—and the reality of time in jail."[17] The CFTC has continued emphasizing coordination and parallel actions with criminal authorities and other domestic and international regulatory partners in the years since.[18] Since 2020, of the six major market abuse enforcement matters resolved with the CFTC where the respondent was a large business organization, four also saw parallel criminal resolutions.[19] As the matters resulting in criminal investigations and resolutions demonstrate, a business' failure to design and implement an effective compliance and surveillance system, and the lack of a culture of compliance within an organization, can lead to an increased and unchecked risk of employee misconduct, making criminal prosecution more likely. Proactive compliance, identification of risk areas, and appropriate responses to investigations can mitigate an organization's criminal exposure where such issues occur.

STATUTORY AUTHORITY FOR CRIMINAL PROSECUTION

Experience teaches that the means of market misconduct are limited only by human ingenuity. By comparison, the statutory bases for criminal prosecution, while numerous, are finite. Each willful violation of any CEA or CFTC rule or regulation promulgated under the CEA is punishable by a maximum inflation-variable fine of approximately $1.2 million (as of 2021) or imprisonment for not more than 10 years, or both, together with the costs of prosecution.[20] Critically, this penalty amount is applicable to each instance of a violation. Given that a pattern of misconduct (such as spoofing, the practice of bidding or offering with the intent to cancel the bid or offer before execution) may involve multiple instances of violation, each of which is separately chargeable, the penalties can quickly balloon to astronomical sums that can materially impact the bottom line and even threaten the viability of a company or business area. For example, as discussed below, the DOJ and CFTC jointly levied fines in the hundreds of millions of dollars against two financial institutions in August and Septem-

ber 2020, based on thousands of alleged instances of spoofing. The CEA also imposes criminal liability for making knowingly false statements to the CFTC or self-regulatory organizations ("SROs"), such as a CEA designated futures market. In addition to false statements made to CFTC investigators and staff, CEA § 9(a)(3) prohibits making knowingly false statements in any report or document required to be filed under the CEA, and CEA § 9(a)(4) prohibits making willfully false statements to SROs, such as a CFTC designated exchange or other SRO. Because the CFTC has no criminal prosecutorial authority, it regularly refers such matters to the DOJ.[21] For example, the CFTC has referred cases against both companies and individuals arising out of the manipulation of LIBOR and other benchmark interest rates,[22] manipulation of precious metals futures,[23] manipulation of propane prices,[24] spoofing and other prohibited trading practices,[25] embezzlement,[26] and fraud schemes in cryptocurrency markets.[27]

The DOJ has also sought to bring charges under other federal criminal statutes, including wire fraud (18 U.S.C.A. § 1343), bank fraud (18 U.S.C.A. § 1344), securities and commodities fraud (18 U.S.C.A. § 1348), and/or attempt or conspiracy to commit securities, commodities, bank, or wire fraud (18 U.S.C.A. § 1349). Indeed, in prosecutions for manipulation or attempted manipulation of a derivatives or commodities market, the DOJ will in many cases seek both CEA-based manipulation charges as well as wire-fraud charges based upon the same underlying conduct.[28] Such cases must meet the elements of a wire fraud charge, including: (i) the existence of a scheme to defraud; (ii) involving money, property, or honest services; (iii) that used wires in furtherance of the scheme; (iv) with fraudulent intent.[29]

While prosecutions against individuals can of course result in incarceration as well as the assessment of a criminal fine, in relation to business organizations, DOJ investigations may result in (i) a declination, (ii) a non-prosecution agreement ("NPA"), (iii) a deferred prosecution agreement ("DPA"),[30] or (iv) a guilty plea to criminal charges against an entity, parent, or subsidiary. In an NPA, in exchange for cooperation, DOJ will agree not to prosecute the corporation. In a DPA, criminal charges are filed along with an agreement to dismiss the charges within a specific time period if the defendant fulfills the DPA requirements. DOJ generally requires an admission of wrongdoing to resolve an investigation of a corporation. Under its Principles of Federal Prosecution of Business Organizations, the DOJ will assess whether criminal charges should be brought against an entity after considering several factors which include, for example, the nature and seriousness of the offense, the corporation's willingness to cooperate in the investigation, the pervasiveness of wrongdoing within the corporation (including by management), the corporation's history of similar misconduct, and the collateral consequences arising from a prosecution.[31] The factors can serve either to aggravate or mitigate the underlying offense and will guide the DOJ in formulating its position on a fine amount and the form of a resolution. In recent years, criminal charges and guilty pleas involving legal entities have increased significantly, including against parent-level entities of prominent market actors.

DOJ'S SPECIALIZED MARKET INTEGRITY TEAM (THE MIMF UNIT)

As the DOJ itself describes, the MIMF Unit "focuses on the prosecution of complex and sophisticated securities, commodities, corporate, investment, and cryptocurrency-related fraud cases."[32] As part of its mission, it coordinates with the CFTC as well as the SEC and other agencies on major national and international fraud schemes. Accordingly, a core focus for the MIMF Unit is prosecuting manipulation and fraud in the commodities markets.

The organization of a specialized commodities fraud team within the MIMF Unit has corresponded with a significant rise in criminal actions that have arisen out of CFTC investigations or have involved conduct related to futures or swaps trading, evidencing the continued criminalization of market abuse and fraud in CFTC-covered markets. The greater ease of gathering and analyzing evidence that has resulted from the growth of electronic markets and communications has greatly facilitated this increase. Since DOJ criminal charges must be proven "beyond a reasonable doubt," in contrast to the civil "preponderance of the evidence" standard applicable to CFTC enforcement cases, the DOJ was historically limited in its ability to successfully prosecute cases involving complex market activities. Today, however, the common use of electronic markets which record orders and trades to the microsecond, combined with the availability to investigators of computational solutions that can comprehensively reconstruct markets, has made analysis of complex, fast-moving market activity susceptible to a level of precision not previously possible. Further, traders' use of electronic communications in the form of emails, texts, and chat platforms (all of which are regularly recorded, retained, and electronically searchable) has provided new sources of evidence. Similarly, the use by traders of digitally recorded, retained, and searchable telephone lines has been useful evidence for DOJ prosecutors building criminal cases.

The DOJ Fraud Section's trial attorneys, including those within the MIMF Unit, typically work in conjunction with prosecutors from a U.S. Attorney's office on a given matter.[33] The Fraud Section's prominence increased through a series of high-profile settlements with global financial institutions arising from widespread interest rate and currency manipulation. That momentum has carried through to prosecutions brought by the MIMF Unit, including a 2021 guilty plea (and $35 million in monetary penalties) from a large international investment bank concerning spoofing of U.S. Treasuries and futures, and a 2022 guilty plea with $1.1 billion in monetary penalties from a multinational commodity trading and mining firm simultaneously resolving manipulation of fuel oil price and FCPA violations.[34] These resolutions are discussed further below.

DOJ'S EVOLVING CORPORATE ENFORCEMENT POLICY

Against the backdrop of increasingly punishing resolutions, the DOJ's evolving policies pertaining to prosecuting and resolving corporate criminal matters increasingly have been relevant to businesses engaged in derivatives and commodities trading. On July 1, 2022, the DOJ published its strategic plan for the following four years, highlighting as a core strategy that it will "aggressively prosecute corporate crime, not only

by holding companies accountable for their criminal conduct, but also by prosecuting the individuals who commit and profit from corporate malfeasance."[35] In support of these efforts to combat corporate crime, the DOJ has promised to bolster the number of federal investigators available to the Fraud Section by embedding a "squad of FBI agents" within the unit "to further strengthen our ability to bring data-driven corporate crime cases nationwide."[36] In a March 2022 speech, Attorney General Merrick Garland noted that a sizeable $325 million within the DOJ's Fiscal Year 2022 budget would "fund more than 900 FBI agents to support the FBI's White Collar-Crime Program."[37]

In addition, on October 28, 2021, Deputy Attorney General ("DAG") Lisa Monaco announced major changes to DOJ policy in this respect, marking a significant divergence from policies under the prior administration.[38] The policy updates announced include (1) a requirement that prosecutors consider the full history of corporations' prior violations in deciding whether a resolution short of a guilty plea is appropriate, (2) for any corporation seeking cooperation credit, the reporting of all individuals involved in the misconduct, and (3) the use of monitorships in resolutions of corporate misconduct.

These recent updates are the latest in the DOJ's amendments to corporate prosecution policy dating back to 1999, and significantly, through 2008 amendments known as the Filip Factors that are codified in the Justice Manual (formerly the U.S. Attorney's Manual) as the Principles of Federal Prosecution of Business Organizations.[39] Those factors included a focus on: the corporation's conduct, any similar prior wrongdoing, the corporation's cooperation with the investigation, the corporation's compliance program (both when the misconduct occurred as well as in connection with efforts to remediate), work done to remediate the misdeeds, and collateral consequences to others.[40] In 2015, then-Deputy Attorney General Sally Yates issued a memorandum making significant changes to the Filip Factors, most notably requiring a corporation seeking cooperation credit to provide the DOJ with "all relevant facts about the individuals involved in corporate misconduct."[41] The focus on individual responsibility for corporate crime came with an emphasis that DOJ would not resolve corporate investigations without considering charges for individuals. This condition became a significant factor that companies would consider when making voluntary disclosure decisions and responding to government investigations, and it has continued to shape the contours of internal investigations. The policy's requirement that all individuals—no matter their level of involvement—be identified generated debate, however, about efficiency and delay, and was not consistently followed.

In response to these concerns "about the inefficiency of requiring companies to identify every employee involved regardless of relative culpability," on November 29, 2018, then-Deputy Attorney General Rod J. Rosenstein announced updates to the DOJ policy for criminal and civil enforcement, making adjustments to the 2015 Yates policy, as well as prior DOJ guidance.[42] The Rosenstein guidance revised the "all-or-nothing" approach to cooperation credit by awarding such credit where a corporation identified every individual "substantially involved" in, or responsible for, the misconduct.[43] Thus, identification of all involved employees, regardless of level of seniority or culpability, was no longer a precondition for cooperation credit.[44]

What qualifies as "substantially involved," however, was and remains unclear. Moreover, while the revised policy was meant to expedite resolution of investigations, it did not create a right to refuse to identify employees whose involvement the company deemed insignificant. In remarks, Mr. Rosenstein had emphasized that an increased focus on prosecuting individuals may be more effective than imposing record-setting financial penalties on corporations.[45] The emphasis on individual prosecutions was not matched, however, by any suggestion of reduced penalties for the corporations that employ these individuals.

With respect to the major shift under the current DOJ leadership requiring an assessment of a corporation's prior violations, DAG Monaco outlined in her October 2021 speech announcing changes to the department's corporate criminal enforcement policy that DOJ is actively considering "whether and how to differently account for companies that become the focus of repeated DOJ investigations," in light of an internal review finding that "somewhere between 10% and 20% of all significant corporate criminal resolutions involve companies who have previously entered into a resolution with the department."[46] At a policy level, this data has caused DOJ to reconsider whether "the opportunity to receive multiple NPAs and DPAs instill[s] a sense among corporations that these resolutions and the attendant fines are just the cost of doing business."[47]

As the corresponding corporate enforcement policy memorandum by DAG Monaco (the "Monaco Memo") lays out, DOJ prosecutors must now consider the full history of a corporation's misconduct, including criminal, civil, or regulatory violations, whether domestic or foreign, when making determinations about criminal charges and resolutions.[48] Critically, this assessment extends to the entirety of a corporate family, meaning prosecutors will examine the history of a company's affiliates, subsidiaries, and other entities.[49] In her speech announcing the changes to DOJ enforcement policy, DAG Monaco stated that this fulsome consideration of past misconduct would enable DOJ to assess a company's "overall commitment to compliance programs and the appropriate culture to disincentivize criminal activity."[50]

DAG Monaco also underscored that DOJ will determine "how to account for companies who have a documented history of repeated corporate wrongdoing," particularly those facing investigations across "multiple sections and divisions."[51] She announced that an "immediate" DOJ consideration is whether NPAs and DPAs are appropriate "for certain recidivist companies," given that the commission of further offenses "undermines the purpose of pretrial diversion."[52] As a related measure, DOJ will analyze "whether the companies under the terms of an NPA or DPA take those obligations seriously enough."[53] DAG Monaco asserted that DOJ will have "no tolerance for companies that take advantage of pre-trial diversion by going on to continue to commit crimes, particularly if they then compound their wrongdoing by knowingly hiding it from the government."[54] Calling such behavior "outrageous," DAG Monaco warned that DOJ "will hold accountable any company that breaches the terms of its DPA or NPA. DPAs and NPAs are not a free pass, and there will be serious consequences for violating their terms."[55] DAG Monaco repeated this warning in December 2021, promising "consequences" for companies that do not abide by these agreements.[56]

To implement these policy positions, a recently-created and convened Corporate Crime Advisory Group ("Advisory Group") announced by DAG Monaco will not only examine the utility of NPAs and DPAs in corporate criminal enforcement but also explore various approaches to the DOJ's prosecution of corporate crime.[57] The Advisory Group—driven by representatives from every part of the DOJ involved in corporate criminal enforcement—will also analyze NPA/DPA non-compliance, monitorship selection, recidivism, and benchmarks for successful corporate cooperation.[58] With solicited input from the business, academic, and defense bar communities, the Advisory Group will develop recommendations and propose revisions to the DOJ's corporate criminal enforcement policies.[59]

This scrutiny of corporate compliance following settlement through a DPA or NPA means that corporate families, including multinational organizations, that are subject to settlement-related reporting obligations face the challenging task of policing and reporting numerous species of misconduct across the entirety of their corporate structure. As DOJ bolsters its focus on corporate recidivism, its renewed interest in closely scrutinizing corporate compliance with pre-existing resolution obligations, coupled with the likelihood of increased costs and penalties by way of fines, monitorships, or even indictment and prosecution, raises the stakes for investigation targets.

In addition, the Monaco Memo provides that DOJ will increase its imposition of monitorships, and now favors their use especially where an "investigation reveals that a compliance program is deficient or inadequate in numerous or significant respects,"[60] noting that "monitors can be an effective resource in assessing a corporation's compliance with the terms of a corporate criminal resolution, whether a DPA, NPA, or plea agreement."[61] This policy reverses DOJ's prior guidance issued under Rod Rosenstein, which suggested that monitorships were disfavored.[62]

DOJ's recent announcement that monitorships will typically involve a compliance certification, under penalty of perjury, by the CEO and CCO, underscores the critical importance of an effective compliance program. The certification, to be provided at the conclusion of the term of a monitorship, requires corporate executives to be in a position to certify the effectiveness of their compliance functions, meaning they must have enough familiarity with those programs and how they function to determine that they pass muster.[63] While the consequences of a false certification may be severe, DOJ has emphasized that the compliance certification is intended to empower the compliance function, which DOJ sees as critical to reducing corporate recidivism.

In sum, while entities resolving matters through a DPA or NPA may be eager to put the matters at issue in the rearview mirror, the Monaco Memo and DAG Monaco's public statements underscore the necessity of carefully negotiating such agreements and assuring continued compliance with the terms of any prior resolutions with DOJ. The guidance also illuminates the risk that, during the duration of any such agreement, the commission of a seemingly distinct violation or the leveling of significant allegations throughout the corporate family can cause a breach.

In light of the expanding scope of information that DOJ expects to receive pursuant to a company's reporting obligations, corporate counsel and

compliance functions should assess whether matters and facts within their purview require escalation, and should also right-size compliance functions across corporate structures to counter risks of market misconduct and meet DOJ's expectations on preventing, detecting, and reporting such misconduct. Moreover, if DAG Monaco's statements and the creation of the Advisory Group provide any indication of the extent to which the DOJ plans to aggressively alter its enforcement approach to corporate crime, companies can expect to face even more scrutiny as those policies continue to evolve.

GOVERNMENT GUIDANCE: EFFECTIVE COMPLIANCE PROGRAMS CAN REDUCE THE RISK OF CRIMINAL CHARGES

Considering the ever-increasing criminal penalties, usage of organization-level guilty pleas, DOJ's impatience with corporate recidivism and its communicated expectations to implement effective compliance programs to prevent and detect misconduct (as well as certain remedial responses), market participants would be well-served by understanding and internalizing the government's compliance expectations and avoiding procedural missteps when facing a regulatory or criminal inquiry.[64]

To do so, market participants can look to and internalize further guidance that DOJ and the CFTC have promulgated.[65] In June 2020, DOJ issued a detailed memorandum entitled *Evaluation of Corporate Compliance Programs*, which was intended to assist prosecutors in determining whether and to what extent a corporation's compliance program was effective at the time of the offense and at the time of a charging decision or resolution.[66] The guidance is centered on evaluation of three "fundamental questions," specifically: (1) "Is the corporation's compliance program well designed?" (2) "'Is the program being applied earnestly and in good faith?' In other words, is the program adequately resourced and empowered to function effectively?" and (3) "'Does the corporation's compliance program work' in practice?"[67]

Over the course of 20 pages, the DOJ guidance lays out detailed subfactors for rendering an assessment on each question. With respect to compliance program design, the guidance directs evaluation of a company's risk assessment, policies and procedures, training and communications, confidential reporting structure and investigation process. Assessment of adequate resourcing and empowerment includes analysis of the commitment by senior and middle management, sufficiency of autonomy and resources, as well as incentives for compliance and disincentives for non-compliance. An analysis of the real-world application of the compliance program's design evaluates continuous improvement, periodic testing and review of the program, timely and thorough investigations of allegations or suspected misconduct, and the analysis and remediation of any underlying misconduct.[68] The guidance makes clear that the true effectiveness of a compliance program is of high importance and is subject to scrutiny.

In May 2020, the CFTC for the first time published direction for the assessment of civil monetary penalties, which instructs Enforcement Division staff to consider (1) the gravity of the violation (including the nature and scope of the misconduct and any consequences as well as the respondent's state of mind), (2) any mitigating or

aggravating circumstances, and (3) "other considerations," including any relief in parallel actions by other authorities and penalties assessed in analogous cases.[69] The penalty guidance specifically lists the "[e]xistence and effectiveness of the company's pre-existing compliance program" as a mitigating (or aggravating) factor.[70]

On September 10, 2020, the CFTC elaborated on the compliance element of its penalty guidance when its Division of Enforcement issued guidelines for evaluating corporate compliance programs in connection with enforcement charging decisions and penalty assessments (the "Compliance Program Guidance").[71] The Compliance Program Guidance shows that the CFTC will consider whether a company's compliance program was reasonably designed and implemented to achieve three goals: (1) preventing the underlying misconduct at issue; (2) detecting the misconduct; and (3) remediating the misconduct.[72] This includes consideration of what the company did to review and modify its compliance program after discovering any malfeasance, including mitigation where harm occurs and discipline for culpable individuals. Although the Compliance Program Guidance is principles-based and not strictly prescriptive, it nevertheless provides a checklist for proactively assessing the adequacy of compliance frameworks prior to any CFTC action, during the initial phase of any investigation or response, as well as during the pendency of any matter before the Enforcement Division (particularly as the division staff will consider such factors in evaluating corporate compliance programs).

The guidance documents make clear that the presence of an effective compliance function will be a mitigating factor in charging decisions and penalty determinations, and the absence of effective compliance will be an aggravating factor. And as stated above, the DOJ's corporate charging guidelines similarly require prosecutors to assess corporate compliance programs in making charging decisions. Settlement agreements demonstrate that the authorities will not hesitate to levy harsher penalties based upon perceived compliance shortcomings, and such deficiencies can increase the likelihood of criminal consequences for an organization whose employees engage in misconduct.

With this information in mind, when considering whether a compliance program effectively prevents potential misconduct, relevant stakeholders within a company should assess policies and procedures, training, remediation of known deficiencies, adequacy of resources, and independence from the organization's business functions. The assessment of a program's ability to detect malfeasance should include an analysis of internal surveillance and monitoring systems, internal reporting, and procedures for evaluating unusual or suspicious activity. Finally, in the context of remediating any misconduct identified, an organization should mitigate and otherwise address harmful impacts, discipline responsible individuals, and remediate deficiencies that contributed to the misconduct or failure to detect it.

RESOLVED CRIMINAL MATTERS DEMONSTRATE PITFALLS OF INADEQUATE DETECTION AND INVESTIGATION RESPONSES, AND BENEFITS OF HEALTHY COMPLIANCE AND COOPERATION

The practical application of the DOJ's written

guidance is observable from the resolutions of various recent DOJ investigations concerning trader misconduct. Where, in some cases, the DOJ has required the employing organization to plead guilty to one or more criminal offenses, DOJ has agreed to resolve others by way of a DPA or NPA. In other instances, the DOJ has declined to prosecute the employing organization altogether. The basis for the various criminal resolutions is often multifactorial and complex due in part to the differences in the misconduct's nature, frequency, duration and any financial gain or harm involved. Also important will be any non-compliance history of the organization. However, a review of some of these cases elicits some suggested useful approaches for a business seeking to avoid the most severe criminal sanctions where employee trader misconduct occurs.

Most recently, in May 2022, a global trading company pleaded guilty to a DOJ charge of criminal conspiracy to engage in commodity price manipulation concerning many instances of manipulative trading by a number of employees over several years.[73] The penalties imposed upon the trading company totaled over $485 million, which included a criminal fine of over $341 million, and criminal forfeiture of over $144 million.[74] The resolution also included the imposition of an independent compliance monitor for three years.[75] The DOJ pointed to as negative factors the seriousness of the offense, the company's failure to disclose the conduct fully and voluntarily to DOJ, the state of its compliance program and remediation progress.[76] In DOJ's view, the company did not take adequate disciplinary measures with respect to personnel involved in or aware of the conduct.[77] Also, in finding the company's compliance program to be "inadequate and ineffective," the DOJ specifically noted that it did not have an electronic trade surveillance program.[78] The state of the company's compliance program and incomplete remediation led DOJ to determine that the compliance monitor was necessary.[79] The resolution, which includes a compliance certification requirement by the CEO and CCO at the end of the monitor's term, emphasizes the importance of well-designed and effectively implemented compliance programs, as well as appropriate remedial responses to apparent trader misconduct.

In December 2021, a non-U.S. based global banking and financial services firm pleaded guilty to DOJ criminal wire fraud and securities fraud charges regarding various fraudulent spoofing schemes in U.S. securities and futures markets.[80] Critically, this resolution demonstrates the DOJ's increasing impatience with corporate recidivism (as described by DAG Monaco the same year). Whereas the losses to other market participants flowing from the misconduct amounted to less than $7 million, the conduct constituted a breach of a 2017 NPA and occurred while the company was on probation following a 2015 guilty plea concerning manipulation in the foreign exchange market.[81] The DOJ considered the company's "substantial" prior criminal history and other civil and regulatory actions against it negatively in determining that a guilty plea, over $28 million in criminal penalties, as well as the imposition of an independent compliance monitor, was necessary.[82] As the imposition of a guilty plea, high financial penalties relative to any gain, and perhaps critically, the appointment of an independent compliance monitor in this matter shows, avoiding the commission of repeated offenses and strict compliance with the terms of any prior resolutions ought to be a central focus for internal compliance systems.

In August 2020, another financial institution headquartered outside the U.S., facing a futures spoofing investigation, entered into a DPA with the DOJ and agreed to pay a criminal fine, forfeiture, and restitution totaling $60.4 million and to appoint an independent compliance monitor for a period of three years.[83] In contrast with the matters resolved by guilty plea discussed above, a DPA permits the suspending of a prosecution for a period of time, provided that the institution meets the conditions agreed upon. One factor informing the August 2020 settlement related to the company's failure to make a complete and accurate disclosure of misconduct in a prior CFTC investigation settled in 2018, such that the scope of wrongdoing was not fully apparent.[84] While the 2018 resolution only involved the CFTC, the expanded criminal resolution in 2020 brought the matter within the DOJ's purview. Demonstrating the type of organizational conduct that can rise to a criminal violation, in rendering the penalty, DOJ noted that the company's compliance function not only failed to detect or prevent several traders' long-term unlawful trading practices, but compliance officers possessed information regarding unlawful trading by one of the traders for more than two years without taking steps to cease the misconduct or prevent any further misconduct.[85] In addition, the company's failure to have an effective compliance program at the time of the misconduct, and the role that certain former compliance officers played in the misconduct were principal factors in determining a high criminal fine.[86]

The very next month, a September 2020 spoofing DPA also faulted a financial institution for failing to voluntarily and timely disclose the spoofing conduct at issue, and the facts described in the criminal settlement reflect the extent to which a surveillance and compliance void can invite pervasive misconduct involving numerous individuals over many years.[87] Noting the nature and seriousness of the misconduct, which involved fraudulent spoofing of futures contracts by fifteen traders over several years, in settling the criminal investigation, the DOJ imposed a financial penalty of over $436 million and disgorgement of over $172 million, and required the company to agree to an exacting set of standards for its corporate compliance program.[88] These obligations followed prior efforts to bolster the company's market conduct compliance program and controls following a 2015 guilty plea concerning similar misconduct involving manipulative and deceptive trading practices in other markets.[89] Among other things, through the 2020 DPA, the company agreed to provide Board and senior management support to compliance to promulgate "policies and procedures designed to reduce the prospect of violations of the Securities and Commodities Laws."[90] The company further agreed to review and update its policies at least annually, and to conduct periodic risk assessments of its "compliance code, policies, and procedures regarding the Securities and Commodities Laws designed to evaluate and improve their effectiveness in preventing and detecting violations."[91] Finally, the company agreed to ensure that its compliance program had adequate surveillance capabilities to detect any violations, as well as enforcement and disciplinary measures to address any violations.[92] In assessing the company's remediation efforts and the state of the company's compliance program, the DOJ determined that the imposition of an independent compliance monitor was not necessary.[93] Echoing the DOJ's focus on identifying culpable individuals, the DPA required the company to co-

operate fully with DOJ in any matters relating to the conduct, and the DOJ has brought related charges against the traders involved.[94]

Notably, in June 2019, a commodities trading firm entered into an NPA with the DOJ, admitting that two of its traders placed numerous fraudulent spoofing orders in precious metals futures over the course of approximately six years, and agreeing to pay $25 million in criminal fines, restitution, and forfeiture of trading profits to resolve the government's investigation.[95] Within the NPA, the DOJ noted that the company did not receive voluntary disclosure credit because it did not voluntarily and timely disclose the conduct, but it did receive credit for cooperating with the DOJ's investigation, including by collecting, analyzing, and organizing voluminous evidence and information for DOJ, and by the conclusion of the investigation, the firm had provided all relevant facts known, including information about individuals involved in the conduct.[96] The firm also engaged in remedial efforts prior to the DOJ's investigation, as well as after, including enhancing its compliance program and internal controls to detect and deter spoofing and other manipulative conduct.[97]

As the DOJ has advised, the benefits of voluntary self-disclosure, cooperation, and remediation can result in a declination to prosecute at all where appropriate.[98] For example, in February 2018, the DOJ issued a declination involving a prominent non-U.S. financial institution where the institution (1) timely and voluntarily self-disclosed the foreign exchange front-running conduct at issue, (2) conducted a thorough and comprehensive investigation, (3) fully cooperated (including by providing all known relevant facts about the individuals involved in or responsible for the misconduct), (4) enhanced its compliance program, (5) fully remediated, including by agreeing to provide full restitution and disgorge any ill-gotten gains, and (6) agreeing to continue to cooperate with the DOJ in the matter or any related matters.[99] Notably, the DOJ did prosecute certain involved employees, but because of the steps taken by the employing institution, the DOJ declined to prosecute the institution itself.[100] The DOJ has similarly charged individuals involved in misconduct, but not their employer, in a matter concerning spoofing of precious metals futures.[101]

These resolutions illustrate the practical outcomes that can occur where DOJ views an entity's actions as deserving credit or punishment, particularly in respect of preventive matters such as implementing effective compliance and monitoring systems and controls, whether and to what extent the organization is a repeat offender, involvement or awareness by senior management or compliance personnel, reporting the misconduct timely and accurately, and providing appropriate cooperation throughout an investigation. While the nature of misconduct, as well as the severity in terms of time, personnel, and financial losses at issue all play a prominent role in any DOJ charging decision, it is clear that matters pertaining to detecting misconduct and appropriately responding weigh heavily in such determinations.

CRIMINAL EXPOSURE REDUCTION: PERIODIC RISK ASSESSMENT

Given the DOJ's written guidance and the recent history of criminal resolutions against

companies for their employees' misconduct, it has become apparent that charges and penalties can and should be mitigated by having in place a well-designed compliance program, and through early detection and remediation of potential violations and cooperation with the authorities where appropriate. Equally apparent is that the DOJ and the CFTC will evaluate a company's compliance program and scrutinize risk assessment practices in rendering charging and penalty determinations. To have proper systems in place to prevent and detect employee misconduct effectively, companies will be expected by DOJ and the CFTC to regularly evaluate their compliance functions, and ensure that those functions have mechanisms for discovering, investigating, reporting, and remediating misconduct once identified, in line with the CFTC's and DOJ's guidelines. Such controls, which should match the risk profile of the organization considering its market activity, include policies and procedures relating to prohibited conduct, and escalation of potential misconduct, as well as tailored and ongoing trainings. The DOJ and CFTC will also scrutinize communication surveillance and transaction monitoring processes and technology, and assessment of internal control functions such as compliance and internal audit.

With respect to evaluating compliance programs, to meet the CFTC's and DOJ's expectations as outlined above, companies that trade in markets subject to the CFTC's and DOJ's commodities and derivatives enforcement jurisdiction should conduct periodic risk assessments aimed at evaluating their ability to comply with periodically evolving laws and regulations that govern trading in these markets, as well as their ability to prevent or detect any potential misconduct. The first step a company should take in any compliance review is to inventory its trading operations and strategically assess which parts of those operations are most susceptible to scrutiny and enforcement. Based on recent enforcement actions and the government's identified areas of focus, activities to which entities should pay particular attention include: (1) activities that may present greater motive or opportunity for price manipulation, including any non-hedge proprietary trading, highly leveraged trading, or trading in products for which, or at times when, they possess pricing power, such as when they are the dominant trader or position holder (particularly in markets that provide for physical delivery) or where market trading volume or liquidity is relatively low, (2) activities that may present greater motive or opportunity for fraud or manipulation based on false reporting, which include making submissions of data to price-reporting agencies or benchmark publishers, (3) activities that may present an opportunity for front-running, including any trading on behalf of customers or clients (as opposed to arms-length, principal-to-principal trading), and (4) activities that may present greater motive or opportunity for insider trading, including any interactions with government entities, expert networks or competitors. A cornerstone of such a risk assessment is whether an organization has created and maintained a robust culture of compliance. In evaluating a culture of compliance, the DOJ (and the CFTC) examine how well-resourced and empowered an entity's compliance program is.[102]

Based on the available government guidance, and in view of the trend toward aggressive, high stakes investigations and prosecutions, it is clear that regular compliance and risk assessment is prudent. Organizations with significant trading

operations ought to conduct such a risk assessment periodically and not merely after any investigation or known misconduct. An effective, proactive risk assessment will strategically calibrate U.S. enforcement risks with the goal of properly allocating compliance resources and remediating any compliance deficiencies.

To carry out such an assessment, companies should independently, or working with an experienced external advisor, assess in detail the company's business structure and operations, geographic locations, markets and products, business strategies, compliance resources, policies and procedures, as well as controls and supervisory frameworks. Analysis of those areas should refer to U.S. laws, regulations, and published guidance, industry standards and best practices, recent enforcement cases and trends, as well as additional insights that an experienced assessor can provide through experience with past enforcement matters and continued engagement with enforcement authorities.

Based upon analysis of the factors outlined above, tailored recommendations for implementation can include development of appropriate policies, review of trading strategies, and surveillance system checks. In addition, individuals involved in the organization's market activity ought to have awareness of and make best efforts to comply with relevant market conduct rules.

CRIMINAL EXPOSURE REDUCTION: RESPONDING APPROPRIATELY TO RED FLAGS AND GOVERNMENT INVESTIGATIONS

As demonstrated by recent criminal resolutions of trading investigations, the nature of any charges and the penalties imposed may depend upon how a company reacts once employee misconduct is suspected. An appropriate and effective initial investigation can be critical, given that the guidance from DOJ (and the CFTC), as well as resolved cases, demonstrate that authorities will expect a company to act quickly to determine the nature and scope of any violation and to remediate. As the resolutions discussed in this article show, any credit that may be available for self-reporting and cooperating will diminish with the passage of time, especially if the DOJ or CFTC learns of the misconduct before violations have ceased and remedial steps have been taken. For example, in the August 2020 matter resolved through a DPA discussed above, the company had provided an incomplete voluntary disclosure to the CFTC, and no voluntary disclosure to the DOJ, for which the company was criticized.[103] Whether and to whom to self-report any suspected employee misconduct is a determination that requires careful consideration, given the potential benefits available pursuant to DOJ guidance, but also taking into consideration the burdens, cooperation expectations, and heightened scrutiny that the business organization will likely face.

At the outset, typically, it falls to a company's internal compliance team to follow up on any red flags, and the compliance function would be expected to review a limited number of relevant documents and speak informally with the relevant employee or employees. Best practices require these follow-up steps to be prompt and, if compliance was not fully satisfied, internal legal counsel to become involved. Best practices would also require notification of management and selected stakeholders. In most circumstances, because only a very limited set of facts would be

gathered, it would be premature to determine whether any self-reporting should occur based at this phase. However, DOJ would likely expect that any improper conduct would be immediately suspended and further investigated.

As a next step, in order for management to understand the nature and scope of any potential criminal exposure, it would be advisable to conduct an expedited preliminary internal investigation, one that would in a relatively short time provide enough information for management to determine what, if any, further steps are appropriate. Depending upon the circumstances and the resources needed, this investigation can be conducted subject to attorney-client privilege by internal counsel, external counsel, or a combination of the two. In order to take advantage of the maximum credit from the DOJ, it may be necessary to consider self-reporting based upon the conclusions reached in this phase. Regardless, the preliminary investigation should be properly planned and documented to assure its thoroughness and efficiency. Additionally, in the event of subsequent criminal investigation, the timeliness and approach of any such internal investigation, as well as management's reaction, may be scrutinized by DOJ should any criminal sanctions be considered.

While the appropriate organizational response will differ depending on the nature and likelihood of suspected employee misconduct, expedited preliminary investigations will often include: (1) interviews of relevant employees and supervisors within the trading function, to understand whether wrongdoing may have occurred and what defenses may be available, and to determine the products and time periods that should be assessed; (2) a review of potentially relevant communications for inculpatory or exculpatory information; (3) a review of trading data, to determine whether any pattern or trading suggests violative conduct; and (4) interviews of compliance personnel and an assessment of any existing control and surveillance frameworks, to determine whether enhancements are needed. The information assessed through this phase can supply management with adequate bases to determine the appropriate scope of any remediation or self-reporting that may be appropriate.

CONCLUSION

The recent trend toward increasing DOJ scrutiny of suspected trader misconduct in U.S. derivatives and commodities markets makes plain the increased risk of criminal prosecution of the employing business organizations trading in these markets. However, it is also clear that such risk can be mitigated by following published DOJ (and CFTC) guidance concerning adequate compliance programs and functions, as well as compliance-minded responses to suspected misconduct. For organizations, such efforts involve tailoring compliance functions and systems to their market activities. And where employee misconduct is detected, an organization can reduce the risk of severe criminal penalties levied against it by undertaking proactive and comprehensive efforts to fully investigate and remediate. Whether or not self-reporting is available or appropriate, in all cases, best practice is for an organization to comply promptly and accurately with government information requests and conduct itself in a manner that both reflects its cooperation and, at the same time, enables it to credibly and zealously advocate its position on the facts and the law.

ENDNOTES:

[1]*See* David Yeres et al., *Responding to a U.S. Government Investigation in the Derivatives, Commodities, and Securities Markets*, Clifford Chance (June 7, 2021), https://www.cliffordchance.com/content/dam/cliffordchance/briefings/2021/06/Responding%20to%20a%20US%20Government%20Investigation%20in%20the%20Derivatives%20Commodities%20and%20Securities%20Markets.pdf; *see also* David Yeres et al., *Controlling the Escalating Costs of U.S. Commodities and Derivatives Market Enforcement Actions*, Clifford Chance (Mar. 16, 2021), https://www.cliffordchance.com/content/dam/cliffordchance/briefings/2021/03/Controlling-the-Escalating-Costs-of-US-Commodities-and-Derivatives-Market-Enforcement-Actions.pdf; David Yeres et al., *CFTC Issues Enforcement Guidance on Evaluating Corporate Compliance Programs*, Clifford Chance (Sept. 15, 2020), https://www.cliffordchance.com/content/dam/cliffordchance/briefings/2020/09/CFTC-issues-enforcement-guidance-on-evaluating-corporate-compliance-programs.pdf.

[2]7 U.S.C.A. § 1 *et seq*.

[3]7 U.S.C.A. § 13(a)(2).

[4]7 U.S.C.A. §§ 13a-1(f), 12(a)(2); Commodity Futures Trading Comm'n, Enforcement Manual, at 36 (May 20, 2020), https://www.cftc.gov/sites/default/files/2021-05/EnforcementManual.pdf [hereinafter CFTC Enforcement Manual].

[5]*See e.g.*, *United States v. Glencore International A.G.*, No. 22-CR-00071 (D. Conn. filed May 24, 2022); *United States v. Deutsche Bank Aktiengesellshaft*, No. 20-CR-00584 (E.D.N.Y. filed Dec. 20, 2020); *see also* David Yeres et al., *Arrest of Former UBS Trader During U.S. Travel Reveals DOJ's Continued Focus on Prosecutions of Foreign Nationals for Alleged Market Abuse*, Clifford Chance (Sept. 22, 2017), https://www.cliffordchance.com/content/dam/cliffordchance/briefings/2017/09/arrest-of-former-ubs-trader-during-us-travel-reveals-dojs-continued-focus-on-prosecutions-of-foreign-nationals-for-al.pdf; David Yeres et al., *U.S. Arrests of Foreign Nationals for Acts Committed Overseas Warrant Vigilance*, Clifford Chance (Sept. 8, 2016), https://www.cliffordchance.com/content/dam/cliffordchance/briefings/2016/09/us-arrests-of-foreign-nationals-for-acts-committed-overseas-warrant-vigilance.pdf.

[6]7 U.S.C.A. § 1a(9); *see also Commodity Futures Trading Com'n v. American Bd. of Trade, Inc.*, 803 F.2d 1242, 1248 (2d Cir. 1986) (recognizing that nearly "anything" can be treated as a "commodity" subject to CEA oversight, "simply by its futures being traded on some exchange").

[7]In addition to cooperation with DOJ, the CFTC has conducted joint investigations with the SEC, the Federal Energy Regulatory Commission ("FERC"), the Federal Trade Commission ("FTC"), the New York Attorney General, and the Manhattan District Attorney, among others.

[8]*See* Exec. Order No. 13519, 74 Fed. Reg. 60,123 (Nov. 17, 2009), available at https://obamawhitehouse.archives.gov/the-press-office/executive-order-financial-fraud-enforcement-task-force.

[9]Robb Adkins, *Financial Fraud Enforcement Task Force*, 58 U.S. Attorneys' Bulletin 1, 2 (Sept. 2010), https://www.justice.gov/sites/default/files/usao/legacy/2010/10/05/usab5805.pdf.

[10]Fraud Section, U.S. Dep't of Just., Fraud Section Year in Review 2021, at 31 (2021), https://www.justice.gov/criminal-fraud/file/1472076/download; *see also* Brian A. Benczkowski, Assistant Att'y Gen., Dep't of Just., Remarks at the Global Investigations Review Live New York (Oct. 8, 2019) (available at https://www.justice.gov/opa/speech/assistant-attorney-general-brian-benczkowski-delivers-remarks-global-investigations); *Market Integrity Major Frauds Unit*, U.S. Dep't Just.: Crim. Div., https://www.justice.gov/criminal-fraud/commodities-fraud (last visited Aug. 11, 2022).

[11]Benczkowski, *supra* note 10.

[12]Within the U.S. Attorney's Office for the Southern District of New York, for example, the Securities and Commodities Fraud Task Force handles such matters, as does the Securities and Commodities Fraud Section within the U.S. Attorney's Office for the Northern District of Illi-

nois. *See About: Divisions*, U.S. Dep't Just.: S. Dist. N.Y., https://www.justice.gov/usao-sdny/criminal-division (last visited Aug. 11, 2022); *About*, U.S. Dep't Just.: N. Dist. Ill., https://www.justice.gov/usao-ndil/about (last visited Aug. 11, 2022).

[13]Commodity Futures trading Comm'n, FY2019 Division of Enforcement Annual Report, at 8 (Nov. 25, 2019), https://www.cftc.gov/PressRoom/PressReleases/8085-19 [hereinafter CFTC FY2019 Annual Report]; Commodity Futures trading Comm'n, FY2020 Division of Enforcement Annual Report, at 9 (Dec. 1, 2020), https://www.cftc.gov/PressRoom/PressReleases/8323-20.

[14]*Id.*

[15]The CFTC also conducts enforcement actions in parallel with state attorneys general offices. *See* 7 U.S.C.A. § 16(a); CFTC Enforcement Manual, *supra* note 4, at 38.

[16]Christopher J. Giancarlo, Chairman, Commodity Futures Trading Comm'n, Testimony Before the Senate Committee on Appropriations Subcommittee on Financial Services and General Government (May 8, 2019) (available at https://www.cftc.gov/PressRoom/SpeechesTestimony/opagiancarlo71).

[17]CFTC FY2019 Annual Report, *supra* note 13, at 7. In addition, according to the Division of Enforcement, the CFTC "can most effectively protect our markets when working closely with our colleagues in the enforcement and regulatory community, both domestic and international." *Id.* at 2.

[18]Commodity Futures Trading Comm'n, Agency Financial Report Fiscal Year 2021, at 16, 20 (Nov. 15, 2021), https://www.cftc.gov/node/238691.

[19]*See* Plea Agreement in *United States v. Glencore International A.G.*, No. 22-CR-00071 (D. Conn. filed May 24, 2022), ECF No. 18; Deferred Prosecution Agreement in *United States v. Bank of Nova Scotia*, No. 20-CR-00707 (D.N.J. filed Aug. 19, 2020), ECF No. 2; Deferred Prosecution Agreement in *United States v. JPMorgan Chase & Co.*, No. 20-CR-00175 (D. Conn. filed Sept. 29, 2020), ECF No. 2; Deferred Prosecution Agreement in *United States v. Vitol, Inc.*, No. 20-CR-00539 (E.D.N.Y. filed Nov. 24, 2020), https://www.justice.gov/opa/press-release/file/1342896/download. The Vitol DPA resolved foreign bribery charges, while a parallel resolution with the CFTC concerning both the foreign corruption conduct and attempted manipulation of physical oil benchmarks recognized and offset a portion of the criminal penalty paid to DOJ. Deferred Prosecution Agreement in *United States v. Vitol, Inc.*; *In re* Vitol Inc., CFTC No. 21-01 (Dec. 3, 2020), at 11-12.

[20]7 U.S.C.A. § 13(a)(5).

[21]The CFTC also makes referrals to state criminal prosecutors. 7 U.S.C.A. § 16(a); CFTC Enforcement Manual, *supra* note 4, at 36.

[22]*See, e.g.*, *United States v. Deutsche Bank AG*, No. 15-CR-00061 (D. Conn. filed April 23, 2015); *United States v. Robson*, No. 14-CR-00272 (S.D.N.Y. filed April 28, 2014); *United States v. UBS AG.*, No. 15-CR-00076 (D. Conn. filed May 20, 2015).

[23]*See, e.g.*, *United States v. Smith*, No. 19-CR-00669 (N.D. Ill. filed Aug. 22, 2019).

[24]*See, e.g.*, *United States v. BP Am. Inc.*, No. 07-CR-00683 (N.D. Ill. filed Oct. 25, 2007); *U.S. v. Radley*, 659 F. Supp. 2d 803 (S.D. Tex. 2009).

[25]*See, e.g.*, *United States v. Flaum*, No. 19-CR-00338 (E.D.N.Y. filed July 25, 2019); *United States v. Tower Research Capital LLC*, No. 19-CR-00819 (S.D. Tex. filed Nov. 6, 2019); *United States v. Sarao*, No. 15-CR-00075 (N.D. Ill. unsealed Apr. 21, 2015); *United States v. Coscia*, No. 14-CR-00551 (N.D. Ill. filed Oct. 1, 2014).

[26]*See, e.g.*, *United States v. Wasendorf*, No. 12-CR-02021 (N.D. Iowa filed Oct. 9, 2012).

[27]*See, e.g.*, *United States v. Thompson*, No. 19-CR-00698 (S.D.N.Y. filed Sept. 30, 2019).

[28]18 U.S.C.A. § 1343.

[29]*See U.S. v. Brooks*, 2009 WL 3644122, at *3 (E.D. N.Y. 2009); *see also* Appellant's Opening Br. in *United States v. Chanu*, Nos. 21-2242, 21-2251, 21-2666 (7th Cir. filed Oct. 15, 2021), ECF No. 25 (Defendant-appellant traders argued

that they believed that manual spoofing, despite being a form of deception, was nonetheless permitted on COMEX given that the orders were readily tradeable and at risk, and accordingly "manual spoofing could not be prosecuted under the wire fraud statute because it did not involve material misrepresentations or omissions." The Seventh Circuit's ruling on this issue is pending.).

[30]DOJ guidance classifies these alternatives to prosecution as being an "important middle ground between declining prosecution and obtaining the conviction of a corporation." U.S. Dep't of Just., Just. Manual § 9-28.200(B) (2020).

[31]U.S. Dep't of Just., Just. Manual § 9-28.300 (2020).

[32]Fraud Section, U.S. Dep't of Just., Fraud Section Year in Review 2021, at 3 (2021), https://www.justice.gov/criminal-fraud/file/1472076/download.

[33]*See* Fraud Section, U.S. Dep't of Just., Fraud Section Year in Review 2020 (2020), https://www.justice.gov/criminal-fraud/file/1370171/download.

[34]*United States v. NatWest Markets Plc*, No. 21-CR-00187 (D. Conn. 2021); *United States v. Glencore International A.G.*, No. 22-CR-00297, (S.D.N.Y. 2022); see also David Yeres et al., FCPA and the Commodity Exchange Act: A New Relationship (Mar. 13, 2019), https://www.cliffordchance.com/content/dam/cliffordchance/briefings/2019/03/fcpa-and-the-commodity-exchange-act-a-new-relationship.pdf.

[35]U.S. Dep't of Just., FYs 2022-2026 Strategic Plan, at 53 (July 1, 2022), https://www.justice.gov/doj/book/file/1516901/download.

[36]Merrick B. Garland, U.S. Att'y Gen., Dep't of Just., Keynote Address at ABA's Annual National Institute on White Collar Crime (Mar. 3, 2022) (available at https://www.justice.gov/opa/speech/attorney-general-merrick-b-garland-delivers-remarks-aba-institute-white-collar-crime).

[37]*Id.*

[38]Lisa O. Monaco, U.S. Deputy Att'y Gen., Dep't of Just., Keynote Address at ABA's 36th National Institute on White Collar Crime (Oct. 28, 2021) (available at https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-o-monaco-gives-keynote-address-abas-36th-national-institute) [hereinafter Monaco Speech].

[39]U.S. Dep't of Just., Just. Manual § 9-28.200 (2008), http://www.justice.gov/opa/documents/corp-charging-guide?lines.pdf.

[40]*Id.*

[41]Memorandum from Sally Quillian Yates Deputy Att'y Gen. U.S. Dep't of Just. on Individual Accountability for Corporate Wrongdoing to U.S. Dep't of Just. Staff (Sept. 9, 2015) (available at https://www.justice.gov/archives/dag/file/769036/download).

[42]Rod J. Rosenstein, Deputy Att'y Gen., U.S. Dep't of Just., Remarks at the American Conference Institute's 35th International Conference on the Foreign Corrupt Practices Act (Nov. 29, 2018) (available at https://www.justice.gov/opa/speech/deputy-attorney-general-rod-j-rosenstein-delivers-remarks-american-conference-institute-0).

[43]*Id.*

[44]*Id.*

[45]*Id.*

[46]Monaco Speech, *supra* note 38.

[47]*Id.*

[48]Memorandum from Lisa O. Monaco Deputy Att'y Gen. Dep't of Just. on Corp. Crime Advisory Group and Initial Revisions to Corp. Crim. Enf't Policies to U.S. Dep't of Just. Staff, at 3 (Oct. 28, 2021) (available at https://www.justice.gov/dag/page/file/1445106/download) [hereinafter Monaco Memo].

[49]*See id.*

[50]Monaco Speech, *supra* note 38.

[51]*Id.*

[52]*Id.*

[53]*Id.*

[54]*Id.*

[55]*Id.*

[56]Sadie Gurman, *Deputy Attorney General Lisa Monaco Underscores DOJ's Tougher Line on Corporate Crime*, Wall Str. J. (Dec. 7, 2021), https://www.wsj.com/livecoverage/wsj-ceo-council-tesla-intel-reddit-pfizer/card/SqhPc0C3ih6pvJZtJw3u ("At the end of the day, we cannot have a system where it appears that entering into one of these agreements [such as a DPA or NPA] is just the cost of doing business.").

[57]*See* Monaco Memo, *supra* note 48, at 2.

[58]*See* Monaco Speech, *supra* note 38.

[59]*See* Monaco Memo, *supra* note 48, at 2.

[60]*Id.* at 4-5.

[61]*Id.* at 4.

[62]*See* Monaco Speech, *supra* note 38.

[63]Kenneth A. Polite Jr., Assistant Att'y Gen., U.S. Dep't of Just., Remarks at NYU Law's Program on Corp. Compliance and Enf't (PCCE) (Mar. 25, 2022) (available at https://www.justice.gov/opa/speech/assistant-attorney-general-kenneth-polite-jr-delivers-remarks-nyu-law-s-program-corporate).

[64]Yeres et al., Responding to a U.S. Government Investigation in the Derivatives, Commodities, and Securities Markets, supra note 1; see also Yeres et al., Controlling the Escalating Costs of U.S. Commodities and Derivatives Market Enforcement Actions, supra note 1.

[65]See Yeres et al., CFTC Issues Enforcement Guidance on Evaluating Corporate Compliance Programs, supra note 1.

[66]Criminal division, U.S. Dep't of Just., Evaluation of corporate Compliance Programs (2020), https://www.justice.gov/criminal-fraud/page/file/937501/download.

[67]*Id.* at 1-2.

[68]*Id.* at 15-18.

[69]*See* Memorandum from James M. McDonald Dir. Div. of Enf't Commodities Futures Trading Comm'n on Civ. Monetary Penalty Guidance to the Div. of Enf't Staff (May 20, 2020) (available at https://www.cftc.gov/media/3896/EnfPenaltyGuidance052020/download) [hereinafter May 20, 2020 Memorandum]; *see also* Robert G. Houck et al., *Developments in Commodities Law 2020—an Uncommon Year in Review*, 54 No. 14 Rev. Sec. & Commodities Regul., 165, 167 (Aug. 18, 2021).

[70]*See* May 20, 2020 Memorandum, *supra* note 69, at 4.

[71]*See* Memorandum from James M. McDonald Dir. Div. of Enf't Commodities Futures Trading Comm'n regarding Guidance on Evaluating Compliance Programs in Connection with Enf't Matters to the Div. of Enf't Staff (Sept. 10, 2020) (available at https://www.cftc.gov/media/4626/EnfGuidanceEvaluatingCompliancePrograms091020/download).

[72]*Id.* at 2-3.

[73]*United States v. Glencore International A.G.*, No. 22-CR-00071 (D. Conn filed May 24, 2022); Plea Agreement in *United States v. Glencore International A.G.*, No. 22-CR-00071 (D. Conn. filed May 24, 2022), ECF No. 18. Simultaneously, the firm pleaded guilty to unrelated FCPA charges in the Southern District of New York. Press Release No. 22-554, U.S. Dep't of Just., Glencore Entered Guilty Pleas to Foreign Bribery and Market Manipulation Schemes (May 24, 2022), https://www.justice.gov/opa/pr/glencore-entered-guilty-pleas-foreign-bribery-and-market-manipulation-schemes.

[74]*Plea Agreement in United States v. Glencore International A.G.*, at 18-20.

[75]In tandem, the company settled with the CFTC on manipulation and attempted manipulation charges under the CEA concerning the conduct, and in so doing, incurred payment of over $865 million in civil penalties and over $320 million in disgorgement, bringing total penalties concerning the conduct to over $1.6 billion. *See In re* Glencore Int'l AG, CFTC No. 22-16 (May 24, 2022).

[76]Plea Agreement in *United States v. Glencore International A.G.*, at 9.

[77]*Id.* at 10.

[78]*Id.* at 9-10.

[79]*Id.* at 11.

[80]*United States v. NatWest Markets Plc*, No.

21-CR-00187 (D. Conn. 2021); Plea Agreement in *United States v. NatWest Markets Plc*, No. 21-CR-00187 (D. Conn. 2021), ECF No. 9.

[81]*Plea Agreement in United States v. NatWest Markets Plc*, at 3.

[82]*Id.* at 4, 17, 20.

[83]Deferred Prosecution Agreement in *United States v. Bank of Nova Scotia*, No. 20-CR-00707 (D.N.J. filed Aug. 19, 2020), ECF No. 2., at 9, 14-15.

[84]*Id.* at 4. While the company had made a limited voluntary disclosure to the CFTC, the DOJ declined to provide voluntary disclosure credit because the company did not disclose the conduct to DOJ and the disclosure to CFTC was materially incomplete. In tandem, the CFTC announced, via three separate orders, a $127.4 million settlement with the financial institution on charges relating to spoofing and false statements. *In re* Bank of Nova Scotia, CFTC No. 20-26 (Aug. 19, 2020); *In re* Bank of Nova Scotia, CFTC No. 20-27 (Aug. 19, 2020); *In re* Bank of Nova Scotia, CFTC No. 20-28 (Aug. 19, 2020); Press Release No. 8220-20, Commodity Futures Trading Comm'n, CFTC Orders The Bank of Nova Scotia to Pay $127.4 Million for Spoofing, False Statements, Compliance and Supervision Violations (Aug. 19, 2020), https://www.cftc.gov/PressRoom/PressReleases/8220-20. The 2018 spoofing investigation had been settled with the CFTC for $800,000. Press Release No. 7818-18, Commodity Futures Trading Comm'n, CFTC Orders the Bank of Nova Scotia to Pay $800,000 Penalty for Spoofing in the Precious Metals Futures Markets (Oct. 1, 2018), https://www.cftc.gov/PressRoom/PressReleases/7818-18. After the 2018 CFTC settlement, it was discovered that employees' spoofing activities were broader than originally understood, and that the financial institution had not been candid in response to its initial investigation, leading to the imposition of heavy penalties. *In re* Bank of Nova Scotia, CFTC No. 20-27, at 2-4. The 2020 settlement included what at the time were the largest penalties ever assessed by the CFTC for spoofing and for making false statements to the CFTC.

[85]Deferred Prosecution Agreement in *United States v. Bank of Nova Scotia,* at 4.

[86]*Id.* at 5-6.

[87]Deferred Prosecution Agreement in *United States v. JPMorgan Chase & Co.*, No. 20-CR-00175 (D. Conn. filed Sept. 29, 2020), ECF No. 2, https://www.justice.gov/opa/press-release/file/1320576/download. As well, a parallel CFTC resolution specifically criticized the institution's surveillance system for lacking "the ability to effectively identify spoofing conduct" prior to 2014. *See In re* JPMorgan Chase & Co., CFTC No. 20-69 (Sept. 29, 2020).

[88]Deferred Prosecution Agreement in *United States v. JPMorgan Chase & Co.* at 11-12.

[89]*Id.* at 5.

[90]*Id.* at C-2.

[91]*Id.* at C-6.

[92]*Id.* at 17.

[93]*Id.* at 8.

[94]*Id.* at 9-11; *see United States v. John Edmonds*, No. 18-CR-00239 (D. Conn. filed Oct. 9, 2018); *United States v. Christiaan Trunz*, No. 19-CR-00375 (E.D.N.Y. filed Aug. 19, 2019); *see also United States v. Smith,* No. 19-CR-00669 (N.D. Ill. filed Aug. 22, 2019).

[95]Press Release No. 19-712, U.S. Dep't of Just., Merrill Lynch Commodities, Inc. Crim. Investigation (June 25, 2019), https://www.justice.gov/opa/pr/merrill-lynch-commodities-inc-enters-corporate-resolution-and-agrees-pay-25-million; Non-Prosecution Agreement in *Merrill Lynch Commodities, Inc. Crim. Investigation*, Dep't of Just. Crim. Div. (June 25, 2019), https://www.justice.gov/opa/press-release/file/1177296/download. On the same day, the CFTC also settled its charges against the trading firm (which is a provisionally registered swap dealer) for the alleged spoofing, manipulation, and attempted manipulation. *See In re* Merrill Lynch Commodities, Inc., CFTC No. 19-07 (June 25, 2019). The firm agreed to pay approximately $25 million, which includes a civil monetary penalty of $11.5 million, over $2.3 million in restitution, and disgorgement of $11.1 million.

[96]Non-Prosecution Agreement in *Merrill*

Lynch Commodities, Inc. Crim. Investigation, at 1.

[97]*Id.* at 1-2.

[98]Principal Deputy Assistant Att'y Gen. John P. Cronan, Dep't of Just., Remarks at the 3rd Annual Global Investigations Review Live Event (Oct. 25, 2018) (available at https://www.justice.gov/opa/speech/principal-deputy-assistant-attorney-general-john-p-cronan-justice-department-s-criminal-1) [hereinafter Cronan Speech].

[99]U.S. Dep't of Just., Declination Letter (Feb. 28, 2018), https://www.justice.gov/archives/criminal-fraud/file/1039791/download.

[100]Cronan Speech, *supra* note 98.

[101]*United States v. Vorley & Chanu*, No. 18-CR-00035 (N.D. Ill. filed July 24, 2018).

[102]U.S. Dep't of Just., Crim. Div., Evaluation of Corporate Compliance Programs, at 9 (June 2020), https://www.justice.gov/criminal-fraud/page/file/937501/download; Commodity Futures Trading Comm'n, Guidance on Evaluating Compliance Programs in Connection with Enforcement Matters, at 2 (Sept. 10, 2020), https://www.cftc.gov/PressRoom/PressReleases/8235-20.

[103]Deferred Prosecution Agreement in *United States v. Bank of Nova Scotia*, No. 20-CR-00707 (D.N.J. filed Aug. 19, 2020), ECF No. 2, at 4-5.