

RECORD-SETTING CFTC AND DOJ PENALTIES IMPOSED AFTER FAILURE TO PROVIDE COMPLETE AND ACCURATE INFORMATION IN AN EARLIER INVESTIGATION AND SETTLEMENT OF SPOOFING CHARGES

On August 19, 2020, the U.S. Commodity Futures Trading Commission (“CFTC”) announced a \$127.4 million settlement with a bank headquartered outside the United States (the “Bank”) for spoofing and false statements. The settlement resulted from the Bank’s failure to respond candidly in connection with a prior spoofing investigation by CFTC, which was settled in 2018 for \$800,000, and the discovery of additional violations upon CFTC’s expanded reinvestigation. CFTC Chairman Heath Tarbert commented that “[t]hese record-setting penalties reflect not only our commitment to being tough on those who break the rules, but also the tremendous strides the agency has made in data analytics.”¹ The current settlement includes the largest penalties ever assessed by CFTC for spoofing and for making false statements to CFTC as well as the appointment of a monitor. In addition, the Bank entered a deferred prosecution agreement (“DPA”) with the U.S. Department of Justice (“DOJ”) and agreed to pay a criminal fine of \$60.4 million. The size and scope of these penalties underscore the downsides of failure to respond thoroughly and candidly to CFTC investigations. More information on these topics can be found in Clifford Chance’s *Guide to United States and United Kingdom Derivative and Commodity Market Enforcement Regimes* and other publications,

¹ Press Release (Aug. 19, 2020) (“Press Release”). https://www.cftc.gov/PressRoom/PressReleases/8220-20?utm_source=govdelivery.

including *Responding Properly to US/UK investigations*, and *CFTC Updates Self-Reporting and Cooperation Guidelines*.²

TAKEAWAY

As this settlement demonstrates, when responding to an inquiry from CFTC or an exchange, organizations should seek to conduct an internal investigation that is sufficiently broad to identify the full scope of potential misconduct. Depending upon the nature and scope of the authority's initial inquiry, the internal investigation may well need to be broader than the time period and personnel identified by the inquiring authority. Any representations made to the authorities (including prosecutors, regulators, exchanges and self-regulatory organizations) must be vetted by legal or compliance staff for completeness and accuracy. If an organization finds that a prior representation was inaccurate or that the scope of misconduct is broader than previously thought, the organization should, in nearly all instances, proactively disclose this new information to the authorities. If subsequently discovered by the authorities, the penalty for a failure to disclose will almost always be much greater than any additional penalty that results from a proactive disclosure.

BACKGROUND

In 2018, the Bank paid a civil monetary penalty of \$800,000 to CFTC to settle charges of spoofing, which is the act of placing orders to buy or sell on an exchange, with the intent to cancel or modify those orders rather than to execute. The 2018 settlement order alleged that from 2013 to 2016, traders on the Bank's precious metals desk in New York engaged in spoofing of gold and silver futures contracts traded on the COMEX exchange.³ CFTC cited the Bank's substantial cooperation with its investigation as a factor in agreeing to settle for the relatively small sum of \$800,000.⁴

CURRENT SETTLEMENT

After the settlement, however, CFTC relied on its enhanced data analytics capability⁵ and discovered that the Bank's spoofing activities were broader than it had originally understood, and concluded that the Bank had not been candid in response to its initial investigation.⁶ Among other things, the Bank failed to identify to CFTC certain of its precious metals traders, certain accounts through which it traded precious metals futures contracts and certain COMEX user IDs that its traders used to trade precious metals.⁷ CFTC further found that the Bank

² Clifford Chance US LLP, *Don't make it worse: responding properly to US/UK investigations* (February 7, 2019), available at: <https://www.cliffordchance.com/content/dam/cliffordchance/PDF/responding-to-uk-uk-derivatives-investigations.pdf>; CFTC Updates Self-Reporting and Cooperation Guidelines (September 26, 2017), available at: <https://www.cliffordchance.com/content/dam/cliffordchance/briefings/2017/09/cftc-updates-self-reporting-and-cooperation-guidelines.pdf>. Please also refer to Clifford Chance's Guide to United States and United Kingdom Derivative and Commodity Market Enforcement Regimes available upon request.

³ CFTC No. 18-50, 2018 WL 4828376 (Sept. 28, 2018)

⁴ *Id.* at *2

⁵ Press Release. CFTC Division of Enforcement James McDonald stated that "[w]e now have the tools, including through the development of our data-analytics program, to better test and verify the information we receive."

⁶ Order Instituting Proceedings Pursuant To Section 6(c) And (d) Of The Commodity Exchange Act, Making Findings, And Imposing Remedial Sanctions at 2. CFTC Docket No. 20-28 ("False Statement Order").

⁷ *Id.* at 3.

made false statements to COMEX regarding the existence of a central repository of COMEX user IDs that its traders used, and to the National Futures Association concerning its use of software to monitor manipulative or deceptive trading practices, including spoofing.⁸ The Bank also failed to correct misleading statements made by its employees in sworn testimony.⁹ Whereas CFTC originally settled based on conduct dating back to 2013 and involving only traders in New York, its further investigation revealed that the conduct dated back to 2008, involved traders in London and Hong Kong¹⁰ in addition to New York, and involved trading in platinum and palladium in addition to gold and silver.

The Bank was very heavily penalized for its lack of candor in responding to the first investigation. The Bank agreed to a new settlement with CFTC, which included a \$42 million civil monetary penalty for spoofing (CFTC's largest spoofing penalty to date), a \$17 million civil monetary penalty for false statements (CFTC's largest false-statements penalty to date), a \$50 million civil monetary penalty for compliance and supervision failures, and a combined \$18.4 million in disgorgement and restitution.¹¹ The Bank also entered a DPA with the DOJ, deferring criminal charges of wire fraud and attempted price manipulation.¹² The DPA requires the Bank to pay a \$60.4 million fine and to appoint an independent compliance monitor for a period of three years.¹³

The very large penalty paid by the Bank stands in sharp contrast to the \$25 million spoofing penalty that another large bank paid to CFTC in 2018.¹⁴ In that matter, the CFTC alleged a similar number of instances of spoofing, involving a similar number of traders, as in this matter. But likely as a result of that bank's candor and effective cooperation, its penalty was less than one fifth the penalty paid by the Bank in this matter, and did not involve a DOJ component.

BIG PICTURE

As this settlement demonstrates, banks and other trading institutions would be well advised to ensure that their responses to CFTC inquiries are thorough and accurate. This may require a greater investment of resources and management oversight up front. But that investment of additional resources will likely pale in comparison to the penalties that an institution will face should the initial response to the investigation be incomplete or inaccurate.

⁸ *Id.* at 3-4.

⁹ Order Instituting Proceedings Pursuant To Section 6(C) And (D) Of The Commodity Exchange Act, Making Findings, And Imposing Remedial Sanctions at 10-11. CFTC Docket No. 20-26 ("Compliance Order").

¹⁰ For more information regarding the extraterritorial reach of the commodities laws, see *Defending Against U.S. Trading-related Investigations And Litigation: Do The U.S. Securities And Commodities Laws Reach Foreign Conduct?* (<https://www.cliffordchance.com/briefings/2019/10/defending-against-u-s--trading-related-investigations-and-litiga.html>); David Yeres, Tim Cornell, Robert Houck, Benjamin Peacock and John Friel, *Extraterritorial Enforcement of the Commodities, Securities and Antitrust laws: A Growing Confluence*, Futures and Derivatives Law Report, Volume 40, Issue 3 (March 2020).

¹¹ Spoofing Order at 8, 9, Compliance Order at 18, and False Statement Order at 6.

¹² Deferred Prosecution Agreement. Case No. 20-207.

¹³ *Id.* at ¶¶ 3, 7. Because CFTC agreed to offset certain amounts that the Bank paid to DOJ and *vice versa*, the Bank was required to pay a combined total of \$127.4 million to CFTC and DOJ. See *Id.* at ¶ 8; Spoofing Order at 8.

¹⁴ Order Instituting Proceedings Pursuant To Section 6(c) And 6(d) Of The Commodity Exchange Act, Making Findings And Imposing Remedial Sanctions at 3. CFTC Docket No. 17-06.

CONTACTS

David Yeres
Senior Counsel

T +1 212 878 8075
E david.yeres
@cliffordchance.com

Robert Houck
Partner

T +1 212 878 3224
E robert.houck
@cliffordchance.com

Benjamin Peacock
Associate

T +1 212 878 8051
E benjamin.peacock
@cliffordchance.com

Gege Wang
Associate

T +1 212 878 8106
E gege.wang
@cliffordchance.com

This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

www.cliffordchance.com

Clifford Chance, 31 West 52nd Street, New York, NY 10019-6131, USA

© Clifford Chance 2020

Clifford Chance US LLP

Abu Dhabi • Amsterdam • Barcelona • Beijing • Brussels • Bucharest • Casablanca • Dubai • Düsseldorf • Frankfurt • Hong Kong • Istanbul • London • Luxembourg • Madrid • Milan • Moscow • Munich • Newcastle • New York • Paris • Perth • Prague • Rome • São Paulo • Seoul • Shanghai • Singapore • Sydney • Tokyo • Warsaw • Washington, D.C.

Clifford Chance has a co-operation agreement with Abuhimed Alsheikh Alhagbani Law Firm in Riyadh.

Clifford Chance has a best friends relationship with Redcliffe Partners in Ukraine.