ANOTHER COP ON THE INTERNATIONAL BEAT: THE CFTC ANNOUNCES EXPANDED FOCUS ON FOREIGN CORRUPTION

Date: 7 March 2019

Regulatory & Policy

By: Clifford C. Histed, Christopher L. Nasson, Neil T. Smith, Hayley Trahan-Liptak

On Wednesday, the U.S. Commodity Futures Trading Commission ("CFTC" or the "Commission") became the latest government agency to formally set its sights on foreign corruption. In a speech at the American Bar Association's National Institute on White Collar Crime, CFTC Enforcement Director James McDonald announced that the Commission was "committed" to enforcing the Commodity Exchange Act ("CEA") where foreign corrupt practices impact domestic markets.[1] This announcement marks the first publicized, coordinated effort by the CFTC to focus on foreign bribery as a policy priority.

In his remarks, Director McDonald emphasized the adverse impact that foreign corruption has on the domestic markets that the CFTC regulates, and advised that such acts may constitute fraud, manipulation, false reporting, or other violations under the CEA. Director McDonald cited several examples of misconduct the CFTC may investigate, including the payment of bribes to win business trading swaps and derivatives contracts, for example, and cases where the concealment of bribes results in the manipulation of benchmark interest rates.

The Director's remarks and the CFTC's newly announced policy should caution international traders and trading firms and serve as a reminder of both the dangers of operating in high-risk international markets and the scope of U.S. government enforcement beyond its borders. In making this policy announcement, the CFTC also entered a crowded landscape of government agencies seeking to investigate and prosecute individuals and entities engaging in foreign corruption. While the Department of Justice ("DOJ") and Securities and Exchange Commission ("SEC") have historically led the charge into combatting foreign corruption on behalf of the United States, other government agencies have recently joined the fight. This includes the New York Federal Reserve, which brought charges in 2016 against an entity and individuals relating to corrupt hiring practices in Asia. The CFTC's announcement was made in the context of inter-agency collaboration with the DOJ and SEC, and signals the government's realization that increasingly complex international bribery schemes require strong enforcement coordination to effectively identify violators.

Conduct that may have previously flown under the radar of other government enforcement agencies will now attract the CFTC's attention. For example, the use of bribery to obtain sovereign wealth funds as investors in derivatives transactions now will be under the CFTC's microscope. Moreover, those operating in industries with strict reporting requirements could also run afoul of the CEA if they are reporting prices inaccurately because those prices and transactions were secured through a bribe. For example, if a U.S. company pays a bribe to win an oil contract, and then reports the complete contract value without disclosing the amount of the bribe, or

©2005-2026 K&L Gates LLP. All Rights Reserved.

underreports the contract value by omitting the bribe's value, that company may be subject to financial penalties and disgorgement for violating the CEA.

The CFTC policy was announced in conjunction with a new Enforcement Advisory on cooperation and self-reporting.[2] According to the Enforcement Advisory, the Commission will offer incentives to cooperating companies and individuals. For those not registered or required to register with the CFTC, the agency will apply a presumption (absent aggravating circumstances) against recommending a civil monetary penalty if the company or individual "timely self-reports violations … involving foreign corrupt practices, fully cooperates, and appropriately remediates."[3] Likewise, companies and individuals who are required to register with the CFTC will be eligible for recommended reductions in civil monetary penalties if they cooperate with the CFTC.[4] Historically, the Commission's January 19, 2017 and September 26, 2017 Enforcement Advisories set forth the CFTC's strong policy to encourage companies and individuals to voluntarily disclose violations and fully cooperate in investigations. These policies were reflected in high-profile settlements in 2018, where the Commission mentioned substantial cooperation as a factor in the agreement. These policies are also consistent with the efforts to encourage cooperation and self-reporting at the SEC and DOJ.[5] As the CFTC widens its lens to the international market, industries can expect a similar, or even greater push, for cooperation in these complex industries that would otherwise be challenging for the CFTC to investigate. And CFTC-regulated entities should expect another player at the table in investigations into potentially corrupt international conduct.

Although Wednesday's announcement was the first public statement of the CFTC's intent to focus on foreign corruption, it is likely that multiple investigations are already underway. Companies and individuals participating in international commodity and derivatives markets should stay tuned as it is expected that the CFTC will begin bringing enforcement actions in this area in the near future.

NOTES:

[1] Remarks of CFTC Director of Enforcement James M. McDonald at the American Bar Association's National Institute on White Collar Crime (March 6, 2019), https://www.cftc.gov/PressRoom/SpeechesTestimony/opamcdonald2.
[2] U.S. COMMODITY FUTURES TRADING COMMISSION, Enforcement Advisory: Advisory on Self Reporting and Cooperation for CEA Violations Involving Foreign Corrupt Practices, (March 6, 2019), https://www.cftc.gov/sites/default/files/2019-03/enfadvisoryselfreporting030619.pdf.
[3] Id.
[4] Id.
[5] FCPA Corporate Enforcement Policy, USAM 9-47.120, Department of Justice, (updated Nov. 29, 2017), https://www.justice.gov/criminal-fraud/corporate-enforcement-policy.

©2005-2026 K&L Gates LLP. All Rights Reserved.

KEY CONTACTS



CLIFFORD C. HISTED
PARTNER

CHICAGO
+1.312.807.4448
CLIFFORD.HISTED@KLGATES.COM



NEIL T. SMITH
PARTNER

BOSTON
+1.617.261.3180
NEIL.SMITH@KLGATES.COM



CHRISTOPHER L. NASSON
MANAGING PARTNER, BOSTON OFFICE

BOSTON, NEW YORK
+1.617.261.3135
CHRISTOPHER.NASSON@KLGATES.COM



HAYLEY TRAHAN-LIPTAK
PARTNER

BOSTON
+1.617.951.9148
HAYLEY.TRAHAN-LIPTAK@KLGATES.COM

This publication/newsletter is for informational purposes and does not contain or convey legal advice. The information herein should not be used or relied upon in regard to any particular facts or circumstances without first consulting a lawyer. Any views expressed herein are those of the author(s) and not necessarily those of the law firm's clients.

©2005-2026 K&L Gates LLP. All Rights Reserved.