



White Collar, Government & Internal Investigations ADVISORY ■

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CFTC Announces New Foreign Corrupt Practices Initiative

On March 6, 2019, the enforcement director for the Commodity Futures Trading Commission (CFTC), James McDonald, [announced](#) that the CFTC will be wading into investigation and enforcement related to foreign corruption practices. On the same day, the CFTC also released a [new advisory](#) addressing the impact of self-reporting and cooperation for Commodity Exchange Act (CEA) violations involving foreign corrupt practices. The statement and advisory signal a new focus for the CFTC and may be a sign that one or more corporate resolutions involving foreign corruption issues could be coming soon.

The CFTC Is Already Working with Other Federal Departments

McDonald acknowledged that foreign-corruption investigations have typically been the province of the U.S. Department of Justice (DOJ) and the U.S. Securities and Exchange Commission (SEC) under the Foreign Corrupt Practices Act (FCPA). According to McDonald, the CFTC's decision to coordinate with the DOJ and SEC arose out of "conversations with our enforcement partners about factual scenarios known to them, to which ... the CFTC might be able to add our expertise about how those facts would affect American derivatives markets."

Explaining that foreign corrupt practices could "constitute fraud, manipulation, false reporting, or a number of other types of violations under the CEA," McDonald cited several examples of how such practices could implicate derivatives markets.

- Bribes could be paid to secure business tied to regulated activities like trading, advising, or dealing swaps or derivatives.
- Bribes could be paid to manipulate benchmarks underlying related derivative contracts.
- Prices could be impacted by bribery and corruption and falsely reported to benchmarks.
- Corrupt practices could impact prices in commodity markets that drive U.S. derivatives prices.

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McDonald also made it clear that these scenarios are not merely hypothetical, stating that the CFTC currently has “open investigations involving similar conduct.” The clear implication of McDonald’s statement is that the CFTC is already active in this area and that corporate resolutions may be forthcoming.

The CFTC’s New Advisory Parallels DOJ FCPA Enforcement Policies

McDonald’s announcement and the related advisory issued by the CFTC provided assurances to industry that the CFTC intends to implement policies similar to those already utilized by the DOJ in FCPA investigations. This is true both for self-disclosure and cooperation and for coordinating resolutions.

In December 2017, the DOJ issued new guidance indicating creating a presumption of an FCPA declination for companies that meet the following requirements:

- Voluntary self-disclosure of potential violations.
- Full cooperation with the government’s investigation.
- Timely remediation of identified problems.

The new CFTC advisory likewise confirms that companies that are not registered or required to register with the CFTC and meet these same three requirements will presumptively receive a recommendation of no civil monetary penalty absent aggravating factors. Even registered companies, which already have requirements to disclose foreign corrupt practices to the CFTC, will be eligible for a “substantial reduction in penalty,” according to McDonald.

In December 2018, Deputy Attorney General Rod Rosenstein announced a new “piling on” policy, which has since been formalized in the DOJ’s Justice Manual (formerly the USAM). The policy encourages DOJ attorneys to take into account fines, penalties, and forfeiture imposed by other enforcement authorities when seeking to resolve a DOJ investigation. Echoing Rosenstein’s policy, McDonald’s comments confirmed that the CFTC “will not pile onto other existing investigations” and will work closely with other enforcement authorities “to avoid duplicative investigative steps.”

Conclusion

Though the full impact of the CFTC’s decision to move into foreign corrupt practices enforcement remains to be seen, McDonald’s comments suggest that we may not have to wait long for the first CFTC resolution to become public. In addition, companies with FCPA issues must now be aware that another federal enforcement authority is watching and must make decisions about voluntary disclosure and cooperation accordingly.

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