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All Aboard! CFTC Jumps on the Anti-Corruption Enforcement Train

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March 11, 2019 – Anti-corruption enforcement was once almost entirely the domain of the U.S. Department of Justice (DOJ) and the Securities and Exchange Commission (SEC). Over the past several years, anti-corruption enforcement has spread across the globe, with new legislation and regulators appearing around every corner. Last week another new face – and not one many would have expected – hopped aboard the enforcement train.

On March 6, 2019, the Division of Enforcement of the Commodity Futures Trading Commission (CFTC) issued an Enforcement Advisory on Self-Reporting and Cooperation for Commodities Exchange Act Violations Involving Foreign Corrupt Practices (the Advisory). CFTC's Enforcement Director, James McDonald, concurrently announced the Advisory in his remarks at the American Bar Association's 33rd National Institute on White Collar Crimes. The announcement sent out clear signals that the CFTC will investigate foreign bribery schemes as violations, not of the Foreign Corrupt Practices Act (FCPA), but of the Commodities Exchange Act (CEA). "Companies and individuals engaging in foreign corrupt practices should recognize that this sort of misconduct might constitute fraud, manipulation, false reporting, or a number of other types of violations under the CEA, and thus be subject to enforcement actions brought by the CFTC," McDonald said during the announcement.

In his remarks, McDonald explained that the Advisory is a gap-filling measure to detect misconduct that otherwise might escape scrutiny. To illustrate foreign corrupt practices that might constitute fraud, manipulation, false reporting and other violations under the CEA, and therefore be subject to the CFTC's jurisdiction, Director McDonald gave the following examples:

- 1) Bribery in connection with CFTC-regulated activities, including trading, advising, or dealing in swaps or derivatives,
- 2) Manipulation of benchmarks through the use of bribery or other corrupt practices,

- 3) Reporting of prices influenced by corrupt practices for benchmark price calculation, and
- 4) Other corrupt practices that result in distorted commodity prices that may alter prices in the U.S. derivatives market.

Director McDonald mentioned that the Division currently has open investigations involving similar conduct. During the panel discussion that followed his remarks, he named the DOJ's enforcement actions against Société Générale SA and Och-Ziff Capital Management Group LLC as fact patterns that involve the commodities markets.

The Advisory specifically addresses self-reporting and cooperation of "violations of the CEA involving foreign corrupt practices." If companies or individuals timely and voluntarily disclose such violations to the Division, and then fully cooperate and appropriately remediate in accordance to the CFTC's prior January 2017 and September 2017 Advisories, the Division will apply *a presumption of recommending a resolution with no civil monetary penalty*. Aggravating factors, such as involvement of senior management, pervasiveness of the violation within the company, and the company or individual being a recidivist, may defeat the presumption. The Division may still request disgorgement, restitution or forfeiture when recommending a resolution without a civil penalty.

It should be noted that the Advisory applies only to companies and individuals not registered (or required to be registered) with the CFTC. CFTC registrants have existing, independent obligations to report any material noncompliance issues under the CEA, including any foreign corrupt practices that violate the CEA. Director McDonald explained during his remarks that although registrants are not eligible for the presumptive recommendation of no penalty provided in the Advisory, the general recommendation of penalty reduction laid out in existing Advisories will still apply to those that self-report, cooperate, and remediate.

While expressing the CFTC's commitment to enforcing provisions in the CEA that encompass foreign corrupt practices, Director McDonald also recognized the importance of coordination with the Commission's enforcement partners at the SEC and the DOJ. Moving forward, the CFTC will bring to bear its expertise in the derivative markets, avoid duplicative steps in parallel investigations and piling onto existing investigations, and credit disgorgement and restitution payments in related enforcement actions.

In a CFTC press release issued after McDonald's announcement, Brian Benczkowski, Assistant Attorney General in charge of the DOJ's Criminal Division, commended the Advisory for echoing the DOJ's Corporate Enforcement Policy, and said that DOJ looked forward to "working in parallel with the CFTC in cases involving foreign corrupt practices, as well as others."

As the CFTC's announcement shows, anti-corruption enforcement is ever changing. Companies should regularly review their compliance policies and safeguards to make sure they remain sufficiently robust to ensure compliance, and that they evolve as necessary. With the CFTC's move into anti-corruption enforcement in particular, individuals and firms that participate in the derivatives markets should review their compliance policies and continue to monitor guidance from the CFTC on this topic.

Please contact the attorneys in Hughes Hubbard's Anti-Corruption and Securities Enforcement practices if you have questions about the CFTC's recent advisories or the adequacy of your current anti-corruption policies and safeguards.

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