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CFTC Reaffirms Focus on Foreign Corrupt Practices

By [Nathaniel B. Edmonds](#), [Tara K. Giunta](#), [Michael L. Spafford](#) & [Daren F. Stanaway](#)

In March 2019, the Commodity Futures Trading Commission (“CFTC”) issued an Enforcement Advisory signaling its plan to focus investigative resources on foreign corruption connected to CFTC-regulated activities.¹ As we reported in an earlier [article](#),² this rollout marked the agency’s first foray into a regulatory jurisdiction traditionally occupied exclusively by the Department of Justice (“DOJ”) and the Securities and Exchange Commission (“SEC”). At the time of the Enforcement Advisory’s release, CFTC Enforcement Director James McDonald explained the new initiative as a response to the rising incidence of foreign “fraud, manipulation, false reporting, [and] other types of violations under the CEA [Commodity Exchange Act]” that, “left unchecked, can distort prices and undermine the integrity of [CFTC-regulated] markets.”³

On May 16, 2019, Director McDonald elaborated on his earlier comments and further described the CFTC’s new mandate. Speaking at the American Conference Institute’s Foreign Corrupt Practices Act (“FCPA”) Conference in New York, Director McDonald reaffirmed the agency’s intent to investigate a broad range of foreign corrupt practices that produce “negative effects on the integrity” of U.S. commodities and derivatives markets.⁴ He explained that a focus on foreign conduct fits well within the CFTC’s existing regulatory structure, and that the agency is “not looking to bring actions under the FCPA”⁵ (which it lacks authority to do in any event). He also emphasized the additive value of expanding the CFTC’s enforcement presence, highlighting the agency’s ability to fill “a gap in non-issuer areas where there has been DOJ authority and there really hasn’t been a civil regulator involved” and “lend [its] market expertise” accordingly.⁶

In the months since the issuance of the Enforcement Advisory, the CFTC has commenced pursuit of its new initiative, issuing document preservation notices and requesting materials in connection with ongoing overseas bribery and corruption investigations previously opened by the SEC, DOJ, and foreign regulators in the energy sector. These inquiries are likely to increase in the coming months, but questions remain about what types of conduct the CFTC ultimately will pursue and how it will coordinate with other regulators in these cases. As we previously reported,⁷ the CFTC likely will focus on U.S. persons engaged in conduct involving not only the bribery of foreign officials but also the commodities markets. Although the precise scope of the CFTC’s mandate is unclear, it may include, for example, payments to foreign officials participating in commodities markets; a scheme to commit market manipulation involving bribery of a foreign official; or use of CFTC-regulated digital products or virtual currencies as a means of paying bribes.



In the meantime, early indications suggest that some form of collaborative enforcement choreography will emerge among the CFTC, the DOJ, and the SEC as they pursue overlapping regulatory directives. Further, companies and individuals can expect the CFTC's Enforcement Division to continue to more closely scrutinize—through a foreign corruption lens—the conduct of traders and firms active in the commodities and derivatives markets, regardless of their registration status with the CFTC.⁸ To that end, participants in CFTC-regulated markets should be vigilant in their efforts to identify potential exposure in this space, including by conducting anti-corruption risk assessments⁹ and strengthening their internal compliance programs accordingly, including via consultation with outside counsel familiar with both the CFTC's practices and FCPA enforcement initiatives and compliance best practices.



If you have any questions concerning these developing issues, please do not hesitate to contact any of the following Paul Hastings Washington, D.C. lawyers:

Nathaniel B. Edmonds
1.202.551.1774
nathanieledmonds@paulhastings.com

Michael L. Spafford
1.202.551.1988
michaelspafford@paulhastings.com

Tara K. Giunta
1.202.551.1791
tara.giunta@paulhastings.com

Daren F. Stanaway
1.202.551.1992
darenstanaway@paulhastings.com

¹ CFTC, A D V I S O R Y O N S E L F R E P O R T I N G A N D C O O P E R A T I O N F O R C E A V I O L A T I O N S I N V O L V I N G F O R E I G N C O R R U P T P R A C T I C E S (M a r . 6 , 2 0 1 9) , <https://www.cftc.gov/sites/default/files/2019-03/enfadvisorselfreporting030619.pdf>.

² Nathaniel Edmonds et al., *A New Enforcement Agency Joins the World of International Corruption Enforcement: CFTC Announces New Initiative Covering Companies Involved in Foreign Corrupt Practices*, PAUL HASTINGS (Mar. 13, 2019), <http://www.paulhastings.com/publications-items/details/?id=9955a96c-2334-6428-811c-ff00004cbded> [hereinafter "Paul Hastings March 2019 Client Alert"].

³ James M. McDonald, Director of Enforcement, CFTC, Remarks at the American Bar Association's National Institute on White Collar Crime (Mar. 6, 2019), <https://www.cftc.gov/PressRoom/SpeechesTestimony/opamcdonald2>.

⁴ Nicole Di Schino, *CFTC's Director of Enforcement Explains Decision to Regulate Foreign Corruption*, ANTI-CORRUPTION REPORT (May 29, 2019), <https://www.anti-corruption.com/2745406/cftcs-director-of-enforcement-explains-decision-to-regulate-foreign-corruption.html>.

⁵ *Id.*

⁶ *Id.*

⁷ See Paul Hastings March 2019 Client Alert.

⁸ See Stewart Bishop, *CFTC Unveils Leniency Policy for Self-Reporting Corruption*, LAW360 (Mar. 6, 2019), <https://www.law360.com/securities/articles/1136090/cftc-unveils-leniency-policy-for-self-reporting-corruption> (referencing Director McDonald's remarks); see also Paul Hastings March 2019 Client Alert.

⁹ In recent published statements regarding how the DOJ considers FCPA compliance, the DOJ emphasized the importance of conducting a risk assessment on the company's anticorruption risks. See U.S. DEP'T OF JUSTICE, CRIMINAL DIVISION, EVALUATION OF CORPORATE COMPLIANCE PROGRAMS at 2-3, 15 (2019), <https://www.justice.gov/criminal-fraud/page/file/937501/download>; see also Paul Hastings Investigations and White Collar Defense Practice Group, *Clarity or Confusion: New DOJ Guidance for Evaluating Corporate Compliance Programs*, PAUL HASTINGS (May 2, 2019), <http://paulhastings.com/publications-items/details/?id=bc6cf96c-2334-6428-811c-ff00004cbded>.

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