

Derivatives Alert

If you have any questions regarding the matters discussed in this memorandum, please contact the following attorneys or call your regular Skadden contact.

David Meister

Partner / New York
212.735.2100
david.meister@skadden.com

Jonathan Marcus

Of Counsel / Washington, D.C.
202.371.7596
jonathan.marcus@skadden.com

Daniel B. O'Connell

Associate / Washington, D.C.
202.371.7003
daniel.oconnell@skadden.com

Shekida A. Smith

Associate / Washington, D.C.
202.371.7382
shekida.smith@skadden.com

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Four Times Square
New York, NY 10036
212.735.3000

1440 New York Avenue, N.W.
Washington, D.C. 20005
202.371.7000

CFTC Chairman Giancarlo Reaffirms Commitment to Aggressive Enforcement Efforts

On October 2, 2018, in a speech to the Economic Club of Minnesota in Minneapolis, Commodity Futures Trading Commission (CFTC) Chairman J. Christopher Giancarlo forcefully emphasized the agency's commitment to an active enforcement program.¹ Giancarlo stressed that the CFTC's vigorous enforcement of the Commodity Exchange Act (CEA) and CFTC regulations is essential to a safe and fair market for consumers, citing a study correlating robust enforcement with higher valuations and lower capital costs.²

While Giancarlo noted that "a strong enforcement program is about more than just numbers," he highlighted metrics from the CFTC's last fiscal year to demonstrate the CFTC Division of Enforcement's level of activity, such as the following:

- The CFTC filed 83 enforcement actions, which was a 25 percent increase from each of the last three years of the prior administration, for a wide range of alleged misconduct, including virtual currency fraud.³
- The CFTC imposed \$900 million in civil monetary penalties, 90 percent of which already has been collected by the agency.
- The CFTC increased the number of cases that imposed civil monetary penalties in excess of \$10 million to more than triple the annual average for 2009-2016.
- The CFTC filed five times more manipulative conduct and disruptive practices cases than the agency's annual average from 2009-2016.⁴
- 70 percent of cases brought by the CFTC involved charges against individuals, rather than entities, which Giancarlo said highlights a focus on personal accountability.

Giancarlo noted that the CFTC increased its coordination with criminal law enforcement authorities; other regulators, such as the Securities and Exchange Commission; and self-regulatory organizations, such as the National Futures Association and exchanges.

¹ "Remarks of Chairman J. Christopher Giancarlo at Economic Club of Minnesota, Minneapolis, Minnesota," CFTC (Oct. 2, 2018).

² See *id.* n.2 (citing John C. Coffee, Jr., Law and the Market: The Impact of Enforcement, 156 U. Pa. L. Rev. 229, 242-46 (2007) (arguing that robust enforcement contributes to lower cost of capital and higher securities valuations in U.S. markets)).

³ See Skadden's [October 1, 2018](#), client alert (discussing recent virtual currency fraud enforcement actions).

⁴ See *id.* (noting recent anti-spoofing actions) and [February 8, 2018](#), client alert (discussing CFTC and Department of Justice anti-spoofing actions).

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He cited 14 parallel actions with criminal law enforcement authorities, including “spoofing” cases.⁵ Giancarlo also noted record awards to whistleblowers — \$75 million in the most recent fiscal year — and new CFTC rules to prohibit employers from retaliating against or discouraging whistleblowers.⁶ Though not mentioned in Giancarlo’s speech, both the number of enforcement actions brought and penalties imposed by the CFTC in 2018 are a marked contrast to 2017, when the agency brought 49 enforcement-related actions and imposed \$413 million in restitution, disgorgement and penalties.⁷

Giancarlo’s remarks shed light on the energy with which the agency has been pursuing enforcement duties since he became chairman in 2017, and are consistent with his previously expressed intent for the agency to have “no pause, no let up and no relaxation in [its] mission to enforce the law and punish wrongdoing.”⁸

⁵ The CEA describes “spoofing” as “bidding or offering with the intent to cancel the bid or offer before execution.” See Commodity Exchange Act Section 4c(a) (5)(C). In 2013, the CFTC issued interpretive guidance identifying activity that it may consider “spoofing.” See “[Antidisruptive Practices Authority](#),” 78 Fed. Reg. 31,890 (May 28, 2013).

⁶ See Jonathan Marcus and David Meister, “[CFTC Moves to Protect Whistleblowers and to Make Claims and Awards Easier](#),” N.Y.L.J., Vol. 257, No. 110 (June 9, 2017); “Whistleblower Awards Process,” 82 Fed. Reg. 24,487 (May 30, 2017).

⁷ Press Release, “[CFTC Releases Annual Enforcement Results for Fiscal Year 2017](#),” CFTC (Nov. 22, 2017).

⁸ Press Release, “[CFTC Acting Chairman Giancarlo Appoints James McDonald as Enforcement Director](#),” CFTC (Mar. 30, 2017).

In keeping with this direction, the CFTC has brought enforcement actions for a wide range of alleged misconduct this year. For example, “insider trading” (a label taken from the securities markets) is one area of recent focus. In September 2018, the CFTC filed a complaint in New York federal district court against an introducing broker firm and an individual broker alleging that the defendants misused material nonpublic information in connection with block trades and committed recordkeeping and supervision failures⁹. Concurrent with the announcement of the complaint, James McDonald, director of the CFTC’s Division of Enforcement, announced the creation of an Insider Trading and Information Protection Task Force, stating, “[i]llegal use of inside or otherwise confidential information significantly undermines market integrity and harms customers in our markets.”¹⁰

⁹ See Compl., *CFTC v. EOX Holdings LLC*, No. 18-cv-8890 (S.D.N.Y. Sept. 28, 2018), ECF No. 1. However, this is not the first insider trading action that the CFTC has pursued. See, e.g., *In re Ruggles*, CFTC No. 16-34 (Sept. 29, 2016); and *In re Arya Motazed*, CFTC No. 16-02 (Dec. 2, 2015). Historically, the CFTC did not police insider trading. However, in recent years, it has filed insider trading actions pursuant to new antifraud and anti-manipulation authority under the Dodd-Frank Act. See Skadden’s [Oct. 1, 2018 client alert](#); compare CEA Section 6(c)(1) and CFTC Rule 180.1, with Securities Exchange Act Section 10(b) and SEC Rule 10b-5.

¹⁰ Press Release, “[CFTC Charges Block Trade Broker With Insider Trading](#),” CFTC (Sept. 28, 2018). The CFTC noted that it will seek to “investigate and, where appropriate, prosecute instances in which individuals have abused access to confidential information,” including by misappropriation, improper disclosure of client trading information, front-running, or using confidential information to prearrange trades in violation of the CEA and CFTC regulations. See *id.*