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Skadden Discusses CFTC Division of Enforcement’s First Annual Report

By David Meister, Jonathan Marcus and Daniel B. O’Connell November 27, 2018

Comment

On November 14, 2018, the Commodity Futures Trading Commission (CFTC) Division of Enforcement released an annual report, apparently the first of its kind.¹ In a speech given at New York University School of Law, James M. McDonald, director of the Division of Enforcement, remarked that the report confirms that the past fiscal year has been “among the most vigorous in the history of the CFTC.”² Highlighting key points from the report, McDonald expanded on CFTC Chairman J. Christopher Giancarlo’s October 2, 2018, speech on the CFTC’s recent enforcement record.³

McDonald stated that the CFTC’s enforcement program over the past year focused on four priorities: preserving market integrity, protecting customers, promoting individual accountability and enhancing coordination with other regulators and criminal authorities.⁴ McDonald cited a number of records or near records set over the past year in pursuit of those goals, including:

- the third-highest number of cases filed;
- the fourth-highest amount of penalties imposed;
- nearly five times the number of manipulation cases filed over the 2009-17 annual average;
- the greatest number and highest amount of whistleblower awards;
- the largest percentage of cases charging individuals; and
- the highest number of parallel criminal investigations.

The report notes that the Division of Enforcement’s fraud prosecutions have spanned traditional areas such as precious metals, foreign exchange and binary options, and new areas such as virtual currency, and discusses steps that the Division of Enforcement has taken to enhance its data analysis capabilities.⁵ The report also highlights several new Division of Enforcement “task forces” created to ensure a “smart and consistent” approach to new types of cases, including spoofing and manipulative trading, virtual currency, unlawful use of confidential information and actions implicating Bank Secrecy Act compliance.⁶

Additionally, the report devotes significant attention to the Division of Enforcement’s approximately one-year-old program that offers potentially substantial credit to institutions that self-report to, and cooperate with, the division, a concept that McDonald said originated from criminal law enforcement and is meant to incentivize companies and individuals to report misconduct.⁷ McDonald stated that the Division of Enforcement was seeing positive “early returns” from the program, including three orders in the last fiscal year that included civil monetary penalties reflecting a significant reduction due to self-reporting, cooperation and remediation.⁸ In particular, McDonald pointed to two recent developments as examples of the Division of Enforcement’s innovative use of its cooperation and self-reporting programs: the division’s decision to bifurcate the liability and penalty determinations for one cooperator’s case in order to allow the division to “consider the entire range of cooperation when determining the appropriate penalty,”⁹ and the division’s first-ever declination letter, issued to a bank for its cooperation, self-reporting and remediation efforts with respect to an individual employee’s alleged misconduct.¹⁰

When a self-reporting and cooperation penalty discount is granted to an institution, the amount of the discount is generally not publicly disclosed. Questioned during his speech about whether he intends to disclose the amount of the discount in the future, McDonald indicated that he is giving thought to that idea. At the same time, he noted that the institution receiving the discount generally will not want the undiscounted figure to be disclosed.¹¹

Concluding his remarks on the report, McDonald explained that the Division of Enforcement’s ultimate goal is to utilize its tools to foster a “culture of compliance,” where companies are “committed to identifying any misconduct, and to reporting it out to the relevant authorities.”¹²

ENDNOTES

¹ Annual Report of the Division of Enforcement ” CFTC (Nov_2018) [hereinafter “Annual Report”]

² “Speech of Enforcement Director James M. McDonald Regarding Enforcement Trends at the CFTC. NYU School of Law: Program on Corporate Compliance & Enforcement,” CFTC (Nov. 14, 2018) [hereinafter “Speech of Enforcement Director James M. McDonald”].

³ For more on Chairman Giancarlo’s speech, see Skadden’s [October 11, 2018](#) client alert.

⁴ See Speech of Enforcement Director James M. McDonald; *see also* Annual Report at 1-2.

⁵ See Annual Report at 2, 4-5.

⁶ See *id.* at 5-6.

⁷ See *id.* at 4; *see also* Speech of Enforcement Director James M. McDonald. For more on the CFTC’s self-reporting and cooperation initiatives, see Skadden-authored articles from [February 8, 2017](#), [August 15, 2017](#), and [October 4, 2017](#).

⁸ See Speech of Enforcement Director James M. McDonald (citing *In re The Bank of Nova Scotia*, CFTC No. 18-50, 2018 WL 4828376 (Sept. 28, 2018) (consent order); *In re UBS AG*, CFTC No. 18-07, 2018 WL 684636 (Jan. 29, 2018) (consent order); *In re The Bank of Tokyo-Mitsubishi UFJ, Ltd.*, CFTC No. 17-21, 2017 WL 3433489 (Aug. 7, 2017) (consent order)). McDonald noted that the CFTC also has used its individual cooperation program to obtain cooperation agreements from individuals, which also led to substantially reduced penalties or, in some cases, no civil monetary penalty. *See id.* (citing *In re Brookshire*, CFTC No. 18-45, 2018 WL 4772229 (Sept. 27, 2018) (consent order)).

⁹ See *id.* (citing *In re Gandhi*, CFTC No. 19-01, 2018 WL 5084650 (Oct. 11, 2018) (consent order)).

¹⁰ See *id.*; *see also In re Jacob Bourne*, CFTC No. 18-51 (Sept. 28, 2018). The declination letter is available on the CFTC’s website.

¹¹ Jody Godoy, “[For CFTC, 2018 Was One of the ‘Most Vigorous’ in its History.](#)” *Law360* (Nov. 15, 2018).

¹² See Speech of Enforcement Director James M. McDonald; *see also* Annual Report at 3.

This post comes to us from Skadden, Arps, Slate, Meagher & Flom LLP. It is based on the firm’s memorandum, “CFTC Division of Enforcement Touts ‘Vigorous’ Year in First Annual Report,” dated November 20, 2018, and available [here](#).