

CFTC Signals Foreign Corrupt Practices Investigations

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On March 6, 2019, the Commodity Futures Trading Commission's (CFTC or Commission) Division of Enforcement (Division) published an advisory on self-reporting and cooperation for violations of the Commodity Exchange Act (CEA) that involve foreign corrupt practices. On the same date, James McDonald, the CFTC's enforcement director, announced the new advisory at the American Bar Association's National Institute on White Collar Crime conference. In issuing the advisory, the Division signaled for the first time its intention to investigate and charge CEA and CFTC rule violations related to foreign corrupt practices.

The advisory applies to companies and individuals who are not registered or required to be registered with the CFTC, who "timely and voluntarily" disclose to the Division CEA violations "involving" foreign corrupt practices and follow up the disclosure with full cooperation and appropriate remediation. If a firm or individual meets these criteria, the Division will "apply a presumption that it will recommend" to the Commission a resolution without a civil monetary penalty, as long as there are no aggravating circumstances involving either the nature of the offender or the seriousness of the violation. However, the Division will still require self-reporters to pay disgorgement, forfeiture or restitution. And it will seek "all available remedies," including civil monetary penalties, for companies or individuals involved in the violation who were not involved in submitting the self-report.

The advisory notes that the self-reporter's cooperation and remediation efforts must be in accordance with the Division's January 2017 and September 2017 advisories on cooperation and self-reporting. It also points out that CFTC registrants have existing reporting obligations to the Commission, such as reporting material noncompliance issues, including foreign corrupt practices that violate the CEA.

What is most significant here is that the CFTC is getting involved in Foreign Corrupt Practices Act-like cases, which are traditionally handled by the Department of Justice and the Securities and Exchange Commission. At the conference, McDonald remarked on ways CEA violations could be carried out through foreign corrupt practices — for example, bribery to procure business in connection with trading activity, and benchmark manipulation and false reporting of prices that are the "product of corruption." McDonald noted that the Division's intention is not to "pile onto other existing investigations" by applying duplicative investigative steps and penalties, and that the Division would credit disgorgement and restitution payments already made in parallel enforcement actions by other agencies. However, time will tell whether regulators will ultimately agree to defer to one another in investigations that the CFTC contends involve CEA violations in addition to violations of other laws.

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