ENFORCEMENT AT THE CFTC TAKES SHAPE

By Jeffrey Martino and Ivory L. Bishop Jr.

Jeffrey Martino is a partner, and Ivory Bishop is an associate, in the New York office of BakerHostetler. Contact: jmartino@bakerlaw.com or ibishop@bakerlaw.com.

A top priority of the Commodity Futures Trading Commission’s (“CFTC”) Division of Enforcement “has been to continue to enhance coordination with [its] law enforcement partners,” declared James McDonald, a former assistant U.S. attorney in the Southern District of New York and the current director of enforcement at the CFTC. Accordingly, the CFTC recently took another step to bring itself in line with Department of Justice (“DOJ”) policies, this time issuing guidance on self-reporting and cooperation credit in connection with violations of the Commodities Exchange Act (“CEA”) involving foreign corrupt practices.

As the CFTC’s guidance and the growing number of parallel prosecutions and enforcement actions make clear, the CFTC has been increasingly finding areas to coordinate with the DOJ’s Criminal and Antitrust divisions. High-profile prosecutions involving the manipulation of foreign currency exchanges (“FX”), LIBOR rates, and precious metals markets, where the CFTC exercises jurisdiction, has even led the CFTC to embed attorneys within the Criminal and Antitrust divisions to assist with prosecutions and facilitate subsequent enforcement actions.

Given the alignment of the CFTC’s recent guidance, the DOJ’s self-reporting and cooperation policies, and both agencies’ focus on financial benchmark enforcement, it is likely that this tandem will continue to engage in significant parallel prosecutions and enforcement actions against traders, brokers, and other financial players for the foreseeable future.

For defendants and members of the defense bar, it is important to understand how to handle self-reporting and cooperation with either agency, given the fact that the other may be waiting in the wings.

Converging Self-Reporting Policies

The CFTC’s self-reporting guidance provides two standards: one for defendants that are required to register with the CFTC and another for defendants that are not required to register with the CFTC. For those required to register, if there is timely and voluntarily self-reporting of any violations of the CEA and full cooperation and remediation, the CFTC will recommend the most substantial reduction in the civil monetary penalty that otherwise would be applicable.

For those not required to register, the CFTC encourages self-reporting, cooperation, and remediation with an even more favorable outcome—a presumption that the CFTC will rec
ommend a resolution with no civil monetary penalty at all, absent aggravating circumstances involving the nature of the offender or the seriousness of the offense.

Under the Criminal Division’s self-reporting policy, when a company has voluntarily self-disclosed misconduct in a Foreign Corrupt Practices Act (“FCPA”) matter, fully cooperated, and timely and appropriately remediated in accordance with the standards set forth by the Criminal Division, there is a presumption that the company will receive a declination absent aggravating circumstances involving the seriousness of the offense or the nature of the offender.\(^2\)

Under the Antitrust Division’s Leniency Policy, the first company (or individual) to self-report a criminal antitrust violation and cooperate with the division in its investigation and prosecution of such violation can secure a non-prosecution agreement that could potentially even cover its key executives.\(^3\) Additionally, self-reporting and cooperating companies that also timely cooperate with civil plaintiffs would limit damages to single damages in subsequent class action suits rather than the treble damages otherwise available under federal antitrust law.\(^4\)

These similarities, along with the areas of joint jurisdiction shared by the agencies, have led to several recent parallel prosecutions and enforcement actions that were the result of would-be defendants self-reporting and cooperating under the agencies’ policies.

### Increasing Trend of Parallel Action

On January 5, 2017, having failed to self-report first, Barclays PLC, Citicorp, JPMorgan Chase & Co., and The Royal Bank of Scotland pleaded guilty to conspiring to fix prices and rig bids for dollars and euros exchanged in the FX spot market. The companies were sentenced to pay criminal fines totaling more than $2.5 billion. It is notable that the CFTC detailees to the Antitrust Division aided in the prosecutions.

In addition to the criminal actions, each bank was subject to CFTC enforcement actions resulting in combined civil penalties of more than $1.4 billion.\(^5\)

As part of this increasing trend, for the past five years, the CFTC has worked closely with the Criminal Division on numerous investigations, prosecutions, and enforcement actions regarding the manipulation of the precious metals markets. In one such case, three individual defendants were indicted for conspiring to commit price manipulation, bank fraud, wire fraud, commodities fraud, and “spoofing,” among other offenses.\(^6\) The CFTC filed its own corresponding civil enforcement complaint alleging that the individuals intentionally manipulated the price of precious metals futures contracts by spoofing, or...
“placing orders to buy or sell futures contracts with the intent to cancel those orders before execution.” The defendants must now decide whether and how to proceed in the face of the cooperation and testimony of eight unnamed co-conspirators who may have already entered into agreements with the government.

According to its new guidance, the CFTC will extend its interagency cooperation to cover violations of the CEA carried out through foreign corrupt practices. Director McDonald now foresees cooperation with the DOJ to prosecute (1) bribes employed “to secure business in connection with regulated activities like trading, advising, or dealing in swaps or derivatives”; (2) “[c]orrupt practices [used] to manipulate benchmarks that serve as the basis for related derivatives contracts”; (3) false reporting to benchmarks of prices that are the product of corruption; and (4) corrupt practices in any number of forms that alter the prices in commodity markets that drive derivative prices in the U.S.8

Self-Reporting and Cooperation Considerations

Individuals, potentially facing prison sentences, may opt to risk a trial in hopes of clearing their names. But fighting off a criminal trial does not guarantee avoiding the subsequent or simultaneous civil enforcement actions by the CFTC. Institutions, on the other hand, facing collateral regulatory issues and significant penalties, are more likely to seek the benefits of self-reporting, if they are aware of the conduct before the enforcers.

Whether the defendant is an institution or an individual, the decision whether to self-report is not one that should be taken lightly since it comes with the expectation of full cooperation. Under both agencies’ policies, self-reporting is only the first step that defendants must take for favorable treatment; they must also commit to full cooperation in the investigation and prosecution of the underlying misconduct.

Recently, Richard A. Powers, deputy assistant attorney general of the Antitrust Division, elaborated on what the division expects of cooperation. “[I]t’s not a free ride . . . in order to attain the benefits of cooperation, companies and individuals must meaningfully assist the Division’s investigation through truthful, thorough, and timely cooperation.”9

As an example of what is meant by “thorough” cooperation, individuals subject to a corporate plea agreement’s terms, such as current employees, and individual defendants cooperating under a plea agreement may be asked to assist the division with affirmative investigative opportunities. These opportunities may include active participation in covert techniques. “Participation in covert techniques such as recording conversations has always fit within the ambit of full, truthful, and continuing cooperation,” Powers said. “When covert investigative opportunities are presented, we expect individuals to assist in them in order to be fully cooperative and expect their cooperating employers, where appropriate, to help facilitate such assistance.”

Additionally, for prosecutors to consider cooperation, the defendant must identify all individuals substantially involved in or responsible for the misconduct at issue and provide “all relevant facts relating to that misconduct,” whether favorable or unfavorable.10 Cooperation will not benefit defendants that decline “to learn of such facts” or to provide “complete factual information about the individuals substantially involved in or responsible for the misconduct.”

As these policies, parallel actions and cooperation considerations indicate, deciding whether to self-report (and cooperate) or fight is a difficult choice. Neither is without risk; both must be navigated with great care.

However, Director McDonald has made clear that the CFTC intends to ramp up its cooperation with the DOJ. Therefore, the risks associated with parallel actions will only increase for market makers, traders, and financial institutions.

ENDNOTES:

1Remarks of CFTC Director of Enforcement James M. McDonald at the American Bar Association’s National Institute on White Collar Crime (Mar. 6, 2019), htt
ps://www.cftc.gov/PressRoom/SpeechesTestimony/opamcdonald2.


3Department of Justice Antitrust Division Leniency Program, https://www.justice.gov/atr/leniency-program.


