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CFTC Alert

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New Commission Moves Quickly on Enforcement

Within a week of the ceremonial swearing in of its last commissioner,¹ the now fully-formed Commodity Futures Trading Commission² (CFTC) issued 17 enforcement orders and filed one complaint.³ These initial enforcement actions were brought against a wide range of market participants and address four broad areas: (1) fraud and manipulation; (2) record-keeping and supervision; (3) reporting; and (4) registration. Significantly, continuing a trend started last year,⁴ in all four areas, the CFTC highlighted the importance of cooperation.

Fraud and Manipulation

On September 14, 2018, the CFTC's Division of Enforcement (Division), under Director James McDonald, filed a civil enforcement action in the US District Court for the Southern District of New York against an unregistered dealer and one of its owners. The complaint alleged that the defendants defrauded retail clients in connection with precious metals transactions, fraudulently obtaining more than \$600,000.⁵ Also, on September 19, 2018 the Division issued an order against a dually registered commodity pool operator (CPO) and commodity trading advisor (CTA) for one of its trader's alleged spoofing, and employment of a manipulative scheme, in commodity futures

contracts.⁶ The Division alleged that the trader's prohibitive activity took place over a period of approximately one year, across domestic and international markets, and fined the CPO/CTA \$1.8 million.⁷ In a separate order, the trader was fined \$500,000 and received a six-month trading ban.⁸

On September 18 and 19, 2018, the Division also issued orders against an introducing broker (IB)⁹ and a swap dealer¹⁰ for attempted manipulation of the USD ISDAFIX. In both cases, the Division noted the firms' cooperation, including providing information that helped the Division conduct its investigation "efficiently and effectively."¹¹ The Division expressly noted, without going into further detail, that the IB's penalty of \$50 million "reflect[ed] the level of cooperation ... provided during the course of the investigation,"¹² and that the dealer engaged in "significant" remedial action to buttress its controls and policies in regard to benchmarks broadly, and specifically to the USD ISDAFIX.¹³

Record-Keeping and Supervision

On September 14, 2018, the Division issued orders against both an IB and a futures commission merchant (FCM) for record-keeping violations and related supervision failures. Though charged with the same basic violations, unlike for the IB, the Division highlighted the FCM's robust cooperation.

Regarding the IB, the Division charged that it had failed to supervise its associated person's management

of the actions of a CTA client who misappropriated funds from its FCM account through misuse of the post-execution allocation process of its bunched orders.¹⁴ Ordering a \$300,000 penalty, the Division charged the IB with failure to supervise because, *inter alia*, it (1) had an inadequate supervisory system; (2) did not conduct an inquiry after the observation of questionable activity (that is, red flags); and (3) did not implement its own policy and procedures.¹⁵ Moreover, the Division also brought record-keeping violations for the IB's failure to maintain instant messages conveying the CTA's allocation instructions.¹⁶

In another order, the Division brought record-keeping violations against an FCM for failing to maintain audit trail data because its legacy system corrupted 8.4 million records, affecting 65 customers.¹⁷ The Division also charged the FCM with failure to supervise because it had not detected the system failure until the Division brought it to its attention.¹⁸ Importantly, however, the Division also acknowledged the FCM's cooperation and remediation, noting that it, among other things:

1. immediately took remedial steps upon acknowledgment;
2. made "substantial efforts" to fix the audit trail data;
3. undertook, through an internal investigation, a comprehensive five-year review to determine the scope of the problem;
4. employed a sizable number of personnel to address the problem;
5. voluntarily communicated its progress to the Division;
6. ultimately reconstructed most of the affected records; and
7. instituted a new testing regime for its audit trail system.¹⁹

The firm's penalty was \$160,000.²⁰

Reporting

Also, on September 14, 2018, the Division issued an order against a provisionally registered swap dealer

for failure to report hundreds of thousands of transactions to a swap data repository (SDR) in several asset classes, stating that it had "under-reported and over-reported tens of thousands of transactions to an SDR, misreported tens of thousands of transactions to an SDR, and failed to report hundreds of thousands of pre-enactment transactions to an SDR in a timely manner."²¹ The Division further noted that these errors resulted in the swap dealer's inability to timely report, *inter alia*, creation and continuation data, unique swap identifiers, and inter-affiliate and pre-enactment swaps.²² The Division order imposed a \$750,000 penalty on the swap dealer, acknowledging, without going into detail, the swap dealer's "substantial" cooperation and remedial action and noted that it resulted in "a significantly reduced civil monetary penalty."²³

Registration

On September 14, 2018, the Division issued nine orders against eight CTAs²⁴ and one CPO²⁵ for offering retail customer foreign exchange (forex) and/or binary options without acquiring the appropriate registration. In referring to these matters, Director McDonald noted that "the Division will vigorously pursue entities and individuals who fail to register with the Division when required."²⁶ The defendants received a range of penalties from \$75,000 to \$150,000,²⁷ and the CPO also received a permanent trading ban.²⁸

The Division noted the importance of cooperation in at least two of these cases. In one case, it noted that the defendants "cooperated extensively," including "providing the Division with material information it had not explicitly requested."²⁹ The Division did not explicitly state in this order, as it did in others, however, that the cooperation had influenced the outcome. And indeed, though the matter did not appear on its face to have particularly exceptional facts compared with the other cases, the defendants received one of the higher penalties at \$150,000.³⁰ Conversely, in regard to another CTA, the Division noted that its "substantial cooperation"

(which the Division did not detail) resulted in a “substantially reduced civil monetary penalty” of \$75,000.³¹

Takeaways

It is too early to tell what, if anything, these 18 matters, which target a wide array of prohibitive behaviors and involve a broad range of CFTC registrants, indicate about the new CFTC’s enforcement direction. It is noteworthy, however, that a number of these cases make direct reference to cooperation. They thus provide more data on how the CFTC is viewing its recently established cooperation policy—at times merely acknowledging cooperation while, at other times, explicitly stating that the cooperation affected the penalty amount. In the latter references, however, there is not a clear indication of just how much the cooperation affected the actual magnitude of the effect. Therefore, for market participants, whether to cooperate remains a nuanced, fact-specific and complex determination.

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NOTES

- ¹ See “Dawn D. Stump Sworn in to Serve as a Commissioner of the CFTC,” Sept. 12, 2018.
- ² See “CFTC Alert: CFTC Commissioners Confirmed,” Aug. 31, 2018.
- ³ As seen below, most of these actions occurred on September 14, 2018.
- ⁴ See “New CFTC Enforcement Policy Encourages Self-Reporting,” Sept. 27, 2017.
- ⁵ Complaint, *CFTC v. Royal Metals Group, LLC & Chelsea Gless*, Civ. No. 18-08407 (Sept. 14, 2018 SDNY).
- ⁶ Order Instituting Proceedings, *Victory Asset, Inc.*, CFTC Dkt. No. 18-36 (Sept. 19, 2018).

- ⁷ *Id.* at 7.
- ⁸ Order Instituting Proceedings, *Michael D. Franko*, CFTC Dkt. No. 18-35 (Sept. 19, 2018).
- ⁹ Order Instituting Proceedings, *ICAP Capital Markets LLC, et al. (ICAP)*, CFTC Dkt. No. 18-33 (Sept. 18, 2018).
- ¹⁰ Order Instituting Proceedings, *Bank of America, N.A. (Bank of America)*, CFTC Dkt. No. 18-34 (Sept. 19, 2018).
- ¹¹ *ICAP* at 3; *Bank of America* at 3.
- ¹² *ICAP* at 3.
- ¹³ *Bank of America* at 3.
- ¹⁴ Order Instituting Proceedings, *Global Asset Advisors LLC d/b/a Daniels Trading & Glenn A. Swanson*, CFTC Dkt. No. 18-30 (Sept. 14, 2018).
- ¹⁵ *Id.* at 6.
- ¹⁶ *Id.* at 6-7.
- ¹⁷ Order Instituting Proceedings, *ABN AMRO Clearing Chicago LLC*, CFTC Dkt. No. 18-31 (Sept. 14, 2018).
- ¹⁸ *Id.*
- ¹⁹ *Id.* at 2-3.
- ²⁰ *Id.* at 7.
- ²¹ Order Instituting Proceedings, *NatWest Markets Plc, formerly Royal Bank of Scotland plc*, at 3, CFTC Dkt. No. 18-32 (Sept. 14, 2018).
- ²² *Id.* at 4.
- ²³ The Division also issued an order against an end-user for failing to report position limit breaches, resulting in a \$300,000 penalty. Order Instituting Proceedings, *Honouround (HK) International Trade Co. Ltd.*, CFTC Dkt. No. 18-29 (Sept. 14, 2018).
- ²⁴ Order Instituting Proceedings, *Forex Entourage, LLC*, CFTC Dkt. No. 18-21 (Sept. 14, 2018); Order Instituting Proceedings, *Isaac Tivon and HedgeFund4U LLC*, CFTC Dkt. No. 18-22 (Sept. 14, 2018); order Instituting Proceedings, *Hooley Solutions, LLC, et al.*, CFTC Dkt. No. 18-23 (Sept. 14, 2018); order Instituting Proceedings, *International Markets Live, Inc.*, CFTC Dkt. No. 18-24 (Sept. 14, 2018); order Instituting Proceedings, *LegionFX, LLC*, CFTC Dkt. No. 18-25, (Sept. 14,

- 2018); order Instituting Proceedings, *Lion's Share FX, LLC, et al.*, CFTC Dkt. No. 18-26 (Sept. 14, 2018); order Instituting Proceedings, *Wealth Generators LLC*, CFTC Dkt. No. 18-27 (Sept. 14, 2018); order Instituting Proceedings, *Mobius Risk Group LLC*, CFTC Dkt. No. 18-28 (Sept. 14, 2018).
- ²⁵ Order Instituting Proceedings, *Ryan Jacob Allen*, CFTC Dkt. No. 18-20 (Sept. 14, 2018).
- ²⁶ CFTC Website. (2018). CFTC files 12 enforcement actions addressing registration, position limits, record-keeping, supervision and reporting [Press release]. Retrieved from <https://www.cftc.gov/PressRoom/PressReleases/7790-18>.
- ²⁷ Order Instituting Proceedings, *Forex Entourage LLC*, CFTC Dkt. No. 18-21 (Sept. 14, 2018); Order Instituting Proceedings, *Isaac Tivon and HedgeFund4U LLC*, CFTC Dkt. No. 18-22 (Sept. 14, 2018); Order Instituting Proceedings, *Hooley Solutions, LLC*, CFTC Dkt. No. 18-23 (Sept. 14, 2018); Order Instituting Proceedings, *International Markets Live, Inc.*, CFTC Dkt. No. 18-24 (Sept. 14, 2018); Order Instituting Proceedings, *LegionFX, LLC*, Dkt. No. 18-25 (Sept. 14, 2018); Order Instituting Proceedings, *Lion's Share FX*, CFTC Dkt. No. 18-26 (Sept. 14, 2018); Order Instituting Proceedings, *Wealth Generators LLC*, CFTC Dkt. No. 18-27 (Sept. 14, 2018).
- ²⁸ Order Instituting Proceedings, *Ryan Jacob Allen*, CFTC Dkt. No. 18-20 (Sept. 14, 2018).
- ²⁹ *International Markets Live, Inc.*, CFTC Dkt. No. 18-24, at 2 (Sept. 14, 2018).
- ³⁰ *Id.*
- ³¹ Order Instituting Proceedings, *Mobius Risk Group LLC*, CFTC Dkt. No. 18-28, at 2 (Sept. 14, 2018).

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