

CFTC Enforcement Alert

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SECURITIES

2014 CFTC Enforcement Year-in-Review, and a Look Forward

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Introduction

In 2014, the Commodity Futures Trading Commission (“CFTC” or the “Commission”) filed 67 new enforcement cases—fewer than any year since 2010—but obtained a record \$3.27 billion in monetary sanctions, nearly double the previous record of \$1.7 billion set in 2013.¹ Roughly half of this amount was recovered in foreign-exchange (“FX”) manipulation settlements with five major banks.² The Commission’s enforcement record in 2014 continues the recent trend of a decline in the overall number of enforcement cases filed annually, but with a greater focus on complex, high-profile cases and the imposition of significantly higher sanctions. In addition, as expected, the Commission began to flex its use of the new enforcement powers provided by the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (“Dodd-Frank”).³ Although the agency has undergone a change in leadership with the arrival of three new Commissioners and a new Director of the Division of Enforcement (“Division”), we expect these trends to continue through 2015. We also expect to see a greater focus on market structure and high-frequency trading issues, as part of the Commission’s core market integrity mission.

New Leadership and Budgetary Pressures

The Commission and its senior Staff experienced significant change in 2014. Since the beginning of the year, three new Commissioners took office: Chairman Timothy G. Massad, Sharon Y. Bowen, and J. Christopher Giancarlo. Commissioner Mark P. Wetjen, appointed in 2011, is the Commission’s only continuing member; the agency’s fifth seat currently remains unoccupied. Additionally, the Chairman appointed Aitan D. Goelman, a former federal prosecutor, as the Commission’s new Director of Enforcement.

While Dodd-Frank greatly expanded the CFTC’s responsibilities, Congress has not provided the Commission with the significant budget increases requested by the agency to meet its expanded mission.⁴ The Division’s employment base has not been correspondingly increased either.⁵ The

¹ COMMODITY FUTURES TRADING COMM’N, AGENCY FINANCIAL REPORT: FISCAL YEAR 2014, at 2 (2014) [hereinafter CFTC 2014 REPORT]; see also Paul M. Architzel et al., 2013 CFTC Enforcement Year-in-Review, and a Look Forward (Feb. 6, 2014) (noting that Commission brought 82 enforcement actions in FY 2013, and 102 enforcement actions in FY 2012).

² See Press Release, Commodity Futures Trading Comm’n, CFTC Orders Five Banks to Pay over \$1.4 Billion in Penalties for Attempted Manipulation of Foreign Exchange Benchmark Rates (November 12, 2014); see also CFTC 2014 REPORT at 38.

³ The Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, H.R. 4173 § 753 (July 21, 2010) (amending the Commodity Exchange Act (codified at 7 U.S.C. § 1 et seq.)).

⁴ See, e.g., Sharon Bowen, Comm’r, Commodity Futures Trading Comm’n, Remarks at the Futures Industry Association Expo 2014 (Nov. 5, 2014) (“Our budget is insufficient, and the Commission and staff consistently have to make difficult choices about how to allocate scarce resources amongst our many regulatory priorities.”).

Commission itself noted, in its annual financial report, that the Division was operating with approximately 3% fewer staff than it had the previous year.⁶ Further, as noted by Chairman Massad, the Division currently has fewer staff than it did in 2002, when the agency's responsibilities were limited to the futures markets.⁷

CFTC officials have stated that these funding constraints will have an impact on the Division's ability to investigate and file new enforcement cases. Division Director Goelman also has stated that the Division intends to file more enforcement cases before administrative law judges in order to avoid the resource-intensive discovery process that is associated with litigation in federal court.⁸

The President has proposed increasing the agency's budget by nearly a third for fiscal year 2016, which would provide funding for approximately 150 new staff members.⁹ Whether the Commission's final budget is increased or current constraints continue, we anticipate that the Commission will continue to bring high-profile complex cases and will continue to seek higher penalties.

Enforcement Activity

Below we discuss several notable highlights in 2014 CFTC enforcement activity.

Benchmark Manipulation

The CFTC's focus on benchmark manipulation continued in 2014. As noted above, the most high-profile actions involved the Commission's ongoing investigations into manipulation of FX benchmark rates. In November 2014, the CFTC filed and settled actions against five major banks for allegedly attempting to manipulate benchmark FX rates. These matters resulted in more than \$1.4 billion in penalties.¹⁰ The orders find that traders at these banks coordinated trading through private chat rooms in an attempt to manipulate the World Markets/Reuters Closing Spot Rates in certain currencies to benefit their positions.¹¹ Though not quantified by the CFTC, the agency credited the banks' "significant cooperation" in the matter, including their self-disclosures of the underlying misconduct.¹²

The Commission also filed two additional settlement orders regarding manipulation of benchmark interest rates involving Lloyds Bank¹³ and RP Martin Holdings Limited¹⁴ for allegedly manipulating and attempting to manipulate LIBOR benchmark interest rates.¹⁵ As part of its settled action, Lloyds agreed to pay a \$105

⁵ *The Commodity Futures Trading Commission: Effective Enforcement and the Future of Derivatives Regulation: Hearing Before the S. Comm. on Agriculture, Nutrition, & Forestry*, 113th Cong. 23 (Dec. 10, 2014) (statement of Timothy Massad, Chairman, Commodity Futures Trading Comm'n) [hereinafter Massad Senate Testimony] (noting that agency staff "is no larger than it was when Dodd-Frank was enacted in 2010").

⁶ CFTC 2014 REPORT at 2.

⁷ *Commodity Futures Trading Commission: Hearing Before the Subcomm. on Agriculture, Rural Development, Food and Drug Administration, and Related Agencies of the H. Comm. on Appropriations*, 113th Cong. 8 (March 6, 2014) (statement of Mark P. Wetjen, Acting Chairman, Commodity Futures Trading Comm'n) [hereinafter Wetjen Senate Testimony] (noting that the Division currently has 149 employees, compared to 154 employees in 2002).

⁸ Stephanie Russell-Kraft, *Cash-Strapped CFTC Faces Troubled Return to Admin Court*, LAW360, Nov. 14, 2014.

⁹ See Ed Beeson, *SEC, CFTC Budgets See Hefty Raises Under Obama Plan*, LAW360, Feb. 2, 2015.

¹⁰ Press Release, Commodity Futures Trading Comm'n, CFTC Orders Five Banks to Pay over \$1.4 Billion in Penalties for Attempted Manipulation of Foreign Exchange Benchmark Rates (Nov. 12, 2014). At the same time, the Financial Conduct Authority separately settled actions against each of the five banks for \$1.7 billion. Press Release, Commodity Futures Trading Comm'n, CFTC Orders Five Banks to Pay over \$1.4 Billion in Penalties for Attempted Manipulation of Foreign Exchange Benchmark Rates (Nov. 12, 2014). The Swiss Financial Market Supervisory Authority and the OCC also brought related actions.

¹¹ See *id.*

¹² Press Release, Commodity Futures Trading Comm'n, CFTC Orders Five Banks to Pay over \$1.4 Billion in Penalties for Attempted Manipulation of Foreign Exchange Benchmark Rates (Nov. 12, 2014).

¹³ See *In re Lloyds Banking Group plc*, CFTC Docket No. 14-18 (July 28, 2014).

¹⁴ See also *In re RP Martin Holdings Limited*, CFTC Docket No. 14-16 (May 15, 2014).

¹⁵ *Lloyds Banking Group plc*, CFTC Docket No. 14-18.

million fine.¹⁶ At the same time, Lloyds entered into a deferred prosecution agreement with the Department of Justice, in which it admitted to wrongdoing and agreed to pay an additional \$86 million criminal penalty.¹⁷ It also entered into agreements with the Bank of England and the United Kingdom's Financial Conduct Authority.¹⁸ As part of its settled action with the Commission, RP Martin agreed to pay a \$1.2 million fine for allegedly disseminating false and misleading information regarding Yen borrowing rates.¹⁹ Together, these settlements added \$106 million to the \$1.77 billion in penalties the Commission previously recovered through benchmark interest rate investigations.²⁰ This figure excludes penalties obtained by the Department of Justice or foreign regulators.

Looking ahead, we believe benchmark integrity will continue to be a high priority area for the Division. Chairman Massad has stated that the agency will continue to investigate and take appropriate enforcement action to ensure that price benchmarks are free from manipulation.²¹ Division officials have stated they are continuing to look into the integrity of price benchmarks.²² In 2015, we may see additional enforcement actions stemming from the Commission's ongoing investigations into interest rate and FX benchmarks, and further cooperative efforts with other domestic and foreign regulatory agencies.²³

Other Manipulation Cases

In 2014, the CFTC settled several manipulation and attempted manipulation cases that had been pending for several years. In *CFTC v. Moncada*,²⁴ the Commission obtained a federal consent order imposing a \$1.56 million civil penalty and trading restrictions as a result of defendant Eric Moncada's alleged attempted manipulation of the wheat futures market. According to the order, Moncada intended to create misleading impressions of rising liquidity by electronically entering and immediately canceling large-lot orders in the CBOT wheat futures market. In *CFTC v. Parnon Energy, Inc.*,²⁵ the Commission obtained a federal consent order imposing a \$13 million civil penalty against Parnon Energy, two affiliates, and two individuals for allegedly manipulating and attempting to manipulate spreads in crude oil futures by concentrated buying and selling in the physical market. In *CFTC v. Hunter*,²⁶ the Commission obtained a federal consent order imposing a \$750,000 civil penalty against trader Brian Hunter for allegedly marking the close in natural gas futures to benefit larger positions in natural gas-related swaps.

As the conduct in these cases occurred prior to the passage of the Dodd-Frank Act, these manipulation cases were all brought under the pre-Dodd-Frank provisions in the Commodity Exchange Act that prohibit the manipulation or attempted manipulation of the price of any commodity or futures contract.²⁷ However, we expect that the Commission will bring future manipulation cases involving more recent conduct under the new powers provided by Section 6(c) of the Commodity Exchange Act and Regulation 180.1, which prohibit the use or attempted use of "any manipulative or deceptive device or contrivance," or any "scheme, or artifice to defraud," with respect to any swap, cash contract, or futures contract. While the

¹⁶ *Id.*

¹⁷ Press Release, Dep't of Justice, Lloyds Banking Group Admits Wrongdoing in LIBOR Investigation, Agrees to Pay \$86 Million Criminal Penalty (July 28, 2014).

¹⁸ Chad Bray, *Lloyds Bank to Pay \$380 Million to Resolve Rate Manipulation Inquiries*, N.Y. TIMES, July 29, 2014, at B3.

¹⁹ *RP Martin Holdings Limited*, CFTC Docket No. 14-16.

²⁰ Press Release, Commodity Futures Trading Comm'n, CFTC Charges Lloyds Banking Group and Lloyds Bank with Manipulation, Attempted Manipulation, and False Reporting of LIBOR (July 28, 2014).

²¹ Massad Senate Testimony at 21.

²² See CFTC 2014 REPORT at 38 (noting that the Commission continues to investigate whether other firms manipulated or attempted to manipulate LIBOR and ICAP ISDAFIX interest rates).

²³ See *id.* (noting continued cooperation with "domestic and foreign regulators and agencies").

²⁴ Consent Order for Permanent Injunction, Civil Monetary Penalty and Other Equitable Relief Against Eric Moncada, *CFTC v. Moncada*, No. 12-cv-8791 (S.D.N.Y. Oct. 1, 2014).

²⁵ Final Consent Order of Permanent Injunction, Civil Monetary Penalty, and Other Relief, *CFTC v. Parnon Energy Inc.*, No. 11 Civ. 3543 (S.D.N.Y. August 4, 2014).

²⁶ Consent Order for Civil Monetary Penalty, and Other Equitable Relief Against Defendant Brian Hunter, *CFTC v. Hunter*, No. 07 Civ. 6682 (S.D.N.Y. Sept. 15, 2014).

²⁷ 7 U.S.C. § 13(a)(2) (2013).

Commission has, to date, only relied on this new authority in cases involving fraudulent conduct,²⁸ we expect that the Division will continue to seek cases to expand its use of its new enforcement authority and will test the boundaries of this new authority in both fraud and manipulation cases.

Disruptive Trading Practices

The CFTC has encouraged self-regulatory authorities to make greater efforts to police disruptive trading practices. Most prominently, the Commission recommended that the Chicago Mercantile Exchange (“CME”) “develop strategies to identify instances of spoofing and, as appropriate, pursue actions against perpetrators.”²⁹ In addition, the CME has issued new Rule 575 specifically to prevent spoofing and other disruptive trading practices.³⁰ Similarly, ICE Futures US has amended its rules prohibiting disruptive trading practices and has issued guidance on their application.³¹

Based on a referral from the Commission, the US Attorney’s Office for the Northern District of Illinois brought criminal charges against Michael Coscia for spoofing certain futures contracts.³² This same activity served as the basis for the Commission’s own settled action against Coscia and his firm in 2013.³³

Position Limits

In 2014, the CFTC brought a number of actions, and obtained substantial civil penalties, against parties that allegedly exceeded position limits established pursuant to Section 4a of the Commodities Exchange Act.³⁴ In the largest case, the CFTC fined a father and son \$525,000 for allegedly exceeding the CME’s speculative position limit for live cattle futures contracts.³⁵

Enforcement of speculative position limits has been a traditional component of the Commission’s enforcement program. This aspect of the Commission’s enforcement efforts will likely take on broader significance when the Commission finalizes its speculative position limit rule, which will also apply position limits to the swaps market.³⁶ Commissioner Bowen has stated that finalizing this rule is a priority for 2015 and all market participants will need to be vigilant to ensure that they comply with the new rules.³⁷

²⁸ 7 U.S.C. § 9 (2013); 17 C.F.R. § 180.1 (2014); see also Complaint, *CFTC v. Considine*, No. 1:14-cv-07556 (N.D. Ill. Sept. 29, 2014); Final Judgment and Consent Order for Permanent Injunction, Civil Monetary Penalty and Other Equitable Relief against Defendant John Aaron Brooks, *CFTC v. Brooks*, No. 13-cv-6879 (August 1, 2014); Complaint, *CFTC v. Southern Trust Metals, Inc.*, No. 1:14-cv-22739 (July 23, 2014); Complaint, *CFTC v. Miklovich*, No. 3:14-cv-00594 (March 19, 2014). For a discussion of the similarities and differences between these two enforcement provisions, see Paul M. Architzel et al., *The Commodity Futures Trading Commission Issues Sweeping New Rules to Prohibit Fraud and Manipulation in the Swaps, Cash, and Futures Markets* (July 28, 2011).

²⁹ Massad Senate Testimony at 21; see also Nick Baker & Sam Mamudi, *CME Market Surveillance Found Lacking by Its Chief Regulator*, BLOOMBERG, Nov. 25, 2014.

³⁰ See CME Rule 575; CME Market Regulation Advisory Notice: Disruptive Practices Prohibited (Sept. 15, 2014).

³¹ See ICE Futures US, Notice, Amendments to Rule 4.02 and new FAQ regarding Disruptive Trading Practices, Dec. 29, 2014.

³² Indictment, *United States v. Michael Coscia*, 14-CR-551 (N.D. Ill. Oct. 1, 2014); see also Massad Senate Testimony at 21 (noting that indictment was based on Commission referral). Coscia has moved to dismiss the indictment against him on the grounds that the anti-spoofing provision provided in Dodd-Frank is unconstitutionally vague. See Memorandum of Law in Support of Defendant’s Motion to Dismiss, *United States v. Michael Coscia*, 14-CR-551 (Dec. 15, 2014). As of the date of publication, his motion is still pending.

³³ *In re Panther Energy Trading LLC*, CFTC Docket No. 13-26 (July 22, 2013).

³⁴ 7 U.S.C. § 6a (2013); see, e.g., *Morgan Stanley Capital Group Inc.*, CFTC Docket No. 14-10 (March 24, 2014).

³⁵ *In re Thrasher*, CFTC Docket No. 14-29 (Sept. 24, 2014). In April 2014, the Commission obtained a \$130,000 civil penalty against another individual trader for violating the CME’s live cattle speculative position limits. See Final Judgment and Consent Order for Permanent Injunction, Civil Monetary Penalty and other Equitable Relief Against Defendant James C. Yadgir, *CFTC v. Yadgir*, No. 1:13-cv-07948 (N.D. Ill. April 23, 2014).

³⁶ Position Limits for Derivatives and Aggregation of Positions, 79 Fed. Reg. 71973 (Dec. 4, 2014) (extending time for commenting on proposed position limit rules).

³⁷ Sharon Bowen, Comm’r, Commodity Futures Trading Comm’n, Remarks at the Futures Industry Association Expo 2014 (Nov. 5, 2014) (“These rules have been discussed for years now, and it is time for the Commission to make the decisions it needs to make to get the rules finalized. I hope we can finalize this rule in a way that both realizes Congressional intent in mandating position limits and maintains companies’ ability to manage their commercial risks.”).

Failure to Supervise and Gatekeeper Liability

In addition to policing substantive violations, the Commission has prioritized bringing actions against individuals and entities that failed to properly supervise their employees. During the past year, the Commission brought a number of actions against futures commission merchants for violations of Regulation 166.3, which imposes a duty on CFTC registrants to “diligently supervise” the activities of its affiliates and employees.³⁸ These actions have involved alleged deficiencies in processing of exchange and clearing fees,³⁹ maintaining records of segregated funds,⁴⁰ and “know your customer” procedures.⁴¹ In one action, the Commission charged a firm for failing to reasonably supervise compliance with another agency’s regulations.⁴² Relatedly, the Commission charged a Florida attorney who allegedly knowingly and repeatedly aided and abetted his clients’ fraudulent off-exchange transactions.⁴³

These actions further the CFTC’s apparent push to increase the accountability of gatekeepers, such as compliance officers and attorneys, and supervisors for activities within their areas of responsibility. This approach in enforcement actions also is consistent with the Commission’s increased emphasis on the importance and responsibilities of compliance personnel in its regulations implementing the Dodd-Frank Act. For example, although the Commission’s adopting release is somewhat unclear, the agency’s rulemaking requiring swap dealers to establish a Chief Compliance Officer (“CCO”) indicates that the Commission views the duties of a swap dealer CCO as going beyond the “customary and traditional [advisory] role” of a compliance officer.⁴⁴

Customer Protection

The Commission also brought five actions for alleged violations of various customer protection rules.⁴⁵ Unlike the Commission’s actions against MF Global⁴⁶ and Peregrine Financial Group in 2013,⁴⁷ these actions did not involve significant client losses or fraud. Instead, these actions suggest that the Commission is aggressively pursuing violations of customer protection regulations, even in the absence of customer harm. We expect this trend to continue in 2015.

What to Expect in 2015

Over the next year, we expect the Commission will focus on the following:

³⁸ 17 C.F.R. § 166.3 (2014).

³⁹ *In re Merrill Lynch, Pierce, Fenner & Smith Incorporated*, CFTC Docket No. 14-22 (Aug. 26, 2014).

⁴⁰ *In re Morgan Stanley Smith Barney, LLC*, CFTC Docket No. 14-11 (March 27, 2014).

⁴¹ *In re Morgan Stanley Smith Barney, LLC*, CFTC Docket No. 14-25 (Sept. 15, 2014).

⁴² *In re Zulutrade, Inc.*, CFTC Docket No. 14-24 (Sept. 9, 2014) (failure to follow OFAC guidance when screening account holders from countries subject to US sanctions).

⁴³ Complaint, *CFTC v. Grossman*, No. 14-CV-62061 (S.D. Fla. Sept. 9, 2014).

⁴⁴ See Swap Dealer and Major Swap Participant Recordkeeping, Reporting, and Duties Rules; Futures Commission Merchant and Introducing Broker Conflicts of Interest Rules; and Chief Compliance Officer Rules for Swap Dealers, Major Swap Participants, and Futures Commission Merchants, 77 Fed. Reg. 20128, 20162 (Apr. 3, 2012); see also Dan M. Berkovitz & Gail Bernstein, *Swap Dealer Chief Compliance Officer Requirements – First Year in Review*, 47 REV. OF SECS. & COMMODS. REG. 195 (Sept. 3, 2014).

⁴⁵ *In re FXDirectDealer, LLC*, CFTC Docket No. 14-28 (Sept. 24, 2014) (violation of minimum net capital requirements); *In re Global Futures & Forex, Ltd.*, CFTC Docket No. 14-17 (May 19, 2014) (violation of minimum net capital requirements); Consent Order for Permanent Injunction, Civil Monetary Penalty and Other Equitable Relief Against Tunney & Associates, P.C. & Michael Tunney, *CFTC v. Tunney & Associates, P.C.*, No. 1:13-cv-02919 (April 28, 2014) (failure to conduct audit in compliance with GAAP); *In re Capital Market Services*, CFTC Docket No. 14-12 (April 7, 2014) (violation of minimum net capital requirements); *In re Morgan Stanley Smith Barney, LLC*, CFTC Docket No. 14-11 (March 27, 2014) (failure to maintain adequate records of secured and segregated funds).

⁴⁶ See Final Consent Order Of Restitution, Civil Monetary Penalty, And Ancillary Relief, *CFTC v. MF Global Inc.*, No. 11-CIV-7866 (S.D.N.Y. Nov. 8, 2013) (\$100 million fine).

⁴⁷ A default judgment was entered against Peregrine in February 2013. See Default Judgment Order of Permanent Injunction and Other Ancillary Relief, *CFTC v. Peregrine Fin. Grp., Inc.*, No. 1:12-CV-05383 (N.D. Ill. Feb. 13, 2013). The firm’s owner Wasendorf also was charged criminally and pled guilty; he was sentenced to 50 years in prison and ordered to pay more than \$215 million in restitution. See *United States v. Wasendorf*, No. 12-CR-2021 (N.D. Iowa Jan. 23, 2013).

Market Structure and High-Frequency Trading

We expect that the Commission's focus on market structure issues and high-frequency trading will continue in 2015.⁴⁸ Further, we expect the Commission to bring increasingly sophisticated investigative techniques to bear in these matters as it develops and enhances its technological resources and institutional knowledge.⁴⁹

In parallel, the CFTC is fully "examining the issues surrounding automated trading," which may result in some type of "regulatory action to improve market structure."⁵⁰ In particular, the Commission continues to evaluate comments regarding its Concept Release on Risk Controls and System Safeguards for Automated Trading Environments that was released last year.⁵¹ While the Commission has not proposed any new rules, the agency appears to be contemplating whether a rule requiring pre-trade risk controls and related supervisory reviews, similar to the Securities and Exchange Commission's ("SEC") Market Access Rule, should be adopted for the futures and swaps markets or if these markets require a different approach.⁵² If such a rule is adopted, we expect the Commission to bring enforcement actions in similar situations as the SEC has done under the Market Access Rule.⁵³

We also expect that the Commission will aggressively police the swaps markets. Many of the Dodd-Frank rulemakings are now several years old, and we expect that the Division will vigilantly enforce compliance with the swaps regulatory regime.

Inter-Agency Coordination and Parallel Criminal Proceedings

We expect the CFTC to continue its cooperation and coordination with other federal regulators, such as Department of Justice, and its foreign counterparts. Many of the agency's major cases in 2014 were brought with the coordination of one or more other investigating agencies. For example, the FX manipulation cases resulted in enforcement actions by the CFTC, the Office of the Comptroller of the Currency, the Financial Conduct Authority, and the Swiss Financial Market Supervisory Authority.⁵⁴ In other recent matters, the Commission has cooperated with the Netherlands Authority for the Financial Markets,⁵⁵ the Federal Energy Regulatory Commission,⁵⁶ and the SEC.⁵⁷ Further, in the past year, the

⁴⁸ E.g., *In re Panther Energy Trading LLC*, CFTC Docket No. 13-26 (July 22, 2013).

⁴⁹ See Wetjen Senate Testimony at 6 (noting agency is devoting "millions of dollars [to] new and sophisticated analytical systems that will assist the Commission in its efforts to ensure market integrity").

⁵⁰ Scott D. O'Malia, Comm'r, Commodity Futures Trading Comm'n, Keynote Address at Derivatives 2014: A Market in Transition – A TabbForum Event (May 6, 2014).

⁵¹ Concept Release on Risk Controls and System Safeguards for Automated Trading Environments, 78 Fed. Reg. 56,542 (Sept. 12, 2013).

⁵² *High Frequency and Automated Trading in Futures Markets: Hearing Before the S. Comm. on Agriculture, Nutrition, & Forestry*, 113th Cong. (May 13, 2014) (statement of Vincent McGonagle, Director of the Division of Market Oversight, Commodity Futures Trading Comm'n); Scott D. O'Malia, Comm'r, Commodity Futures Trading Comm'n, Keynote Address at Derivatives 2014: A Market in Transition – A TabbForum Event (May 6, 2014).

⁵³ See, e.g., *In re Knight Cap. Americas LLC*, Exchange Act Release No. 70,694 (Oct. 16, 2013).

⁵⁴ Press Release, Commodity Futures Trading Comm'n, CFTC Orders Five Banks to Pay over \$1.4 Billion in Penalties for Attempted Manipulation of Foreign Exchange Benchmark Rates (Nov. 12, 2014).

⁵⁵ Press Release, Commodity Futures Trading Comm'n, CFTC Obtains Default Judgment against Texas-Based Financial Robotics, Inc. for Fraudulent Forex Scheme (Oct. 24, 2014).

⁵⁶ Press Release, Commodity Futures Trading Comm'n, Federal Court Orders Brian Hunter of Calgary, Alberta to Pay a \$750,000 Civil Fine in CFTC Action Alleging Attempted Manipulation of Natural Gas Futures Prices during the Expiry on Two Trading Days (Sept. 15, 2014).

⁵⁷ See Press Release, Commodity Futures Trading Comm'n, CFTC Charges MF Global Inc., MF Global Holdings Ltd., Former CEO Jon S. Corzine, and Former Employee Edith O'Brien for MF Global's Unlawful Misuse of Nearly One Billion Dollars of Customer Funds and Related Violations (June 27, 2013).

Commission has entered memoranda of understanding agreeing to cooperate with regulators in Australia, Canada, and Japan.⁵⁸

The Commission has also prioritized criminal referrals in appropriate matters. While the agency has the authority charge individuals civilly, Chairman Massad has indicated that the CFTC will also refer willful violations of the Commodity Exchange Act to the Department of Justice to maximize deterrence of future misconduct.⁵⁹ As noted above, this policy led to the criminal indictment of Michael Coscia in October.

We think that these trends will continue in 2015.

Whistleblower Program

In May 2014, the Commission issued its first award under the whistleblower program implemented under Dodd-Frank.⁶⁰ Chairman Massad has indicated that this program is still “ramping up,” and we believe it will become an increasingly important aspect of the CFTC’s enforcement program in the coming years.⁶¹

Administrative Enforcement Proceedings

According to Division Director Goelman, the Commission plans to resume bringing contested enforcement actions in its own adjudicatory forum, rather than as litigated actions in federal district court.⁶² This initiative appears primarily designed to conserve resources,⁶³ but it will also give the Commission the opportunity to interpret the Commodity Exchange Act and develop its own precedent.

This plan will represent a significant shift from the Commission’s current practice. While the SEC brings approximately 40% of its enforcement actions as administrative proceedings,⁶⁴ the CFTC has not instituted a contested administrative proceeding since 2001.⁶⁵ Further, while we expect the Commission will dust off its Rules of Practice,⁶⁶ these rules may need to be updated to reflect advances in technology since they were last used extensively.

This plan may also raise some concerns for the subjects of CFTC investigations. A number of commentators have raised questions about whether the SEC’s use of administrative proceedings give the agency an unfair home-field advantage.⁶⁷ For example, the administrative forum provides much more limited rules of discovery and respondents are given much less time to prepare their cases than would be available in federal court. However, some potential respondents may be more willing to litigate before an agency judge than in federal court, as the public spotlight may be less intense. Additionally, the CFTC’s past experience with the administrative enforcement process demonstrates that the administrative process can be quite lengthy, particularly in complex cases, and that the Commission’s decisions in these cases often depart from the positions taken by the Division.

⁵⁸ Memorandum of Understanding between CFTC and Australian Securities and Investments Comm’n (Sept. 24, 2014); Memorandum of Understanding between CFTC and Reserve Bank of Australia and Australian Securities and Investments Comm’n (June 5, 2014); Memorandum of Understanding between CFTC and Alberta Securities Commission, British Columbia Securities Commission, Ontario Securities Commission and Autorite de marches financiers (March 25, 2014); Memorandum of Understanding between CFTC and Fin. Servs. Agency of Japan (March 10, 2014).

⁵⁹ Massad Senate Testimony at 22.

⁶⁰ Press Release, Commodity Futures Trading Comm’n, CFTC Issues First Whistleblower Award (May 20, 2014).

⁶¹ Massad Senate Testimony at 22.

⁶² Jean Eaglesham, *CFTC Turns Toward Administrative Judges*, WALL ST. J., Nov. 9, 2014.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *In re DiPlacido*, CFTC Docket No. 01-23 (Aug. 21, 2001). While the underlying conduct occurred in 1998, the Commission did not fully resolve this matter until 2008. Opinion and Order, *In re DiPlacido*, CFTC Docket No. 01-23 (Nov. 5, 2008). The Second Circuit affirmed the Commission’s order in October 2009. See *CFTC v. DiPlacido*, 364 Fed. App’x 657 (2d. Cir. 2009).

⁶⁶ See 17 C.F.R. pt. 10 (2014).

⁶⁷ *E.g.*, Jean Eaglesham, *SEC is Steering More Trials to Judge It Appoints*, WALL ST. J., Oct. 21, 2014.

We expect a number of issues regarding the fairness, efficiency, and effectiveness of the administrative process will be the subject of intense focus if the CFTC increases its use of administrative proceedings in 2015.

Conclusion

Despite the budgetary constraints that the Commission faced in 2014, the agency maintained its aggressive enforcement approach and obtained another year of record fines. We can expect this trend to continue or accelerate as the agency focuses on compliance with its Dodd-Frank rules and tests and expands its new enforcement powers. Further, we expect to see the Commission bring increasingly complex matters as it further enhances its technological capabilities and its relationships with its international counterparts.

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