

CFTC Division of Enforcement Releases First Public Enforcement Manual

May 13, 2019

On May 8, 2019, the Division of Enforcement (the “Division”) of the Commodity Futures Trading Commission (“CFTC”) released an Enforcement Manual (the “Manual”) – the first public document of its kind from the Division.¹ Though the Manual does not reveal any significant shifts in policy, it will undoubtedly serve as an important resource for individuals and entities dealing with CFTC enforcement actions. The Division’s decision to publish an enforcement manual continues a trend of providing more public guidance regarding the Division’s enforcement practices and policies. In recent years, the CFTC has also asserted itself as an increasingly active enforcement authority, and this publication suggests that the Division intends that trend to continue.

If you have any questions concerning this memorandum, please reach out to your regular firm contact or the following authors

NEW YORK

Breon S. Peace
+1 212 225 2059
bpeace@cgsh.com

WASHINGTON D.C.

Robin M. Bergen
+1 202 974 1514
rbergen@cgsh.com

Nowell D. Bamberger
+1 202 974 1752
nbamberger@cgsh.com

¹ U.S. Commodity Futures Trading Commission Division of Enforcement, Enforcement Manual (May 8, 2019), available at <https://www.cftc.gov/LawRegulation/Enforcement/EnforcementManual.pdf>.



Overview of the Manual

Closely mirroring the enforcement manual published by the Securities and Exchange Commission (“SEC”) since 2008,² the CFTC Manual provides extensive guidance regarding many of the “nuts and bolts” of the Division’s enforcement practices, as well as describing the general policies and procedures that guide the work of the Division’s enforcement staff. For both lawyers who appear before the Division and companies and individuals who find themselves in enforcement proceedings, the Manual provides useful guidance on how Division staff conduct their investigations.

While it is not intended to alter or confer rights or policies, the Manual does usefully collate and annotate guidance that previously existed in a number of different sections of Title 7 of the U.S. Code and Title 17 of the Code of Federal Regulations. In that sense, it is a useful tool for confirming, for example, the basis of the CFTC’s authority for taking certain investigative steps, and how the Division’s staff implements in practice the policies and procedures it has adopted by regulation.

For the first time, the Manual also publicly confirms many of the previously-unwritten practices of the Division’s staff. For example, the Manual describes the process by which the Division’s staff may issue a Notice of Proposed Enforcement Action, also referred to as a “Wells Notice” following the nomenclature of the similar process used by the SEC. The Manual makes clear that this is not a requirement for the Division’s staff, but outlines the process that the Division expects the recipients of such notices to follow in responding to them. Likewise, the Manual describes the Division’s practice in issuing closing letters at the conclusion of investigations, a process not previously documented.

In addition to matters concerning interactions with the Division’s enforcement staff, the Manual also provides useful guidance regarding the internal workings of the Division. This includes, for example, describing how CFTC enforcement teams are organized how enforcement matters are monitored internally, as well as outlining various circumstances in which investigative staff may require approval from more senior Division staff to pursue various investigative techniques or release information to other authorities. This increased transparency is useful to market participants and others who may be subject to CFTC investigations by allowing for greater understanding of the Division’s processes, and identifying points in the lifecycle of an investigation when advocacy may be most relevant.

While the Manual does provide significantly more guidance than has been previously available, it is still not as detailed as the SEC’s Enforcement Manual (it is about half the length), and provides somewhat less concrete guidance in many respects. As one example, the Division’s guidance on its Wells process is about one-and-a-half pages of high-level guidance, approximately half of which constitutes a description of the format of permitted responses to a Wells Notice. The equivalent section of the SEC’s enforcement manual is approximately 4 pages long, and includes detailed guidance on the process for issuing a Wells Notice, what must be included in such a Notice, and other matters such as the availability of the staff’s investigatory file. The CFTC’s Manual does not, at least yet, contain such detailed guidance.

The CFTC’s Enforcement Division

In issuing the Manual, the Division’s Director of Enforcement James McDonald emphasized that the Manual creates no private rights and is not binding law, but rather is intended to serve as a “general reference” for Division staff.³ He also highlighted that

² U.S. Securities and Exchange Commission Division of Enforcement, Enforcement Manual (Nov. 28, 2017), <https://www.sec.gov/divisions/enforce/enforcementmanual.pdf>.

³ Remarks of CFTC Director of Enforcement James M. McDonald at the 41st Annual Conference of the Future Industry Association’s Law & Compliance Division (May 8, 2019),

this was part of the Division’s effort to “increase the level of clarity and transparency in our work. Clarity and transparency in our policies should promote fairness, increase predictability, and enhance respect for the rule of law.”⁴

In the last few years, the CFTC has issued extensive written guidance on a variety of topics related to its enforcement practices, and that guidance has been incorporated into the Manual. This includes, for example, guidance on cooperation guidelines for individuals and companies;⁵ guidance to incentivize self-reporting;⁶ and amendments strengthening its whistleblower program.⁷ In addition to its core competency as a regulator of the commodities and swaps markets, the Division has also signaled a more ambitious agenda. In March 2019, for example, the Division issued an Enforcement Advisory concerning investigations related to foreign corrupt practices, a field historically occupied by the Justice Department and the SEC exercising their statutory mandates under the Foreign Corrupt Practices Act.⁸

<https://www.cftc.gov/PressRoom/SpeechesTestimony/opamcdonald3>.

⁴ U.S. Commodity Futures Trading Commission, CFTC’s Division of Enforcement Issues First Public Enforcement Manual, Release No. 7925-19 (May 8, 2019), <https://www.cftc.gov/PressRoom/PressReleases/7925-19>.

⁵ Breon S. Peace, Jennifer Kennedy Park, Robin M. Bergen, Nowell Bamberger, CFTC’s Demanding New Cooperation Guidelines For Companies and Individuals, Cleary Gottlieb (Jan. 24, 2017), <https://www.clearygottlieb.com/~media/organize-archive/cgsh/files/publication-pdfs/alert-memos/2017/alert-memo-201716.pdf>.

⁶ Nowell D. Bamberger, Robin M. Bergen, Alexander Janghorbani, Jennifer Kennedy Park, Breon S. Peace, CFTC Announces New Enforcement Strategy Focused on Self Reporting, Cleary Gottlieb (Sept. 26, 2017), <https://www.clearygottlieb.com/news-and-insights/publication-listing/cftc-announces-new-enforcement-strategy-focused-on-self-reporting-9-26-17>.

⁷ Breon S. Peace, Jennifer Kennedy Park, Robin M. Bergen, Nowell D. Bamberger, CFTC Approves Amendments to Whistleblower Rules Including Significant Enhancements of its Anti-Retaliation Protections, Cleary Gottlieb (May 25, 2017), <https://www.clearygottlieb.com/~media/organize->

In recent resolutions, the Division has made an effort to highlight when it has imposed reduced fines or issued declination of enforcement action, consistent with its guidance. For example, in November 2018, the Division declined to take enforcement action against Deutsche Bank AG in connection with a matter related to fraudulent mismarking of swaps valuations based on Deutsche Bank’s self-reporting, cooperation and remediation.⁹ Likewise, in August 2017, the Division imposed a substantially-reduced financial penalty on The Bank of Tokyo-Mitsubishi UFJ, Ltd. based on findings of “spoofing” in connection with futures contracts traded in the Chicago Mercantile Exchange and Chicago Board of Trade.¹⁰

The timing of the publication of the CFTC’s Manual also aligns with a recent, notable increase in the CFTC’s enforcement activity. In its 2018 Annual Report, the Division indicated that during Fiscal Year 2018 it filed 83 enforcement actions—the highest number since Fiscal Year 2012, and a 69% increase over Fiscal Year 2017.¹¹ Additionally, the Division

<archive/cgsh/files/2017/publications/alert-memos/cftc-approves-amendments-to-whistleblower-rules-6-1-17.pdf>.

⁸ U.S. Commodity Futures Trading Commission, Enforcement Advisory: Advisory on Self Reporting and Cooperation for CEA Violations Involving Foreign Corrupt Practices (March 6, 2019), <https://www.cftc.gov/sites/default/files/2019-03/enfadvisoryselfreporting030619.pdf>.

⁹ U.S. Commodity Futures Trading Commission, CFTC Charges Former Deutsche Bank Trader with Fraudulently Mismarking Swaps: Division of Enforcement also Issues Declination Letter to Deutsche Bank in Recognition of its Self-Reporting, Full Cooperation, and Remediation, Release No. 7838-18 (Nov. 8, 2018), <https://www.cftc.gov/PressRoom/PressReleases/7838-18>.

¹⁰ U.S. Commodity Futures Trading Commission, CFTC Finds that The Bank of Tokyo-Mitsubishi UFJ, Ltd. Engaged in Spoofing of Treasury Futures and Eurodollar Futures: CFTC Recognizes The Bank of Tokyo-Mitsubishi UFJ, LTD.’s Cooperation, Self-Reporting, and Pro-Active Implementation of Remedial Measures and Process Improvements, Release No. 7838-18 (Nov. 8, 2018), <https://www.cftc.gov/PressRoom/PressReleases/pr7598-17>.

¹¹ U.S. Commodity Futures Trading Commission, Annual Report on the Division of Enforcement (Nov. 2018),

recently announced it was beginning to work with the Department of Justice to evaluate foreign bribery and related corruption offenses under the Foreign Corrupt Practices Act. Further, the Division has markedly increased the use of the CFTC's Whistleblower Program, giving the largest award to date of more than \$45 million,¹² the first award to a person living in a foreign country,¹³ and the agency's first award for a related action, which was also the first granted to a company outsider.¹⁴

* * *

Greater transparency about the Division's enforcement practices should be a welcome development for practitioners and market participants alike. It also signals, however, that the Division continues to view itself as an aggressive and ambitious law enforcement agency. Avoiding and minimizing the impact of Division enforcement action therefore remains a matter of preventing violations of law, promptly identifying and remediating violations that may be identified, and in appropriate cases self-reporting and cooperating with the Division's enforcement staff. Increased transparency from the Division, however, enhances the ability of those under investigation to effectively engage with the Division and to pursue substantive advocacy in ways that are more likely to be effective.

...

CLEARY GOTTlieb

https://www.cftc.gov/sites/default/files/2018-11/ENFAnnualReport111418_0.pdf.

¹² Joon H. Kim, Matthew C. Solomon, Armine (Inna) Sanamyan, CFTC Announces Highest Aggregate Whistleblower Award to Date, Totaling More Than \$45 Million, Cleary Gottlieb (Aug. 14, 2018), <https://www.clearyenforcementwatch.com/2018/08/cftc-announces-highest-aggregate-whistleblower-award-date-totaling-45-million/>.

¹³ Breon S. Peace, Nowell D. Bamberger, Patrick C. Swiber, CFTC Announces Two Significant Awards by Whistleblower Program, Cleary Gottlieb (July 17, 2018),

<https://www.clearyenforcementwatch.com/2018/07/cftc-announces-two-significant-awards-whistleblower-program/>.

¹⁴ Jennifer Kennedy Park, Nowell D. Bamberger, Alex Janghorbani, Jim Wintering, CFTC Issues First Whistleblower Award Originating From Both a Related Action and a Company Outsider, Cleary Gottlieb (March 11, 2019), <https://www.clearyenforcementwatch.com/2019/03/cftc-issues-first-whistleblower-award-originating-from-both-a-related-action-and-a-company-outsider/>.