CFTC Announces Its First Non-Prosecution Agreements

On June 29, 2017, the Commodity Futures Trading Commission (CFTC) announced that it entered into non-prosecution agreements with three respondents in a CFTC enforcement investigation involving "spoofing," an unlawful trade practice whereby market participants make bids or offers to trade financial instruments with the intent to cancel the bids or offers before any trades are executed. The agreements are the first of their kind at the agency and, according to the CFTC's new Director of Enforcement, James McDonald, "will be an important part of the Division's cooperation program going forward."[1]

I. Overview

Although the CFTC has not used non-prosecution agreements in the past, they have been a component of other agencies' enforcement programs for some time. The United States Securities and Exchange Commission (SEC), for example, has been using them since 2010 as part of its own cooperation program. According to the SEC, the program "provides incentives to individuals and companies who come forward and provide valuable information to SEC investigators."[2] SEC non-prosecution agreements in particular "are entered into in limited circumstances in which the Commission agrees not to pursue an enforcement action against a cooperator if the individual or company agrees to cooperate fully and truthfully and comply with express undertakings."[3]

Similarly, according to CFTC Enforcement Director McDonald, CFTC "[n]on-prosecution agreements . . . give the Division [of Enforcement] a powerful tool to reward extraordinary cooperation in the right cases, while providing individuals and organizations strong incentives to promptly accept responsibility for their wrongdoing and cooperate with the Division's investigation. . . . [F]or many types of complex cases, there is simply no substitute for cooperating witnesses, who can tell the inside story of the fraud or misconduct at issue. Used properly, this type of first-hand knowledge can help the Division identify more culpable wrongdoers, hold them accountable, and further protect customers and the integrity of the markets."[4]

Non-prosecution agreements do not, however, necessarily exempt respondents from administrative sanctions or other adverse effects of settlements with regulators. For example, SEC non-prosecution agreements often require respondents to disgorge ill-gotten monetary gains. Further, although SEC non-prosecution agreements contain language to the effect that the respondent neither admits nor denies liability for the relevant conduct, they also typically state that a respondent "accepts responsibility for its conduct." And like administrative and district court settlements with the SEC and CFTC, non-prosecution agreements with both agencies are publicly available, not confidential.

II. The CFTC's Non-Prosecution Agreements

The first CFTC non-prosecution agreements arose from an investigation by the agency's Enforcement Division into possible spoofing in the U.S. Treasuries futures markets by Citigroup Global Markets Inc. and its employees. In the agreements, three traders, Jeremy Lao, Daniel Liao, and Shlomo Salant, admitted that they engaged in spoofing in the futures markets while trading in 2011 and 2012. The agreements emphasize the

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[1] *See* CFTC June 29, 2017 Press Release, available at http://www.cftc.gov/PressRoom/PressReleases/pr7581-17.

[2] *See* SEC Spotlight, Enforcement Cooperation Program, available at https://www.sec.gov/spotlight/enforcement-cooperation-initiative.shtml.

[3] *Id.*

[4] *See* CFTC June 29, 2017 Press Release.

respondents' "timely and substantial" cooperation, willingness to "accept responsibility for [their] misconduct," "material assistance" provided to the CFTC's investigation of their prior employer, and the absence of prior misconduct. Importantly, the agreements were in part expressly predicated on the employees "implicating others . . . for unlawful conduct" or "identifying specific misconduct at [their prior employer]."[5] Among other things, the agreements also require the respondents to:

- Cooperate "fully and truthfully" with the CFTC's investigation and any related CFTC litigation or proceeding, including producing documents, providing interviews or administrative testimony, executing affidavits or declarations, and testifying at depositions or trial;

- Cooperate "fully and truthfully" in any "official investigation or proceeding by any other federal or state authority or a self-regulatory organization related to" the CFTC's investigation;

- Refrain from violating the Commodity Exchange Act (CEA) and the CFTC's and self-regulatory organizations' regulations;

- Refrain from "tak[ing] any action or mak[ing] any public statement denying, directly or indirectly, any aspect of [the non-prosecution agreement] or creating . . . the impression that [the agreement] . . . is without a factual basis"; and

- Have the text of "any press release concerning" the non-prosecution agreement "approved by the Division [of Enforcement] staff" before a respondent issues it.

Each agreement contains a provision allowing the CFTC to commence enforcement proceedings against the respondent if the Enforcement Division, "in its sole discretion," determines that the respondent failed to comply with the agreement's terms.

Perhaps most important, each agreement includes an exhibit which sets forth a detailed statement of the facts on which the CFTC's spoofing allegations are based—which Lao, Liao and Shlomo admitted—and provides that "[i]f [respondent] violates this Agreement, [he] agrees not to dispute, contest, or contradict the factual statements in [the exhibit] as admissions pursuant to Federal Rule of Evidence 801(d)(2), or their admissibility, in any future action or proceeding against [respondent] or any action or proceeding to which the [CFTC] is a party." Finally, the agreements contain a tolling provision that allows the CFTC to commence an enforcement action against the respondents "following [their] violation of the Agreement . . . notwithstanding the expiration of the statute of limitations between the signing of [the] Agreement and the commencement of such action . . . ."

III. Conclusion

On their face, the CFTC's new non-prosecution agreements seem to offer significant benefits in that they allow respondents to avoid formal charges and the protracted litigation that often follows—and, of course, the possibility of liability for violations of the CEA and CFTC rules. However, the agreements do not exempt respondents from monetary sanctions for alleged but unproven wrongdoing, or the scrutiny that attends public disclosure of what the CFTC unilaterally deems "misconduct," which is the same whether the disclosure appears in a complaint, settlement or non-prosecution agreement.

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[5] *See, e.g.*, Non-Prosecution Agreement between CFTC and Jeremy Lao at 1, available at http://www.cftc.gov/idc/groups/public/@lrenforcementactions/documents/legalpleading/enfnonprosecutionlao062917.pdf.

It remains to be seen whether the CFTC will continue to insist that its non-prosecution agreements contain a detailed recitation of admitted facts. The CEA arguably imputes the conduct of individuals to the entities they work for, raising further concerns with respect to admissions.[6] The CFTC's program is new, however, and if properly administered stands to benefit both regulator and regulated parties.

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If you have any questions about the issues addressed in this memorandum, or if you would like a copy of any of the materials mentioned in it, please do not hesitate to call or email Bradley J. Bondi at 202.862.8910 or bbondi@cahill.com; Charles A. Gilman at 212.701.3403 or cgilman@cahill.com; Kimberly Petillo-Décossard at 212.701.3265 or kpetillo-decossard@cahill.com; John Schuster at 212.701.3323 or jschuster@cahill.com; or David Slovick at 212.701.3978 or dslovick@cahill.com.

[6] *See* 7 U.S.C. § 2(a)(1)(B).

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