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CFTC Intentions Unclear In Foreign Corrupt Practice Advisory

By **Laura Brookover** (March 7, 2019, 10:02 PM EST)

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This week, the U.S. Commodity Futures Trading Commission made waves by announcing its entry into the foreign bribery space. In an American Bar Association conference panel discussion and written advisory, Enforcement Director James McDonald outlined cooperation credit guidelines for "violations involving foreign corrupt practices."

The enforcement advisory coyly leaves open a million-dollar question: What are "violations involving foreign corrupt practices" under the CFTC's purview? To date, that's not been an area of focus, and it's not immediately obvious what the CFTC means.

The advisory's language undeniably conjures up the Foreign Corrupt Practices Act. The FCPA's anti-bribery provisions, simply put, prohibit making bribes to foreign officials to gain business. The law is enforced by the U.S. Department of Justice and the U.S. Securities and Exchange Commission. The CFTC has no role in the FCPA enforcement scheme.

The advisory seems to have in mind violations of the Commodity Exchange Act that overlap with FCPA violations. In other words, ordinary CEA violations that have a "foreign corrupt practices" aspect.

Let's look at some possible theories.

Commodity Manipulation Carried Out Through Bribes

If there's a theme around CFTC enforcement these days, it's market manipulation. The agency is concerned with conduct that undermines the integrity of commodity markets and trading at a systemic level. We've seen this in the CFTC's methodical takedowns of spoofing and insider trading.

In the FCPA space, charges sometimes involve commodity producers and companies that do business with them. In recent years, FCPA matters with a commodities aspect have involved a Canadian gold mining company, a Chilean metals mining company, and various state-owned oil companies, among others.[1]

When FCPA charges are set out, the government does not always describe in detail the goals of the alleged conduct in relation to commodity markets. For instance, in the Chilean metals case, U.S. v.

Sociedad Química y Minera de Chile, the criminal information alleged only that payments were made to an official who "had influence over the Chilean government's plans for mining in Chile, an issue of central importance to SQM's business."[2] It's not clear what specific benefit SQM was allegedly hoping to obtain from the payments, and if that benefit had an actual or intended impact on a commodity price.

But that would be the CFTC's overriding question when looking at possible manipulation involving foreign corrupt practices. Did the bribe have an effect on the price of a commodity? If so, the CFTC may see grounds to charge violations of 7 U.S.C. Section 9(3) (for manipulation or attempted manipulation) or 7 U.S.C. Section 9(1) and Regulation 180.1 (for use of a manipulative device).

Looking more closely at manipulation under Section 9(3), suppose a bribe was paid to obtain a government-granted production monopoly. Using that monopoly, the company suppresses production to increase commodity prices and boost profits. If price effects were felt in the United States, the CFTC could charge manipulation and attempted manipulation, based on the company's intentional actions.

Intent is not strictly necessary, however, since a manipulative device charge under Section 9(1) and Regulation 180.1 is also an option. If a price effect were an unintended but still reasonably foreseeable result of the bribe, then the CFTC could charge the company with using a manipulative device. This is because the manipulative device provision covers intentional and reckless conduct.[3]

Fraud Involving the Payment of Bribes

Bribes may also constitute fraud in certain contexts. Consider an investment pool that uses investor funds to pay a bribe. If the payment's true nature isn't disclosed or is misrepresented to investors, that could constitute fraud under the CEA.

There is some related precedent here. The DOJ and SEC brought FCPA charges against Och-Ziff, one of the world's largest hedge funds.[4] Och-Ziff allegedly paid bribes to Libyan officials using investor funds. The SEC alleged that these bribes were falsely portrayed as legitimate expense payments in fund documents. This led the SEC to charge Och-Ziff with defrauding investors, alleging that they were misled about the use of their funds. The fraud charges were brought under the SEC's independent anti-fraud authority (the Investment Advisors Act), not the FCPA.

A case with slightly different facts could fall within the CFTC's anti-fraud jurisdiction. For instance, if hedge fund investors believed that their funds were being used to invest in futures contracts, swaps or options, but the funds were used to pay bribes instead, then the hedge fund could be charged with fraud under several CEA provisions.[5]

In addition, if a hedge fund is registered as a commodity pool operator (which many are), the CFTC could bring fraud charges for bribery even if there was no connection to a futures contract or swap.[6] Similarly broad fraud prohibitions apply to swap dealers and major swap participants as well.[7]

Recordkeeping Violations for Hiding Bribe Payments

In a similar vein, bribes that are illegal under the FCPA could involve recordkeeping violations under the CFTC's purview. Turning again to Och-Ziff, the hedge fund allegedly recorded the bribes as ordinary expense payments in its business records. The SEC charged Och-Ziff with violating provisions of the FCPA that require companies to keep accurate records.

The CEA has recordkeeping requirements that could form the basis for similar charges by the CFTC. For instance, commodity pool operators must keep detailed and accurate accounts of expenditures.[8] If a hedge fund that is registered as a commodity pool operator inaccurately characterized bribes in its books, the CFTC could charge recordkeeping violations similar to those charged by the SEC.

In addition to the theories above, there are still more possibilities — such as bribes involving virtual currency (ruled a commodity under the CFTC's jurisdiction), bribes involving false reporting of index prices (imagine variations on the Libor false reporting scheme), and bribes involving the management of sovereign wealth funds, to name a few.

Isn't There Enough FCPA Enforcement?

A central question is not what the CFTC will be charging, but why. The DOJ and SEC have long policed foreign corrupt practices. Is the CFTC's arrival on the scene unnecessary, or potentially counterproductive?

It's too early to say. We'll need to see the types of cases the CFTC investigates and charges. If the CFTC focuses on the first theory above — commodity market manipulation — its efforts would not be duplicative. After all, the DOJ and SEC aren't looking at the effect of bribery on commodity markets. The CFTC, which is tasked with ensuring integrity and confidence in its markets, could shine a light on potentially significant conduct.

On the other hand, if the CFTC just adds additional recordkeeping charges to FCPA matters already being brought, it may not be contributing much. The agency could face complaints of "piling on," which the DOJ under Deputy Attorney General Rod Rosenstein has lately taken measures against. The CFTC has anticipated this potential criticism, however. In prepared remarks accompanying the announcement, CFTC Director McDonald sought to assure industry that the CFTC will work closely with other agencies to avoid duplicative investigation and financial penalties.

At this point, all we know is that the CFTC is entering the FCPA space. This is a significant new development, at a time when the CFTC's Enforcement Division is grabbing headlines with regularity. How the CFTC exercises its prosecutorial discretion in this area will be watched closely.

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[1] See In re Kinross Gold, SEC File No. 3-18407 (Mar. 26, 2018) (involving gold mining operations in Mauritania and Ghana); United States v. Sociedad Química y Minera de Chile (SQM), No. 1:17-cr-00013 (D.D.C. Jan. 13, 2017) (involving metals mining operations in Chile); United States v. Reyes Lopez, No. 1:17-cr-20747 (S.D. Fla. Oct. 24, 2017) (involving Ecuadorean state-owned oil company); United States v. Leon-Perez, No. 4:17-cr-00514 (S.D. Tex. Aug. 23, 2017) (involving Venezuelan state-owned oil company); United States v. Keppel Offshore & Marine Ltd., No. 17-cr-00697 (E.D.N.Y. Dec. 22, 2017) (involving Brazilian state-owned oil company).

[2] See United States v. Sociedad Química y Minera de Chile (SQM), No. 1:17-cr-00013, at 4 (D.D.C. Jan. 13, 2017).

[3] See 17 C.F.R. Section 180.1(a).

[4] See United States v. Och-Ziff Capital Mgmt. Grp. LLC, No. 1:16-cr-00516 (E.D.N.Y. Sept. 29, 2016); In re Och-Ziff Capital Mgmt. Grp. LLC, SEC File No. 3-17595.

[5] See, e.g., 7 U.S.C. Sections 6b(a) (prohibiting fraud in connection with futures and swaps), 9(1) (prohibiting "deceptive" devices in connection with futures and swaps).

[6] See 7 U.S.C. Section 6o(1) (prohibiting fraud by a CPO against an investor, regardless of whether futures or swaps were involved).

[7] See 17 C.F.R. Section 23.410(a).

[8] See 17 C.F.R. Section 4.23.