



## ONPOINT / A legal update from Dechert

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### CFTC Issues Enforcement Guidance to Encourage Self Reporting of FCPA Violations

On March 6, 2019, the Commodity Futures Trading Commission (“CFTC”) published an [Enforcement Advisory](#) describing the circumstances in which companies that self-report violations of the Foreign Corrupt Practices Act (“FCPA”) to the CFTC may achieve a resolution without a civil monetary penalty. The CFTC’s approach largely mirrors the approach taken by the lead agencies on anti-corruption enforcement, the U.S. Department of Justice (“DOJ”) and U.S. Securities and Exchange Commission (“SEC”).

#### Overview and Applicability

The CFTC regulates futures and options on futures traded on U.S. commodity exchanges, swaps, and market intermediaries such as commodity pool operators and commodity trading advisors. The CFTC also has authority to bring enforcement actions for fraud in connection with the purchase and sale of cash commodities in which futures contracts are presently traded or in the future may be traded.

The CFTC’s objective with the Enforcement Advisory is to regulate misconduct that undermines U.S. markets through corrupt practices, which might constitute fraud, manipulation, false reporting, or a number of other types of violations under the Commodity Exchange Act (“CEA”). The Enforcement Advisory applies to companies and individuals that are not registered (or required to be registered) with the CFTC, but are nevertheless regulated by the CFTC, and timely/voluntarily disclose FCPA violations to the CFTC.

In order to qualify for a potential declination pursuant to the Enforcement Advisory, a company must voluntarily and timely self-report violations of the FCPA to the CFTC, cooperate fully with the government’s investigation, and implement remedial measures to prevent recurrence. In circumstances where a company has properly disclosed a violation, the CFTC will consider “aggravating circumstances” such as the nature of the offense and offender. In evaluating aggravating circumstances, the CFTC will consider, among other factors, the pervasiveness of misconduct within a company.

#### Multi-Agency FCPA Enforcement and Efforts to Avoid Piling On

Historically, the FCPA has been enforced by the DOJ and SEC. The CFTC’s role with respect to FCPA enforcement is not clear. Certainly, while there are examples of anti-corruption enforcement actions involving a commodity (e.g., various mining and oil company enforcement actions have been brought in recent years), the charging/settlement materials for such actions have not historically articulated a clear relationship to commodity markets regulated by the CFTC. Whether the CFTC is able to identify a relationship between an FCPA violation and market manipulation will be an area to monitor ahead. At a minimum, the CFTC’s Enforcement Advisory demonstrates the multi-agency nature of anti-corruption investigations brought by the U.S. government.

In remarks to the American Bar Association’s National Institute on White Collar Crime (available [here](#)), James McDonald, the CFTC’s Enforcement Director, stated that “bribes might be employed, for example, to secure business in connection with regulated activities like trading, advising, or dealing in swaps or derivatives. Corrupt practices might be used to manipulate benchmarks that serve as the basis for related

derivatives contracts. Prices that are the product of corruption might be falsely reported to benchmarks. Or corrupt practices in any number of forms might alter the prices in commodity markets that drive U.S. derivatives prices. We currently have open investigations involving similar conduct.”

Mr. McDonald also made clear in his remarks that the CFTC would not “pile onto other existing investigations”. In circumstances where the CFTC investigates in parallel with other enforcement authorities, McDonald stated that the CFTC would “avoid duplicative steps” and ensure that any CFTC penalty takes into consideration penalties imposed by other enforcement authorities. The same would apply to circumstances where disgorgement or restitution are imposed – “dollar-for-dollar credit” would be given in connection with other related efforts.

The CFTC’s Enforcement Advisory mirrors the essential components of the DOJ’s [Corporate Enforcement Policy](#) and SEC’s [Enforcement Cooperation Program](#) regarding the circumstances in which companies may earn declinations for voluntary disclosures of potential violations of the FCPA. It is not yet clear how the DOJ and SEC would treat a disclosure to the CFTC; however, the DOJ and SEC have similar policies in place to avoid ‘piling on’ with investigations/penalties by other enforcement authorities.

### How Dechert Can Assist

Companies with significant overseas exposure should strongly consider whether their existing anti-bribery policies and practices are sufficient to address compliance risks under the FCPA and other applicable anti-corruption laws. Dechert assists clients in developing anti-corruption compliance programs, providing counsel on tactics for identifying and effectively managing risks efficiently and thoroughly. When clients detect potential violations of anti-corruption laws, we assist them in investigating, remediating, and, where appropriate, disclosing such violations to governmental authorities.

This update was authored by:



**Michael Gilbert**  
Partner, New York  
T: +1 212 698 3886  
[michael.gilbert@dechert.com](mailto:michael.gilbert@dechert.com)



**Jeremy Zucker**  
Partner, Washington, D.C.  
T: +1 202 261 3322  
[jeremy.zucker@dechert.com](mailto:jeremy.zucker@dechert.com)



**Audrey Wagner**  
Counsel, Washington, D.C.  
T: +1 202 261 3365  
[audrey.wagner@dechert.com](mailto:audrey.wagner@dechert.com)



**Hrishikesh Hari**  
Associate, Washington, D.C.  
T: +1 202 261 3347  
[hrishikesh.hari@dechert.com](mailto:hrishikesh.hari@dechert.com)

