

# The CFTC's Enforcement Manual: Key Content and Use for Practitioners in CFTC Investigations

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\* Few case citations appear in the Enforcement Manual. The case citations included herein are added by the authors for educational purposes.

# Overview of the Enforcement Manual

- Manual of the CFTC Division of Enforcement (DOE) provides guidance to its Staff with respect to detecting, investigating, and prosecuting violations of the Commodity Exchange Act (CEA) and CFTC Regulations.
- Informative compilation of basic enforcement policies and procedures.

# Witness Testimony and Rights

- Request copy of formal Order of Investigation. (Sec. 5.4.2.1)
- No “target” or “subject” designations. (Sec. 5.2.1)
- Witness is entitled to obtain **transcript** of testimony. (Sec. 5.9.5)
  - Except when the Commission has “good cause” to limit request. 17 C.F.R. § 11.7(b).
- Witness may request **immunity** for testimony. (Sec. 8.1.2.4)
  - Civil immunity from CFTC prosecution
    - Limited in duration and scope.
    - Granted by Director of DOE upon request by Staff.
  - Commission Order
    - Approval by U.S. Attorney General required. 17 C.F.R. § 11.7(d).

# Cooperation

- Types of **cooperation tools**:
  - DOE Cooperation Agreement (Sec. 7.2.1)
    - Between DOE and a potential cooperating individual expected to provide substantial assistance.
  - Deferred Prosecution Agreement (Sec. 7.2.2)
    - Between the Commission, acting through DOE, and a potential cooperating individual or company. DOE typically agrees to forego recommending an enforcement action.
  - Non-Prosecution Agreement (Sec. 7.2.3)
    - Between the Commission, acting through DOE, and a potential cooperating individual or company.
    - Available in very limited circumstances.
- Director approval is required for use of any these tools.
- Tolling agreements regarding statute of limitations (Sec. 5.3)
  - DOE may seek these as voluntary agreements.

# Wells Notice

- DOE may inform persons orally or in writing of the nature of allegations before the action is filed. (Sec. 5.11.1)
- DOE has discretion whether and to whom to issue a Wells Notice. See 17 C.F.R. pt. 11 app. A.
- Factors affecting discretion:
  - Useful to DOE and the Commission in evaluating complicated factual, legal or policy issues?
  - Investigation substantially complete?
  - Immediate enforcement action necessary?
  - Alert potential defendants to a possible asset freeze or otherwise risking evasion?
  - Parallel criminal investigation?

# Wells Submissions

- **Wells Submissions:** response to Wells Notice. (Sec. 5.11.2)
  - Set forth relevant factual, legal, or policy matters.
  - Sworn statements for factual content.
- 14 day response period.
  - Applies notwithstanding **settlement discussions**. (Sec. 5.11.3)
  - Extensions may be approved if discussions are in progress and Staff believes that the extension will facilitate those discussions.
- Statements may be used as admission.
- **White Papers:** voluntary statements.

# Post-Wells Notice

- **Post-Wells Notice Meetings:**
  - Are at discretion of the DOE. (Sec. 5.11.4)
  - Generally, no more than one meeting.
- Staff may continue to investigate after Wells Notice and Wells Submissions.
- Request to **forward statement to the Commission:**
  - DOE will do so only when it recommends enforcement action.
- CFTC Wells process similar to that of Securities and Exchange Commission (SEC).



# Federal Court Litigation

- Injunctive Action (Sec. 6.2.1)
  - Preliminary and permanent injunctions of CEA violations
  - Ex parte restraining order
  - Many types of ancillary equitable relief
- CFTC Investigation may continue simultaneously with related civil litigation. (Sec. 6.3)
  - Requires “independent, good faith basis”
    - E.g., involvement of additional persons or additional potential violations by defendants
- Parallel criminal proceedings (Sec. 8.1.2.3)
  - Civil action must have its own independent civil investigative purpose and not be initiated to obtain evidence for criminal prosecution

# Federal Court Litigation (cont'd)

- **Settlement conferences** (Sec. 6.5.3)
  - DOE must tell Court that DOE does not possess independent settlement authority.
    - Only the Commission may grant DOE authority to enter into a proposed settlement.
  - DOE does have authority to negotiate terms of a settlement that the DOE will affirmatively recommend the Commission accept.
    - Director must approve proposed settlement terms.
- Similar considerations in **mediations**.
- **CFTC press releases** (Sec. 10.4)
  - Press releases are not subject to negotiation.
  - CFTC issues them at initiation, conclusion or settlement of court and administrative actions.
  - CFTC's Office of External Affairs is responsible for issuance.
  - Subject to review and approval by DOE Director or delegate, OGC, and Office of the Chairman.

# Inability to Pay Monetary Sanctions

- If a person claims **inability to pay**:
  - DOE Staff will confirm and ascertain maximum amount that can be paid. (Sec. 6.5.4.2)
  - DOE will not recommend proposed settlement to Commission unless it has obtained sufficient information.
- Proof considered:
  - credit reports;
  - completed DOE Financial Disclosure Statement;
  - bank statements, brokerage statements;
  - federal tax filings; and
  - database searches (e.g., real property, vehicles, corporate interests, stock ownership, bankruptcies, liens, judgments).
- No comparable provision in SEC's Manual.

# Receivers

- Sought when defendants have engaged in fraud or are otherwise not competent to manage assets. (Sec. 6.7)
- Receiver powers include:
  - seizing control of and manage business,
  - marshal assets,
  - liquidate assets through auctions or other sales,
  - initiate actions against third parties,
  - negotiate with third parties and creditors to protect assets, and
  - provide Court with independent perspective on receivership defendant's operation, receipts, and expenditures.
- If defendant maintains **assets abroad**, Staff requests provision to proposed restraining order or injunction that freezes property. (Sec. 6.2.5.1)

# Cooperative Enforcement (Domestic)

- CEA § 6c(f) authorizes **criminal referrals** to Department of Justice. (Sec. 8.1.1)
- CEA §§ 8(a)(2) and 12(a) authorize **cooperation** with federal, state, local, and foreign agencies.
  - Includes referring appropriate matters to those agencies.

# Cooperative Enforcement (Domestic)

- **Inter-Agency Sharing of Information**
  - CFTC access to files of other agencies and self-regulatory organizations (SROs). (Sec. 8.1.2.1)
    - Files of criminal authorities (federal, state and local).
    - Files of the National Futures Association and other SROs (e.g., DCMs, DCOs and SEFs).
    - Memoranda of Understanding with Federal Energy Regulatory Commission and Federal Trade Commission.
  - Access to CFTC files by other government agencies and SROs (Sec. 8.1.2.2)
    - CEA § 8(e) (authorizes CFTC to disclose information to U.S. and foreign government agencies)
    - CEA § 8a(6) (authorizes CFTC to disclose to registered entities, NFA, SROs)
    - CFTC Rule 140.72 (delegated authority to staff to provide information to registered entities, NFA, SROs).
    - CFTC Rule 140.73 (delegated authority to staff to provide information to domestic and foreign authorities).



# Cooperative Enforcement (Foreign)

- DOE must consult with Office of Chief Counsel (OCC) before contacting persons in **foreign jurisdiction**. (Sec. 8.2)
  - Contacts are made through OCC. (Sec. 8.2.1)
  - In jurisdictions with MoU or similar arrangement, OCC can request assistance. (Sec. 8.2.1.1)
- 7 U.S.C. § 9 provides procedures for **subpoena** to person in foreign jurisdiction. (Sec. 8.2.2)
  - Service as permitted by Federal Rules of Civil Procedure for service of process in foreign country.
- DOE may grant access to non-public information in its files to foreign enforcement authorities. (Sec. 8.2.4)
- CFTC may use investigative powers on behalf of foreign futures authorities.

# Violations Involving Foreign Corrupt Practices

- Foreign Corrupt Practices Act makes it unlawful for certain persons to pay foreign government officials to assist in obtaining or retaining business. 15 U.S.C. §§ 78dd-1, *et seq.*
- **March 2019 Enforcement Advisory:** persons not registered with CFTC can receive cooperation credit for timely, voluntarily disclosure of CEA violations. (Sec. 7.1.3)
  - Voluntary disclosure must be followed by full cooperation and appropriate remediation.
- DOE presumes it will recommend to Commission a resolution with no civil monetary penalty, absent aggravating circumstances.



# Advice-of-Counsel Defense

- **Defense** requires that person:
  - made complete disclosure to counsel;
  - requested counsel’s advice as to legality of contemplated action;
  - received advice that it was legal; and
  - relied in good faith on that advice. (Sec. 9.1.1.3)
- Evidence of good faith and absence of scienter:
  - *SEC v. Ginder*, 752 F. 3d 569, 576 (2d Cir. 2014)
    - Defendant acted in good faith where trading at issue was approved by counsel, the compliance department and defendant’s supervisors.
  - *Howard v. SEC*, 376 F.3d 1136, 1147 (D.C. Cir. 2004)
    - “Reliance on the advice of counsel . . . is simply evidence of good faith, a relevant consideration in evaluating a defendant’s scienter.”
  - *United States v. Peterson*, 101 F.3d 375, 381 (5th Cir. 1996)
    - “[G]ood faith reliance on the advice of counsel . . . represents possible evidence of an absence of any intent to defraud.”

# Privileges

- **Fifth Amendment Privilege** protects persons from being forced to incriminate themselves. *Minnesota v. Murphy*, 465 U.S. 420 (1984).
  - Requires witness to appear in person. (Sec. 9.1.3)
  - Adverse inference may be drawn from refusal to testify.
- Under **required records doctrine**, privilege does not apply to records required to be kept under government regulation.
  - See *In Matter of the Grand Jury Subpoena Duces Tecum Served upon Ira Kuhlik*, [1980-1982 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶21,135 (S.D.N.Y. 1980) (floor trader's trading cards must be surrendered).
  - But see *CFTC v. Buterin*, [1980-1982 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶21,133 (D. Kan. 1980) (records permitted to be withheld even though required by law, because mere surrender of records to Commission was viewed as a "testimonial act".)
  - When issuing subpoena for records not covered by CEA's recordkeeping requirements, CFTC must establish relevance to the investigation.
    - See *CFTC v. Collins*, 997 F.2d 1230 (7th Cir. 1993) (CFTC did not make adequate showing that it needed individuals' income tax returns).
- Generally does not apply to corporations.

# Privileges (cont'd)

- DOE does not expect persons to **waive** attorney-client privilege or work-product protection. (Sec. 9.3)
  - Disclosure to third party implies waiver.
  - Selective waiver accepted in minority of jurisdictions.
    - See, e.g., *Diversified Industries, Inc. v. Meredith*, 572 F.2d 596 (8th Cir. 1977) (adopting selective waiver doctrine).
  - Waiver required for advice-of-counsel defense.
- **Inadvertent disclosure** does not operate as waiver if:
  - Holder of privilege took reasonable steps to prevent disclosure; and
  - Holder promptly took reasonable steps to rectify error.
  - See Fed. R. Evid. 502(b) (Sec. 9.2)

# Privileges (cont'd)

- CFTC claims governmental privileges (Sec. 9.1.4)
  - deliberative process privilege
  - investigatory files or law enforcement privilege
  - information given on pledge of confidentiality
  - informant privilege
  - confidential report privilege

# Confidentiality

- CFTC required to maintain confidentiality of **non-public information** obtained during investigations. (Sec. 9.4)
  - May be disclosed only where
    - Commission directs or authorizes public disclosure of investigation;
    - information and documents are made matter of public record during adjudicatory proceeding; or
    - disclosure required by FOIA, FOIA Regulations, other statute or regulation, or court order.
- Other statutes provide additional confidentiality protections:
  - Privacy Act of 1974; Freedom of Information Act; Right to Financial Privacy Act of 1978; and Electronic Communications Privacy Act of 1986. (Sec. 9.4.1-4)

# Whistleblower Program

- Monetary incentives to individuals who report violations of CEA.
  - Must submit information via Form TCR. (Sec. 11.2)
- Anti-retaliation and confidentiality protections.
- CFTC must not disclose information that “could reasonably be expected to reveal the identity of the whistleblower.” (Sec. 11.3.1)
  - DOE must take measures to ensure that information is not disclosed.
  - But may provide information to: criminal authorities; federal, state, and local agencies; foreign authorities; and registered entities, NFA, or an SRO. (Sec. 11.3.1.1)

# Closing a Matter

- **Closing Letter** notifies person of closure of investigation without enforcement action. (Sec. 5.12.1)
- DOE has discretion whether to issue Closing Letters.
- Can be issued to certain persons before entire investigation is closed.
- Does not imply that conduct was lawful or in compliance with the CEA and CFTC Regulations.

# Closing a Matter (cont'd)

- **Closing enforcement matter** requires DOE Staff to:
  - ensure that recordkeeping obligations are completed;
  - complete appropriate closing reports; and
  - provide closing reports to Deputy. (Sec. 10.3)



# Useful Reminders

- Statutory Disqualification: CFTC can bring action to restrict, revoke or bar registration. (Sec. 6.2.3)
- CFTC can **suspend or disbar** a person from appearing before the Commission as an attorney. (Sec. 6.2.4)

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