Thank you for joining us today!

The webinar will begin shortly

MNPI, Misuse of Confidential Information, and Physical Commodities Markets

Insights and Implications from Recent Enforcement Actions

February 29, 2024

Reminders

- The webinar will be recorded and posted to the FIA website within 24 hours of the live webinar.
- Please use the “question” function on your webinar control panel to ask a question to the moderator or speakers.

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Disclaimer

This presentation reflects Sullivan & Cromwell LLP's views and interpretations of the Commodity Futures Trading Commission's ("CFTC") and Securities and Exchange Commission's ("SEC") and others' regulations and interpretations thereunder. In many cases, the rules and interpretations are not final or are not clear. We attempt in this presentation to provide what we believe is the best view of these regulations and interpretations. We cannot commit in all cases that the CFTC, SEC, other regulators or a court, will accept our views. In addition, many of these interpretations require consideration of particular facts and circumstances, which may limit the applicability of the views expressed herein.

Today's Agenda

I. MNPI and the Commodities Markets

II. Case Studies
   A. Broker Misuse of Customer Information
   B. "Inside Information" and FERC Anti-Manipulation Rule
   C. Swap Dealer Duties to Counterparties
   D. Information Barriers
   E. Information Obtained Through Corrupt Payments

III. Investigating Potential Misuse of Confidential Information

I. MNPI and the Commodities Markets

Prohibition on Misuse of Confidential Information

- Terms like "**material, non-public information**" (or "**MNPI**") and "**Insider Trading**" call to mind the disclosure-based regulatory framework of the securities markets.
- But a variety of U.S. laws and rules have long prohibited misappropriation of confidential information in breach of a pre-existing duty or through fraud or deception.
  - For example: Rule 10b-5 (SEC), Rule 180.1 (CFTC), Rule 1c (FERC), Commodities Fraud Statute (DOJ), and Wire Fraud (DOJ).
- In short, the prohibition applies to commodities and their derivatives (physical and financial commodities), as well as other asset classes, including securities.

What is MNPI?

- Caselaw tells us:
  - Information is "material" if there is a substantial likelihood that a reasonable investor would find it important in making an investment decision by having significantly altered the total mix of information available.[1]
  - Information is generally considered "non-public" if has yet to be disseminated broadly to the marketplace and has not yet permeated the proper channels.[2]

[1] *See TSC Indus.* v. *Northway, Inc.*, 426 U.S. 438, 448-50 (1976).
[2] *See Chiarella* v. *United States*, 445 U.S. 222, 228 (1980).

What is MNPI?

- Some agency actions have focused on the potential for market impact in assessing whether information is "material" or on whether traders considered the information "useful" and thus material to their own decision-making for particular transactions:
  - "The information was material because Gizienski and Customer A knew that Customer B traded energy contracts for one of the nation's largest power generation companies; as such, Customer B's activity could impact the market for the particular contract on which he is bidding as well as related contracts. In this instance, the disclosure led Customer A to instruct Gizienski to sell 'some 60 puts.'" (*CFTC* v. *Eox*)
  - Commodities trading firm employees "improperly obtained confidential information, and took steps to maintain it in confidence," demonstrating that they "appreciated the sensitivity of this information, and considered it material to certain [] business and trading decisions." (CFTC Docket No. 21-01)

What is MNPI?

- In commodities markets, trading in possession of MNPI violates relevant regulations only when the MNPI was obtained in breach of a pre-existing duty, including through fraud or deception.
- In the rulemaking adopting its Part 180 anti-manipulation rules, the CFTC recognized that "***derivatives markets have long operated in a way that allows for market participants to trade on the basis of lawfully obtained material nonpublic information***."

Representative Fact Patterns: Breach of Duty

Personal Account Trading	Employee misappropriation of employer information, including trading in personal accounts. Personal trading also may raise issues if trading occurs while in possession of MNPI or in breach of other duties to third parties.
Broker/Customer	Broker misappropriation of customer information, including front-running or sharing information with preferred counterparties.
Dealer/Customer	Previewing block trade sales to favored counterparties ahead of an expected price decrease, and related sharing of MNPI.
Tippee Liability	Receipt of counterparty proprietary information, where firm allegedly knew or should have known disclosure was unauthorized.
Alt Data	Use of intermediaries, including alternative data providers.

Legal Risks of MNPI

- Receiving MNPI poses legal risk, and care should be taken to assess whether any duties have been breached.
  - Traders may be liable for trading while in knowing possession of such information, if they knew or should have known that disclosures were unauthorized.
  - Relationships with middle-men and consultants should be evaluated carefully.
- Evaluate the characteristics of information you receive:
  - ***The nature of information:*** *e.g.*, pricing or competitor information might suggest on its face that it is confidential and cannot be shared with or acted upon by the receiving party.
  - ***The source of the information:*** *e.g.*, whether there is reason to believe the source is not authorized to share the information. That may be the case if the source seeks to conceal from others that the information was shared, and if the source has clear policies and guidelines for how information is shared.
  - ***The potential uses of the information:*** In general, more commercially valuable information will warrant a higher level of scrutiny.
- Some cases have found that a duty of confidentiality was created through words or actions, even where written agreements or front office policies disclaimed those duties.

Other Relevant Regulatory Authority

- Swap dealers are subject to business conduct rules related to MNPI:
  - Rule 23.410 (prohibition on fraud, manipulation, and other abusive practices)
    - "It shall be unlawful for a swap dealer . . . [t]o employ any device, scheme, or artifice to defraud . . . to engage in any transaction, practice, or course of business that operates as a fraud . . . [or] to engage in any act, practice, or course of business that is fraudulent, deceptive, or manipulative."
    - Subject to specified exceptions, "[i]It shall be unlawful for a swap dealer . . . to . . . [d]isclose to any other person any material confidential information provided by or on behalf of a counterparty to the swap dealer . . . or . . . [u]se for its own purposes in any way that would tend to be materially adverse to the interests of a counterparty, any material confidential information provided by or on behalf of a counterparty to the swap dealer."
  - Rule 23.431(a)(3) (disclosure of conflicts of interest)
    - "[A] swap dealer . . . shall disclose to any counterparty to the swap (other than a swap dealer . . .) the material information concerning the swap in a manner reasonably designed to allow the counterparty to assess the material incentives and conflicts of interest that the swap dealer . . . may have in connection with a particular swap."
  - Rule 23.433 (communication)
    - "[T]he swap dealer or major swap participant shall communicate in a fair and balanced manner based on principles of fair dealing and good faith."

Other Relevant Regulatory Authority

- FCMs (Rule 155.3) and IBs (Rule 155.4) are subject to trading practice rules related to MNPI:
  - "No [FCM or IB] or any of its affiliated persons shall disclose that an order of another person is being held by the [FCM or IB] . . . , unless such disclosure is necessary to the effective execution of such order . . . knowingly take, directly or indirectly, the other side of any order of another person revealed to the [FCM or IB] or any of its affiliated persons by reason of their relationship to such other person, except with such other person's consent . . . ."

II. Case Studies

Case Studies

A. Broker Misuse of Customer Information
B. “Inside Information” and FERC Anti-Manipulation Rule
C. Swap Dealer Duties to Counterparties
D. Information Barriers
E. Information Obtained Through Corrupt Payments

A. Broker Misuse of Customer Information

Case Study: *Classic Energy* cases

- Since 2019, the CFTC and DOJ have brought 9 cases against traders and brokers who allegedly conspired to trade natural gas futures contracts using misappropriated MNPI.
- Classic Energy facilitated block trades between customers in natural gas futures. As alleged, traders and brokers:
  - Used MNPI about customer block trade orders to trade against their customers; and
  - Failed to disclose that they were acting as counterparties to these transactions.
- The traders allegedly used the information to arrange block trades between themselves and Classic Energy customers at a profit, shared among those involved in the scheme.
- Scheme continued from September 2015 to at least January 2019.

Case Study: *Classic Energy* cases

- Classic Energy and its owner agreed to pay the CFTC:
  - $1.5 million civil monetary penalty
  - $1.3 million in disgorged profits
- Classic Energy's owner also received a two-year trading and registration ban
- To date, five individuals have pleaded guilty to criminal charges, and a sixth faces trial in Houston in March 2024.
  - Other traders to be sentenced in 2024
  - One received sentence of 33 months

Case Study: *CFTC* v. *EOX* (S.D. Tex. 2022)

- The CFTC charged an energy commodities brokerage firm and one of its brokers for alleged disclosure of MNPI about other customers' activity, including:
  - **Identity of other EOX customers** *[Customer B] is going to make this pop . . . He keeps yelling bday 100 calls 4 bid.*
  - **Orders of other EOX customers** (not necessary to execute the orders)
    - *Gizienski: [Customer D] is covering here . . . He just told me to buy him 150mws . . . Bday …*
    - *Customer A: k we need to cover*
  - **Trading activity by other EOX customers** that had not yet been publicly reported
    - *Here she comes . . . Ur girl . . . nd nepool . . . 37.00 at 38.25 . . . She is lifting offer . . . 38.25 . . . Buy on"*
- Jury ultimately rejected MNPI charge on grounds that broker's "duty" of confidentiality was not proven
- Defendants were ordered to pay $7.5 million on Aug. 15, 2022 on other charges, subsequently reversed by Fifth Circuit on fair notice grounds.

B. “Inside Information” and FERC Anti-Manipulation Rule

"Inside Information" and FERC Anti-Manipulation Rule

FERC Docket No. IN18-9-00 (Consent Agreement, Aug. 19, 2022).

- An energy trading firm and two of its traders (along with the estate of a firm founder) agreed to pay ~$181 million to settle allegations that they manipulated the PJM Interconnection's financial transmission rights (FTR) market.
- FERC's May 20, 2021 Order to Show Cause alleged that the energy trading firm used "inside information about Shell Energy North America (US) LP's offers (on the seller side of the auction) in designing its own bids for the same FTRs (on the buyer side of the auction)."

> While GreenHat denies that it used inside information about Shell's offer volumes and prices to rig PJM auctions,[325] that denial is belied by the facts. *First*, GreenHat does not even address, much less attempt to explain away, the fact that the *volumes* of many of its bids on FTRs it had just sold to Shell **were identical to, or exactly double**, the volumes of Shell's offers to sell those same FTRs. For example, GreenHat neither disputes nor tries to explain why it bid in PJM auctions on 1,761 FTR paths in exactly the same volumes at which Shell was selling the same FTRs, or on 1,007 FTR paths in exactly double the volumes at which Shell was selling the same FTRs.[326] It neither disputes nor tries to explain away the fact that in the June 2017 auction, 89% of its bids for the FTRs it sold to Shell were at the same, or exactly double, the volume of what Shell offered into the auction.[327] The only explanation for these undisputed facts is that GreenHat used inside information about Shell's offers in crafting its own bids. (As discussed above (at p. 56), GreenHat was able to determine what bids Shell would submit based on information the parties exchanged in their contract negotiations.)

"Inside Information" and FERC Anti-Manipulation Rule

- Commissioner Danly's concurring statement:

> 23 The Staff Report relies on the fact that GreenHat knew the terms of its transactions with Shell, but my understanding is that GreenHat did not have any other information as to whether Shell would offer any FTRs into a particular auction and, if so, the quantity of FTRs Shell would offer or the prices at which Shell would offer. I would like to hear from the parties whether my understanding is correct and, if so, whether the information that GreenHat had constitutes the type of inside information that cannot be used in bidding on FTRs on the same paths as the FTRs GreenHat sold to Shell. It is reasonable to conclude that GreenHat could make inferences about Shell's possible offers as a consequence of its agreements with Shell, but does that constitute the unlawful use of inside information?

- Consent Agreement does not reference these "inside information" claims.

C. Swap Dealer Duties to Counterparties

Case Study: CFTC Dkt No. 23-25 (Apr. 25, 2023)

- On April 25, 2023, the CFTC entered into a consent order with a non-U.S. swap dealer for failing to adequately disclose trading practices to customers that involved "pre-hedging" certain foreign exchange forward transactions.
- Traders at the swap dealer allegedly hedged the firm's anticipated exposure in the minutes or seconds before providing the dealer's customers with the spot exchange rate.
- According to settlement, engaging in this "pre-hedging" activity:
  - Likely moved the relevant spot exchange rate against the customer, resulting in the customer getting a less favorable rate; and
  - May have allowed the dealer to hedge its exposure at a rate more favorable than may otherwise have been available.

Case Study: CFTC Dkt No. 23-25 (Apr. 25, 2023)

- While the dealer disclosed to customers that it may engage in pre-hedging activity, it did not specifically inform clients that "it was engaged in trading in the minutes or seconds before providing the spot rate for, and executing" transactions.
- Based on these allegations, the CFTC charged the dealer with violations of:
  - Section 4s(h)(3)(B)(ii) of the CEA and Regulation 23.431(a)(3)(ii) (for failing to disclose material information sufficient to allow a client to assess conflicts of interest); and
  - Sections 4s(h)(3)(C) and 4s(h)(1)(B), as well as Regulations 23.433 and 23.602(a) (for failing to communicate in a fair and balanced manner with counterparties and failing to supervise its business as swap dealer).

Case Study: CFTC Dkt No. 23-25 (Apr. 25, 2023)

- The dealer agreed to pay the CFTC a total penalty of $6.85 million, including:
  - $1.85 million restitution
  - $5 million civil monetary penalty
- The CFTC acknowledged dealer's remediation measures, including:
  - Implementing new policies and procedures
  - Updating disclosures to explain pre-hedging activities
  - Implementing new training
  - Refraining from pre-hedging at client request

D. Information Barriers

Case Study: Broker-Dealer MNPI Policies

SEC Release No. 83685 (July 23, 2018)

- The SEC entered into a consent order with a broker-dealer for failing to adequately maintain and enforce MNPI policies and procedures.
  - These policies and procedures required, among other things:
    - Effective information barriers between the broker-dealer's equity trading desks; and
    - Measures to protect confidential broker-dealer customer order information, including the identities of buyback customers.
- The broker-dealer's traders allegedly "received confidential issuer buyback trade information on nearly every day that the broker-dealer executed buyback trades" and shared certain information regarding these trades with other customers without permission from issuer buyback customers
- For alleged violations of Section 15(g) of the Exchange Act, the broker-dealer paid a civil monetary penalty of $1,250,000.
  - The SEC recognized the broker-dealer's remedial efforts, including movement of certain personnel to the private side and enhanced wall crossing procedures.

Case Study: Statements to Customers About Info Barriers

No. 23-cv-8072 (S.D.N.Y. Sept. 12, 2023)

- The SEC filed charges against a broker-dealer and its parent company, for failing to have adequate information barrier policies and procedures and making materially false and misleading statements related to its information barriers.
- The parent allegedly "repeatedly – and falsely – told their institutional customers and the public that [the broker-dealer] used 'information barriers' and 'systemic separation between business groups' in order to safeguard these customers' MNPI."
- The SEC alleged that the broker-dealer failed to safeguard a database including post-trade information generated from customer orders.
  - This database was accessible to practically anyone at the broker-dealer and its affiliates, including their proprietary traders.
  - "[The broker-dealer's] failure to safeguard this information created significant risk that its proprietary traders could misuse it or share it outside [the broker-dealer]."
  - However, the SEC did not allege any specific instances of misuse.
- Case is pending in S.D.N.Y.

E. Information Obtained Through Corrupt Payments

Case Study: CFTC Rule 180.1 Corruption Cases

- The CFTC has brought a number of actions against physical commodities trading firms for misappropriation of confidential information of state owned entities, allegedly obtained through corrupt payments.
  - Actions impose liability for receipt of confidential information the firm knew or reasonably should have known was obtained in breach of a duty.
  - Corporate resolutions coordinated with parallel criminal actions for FCPA violations.
  - The CFTC's 2019 Enforcement Advisory incentivized timely reporting of CEA violations involving foreign corrupt practices by offering reduced penalties for such violations.

Case Study: CFTC Dkt No. 24-02 (Dec. 12, 2023)

- Between June 2012 and November 2018, a trading firm worked with a consultant, who paid bribes to employees of Petroleo Brasiliero S.A. ("Petrobras"), a state-owned Brazilian oil company.
  - Allegedly paid a total of $3.9 million in bribes.
- Petrobras employees in turn provided the consultant with MNPI related to Petrobras's business, including details of oil shipments and negotiations with competitors.
- The CFTC alleged that "one or more" of the firm's traders then used the MNPI in their business, including purchases of fuel oil for delivery into the United States.

Case Study: CFTC Dkt No. 24-02 (Dec. 12, 2023)

- The trading firm's employees took steps to conceal their possession of MNPI from Petrobras:
  - Avoided using the consultant's name in interactions with Petrobras
  - Submitted bids for cargo the firm did not want to conceal the advantage it obtained from the MNPI
  - Used code words (*e.g.*, "breakfast" = bribes) and encrypted messages with the consultant
  - Falsified invoices
- Coordinated resolutions with CFTC (Consent Order) and DOJ (DPA), imposing a total monetary penalty in the amount of $98 million.

III. Investigating Potential Misuse of Confidential Information

Importance of Effective Internal Investigations

- An internal investigation can be important to:
  - Developing a full understanding of the facts;
  - Learning and disclosing important information to increase the likelihood of cooperation credit; and
  - Improving corporate governance.
- Either in-house or outside counsel should be involved to ensure material from the investigation is privileged.
  - The DOJ, CFTC, and SEC have policies that they will not seek the waiver of privileged material.

Key Considerations in MNPI Investigations

Consider immediate steps to limit distribution of potentially problematic information and prevent trading by individuals who know the information, pending further assessment.

- Consider whether the source of the information may be subject to a duty confidence:
  - Regulatory
  - Contractual
  - Relationship-based duties
  - Extra-contractual promises
- Assess materiality of potentially problematic information, bearing in mind the broad definitions asserted in some regulatory actions to-date.
- If problematic information is identified, evaluate potential cleansing events and consider strategic next steps.

Self-reporting and Cooperation

- Can reduce penalties and, in some cases, avoid charges.
- ***DOJ***: March 2023 Guidelines clarify that the Criminal Division will not seek a guilty plea where a company has self-disclosed and remediated misconduct, absent aggravating factors.
- ***SEC***: Enforcement Manual identifies four considerations for credit in this regard: 1) self-policing; 2) self-reporting; 3) remediation; and 4) cooperation.
- ***CFTC***: October 2023 Enforcement Advisory on Penalties, Monitors, and Admissions: among other things, the Advisory suggests that companies may have to admit to violations to receive cooperation credit in some cases.
- ***FERC***: The agency's November 2016 white paper on Anti-Market Manipulation Enforcement Efforts emphasizes the importance of cooperation and notes that the Commission offers a one-point credit reduction to a company's culpability score for cooperation.

Negotiating Resolutions

- Criminal or regulatory settlements can include a variety of terms:
  - Monetary Penalties
  - Admissions
  - Remediation
  - Monitors
- There has been a trend towards the imposition of external monitors in recent years.
  - ***CFTC*:** An October 2023 Enforcement Advisory noted that the agency would seek increased use of both monitors and consultants.
  - ***DOJ*:** In October 2021, DAG Monaco said she was rescinding any prior guidance that suggested monitorships were "disfavored" or the "exception."

Negotiating Resolutions

- Many regulators have emphasized their focus on individual accountability in recent years.
  - ***DOJ*:** In 2021, the DOJ announced that individual accountability is a priority and that it was restoring prior guidance requiring companies to provide all non-privileged information about individuals involved in or responsible for the misconduct at issue.
  - ***SEC*:** The SEC's FY2023 Enforcement Results emphasized that individual accountability is a "pillar" of the agency's enforcement strategy. Over 2/3rds of SEC enforcement actions last year involved charges against one or more individuals.
  - ***CFTC*:** The CFTC's October 2023 Enforcement Advisory noted the importance of penalties sufficiently high enough to deter a trend of recidivism, including by "individual offenders."

Potential Collateral Consequences

- Criminal or regulatory settlements can trigger a number of collateral consequences including:
  - Restrictions or bans on trading
  - Revocation of registrations
  - Bar from participating in federal procurement contracts
  - Loss of state licenses
- Corporations may need to seek waivers or exemptions from multiple regulators to allow them to continue engaging in the affected business activities.
  - Timing of waivers is critical to ensure no gaps in licenses and statuses.

Resolving Parallel Investigations

- Coordinating multiple agencies can be challenging, but coordinated settlements carry benefits:
  - Increased control over the release of information
  - Limited effect of harmful disclosures on the market
  - Greater sense of finality
- Agencies have trended towards multi-agency settlements as agencies increase collaboration, including across borders.

Anticipating Follow-on Civil Claims

- Settlements can increase the potential of follow-on civil litigation.
- Courts have increasingly permitted civil plaintiffs to rely on factual or legal admissions in settlement agreements, including DPAs and NPAs.
  - Courts have been more reluctant to allow plaintiffs to rely on administrative consent orders.
- Companies should take care to ensure that any admissions are concrete, specific and not subject to interpretation.

Thank you for joining us today!

Upcoming Webinar:

The SEC's New Treasury Clearing Rule
10:00 – 11:00 AM ET

Appendix

CFTC Enforcement Authority

- Rule 180.1(a): "It shall be unlawful for any person . . . in connection with any [swap, commodity, or future] to intentionally or recklessly:
    1. use or employ, or attempt to use or employ, any manipulative device, scheme, or artifice to defraud;
    2. make, or attempt to make, any untrue or misleading statement of material fact or to omit to state a material fact . . . ;
    3. engage, or attempt to engage, in any act, practice, or course of business, which operates or would operate as a fraud or deceit upon any person; or
    4. deliver or cause to be delivered, or attempt to deliver . . . by any means of communication whatsoever, a false or misleading or inaccurate report concerning crop or market information or conditions that affect or tend to affect the price of any commodity in interstate commerce, knowing, or acting in reckless disregard of the fact that such a report is false, misleading, or inaccurate."

CFTC Enforcement Authority

- Rule 180.2: "It shall be unlawful for any person . . . to manipulate or attempt to manipulate the price of any swap, or of any commodity in interstate commerce, for future delivery on or subject to the rules of any registered entity."
- To violate Rule 180.2:
  - Violator must have the ability to influence prices;
  - Violator must have the specific intent to influence;
  - Artificial prices must exist; and
  - The conduct must be shown to have caused the artificial price.[3]
- The CFTC must prove both (1) specific intent to manipulate and (2) causation (i.e., that the conduct caused artificial prices).

[3]Press Release, CFTC, Fact Sheet: Anti-Manipulation and Anti-Fraud Final Rules (July 14, 2011).

Other Relevant CFTC Authority

- Rule 23.410: "It shall be unlawful for a swap dealer or major swap participant
  - To employ any device, scheme, or artifice to defraud any Special Entity or prospective customer who is a Special Entity;
  - To engage in any transaction, practice, or course of business that operates as a fraud or deceit on any Special Entity or prospective customer who is a Special Entity; or
  - To engage in any act, practice, or course of business that is fraudulent, deceptive, or manipulative."

Other Relevant CFTC Authority

- Rule 23.431(a)(3): "At a reasonably sufficient time prior to entering into a swap, a swap dealer . . . shall disclose to any counterparty to the swap . . . material information concerning the swap in a manner reasonably designed to allow the counterparty to assess:
  - The material incentives and conflicts of interest that the swap dealer . . . May have in connection with a particular swap, which shall include:
    - . . . the price of the swap and the mid-market mark of the swap . . . ; and
    - Any compensation or incentive from any source other than the counterparty that the swap dealer . . . may receive in connection with the swap."

Other Relevant CFTC Authority

- Rule 23.433: “With respect to any communication between a swap dealer . . . and any counterparty, the swap dealer or major swap participant shall communicate in a fair and balanced manner based on principles of fair dealing and good faith.”

Other Relevant CFTC Authority

- Rule 155.3(b): "No futures commission merchant or any of its affiliated persons shall:
  - Disclose that an order of another person is being held by the [FCM] . . . , unless such disclosure is necessary to the effective execution of such order . . . ; or
  - Knowingly take, directly or indirectly, the other side of any order of another person revealed to the [FCM] or any of its affiliated persons by reason of their relationship to such other person, except with such other person's consent . . . ."
- Rule 155.4(b): "No introducing broker or any of its affiliated persons shall:
  - Disclose that an order of another person is being held by the [IB] . . . unless such disclosure is necessary to the effective execution of such order . . . ; or
  - Knowingly take, directly or indirectly, the other side of any order of another person revealed to the [IB] or any of its affiliated persons by reason of their relationship to such other person, except with such other person's prior consent. . . ."

SEC Enforcement Authority

- SEC Rule 10b-5: "It shall be unlawful for any person . . . by use of any means or instrumentality of interstate commerce, or of the mails or of any national securities exchanges:
  a) to employ any device, scheme, or artifice to defraud;
  b) to make any untrue statement of material fact or to omit to state a material fact . . . ; or
  c) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person."

SEC Enforcement Authority

- To establish liability under Rule 10b-5(a), (c), the SEC must allege:
  - defendant, in connection with the purchase or sale of securities, engaged in a manipulative or deceptive act;
  - in furtherance of an alleged scheme to defraud; and
  - acted with scienter.[2]

- To establish liability under Rule 10b-5(b), the SEC must allege:
  - defendant made a material misrepresentation or material omission as to which he had a duty to speak, or used a fraudulent device;
  - with scienter;
  - in connection with the purchase or sale of securities.[3]

[2] *SEC* v. *Wey*, 246 F. Supp. 3d 894, 915–16 (S.D.N.Y. 2017).
[3] *SEC* v. *Frohling*, 851 F.3d 132, 136 (2d Cir. 2016).

FERC Enforcement Authority

- Rule 1c: “It shall be unlawful for any entity, directly or indirectly, in connection with the purchase or sale of [natural gas][electric energy] or the purchase or sale of [transportation][transmission] services subject to the jurisdiction of [FERC]:
    - To use or employ any device, scheme, or artifice to defraud,
    - To make any untrue statement of a material fact or omit to state a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
    - To engage in any act, practice or course of business that operates or would operate as a fraud or deceit upon any entity.”

S&C Bios

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> "He is not only **brilliant** but very **plugged into US regulators, their mindset and industry participants** in general."
> "Colin Lloyd has **unparalleled technical knowledge, relationships and commercial acumen** in derivatives matters. He's also **accessible, responsive and easy to work with**."
>
> ***Chambers USA*, 2023**

Colin Lloyd is a partner in the Firm's Commodities, Futures and Derivatives and Capital Markets Groups. He focuses on advising clients on a broad range of securities and derivatives regulatory, enforcement, transactional, and legislative matters. His clients include U.S. and non-U.S. broker-dealers, swap dealers, banks, exchanges, electronic trading platforms, clearinghouses, private equity funds, investment managers, sovereigns, and derivatives end users. He regularly represents clients before various federal regulatory agencies, including the Commodity Futures Trading Commission, the U.S. Securities and Exchange Commission, the Financial Industry Regulatory Authority, as well as other federal regulatory agencies and self-regulatory organizations.

Mr. Lloyd is recognized as a leader in his practice by Chambers USA, IFLR1000 and The Legal 500 United States. He has also been named to Bloomberg Law's 2023 "They've Got Next: The 40 Under 40" list, recognized as a "Cryptocurrency, Blockchain, and FinTech Trailblazer" by The National Law Journal, a Law360 "Rising Star" and a "Future Leader" by the Institute of International Finance.

Mr. Lloyd's work on derivatives and foreign exchange matters has included the development of path breaking derivatives products and transactions, providing regulatory guidance and updates to trade associations and self-regulatory organizations, and developing a comprehensive compliance manual widely used by registered swap dealers as the foundation for their compliance policies and procedures.

He advises U.S. and non-U.S. broker-dealers and other trading firms on variety of securities market regulatory matters, including compliance with SEC Rule 15a-6, ongoing capital, customer protection, and margin advice for investment banks, market structure issues – including high-frequency trading and market-making strategies – for full-service and proprietary trading firms, as well as advising commercial and custody banks on the permitted scope of securities-related activities.

He has represented clients in connection with settlements with various regulators, including the Department of Justice and CFTC, on matters involving global foreign exchange and interest-rate benchmarks, Dodd-Frank swap dealer regulations, swap data reporting, wash trading allegations, and segregation, recordkeeping, and reporting.

Link to Online Bio

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University of Texas, B.B.A. 2002

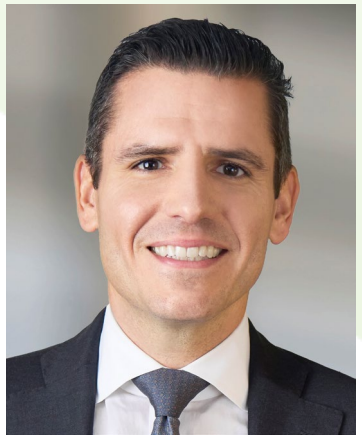
> "Kathleen is a fantastic lawyer - **whip-smart, strategic and has immense expertise**."
> "She is **excellent**. A quality lawyer."
> ***Chambers USA, 2023***

Kathleen S. McArthur, co-head of S&C's Securities & Commodities Investigations practice and the Firm's Commodities, Futures and Derivatives practice, has advised some of the world's biggest companies on major matters involving complex financial products and physical commodities, including enforcement inquiries, internal investigations and commercial litigation. Katy has a keen understanding of trading and markets that enables her to advocate effectively for clients facing even the most complex allegations of fraud or market manipulation, including proceedings brought by the CFTC, SEC, FERC and DOJ.

Ms. McArthur has been recognized by leading publications, including Chambers USA and The Best Lawyers in America. She has also been recognized as a "Rising Star" by New York Super Lawyers, Who's Who Legal: Investigations and by The Legal 500 United States, and is a Fellow of the Leadership Council on Legal Diversity. She also was a member of the Sullivan & Cromwell team that was awarded The Legal Aid Society's 2018 Pro Bono Publico Award. She is a native speaker of Spanish and also is fluent in Portuguese.

Link to Online Bio

Lawyer Profiles



James M. McDonald

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Partner since 2021
University of Virginia School of Law, J.D. 2007
Harvard University, B.A. 2004

"He is incredibly responsive and has great insight into how regulators think about issues."
Chambers USA 2023

James M. McDonald is a litigation partner and a member of the Firm's Securities & Commodities Investigations Practice and its Commodities, Futures and Derivatives group. His practice focuses on advising clients on regulatory enforcement matters, white-collar criminal matters, and internal investigations, as well as on regulatory and corporate governance matters related to the securities and commodities laws. In addition, he has represented entities and individuals across the cryptocurrency ecosystem in government investigations, civil litigation, and regulatory matters.

From 2017 to 2020, Mr. McDonald served as Director of Enforcement at the U.S. Commodity Futures Trading Commission, where he had overall responsibility for all aspects of the CFTC's enforcement program, including its investigations and litigations, market surveillance, and whistleblower office. During his time at the CFTC, Mr. McDonald was responsible for creating the first task forces within the Division of Enforcement focused on manipulation and spoofing; insider trading; foreign corruption; anti-money laundering and the Bank Secrecy Act; and digital assets. He also coordinated the CFTC's enforcement activities with the Department of Justice, the SEC, and numerous international regulators.

Prior to joining the CFTC in 2017, Mr. McDonald served as an Assistant United States Attorney in the Southern District of New York, where he investigated and prosecuted white-collar criminal offenses, as well as cases involving international narcotics trafficking and violent crime, and tried numerous jury cases.

Mr. McDonald served as a law clerk to John G. Roberts, Jr., Chief Justice of the United States, and Jeffrey S. Sutton, Jr., Judge on the United States Court of Appeals for the Sixth Circuit, and as a Deputy Associate Counsel, in the Office of the White House Counsel, under President George W. Bush.

Mr. McDonald joined Sullivan & Cromwell as a partner in January 2021.

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Lawyer Profiles

Aaron M. Levine

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Associate since 2017
Yale Law School, 2017
Northwestern University, 2014

Aaron is an associate in the Firm's General Practice Group, practicing primarily in its Financial Services and Commodities, Futures and Derivatives Groups. He focuses on advising clients on a broad range of derivatives, securities and bank regulatory, transactional, enforcement and advisory matters. He also advises clients on corporate governance, compensation and governance matters. His clients include U.S. and non-U.S. banks, broker-dealers, swap dealers, exchanges, asset managers, investment managers, trading firms and fintech firms. He serves as a member of the Futures & Derivatives Regulation Committee of the New York City Bar Association and maintains an active pro bono practice.

Recent Representations

- **FTX** in its pending Chapter 11 proceedings, including its sale of LedgerX and in ongoing trading regulatory matters
- **Credit Suisse** in its $3.2 billion merger with UBS and post-merger integration
- **A digital asset trading platform** in connection with CFTC and SEC investigations
- **Various individual clients and trade associations** in comment letters and other advocacy efforts on proposed legislation and regulations from the CFTC, SEC, FINRA and the prudential banking regulators


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