

## CFTC's Foray Into Corruption Hints At Imminent Action

By **Alison Noon**

*Law360 (March 8, 2019, 8:14 PM EST)* -- A carefully worded announcement that the Commodity Futures Trading Commission will wade into the United States' already tremendous efforts to prosecute corruption has left white collar and finance attorneys baffled, but convinced that an enforcement action is imminent.

The CFTC's initiative marked the entry of a third U.S. agency into the complex realm of the Foreign Corrupt Practices Act, one of the world's preeminent anti-bribery tools that Congress assigned to the U.S. Department of Justice and the U.S. Securities and Exchange Commission. Attorneys said the official spearheading the corruption move, CFTC Enforcement Director James McDonald, not only indicated there's a new cook in the kitchen, but that he has something up his sleeve.

When McDonald announced the initiative on Wednesday, he said foreign corrupt practices in the CFTC's wheelhouse could include bribes used to secure business in swaps or derivatives, as well as corrupted transactions that have an effect on prices or benchmark rates.

"We currently have open investigations involving similar conduct," McDonald added.

Close observers have clung to that sentence.

"Something is behind that curtain," said Gary DeWaal of Katten Muchin Rosenman LLP, a former CFTC attorney. "There seems to be a suggestion that, regarding bribery that causes an FCPA violation, something related to that bribery could have hit the radar at the CFTC as impacting markets."

Ruminating on possible targets, Anthony Mansfield of Allen & Overy LLP said transactions embroiled in corruption scandals in South America, notably the Petrobras investigations in Brazil and kleptocracy allegations surrounding Venezuela's President Nicolas Maduro, could easily have had an effect on U.S. markets and be ripe for CFTC intervention. He said McDonald's tip about ongoing investigations was no slip of the tongue.

"I think he was expecting people and wanting people to pay attention to that reference," said Mansfield, a former CFTC attorney.

A representative for the CFTC did not respond to messages seeking comment Friday.

The announcement sent practitioners reeling not only because there was no precedent for swaps and derivatives enforcement in corruption, but because the CFTC, despite a modest budget boost this year, has nowhere near the manpower of traditional corruption cops.

Among the CFTC veterans scratching their heads is McDonald's predecessor, Aitan Goelman, a partner at Zuckerman Spaeder LLP who served as CFTC enforcement chief from 2014 to 2017.

"There's no question that Jamie's right on the law, and that corrupt foreign payments could conceivably constitute a violation of various provisions of the [Commodity Exchange Act]," Goelman said. "But given that the CFTC is chronically underfunded and that, in the FCPA, Congress explicitly directed the DOJ and SEC to police the bribery of foreign officials, I doubt that the CFTC will divert much of its scarce enforcement resources to investigating foreign corrupt payments."

McDonald joined the CFTC two years ago from one of the nation's highest-profile public corruption units at the U.S. Attorney's Office for the Southern District of New York, where he spent three years prosecuting gang members in the Bronx and former New York Assembly Speaker Sheldon Silver.

An attorney who worked with McDonald at the CFTC as recently as last summer said she was not surprised that the former prosecutor, who's already expanded agency efforts on electronic and insider futures trading, would also go hunting for market manipulation in the corruption arena.

"This is sort of an unpredictable development, but also unsurprising because I think under his leadership we've seen a renewed focus on policing the integrity of the markets under CFTC jurisdiction," Laura Brookover, now an attorney at Covington & Burling LLP, said.

Mansfield, too, said McDonald has been on a roll with initiatives that take the CFTC into space the agency is not ordinarily seen, including action in anti-money laundering. Overall, CFTC enforcement has markedly increased under his watch.

The latest initiative has the potential to cause severe headaches, though.

It's already difficult to work through parallel negotiations with the DOJ and SEC, which have differing interests and procedures, said Brian Frey, a white collar partner at Alston & Bird LLP and former federal prosecutor.

"Any time you add one more government agency, it adds cost, it adds time and it adds complexity," Frey said. "It's one more set of presentations you have to do, it's answering a set of questions that might be slightly different than the ones everyone else is asking, it adds a lot of additional work for companies who are trying to cooperate and just a lot of practical challenges for practitioners."

The initiative should reiterate to compliance departments the importance of a holistic approach to combating unethical and illicit business maneuvers, said John Nowak, a partner at Paul Hastings LLP who previously oversaw FCPA investigations at the U.S. Attorney's Office for the Eastern District of New York.

"The concept of applying different statutory schemes to the same set of facts is not new, that's something that I think sometimes gets forgotten within compliance programs," Nowak said. "Sometimes you see a focus on just the FCPA angle or just the statutory scheme, instead of having a broader view of the potential for misconduct."

Money laundering, wire fraud, Travel Act violations, and now commodity markets should be part of the FCPA compliance equation, he said.

“When your focus is just on the FCPA, you’re sometimes missing the scope or the reach of other potential violations or statutory regimes,” Nowak said. “Thinking too narrowly about the issue, that can be the problem.”

--Editing by Emily Kokoll and Alanna Weissman.