

Alert

CFTC Sanctions CCO for Participation in Fraud: Lessons for Private Fund Compliance Officers

September 19, 2019

On Sept. 12, 2019, the U.S. Commodity Futures Trading Commission (“CFTC”) instituted and settled an action against the chief compliance officer of a private fund manager registered as a commodity pool operator.¹ The CCO was fined \$125,000, received a cease and desist order and is subject to other ongoing sanctions.

The Marconato Order

The CFTC order² alleges that the CCO, Rafael Marconato, engaged in fraud alongside the manager’s chief executive officer. Marconato and the CEO are alleged to have engaged in solicitation activities involving the preparation and distribution of advertising documents that presented false positive performance, when, in fact, the manager, and the CEO himself, misappropriated participants’ funds for their own benefit.

The National Futures Association (“NFA”) commenced an examination of the manager in November 2017, and Marconato is also alleged to have made knowing misstatements and to have provided false documents to the NFA. In addition, Marconato is alleged to have engaged in a redemption that was effectively funded by investments made on the basis of his misrepresentations.

As a result of his actions, Marconato was ordered by the CFTC to make \$125,000 in restitution payments and to pay a \$25,000 civil penalty. Marconato is also permanently prohibited from trading commodity interests for himself or others, soliciting or accepting funds from others for the purpose of trading commodity interests, and from registering with the CFTC.

Given the scope and nature of his alleged actions, Marconato’s sanctions were relatively light, which was the result of his ongoing cooperation in ongoing litigation against other parties.

Lessons for Private Fund Managers

While the actions alleged to have been carried out by Marconato, the manager and the manager’s CEO are clearly extreme, this action still contains a number of lessons and practice tips for the average private fund manager.

One point to note, which we have mentioned in earlier *Alerts*, is that the CFTC is aggressively and effectively leveraging its relationships with the NFA and other regulators and self-regulatory

¹ See CFTC Orders Chief Compliance Officer of Trading Firm to Pay \$150,000 for Fraud and False Statements to a Self-Regulatory Organization (Sept. 12, 2019), available [here](#).

² See Order Instituting Proceedings Pursuant To Section 6(C) And (D) Of The Commodity Exchange Act, Making Findings, And Imposing Remedial Sanctions (Sept. 12, 2019), available [here](#).

organizations. All managerial personnel, and especially compliance and finance personnel, should be cognizant that any and all statements made or documents provided to the NFA, either on examination or in less formal situations, may be referred to the CFTC and its enforcement staff.

A second point to consider is that the CFTC is willing to pursue cases (and defendants) that have ties to non-U.S. jurisdictions. In this case, the CFTC pursued Marconato from his original location of Miami to his current residence in Brazil. Indeed, the CFTC's Director of Enforcement, James McDonald, was quoted as stating, "The reach of our enforcement efforts does not stop at our borders — we will root out fraud and misconduct in our markets no matter where it originates. I want to thank our U.S. and international law enforcement partners for their assistance in this matter."

A final aspect of this matter to note is that Marconato was acting as (and charged as) a chief compliance officer. While the allegations of personal involvement in fraud indicate that this is not a borderline case of "CCO liability" for failing to effectively administer a compliance program, actions like this could more generally color the views of examiners in assessing actions of CCOs and other control personnel. Also, while the facts here are far away from the normal course of business of a private fund manager, this case can also serve as a reminder that any CCO transaction with a fund or other client (e.g., a redemption) may deserve extra or independent scrutiny.

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If you have any questions concerning this *Alert*, please contact your attorney at Schulte Roth & Zabel or one of the authors.

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