

## CFTC Focus on Insider Trading Continues

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On Aug. 3, 2020, the Commodity Futures Trading Commission settled an enforcement action with two New York Mercantile Exchange employees (and with NYMEX itself on a vicarious liability theory) for disclosing confidential information about futures trading activity to a third-party broker. The information included the identities of counterparties to specific trades as well as the prices and other details of those trades (all of which was considered to be confidential information by NYMEX). The settlement involved a \$4-million civil penalty against the three defendants and permanent injunctions and industry bars against both individuals. The defendants also agreed to cooperate in future actions relating to the underlying facts (litigation against the broker is continuing).

In 2011, the CFTC adopted Rule 180.1, explicitly modelled on SEC Rule 10b-5, which prohibits trading on material non-public information in violation of a preexisting duty, as well as trading on such information obtained through fraud or deception. Since then, the CFTC has made it a priority to identify and pursue insider trading cases. While the CFTC did not use the words “insider trading” in announcing this settlement, and while it was brought under Section 9(e)(1) of the Commodity Exchange Act and CFTC Regulation 1.59(d) (which are legacy provisions limited to abuses of an individual’s position with a self-regulatory organization) — and not under Rule 180.1 — the phrase “material nonpublic information” is used throughout the consent order; this suggests that the CFTC may use this case to bolster its broader effort to uncover and prosecute insider trading in the commodities markets.

Fund managers trading commodity interests — even if they are not registered with the CFTC — should therefore ensure that their internal compliance program seeks to assess and mitigate risks related to the acquisition and use of material nonpublic information.

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