

Alert

The New Normal in Commodity Derivatives Enforcement Actions: ‘Cooperative Enforcement’ and Implications for Private Fund Managers

October 2, 2018

In its budget request for fiscal year 2018, the Commodity Futures Trading Commission outlined an increasingly muscular enforcement effort, stating that, “the Commission will utilize its enforcement resources to continue preserving market integrity[.]”¹ This 2017 request, however, also foreshadowed a new enforcement initiative for 2018, one focused on:

“Increasing effectiveness and efficiency of enforcement through cooperative enforcement with SROs, state, Federal, and international authorities, including achieving efficiencies through referrals[.]”²

The fruits of this “cooperative enforcement” initiative became evident in the last three weeks of the CFTC’s 2018 fiscal year.³ In what has become a familiar pattern with other federal regulators, the close of the fiscal year is preceded by the announcement and resolution of numerous enforcement actions. What was especially noteworthy this year, however, was the number of CFTC enforcement actions that were marked by nearly-simultaneous settlements with self-regulatory organizations, such as the National Futures Association (“NFA”), the self-regulatory organization for the commodity derivatives industry, and CME Group, a global operator of commodity futures and options exchanges.

In many ways, the cooperative enforcement effort is a response to the fiscal realities facing the CFTC. A recent article in the financial press (which was focused on buyout payments that the CFTC is offering to a wide swath of its workforce) noted that “the CFTC’s \$249 million annual budget hasn’t kept pace with its mushrooming duties ... [CFTC Chairman Christopher Giancarlo] has unsuccessfully tried to persuade lawmakers to give the 700-person agency more money since taking over last year.”⁴ Simply put, leveraging its oversight role and relationships with the various self-regulatory organizations is a cost-effective mechanism for the CFTC to maintain an active enforcement effort.

In September alone, the CFTC announced nine settlements with industry participants that were complemented or mirrored by self-regulatory organization enforcement actions. Each of these involved trading activity that was identified by an exchange regulator or the NFA and that was then settled in a coordinated manner. A table listing these matters follows.

¹ Commodity Futures Trading Commission, Budget Request Fiscal Year 2018, 10 (2017), available [here](#).

² *Id.*

³ The CFTC’s fiscal year runs from October to September.

⁴ Benjamin Bain and Robert Schmidt, “Wall Street Regulator Facing Cash Crunch Offers Staff Buyouts,” *Bloomberg* (Sept.25, 2018), available [here](#).

Market Participant	Referring SRO	Alleged Violations	CFTC Sanction	SRO Sanction
Global Asset Advisors LLC; Glenn Swanson (a principal of Global Asset Advisors)	NFA	Failure to supervise (re: a customer's unlawful post-execution allocation scheme); other recordkeeping violations	\$300,000 fine (joint and several obligation); cease and desist ⁵	\$200,000 fine (joint and several obligation) ⁶
Geneva Trading USA LLC	CME Group	Multiple counts of spoofing	\$1.5 million fine; cease and desist ⁷	Disgorgement of over \$12,000 in profits ⁸
Kooima & Kaemingk Commodities Inc.; Bradley Kooima; Lauren Kaemingk	CME Group; NFA	Fraud; unauthorized trading; making false or misleading statements to a regulator; failure to supervise	\$1.25 million fine and restitution of \$11,920,857 (both assessed jointly and severally); cease and desist ⁹	Fine of \$1.25 million and restitution of \$8.7 million (both assessed jointly and severally) ¹⁰
Adam Flavin; Peter Grady	CME Group	Attempted manipulation of certain wheat futures and options contracts	<i>Flavin</i> : \$125,000 fine; cease and desist; four-year commodity interest trading bar; ¹¹ <i>Grady</i> : \$250,000 fine; cease and desist; nine-month commodity interest trading bar ¹²	<i>Flavin</i> : Fine of \$125,000; four-year suspension; ¹³ <i>Grady</i> : Fine of \$250,000; nine-month suspension ¹⁴

⁵ *In re Global Asset Advisors LLC d/b/a Daniels Trading and Glenn A. Swanson*, Commodity Futures Trading Commission Docket No. 18-30 (Sept. 14, 2018), available [here](#).

⁶ *Global Asset Advisors LLC, Glenn A. Swanson and Kenneth S. Packard*, NFA Case No. 18-BCC-013 (Sept. 17, 2018), available [here](#).

⁷ *In re Geneva Trading USA LLC*, Commodity Futures Trading Commission Docket No. 18-37 (Sept. 20, 2018), available [here](#). It is interesting to note that, because Geneva Trading is not registered with the CFTC, the CFTC was not able to charge a failure to supervise.

⁸ *Geneva Trading USA LLC*, Notice of Disciplinary Action, CBOT 16-0455-BC (Sept. 20, 2018), available [here](#). One of Geneva Trading's traders was suspended and fined \$75,000 for the alleged spoofing activities, *see Garrett Connery*, Notice of Disciplinary Action, CME-16-0455-BC (Sept. 20, 2018), available [here](#).

⁹ *In re Kooima & Kaemingk Commodities Inc., Lauren Kaemingk and Bradley Kooima*, Commodity Futures Trading Commission Docket No. 18-39 (Sept. 26, 2018), available [here](#).

¹⁰ *Kooima & Kaemingk Commodities Inc.*, Notice of Disciplinary Action, CME-14-9938-BC-3 (Sept. 26, 2018), available [here](#).

¹¹ *In re Peter Grady*, Commodity Futures Trading Commission Docket No. 18-41 (Sept. 26, 2018), available [here](#).

¹² *In re Adam Flavin*, Commodity Futures Trading Commission Docket No. 18-40 (Sept. 26, 2018), available [here](#).

Market Participant	Referring SRO	Alleged Violations	CFTC Sanction	SRO Sanction
David Ramsey	CME Group; North American Derivatives Exchange Inc. (“Nadex”)	Cross-exchange manipulation	Fine of \$325,000 and disgorgement of \$250,636; five-year ban on commodity interest trading or acting on behalf of a commodity fund; cease and desist	<i>CME Group</i> : Fine of \$135,000; five-year suspension; ¹⁵ <i>Nadex</i> : Fine of \$140,000 and disgorgement of \$250,636; permanent bar ¹⁶

These “cooperative enforcement” settlements have several implications for private fund managers.

First, these fines are large. All of the actions listed above involve aggregate fines of over \$500,000, and several are multi-million dollar matters. And fines, unlike disgorgement, are duplicative sanctions across regulators.

Second, this level of cooperation makes it clear that an exemption from registration does not necessarily offer protection. While the NFA only has authority over its members, the CFTC can assert authority over persons that trade (or influence the trading of) derivatives contracts, regardless of their location or CFTC registration status. Similarly, the commodity futures and options exchanges and swap execution facilities assert jurisdiction (and impose all of their marketplace rules) over any person that trades on its exchange. The *Geneva Trading* settlement, for example, demonstrates this point: Geneva Trading USA, which was not a CFTC registrant, was subject to CFTC and CME jurisdiction solely as a result of its trading activity.

Third, given the level of cooperation between the SROs and the CFTC, it is more important than ever to train front office and operations staff to consult the legal and compliance departments before responding to informational requests from exchange personnel. This can be especially difficult, given that ordinary-course communications between the exchange personnel and a manager’s operations group often occur on a daily basis. Managers should expect that information provided to a broker, a counterparty or to the exchange itself may well be forwarded on to the CFTC. As a training matter, it may be useful to point out that, in the *Kooima & Kaemingk* matter, charges were brought by the CFTC for false statements provided to the CME.

Fourth, given the increased potential for a CFTC referral, managers should carefully assess whether and how privilege should be asserted in the context of a trading inquiry. Managers should also consider

¹³ Adam Flavin, Notice of Disciplinary Action, CBOT-15-0160-BC-2 (Sept. 26, 2018), available [here](#).

¹⁴ Peter Grady, Notice of Disciplinary Action, CBOT-15-0160-BC-3 (Sept. 26, 2018), available [here](#).

¹⁵ David Ramsey, Notice of Disciplinary Action, CME-17-0709-BC (Sept. 27, 2018), available [here](#).

¹⁶ Nadex Fines and Permanently Bans Individual Trader for Market Manipulation Violations, *Accesswire* (Sept. 27, 2018) available [here](#).

taking steps to best ensure that, were documents to be forwarded to the CFTC by a self-regulatory organization, protections from disclosure under the Freedom of Information Act would be available.

In other words, in this era of “cooperative enforcement,” communications with exchanges and other self-regulatory organizations should be treated as if they were correspondence directly with the CFTC, and should be subject to the same level of legal review and approval. All managers dealing in commodity interests should take the time to review these lessons and to review the “rules of the road” for external communications.

Authored by [Brian T. Daly](#) and [Jacob Preiserowicz](#).

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

Schulte Roth & Zabel
New York | Washington DC | London
www.srz.com

This communication is issued by Schulte Roth & Zabel LLP and Schulte Roth & Zabel International LLP for informational purposes only and does not constitute legal advice or establish an attorney-client relationship. In some jurisdictions, this publication may be considered attorney advertising. ©2018 Schulte Roth & Zabel LLP and Schulte Roth & Zabel International LLP. All rights reserved. SCHULTE ROTH & ZABEL is the registered trademark of Schulte Roth & Zabel LLP.