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WHAT THE CFTC'S SETTLEMENT WITH VITOL INC. PORTENDS ABOUT ENFORCEMENT TRENDS

To Our Clients and Friends:

On December 3, 2020, the Commodity Futures Trading Commission (“CFTC” or the “Commission”) Division of Enforcement (the “Division”) announced a settlement with Vitol Inc. (“Vitol”), an energy and commodities trading firm in Houston, Texas. This is the first public action coming out of the CFTC’s initiative to pursue violations of the Commodity Exchange Act (“CEA”) involving foreign corruption. The CFTC’s action rests on an aggressive theory that seeks to approach allegations of corruption through its historic ability to pursue fraud and manipulation, which has not yet faced a serious legal challenge. It is an enforcement area we expect will continue to be a priority for the CFTC. This settlement involved cooperation between U.S. and Brazilian regulators in what appears to be another significant corporate resolution associated with the Operation Car Wash corruption investigations in Brazil. We expect to see the continued convergence of enforcement by a variety of U.S. enforcement authorities and regulators approaching aspects of alleged foreign corruption from a range of angles corresponding to their primary focus of interest. Depending on the facts, the same conduct that the Department of Justice (“DOJ”) and the Securities and Exchange Commission (“SEC”)—the principal FCPA investigation authorities—investigate for violations of the Foreign Corrupt Practices Act (“FCPA”) already may face scrutiny by DOJ’s Money Laundering and Asset Recovery Section (“MLARS”) on a money laundering basis (including its Kleptocracy Asset Recovery initiative where foreign plutocracy is involved and its Bank Integrity Unit where banks are involved), by the CFTC for violations of the CEA where commodities trading is involved, and by the Federal Reserve for violations of banking regulations. And in the Biden Administration, this convergence may accelerate as the Administration aligns with more vigorous corporate enforcement anticipated in the new era. Navigating the expanding investigations field will become more complex, even more so to the extent that agencies flexing their muscles do not coordinate their efforts.

Given the CFTC’s aggressive approach to bringing enforcement actions involving foreign corruption, and its stated intention to continue to do so, it is particularly important that companies regulated by the CFTC assess and update their compliance programs to meet the standards set forth in the guidance on evaluating compliance programs that the CFTC issued in September 2020.^[1] Moreover, in light of the multi-agency targeting of conduct involving foreign corruption, such companies should also make sure that their compliance programs meet the standards of other agencies, such as DOJ.^[2]

The Vitol Settlement

The CFTC asserted that from 2005 to early 2020, Vitol engaged in manipulative and deceptive conduct involving foreign corruption and physical and derivatives trading in the U.S. and global oil markets.^[3] Specifically, the CFTC’s order found that Vitol violated the CEA ^[4] in a few different ways, using for the first time the alleged foreign corrupt conduct as a basis for a finding of manipulative or fraudulent

acts cognizable under the statute.[5] First, it allegedly made corrupt payments, such as bribes and kickbacks, to employees and agents of certain state-owned entities (“SOEs”) in Brazil, Ecuador, and Mexico to obtain preferential treatment and access to trades with the SOEs to the detriment of the SOEs and other market participants.[6] Vitol, according to the CFTC, concealed this conduct by funneling the payments through offshore bank accounts or to shell entities, and by issuing deceptive invoices.[7] Second, it allegedly made corrupt payments to employees and agents of the Brazilian SOE in exchange for confidential information about trading in physical oil and derivatives, such as the specific price at which Vitol would win a supposedly competitive bidding or tender process.[8] Additionally, Vitol attempted to manipulate two Platts fuel oil benchmarks in order to benefit Vitol’s physical and derivatives positions.[9] If Vitol’s attempts to manipulate the benchmarks had been successful, charged the CFTC, it would have harmed those market participants who held opposing positions and those who rely on the benchmarks as an untainted price reference for U.S. physical or derivative trades.[10]

The same day, the Fraud Section of the DOJ and the United States Attorney’s Office for the Eastern District of New York announced a parallel action in which they entered a Deferred Prosecution Agreement (“DPA”) with Vitol on charges of conspiracy to violate the FCPA.[11] Vitol agreed to pay a criminal penalty of \$135 million under the DPA, and the DOJ noted that it would credit \$45 million against the amount Vitol agreed to pay to resolve an investigation by the Brazilian Ministério Público Federal (“MPF”) for conduct related to the company’s bribery scheme in Brazil.[12] Specifically, on December 3, 2020, the MPF entered into a leniency agreement with Vitol Inc. and Vitol do Brasil Ltda. in connection with Operation Car Wash. In a December 29, 2020 securities filing, Brazilian state-run oil company Petrobras announced that it received 232.6 million reais (or \$44.65 million) as a result of this leniency agreement.[13]

The CFTC ordered Vitol to pay more than \$95 million in civil monetary penalties and disgorgement.[14] Notably, it recognized Vitol’s cooperation during the investigation in the form of a reduced civil monetary penalty.[15] It also recognized and offset a portion of the criminal penalty that Vitol agreed to pay to the DOJ in the parallel criminal action.[16]

CFTC’s Foreign Corrupt Practices Initiative

The CFTC launched its foreign corrupt practices initiative on March 6, 2019, when the Division issued an advisory on self-reporting and cooperation for CEA violations involving foreign corrupt practices (the “Enforcement Advisory”).[17] It announced that it would apply a presumption, absent aggravating circumstances, that it would not recommend imposing a civil monetary penalty in a CFTC action involving foreign corrupt practices where a company or individual not registered or required to be registered with the CFTC (i) voluntarily discloses violations of the CEA involving foreign corrupt practices, (ii) provides full cooperation, and (iii) appropriately remediates.[18] The CFTC bolstered its initiative in May 2019 by issuing a whistleblower alert targeting foreign corrupt practices in the commodities and derivatives markets.[19] To date, this is only the fourth area of potential misconduct regarding which the CFTC has proactively sought tips from would-be whistleblowers.

Implications of Settlement

First, we expect the CFTC to continue pursuing more cases involving foreign corruption in the future. This is the first case brought by the CFTC involving foreign corruption, but it is unlikely to be the last. There are public reports of at least two additional foreign corruption investigations undertaken by the CFTC involving commodities traders. The Enforcement Advisory was issued on the heels of a voluntary disclosure by Switzerland-based mining company Glencore, in April 2019, that it was the subject of an investigation by the CFTC involving foreign corruption claims. Glencore also has announced anti-corruption investigations by the DOJ for potential violations of the FCPA and U.S. money laundering statutes, Brazilian authorities, and Swiss prosecutors,^[20] and it disclosed that the CFTC's investigation had a similar scope as the ongoing DOJ investigation.^[21] No settlement or charges have been announced with respect to the Glencore investigations. News sources also report that Trafigura Group Pte. Ltd., a Singapore-based commodity trading company, is under investigation by the CFTC and Brazilian authorities for similar allegations.^[22]

The CFTC's 2019 issuance of a whistleblower alert soliciting tips about foreign corrupt practices further shows that it is serious about bringing enforcement actions in this area. The CFTC's whistleblower program pays a qualified tipster 10 to 30 percent of any fine over \$1 million levied against a firm for violations of CFTC regulations, and it has significantly enhanced the CFTC's enforcement program. Whistleblowing is likely to increase, not just because there may be conduct to report, but because those aware of it and lawyers working to facilitate reporting will see the benefit of doing so through the CFTC's initiative. Just as the Dodd-Frank whistleblowing award program has significantly increased FCPA tips to the SEC (and DOJ), we expect the CFTC's whistleblowing push could significantly increase the amount of information the CFTC receives and, in turn, the CFTC's ability to bring enforcement actions relating to foreign corruption.

With the announcement of the Vitol settlement, the CFTC has reaffirmed its interest in pursuing CEA violations involving foreign corruption. The CFTC has identified the following examples of foreign corrupt practices that could constitute violations of the CEA and thus be the focus of a CFTC enforcement action:

- The use of bribes to secure business in connection with regulated activities like trading, advising, or dealing in swaps or derivatives;
- Manipulation of benchmarks that serve as the basis for related derivatives contracts;
- Reporting prices that are the product of corruption to benchmarks; and
- Corrupt practices that might alter the prices in commodity markets that drive U.S. derivatives prices.^[23]

Second, the CFTC will continue to coordinate closely with other regulators in its pursuit of foreign corruption. The CFTC frequently coordinates with the DOJ, SEC, and other law enforcement partners, often bringing parallel enforcement actions in areas such as spoofing, misappropriating funds, violations of registration provisions of the federal securities laws, and the manipulation of benchmark interest rates

GIBSON DUNN

(e.g., the LIBOR cases).[24] The Vitol settlement underscores that this cooperation will continue in its foreign corruption initiative. We expect the CFTC to continue to utilize its partnerships with other regulators to pursue foreign corruption, with commodities trading serving as the CFTC's entry point to police foreign corruption under the CEA. That Gary Gensler, formerly the CFTC Chair from 2009 to 2014, is expected to be nominated to serve as the next SEC Chair may smooth the way for the two regulators to collaborate more in foreign corruption (and other) investigations and bringing parallel enforcement actions.[25]

While the CFTC has stated publicly that it is not trying to enforce the FCPA or “pile on” when it comes to penalties,[26] if there is a commodities trading component to a foreign corruption scheme, the CFTC has made clear it has a role to play in investigating and charging such conduct. In announcing the CFTC's foray into foreign bribery, the former Director of Enforcement emphasized the agency's intention to coordinate closely with DOJ, SEC, and other regulators, including foreign authorities, so that it is “investigat[ing] in parallel with other enforcement authorities” to “avoid duplicative investigative steps,” account for penalties imposed by other authorities, and give “credit for disgorgement or restitution payments in connection with other related actions.”[27] But the CFTC's involvement creates an added layer of liability and a potentially expanded universe of relevant conduct that companies with international operations must be mindful of going forward. As we have seen with navigating other multi-agency investigations where conflicting investigative approaches and duplicative penalty demands occur too frequently, early and careful coordination between investigations is critical to ensuring outcomes are proportionate.

Third, going forward, we expect that foreign corruption allegations involving commodities-related business will continue to be investigated and pursued by multiple agencies, domestic and foreign, approaching the issue from different angles. In other words, as the growing number of multi-jurisdictional and agency anti-corruption resolutions suggest, the FCPA units of the DOJ and SEC are not the only cops on the beat, and they have not been for quite some time. As a growing number of regulators in the U.S. and abroad get involved in anti-corruption enforcement, the enforcement landscape only becomes more complex. By way of domestic examples, DOJ's Money Laundering and Asset Recovery Section (“MLARS”) has repeatedly teamed up with its FCPA colleagues to pursue foreign corruption through the lens of the anti-money laundering statutes, both to recover huge sums through its Kleptocracy Program and in prosecuting companies and individuals involved in moving tainted bribery proceeds. In the financial sector, the Federal Reserve has demonstrated its resolve to pursue banks for similar conduct under its authority to supervise banks' financial controls and oversight functions.[28] Not to be outdone, the CFTC has joined the fray, making clear it will aggressively pursue foreign corruption under the CEA where commodities or related derivatives are involved.[29]

Finally, energy firms in particular should be aware of this development. Although they will not be the CFTC's only focus, energy trading firms are squarely in the CFTC's sights. They have historically engaged in transactions that fall under the CEA and often involve contact with risky counterparties. The Vitol settlement makes clear that energy is one industry the CFTC is monitoring with respect to foreign corruption. We expect to see the CFTC under the Biden Administration focus on energy trading cases involving foreign corrupt practices, including assertions that such conduct in energy pricing has disadvantaged the consumer.

In sum, the CFTC will likely become increasingly active in using the CEA as a tool to go after perceived foreign corruption in the commodities markets, claiming such conduct constitutes manipulation or even fraud, while working in parallel with the DOJ and possibly other domestic and foreign regulators intent on vindicating their particular enforcement mandate. Businesses that are involved in cross-border derivatives work should be prepared for potential scrutiny of their transactions, particularly those involving contact with foreign officials or sovereign wealth funds. The CFTC previously has launched broad industry initiatives (for example, with regard to LIBOR interest rate benchmarks), and it remains to be seen whether the CFTC will take such an approach, or pursue foreign corruption on a company-by-company basis as evidence surfaces. Either way, as the CFTC made clear in its 2020 compliance guidance, the CFTC expects companies to address potential corrupt behavior that may harm commodities markets through compliance program enhancements.

[1] CFTC, *Guidance on Evaluating Compliance Programs in Connection with Enforcement Matters* (Sept. 10, 2020), <https://www.cftc.gov/media/4626/EnfGuidanceEvaluatingCompliancePrograms091020/download>.

[2] Dep't of Justice, *Evaluation of Corporate Compliance Programs* (June 3, 2020), <https://www.justice.gov/criminal-fraud/page/file/937501/download>.

[3] CFTC Press Release Number 8326-20, *CFTC Orders Vitol Inc. to Pay \$95.7 Million for Corruption-Based Fraud and Attempted Manipulation* (Dec. 3, 2020), <https://www.cftc.gov/PressRoom/PressReleases/8326-20>.

[4] The CFTC relied on allegations involving corruption to establish fraud under the CEA, even though corruption and fraud are distinct acts with different harms. The CFTC appears to believe that the corruption in this case was a form of deceptive practice and that it need only prove that such corruption infected the market. This is an aggressive theory to which there may be defenses.

[5] Order Instituting Proceedings, *In re Vitol Inc.*, CFTC Docket No. 21-01 (Dec. 3, 2020), <https://www.cftc.gov/media/5346/enfvitolorder120320/download>.

[6] *Id.* at 4.

[7] *Id.*

[8] *Id.* at 5.

[9] *Id.* at 6-7.

[10] *Id.*

GIBSON DUNN

[11] Dep’t of Justice, Press Release, *Vitol Inc. Agrees to Pay over \$135 Million to Resolve Foreign Bribery Case* (Dec. 3, 2020), <https://www.justice.gov/opa/pr/vitol-inc-agrees-pay-over-135-million-resolve-foreign-bribery-case>.

[12] *Id.*

[13] Petróleo Brasileiro S.A. – Petrobras Form 6-K (Dec. 29, 2020), *here*; *see Petrobras receives \$45 million in Vitol corruption settlement*, Reuters (Dec. 29, 2020), <https://www.reuters.com/article/us-petrobras-vitol-settlement/petrobras-receives-45-million-in-vitol-corruption-settlement-idUSKBN294043>.

[14] *Id.* at 11-12.

[15] *Id.* at 3, 8.

[16] *Id.* at 11, 12, 14.

[17] *See* CFTC Enforcement Advisory: Advisory on Self-Reporting and Cooperation for CEA Violations Involving Foreign Corrupt Practices (Mar. 6, 2019) (“Enforcement Advisory”); CFTC Press Release Number 7884-19, *CFTC Division of Enforcement Issues Advisory on Violations of the Commodity Exchange Act Involving Foreign Corrupt Practices* (Mar. 6, 2019), <https://www.cftc.gov/PressRoom/PressReleases/7884-19>; Remarks of CFTC Director of Enforcement James M. McDonald at the American Bar Association’s National Institute on White Collar Crime (Mar. 6, 2019), <https://www.cftc.gov/PressRoom/SpeechesTestimony/opamcdonald2> (“McDonald Remarks”).

[18] Registrants are not eligible for the presumptive recommendation of no penalty. However, registrants who self-report, cooperate, and remediate will continue to be eligible for a “substantial reduction in penalty” under the existing Enforcement Advisories. *See* McDonald Remarks.

[19] CFTC Whistleblower Alert: Blow the Whistle on Foreign Corrupt Practices in the Commodities and Derivatives Markets (May 2019), https://www.whistleblower.gov/whistleblower-alerts/FCP_WBO_Alert.htm.

[20] Glencore, *Update on subpoena from United States Department of Justice* (July 11, 2018), <https://www.glencore.com/media-and-insights/news/Update-on-subpoena-from-United-States-Department-of-Justice>; Jeffrey T. Lewis et al., *Brazil’s Car Wash Probe Eyes Glencore, Vitol, Trafigura for Paying Millions in Bribes*, *The Wall Street Journal* (Dec. 5, 2018), <https://www.wsj.com/articles/brazils-car-wash-probe-eyes-glencore-vitol-trafigura-for-paying-millions-in-bribes-1544021378>; Glencore, *Investigation by the Office of the Attorney General of Switzerland* (June 19, 2020), <https://www.glencore.com/media-and-insights/news/investigation-by-the-office-of-the-attorney-general-of-switzerland>.

GIBSON DUNN

[21] Glencore, *Announcement re the Commodity Futures Trading Commission* (Apr. 25, 2019), <https://www.glencore.com/media-and-insights/news/announcement-re-the-commodity-futures-trading-commission>.

[22] Rob Davies, *Trafigura investigated for alleged corruption, market manipulation*, The Guardian (May 31, 2020), <https://www.theguardian.com/world/2020/may/31/trafigura-investigated-for-alleged-corruption-market-manipulation>; Dave Michaels and Dylan Tokar, *Energy Trader Vitol Paying \$163 Million to Settle Corruption, Manipulation Charges*, The Wall Street Journal (Dec. 3, 2020), <https://www.wsj.com/articles/energy-trader-vitol-to-pay-90-million-to-settle-u-s-corruption-charges-11607023519>.

[23] McDonald Remarks.

[24] *See, e.g.*, CFTC Press Release Number 7884-19; CFTC Press Release Number 8074-19, *CFTC Orders Proprietary Trading Firm to Pay Record \$67.4 Million for Engaging in a Manipulative and Deceptive Scheme and Spoofing* (Nov. 7, 2019), <https://www.cftc.gov/PressRoom/PressReleases/8074-19>; CFTC Press Release Number 8120-20, *CFTC Charges Investment Firm and VP with Commodity Pool Fraud* (Feb. 20, 2020), <https://www.cftc.gov/PressRoom/PressReleases/8120-20>; Press Release, Securities and Exchange Comm'n, *SEC Charges Bitcoin-Funded Securities Dealer and CEO* (Nov. 1, 2018), <https://www.sec.gov/litigation/litreleases/2018/lr24330.htm>; CFTC Press Release Number 7159-15, *Deutsche Bank to Pay \$800 Million Penalty to Settle CFTC Charges of Manipulation, Attempted Manipulation, and False Reporting of LIBOR and Euribor* (Apr. 23, 2015), [here](#).

[25] *See* Andrew Ackerman and Dave Michaels, *Biden Is Expected to Name Gary Gensler for SEC Chairman*, Wall Street Journal, <https://www.wsj.com/articles/biden-is-expected-to-name-gary-gensler-for-sec-chairman-11610487023>.

[26] McDonald Remarks.

[27] *Id.*

[28] *See* Board of Governors of the Federal Reserve System, Press Release, *Federal Reserve Board orders JPMorgan Chase & Co. to pay \$61.9 million civil money penalty* (Nov. 17, 2016), <https://www.federalreserve.gov/newsevents/pressreleases/enforcement20161117a.htm>; Board of Governors of the Federal Reserve System, Press Release, *Federal Reserve Board fines the Goldman Sachs Group, Inc. \$154 million for failure to maintain appropriate oversight, internal controls, and risk management with respect to IMalaysia Development Berhad (IMDB)* (Oct. 22, 2020), <https://www.federalreserve.gov/newsevents/pressreleases/enforcement20201022a.htm>.

[29] While it is difficult to predict whether other U.S. regulators will prioritize focusing on foreign bribery conduct, the statutory support may already be there for other banking regulators, as well as even FinCEN. For example, FinCEN has authority under the Bank Secrecy Act (“BSA”) and AML laws to hold U.S. financial institutions accountable for weak controls. And, notably, on January 1, 2020, the Senate passed the Anti-Money Laundering Act of 2020 (“AMLA”), which is the most comprehensive set of reforms to the AML laws in the United States since the USA PATRIOT Act in

GIBSON DUNN

2001. *See* William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, H.R. 6395. The AMLA has a number of provisions that could result in significantly increased civil and criminal enforcement of AML violations, including, among others, a significantly expanded whistleblower award program that parallels that of the CFTC. *See* AMLA, § 6314 (adding 31 U.S.C. § 5323(b)(1)). The AMLA is discussed in detail in a separate Gibson Dunn client alert: Gibson Dunn, *The Top 10 Takeaways for Financial Institutions from the Anti-Money Laundering Act of 2020* (Jan. 1, 2021), <https://www.gibsondunn.com/the-top-10-takeaways-for-financial-institutions-from-the-anti-money-laundering-act-of-2020/>.



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