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CFTC Division of Enforcement Releases First Public Enforcement Manual

May 14, 2019

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On May 8, 2019, the Commodity Futures Trading Commission's (CFTC) Division of Enforcement (DOE) published its first public ***Enforcement Manual*** (Manual). The CFTC's DOE is responsible for investigating and prosecuting alleged violations of the Commodity Exchange Act (CEA) and Commission regulations. The Manual is intended as a general reference for DOE staff in carrying out these duties and to provide transparency and insight to the public on how the DOE conducts enforcement actions. In announcing its publication Enforcement Director James McDonald stated that the Manual, "is part of a broader agency effort to advance policy-neutral reforms designed to make us better regulators. . . [o]ur Manual aims to increase the level of clarity and transparency in our work. Clarity and transparency in our policies should promote fairness, increase predictability, and enhance respect for the rule of law. We expect the publication of our Manual to advance these goals going forward."

The 60-page Manual is divided into eleven sections. The first half focuses on the policies and procedures applied during the entire lifecycle of a CFTC investigation from receiving a lead and conducting a preliminary inquiry, through investigation and litigation. After providing an overview of the agency and the office, the DOE lists the various sources of its leads and how it conducts triage to properly allocate resources.***[1]*** Notably, the Manual outlines the procedures for informing individuals who may be named in a proposed enforcement action of the nature of the allegations against them before the action is filed, commonly referred to as a "Wells Notice." This includes DOE's policy for determining when to issue a Wells Notice, the procedure for submitting a written response statement, and the timing of possible settlement discussions.***[2]*** Finally, the litigation section provides detail on the types of relief available to the CFTC in civil injunctive actions in Federal Court and administrative enforcement proceedings, along with the DOE's settlement procedures.***[3]***

The back half of the Manual provides an overview of the various tools available to the CFTC in carrying out their duties and their procedures for working with other agencies. This includes an outline of how the DOE considers self-reporting, cooperation, and remediation while conducting investigations and enforcement actions. The section also collects and summarizes the various CFTC advisories available and related tools on these topics.***[4]*** Furthermore, the Manual provides a helpful overview of the privileges available to all parties, such as attorney-client privilege and the Fifth Amendment privilege against self-incrimination. It also describes privileges that might be claimed by the CFTC, including the deliberative process privilege, the informant privilege, and the confidential report privilege.***[5]*** Finally, the Manual closes with a summary of the CFTC's Whistleblower Program, how to qualify, the protections available, and

how information received through the program is handled.

In releasing the manual, the DOE was careful to note that the Manual creates no private rights and is not enforceable in court. Nonetheless, it provides useful guidance on the policies and procedures of the DOE to individuals and entities that are subject to its jurisdiction.

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[1] Pgs. 6-8

[2] Pgs. 18-20

[3] Pgs. 22-29

[4] Pgs. 29-33

[5] Pgs. 38-46