

Cabinet News and Views

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Insider Trading in Physical Commodities



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On December 14, 2023, the Commodity Futures Trading Commission (“CFTC”) and Department of Justice (“DOJ”) Fraud Section announced the settlement of insider trading fraud charges and Foreign Corrupt Practices Act (“FCPA”) charges, respectively, against Freepoint Commodities LLC (“Freepoint”). This note focuses on the CFTC charges which involved trading on material non-public information (“MNPI”) improperly obtained from a foreign state-owned enterprise (“SOE”) in connection with physically deliverable fuel oil trades. As a result of this fraudulent scheme, the CFTC alleges that Freepoint was able to generate approximately \$30 million over a period of 6 years. The CFTC order requires Freepoint to pay more than \$91 million in civil and monetary penalties and disgorgement.

This CFTC case is noteworthy because it is one of the very few where the CFTC asserts its anti-fraud jurisdiction not with respect to swaps, options and futures contracts (*i.e.*, “commodity interests” or derivatives), but with respect to purchases and sales of physically-delivered commodities, such as fuel oil.

According to CFTC’s order, Freepoint, a large commodity trader based in Connecticut, had hired an overseas consultant who was able to obtain MNPI from certain foreign SOE’s employees for bribes and other compensation that gave a significant commercial advantage to Freepoint over its competitors. Freepoint employees knew that the information was improperly obtained and took steps to conceal that they were in possession of this MNPI.

To establish its fraud claim under § 6(c)(1) of the CEA and § 180.1 of CFTC Regulations, the CFTC order found that Freepoint’s traders: (1) attempted or engaged in prohibited fraudulent or manipulative conduct (*i.e.*, engaged in fraud, such as giving bribes and other corrupt payments); (2) with scienter (*i.e.*, acted knowingly and attempted to conceal their knowledge); and (3) in connection with

any swap, futures contract, or contract of sale of any commodity in interstate commerce (*i.e.*, the sale and purchase of physical fuel oil which is a commodity).

The CFTC's order signifies its ambition to expand its anti-fraud and anti-manipulation jurisdiction with fraud claims alleging misappropriation of MNPI (*i.e.*, insider trading claims) involving only physical commodities without the use of derivatives.

In the parallel DOJ matter, DOJ announced the entry of a deferred prosecution agreement (DPA) with Freeport, deferring criminal prosecution on a charge of conspiracy to violate the FCPA.
