

Insights

CFTC'S CONSENT ORDER WITH TRAFIGURA TRADING

WHEN INACTION BECOMES ACTION

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On June 17, 2024, the CFTC filed a consent order against Trafigura Trading LLC, requiring the company to pay a \$55 million civil monetary penalty and implement remedial measures.^[1] The CFTC's order details three violations of the Commodity Exchange Act ("CEA") and related CFTC regulations committed by Trafigura between 2014 and 2020:

1. **Misappropriation of Material Nonpublic Information:** Trafigura entered into physical and derivative gasoline transactions while in possession of confidential information misappropriated from a Mexican trading entity.^[2] This insider trading violated CEA Section 6(c)(1) and CFTC Rule 180.^[3]
2. **Market Manipulation:** In February 2017, Trafigura manipulated the U.S. Gulf Coast high-sulfur fuel oil benchmark to benefit its derivatives positions.^[4] By engaging in heavy bidding and purchasing activities during the benchmark's trading window, Trafigura artificially inflated prices, resulting in gains for its futures and swaps positions and adversely affecting other market participants.^[5]
3. **Impeding Whistleblower Communications:** Trafigura's employment and employee separation agreements included non-disclosure provisions that lacked exceptions for communications with regulators or law enforcement.^[6] This effectively impeded employees from voluntarily providing information to the CFTC, contravening CFTC Regulation 165.19, which protects whistleblower communications.^[7]

The insider trading and market manipulation charges follow what are now fairly well trodden applications of Dodd-Frank-added Section 6(c)(1) and Rule 180 by the CFTC. The CFTC has laid out how the use, in connection with a commodity cash market or derivatives transaction, of misappropriated material, non-public information violates Section 6(c)(1) and Rule 180.^[8] And this even applies to a tippee who does not owe a duty of confidentiality to the source of the information.^[9] Similarly, the CFTC has previously charged that trading to artificially affect the price in one market to advantage positions held in a related market violates Section 6(c)(1) and Rule 180.^[10]

What is new in the Trafigura case is the CFTC's stance on the non-disclosure provisions in Trafigura's employee contracts (NDAs). Trafigura's NDAs contained broad non-disclosure provisions that restricted employees' ability to disclose information regarding Trafigura's business except to the extent required by law or court order. The NDAs contained no carve-out provision expressly permitting employees, or former employees, to share information with the Commission or law enforcement. For the first time, the CFTC asserts such standard NDA provisions violate CFTC Regulation 165.19.^[11] Regulation 165.19 provides in relevant part:

No person may take any action to impede an individual from communicating directly with the Commission's staff about a possible violation of the Commodity Exchange Act, including by enforcing, or threatening to enforce, a confidentiality agreement or predispute arbitration agreement with respect to such communications.^[12]

The CFTC asserts that non-disclosure language with no carve-out "facially prohibiting an individual from communicating with the [CFTC] violates Regulation 165.19 even without any additional actions impeding communications."^[13]

Commissioners Pham and Mersinger both voiced concerns regarding the application of Regulation 165.19.^[14] Commissioner Mersinger highlighted that the regulation was not intended to broadly invalidate employment agreements that otherwise have legitimate purposes, cautioning against an expansive interpretation that could have unintended consequences.^[15] She noted that there was no evidence that Trafigura had taken any steps to enforce the non-disclosure provisions in a manner that would restrict an employee or former employee from communicating with the CFTC. In a sense, then, inaction had become the action offensive to the regulation. Agreeing with Commissioner Mersinger, Commissioner Pham argued that the inclusion of this charge was inappropriate and overreaching, potentially setting a concerning precedent.^[16]

The CFTC's application of Regulation 165.19 to the broad non-disclosure provisions in Trafigura's employee agreements follows a series of recent SEC cases expansively interpreting its regulatory protections for whistleblower communications. There, the SEC has asserted that the following contractual provisions violate its whistleblower protections:

- Settlement agreements with customers that require the customer to keep the agreement and information related to the agreement confidential, with the exception that customers could respond to inquiries from the SEC, FINRA and other regulators because affirmative reports to regulators were prohibited.^[17]

- Employee separation agreements which contained a representation that the employee had not, prior to the employee's separation, filed any complaints or charges against the employer but permitted the employee to make such filings after separation with the EEOC, NLRB or the SEC.^[18]
- Employee separation agreements which expressly permit the employee to file charges or claims with any federal, state or local agency but "took away an employee's right to recover a monetary award for filing a claim with, or participating in an investigation or action by, a governmental agency."^[19]

Overall, the CFTC's action against Trafigura reinforces the importance of ethical conduct, transparency, and compliance in maintaining market integrity. It also makes clear that the CFTC considers broad, unspecific confidentiality requirements a violation the whistleblower protections in its regulations unless the non-disclosure provisions provide an express carve-out for voluntary, affirmative communications with the CFTC and other law enforcement agencies. Companies engaged in commodity trading, whether registered with the CFTC or not, must ensure that their internal policies do not inadvertently hinder regulatory oversight or whistleblower activities.

If you have questions or want to discuss how this rule change impacts you, please reach out directly to Katherine Cooper.

FOOTNOTES

[1] In re Trafigura Trading LLC, CFTC No. 24-08 (June 17, 2024); Press Release Number 8921-24, Commodity Futures Trading Commission, CFTC Orders Trafigura to Pay \$55 Million for Fraud, Manipulation and Impeding Communications with the CFTC (June 17, 2024), <https://www.cftc.gov/PressRoom/PressReleases/8921-24>.

[2] In re Trafigura Trading LLC, supra note 1, at 2, 4-5; Press Release Number 8921-24, Commodity Futures Trading Commission, supra note 1.

[3] In re Trafigura Trading LLC, supra note 1, at 7-8.

[4] Id. at 2, 5-6; Press Release Number 8921-24, Commodity Futures Trading Commission, supra note 1.

[5] In re Trafigura Trading LLC, supra note 1, at 2, 5-6; Press Release Number 8921-24, Commodity Futures Trading Commission, supra note 1.

[6] In re Trafigura Trading LLC, supra note 1, at 2, 6; Press Release Number 8921-24, Commodity Futures Trading Commission, supra note 1; Public Statements and Remarks, Summer K. Mersinger, Commissioner, Commodity Futures Trading Commission, Concurring Statement of Commissioner Summer K. Mersinger Regarding Settlement with Trafigura Trading LLC (J

[7] In re Trafigura Trading LLC, supra note 1, at 9.

[8] See, e.g., In re Classic Energy LLC, CFTC No. 19- 50, 2019 WL 4915492, at *3, *5-6 (Sept. 30, 2019) (consent order) (finding that introducing broker violated Section 6(c)(1) and Regulation 180.1 by misappropriating customer's block trade order information to take the other side of those trades in his proprietary account in breach of a duty of confidentiality

[9] In re Freepoint Commodities LLC, CFTC No. 24-02, 2023 WL 8785812, at *4 (Dec. 14, 2023) (consent order) (finding trading house's deceptive scheme to use misappropriated nonpublic information in trading physical commodities and derivative products violated Section 6(c)(1) of the Act and Regulation 180.1(a)(1)-(3)).

[10] CFTC v. Kraft Foods Grp., Inc., 153 F. Supp. 3d 996, 1015 (N.D. Ill. 2015).

[11] Id. at 10; see also Public Statements and Remarks, Summer K. Mersinger, supra note 7.

[12] 17 C.F.R. § 165.19(b).

[13] In re Trafigura Trading LLC, supra note 1, at 9.

[14] Public Statements and Remarks, Caroline D. Pham, Commissioner, Commodity Futures Trading Commission, Statement of Commissioner Caroline D. Pham Regarding Settlement Order with Trafigura Trading LLC (June 17, 2024), <https://www.cftc.gov/PressRoom/SpeechesTestimony/phamstatement061724>; Public Statements and Remarks, Summer K. Mersinger, supra note 7.

[15] Public Statements and Remarks, Summer K. Mersinger, supra note 7.

[16] Public Statements and Remarks, Caroline D. Pham, supra note 12.

[17] In re J.P. Morgan Securities LLC, SEC No. 34-99344, 2024 WL 178630 (Jan. 16, 2024).

[18] In re CBRE, Inc., SEC No. 34-98429, 2023 WL 6125436 (Sept. 19, 2023).

[19] In re MonoLith Resources, LLC, SEC No. 34-98322, 2023 WL 5830481 *2 (Sept. 8, 2023).

RELATED PRACTICE AREAS

- Financial Regulation Compliance & Investigations

MEET THE TEAM



Katherine Cooper

New York

katherine.cooper@bclplaw.com

[+1 212 541 1141](tel:+12125411141)



Callie Kutasi

Chicago

callie.kutasi@bclplaw.com

[+1 312 602 5067](tel:+13126025067)

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