Litigation Alert

Akin Gump
STRAUSS HAUER & FELD LLP

Increasing Government Enforcement in Insider Trading of Commodities

February 11, 2022

Key Points

- The DOJ and CFTC have filed insider trading charges against a Houston-based energy trader for allegedly disclosing confidential information to a third party who then used the information to trade profitably.
- Although the DOJ and SEC have a long history of applying anti-fraud laws to insider trading, the increasing use of commodities laws to penalize insider trading is a relatively recent development.
- We expect to see additional actions brought under commodities laws for insider trading given the CFTC's interpretation of its anti-fraud regulations to be guided by precedents under virtually identical SEC rules, and statements by CFTC leadership that the CFTC "will continue to aggressively pursue all individuals who participate in or benefit from the misappropriation of confidential information[.]"

On February 3, 2022, a federal grand jury indicted Matthew Clark, a professional trader, on a number of counts related to allegations of insider trading involving commodity interests. That same day, the U.S. Commodity Futures Trading Commission (CFTC) filed a parallel complaint based on the same conduct. These cases highlight the increasing appetite of the CFTC and the U.S. Department of Justice (DOJ) to bring actions for insider trading in the commodities space.

According to the DOJ's indictment and the CFTC's complaint, Clark was an energy trader working for an energy company that engaged in the trading of natural gas products, including natural gas futures contracts on the New York Mercantile Exchange (NYMEX).

The DOJ and CFTC allege that Clark engaged in two separate, but related, schemes. The first is a classic kickback scheme. According to the government, beginning in 2009, Clark allegedly directed that his employer's natural gas block trades be executed through a particular brokerage firm, the president of which allegedly gave Clark a portion of the brokerage commissions Clark's employer paid for the trades.

The second scheme fits squarely within a pattern of Regulation 180.1 cases brought by the CFTC in recent years and which are classified as insider trading cases. Clark is

Contact Information

If you have any questions concerning this update, please contact:

White Collar Investigations and Litigation

Peter I. Altman
Partner
paltman@akingump.com
Los Angeles
+1 310.728.3085

Michael A. Asaro
Partner
masaro@akingump.com
New York
+1 212.872.8100

James Joseph Benjamin Jr.
Partner
jbenjamin@akingump.com
New York
+1 212.872.8091

Paul W. Butler
Partner
pbutler@akingump.com
Washington, D.C.
+1 202.887.4069

Charles F. Connolly
Partner
cconnolly@akingump.com
Washington, D.C.
+1 202.887.4070

Estela Díaz
Partner
ediaz@akingump.com
New York
+1 212.872.8035

Katherine R. Goldstein
Partner
kgoldstein@akingump.com
New York
+1 212.872.8057

charged with misappropriating confidential information and disclosing that information to third parties so they could profitably trade (and share the proceeds with him). More specifically, the government alleges that beginning in or around 2013, Clark disclosed his employer's intended natural gas block trade orders, including prices and quantities, to a broker with the intention that the broker would disclose the information to a particular trader at a different firm than Clark. Clark would then enter, on behalf of his employer, into prearranged, non-arm's length trades on various exchanges with the other trader, all on the basis of the material, nonpublic information originally disclosed by Clark. This enabled them to capture the spread on the block trade and, according to the government, the trader shared the profits from his trades with the broker and Clark.

In 2017, Clark was promoted—he could no longer place trades on behalf of his employer, and the scheme shifted. Instead, the government alleges that the trading arrangement continued through Clark's subordinates.

Both the DOJ and the CFTC have charged Clark with violating commodities laws, including Regulation 180.1(a), which prohibits the use of manipulative or deceptive devices. The government alleges that Clark violated his duty to keep employer's block trade order information confidential. Further, by entering into and executing non-arm's length block trades, the government claims Clark provided the other trader with more advantageous prices and negated market risk in the trades, effectively allowing the other trader to select the prices he needed to make his trading strategy profitable. The government also alleges that as a result of entering into non-arm's length block trades on behalf of his employer that negated market risk, Clark caused prices to be recorded by NYMEX for those block trades that were not true and bona fide prices.

Although insider trading cases have long been brought under the securities laws, insider trading cases involving commodities are relatively new. The CFTC's jurisdiction over insider trading in the commodities markets relates to the broadened enforcement mandate added to Section 6(c)(1) to the Commodity Exchange Act (CEA) by the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010. The CFTC views Section 6(c)(1) as "virtually identical" to Section 10(b) of the Securities and Exchange Act of 1934, the broad anti-fraud statute that the U.S. Securities and Exchange Commission (SEC) enforces. Similarly, the CFTC modeled its Regulation 180.1(a) under Section 6(c)(1) after the SEC's Rule 10b-5, which the SEC uses to enforce against a variety of fraud including insider trading. In 2018, the CFTC created the Insider Trading and Information Protection Task Force and indicated it would begin to address insider trading in this area. The following year, the CFTC solidified its ability to bring insider trading cases under Regulation 180.1 when it defeated a motion to dismiss in its first contested insider trading case. Since then, the CFTC has brought other insider trading actions against energy traders and the DOJ has started to prosecute similar actions under Regulation 180.1. For example, in July 2020 and February 2021, two energy traders pled guilty to misappropriating and trading on material, nonpublic information regarding energy futures contracts.

In the coming years, we can expect additional coordinated actions against commodities traders related to insider trading. Government enforcers are looking to hold traders liable for their duty to maintain confidential material, nonpublic information regarding companies' futures trading plans.

Ian P. McGinley
Partner
imcginley@akingump.com
New York
+1 212.872.1047

Claudius B. Modesti
Partner
cmodesti@akingump.com
Washington, D.C.
+1 202.887.4040

Parvin Daphne Moyne
Parvin
pmoyne@akingump.com
New York
+1 212.872.1076

Douglas A. Rappaport
Partner
darappaport@akingump.com
New York
+1 212.872.7412

Nathaniel B. Botwinick
Counsel
nbotwinick@akingump.com
New York
+1 212.872.8089

Regulatory & Compliance – Investment Adviser

Brian T. Daly
Partner
bdaly@akingump.com
New York
+1 212.872.8170

Jason M. Daniel
Partner
jdaniel@akingump.com
Dallas
+1 214.969.4209

Jan-Paul Bruynes
Partner
jpbruynes@akingump.com
New York
+1 212.872.7457

© 2022 Akin Gump Strauss Hauer & Feld LLP

Risk Assessment

- Firms that trade commodities are not immune to enforcement actions by the DOJ and the CFTC related to the misappropriation of confidential information. Indeed, the government has demonstrated an increased focus on bringing cases in this space.
- Firms that trade commodities should ensure that their policies and training materials related to insider trading are up to date and reflect current legal developments in the securities context as these may be applied to commodities trading.
- In-house counsel and compliance departments should use a risk-based approach to monitoring and deterrence. Block trades and other off-exchange transactions are particularly susceptible to potential manipulation and fraud.
- Given the broad scope of Regulation 180.1, firms that trade commodities should be aware that the CFTC and the DOJ may treat the misappropriation of confidential information relating to physical commodities (e.g., data on crop forecasts for oranges and then trading in orange futures) as a violation of Regulation 180.1.

akingump.com

© 2022 Akin Gump Strauss Hauer & Feld LLP