

CLIENT ALERT

CFTC Settles Insider Trading Action Against NYMEX and Two NYMEX Employees

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On August 3, 2020, the CFTC issued a Consent Order imposing a \$4 million civil penalty and permanent injunctions against the New York Mercantile Exchange, Inc. (“NYMEX”) and two NYMEX employees, William Byrnes and Christopher Curtin, for disclosing confidential information about futures trading activity in the possession of NYMEX to commodities brokers.¹ The Consent Order demonstrates the CFTC’s continued emphasis on investigating and pursuing insider trading activity and holding exchanges accountable for their employees’ conduct.

NYMEX Employees’ Insider Trading

On numerous occasions between 2008 and 2010, Byrnes and Curtin were found to have disclosed to a broker material nonpublic trade information obtained through Byrnes and Curtin’s special access as NYMEX employees. Byrnes and Curtin disclosed the following confidential information: the identities of counterparties to specific options trades; whether a counterparty purchased or sold an option; whether the option was a call or put; the volume of contracts traded; the expiry; the strike price; and the trade price. According to the Consent Order, this conduct violated Section 9(e)(1) of the Commodity Exchange Act (the “Act”), which prohibits insider trading, and CFTC Regulation 1.59(d)(1)(ii), which prohibits disclosure of material nonpublic information obtained through special access as an employee of a self-regulatory organization. Section 9(e)(1) and CFTC Regulation 1.59(d)(1)(ii) are specific to “registered entities” such as contract markets, clearing organizations, and swap data repositories, but does not apply to market participants. Accordingly, this action was not based upon the CFTC’s fraud-based manipulation authority.

¹ CFTC v. William Byrnes, Christopher Curtin, NYMEX, and Ron Eibschutz, No. 13 Civ. 1174 (VSB) (Aug. 3, 2020).

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In addition to imposing a monetary penalty, the CFTC imposed permanent trading bans on Byrnes and Curtin. Curtin voluntarily resigned from NYMEX in April 2009, and Byrnes was terminated in December 2010. Given that the relevant activity occurred between 2008 and 2010, it is likely that the defendants entered into an agreement tolling the statute of limitations during the investigation. The CFTC also charged Ron Eibschutz, the broker who received the nonpublic information, with aiding and abetting the NYMEX employees' violations of the Act. The August 3, 2020 Consent Order does not resolve the CFTC's claim against Eibschutz.

NYMEX Found Vicariously Liable

The Consent Order holds NYMEX vicariously liable for the actions of Byrnes and Curtin, imposing a \$4 million civil monetary penalty jointly and severally on NYMEX, Byrnes, and Curtin, with the liability of the individual traders capped at \$500,000 in total. Additionally, the CFTC enjoined NYMEX from further violations of Section 9(e)(1) of the Act and CFTC Regulation 1.59(d)(1)(ii).

This enforcement action against NYMEX is the “first time the CFTC has charged an exchange with violations of the proscription in the Act and the CFTC regulations against disclosures of material nonpublic information by exchange employees.”² Director of Enforcement James McDonald emphasized that “commodity exchanges are responsible for violations of the Act or CFTC regulations by their officials, employees, and agents within the scope of their employment or office.”³ This serves as a reminder that exchanges must take affirmative steps to ensure that their employees fully understand their obligations under the Act and the CFTC rules.

If you have any questions regarding this client alert, please contact one of the authors, any member of our CFTC team listed below, or the Willkie attorney with whom you regularly work.

² Commodity Futures Trading Commission, *NYMEX and Two Former Employees to Pay \$4 Million for Disclosing Material Non-Public Information* (Aug. 4, 2020), [here](#).

³ *Id.*

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Willkie has a dedicated team of attorneys with extensive knowledge and experience in all aspects of the Commodity Exchange Act and the CFTC regulatory regime. We would be pleased to assist on your matters.

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