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Coscia Gets 3 Years in Prison: The Criminalization of Trading Commodities?

Sarao, Coscia, and now the Berkshire Power Company, each charged with crimes – spoofing, fraud, false information – relating to commodity trading. Commodity traders likely have incorporated into their compliance regimes the general risk that allegations of criminal fraud could arise. These criminal matters no longer appear to be isolated instances and, instead, counsel for vigilance to maintain a robust compliance, risk management, internal auditing, and surveillance regime.

Michael Coscia (Commodities Trader)

The Berkshire criminal investigation (discussed below) is the latest in a series of cases in which the United States Attorney seeks criminal sanctions for conduct previously considered within the province of federal regulatory agencies, or even self-regulatory organizations. In October 2014, the United States Attorney for the Northern District of Illinois charged Michael Coscia, a commodities trader, with six counts of commodity fraud and six counts of "spoofing," or placing non-*bona fide* orders with the intent to affect commodity prices to his benefit. Coscia was found guilty on all counts on Nov. 3, 2015. The parties, not surprisingly, sought significantly different sentences (probation versus 70 to 87 months' imprisonment). On July 13, 2016, Coscia was sentenced by Judge Leinenweber to three years in prison, with an additional three years of supervised release.

Coscia's conviction came quickly on the heels of substantial settlements with both the CME Group (on whose exchanges the trading had taken place) and the United States Commodity Futures Trading Commission (the federal agency charged with bringing civil enforcement action for violations of commodity trading laws). The *Coscia* case is the first conviction under the anti-spoofing legislation enacted pursuant to the Dodd-Frank Act, which criminalized what was previously considered disruptive market conduct generally subject to civil enforcement actions by exchanges and/or CFTC.

Navinder Sarao (Commodities Trader)

One other criminal spoofing case remains open. On Sept. 2, 2015, the United States Attorney for the Northern District of Illinois filed criminal charges against Navinder Sarao, a commodities trader, alleging commodities fraud and spoofing. Sarao was arrested in London and has vigorously contested extradition. On March 23, 2016, a U.K. judge rejected Sarao's extradition challenge and sent the matter to the U.K. Secretary of State for a determination on whether Sarao should be extradited. On May 14, 2016, the Secretary of State ordered Sarao's extradition to the United States.

On May 26, 2016, Sarao appealed the decision to the U.K. High Court, and the appeal is currently pending. The United States criminal proceeding is stayed pending resolution of the extradition proceeding.

Berkshire Power; Power Plant Management Services

And the latest commodities-related criminal investigation: on March 30, 2016, the office of the United States Attorney for the District of Massachusetts (USAO) filed an Information charging Berkshire Power Company, LLC (Berkshire) and Power Plant Management Services, LLC (PPMS) with felonies of conspiring to violate and violating the Clean Air Act (CAA), and charging PPMS with additional felonies of committing fraud under the Federal Power Act (FPA).

The violations relate to Berkshire and PPMS's alleged tampering with emissions equipment and submitting false information to both environmental and energy regulators. A plea agreement was simultaneously filed in which Berkshire and PPMS agree to pay a total of $4.25 million related to the criminal charges. Berkshire will pay a fine of $2.75 million for violations of the CAA and a $750,000 community service payment to the American Lung Association. PPMS will pay a fine of $500,000 for violations of the CAA and FPA and a $250,000 community service payment to the American Lung Association. This was a joint investigation with the Massachusetts Attorney General's Office, which also has brought a related civil case against Berkshire and PPMS.

Also on March 30, the Federal Energy Regulatory Commission (FERC) approved a civil settlement with Berkshire and PPMS over the same conduct. FERC began its investigation of Berkshire and PPMS following a referral from the USAO when the USAO learned during the course of its investigation that PPMS made false statements to the ISO-New England (ISO-NE). Under the stipulation and consent agreement, Berkshire and PPMS consented to findings that they violated section 222 of the FPA and the Anti-Manipulation Rule, which prohibits any entity from using a fraudulent device, scheme, or artifice, or engaging in any act, practice, or course of business that operates or would operate as a fraud. FERC also made findings that Berkshire violated FERC Reliability Standards. Under this settlement, Berkshire and PPMS agreed to pay a civil penalty of $2 million. Berkshire also agreed to pay to ISO-NE disgorgement of over $1 million, plus interest, and a civil penalty of $30,000 for violations of the Reliability Standards.

As part of the settlement, Berkshire consented to factual findings that it owns a natural gas-fired, combined-cycle generating facility in Agawam, Massachusetts (the Plant). From Jan. 1, 2008 to March 30, 2011, ISO-NE was Berkshire's transmission operator and balancing authority. Berkshire was a participant in ISO-NE Forward Capacity Market (FCM). Berkshire hired PPMS to provide project management and administrative services at the Plant. PPMS hired a Projects General Manager (GM) for the Plant. At the Projects GM's direction, as the consented-to findings state, Berkshire engaged in a fraudulent scheme to perform unreported maintenance work and to conceal that work and associated maintenance outages from ISO-NE, which improved the Plant's FCM availability. Individuals at the Plant scheduled maintenance work for times when the Plant was unlikely to be dispatched, and then failed to notify ISO-NE about the work or the associated Plant unavailability. In addition, if the Plant received a dispatch call from ISO-NE during a time that the generator was unavailable, individuals at the Plant were instructed to act as if the generator was available, acknowledge the request, and then contact the Projects GM. He would then contact ISO-NE dispatch office and falsely assert that the Plant had experienced an unanticipated problem during start-up. There were at least six instances of such false representations to ISO-NE. PPMS did this to maximize the Plant's revenues and to minimize repair expenditures.

Looking Ahead

Federal regulatory agencies and exchanges have been steadily ramping up their scrutiny of traders and their firms over the past years. The specter of criminal prosecution for alleged misconduct formerly within the exclusive province of exchanges and regulatory agencies has only raised the stakes for industry members. More than ever, a robust, state-of-the-art, dynamic compliance, risk management, and surveillance regime is vital not only to a company's financial success, but to the ongoing viability of the firm, its members, and associates.

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