

### *Futures Regulation*

## Market Intel at Heart of CFTC Reorganization, Lawyers Say

Acting CFTC Chairman J. Christopher Giancarlo is signaling his intention to increase the agency's market intelligence capabilities by moving certain surveillance functions to the Division of Enforcement, derivatives lawyers told Bloomberg BNA.

Monitoring for suspicious trading patterns that may indicate fraud or manipulation will be shifted to Enforcement, in the reorganization announced March 15, shortly after Giancarlo was tapped to head the Commodity Futures Trading Commission on a permanent basis. Surveillance of trading activity for significant market developments and other information will remain in the Division of Market Oversight under a newly created market intelligence branch. Giancarlo also will appoint a chief market intelligence officer who will report directly to him.

The move reflects Giancarlo's long-standing goal of making the CFTC a "smarter regulator" by learning more about the derivatives marketplace and how it is operating.

"The CFTC must get smarter by focusing on current and emerging market structure and dynamics and not just on participant behavior," the former derivatives industry executive said earlier this month at an industry conference in Florida. At the same time, the acting chairman warned that enforcement will remain "aggressive and assertive."

**Market Intelligence.** Dividing surveillance between Enforcement and DMO will sharpen the agency's market monitoring capabilities and increase its understanding of an evolving marketplace, Giancarlo told the gathering. The move is intended to "inform sound policymaking at the commission and promote efficient and sound markets," he said.

The surveillance restructuring is part of a multi-part plan that also includes fixing the agency's "flawed" swaps rules and addressing bank capital requirements.

Surveillance is often associated with ferreting out wrongdoing, but it is equally important for assessing the state of the marketplace. CFTC staff can learn about risk concentrations, what contracts aren't performing

as intended, trading patterns and whether regulations are working for the good of the market.

Giancarlo may well feel that there hasn't been enough emphasis on getting market intelligence for non-enforcement reasons, Daniel Waldman, a former CFTC general counsel who now heads the derivatives practice group at Arnold & Porter Kaye Scholer LLP, Washington, told Bloomberg BNA. "I think it's more likely the emphasis is in doing more surveillance for purposes" other than enforcement, he said.

**Dramatic and Significant.** Waldman's colleague Peter Haveles, a partner in the firm's New York office, said the "more dramatic and significant" change isn't moving parts of surveillance to Enforcement but the establishment of a market intelligence officer who reports directly to the chairman.

"He's saying, 'there's been a lack of focus on this kind of intense data analytical work with respect to the operation and the functionality of the marketplace, and that is the more important task—to make sure the markets are liquid and serve their purpose,'" Haveles said.

[T]his person's going to do what [Giancarlo] says and get the kind of data he needs to analyze and improve the marketplace."

"I think it's a positive. It's getting back to the role that the Division of Market Oversight had years ago," said Paul Architzel, co-head of the futures and derivatives group at Wilmer Cutler Pickering Hale and Dorr LLP, Washington. "Certainly people [are] more willing to share information with the division if they don't feel it's acting in an enforcement capacity."

The reorganization still could improve enforcement functions, according to one attorney. "Moving surveillance to Enforcement is going to make it easier for surveillance staff to communicate directly with the staff that's going to investigate the lead," said Brian Walsh, a former CFTC attorney now at Murphy & McGonigle, Washington. "This to me is a move of efficiency and is a process improvement for essentially investigating aberrant market activity."

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