

CLIENT ALERT

CFTC Wins \$7.49 Million Jury Verdict in Insider Trading Case

This Marks a Victory for the CFTC's Insider Trading and Information Protection Task Force

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On August 16, 2022, a Southern District of Texas jury awarded a \$7.49 million verdict in favor of the Commodity Futures Trading Commission (the "CFTC") against Andrew Gizienski and EOX Holdings, LLC ("EOX"), for taking opposite positions from those of their clients without consent and disclosing customer confidential information, in violation of CFTC regulations.¹ In addition to the monetary penalties, the judge imposed a 120-day trading and registration ban on Gizienski and ordered EOX to implement adequate policies and procedures within 60 days to prevent future violations. The initial filing of this case coincided with the creation of the CFTC's Insider Trading and Information Protection Task Force ("task force").² The CFTC alleged that Gizienski had provided information about his other clients' nonpublic trades to a client-friend approximately twenty times over the course of two years in order to develop the relationship with the hope of future business. Additionally, Gizienski took opposing positions on trades to those of his clients approximately 100 times without disclosure to the clients.

This verdict marks a victory for the CFTC's task force and we anticipate this could lead to more enforcement actions within the insider trading space by the CFTC. Much of the CFTC's precedent to date was through speaking order

¹ *CFTC v. EOX Holdings LLC et al.*, no. 19-2901 (S.D. Tx.)

² *CFTC Starts Insider Trading Task Force, Sues Energy Broker*, Law360 (Sept. 28, 2018). Willkie's summary of the CFTC's Insider Trading and Information Protection Task Force is available [here](#).

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settlements, whereas this verdict demonstrates success through the end of a trial. This enforcement action focused on Gizienski and EOX passing information about “block trades,” transactions involving more than 10,000 contracts or shares worth at least \$200,000, to another customer. Block trading is also currently a focus of the Department of Justice (“DOJ”) and Securities and Exchange Commission (“SEC”). We anticipate that this successful enforcement action will lead to more joint investigative efforts between the CFTC, DOJ, and SEC into allegations of insider trading related to block-trading clients.

However, even under the theory pursued by the CFTC in *EOX Holdings*, the agency still alleged that the use of the nonpublic information was in breach of a duty to its other clients. Previously, the court had identified three possible methods available to the CFTC to establish a duty: 1) where the law mandated confidentiality regarding the trade, 2) where the rules of the exchange used for the trade require confidentiality on block trade order information, or 3) where a confidentiality or nondisclosure agreement between the financial institution and the block trading requirement imposed such a duty.³ This could prove to be an important limitation on both criminal and civil enforcement actions moving forward because the CFTC historically took a broad view regarding the establishment of a pre-existing duty.⁴ Notably, the Court previously ruled that “an understanding is not an independent source for a duty of trust and understanding” necessary for a misappropriation claim.⁵ In fact, the Court responded to any such argument by saying that the CFTC failed to “cite[] any authority in support of its argument that a duty of trust and confidentiality can arise merely from an understanding.”⁶ *EOX Holdings* provides a guidepost for determining whether a duty existed, though traders and financial institutions should use caution in treating the above as a comprehensive list.

We anticipate both defendants might appeal this verdict and will continue to monitor further developments in this case, as well as the CFTC’s broader enforcement approach towards insider trading.

³ *CFTC v. EOX Holdings LLC*, NO. 19-2901, 2021 WL 4482145, at *23-26 (S.D. Tx. Sept. 30, 2021).

⁴ See *Prohibition on the Employment, or Attempted Employment, of Manipulative and Deceptive Devices and Prohibition on Price Manipulation*, 76 Fed. Reg. 41398, 41493 (July 14, 2011) (“Depending on the facts and circumstances, a person who engages in deceptive or manipulative conduct in connection with any swap, or contract of sale of any commodity in interstate commerce, or contract for future delivery on or subject to the rules of any registered entity, for example by trading on the basis of material nonpublic information in **breach of a pre-existing duty (established by another law or rule, or agreement, understanding, or some other source)**, or by trading on the basis of material nonpublic information that was obtained through fraud or deception, may be in violation of final Rule 180.1. (emphasis added)).

⁵ *EOX Holdings LLC*, 2021 WL 4482145, at *29.

⁶ *Id.*

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