

COMMODITY FUTURES TRADING COMMISSION

CFTC TALKS

INTERVIEW WITH JAMES McDONALD  
DIRECTOR OF ENFORCEMENT

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## T R A N S C R I P T

MR. BUSCH: What if I told you, hypothetically, that you were going to get prosecuted for a financial crime? What if I told you that the lead prosecutor going after you not only worked for the Chief Justice of the Supreme Court at one point, but also successfully prosecuted the former speaker of the New York State Assembly, and prosecuted individuals associated with the Genovese organized crime family of La Cosa Nostra, would you be worried, maybe a little afraid?

In this episode of CFTC Talks, we're going to speak to that prosecutor, who now works at the CFTC, and is in charge of going after bad guys, and women. You know, we're gender neutral here at the CFTC.

Welcome to CFTC Talks. I'm your host, Andy Busch. Just a quick reminder. There is a disclaimer at the end of the show that's important for you to hear.

Now, today, we're going to be speaking with James McDonald or Jamie McDonald, the new Director of Enforcement at the CFTC. We're going to cover a lot of ground on what his background is, his career, lessons he's learned, and what he now does for the agency.

Jamie, welcome to CFTC Talks.

MR. McDONALD: Thanks, Andy. Thanks for having me.

MR. BUSCH: Yeah. It's great. And before we get on to what you do for the agency, which is kind of interesting, to say the least, I want to spend a little bit of time talking about your career and education because I think it's uber cool.

Now, you graduate cum laude from Harvard, and then where did you get your law degree from?

MR. McDONALD: So I got my law degree from UVA Law. So after college I went to UVA Law.

MR. BUSCH: That's University of Virginia?

MR. McDONALD: That's University of Virginia School of Law. From there I went and I clerked for

Jeff Sutton, who is a judge on the Sixth Circuit Court of Appeals in Columbus, Ohio.

MR. BUSCH: Oh, okay.

MR. McDONALD: And after that, I went and worked as a lawyer in the White House Counsels' Office.

MR. BUSCH: Oh, my gosh. Okay.

MR. McDONALD: And I worked there for about a year. I came in. I was in a position called deputy associate counsel where I worked on a range of things from congressional investigations, foreign relations law, and financial-related matters. It was during the financial crisis of 2008, and that's really where I got my start in the world of the intersection between law and finance.

MR. BUSCH: Holy Smokes! 2008. That must have been crazy because so many things were going on, and I know everybody within the administration was trying to figure out like what's happening, what's going on? Was there anything that stood out to you at that time?

MR. McDONALD: It was really an incredible time to be in government. I came in really not knowing that a large part of my focus would be financial-related work.

MR. BUSCH: Right.

MR. McDONALD: So the one thing that stood out was it was an example really, I think, of a team of people working towards a common goal and mission, not necessarily knowing what their particular responsibilities would be six months, nine months, a year down the road. It was a group of people working together trying to figure out the best ways to solve problems.

MR. BUSCH: Under duress. Under duress.

MR. McDONALD: Under duress. And the problems that came up were the financial problems.

MR. BUSCH: Yeah.

MR. McDONALD: And we just worked day and night to try to figure out the best way to handle them.

MR. BUSCH: Wow! That's amazing. Well, tell me about working or clerking for Chief Justice Roberts. That -- I mean, this is amazing that you got that opportunity, and what a wonderful learning experience.

MR. McDONALD: So coming off the work in the White House counsel's Office, I had the chance to clerk for Chief Justice Roberts, and that was really -- looking back at my career, however many years down the road, I think I'll always look at that as one of the highlights of the career.

MR. BUSCH: I can imagine, yeah.

MR. McDONALD: Professionally, to have the chance to work at an institution like that, to have a chance to walk into the Supreme Court of the United States everyday to go to work is just awe inspiring.

MR. BUSCH: Yeah.

MR. McDONALD: When you're walking in at eight a.m. on a Saturday or Sunday to go to work, it makes it a little easier when you walk in and you --

MR. BUSCH: All those long hours. Right?

MR. McDONALD: Well, all the long hours, but you're doing it at the Supreme Court, and you're doing it for a guy like Chief Justice Roberts, who was just an incredible boss, and a guy I was really fortunate to work for.

But even on a personal level, not just professional, but personally, it was one of the most formative years of my life to have a chance to learn from him, to have a chance to learn from my co-clerks, who still remain good friends to this day, and the co-clerks for the other justices. It was really just an incredible experience.

MR. BUSCH: That's a wonderful network to have. As I always like to say, I'm a pretty smart guy, but if I can throw a lot of other, you know, really intelligent brains on a problem, then that really helps. So I think that's what's -- what a cool experience.

Like is there anything that just like stood out like working? Was there a fun case that you really liked, or --

MR. McDONALD: So there were a lot of interesting cases. I think it turned out to be a pretty important term. There was an important Second Amendment case called McDonald that the Court decided. There was an important white collar crime case, United States v. Jeffrey Skilling. There also was one of the more important campaign finance cases in recent history, Citizens United, that was decided during the term.

MR. BUSCH: Oh, yeah, Jeffrey Skilling. A little Enron action there, yeah, exactly.

MR. McDONALD: That's right. So that maybe was my second -- the second interaction I had with the intersection of law and finance, and here, specifically, white collar crime.

But the one thing that -- you asked sort of was there one thing that stands out.

MR. BUSCH: Right.

MR. McDONALD: I'll tell you the thing that stood out to me the most was having the chance to work with my co-clerks and with the clerks for the other

justices to be surrounded -- you talked about getting the best brains or the highest quality people in the room. For me to be exposed to that quality of work, that work ethic, it really caused me to want to up my own game, and I still think now when I'm working on something, I try to bring the same -- the same sort of seriousness of purpose that everybody had in that job to all the jobs I've had after that.

MR. BUSCH: I can't imagine. The bar goes pretty darn high, right, when you're on those guys. So you always want to be on your toes. You always want to be going forward.

MR. McDONALD: That's right.

MR. BUSCH: Well, how did you end up in the Southern District of New York?

MR. McDONALD: So in the White House Counsel's Office, I worked -- three of my bosses had come out of the U.S. Attorney's Office in the Southern District of New York.

MR. BUSCH: Oh.

MR. McDONALD: In law school, I really didn't know a lot about that U.S. Attorney's Office. I thought I wanted to be in court. I wanted to be trying cases. I wanted to be prosecuting. But I didn't have any sort of specific idea about exactly how I wanted to do that.

And then working for these guys in the White House Counsel's Office, they had said if you can possibly get into that office, if you can figure out a way to get them to hire you, you gotta get there. And I was lucky enough to get hired there, and I think along with the clerkships, and the other experiences we've talked about, it was one that I really had the chance to grow as a lawyer and as a person.

MR. BUSCH: Well, to that end, let's talk about the Genovese case. How long did it take to put that thing together, and what was your favorite part of it? I mean, this is just -- anybody who's a fan of like The Mob, or any of those shows just has to love this.

MR. McDONALD: Well, I'll tell you, that case -- that was really an interesting case and a great one to be a part of, but that one in particular, the investigation didn't go quite as long as you might have thought. So we used all sorts of investigative techniques: undercover officers, search warrants, and wiretaps.

MR. BUSCH: Wow!

MR. McDONALD: And there was a specific wiretap in that case where the agents who were listening to the calls on the target, they identified -- they were listening to a murder for hire plot happening.

MR. BUSCH: Wow!

MR. McDONALD: They were able to determine from listening to the calls that there was a murder for hire plot, who the target of the murder for hire was, where it was going to happen, and they actually stopped the car on the way. So they stopped the car, and they searched the car, and we -- the agents who were there found a gun loaded with hollow point

rounds. They found a bag of socks, which we later learned was going to be used to clean up the scene, and a spray bottle full of bleach.

MR. BUSCH: Wow!

MR. McDONALD: So at that point, they made arrests, we made other arrests, and the investigation was overt at that point, and there were a number of other associates of the Genovese family who were arrested in connection with that case.

MR. BUSCH: Wow! I'm just saying wow because that's just -- that's amazing.

Well, let's switch gears a little bit here, and let's talk about your new role at the Commodity Futures Trading Commission.

MR. McDONALD: Sure.

MR. BUSCH: To remind everyone, the CFTC is an independent federal agency whose mission is to foster open, transparent, competitive, and financially sound markets.

So, Jamie, your role as the head of Enforcement, what does this entail?

MR. McDONALD: I lead a team of about 180 people. That includes lawyers, paralegals, investigators, economists, and a surveillance staff. The biggest part of what we do is we investigate violations of our relevant laws and regulations, and we bring enforcement actions, and we file the enforcement actions. Where the Commission determines that a violation is significant enough to warrant an enforcement action, we file those in federal court, and we litigate them there.

MR. BUSCH: Wow! And I think -- you know, I mean, you talk at a high level on this stuff, but I think what is interesting for me is that this really makes a difference to a lot of people because we need to make sure that people can count on these markets that they're following the rules and people don't get cheated out of their money, bottom line. Right?

MR. McDONALD: That's right. So we really try to focus, and one of my priorities is making sure that we are focusing and having the appropriate staff, and resources, and attention to the types of fraud and

manipulation, disruptive trade practices that really have market harm or customer harm.

MR. BUSCH: Yeah.

MR. McDONALD: We want to insure that we are -- we want to insure that the market knows, that everybody knows that we're on duty. We're on watch to make sure that if there's market harm, if there's harm to market integrity, or if there's harm to customers, misappropriation of their funds, fraudulent solicitation, things like that, the Enforcement Division is there to make sure that the people who have committed the violations are accountable, and to provide the right incentives to make sure that going forward folks are complying with the law, and really trying to minimize the market harm and customer harm going forward.

MR. BUSCH: Well, coming from the Southern District, I mean, like what are your goals for this role, and how is it kind of different from what you were doing previously?

MR. McDONALD: We're constantly thinking about how to balance this -- the idea I was just talking about. Giving companies and individuals the incentive, the right incentives to comply with the law while holding the people who violated the law accountable.

And so one of the ways that we're thinking about doing it is trying to incorporate some of the lessons that I've learned from the Southern District of New York. Just to give you one example, using -- trying to provide companies and individuals the right incentives to cooperate with law enforcement to let them know that they should, their calculation should incorporate a substantial benefit on the back end if they cooperate in terms of the, in terms of a reduction in the civil monetary penalty that would be imposed for the wrongdoing.

Now, it's not a get-out-of-jail-free card.

MR. BUSCH: Right.

MR. McDONALD: We're still going to be investigating the case. We're still going to be

looking at it. But take -- self-reporting is one example. I expect that I'm going to talk a lot more about self-reporting going forward.

MR. BUSCH: Yeah.

MR. McDONALD: But that's an area where we want to make sure that companies know that if they self-report to us, it's not going to be a game of gotcha. It's not going to be, well, you self-reported. You told us about nine violations, but we went in and we found a tenth, so you're not getting self-reporting credit.

We want to make it crystal clear to companies what we expect them to do in terms of self-reporting on the front end, but also what is fair for them to expect us to do on the back end.

MR. BUSCH: Right.

MR. McDONALD: And I think if we're clear about that with the market going forward, I think if we get some data points out there about -- demonstrating how we really do take the substantial benefit seriously that we would recommend the

companies get for self-reporting, that we think that that ideally will change the calculation going forward, and would in the long term foster further compliance with the law while also insuring that those who violated the law are held accountable.

MR. BUSCH: Yeah. I can only imagine it must be a little bit frustrating for somebody to self-report and then get really dinged for doing it. Right? Because you're disincenting them from cooperating. Right? You actually want them to say, hey, we made a mistake, but here's how we rectified it. Take a look at it. And you try to see if it's, you know, institutionalized that this mistake would keep happening, or whether or not it was a one-off, and, hey, you know, let's make sure that this doesn't happen again so things work properly in the future.

MR. McDONALD: That's exactly right, but even more than that, the company has to make this decision at the front end. The company has to make the decision about whether to self-report long before they're going to know what potential break they're

going to get on the penalty. So I think it's particularly important for us to be very clear and very transparent about how we're treating self-reporting, about the kinds of things that count to self-reporting.

It has to be a real self-report. It can't be that you'd self-reported to one agency, one law enforcement agency, or you were required to self-report it under the law, or you had some public disclosure requirement under some other legal provision. You have to actually come in and self-report, and say here's the wrongdoing that we've identified.

It's okay if the company says we haven't even -- we aren't even sure whether we've identified all of the wrongdoing. We're still looking at it, but we want to let you know what we found. We want to work together with you, and we will then say, or they should expect, we'll make it clear up front that they should expect that we'll then say, okay, if you stay in the self-reporting and cooperation lane, then it's

fair for you to expect a real benefit on the back end, and I think it's important that we make that clear, otherwise, we can't ever really affect the company's calculation on the front end.

MR. BUSCH:

Yeah.

MR. McDONALD: We're going to get to the stage where we're able to have that conversation on the back end, unless we've made it clear on the front end that their initial decision should be to self-report.

MR. BUSCH: Yeah. And I would imagine over time trust is a really big thing. Right? So that's got to be an obstacle for you. Right? From where this agency has been where they went through really condensed time frame, made rules, you know, put them out there. Now, with the agency's stepping back and looking at these things, and that's got to be part of your rule too, to look like say, hey, look, we want to make sure that you guys are as you describe, you know, staying in that lane doing this, but you have to be really consistent, I think, in that. That's got to be

a challenge, and something that you're thinking about a lot.

MR. McDONALD: That's right. That's one of the things at the forefront of my mind is just trying to figure out how to make that clear. And by the way, part of self-reporting and cooperation means identifying other areas or others who were involved in the wrongdoing.

MR. BUSCH: Yeah.

MR. McDONALD: So it's not -- it's not like everybody will get a free pass, or if we're giving companies self-reporting credit that we're not going to go after the individuals who are involved.

Of course, we're going to investigate the individuals that were involved, and we'd investigate other companies that were also involved, in the wrongdoing.

The point is only you can almost imagine the conversation that a CEO would have with his general counsel, or her general counsel where the CEO says, okay, what's the problem, and the general counsel

says, well, we've identified this problem. CEO says, okay, have we taken all the internal steps that we need to take? Yes. Have we complied with all of our public reporting requirements? Yes. Okay.

Now, we've got a decision to make. Should we self-report to the agency or not? And the general counsel will say, well, that depends. Which agency are we talking about? And let me tell you a little bit about the experience that we and others similarly situated to us have had with this agency with respect to self-reporting.

And I think if I can make it clear what should be expected from us, and what we expect from industry, and if we can get a few data points out there really showing that we can take this seriously, I hope that conversation more and more tends towards self-reporting because I could imagine sitting -- if I were sitting in the CEO's seat, I would say to the general counsel, look, we'd really like to get out ahead of this. We'd like to show the company that we take compliance seriously. If we're going to change

the culture and make it a culture of compliance that's fair for them to look to the top. We're asking them to self-report internally, there's nothing that strengthens that, or fosters that sentiment more than having us self-report, but we can't do it where it doesn't make business sense. And so our goal here is to make clear that in that calculation, it may not make business sense for them in every case, but they should -- that we should make it clear that this is something that we will take seriously on the back end.

MR. BUSCH: Yeah. And I think that overall that's -- you know, fostering the communication is so important, and we're doing the same thing in MIB, the Market Intelligence Bureau, which I'm part of, but I think that's what is key, is like getting people to do this, getting them to trust you to some extent that you're not going to bring the hammer down on them all the time, but when it's appropriate, you're definitely going to do it, and when you're going to go after the bad guys and women that are out there.

So I think that's what's really neat too, because what this does from kind of an outsider coming into the CFTC, to me it fosters better communication, more likely the people will think about this differently, and then better functioning financial markets because of it, and that benefits everybody.

MR. McDONALD: I think that's right.

Ultimately, again, our goal as the enforcement agency within the CFTC, a CFTC goal is to increase compliance with the law and regulations going forward.

MR. BUSCH: Yeah.

MR. McDONALD: And our goal within -- as the Enforcement Division within that structure, is to try to figure out ways where our enforcement actions can be designed to have the broadest impact, or our enforcement policies can give the right incentives to companies so that they'll comply with the law.

MR. BUSCH: Yeah, that makes sense. All right. Before I let you go, I've got to ask you, as you look back over your career, what do you think of

the top three things that like lessons wise that kind of stand out to you?

MR. McDONALD: That's a really good question, Andy. I guess if I were to limit to three, I'd say, first, for me the key has been to find jobs that I can really throw myself into. The kinds of jobs that I'm not working -- I'm not working at the jobs because it's part of the job description. The things I'm doing are not just nine to five. They're the kind of things that I'd want to be reading about on a Saturday or Sunday morning, or want to be thinking about at night, and they're the kinds of things that if I really have a job that I can throw myself into like this one, then I'm just excited to learn about the new areas of law, the new areas of policy or finance, and to really keep up to speed and make sure that I really am giving it my all.

Second, I think it's important to maintain proper perspective. This is something that I really took away from the U.S. Attorney's Office. If you're a government lawyer, you do have a tremendous amount

of power and discretion. And I think it's important to maintain the proper perspective at all points of an investigation, or at all points of a case.

So if you're an assistant U.S. attorney, and you're investigating a case, and you're on the eve of trial, but you get new information that would make you think about the case differently, you can't be dug in just because you're on the eve of trial. There's a real temptation to get dug into particular positions just because you've invested a lot of time, a lot of energy, and a lot of thought in supporting that position.

MR. BUSCH: Right.

MR. McDONALD: You've to resist that temptation, and that's particularly important for government lawyers. I'm not saying --

MR. BUSCH: I think that's a great point. I think a lot of people would be very glad to hear that.

MR. McDONALD: Well, I'm not saying that we'll rethink -- that we're constantly rethinking our decisions. We're not. You can't be an effective

organization and move forward efficiently with that sort of rethinking mentality.

What I do mean, though is that when we get new information, we're going to consider it, and we're going to work as hard as we possibly can to view, and I am, to view every question with clear eyes, and as new information comes to light, to make sure that we're not dug into a particular position just because that's the way that something has been done before, or because that's the way that we view the case or an investigation up to a particular point.

The last thing may be the most obvious, but it's just -- just for me, everything is a lot more fun when I'm doing it with a team --

MR. BUSCH: Right.

MR. McDONALD: -- as opposed to on my own .

MR. BUSCH: Yes.

MR. McDONALD: So just to be a team player. I'm fortunate enough to work in a division where we've got almost 200 other colleagues within that division.

MR. BUSCH: Uh-huh.

MR. McDONALD: And the chance to get to know them, to work with them, to work next to them, and to work towards the common goal and mission I think is one that I've really liked over the past few months, and I really look forward to doing more going forward.

MR. BUSCH: All right. Jamie McDonald, CFTC Director of Enforcement, thanks for coming on the show today.

MR. McDONALD: Thanks for having me, Andy.

MR. BUSCH: All right. That's a wrap for me. Thanks for listening. We'll be back soon with more great guests. I'm Andy Busch, and this has been CFTC Talks.

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