

CFTC DIVISION OF ENFORCEMENT ISSUES NEW GUIDANCE REGARDING THE RECOGNITION OF COOPERATION, SELF-REPORTING, AND REMEDIATION IN ENFORCEMENT ORDERS

To Our Clients and Friends:

The Commodity Futures Trading Commission (“CFTC” or the “Commission”) recently announced that its Division of Enforcement (the “Division”) issued new guidance to its staff when considering a recommendation that the Commission recognize a respondent’s cooperation, self-reporting, or remediation in an enforcement order (the “Guidance”).^[1] The Guidance represents the latest step in the Commission’s ongoing efforts to provide clarity and transparency regarding the Division’s practices and procedures.

Prior Advisories on Cooperation, Self-Reporting and Remediation Remain in Effect

The Guidance explicitly states that it does not change how the Division evaluates self-reporting, cooperation, or remediation, nor how the Division considers reductions in penalties in connection with self-reporting, cooperation, or remediation.^[2] Rather, these evaluations are guided by factors described in prior advisories published by the Division (the “Advisories”)^[3] and set forth in the agency’s Enforcement Manual,^[4] which continue to remain in effect.

While the Advisories remain in effect, they are not binding on Division staff. Instead, they emphasize the discretionary nature of both the Division’s evaluation of cooperation and its resulting recommendations.^[5] Moreover, the Advisories caution that they “should not be read as requiring the Division staff to recommend, or the Commission to impose or authorize, a reduction of sanctions based on the presence or absence of particular cooperation factors.”^[6] Thus, in certain circumstances, and at the discretion of the Division staff, cooperation, self-reporting, and/or remediation *may result* in a recommendation of recognition and of reduced sanctions in a Commission enforcement order.^[7] The Advisories do note, however, that—at the far end of the self-reporting/cooperation/remediation spectrum—“if a company or individual self-reports, fully cooperates, and remediates, the Division *will recommend* that the Commission consider a substantial reduction from the otherwise applicable civil monetary penalty.”^[8] However, where an individual or company did not self-report but otherwise fully cooperated and remediated deficiencies, the Advisories provide that the Division *may recommend* a reduced civil monetary penalty.^[9]

The New Guidance: Clarity on When and How

The Guidance builds upon the Advisories by providing transparency and clarity regarding “when and how” the Division will recommend that assessments relating to self-reporting, cooperation, or

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remediation be reflected and recognized by the CFTC in its enforcement orders.[10] To achieve this objective, the Guidance sets forth the following four scenarios and the corresponding level of recognition and penalty reduction (if any) to be recommended by the Division.

Scenario	Degree of Self-Reporting, Cooperation and Remediation	Recognition/ Penalty	Enforcement Order Language
1	None	No Recognition in Enforcement Order	N/A
2	No Self-Reporting, But <i>Cognizable</i> Cooperation and/or Remediation	Recognition, But No Reduction in Penalty	“In accepting Respondent’s offer, the Commission recognizes the cooperation of [name of Respondent] with the Division of Enforcement’s investigation of this matter. The Commission also acknowledges Respondent’s representations concerning its remediation in connection with this matter.”
3	No Self-Reporting, But <i>Substantial</i> Cooperation and/or Remediation	Recognition <u>and</u> Reduced Penalty	“In accepting Respondent’s Offer, the Commission recognizes the substantial cooperation of [name of respondent] with the Division of Enforcement’s investigation of this matter. The Commission also acknowledges Respondent’s representations concerning its remediation in connection with this matter. The Commission’s recognition of Respondent’s substantial cooperation and appropriate remediation is further reflected in the form of a reduced penalty.”
4	Self-Reporting, <i>Substantial</i> Cooperation <u>and</u> Remediation	Recognition <u>and</u> <i>Substantially</i> Reduced Penalty	“In accepting Respondent’s Offer, the Commission recognizes the self-reporting and substantial cooperation of [name of Respondent] in connection with the Division’s investigation of this matter. The

Scenario	Degree of Self-Reporting, Cooperation and Remediation	Recognition/ Penalty	Enforcement Order Language
			Commission also acknowledges Respondent’s representations concerning its remediation in connection with this matter. The Commission’s recognition of Respondent’s self-reporting, substantial cooperation, and appropriate remediation is further reflected in the form of a substantially reduced penalty.”

By arranging the list of factors set forth in the Advisories into four typical combinations (scenarios), and noting when each particular combination should result in a specific recommendation to the Commission, the Guidance provides the Division’s staff with a clear roadmap for exercising its discretion under the Advisories. The Guidance also provides the staff with the exact language it should recommend be included by the Commission in an enforcement order to describe the nature and extent of a respondent’s self-reporting, cooperation, or remediation for each scenario. In addition, the Division’s recommendation to the Commission should include a description of the particular acts of cooperation, self-reporting, or remediation that should be included in the enforcement order. Significantly, the Guidance—unlike the Advisories—is binding on the Staff.^[11]

Implications of the Guidance

The new Guidance has several important implications. First, the Guidance is an important contribution to the Commission’s initiative to provide consistency, transparency, and clarity to market participants regarding its enforcement actions. The CFTC published its first Enforcement Manual in May 2019, noting its core value of clarity.^[12] On the heels of that publication, the Division issued new civil monetary penalty guidance and compliance program evaluation guidance in, respectively, May 2020 and September 2020.^[13] In connection with these publications, the Commission has noted that clarity serves multiple purposes, including deterring misconduct and assisting respondents by enhancing predictability.^[14] As explained by Chairman Tarbert, the new Guidance furthers these objectives “by ensuring the public understands the levels of recognition the CFTC may provide in its enforcement orders.”^[15]

Second, the Guidance will facilitate consistent practices by the enforcement staff with regard to their recommendations for the recognition of cooperation, self-reporting, or remediation. The binding nature of the Guidance will help promote consistency in that the various geographic offices of the Division will now be required to interpret and apply the Advisories in accordance with the Guidance. Consistent practices by the enforcement staff will, in turn, enhance predictability. While the Commission will continue to exercise its independent judgment in determining when and how self-reporting, cooperation,

or remediation should be recognized in its orders, market participants who are considering whether to negotiate a resolution of an enforcement investigation will benefit significantly from increased predictability by the staff.^[16] Moreover, increased predictability will further incentivize self-reporting, cooperation, and remediation, which will advance some of the key goals of the Division’s enforcement program.

Finally, the Guidance—as well as enforcement orders issued by the Commission as a result of the Guidance—will be valuable reference points for market participants who are negotiating settlements with the Division. The Guidance, coupled with the Advisories, can be used by parties to frame arguments regarding the nature and extent of the credit they should receive for their self-reporting, cooperation, or remediation. Similarly, enforcement orders issued under the Guidance can be used as benchmarks when parties negotiate settlements. The Guidance’s requirements that staff recommendations include a description of the particular acts of self-reporting, cooperation, or remediation by the respondent and that proposed enforcement orders use uniform language for the recognition of such acts should foster benchmarking. Although parties can still use enforcement orders issued before the Guidance as reference points, such orders sometimes include disparate language to describe what are essentially the same levels of self-reporting, cooperation, or remediation. Going forward, it will be easier for parties to compare “apples to apples.”

In sum, although the Guidance has been issued by the Division for its staff, it will be beneficial both to market participants who are considering whether to self-report, cooperate, or remediate, and to parties who are considering whether to attempt to resolve an investigation being conducted by the Division.

[1] CFTC Press Release No. 8296-20.

[2] Memorandum from Vincent A. McGonagle, Acting Director, Division of Enforcement, to Division of Enforcement Staff, Recognizing Cooperation, Self-Reporting, and Remediation in Commission Enforcement Orders (Oct. 29, 2020) (the “Guidance”), at 1.

[3] Enforcement Advisory: Cooperation Factors in Enforcement Division Sanction Recommendations for Individuals (Jan. 19, 2017) (the “Individual Cooperation Guidance”); Enforcement Advisory: Cooperation Factors in Enforcement Division Sanction Recommendations for Companies (Jan. 19, 2017) (the “Company Cooperation Guidance”); Enforcement Advisory: Updated Advisory on Self-Reporting and Full Cooperation (Sept. 25, 2017) (the “Updated Self-Reporting and Cooperation Guidance”).

[4] *See* Commodity Futures Trading Commission, Enforcement Manual (2020).

[5] *See* Individual Cooperation Guidance at 5; Company Cooperation Guidance at 5.

[6] Updated Self-Reporting and Cooperation Guidance at 2.

[7] *Id.* at 1, 5.

[8] Updated Self-Reporting and Cooperation Guidance at 2.

[9] *Id.*

[10] Guidance at 1.

[11] Guidance at 2.

[12] CFTC Press Release No. 7925-19.

[13] CFTC Press Release Nos. 8165-20 and 8235-20.

[14] *See* CFTC Press Release No. 7925-19 (“Clarity and transparency in our policies should promote fairness, increase predictability, and enhance respect for the rule of law.”); CFTC Press Release No. 8165-20 (“Clarity about how our statutes and rules are applied is essential to deterring misconduct and maintaining market integrity.”); CFTC Press Release No. 8235-20 (“It’s in both the agency’s interest and the interest of compliance personnel that the Commission is clear about how and what we’ll evaluate.”).

[15] CFTC Press Release No. 8296-20 (quoting Chairman Heath Tarbert); *see also* CFTC Press Release No. 8296-20 (“Providing clarity to market participants and the public is one of the CFTC’s core values. . . . Through this and the other public guidance, the division seeks consistency and transparency across CFTC enforcement actions.” (quoting Acting Director Vincent McGonagle)).

[16] *See* Cooperation Recognition Guidance at 2, n.4.



Gibson Dunn’s lawyers are available to assist in addressing any questions you may have regarding these developments. Please contact the Gibson Dunn lawyer with whom you usually work in the firm’s Derivatives practice group, or the following authors:

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