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CFTC Division of Enforcement Publishes Guidance on Civil Monetary Penalty Determinations

The CFTC Division of Enforcement (Division) of the U.S. Commodity Futures Trading Commission (CFTC) issued new [guidance](#) (Guidance) on May 20, 2020, that reflects the considerations of the Division when recommending civil monetary penalties (CMPs) to the CFTC in enforcement actions. The Guidance—which marks the first CMP guidance published by the Division since the CFTC published penalty guidelines in 1994[1]—will be incorporated into the CFTC's [enforcement manual](#) and will be binding on all Division staff.

Background

As part of its regulatory tools, the CFTC has authority under its enforcement powers to [impose CMPs](#) on individuals or entities.[2] CMPs may be determined on a per violation basis or up to triple the monetary gain to the "Respondent,"[3] whichever is greater, and the CFTC is required to assess such CMPs in relation to the gravity of the violation.[4] The Guidance details the facts that are evaluated and valued by the Division when preparing a CMP recommendation for the CFTC.

The Guidance serves as a milestone reflecting the regulatory agenda created per the leadership of CFTC Chairman Heath Tarbert. The CFTC recently established its four [core agency values](#): Commitment, Forward-thinking, Teamwork, and Clarity.[5] The Division explained that this Guidance "advances the core value of clarity." [6] In a related [press release](#), Chairman Tarbert expressed support for the Guidance, which is consistent with prior remarks that he has given regarding transparency. In December 2019, Chairman Tarbert gave [remarks](#) before the CFTC's December Open Meeting stressing the importance of clear and transparent regulation. Chairman Tarbert stated, "[a]s regulators, we must be mindful not only of what we do, but how we do it. Our shared vision for the CFTC is to be the global standard for sound derivatives regulation. Soundness is built on transparency: we serve our markets best when we act with the benefit of public input and dialogue. We also owe it to those who rely on our derivatives markets to regulate in the open." [7]

Guidance

The Guidance states that CFTC Staff will take a three-pronged approach in determining and recommending penalties to the CFTC, which evaluates: (a) the "gravity of the violation;" (b) "mitigating and aggravating circumstances;" and (c) "other considerations." [8] When conducting this assessment of each of the factors, "staff will be guided by the overarching consideration of ensuring that any proposed penalty achieves the dual goals of specific and general deterrence." [9]

Prong 1: Gravity of the Violation

The following factors and considerations are illustrative of the Division's analysis in most cases:

- The nature and scope of the violations, which includes facts such as (a) the number, duration, type, and degree of the violations; (b) the Respondent's role in the violations; (c) whether the Respondent acted with others; (d) Respondent's efforts to conceal the ongoing violations, if any; and (e) whether the violations resulted in harm to victims and, if so, the number and type of victims;
- The Respondent's state of mind (i.e., whether the conduct was intentional or willful);

- The nature and scope of any consequences flowing from the violations (including, for example, any harm (or risk of harm) to victims and market participants, benefit (or potential benefit) to the Respondent, or impact on market integrity, customer protection, or the CFTC's regulatory mission and priorities).

Prong 2: Mitigating and Aggravating Circumstances

The Guidance lists the following as examples of typical circumstances that are considered by the Division:

- Post-violation conduct, including (a) mitigating conduct (such as attempts to cure, return of victim funds, or efforts to improve a compliance program); and (b) aggravating conduct (such as concealment or obstruction of an ongoing investigation);
- Whether the Respondent self-reported the misconduct, as well as the extent of cooperation and remediation;
- Timeliness of remediation;
- Existence and effectiveness of the company's pre-existing compliance program;
- Prior misconduct (such as whether the Respondent is a recidivist);
- Pervasiveness of misconduct within the company, including responsibility of management; and
- Nature of any disciplinary action taken by the company with respect to the individuals engaged in misconduct.

Prong 3: Other Considerations

Division staff will also evaluate other considerations, including but not limited to the following:

- The total mix of remedies and monetary relief to be imposed on the Respondent (i.e., potential penalties in the CFTC action in addition to the potential remedies and relief to be imposed in parallel cases involving criminal authorities (including incarceration), other regulatory entities, or self-regulatory organizations);
- Monetary and non-monetary relief in analogous cases; and
- Conservation of CFTC resources, including timely settlement.

Implications for Market Participants

The Guidance provides greater clarity as to the facts and circumstances that are considered and prioritized by the Division but is stated to be largely consistent with the existing enforcement regime. The Guidance confirms that the CFTC's 1994 guidelines regarding CMPs will remain in place.[10] Nevertheless, while the Guidance reasons that the outlined factors generally reflect the existing practice within the Division, the Guidance serves as a more formal blueprint as to the Division's key interests in enforcement cases. For instance, the Guidance specifically notes mitigating and aggravating circumstances,[11] which were not addressed in the CFTC's 1994 guidelines. The inclusion of these factors—coupled with advisories issued by the Division regarding self-reporting and cooperation in 2017[12] and 2019[13]—suggest that these factors will be of increasing importance in Division inquiries and investigations. The Division's interest and attention toward cooperation mitigation is a point that companies should consider and evaluate early in the inquiry process. Companies should consult with experienced regulatory counsel with any questions and for guidance on the best approach in deciding to self-report or take other mitigating steps.

Companies should also note the increase in scrutiny of activities regarding commodities by other regulators. [Media outlets](#) have reported that the U.S. Department of Justice's fraud division has taken vested interest in pursuing investigations of commodity-related violations such as market manipulation and spoofing by formalizing a commodity fraud subunit of its division and hiring Avi Perry, an experienced trial attorney, to run

the unit.

Endnotes

[1] CFTC Policy Statement Relating to the Commission's Authority To Impose Civil Money Penalties, [1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,265 (Nov. 1, 1994).

[2] *See* 7 U.S.C. §§ 9(10), 13a, 13a-1(d).

[3] *See* Memorandum from James M. McDonald, Director, Division of Enforcement, to Division of Enforcement Staff, Civil Monetary Penalty Guidance (May 20, 2020), *available at* <https://www.cftc.gov/media/3896/EnfPenaltyGuidance052020/download> [hereinafter, "Guidance"] (explaining, "[t]he Commission brings charges against 'respondents' in administrative enforcement actions before the Commission and against 'defendants' in civil enforcement actions in U.S. District Courts. For purposes of this memorandum, 'Respondent' is used as a generic descriptor for a person charged.")

[4] *See* Commodity Futures Trading Commission, Inflation Adjusted Civil Monetary Penalties (Jan. 13, 2020), <https://www.cftc.gov/LawRegulation/Enforcement/InflationAdjustedCivilMonetaryPenalties/index.htm> (last visited June 3, 2020).

[5] *See* Commodity Futures Trading Commission, Mission, Vision, and Values, <https://www.cftc.gov/About/Mission/index.htm> (last visited June 3, 2020).

[6] *See* Guidance at 1.

[7] *See* Commodity Futures Trading Commission, Statement of Chairman Heath P. Tarbert Before the December 10, 2019 Open Meeting, <https://www.cftc.gov/PressRoom/SpeechesTestimony/tarbertstatement121019> (last visited June 3, 2020).

[8] *See* Guidance at 2.

[9] *Id.*

[10] *Id.*

[11] *Id.* at 3-4.

[12] On January 19, 2017, the Division issued two Enforcement Advisories outlining the factors the Division will consider in evaluating cooperation by individuals and companies in the agency's investigations and enforcement actions. *See* Enforcement Advisory: Cooperation Factors in Enforcement Division Sanction Recommendations for Companies (Jan. 19, 2017), *available at* <http://www.cftc.gov/idc/groups/public/@lrenforcementactions/documents/legalpleading/enfadvisorycompanies011917.pdf>; *see also* Enforcement Advisory: Cooperation Factors in Enforcement Division Sanction Recommendations for Individuals (Jan. 19, 2017), *available at* <http://www.cftc.gov/idc/groups/public/@lrenforcementactions/documents/legalpleading/enfadvisoryindividuals011917.pdf>.

In explaining the intent behind the advisories, the Division explained, "[t]he Division of Enforcement has long sought to promote voluntary compliance with the law while at the same time ensuring accountability for companies and individuals that violate the law. One way the Division seeks to achieve these dual goals is by providing companies and individuals with meaningful incentives to self-report wrongdoing, cooperate with Division investigations, and, where appropriate, remediate flaws in their controls and compliance." *See*

Enforcement Advisory, Commodity Futures Trading Commission, Division of Enforcement, Updated Advisory on Self Reporting and Full Cooperation, *available at*
<https://www.cftc.gov/sites/default/files/idc/groups/public/@lrenforcementactions/documents/legalpleading/enfadvisorys>

The Division issued an updated advisory in September 2017 in order to "provide greater transparency about what the Division requires from companies and individuals seeking mitigation credit for voluntarily self-reporting misconduct, fully cooperating with an investigation, and remediating, as well as what companies and individuals can expect from the Division if they meet these requirements. *See* Enforcement Advisory, Commodity Futures Trading Commission, Division of Enforcement, Updated Advisory on Self Reporting and Full Cooperation, *available at*

<https://www.cftc.gov/sites/default/files/idc/groups/public/@lrenforcementactions/documents/legalpleading/enfadvisorys>

[13] On March 6, 2019, the Division issued an Enforcement Advisory regarding self-reporting and cooperation for violations of the Commodity Exchange Act involving foreign corrupt practices.

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