Blogs
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The CFTC filed a record number of enforcement actions in 2019 against market participants, the majority of which involved commodities fraud, market manipulation, and spoofing.

As a result of these actions, the CFTC reports that it obtained over $1.3 billion in monetary sanctions and disgorgement in 2019—a 39% increase over the prior fiscal year. And at this year's ABA Derivatives & Futures Law Committee Winter Meeting, regulators from the CFTC and ICE warned market participants to expect these enforcement trends in spoofing and market manipulation to continue into 2020. **CFTC Seeks Parallel Enforcement with Market Regulators, but Coordinated Resolutions Scarce** The CFTC's Chief Counsel of the Division of Enforcement, Gretchen Lowe, commented that protecting market integrity continues to be a top priority at the CFTC. She noted that Enforcement is particularly focused on spoofing and market manipulation, as well as matters involving regulatory infractions, such as registrants' reporting obligations, failure to supervise, business conduct standards, and adequacy of remediation efforts. Lowe also signaled that Enforcement will continue to pursue "parallel cooperative enforcement efforts" with both domestic and foreign market regulators—including SROs and criminal enforcement authorities in the spoofing context. ICE Futures U.S. Enforcement Counsel, Frances Mendieta reinforced that the lines of communication are "very open" between ICE and the CFTC, and that the regulators may share information with each other over the course of an investigation. However, despite such extensive interplay between the regulators, coordinated or "global" resolutions appear to be the exception, rather than the rule. Both Lowe and Mendieta suggested that the sequential nature of the regulators' respective investigations can make it difficult to coordinate settlements. Consequently, while regulators seem keen to build on each other's investigations, the resolutions often occur months, or sometimes years apart, which can leave market participants in protracted cycle of enforcement involving the exact same conduct. **Regulators Seek Early and Extensive Cooperation** While the CFTC's Division of Enforcement has issued multiple advisories regarding self-reporting, cooperation, and remediation, its assessment of cooperation credit remains a discretionary exercise. Commenting on the factors that influence cooperation credit, Lowe stated that early self-reporting can be a critical component. For instance, Lowe explained that early disclosures to Enforcement could entail a registrant or market participant informing the CFTC that they have "found some issue; we're looking at it; and we will tell you more about." Of course, Lowe added that such conversations could generate document requests or a subpoena from Enforcement. In the end, Enforcement is looking for a "fulsome" disclosure of relevant facts. Lowe also expressed her opinion that there are circumstances where facts learned through an internal investigation will be helpful to the CFTC's case, and will not result in a perceived waiver of attorney-client privilege. Importantly, Lowe acknowledged that cooperation does not necessarily mean "agreement as to the law"—in other words, firms "can cooperate and advocate." ICE's Enforcement Counsel added that cooperation credit is similarly discretionary within its Market Regulation division. But, Mendieta opined the "rules are clear" that sitting for an interview and answering Market Regulation's questions is not enough to garner cooperation credit. Rather, Market Regulation looks for firms to "go above and beyond what is required by exchange rules" including conducting internal investigations; implementing remediation; or taking action with respect to individuals who cause violations. But even in under such circumstances, Mendieta cautioned, there is no set "discount" that respondents will obtain in terms of relief from monetary sanctions, if they receive any credit at all. Thus, while cooperation credit remains a critical factor for any market participant in determining whether to self-disclose a potential violation, the calculus remains nebulous. Firms will need to give weighted consideration as to *what* to disclose; *when* to disclose; and to *whom* to disclose. As became clear during the panel discussion amongst market regulators, cooperation with one entity will not necessarily garner cooperation credit with other regulators—even when those regulators are, themselves, coordinating parallel investigations.

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