

HOW MUCH DO THE CFTC ENFORCEMENT-RELATED ADVISORIES CHANGE THE CALCULUS TO SELF-REPORT OR COOPERATE IN AN INVESTIGATION?

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The Division of Enforcement of the U.S. Commodity Futures Trading Commission (“CFTC” or “the Commission”) recently issued an advisory (“the Enforcement Advisory”) revoking prior guidance for its staff in recommending enforcement resolutions, providing a new mitigation-credit calculation to incentivize firms to self-report potential violations and to cooperate in investigations, and establishing that a firm may receive self-reporting credit when it reports a potential violation to the relevant operating division (the Division of Clearing and Risk, Division of Market Oversight, or the Market Participants Division (the Operating Divisions)), rather than to the Division of Enforcement itself. Soon after, the Operating Divisions and the Division of Enforcement issued a follow-up advisory explaining the criteria the Operating Divisions will apply before referring to a matter to the Enforcement Division (the Referral Advisory).

The Enforcement Advisory has been called by some a “game-changer”—is it? As discussed below, the Enforcement Advisory provides helpful information for those considering whether to self-report a potential violation of the Commodity Exchange

Act (“CEA”) or the extent to which to cooperate in a pending investigation. Both Acting CFTC Chairman Caroline Pham and Enforcement Director Brian Young have spoken about the two Advisories and provided helpful explanations and thoughts as to aspects to be addressed in the future. As with many such developments, experience with implementation may be necessary to fully evaluate how much the Advisories change the calculus of whether to self-report or cooperate. We discuss below the details of the Advisories, considerations for how much change the industry may expect from implementation of them, and CFTC responses to some of the questions raised below.

OVERVIEW

With the Enforcement Advisory,¹ the CFTC’s Division of Enforcement has, for the first time, revoked prior guidelines, identifying six in the Advisory including as contained in the 2020 Enforcement Manual,² and replaced them with a new statement on self-reporting, cooperation, and remediation. The Enforcement Advisory is in furtherance of Acting CFTC Chairman Pham’s stated goal to “ensure accountability” through transparency³ as well as President Trump’s directive to the heads of federal agencies to refocus “limited enforcement resources.”⁴ In discussing the Enforcement Advisory, Enforcement Director Brian Young has emphasized the intentions behind it: Predictability and transparency lead to greater cooperation and more instances of self-reporting, and that should result in greater efficiency in the Division’s allocating its resources, ultimately allowing the Division to better focus on Commission priorities such as those committing fraud and returning money to victims of fraud.⁵

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The Enforcement Advisory breaks with prior guidance in several ways, including by crediting self-reports to Operating Divisions, crediting self-reports that may already be required by regulation, offering a safe harbor for erroneous or incomplete self-reports that are later supplemented or corrected and, most notably, providing a framework for calculating rewards for voluntary self-reporting, cooperation, and remediation. The Enforcement Advisory is likely to change, at least to some extent, the calculus by which firms⁶ consider the timing or extent of their self-reporting or cooperation with Enforcement Division investigations.

The Referral Advisory expands on the self-reporting aspects of the Enforcement Advisory by describing the criteria the Operating Divisions will use for determining whether to refer a self-report to the Enforcement Division.⁷ It has long been the case that when an Operating Division learns of a potential violation of the CEA or CFTC regulations, the Operating Division may refer the matter to the Division of Enforcement. However, Commission staff has never previously informed the public of what circumstances may give rise to a referral.

As with the Enforcement Advisory, Acting Chairman Caroline Pham has touted the Referral Advisory's additional clarity, and its utility to firms considering whether to self-report a noncompliance issue to the appropriate Operating Division without what she called "undue concern" regarding referral for an enforcement action.⁸ The Acting Chairman also observed in a recent speech that this approach may help the Commission better identify emerging issues, risks, or trends earlier than it would otherwise.⁹

GUIDANCE ON SELF-REPORTING

The Enforcement Advisory sets out levels of self-reporting and various factors that staff may evaluate when determining the appropriate discount to a civil monetary penalty to recommend in an enforcement resolution.¹⁰ The Enforcement Advisory sets forth three tiers of self-reporting: (1) none, (2) satisfactory, and (3) exemplary.

As would be expected, the discount increases based on the completeness, quality, and materiality of the information provided. Enforcement Division staff are also advised to reward providing additional information that enables the conservation of investigation resources. Staff are to consider

factors such as timeliness and voluntariness—*i.e.*, whether the self-report was made "reasonably promptly" upon discovery of the potential violation and without the imminent threat of public exposure.

Specifically, staff will determine whether it was reasonable to assume that the Enforcement Division could have learned of the violation from the public record or the knowledge of another government actor, as in the knowledge gained from a parallel investigation by the U.S. Department of Justice ("DOJ") or another federal agency.¹¹ The Enforcement Advisory does not address treatment for what staff may learn from self-regulatory organizations such as the National Futures Association or futures exchanges.

In considering the factors, Enforcement Division staff are to assign a tier of self-reporting, as in the following examples:

- (1) *None*: The firm notifies the Commission of a potential violation but refuses to provide any relevant information about the date of the occurrence, method of discovery, root cause of the event, or remediation. The self-report is not reasonably designed to provide notice to the Commission.
- (2) *Satisfactory*: The firm notifies the Commission of a potential violation and includes sufficient information about the occurrence, but the firm does not provide all "material" information reasonably related to the potential violation and known to the firm at the time of making the self-report.
- (3) *Exemplary*: The firm notifies the Commission of a potential violation, includes all material information known to the firm at the time of the self-report, and provides additional information that saves the Enforcement Division from having to expend investigatory resources in developing the factual circumstances of the occurrence.

The Enforcement Advisory differs from prior guidance on self-reports in several respects.

Prompt self-reporting is favored over a firm's waiting to ensure the self-report is full and complete. Enforcement Division staff are also advised to credit self-reports made

even where the firm's own internal investigation is still ongoing, so long as the firm used "best efforts" to determine relevant facts and disclosed all facts known at the time, and continues to cooperate.

To further incentivize firms, material and timely self-reports are protected under a safe harbor when the firm later corrects inaccuracies. This is significant, in that staff has previously considered charging to-be-corrected information as a false statement under 7 U.S.C.A. § 9(2). The Enforcement Advisory's safe harbor requires that the self-report be made in good faith, and that the inaccurate information is supplemented and corrected promptly after discovery of the inaccurate information.

The Enforcement Advisory also provides credit for timely self-identification of potential violations even where such reports are already required pursuant to CFTC regulations. As recently clarified, this includes timely identification made in the annual Chief Compliance Officer's report, which disclosure itself may warrant self-reporting credit.¹²

The Enforcement Advisory affirms that "the attorney-client privilege and work product doctrine are fundamental to the American legal system and the administration of justice" and notes that it does not intend to affect these rights. This is a helpful reinforcement of previous references to the privilege, such as in the Enforcement Manual and other self-reporting and cooperation advisories. The explicit recognition is necessitated by a previous advisory that considered waiver of these privileges as a cooperation factor.¹³

Self-reports no longer need to be made only to Enforcement and will be credited when made to the CFTC division that is the primary division responsible for interpreting and applying the applicable regulations that are the subject of the potential violation (*i.e.*, the relevant Operating Division). Where the potential violation relates to multiple Divisions, only one self-report to one such Division is needed. But Director Young has emphasized that self-reports should be to the appropriate Operating Division and that there should be no forum-shopping.¹⁴

The Enforcement Advisory did not specify whether and how an Operating Division should notify the Enforcement

Division of a self-report, nor does it specify whether the Operating Division will have input on evaluating the appropriate tier for the self-report. It did state, however, that additional guidance would be forthcoming to establish "transparent and consistent criteria" for enforcement referrals by the Operating Divisions.¹⁵ The Referral Advisory soon followed.

GUIDANCE ON REFERRALS OF SELF-REPORTS TO ENFORCEMENT

The Referral Advisory fleshes out the Enforcement Advisory's announcement that self-reporting credit may be available where a firm reports a potential violation to an Operating Division, rather than directly to the Division of Enforcement. It states that the Operating Divisions may refer potential violations that are "material" to the Division of Enforcement. To determine whether a matter is material, the Operating Divisions are to apply a "reasonableness" standard and may refer a matter involving one or more of the following:

- (1) *Egregious violations*: Egregious or prolonged systematic deficiencies or material weakness of the supervisory system, controls, or program;
- (2) *Intent*: Knowing and willful misconduct by management, such as conduct evidencing an intent to conceal a potential violation, or supervision or noncompliance issue;
- (3) *Lack of remediation efforts*: Lack of substantial progress toward the completion of a remediation plan for an unreasonably lengthy period of time, such as several years, particularly after a sustained and continuous process with the appropriate Operating Division.

For a potential violation that is not deemed material, the appropriate Operating Division is to address the matter directly with the self-reporting party without referral to the Division of Enforcement. The Referral Advisory indicates that this will generally apply to matters involving supervision or noncompliance issues (as opposed to conduct involving, for example, fraud, manipulation, or abuse), unless the potential violations are nevertheless material under the criteria provided. It advises firms to use their own judgment

to determine whether it is appropriate to self-report a material violation directly to the Division of Enforcement in the first instance.¹⁶

Together with the Enforcement Advisory, the Referral Advisory marks an important change in how the CFTC's Divisions are thinking about the Commission's separate but related functions as a regulator and enforcement agency. As a practical matter, this change should mean that staff with the most direct expertise and day-to-day involvement in technical compliance issues under the CEA and CFTC regulations generally would be the ones ensuring that the requirements are applied properly and consistently. Conversely, it leaves to the Division of Enforcement the task of addressing serious misconduct such as fraud and manipulation, where technical compliance issues may not be front and center.

GUIDANCE ON COOPERATION AND REMEDIATION

The Enforcement Advisory also expands on prior policies regarding a firm's "substantial" cooperation and remediation,¹⁷ which may serve as a strong signal as to how the administration wants to provide firms a cognizable carrot and not only the opaque stick. Now, staff are to assess cooperation based on a four-tier scale: (1) none, (2) satisfactory, (3) excellent, and (4) exemplary. At tiers (2) through (4), staff are to consider whether the cooperation was timely, substantial, voluntary, thorough, and consistently offered "high-level" and substantial assistance. For example:

- (1) *None*: The firm only complies in accordance with established legal obligations.
- (2) *Satisfactory*: The firm substantially assists by providing documents and information, including the arrangement of witness interviews. The firm also provides analysis on the legal and factual issues identified as a part of its internal investigation into the potential violation.
- (3) *Excellent*: The firm provides consistent, substantial assistance by presenting thorough analysis of the root cause of the occurrence and corrective action for remediation. The firm may also offer up internal or external expert testimony.

- (4) *Exemplary*: The firm goes above and beyond by providing consistent, material assistance. The firm significantly expends its own resources in identifying and remediating the problem. Indeed, the firm has already significantly completed its remediation plan.

Notably, this includes potential credit for cooperation that is often typical such as voluntarily providing documents without a subpoena, *i.e.*, what Enforcement Division staff previously had denigrated as "lowercase 'c' cooperation" as compared to more extraordinary efforts that were deemed to be "capital 'C' cooperation."

Mitigation credit is only available when Staff has concluded that the potential violation has either been remediated or the firm has a remediation plan in place. The remediation plan may include the use of a compliance monitor or consultant, which is consistent with prior practice.¹⁸ The Enforcement Advisory makes clear that remediation is the touchstone. Indeed, the highest tier of cooperation-based mitigation credit—called "exemplary cooperation"—is awarded only when the firm has engaged in "significant completion" of the remediation plan.¹⁹

The Enforcement Division's assessment of appropriate credit, even under the new Enforcement Advisory, remains subjective and highly fact-intensive. Staff are to evaluate the appropriateness of the remediation plan. Staff also are to weigh uncooperative behavior by the firm against any cooperation, no matter how substantial. A firm's untimely compliance with subpoenas, attempts to obscure the discovery of documents, or improper shaping of witness testimony may be deemed uncooperative, even if the efforts did not result in the "unnecessary expenditure" of Enforcement Division resources.

Additional markers of uncooperative behavior include a firm's "willful blindness" and a failure to self-report in the face of willful misconduct, harm suffered by a customer or counterparty, or significant financial losses. Staff are to evaluate uncooperative conduct by employing an "objective reasonableness" standard. Though not expressly defined in the Enforcement Advisory, "objective reasonableness" under the law generally requires analyzing what a reasonable person would have done under the circumstances.

MITIGATION CREDIT MATRIX

The Enforcement Advisory maintains the Enforcement Division's prior-stated policies of rewarding self-reporting and cooperative firms with recommendations for reduced penalties.

But, for the first time, the Enforcement Division provides a mitigation credit matrix by which staff can determine a presumptive discount to a recommended penalty²⁰:

| | Tier 1: No Cooperation | Tier 2: Satisfactory Cooperation | Tier 3: Excellent Cooperation | Tier 4: Exemplary Cooperation |
|---|-----------------------------------|---|--|--|
| Tier 1: No Self-Report | 0% | 10% | 20% | 35% |
| Tier 2: Satisfactory Self-Report | 10% | 20% | 30% | 45% |
| Tier 3: Exemplary Self- Report | 20% | 30% | 40% | 55% |

The Calculation

Under the Commodity Exchange Act, civil monetary penalties for nonregistered entities²¹ are the greater of \$140,000 or triple the gain for non-manipulation violations (and up to \$500,000 per violation for registered entities), and for manipulation or attempted manipulation, the greater of \$1 million or triple the gain for nonregistered entities (and up to \$1 million per each violation for registered entities).²² For the first time, the Enforcement Advisory offers credits off civil monetary penalties²³—up to 55%—depending on the tiers of self-reporting and cooperation.

Staff retain the discretion to deviate from the mitigation credit matrix. In extraordinary circumstances, the Enforcement Division may even recommend a declination of the penalty entirely. However, declination in this respect is a difficult bar to reach, requiring firms to be the first to self-report pervasive fraud, manipulation, or abuse causing harm to multiple parties before consistently providing material assistance as an exemplary cooperator.

Challenges of Implementation

With all of the helpful provisions in the Enforcement Advisory, it is not without challenges in its implementation. A primary one is: what is the base from which the discount will be applied? As noted above, there are statutory requirements for calculating civil monetary penalties (CMPs)—but the Commission has rarely used a precise calculation in determining such penalties.

The matrix could be viewed as analogous to guidance set

out by the Department of Justice (DOJ) in calculating discounts off penalties, such as for violations of the Foreign Corrupt Practices Act (FCPA), where the threshold for DOJ is the U.S. Sentencing Guidelines.²⁴ Indeed, Acting Chairman Pham praised the transparency of the new mitigation credit matrix as “aligned with best practices for assessing penalties followed by the [DOJ] and other U.S. financial regulators.”²⁵ Under the DOJ's tiered system of self-disclosure and cooperation, potential FCPA violators can receive a full declination of criminal charges or reduced criminal penalties up to 75% off the low end of the penalty under the U.S. Sentencing Guidelines. Even where other aggravating factors exist, DOJ prosecutors have faithfully applied a credit to the low end of the appropriate criminal penalty under the U.S. Sentencing Guidelines to an FCPA offender's sentence.²⁶

Here, like the DOJ policy, the mitigation credit matrix directs staff to engage in a subjective and fact-intensive analysis of the behavior before applying a discretionary calculation. But, distinctly, the DOJ's credits for self-reporting and cooperation are tied to the U.S. Sentencing Guidelines, which set forth precise figures that are traditionally used in setting the penalty. By contrast, the CFTC's statutory limits on civil monetary penalties are not comparable to those in the Sentencing Guidelines and are often not used as a precise base calculation for Commission settlement orders.

In addressing the concern, Director Young has provided more explanation and context. He has acknowledged that the process will not resemble the aspects of DOJ's credits

that operate more like a “numerical exercise.”²⁷ He also noted that the Enforcement Division will look to older settlement “precedents” in determining a relevant figure, and not only those issued within the past few years, which may have the effect of lowering a CMP.²⁸ He explained that the process will begin with staff’s calculating a CMP and describing how the number was arrived at, and then applying the credit to that number.²⁹ He further explained that there will not be a “backing into” a desired figure, because doing so would defeat the purpose of the incentivization.

Against this backdrop, it will remain to be seen how precisely the mitigation credit matrix is implemented in practice. It was criticized by CFTC Commissioner Kristin N. Johnson as posing the risk of “muddy[ing] the waters,” and noted that the Commission “must exercise caution when advancing new reporting, cooperation, and remediation regimes or rescinding long-standing guidance.”³⁰

WHAT’S NEXT FOR ENFORCEMENT?

Although the Enforcement Advisory addresses many of the provisions in previous guidance (e.g., the call for increased CMPs), there remain other aspects not yet addressed. For example, the immediate past guidance called for admissions by respondents in settling actions, as well as increased use of Commission-imposed monitors and voluntarily engaged consultants.

While it may be possible to make an educated guess that the themes underpinning the Enforcement Advisory will not result in increased requirements of admissions or monitors/consultants, that have not yet been explicitly addressed.

In the meantime, the Enforcement Advisory remains purely discretionary and, as with prior advisories, does not require the Enforcement Division to “recommend, or the Commission to impose or authorize, a reduction of sanctions based on the presence or absence of particular cooperation factors.”³¹ Along the same lines, although the Referral Advisory clarifies the conditions under which the Operating Divisions may refer a matter to the Division Enforcement, Enforcement staff may learn of such violations directly, such as through tips from whistleblowers. Nothing in the Referral Advisory guarantees that Enforcement staff will not pursue those leads.

Historically, the Commission has imposed eye-popping

settlements in the hundreds of millions or even \$1 billion. The Enforcement Advisory sets forth a framework that may reduce the level of penalties overall, but experience with implementation of the Enforcement Advisory will be the ultimate guide for firms anticipating or in the midst of a CFTC investigation.

ENDNOTES:

¹CFTC, *Advisory on Self-Reporting, Cooperation, and Remediation* (Feb. 25, 2025).

²CFTC, *Advisory Regarding Penalties, Monitors and Consultants, and Admissions in CFTC Enforcement Actions* (Oct. 17, 2023); CFTC, *Cooperation, Self-Reporting, and Remediation Recognition in Commission Orders* (Oct. 29, 2020); CFTC, *Advisory on Self-Reporting and Cooperation for CEA Violations Including Foreign Corrupt Practices* (Mar. 6, 2019); CFTC, *Updated Advisory on Self-Reporting and Full Cooperation* (Sept. 25, 2017); CFTC, *Cooperation Factors in Enforcement Division Sanction Recommendations for Companies* (Jan. 19, 2017); CFTC, *Cooperation Factors in Enforcement Division Sanction Recommendations for Individuals* (Jan. 19, 2017). See also CFTC, *Enforcement Manual* (May 20, 2020).

³CFTC, *Press Release, CFTC Releases Enforcement Advisory on Self-Reporting, Cooperation, and Remediation*, No. 9054-25 (Feb. 25, 2025) (citing Exec. Order No. 14219, *Ensuring Lawful Governance And Implementing The President’s “Department Of Government Efficiency” Deregulatory Initiative* (Feb. 19, 2025)).

⁴Exec. Order No. 14219, *supra* note 3.

⁵Brian Young, Director of Division of Enforcement, Commodity Futures Trading Commission, Remarks at FIA Webinar: CFTC Self-Reporting, Cooperation, and Remediation Advisory: A Game-Changer (Mar. 27, 2025) (“Young webinar remarks”).

⁶The Advisory is directed to firms, not individuals, but there may be applications to individuals as well. Director Young recently confirmed that the Advisory applies to those registered with the Commission, as well as non-registrants. *Id.*

⁷CFTC, *Staff Advisory on Materiality or Other Criteria That Operating Divisions Will Use to Determine Referrals to the Division of Enforcement* (Apr. 17, 2025).

⁸Acting Chairman Caroline Pham, Commodity Futures Trading Commission, Keynote Address: FIA BOCA50 (Mar. 11, 2025).

⁹*Id.*

¹⁰These factors are not unlike prior similar policies. See, e.g., CFTC, *Cooperation, Self-Reporting, and Remediation Recognition in Commission Orders* (2020), *supra* note 2.

¹¹CFTC, *Advisory on Self-Reporting, Cooperation, and Remediation*, supra note 1 at 3.

¹²Brian Young, Director of Division of Enforcement, Commodity Futures Trading Commission, Remarks at ABA 40th White Collar Crime Institute (Mar. 5, 2025) (“Young ABA remarks”).

¹³CFTC, *Enforcement Advisory Cooperation Factors in Enforcement Division Sanction Recommendations* (Aug. 11, 2004).

¹⁴Brian Young, Director of Division of Enforcement, Commodity Futures Trading Commission, Remarks at SIFMA C&L 2025 Annual Seminar (Mar. 24, 2025).

¹⁵CFTC, *Advisory on Self-Reporting, Cooperation, and Remediation*, supra note 1 at 2 n.3.

¹⁶CFTC, *Staff Advisory on Materiality or Other Criteria That Operating Divisions Will Use to Determine Referrals to the Division of Enforcement*, supra note 7 at 2-3.

¹⁷CFTC, *Cooperation, Self-Reporting, and Remediation Recognition in Commission Orders*, supra note 2.

¹⁸See CFTC, *Advisory Regarding Penalties, Monitors and Consultants, and Admissions in CFTC Enforcement Actions*, supra note 2.

¹⁹CFTC, *Advisory on Self-Reporting, Cooperation, and Remediation*, supra note 1 at 8, 12.

²⁰Note, however, in certain circumstances the presumption in favor of a reward for self-reporting and cooperative conduct is rebutted and credit is unavailable, as in the case of fraud or manipulation resulting in harm to a client or counterparty.

²¹“Registered entities” include: boards of trade designated as contract markets under the Commodity Exchange Act; derivatives clearing organizations registered with the CFTC; swap execution facilities registered with the CFTC; swap data repositories registered with the CFTC; and “with respect to [] contract[s] that the Commission determines [are] a significant price discovery contract, any electronic trading facility on which the contract[s] [are] executed or traded.” 7 U.S.C.A. § 1a(40); see also CFTC, *Be Smart: Check Registration & Backgrounds Before You Trade*, available at <https://www.cftc.gov/check>.

²²7 U.S.C.A. §§ 9(10), 13a. As adjusted for inflation, civil penalties are limited to \$206,244 (\$1,136,100 for registered entities) for non-manipulation violations, and \$1,487,712 for manipulation. *Federal Register, Annual Adjustment of Civil Monetary Penalties To Reflect Inflation-2025* (Jan. 24, 2025).

²³The Advisory applies credits to civil monetary penalties, not disgorgement or restitution.

²⁴15 U.S.C.A. §§ 78ff(c)(1)(B), (c)(2)(B); 17 C.F.R. § 201.1005; 15 U.S.C.A. § 78u(d)(1)-(3); 15 U.S.C.A. § 78u-3(a), (e). See also DOJ, A Resource Guide to the U.S. Foreign Corrupt Practices Act (Jul. 2020); DOJ Policy, Criminal Division Corporate Enforcement and Voluntary Self-Disclosure Policy, 9-47.120 (Aug. 1, 2024).

²⁵CFTC, *CFTC Releases Enforcement Advisory on Self-Reporting, Cooperation, and Remediation*, supra note 3.

²⁶See DOJ, *Press Release, Commodities Trading Company Agrees to Pay Over \$98M to Resolve Foreign Bribery Case*, No. 23-1424 (Dec. 14, 2023) (“In light of these considerations, the criminal penalty calculated under the U.S. Sentencing Guidelines reflects a 15% reduction off the bottom of the applicable guidelines fine range.”). Of note, the implementation of the DOJ policy has very recently been thrown further into flux given President Trump’s executive order pausing all FCPA enforcement. Exec. Order No. 14209, *Pausing Foreign Corrupt Practices Act Enforcement to Further American Economic and National Security* (Feb. 10, 2025).

²⁷Young webinar remarks, supra note 5.

²⁸Young ABA remarks, supra note 12.

²⁹*Id.*

³⁰CFTC, Statement of Commissioner Kristin N. Johnson on the Enforcement Advisory on Self-Reporting, Cooperation and Remediation (Feb. 25, 2025).

³¹*Id.*, at 14 (“The Advisory should not be read as requiring the Division to recommend, or the Commission to impose or authorize, a reduction of sanctions based on the presence or absence of particular cooperation factors.”). Compare with CFTC, *Advisory Regarding Penalties, Monitors and Consultants, and Admissions in CFTC Enforcement Actions*, supra note 2 at 7.

