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Sidley Austin Discusses CFTC Advisory on Self-Reporting, Cooperation, and Remediation

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Comment 

On February 25, 2025, the Division of Enforcement (Enforcement Division) of the U.S. Commodity Futures Trading Commission (CFTC) released an Enforcement Advisory on Self-Reporting, Cooperation, and Remediation (Advisory). The Advisory is the Enforcement Division's "sole policy on self-reporting, cooperation, and remediation," rescinding the Enforcement Division's prior guidance.¹

The Advisory aims to broaden incentives for self-reporting, cooperation, and remediation by (1) offering transparent guidance on the criteria that the Enforcement Division will use to evaluate market participants' self-reporting and cooperation and, (2) for the first time, creating a formula establishing the presumptive penalty discount (Mitigation Credit) that a given level of self-reporting or cooperation will yield.

The Advisory follows a recently announced reorganization at the Enforcement Division intended to "combat fraud and help victims while ending the practice of regulation by enforcement."² In keeping with this shift, Acting Chair Caroline Pham stated in the press release announcing the Advisory that it "will enable the CFTC to do more with less and free up enforcement resources to focus relentlessly on catching fraudsters and scammers, helping victims, and promoting market integrity."³

Key Takeaways

The Advisory provides guidance for market participants seeking Mitigation Credit for self-reporting, cooperation, and remediation activities, allowing market participants to make more informed decisions regarding how to address potential violations of the Commodity Exchange Act and CFTC regulations.

Investing in remedial measures and improvements to compliance programs should be top of mind for companies seeking to take advantage of the available Mitigation Credit. The Advisory states that "[a]s a general matter, the Division will only recommend providing Mitigation Credit" in circumstances where "the potential violation and its root cause have either been remediated or [] there is a remediation plan in place that is appropriate based on the facts and circumstances."⁴ Put differently, remedial measures may be viewed as a threshold requirement for any Mitigation Credit.

The Enforcement Division retains discretion to consider additional factors when determining whether and to what extent Mitigation Credit should be granted, including culpability, recidivism, and severity of a violation. The Enforcement Division also retains substantial discretion in determining the initial penalty amount to which any Mitigation Credit discount will be applied. As a result, companies will still face challenges in fully assessing the benefit that they may receive from self-reporting. Further, companies that self-report to the CFTC could also face separate enforcement proceedings by U.S. futures exchanges for violations of exchange rules. The U.S. futures exchanges are not bound to follow the Advisory and do not have written guidance recognizing "cooperation credit" for self-reporting.

The Advisory comes on the heels of years of robust messaging from the Department of Justice (DOJ) seeking to encourage voluntary self-disclosures, cooperation, and remediation and borrows from the conceptual framework set forth in the DOJ's corporate enforcement policies.⁵ Indeed, CFTC Enforcement Director Brian Young cited his experience in criminal practice in support of the Advisory.⁶ While there have been notable recent policy and priority shifts at the DOJ,⁷ the issuance of the Advisory may be an early sign that there will not be a complete paradigm shift with respect to incentives for corporate voluntary self-disclosures across federal agencies. Furthermore, when fact patterns involve the prospect of criminal as well as civil violations,

companies should be aware that the DOJ’s “anti-piling-on” policy, which allows for reduced penalties in parallel civil/criminal cases arising from the same facts, remains in effect.⁸

Self-Reporting and Cooperation

Criteria for Self-Reporting

The Advisory lays out several criteria for evaluating self-reports, including whether the reports are voluntary, made to the CFTC, timely, and complete.

To qualify as voluntary, the information must have been provided prior to an imminent threat of exposure of the violation to the CFTC. The Advisory makes clear that information that must be included in mandatory annual reports can be eligible for Mitigation Credit “so long as the self-report was made in a timely manner notwithstanding the timing of the annual report.”⁹

The information must be provided to an “appropriate division” of the CFTC. In a shift from prior policy, this requirement can be met by informing the Enforcement Division or by informing the relevant operating division. A market participant need only report to a single division, but it must be prepared to provide the Enforcement Division with evidence of a self-report to another division upon request.

In addition, the self-report must be prompt. Evaluation of this factor will take into account the time required to discover, escalate, and investigate a potential violation. Finally, to receive full Mitigation Credit, the self-report must be complete, containing all material information known at the time of the self-report. A market participant can receive full credit for completeness if it exercised best efforts to determine relevant facts and disclosed additional facts as they were identified.

The Advisory establishes a safe harbor against penalties for false or misleading statements, provided that the report was made in good faith and was corrected promptly after the discovery of any inaccuracy.

Self-Reporting Tiers

The Advisory establishes three tiers for self-reporting: “**No Self-Report**” (Tier 1) applies where a market participant provided no new information. It also applies to information unrelated to the potential violation and to information not reasonably designed to provide notice. “**Satisfactory Self-Report**” (Tier 2) applies when a self-report occurred but failed to include material information known at the time. “**Exemplary Self-Report**” (Tier 3) applies where a market participant reports all material information known at the time and provides additional information that conserves Enforcement Division resources.

Cooperation Tiers

The Advisory also provides guidance on how the Enforcement Division will evaluate a market participant’s cooperation. “**No Cooperation**” (Tier 1) applies where a market participant complied with compulsory process but did not provide substantial assistance. “**Satisfactory Cooperation**” (Tier 2) applies where a market participant complied with compulsory process and provided substantial assistance, such as voluntarily providing documents or information, giving presentations, or making witnesses available. “**Excellent Cooperation**” (Tier 3) applies where the requirements of Tier 2 are met and a market participant provided further substantial assistance, such as by conducting an internal investigation or providing a thorough analysis of the violation, its cause, and corrective action taken. “**Exemplary Cooperation**” (Tier 4) applies where the requirements of Tier 3 are met “at a consistently high level” and significant remediation has been completed.¹⁰

As part of the cooperation analysis, the Enforcement Division will consider remediation, including whether the market participant took immediate steps to address the issue, performed a gap analysis, and implemented a remediation plan. Separately, divisions within the CFTC (e.g., the Market Participants Division or the Division of Market Oversight) will assess remediation plans and determine whether to recommend the appointment of a monitor or consultant to oversee remediation efforts.

When determining the appropriate cooperation tier, the Enforcement Division will also consider whether the market participant provided material assistance that led to a timely resolution; the timeliness, nature, and extent of the cooperation; and the adequacy and thoroughness of submissions. Importantly, a waiver of a person’s constitutional right to not self-incriminate under the Fifth Amendment or an invocation of that right will not affect cooperation credit.

Mitigation Credit for Self-Reporting and Cooperation

The Advisory provides a matrix with the percentage by which a penalty presumptively will be discounted, based on a market participant’s self-reporting and cooperation tiers. The publication of specific percentages and the establishment of entirely separate analyses for self-reporting credit and cooperation credit are departures from recent Enforcement Division practice in which it announced factors that could increase or decrease Mitigation Credit but did not announce the specific discount for particular levels of self-reporting or cooperation. The Advisory does not give guidance regarding benchmark penalty amounts, so the actual penalties that a market participant might face for a given violation remain uncertain.

Additional Issues Addressed in the Advisory

Uncooperative conduct — Conduct can offset Mitigation Credit if it involves bad faith, willful blindness to red flags, or the failure to correct or self-report following the discovery of a material violation.

Declination — The Advisory notes that “[i]n extraordinary circumstances — for example where a Person is the first to self-report pervasive fraud, manipulation, or abuse involving multiple parties, and also provides Exemplary Cooperation — the Division may recommend a declination,” that is, that no penalty be assessed.¹¹

In a departure from the Enforcement Division’s most recent (now-rescinded) guidance, which focused heavily on deterring recidivist actors,¹² the Advisory mentions recidivism only briefly as a factor the Enforcement Division may consider.

ENDNOTES

¹ Enforcement Advisory: Advisory On Self-Reporting, Cooperation, and Remediation (Feb. 25, 2025) (Advisory) at 1 n3, <https://www.cftc.gov/PressRoom/PressReleases/9054-25>.

² Press Release, CFTC Division of Enforcement to Refocus on Fraud and Helping Victims, Stop Regulation by Enforcement (Feb. 4, 2025), <https://www.cftc.gov/PressRoom/PressReleases/9044-25>.

³ Press Release, CFTC Releases Enforcement Advisory on Self-Reporting, Cooperation, and Remediation (Feb. 25, 2025) (Advisory Press Release), <https://www.cftc.gov/PressRoom/PressReleases/9054-25>.

⁴ Advisory at 9 (emphasis added).

⁵ U.S. Department of Justice, Criminal Division Corporate Enforcement and Voluntary Self-Disclosure Policy, <https://www.justice.gov/criminal/criminal-fraud/file/1562831/dl?inline>; see also Assistant Attorney General Kenneth A. Polite Jr., Remarks on Revisions to the Criminal Division’s Corporate Enforcement Policy (Jan. 17, 2023), <https://www.justice.gov/archives/opa/speech/assistant-attorney-general-kenneth-polite-jr-delivers-remarks-georgetown-university-law>; Press Release, Damian Williams and Breon Peace Announce New Voluntary Self-Disclosure Policy for United States Attorney’s Offices (Feb. 22, 2023), <https://www.justice.gov/usao-edny/pr/damian-williams-and-breon-peace-announce-new-voluntary-self-disclosure-policy-united>; Principal Deputy Assistant Attorney General John P. Cronan, Remarks at the 3rd Annual GIR Live DC Fall Event (Oct. 25, 2018), <https://www.justice.gov/archives/opa/speech/principal-deputy-assistant-attorney-general-john-p-cronan-justice-department-s-criminal-1>.

⁶ Advisory Press Release, *supra* note 3.

⁷ See, e.g., Sidley Update, U.S. DOJ Hits the Brakes on FCPA Enforcement and Announces Other Key Policies at the Beginning of Attorney General Bondi’s Tenure (Feb. 12, 2025), <https://www.sidley.com/en/insights/newsupdates/2025/02/us-doj-hits-the-brakes-on-fcpa-enforcement-and-announces-other-key-policies>.

⁸ See Sidley Update, New U.S. Department of Justice Policy on Coordination of Corporate Penalties (Jun. 7, 2018), <https://www.sidley.com/en/insights/newsupdates/2018/06/new-us-department-of-justice-policy>

⁹ Advisory at 3.

¹⁰ *Id.* at 8.

¹¹ *Id.* at 14.

¹² Enforcement Advisory: Advisory Regarding Penalties, Monitors and Consultants, and Admissions in CFTC Enforcement Actions (Oct. 17, 2023), <https://www.cftc.gov/PressRoom/PressReleases/8808-23>.

This post comes to us from Sidley Austin LLP. It is based on the firm’s memorandum, “U.S. CFTC Enforcement Advisory on Self-Reporting, Cooperation, and Remediation,” dated March 6, 2025, and available [here](#).