

CFTC Announces New Enforcement Strategy Focused on Self-Reporting

September 26, 2017

In a September 25, 2017 speech in New York, U.S. Commodity Futures Trading Commission (the “CFTC”) Division of Enforcement (the “Division”) Director James McDonald outlined the CFTC’s focus on creating greater incentives for self-reporting and cooperation in order to deter and detect misconduct in the commodities markets. Director McDonald’s speech accompanied the release of an *Updated Advisory on Self Reporting and Full Cooperation*, which supplements the [guidance issued by the CFTC earlier this year](#).

The new guidance reflects an effort by the CFTC to rebalance the incentives facing firms who identify potential misconduct to favor voluntary reporting and pro-active cooperation, reinforced by the potential for concrete benefits in the form of fine reductions and, potentially, declination of prosecution in appropriate cases. Commodities market participants and financial institutions should take note of this guidance when considering how to respond to potential evidence of misconduct and in dealing with the Division.

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Background

On January 19, 2017, the Division issued two Enforcement Advisories providing guidance on what the Division considers effective cooperation by a company and/or an individual in a CFTC investigation and enforcement action. The guidance updated and reinforced earlier guidance issued in 2007. In summary, the 2017 guidance outlined three policy-based considerations that the Division will weigh in assessing whether and to what extent a company might qualify for cooperation credit:

- (1) The value of the company's cooperation to the Division's investigation(s) and enforcement actions;
- (2) The value of the company's cooperation to the CFTC's broader law enforcement interests; and
- (3) The balancing of the level of the company's culpability and history of prior misconduct with the acceptance of responsibility, mitigation and remediation.

Further details regarding this guidance are provided by Cleary Gottlieb's January 24, 2017 [Alert Memorandum](#).

Incentivizing Self-Reporting and Cooperation

The key theme of Director McDonald's September 25 speech was the goal of providing concrete incentives for companies and individuals to self-report misconduct and cooperate with the Division. This, he recognized, required providing real incentives, because "no matter how much corporate leaders may want to foster compliance within the company, when they detect misconduct, their decision whether to voluntarily report often comes down to a business decision – to dollars and cents." "We at the CFTC want to shift this analysis in favor of self-reporting," Director McDonald said.

Director McDonald's September 25 speech outlined three expectations of firms and individuals that identify wrongdoing:

- (1) **Voluntary Self-Reporting:** To obtain credit for self-reporting, conduct must be disclosed in a context that is truly voluntary and within a reasonably prompt time after it is detected.

Observing that companies may not always know the full facts early in an investigation, Director McDonald noted that "we'll recommend the company receive full credit where the company made diligent efforts to figure out the relevant facts at the outset, fully disclosed the facts known to it at the time, continued to investigate, and disclosed additional relevant facts as the company became aware of them."

- (2) **Cooperation:** A company must fully cooperate with the CFTC's investigation, including by (a) disclosing facts as the company becomes aware of them, (b) attributing facts to particular individuals within the firm, and (c) providing information pro-actively, not just in response to requests from Division staff.
- (3) **Timely Remediation:** The company must work to fix the flaws in its compliance and internal controls programs that allowed the misconduct to occur in the first place.

In exchange, Director McDonald committed that the CFTC would provide concrete benefits:

- (1) **Clear communication of expectations:** The Division commits to communicate its expectations early to avoid a "game of gotcha" where the company only knows if it will receive cooperation credit once it reaches the settlement table. Rather, "[y]ou'll know right up front what we expect from you, and you'll know if there's a point you're veering off course, so that you'll have a chance to get back on track."
- (2) **Cooperative Remediation:** The Division commits to work with firms to identify appropriate remedial actions based on the facts and circumstances, and will communicate its expectations in this regard.
- (3) **Concrete Benefits:** Perhaps most importantly, the Division commits that it will "recommend a substantial reduction in the penalty that otherwise would be applicable. In truly extraordinary circumstances, the Division may

recommend declining to prosecute a case.” The Division has made clear, however, that in all cases, the company or individual will be required to disgorge profits and pay restitution resulting from any violations, notwithstanding self-reporting or cooperation.

These principles were reflected in [updated advisory guidance](#) that the Division also issued on September 25, 2017.

An Emphasis on Self-Reporting; But Credit Also Available for Cooperation

An important aspect of Director McDonald’s speech, and of the updated advisory guidance, is that they distinguish between self-reporting, on the one hand, and cooperation, on the other. While the CFTC promises credit for cooperation, emphasis is placed on voluntary and pro-active self-reporting. As Director McDonald explained:

To be a self-reporter, you have to tell us about the misconduct before we know about it. But our broader program also gives credit for cooperation, after the investigation is underway, where the company or individual did not self-report in the first instance. In those circumstances, too, the cooperator stands to earn a substantial benefit in terms of a reduced penalty. But the benefit will be less substantial than the self-reporting benefit. The biggest reduction is reserved for those who self-report, fully cooperate, and remediate. We will continue to give substantial credit for cooperation. But all else equal, it will be significantly less than for those companies that self-report the misconduct at the outset.

This emphasis continues a trend evident in the January 2017 Enforcement Advisories and made explicit in the updated guidance issued on September 25. When it speaks of cooperation and self-reporting, the Division is looking for companies that bring matters pro-actively to the Division’s attention that it would not otherwise have

investigated. Experience reinforces that this should be distinguished in a meaningful way from simply fulfilling the legal obligations that arise in the context of a CFTC investigation – such as providing information and access to employees in response to CFTC subpoenas. Such efforts are, under the current guidance, unlikely to be viewed as satisfying the obligations of a company that seeks the full benefits of cooperation credit.

There are recent examples of cases in which the CFTC has followed through on its commitment to give concrete benefits to firms that pro-actively report misconduct to the Division. For example, in August, the Division resolved an investigation with The Bank of Tokyo-Mitsubishi UFG, Ltd. (“BTMU”) related to alleged “spoofing” by one of its Tokyo-based employees during the period July 2009 through December 2014. According to the CFTC’s [August 7, 2017 Order](#), once aware of the misconduct, BTMU promptly suspended the trader involved and reported the conduct to the Division. That report was followed by an “expansive internal review” and “an overhaul of its systems and controls . . . to detect and prevent similar misconduct.”

In conjunction with announcing the resolution with BTMU, which included a \$600,000 penalty, Director McDonald said “[t]his case shows the benefits of self-reporting and cooperation, which I anticipate being an important part of our enforcement program going forward The Bank of Tokyo benefitted from its self-reporting and cooperation in the form of a substantially reduced penalty.”

In cases where true pro-active self-reporting is not an option, because the Division is already investigating the conduct, there are a number of practical steps that a company seeking cooperation credit should consider:

- Self-reporting other conduct identified in the course of an investigation – including, in particular, evidence of violations that may not fall strictly within the scope of the Division’s information requests.
- Conducting pro-active investigations of similar transactions or other individuals who may not

fall directly within the scope of the Division's investigation.

- Providing detailed, substantive briefings and presentations to the Division to assist its investigation, including by identifying the individuals whose conduct may be relevant.
- Providing access to the company's resources to conduct aspects of the investigation that may assist the Division, for example, complex data analytics.

The Division's recent guidance emphasizes that firms should engage pro-actively with the Division, and commits the Division to provide guidance regarding its own expectations. It is reasonable when engaging with the Division, therefore, to openly discuss a company's desire to cooperate and to solicit feedback early and often from Division staff on whether their expectations are being met.

Alignment of Incentives with Other Law Enforcement Agencies

Before heading the Division, Director McDonald was an Assistant U.S. Attorney in the Southern District of New York, working in the public corruption unit. He made clear in his speech that the Division would approach its role from the standpoint of a law enforcement agency, drawing an analogy between the role of the Division and his work prosecuting gang-land racketeering cases as a federal prosecutor. He explained that the Division's goal in obtaining cooperation was to "gain[] an insider perspective so we can more effectively prosecute all of the bad actors."

Director McDonald explained that "[o]ne goal in advancing our self-reporting and cooperation program is to bring ours in line with our law enforcement partners, so companies covered by multiple regulators don't have to work within multiple, sometimes conflicting, self-reporting and cooperation regimes." He highlighted "most notably" the alignment between the CFTC's expectations and the self-reporting program "at the Department of Justice." In that regard, while not directly applicable to most matters over which the CFTC would have jurisdiction, companies that have adopted a cooperative posture with respect to the CFTC

should likewise consider the requirements for credit under the Justice Department Fraud Section's [Foreign Corrupt Practice Act Pilot Program](#), which has recently been extended. The Pilot Program outlines the Fraud Section's expectations for self-reporting and cooperation, and provides guidance that is likely to apply to companies both in and out of the Foreign Corrupt Practices Act context.

Conclusion

Director McDonald's speech and the updated guidance provides welcome direction to companies that seek to cooperate with the Division and pro-actively to report misconduct. By committing to provide clear lines of communication and articulation of expectations and concrete (and substantial) penalty reductions, the Division appears to advance toward the goal of providing greater incentives for cooperation. Companies faced with evidence of potential misconduct or an active CFTC investigation are well-served to take note of the Division's expectations and guidance.

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