

CFTC announces new self-reporting and cooperation program

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Abstract

Purpose – To provide an overview of the Commodity Futures Trading Commission's (CFTC's) new self-reporting and cooperation program.

Design/methodology/approach – Summarizes the key features of the CFTC's new cooperation program and the CFTC's statement of its purpose in enacting the program; provides the authors' views on the likely implications of the program for CFTC enforcement actions.

Findings – Whether the CFTC's self-reporting and cooperation program will be a useful tool for deterring misconduct remains to be seen as the CFTC begins to implement it, but there are indications that it may encourage cooperation. If properly implemented, the program has the potential to benefit the CFTC and regulated parties significantly.

Originality/value – Practical insights on a new CFTC policy from experienced civil enforcement lawyers.

Keywords Cooperation, Commodity Futures Trading Commission (CFTC), Division of Enforcement, Remediation, Self-reporting, Enforcement advisory

Paper type Technical paper

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In a September 25, 2017 speech at New York University School of Law, James McDonald, the Director of the Division of Enforcement of the Commodity Futures Trading Commission (“CFTC”), announced a new self-reporting and cooperation program aimed at deterring misconduct in the commodities and derivatives industries^[1]. The CFTC's Division of Enforcement also published an updated Enforcement Advisory (the “Updated Enforcement Advisory”), which contains additional information regarding the credit potentially available to companies and individuals that voluntarily disclose misconduct and otherwise cooperate with the Division in its investigations^[2].

Director McDonald's remarks and the Updated Enforcement Advisory outline (1) the CFTC's expectations of companies and individuals seeking full cooperation credit; (2) the Division of Enforcement's commitment to, among other things, recommend substantially reduced civil monetary penalties in exchange for self-reporting, cooperation, and remediation; and (3) important additional points related to the new program for industry participants to consider.

1. Overview

As a preliminary matter, Director McDonald stated that the CFTC's enforcement program is essential to the CFTC's mission to foster open, transparent, competitive, and financially sound markets, and affirmed the CFTC's commitment to enforce the law and punish wrongdoing. At the same time, he recognized that the purpose of the Division of Enforcement is “not to bring enforcement actions for their own sake” but rather “to deter misconduct.” Director McDonald stated that the CFTC is “committed to working together with the companies and individuals [it regulates] to identify and prosecute wrongdoing that

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has occurred, and to stop future wrongdoing before it starts.” In particular, he emphasized “giving companies and individuals the right incentives to voluntarily comply with the law in the first place—and to look for misconduct and report it to [the CFTC] when they see it.”

Director McDonald’s remarks and the Updated Enforcement Advisory supplement prior CFTC guidance regarding cooperation. In January 2017, the CFTC issued two Enforcement Advisories to assist individuals and companies in assessing possible settlement positions and litigation risks^[3]. According to these advisories, the CFTC looks for more than “ordinary cooperation or mere compliance” with the law when determining whether to award cooperation credit. The advisories state that recognition for cooperation “is most likely to be given” for conduct that is sincere, robust, and indicative of a willingness to accept responsibility, where appropriate. At a high level, the CFTC considers three broad policy goals when assessing the quality of cooperation: (1) the value of the cooperation to the investigation and enforcement action; (2) the value of the cooperation to the CFTC’s broader law enforcement interests; and (3) the balancing of the individual’s or the company’s culpability and history of prior misconduct with the acceptance of responsibility, mitigation, and remediation.

Against this background, in his September 25, 2017 remarks Director McDonald announced that the CFTC will recommend “a significantly reduced [civil monetary] penalty” to companies and individuals that self-report misconduct and cooperate with the CFTC, and he set forth what the Division expects from companies and individuals that seek this benefit.

2. The CFTC’s self-reporting and cooperation program

2.1 *The CFTC’s expectations*

Director McDonald’s remarks and the Updated Enforcement Advisory set out three main expectations for companies and individuals that seek full credit for self-reporting and cooperation:

Voluntary Self-Reporting. The Division’s recommendations for the most substantial penalty reductions are reserved for companies and individuals that both cooperate *and* voluntarily self-report^[4]. Such reporting must be made prior to an imminent threat of exposure of the misconduct, must be made within a reasonably prompt time after the misconduct is discovered, and must include all relevant facts known as of the time of the self-report. The Division acknowledged that companies and individuals may not have all the relevant facts at the time of their first disclosure, and it expects companies and individuals to continue to investigate and disclose additional relevant facts as they come to light.

Full and Proactive Cooperation. The Division expects companies and individuals to cooperate fully throughout an investigation by adhering to the Division’s January 2017 Enforcement Advisories addressing cooperation by companies and individuals. These advisories focused, among other things, on the value of the individual’s or the company’s cooperation to the CFTC’s investigation and to its law enforcement priorities in general. Referring to these earlier advisories, Director McDonald emphasized the value of providing detailed disclosure of misconduct that attributes particular facts to particular people. The Division also expects cooperation to be a proactive “effort to find all related wrongdoing,” and Director McDonald indicated that simply being responsive to the enforcement staff during an investigation is not enough.

Timely and Appropriate Remediation. The Division expects companies to take timely and appropriate remedial action to prevent future misconduct and fix the flaws in their compliance programs and internal controls that allowed the reported misconduct to occur.

2.2 The CFTC's commitment

In exchange for self-reporting, full cooperation, and remediation, Director McDonald stated that the Division will do the following:

Communicate Clearly Regarding Self-Reporting, Cooperation, and Remediation. From the outset of its inquiry, the Division will communicate with respondents regarding the Division's expectations for self-reporting, cooperation, and remediation, and inform respondents if they are "veering off course" during the inquiry so that companies can "get back on track."

Provide Assistance Regarding Remediation. Without going into detail, Director McDonald stated that the Division will make clear its expectations regarding remediation and will "work with [respondents] on remediation" to "get it right."

Concrete Benefits. The Division "will recommend the most substantial reduction in the civil monetary penalty that otherwise would be applicable[5]". Director McDonald stated that "[i]n truly extraordinary circumstances, the Division may recommend declining to prosecute a case[6]".

2.3 Important additional considerations

In his remarks, Director McDonald articulated four additional points to consider with respect to the CFTC's self-reporting and cooperation program. First, he indicated that the program should not be misinterpreted as leniency toward companies or individuals. Rather, Director McDonald views the program as an aggressive enforcement tool. He emphasized that the program requires *substantial* cooperation that allows the Division to bring charges against others. According to Director McDonald, it is designed to gain "an insider perspective" so the Division "can more effectively prosecute all of the bad actors."

Second, Director McDonald stated that self-reporting and cooperation are related but distinct. He indicated that the Division will continue to award credit for cooperation even if a company or individual does not self-report, but the largest civil penalty reductions are reserved for those that self-report, fully cooperate, and remediate.

Third, Director McDonald said that, while the Division encourages self-reporting, it nonetheless will investigate the reported misconduct to confirm the scope of the reported wrongdoing. He stated that such confirmatory investigations would be expeditious and take "months, not years."

Fourth, Director McDonald indicated that the goal of the Division's self-reporting and cooperation program is not to coerce cooperation, but rather to emphasize that companies and individuals have a choice to self-report or not. His remarks suggest that the choice is between failing to self-report and cooperate, with the resulting aggressive enforcement and potential for full monetary penalties, on the one hand compared with self-reporting and cooperation, with the potential for an expeditious enforcement action and concrete benefits, on the other.

3. Conclusion

On its face, the CFTC's new self-reporting and cooperation program represents a significant step toward providing appropriate incentives to self-report misconduct and cooperate with a CFTC investigation. In this regard, the CFTC's program mirrors similar efforts by the Securities and Exchange Commission, which issued the *Seaboard Report*[7] in 2001 to encourage cooperation by companies and issued a policy statement[8] in 2010 regarding individuals seeking to cooperate. Whether the CFTC's program will be a helpful tool for deterring misconduct remains to be seen, but there are some early indications that it may be encouraging cooperation. A recent statement by Director McDonald indicated that

several respondents had received reduced financial penalties because of substantial cooperation with the Division of Enforcement, including self-reporting. Still, the Updated Enforcement Advisory sets forth only the program's general principles. The CFTC does not indicate, for example, whether it will disclose how much a civil enforcement penalty *would have been* if a respondent had not cooperated. Such a disclosure could help the CFTC demonstrate the concrete benefits of cooperation and could help industry participants assess litigation risk and the relative value of cooperation. The CFTC likely will fine tune the new program through future enforcement advisories, enforcement actions, and related guidance as industry participants begin to take advantage of it. If properly implemented, the cooperation program has the potential to benefit the CFTC and regulated parties significantly.

Notes

1. See James McDonald, Director of the Division of Enforcement, CFTC, Remarks before the NYU Program on Corporate Compliance & Enforcement/Institute for Corporate Governance & Finance: *Perspectives on Enforcement: Self-Reporting and Cooperation at the CFTC* (Sept. 25, 2017), available at: www.cftc.gov/PressRoom/SpeechesTestimony/opamcdonald092517
2. See CFTC Enforcement Advisory: Updated Enforcement Advisory on Self-Reporting and Full Cooperation (Sept. 25, 2017), available at: www.cftc.gov/ido/groups/public/@lrenforcementactions/documents/legalpleading/enfadvisoryselfreporting0917.pdf (hereinafter, "Updated Enforcement Advisory").
3. See *id.* at 3 (citing CFTC Enforcement Advisory: Cooperation Factors in Enforcement Division Sanction Recommendations for Companies (Jan. 19, 2017), available at: www.cftc.gov/ido/groups/public/@lrenforcementactions/documents/legalpleading/enfadvisorycompanies011917.pdf and CFTC Enforcement Advisory: Cooperation Factors in Enforcement Division Sanction Recommendations for Individuals (Jan. 19, 2017), available at: www.cftc.gov/ido/groups/public/@lrenforcementactions/documents/legalpleading/enfadvisoryindividuals011917.pdf)
4. See Updated Enforcement Advisory at 2.
5. See Updated Enforcement Advisory at 3. At one point, Director McDonald indicated that the CFTC expected to reduce penalties by up to 75%. Later, he clarified that the CFTC would not target a specific percentage, and the amount of the reduction would be determined on a case-by-case basis. Subsequently, it was reported that Director McDonald stated the reduction in the civil penalty generally would be in the 50% to 75% range, depending on the level of cooperation.
6. An example of an extraordinary circumstance is "where misconduct is pervasive across an industry and the company or individual is the first to self-report." See Updated Enforcement Advisory at 3.
7. See Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions, Exchange Act Rel. No. 44969 (Oct. 23, 2001).
8. See Policy Statement of the Securities and Exchange Commission Concerning Cooperation by Individuals in its Investigations and Related Enforcement Actions, Rel. No. 34-61340 (Jan. 13, 2010).

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