

CLIENT MEMORANDUM

CFTC Cooperation Advisories Prescribe High Burdens – Has the Expectation of Above-and-Beyond Cooperation Across Federal Agencies Reached Its Apex?

March 15, 2017

AUTHORS

Paul Pantano Jr. | Elizabeth Gray | Jeffrey Clark | Neal Kumar | Thomas Millar | Hayley Tozeski

In January 2017, the Division of Enforcement for the Commodity Futures Trading Commission issued two new Enforcement Advisories on cooperation. Consistent with similar guidance from the Securities and Exchange Commission (“SEC”), the Department of Justice (“DOJ”) and the Federal Energy Regulatory Commission (“FERC”), the Commodity Futures Trading Commission’s (“CFTC”) Enforcement Division reserves cooperation credit for exemplary cooperation only. Across these agencies, the benefits of cooperation can range from no enforcement action to a reduction in fines or remedial measures.

The Advisories add to a growing body of federal agency guidance that seeks to incentivize companies and individuals to provide material assistance to the investigating agency.¹ Under the Obama administration, many companies found it difficult to obtain cooperation credit, and for those who received credit, it was difficult to identify tangible benefits. Will President Trump’s new administration change that? In this Memorandum, we summarize the cooperation regimes at the CFTC, SEC, DOJ and FERC and discuss our expectations for the future of cooperation standards across these agencies as the Trump administration settles into governing.

¹ See, e.g., Sally Quillian Yates, Deputy Attorney Gen., U.S. Dep’t of Justice, Individual Accountability for Corporate Wrongdoing (Sept. 9, 2015) (“Yates Memo”); Revised Policy Statement on Enforcement, 123 FERC ¶ 61,156 (May 15, 2008).

CFTC Cooperation Advisories Prescribe High Burdens – Has the Expectation of Above-and-Beyond Cooperation Across Federal Agencies Reached Its Apex?

Continued

The CFTC's Most Recent Guidance

The CFTC Cooperation Guidelines address cooperation factors for investigations involving companies and individuals.² The factors for companies and individuals are largely consistent. Although the Advisories provide transparency into the factors for cooperation, the consideration of these factors ultimately is within the discretion of the CFTC enforcement attorneys handling a particular matter. When assessing the factors, the CFTC's Division of Enforcement "looks for more than ordinary cooperation or mere compliance with the requirements of law." The Enforcement Division is most likely to attribute cooperation to a company or individual "for conduct that is sincere, robustly cooperative, and indicative of a willingness to accept responsibility for the misconduct, where appropriate."

The CFTC Cooperation Guidelines for companies and individuals fall into three general categories:

- **Value of the cooperation to the Division's investigation.** For example:
 - Whether the cooperation is material to the investigation;
 - The timeliness of the initial cooperation, including whether the issue was self-reported to the CFTC; and
 - Whether the cooperation is ongoing, *e.g.*, whether the company or individual preserved relevant documents, made persons available for testimony, and met with Staff to explain the facts.
- **Value of the cooperation to the CFTC's broader law enforcement interests.** For example:
 - The degree to which cooperation credit encourages high-quality cooperation from others;
 - Whether it represents a CFTC priority; and
 - Whether the cooperation conserved CFTC resources.
- **Balancing culpability and history of prior misconduct with the acceptance of responsibility, mitigation and remediation.** For this factor, the Division analyzes the extent to which the mitigation and remediation efforts outweigh the history of the prior misconduct. For example:
 - The duration and egregiousness of the misconduct, and for companies, the level of the organization at which the conduct occurred;
 - The steps taken to mitigate losses caused by the misconduct;

² A copy of the CFTC Cooperation Guidelines for companies is available [here](#). A copy of the CFTC Cooperation Guidelines for individuals is available [here](#).

CFTC Cooperation Advisories Prescribe High Burdens – Has the Expectation of Above-and-Beyond Cooperation Across Federal Agencies Reached Its Apex?

Continued

- Remediation efforts to address the misconduct and implement an effective response; and
- The acceptance of responsibility for the misconduct.

In addition to examples of cooperative conduct, the CFTC Cooperation Guidelines also provide examples of uncooperative conduct, which cover the expected topics, such as failing to respond to subpoenas and requests and withholding or misrepresenting information.

Securities and Exchange Commission

The SEC's guidelines for corporate cooperation were initially set forth and continue to be reflected in the SEC's October 2001 Seaboard Report.³ In January 2010, the SEC issued a policy statement outlining an analytical framework to evaluate whether, and to what extent, to credit cooperation by individuals in its investigations and enforcement actions ("SEC Policy Statement").⁴ The SEC's guidelines for individual and corporate cooperation are thematically consistent with the CFTC Cooperation Guidelines. Similar to the CFTC, the benefits offered by cooperation with the SEC range from reduced charges, mitigating language in the published documents resolving the matter, or the "extraordinary" step of taking no enforcement action.

The SEC's guidelines for corporate cooperation emphasize:

- *Self-policing* prior to the discovery of the misconduct, including establishing effective compliance procedures and an appropriate "tone at the top";
- *Self-reporting* of misconduct when it is discovered, including conducting a thorough review of the nature, extent, origins and consequences of the misconduct, and promptly, completely and effectively disclosing the misconduct;
- *Remediation*, including dismissing or appropriately disciplining wrongdoers, modifying and improving internal controls and procedures to prevent recurrence of the misconduct, and appropriately compensating those adversely affected; and
- *Disclosure*, including providing the SEC staff with all information relevant to the underlying violations and the company's remedial efforts.

³ 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, Securities Exchange Act Release No. 44969 (Oct. 23, 2011), available [here](#).

⁴ Policy Statement Concerning Cooperation by Individuals in Its Investigations and Related Enforcement Actions, Securities and Exchange Commission, Release No. 34-61340 (Jan. 19, 2010), available [here](#).

CFTC Cooperation Advisories Prescribe High Burdens – Has the Expectation of Above-and-Beyond Cooperation Across Federal Agencies Reached Its Apex?

Continued

Relevant considerations that the SEC uses to evaluate those measures include the nature of the misconduct; whether the misconduct resulted from inadvertent, negligent, or deliberate action; how the misconduct came to light; whether compliance procedures were in place and why they failed to prevent the misconduct; the seniority of the personnel involved; the duration of the misconduct; the extent of the harm inflicted on investors and other corporate constituencies; the company's commitment to investigating the full extent of the misconduct; the extent and thoroughness of disclosure to the Commission; and whether the misconduct is likely to recur.

The SEC's guidelines for individual cooperation emphasize:

- The assistance provided by the cooperator, including the value and nature of the cooperation;
- The importance of the underlying matter, including the danger posed by the underlying misconduct;
- The SEC's interest in holding the individual accountable, given the individual's culpability relative to others involved in the misconduct; and
- The profile of the individuals, including acceptance of responsibility for the misconduct.

Relevant factors used to evaluate individual cooperation include the timeliness of an individual's cooperation, whether the cooperation is voluntary, the time and resources conserved as a result of the individual's cooperation, whether the individual provided information that was not requested or might not otherwise have been discovered, and whether the individual encouraged or authorized others who might not otherwise have participated to assist the Commission.

Department of Justice Fraud Section

The CFTC's factors are also thematically consistent with the DOJ's approach. In April 2016, the DOJ Fraud Section announced a one-year Foreign Corrupt Practices Act ("FCPA") enforcement pilot program to provide companies with the opportunity to receive a substantial reduction in fines in exchange for cooperation with the government's investigation (the "Guidance").⁵ The Guidance was intended to offer greater transparency concerning the requirements for companies seeking cooperation credit and the benefits of fully cooperating. In addition, the pilot program is intended to enhance the Fraud Section's ability to prosecute individual wrongdoers by incentivizing companies to disclose facts about their

⁵ See The Fraud Section's Foreign Corrupt Practices Act Enforcement Plan and Guidance, U.S. Dep't of Justice, Criminal Division (Apr. 5, 2016), available [here](#). The Guidance applies only to matters handled by the Fraud Section's FCPA Unit and does not restrict the SEC in its handling of FCPA investigations and settlements. Nevertheless, the Guidance, the most specific issued by the DOJ to date, provides useful benchmarks in dealing with federal prosecutors outside the Fraud Section during corporate investigations.

CFTC Cooperation Advisories Prescribe High Burdens – Has the Expectation of Above-and-Beyond Cooperation Across Federal Agencies Reached Its Apex?

Continued

misconduct, consistent with the Department-wide policy articulated in a memorandum issued by then Deputy Attorney General Sally Quillian Yates in September 2015.⁶

If a company fully cooperates, the Fraud Section may decline prosecution or provide a reduction of up to 50% off the lower end of the otherwise applicable fine range prescribed under the U.S. Sentencing Guidelines. Cooperation may also dissuade the Fraud Section from appointing a monitor as a remedial measure. To qualify for cooperation credit under the pilot program, a company must satisfy four requirements: (1) voluntarily self-disclose its misconduct; (2) fully cooperate with the Fraud Section's investigation; (3) remediate flaws in its internal controls and compliance program, where appropriate; and (4) disgorge all profits resulting from the violations. Of the four agencies, the DOJ has issued the most specific criteria for satisfying its cooperation regime's general requirements:

- The company's self-disclosure must be truly voluntary and occur prior to an imminent threat of disclosure or government investigation;
- The company must disclose within a reasonably prompt time after becoming aware of the offense;
- The company must proactively disclose all relevant facts, including all relevant facts known about the corporation's officers, employees, or agents and all third parties;
- In addition, the company must attribute facts to specific sources, where not protected by the attorney-client privilege;
- The company must make the DOJ aware of opportunities for the DOJ to obtain relevant evidence, and make officers and employees available for interview, including those located overseas;
- The company must disclose or facilitate the disclosure of all overseas documents, including from third parties, unless prohibited by foreign law, including foreign data privacy laws;
- The company must provide translations upon request; and
- Remediation must include the implementation of an effective compliance program, discipline for employees responsible for misconduct and for those with oversight responsibilities, and additional steps to address the seriousness of the misconduct, including measures to identify future risks.

⁶ As reflected in press reports beginning on March 10, 2017, DOJ officials have indicated that the FCPA Pilot Program, which is set to expire on its one-year anniversary in April 2017 unless extended, will be extended. This will allow the new administration's DOJ leadership to make an assessment of how to proceed with the program.

CFTC Cooperation Advisories Prescribe High Burdens – Has the Expectation of Above-and-Beyond Cooperation Across Federal Agencies Reached Its Apex?

Continued

Consistent with existing DOJ policy, the cooperating company will not be required to waive the attorney-client privilege or work-product protection to be eligible for full cooperation credit.

Federal Energy Regulatory Commission

Recent FERC Office of Enforcement Staff (“OE”) guidance, the Commission’s May 15, 2008 Revised Policy Statement on Enforcement and other FERC authority reflect an approach to cooperation generally similar to the approaches of the other agencies. In its November 2016 White Paper on Enforcement, OE opined that “the Commission also places great importance on good-faith and consistent cooperation throughout an investigation because that ‘help[s] provide Enforcement staff with sufficient information to understand the circumstances of how and why the violation occurred as well as the identity of the relevant personnel involved in the violation.’”⁷ The Commission uses Penalty Guidelines to calculate what it believes to be appropriate civil penalties, and “exemplary cooperation” can earn an entity being investigated a one-point credit, which can reduce its civil penalty.⁸ Valuing the one-point credit, however, is notoriously difficult.

FERC’s cooperation expectations are similar to those of the other agencies. A company is expected to “actively encourage” all employees with relevant knowledge and information to provide the Commission with complete and accurate information. FERC considers whether the investigation subject “identif[ied] culpable employees” to FERC and assisted FERC in “understanding their conduct.”⁹ FERC expects that companies will produce internal investigation and audit reports. And FERC expects involvement by senior management in the investigation and that senior management will express meaningful support for the investigation.

FERC’s Revised Policy Statement on Enforcement sets forth the following factors that the Commission considers when assessing an entity’s cooperation:¹⁰

- Did the company volunteer to provide internal investigation or audit reports relating to the misconduct?
- Did the company hire an independent outside entity to assist the company’s investigation?

⁷ Staff White Paper on Anti-Market Manipulation Enforcement Efforts Ten Years After EPACT 2005 (“White Paper on Enforcement”) (Nov. 2016) (quoting Revised Policy Statement on Penalty Guidelines, PL10-4, 132 FERC ¶ 61,216 at P 142 (Sept. 17, 2010)), available [here](#).

⁸ Enforcement of Statutes, Regulations and Orders, 123 FERC ¶ 61,156, at P 65 (May 15, 2008) (“Revised Policy Statement on Enforcement”) (“Since cooperation is expected of all entities, we do not give penalty mitigation credit for ordinary cooperation However, we do give credit for exemplary cooperation.”).

⁹ Revised Policy Statement on Enforcement at P 66.

¹⁰ FERC generally takes the position that the word “entity” covers human beings and corporate entities.

CFTC Cooperation Advisories Prescribe High Burdens – Has the Expectation of Above-and-Beyond Cooperation Across Federal Agencies Reached Its Apex?

Continued

- Did senior management make clear to all employees that their cooperation has the full support and encouragement of management and the directors of the company?
- Did the company facilitate Commission access to employees with knowledge and information bearing on the issue, and actively encourage such employees to provide the Commission with complete and accurate information?
- Did the company identify culpable employees and assist the Commission in understanding their conduct?
- Did the company make records readily available, with assistance on searching and interpreting information in the records?
- Did the company fairly and accurately determine the effects of the misconduct, including identifying the revenues and profits resulting from the misconduct and the customers or market participants adversely affected by the misconduct?¹¹

Like the other agencies, FERC has discretion with regard to how these factors are implemented.

Conclusion

The cooperation guidelines issued by the CFTC, SEC, DOJ and FERC emphasize that regulators expect timely, thorough, diligent, and proactive cooperation during an investigation. The agencies, most markedly the DOJ, each have taken steps to shift investigatory burdens from their staffs to the entities being investigated, asking companies and individuals to volunteer information that could render them liable for regulatory and criminal violations. But the CFTC's most recent cooperation guidance could mark the apex of this growing trend, at least for the foreseeable future.

Many expect that the Trump administration will adopt policies and exercise existing authorities in a manner that is more favorable to business. While the administration remains in its infancy, with many key posts at the CFTC, SEC, DOJ and FERC still vacant, early indications support this view.¹²

In our view, cooperation standards at the agencies are unlikely to change significantly. Nevertheless, the agencies may apply their cooperation frameworks more favorably to business. As a result, individuals and companies may see more benefit to cooperating and more instances where they can protect their interests while maintaining full cooperation. For example, one issue that sometimes arises during an investigation is a company's desire to redact from responsive

¹¹ Revised Policy Statement on Enforcement at P 66.

¹² For example, on February 3, 2017, President Trump issued an [executive order](#) designed to explore the rollback of major financial regulations, including the Dodd-Frank Wall Street Reform and Consumer Protection Act. A few days earlier, the president issued [another executive order](#) that required all federal agencies to identify at least two existing regulations for repeal whenever they propose or promulgate a new regulation.

.....

CFTC Cooperation Advisories Prescribe High Burdens – Has the Expectation of Above-and-Beyond Cooperation Across Federal Agencies Reached Its Apex?

Continued

documents highly commercially sensitive information. Enforcement staffs at the agencies have historically taken the position that such redaction is not permitted, but commercial concerns may in the future fall on more receptive ears. Going forward, clients involved in investigations may want to consider whether there are opportunities to better protect their businesses while balancing the perceived risks and benefits of full cooperation.

If you have any questions regarding this memorandum, please contact Paul J. Pantano Jr. (202-303-1211, ppantano@willkie.com), Elizabeth P. Gray (202-303-1207, egray@willkie.com), Jeffrey D. Clark (202-303-1139, jdclark@willkie.com), Neal E. Kumar (202-303-1143, nkumar@willkie.com), Thomas R. Millar (202-303-1144, tmillar@willkie.com), Hayley T.J. Tozeski (202-303-1237, htozeski@willkie.com) or the Willkie attorney with whom you regularly work.

Willkie Farr & Gallagher LLP is an international law firm with offices in New York, Washington, Houston, Paris, London, Frankfurt, Brussels, Milan and Rome. The firm is headquartered at 787 Seventh Avenue, New York, NY 10019-6099. Our telephone number is (212) 728-8000 and our fax number is (212) 728-8111. Our website is located at www.willkie.com.

March 15, 2017

Copyright © 2017 Willkie Farr & Gallagher LLP.

This memorandum is provided by Willkie Farr & Gallagher LLP and its affiliates for educational and informational purposes only and is not intended and should not be construed as legal advice. This memorandum may be considered advertising under applicable state laws.