

CLIENT ALERT

# CFTC Division of Enforcement Issues Civil Monetary Penalty Guidance

June 17, 2020

## AUTHORS

**Paul J. Pantano Jr. | Athena Eastwood | J. Christopher Giancarlo | Neal E. Kumar  
Michael Hartz**

On May 20, 2020, the CFTC's Division of Enforcement issued new guidance regarding civil monetary penalties imposed in Commission enforcement actions (the "2020 Penalty Guidance").<sup>1</sup> In addition, the Director of the Division of Enforcement has since issued public remarks providing further color on the recently published document.<sup>2</sup> The 2020 Penalty Guidance seeks to memorialize the Division's existing practice, and the factors that the Division uses to assess penalties remain effectively the same as those that have been in place since 1994.

The 2020 Penalty Guidance demonstrates a continuation of the CFTC's efforts to modernize its enforcement practice that began under Former Chairman Giancarlo's leadership. Such efforts include the 2018 Memorandum of Understanding between the CFTC and the Securities and Exchange Commission, as well as the 2019 publication of the CFTC's first-ever Enforcement Manual.<sup>3</sup>

<sup>1</sup> Commodity Futures Trading Commission, *Civil Monetary Penalty Guidance* (May 20, 2020), [here](#) (follow "Civil Monetary Penalty Guidance" hyperlink).

<sup>2</sup> Futures Industry Association, *Fireside chat with James McDonald: a discussion of the CFTC's revised penalty guidance and enforcement priorities* (May 28, 2020), [here](#).

<sup>3</sup> Commodity Futures Trading Commission and Securities and Exchange Commission, *Memorandum of Understanding Between the U.S. Securities and Exchange Commission and the U.S. Commodity Futures Trading Commission Regarding Coordination in Areas of Common Regulatory*

---

## CFTC Division of Enforcement Issues Civil Monetary Penalty Guidance

The factors set forth in the 2020 Penalty Guidance are qualitative in nature and, based upon experience, the application of these factors varies from one investigation to the next. Oftentimes, trying to decipher the reasoning behind the size of a Commission-imposed civil penalty—whether being directly involved in the investigation or reading a published speaking order—can be akin to reading tea-leaves. Furthermore, the industry has struggled to observe consistency in civil penalties across cases. Although the newly published guidelines do not alter the existing framework, the introduction to the guidelines note that “[t]his guidance will facilitate the Division’s efforts to be tough on those who break the rules *while striving for fair and consistent outcomes in doing so*.”<sup>4</sup> Given that the penalty guidelines remain unchanged from prior versions, the goal of consistent outcomes may be a catalyst to bring more transparency and consistency to the civil monetary penalty process.

### History of the Division’s Guidelines for Imposing Civil Monetary Penalties

Prior to publishing the 2020 Penalty Guidance, the last time the Division of Enforcement addressed civil monetary penalty guidelines was in 1994 (the “1994 Guidelines”).<sup>5</sup> According to the Division, the recently published 2020 Penalty Guidance is consistent with the 1994 Guidelines. Only a few substantive changes appear between the documents, which are summarized below.

### Factors Used to Assess Penalties

The 2020 Penalty Guidance explains that the Division takes a three-prong approach to civil monetary penalty recommendations, assessing: (1) the gravity of the violation; (2) mitigating and aggravating circumstances; and (3) other considerations. Below is a summary of the Division’s guidance on these three factors.

#### 1. **Gravity of the Violation**

According to the 2020 Penalty Guidance, the gravity of the violation is the primary consideration in determining the appropriate civil monetary penalty. The Division considers the following list of factors in determining the gravity of a violation. The list is non-exhaustive, and no single factor is dispositive:

- The nature and scope of the violations, including the number, duration, type and degree of the violations. Willkie notes that an assessment of this factor often varies from investigation to investigation with little consistency in the process.

---

*Interest and Information Sharing* (July 10, 2018), [here](#); Commodity Futures Trading Commission, *CFTC’s Division of Enforcement Issues First Public Enforcement Manual* (May 8, 2019), [here](#) (follow “Division of Enforcement Manual” hyperlink).

<sup>4</sup> 2020 Penalty Guidance at 1.

<sup>5</sup> CFTC Policy Statement Relating to the Commission’s Authority To Impose Civil Money Penalties, *Comm. Fut. L. Rep. (CCH)* ¶ 26,265 (Nov. 1, 1994).

---

## CFTC Division of Enforcement Issues Civil Monetary Penalty Guidance

- The respondent's role in the violations, the respondent's state of mind, and whether the respondent acted with others.
- Whether there were efforts to conceal any ongoing violations.
- Whether the violations resulted in harm to victims, the existence of benefits to the respondent, and whether violations impacted market integrity, customer protection, or the mission and priorities of the Commission in implementing the Commodity Exchange Act.

### **Mitigating and Aggravating Circumstances**

The Division also considers all relevant mitigating and aggravating circumstances when recommending a civil monetary penalty to the Commission. The 2020 Penalty Guidance provides the following non-exhaustive list of circumstances that inform this recommendation. The 2020 Penalty Guidance also contains new factors not previously listed in the 1994 Guidelines that highlight the importance of internal actions a market participant has taken with regard to the potential misconduct.

- Post-violation conduct, including mitigating conduct (such as attempts to cure, return of victim funds, or efforts to improve a compliance program) and aggravating conduct (such as concealment or obstruction of an ongoing investigation).
- Whether the respondent self-reported the misconduct, as well as the extent of cooperation and remediation, as detailed in the Division's enforcement advisories.
- Prior misconduct, such as whether the respondent is a recidivist.
- New mitigating and aggravating circumstances in the 2020 Penalty Guidance:
  - Timeliness of remediation.
  - Existence and effectiveness of the company's preexisting compliance program.
  - Pervasiveness of misconduct within the company, including the responsibility of management.
  - Nature of any disciplinary action taken by the company with respect to the individuals engaged in misconduct.

---

## CFTC Division of Enforcement Issues Civil Monetary Penalty Guidance

### **Other Considerations**

“Other considerations” may also influence the Division’s recommendation. The 2020 Penalty Guidance provides the following non-exhaustive list of other considers:

- The total mix of remedies and monetary relief to be imposed on the respondent in the recommended Commission enforcement action, in addition to the remedies and relief to be imposed in parallel cases involving criminal authorities (including incarceration), other regulatory entities, or self-regulatory organizations.
- Monetary and non-monetary relief in analogous cases.
- Conservation of Commission resources, including timely settlement.

It is important to note that the 2020 Penalty Guidance removes from the list of “other considerations” whether the respondent is willing to cooperate in the prosecution of the Commission’s action against the remaining respondents.<sup>6</sup> Although this is not expressly addressed in the 2020 Penalty Guidance, the Division likely removed this consideration because the topic of cooperation is covered in the CFTC’s guidance regarding cooperation with the Division’s investigations.<sup>7</sup>

If you have any questions regarding this client alert, please contact one of the authors, any member of our CFTC team listed below, or the Willkie attorney with whom you regularly work.

---

<sup>6</sup> 1994 Guidelines at 2.

<sup>7</sup> Willkie’s summary of the Division’s January 2017 Cooperation Guidelines is available [here](#), and a summary of the Division’s self-reporting guidelines is available [here](#).

---

## CFTC Division of Enforcement Issues Civil Monetary Penalty Guidance

Willkie has a dedicated team of attorneys with extensive knowledge and experience in all aspects of the Commodity Exchange Act and the CFTC regulatory regime. We would be pleased to assist on your matters.

---

**Athena Eastwood**

202 303 1212

aeastwood@willkie.com

**J. Christopher Giancarlo**

212 728 3816

jcgiancarlo@willkie.com

**Rita M. Molesworth**

212 728 8727

rmolesworth@willkie.com

**Paul J. Pantano Jr.**

202 303 1211

ppantano@willkie.com

**Deborah A. Tuchman**

212 728 8491

dtuchman@willkie.com

**Conrad G. Bahlke**

212 728 8233

cbahlke@willkie.com

**Lisa Eskenazi**

212 728 3349

leskenazi@willkie.com

**Neal E. Kumar**

202 303 1143

nkumar@willkie.com

**James E. Lippert**

212 728 8945

jlippert@willkie.com

**Steven C. Matos**

212 728 8757

smatos@willkie.com

**Michael Hartz**

202 303 1161

mhartz@willkie.com

Copyright © 2020 Willkie Farr & Gallagher LLP.

This alert 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 alert may be considered advertising under applicable state laws.

Willkie Farr & Gallagher LLP is an international law firm with offices in New York, Washington, Houston, Palo Alto, San Francisco, Chicago, 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](http://www.willkie.com).