



Division of
Enforcement

COMMODITY FUTURES TRADING COMMISSION

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MEMORANDUM

TO: Division of Enforcement Staff

FROM: Vincent A. McGonagle
Acting Director, Division of Enforcement

DATE: October 29, 2020

SUBJECT: Recognizing Cooperation, Self-Reporting, and Remediation in
Commission Enforcement Orders

This memorandum provides guidance to Commodity Futures Trading Commission (“CFTC” or “Commission”) Division of Enforcement (“Division”) staff in considering recommending the recognition of a respondent’s cooperation, self-reporting, and remediation in Commission enforcement orders. This memorandum does not change Division practice with respect to how the Division will evaluate self-reporting, cooperation, or remediation, or how the Division will consider reductions in penalties in connection with self-reporting, cooperation, or remediation in accordance with the self-reporting and cooperation advisories issued by the Division (“Advisories”)¹ and set forth in the Enforcement Manual.² Rather, this memorandum is intended to provide transparency and clarity regarding when and how the Division will recommend that these assessments be reflected and recognized in the Commission enforcement

¹ See Enforcement Advisory: Cooperation Factors in Enforcement Division Sanction Recommendations for Individuals, <https://www.cftc.gov/sites/default/files/idc/groups/public/@Irenforcementactions/documents/legalpleading/enfadvisoryindividuals011917.pdf>; Enforcement Advisory: Cooperation Factors in Enforcement Division Sanction Recommendations for Companies, <https://www.cftc.gov/sites/default/files/idc/groups/public/@Irenforcementactions/documents/legalpleading/enfadvisorycompanies011917.pdf>; Enforcement Advisory: Updated Advisory on Self Reporting and Full Cooperation, <https://www.cftc.gov/sites/default/files/idc/groups/public/@Irenforcementactions/documents/legalpleading/enfadvisoryselfreporting0917.pdf>.

² See Commodity Futures Trading Commission, Enforcement Manual (2020), <https://www.cftc.gov/LawRegulation/Enforcement/EnforcementManual.pdf>.

orders.³ This guidance will be set forth in the Enforcement Manual, and it will be binding on Division staff.⁴

As part of its evaluation of appropriate sanctions to recommend in an enforcement action, the Division assesses whether a respondent⁵ self-reported the misconduct, cooperated during the course of the investigation, or engaged in substantial remediation to address the misconduct and develop or strengthen related internal controls.⁶ In certain circumstances outlined in the Division's Advisories, which are incorporated in the Enforcement Manual, self-reporting, cooperation, and/or remediation may result in recognition in a Commission enforcement order and a reduction in the penalty imposed.

This memorandum outlines how, and in what circumstances, Division staff will recommend recognizing self-reporting, cooperation, and remediation in Commission enforcement orders.

1. No self-reporting, cooperation, or remediation: Where a respondent has not self-reported, cooperated with a Division's investigation, or remediated in accordance with the Advisories, the Division will not recommend that the Commission's enforcement order publicly recognize self-reporting, cooperation, or remediation. The fact that the Division does not recommend recognition of cooperation does not mean that the respondent was uncooperative or obstructive. Rather, it merely indicates that the respondent did not cooperate in a manner that materially advanced the Division's investigation or otherwise met the factors set out in the Advisories.

2. No self-reporting, but cognizable cooperation and/or remediation that warrant recognition but not a recommended reduction in penalty: At times, the Division will recommend that the Commission recognize a non-self-reporting respondent's cooperation or remediation in the Commission enforcement order without a recommendation that the cooperation or remediation be reflected in the form of a reduced penalty. To constitute cognizable cooperation or remediation warranting this level of recognition, the respondent will have satisfied one or more of the factors set out in the Advisories, but the cooperation would not

³ See, e.g., Chairman Heath P. Tarbert, CFTC, Statement: "Tripling Down on Transparency" (Dec. 10, 2019), <https://www.cftc.gov/PressRoom/SpeechesTestimony/tarbertstatement121019> ("[W]e must be transparent in how we enforce the law. . . . Consistent with this mandate, our Division of Enforcement will soon publish an updated Enforcement Manual that will inform the public about a number of changes designed to increase transparency. We take seriously the need to inform the public about our enforcement priorities and practices.").

⁴ This guidance creates no private rights and is not enforceable in court. Division staff are required to follow the guidance for purposes of making cooperation recognition recommendations to the Commission; the Commission will continue to exercise its independent judgment and discretion as to whether such recognition is merited in any particular matter.

⁵ The Commission brings charges against "respondents" in administrative enforcement actions before the Commission and against "defendants" in civil enforcement actions in U.S. District Courts. For purposes of this memorandum, "respondent" is used as a generic descriptor for a person charged.

⁶ See Enforcement Manual § 6.8.1 (Penalty Guidance); *id.* § 7 (Consideration of Self-Reporting, Cooperation, and Remediation).

have materially assisted the Division's investigation in the manner required to warrant a recommended reduction in penalty.⁷ It will be insufficient to warrant recognition in this context if the respondent has merely done what is required by law. In this context, the Division will recommend the following language be included in the summary of the Commission enforcement order, with cooperation or remediation being recognized as appropriate to the particular matter:

In accepting Respondent's offer, the Commission recognizes the cooperation of [name of Respondent] with the Division of Enforcement's investigation of this matter. The Commission also acknowledges Respondent's representations concerning its remediation in connection with this matter.

The Division will also recommend that the Commission enforcement order describe the particular acts of cooperation and/or remediation that merited recognition.

3. No self-reporting, but substantial cooperation and/or remediation resulting in a reduced penalty: In some investigations, a respondent will have provided a level of cooperation that was substantial, and that materially advanced the Division's investigation in accordance with the Advisories, and/or engaged in substantial remediation to address the misconduct and materially develop or strengthen related internal controls. In this context, the Division will recommend the following language be included in the summary of the order, with cooperation or remediation being recognized as appropriate to the particular matter:

In accepting Respondent's Offer, the Commission recognizes the substantial cooperation of [name of respondent] with the Division of Enforcement's investigation of this matter. The Commission also acknowledges Respondent's representations concerning its remediation in connection with this matter. The Commission's recognition of Respondent's substantial cooperation and appropriate remediation is further reflected in the form of a reduced penalty.

The Division will also recommend that the Commission enforcement order describe the particular acts of cooperation and/or remediation that merited recognition.

4. Self-reporting, substantial cooperation, and remediation resulting in a substantially reduced penalty: Where a respondent has self-reported, substantially cooperated in a manner that materially advanced the Division's investigation, and remediated in accordance with the Advisories, the Division will recommend the most significant reduction in penalty to the

⁷ At times, a respondent's cooperation may be uneven, or a respondent that is not cooperative at one point in the investigation may be cooperative at another. These circumstances may warrant recognition of cooperation and/or remediation without a recommended reduction in penalty. In such circumstances, staff may seek and obtain approval to propose language different from that set out in this memorandum to reflect those facts. At all points, staff should seek to ensure the Commission enforcement order accurately reflects the necessary facts relevant to the cooperation analysis.

Commission.⁸ In this context, the Division will recommend the following language be included in the summary of the Commission enforcement order:

In accepting Respondent's Offer, the Commission recognizes the self-reporting and substantial cooperation of [name of Respondent] in connection with the Division's investigation of this matter. The Commission also acknowledges Respondent's representations concerning its remediation in connection with this matter. The Commission's recognition of Respondent's self-reporting, substantial cooperation, and appropriate remediation is further reflected in the form of a substantially reduced penalty.

The Division will also recommend that the Commission enforcement order describe the particular acts of the self-report, cooperation, and remediation that merited recognition.

* * *

The Division will continue to evaluate and consider issues relating to self-reporting, cooperation, and remediation as they develop through Commission matters. Should staff identify issues in their own cases, those issues should be raised with the appropriate Deputy Director and the Office of Chief Counsel. In addition, staff should raise any questions about how this guidance applies to any particular matter with the appropriate Deputy Director and the Office of Chief Counsel.

⁸ As set forth in the advisories, in extraordinary circumstances, a proposed respondent's cooperation may result in a recommendation that no penalty be imposed by the Commission, although other sanctions and monetary relief may be ordered or enforcement action not be taken. *See* Letter from James M. McDonald, Director, Division of Enforcement, CFTC to Andrew Stemmer, Deutsche Bank Securities Inc. (Nov. 8, 2018), https://www.cftc.gov/sites/default/files/2018-11/enf_DeutscheBankDeclinationLetter110818.pdf.