

CLIENT ALERT

CFTC Enforcement Division Codifies Trend to Compel Admissions, Impose Higher Penalties, and Require a Consultant or Monitor After Settlement

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On October 17, 2023, the CFTC's Division of Enforcement (the "**Division**") released an Advisory providing guidance that increased the likelihood that a respondent would need to admit to facts stated in a settlement, further clarified how the Division assesses the potential size of a civil monetary penalty, and provided guidance for when the Division might seek to impose a compliance Monitor or Consultant in connection with a settlement.¹ Although much of the Advisory memorializes trends in Division practices, the push for more respondents to admit to the facts in a settlement may tip the balance regarding whether a respondent decides to settle or litigate a matter. In particular, the Advisory does not address the fact that admissions in a settlement order may result in private rights of action under Section 22 of the Commodity Exchange Act. Such exposure may disincentivize settlements generally.

The Division will consider a non-exhaustive list of factors to determine whether admissions are appropriate

In the past, respondents entering into settlements with the Division would do so without admitting to or denying any of the facts or conclusions discussed therein. Under the newly issued guidance, "respondents should no longer assume that no-

¹ Commodity Futures Trading Commission, *Advisory Regarding Penalties, Monitors and Consultants, and Admissions in CFTC Enforcement Actions* (Oct. 17, 2023) (the "**Advisory**"), available [here](#).

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admit, no-deny resolutions are the default.”² Instead, the Advisory indicates that the Division will weigh various factors, as well as the relevant facts and circumstances, in deciding whether an admission is appropriate. These factors are not dispositive, and the examples provided in the Advisory are non-exhaustive.

Factors that weigh in favor of requiring an admission include whether:

- There is a parallel criminal resolution where the respondent has admitted to the underlying misconduct;
- The evidence uncovered during the investigation conclusively establishes the misconduct;
- A respondent hopes to receive cooperation credit from the Division. When assessing the extent of a respondent’s cooperation, the Division may consider whether the respondent admits to wrongdoing; and
- The offense is a strict liability offense in clear violation of the law where the respondent’s state of mind is irrelevant.

Factors that weigh against requiring an admission include whether:

- Admitting to the misconduct might open up the respondent to criminal liability and jeopardize the respondent’s ability to defend themselves in a criminal case; and
- A legitimate factual dispute exists where the Division faces litigation risk in establishing the fact at trial. This factor counsels against admissions only as to that disputed fact.³

The Division may increase penalties to avoid recidivism

The Division will heavily weigh the presence of recidivism in recommending penalties. Specifically, where the Division observes multiple instances of “similarly situated respondents violating similar laws in similar ways over time,” the Division may assess higher penalties than those imposed in the past.⁴ Factors that the Division will consider in determining whether a person is a recidivist include:

- Whether the prior and current actions involve the same general subject matter;
- The length of time between offenses;

² Advisory at 5.

³ *Id.* at 6.

⁴ *Id.* at 2.

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- Whether overlapping management was involved;
- The pervasiveness of the new misconduct. For example, *de minimis* new misconduct that is quickly identified and remediated is less likely to result in a recidivism finding than pervasive new misconduct that persists over time; and
- The robustness and effectiveness of remediation, if any, taken and maintained since the prior resolution.⁵

The Division may impose a corporate compliance Monitor or Consultant to rectify misconduct

The Advisory states that the Division will continue to recommend the imposition of both Monitors and Consultants when appropriate. The Division may seek to require a Monitor in cases where the misconduct is severe and the Division lacks confidence that the entity will be able to effect full remediation on its own. The Willkie team has experience with navigating the CFTC's expectations of a Monitorship.

The duties of a Monitor include:

- Testing the sufficiency of the entity's policies, procedures, and controls to identify, address, and prevent future misconduct like that described in the order;
- Drafting specific recommendations to address issues identified during testing; and
- Testing the sufficiency of the entity's enhancements to its policies, procedures, and controls to implement the Monitor's recommendations and the effectiveness of those enhancements over time.⁶

The Division may seek to impose a Consultant if the Division believes that there is sufficient evidence that the entity requires assistance, but that the entity should be able to remediate its misconduct without close oversight. The Consultant will "advise the entity regarding the implementation of remediation-related undertakings."⁷

Conclusion

Though much of the Advisory reflects standing Division practices, the changes regarding admissions of wrongdoing represent a significant departure. Commissioner Christy Goldsmith Romero issued a statement in support of the Advisory, and in particular praised the Division "for end[ing] the routine use of neither-admit-nor-deny settlements."⁸ The Division's

⁵ *Id.* at 2-3.

⁶ *Id.* at 4.

⁷ *Id.*

⁸ Statement of Commissioner Christy Goldsmith Romero on CFTC Enforcement Division Advisory Regarding Penalties, Monitors and Consultants, and Admissions (October 17, 2023), available [here](#).

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insistence that respondents admit to the facts in a proposed settlement may change the calculus on a decision to settle a matter, compared to litigating the issues in court.

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

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.

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