

## New CFTC Enforcement Policy Encourages Self-Reporting

SEPTEMBER 27, 2017

In January of this year, the Commodity Futures Trading Commission's (CFTC or Commission) Division of Enforcement (the Division) issued revised cooperation credit guidelines for companies, and its first-ever cooperation guidelines for individuals (together, the January 2017 Advisories).<sup>1</sup> Building upon the January 2017 Advisories, on September 25, 2017, James McDonald, the recently appointed director of the Division, announced significant new details regarding voluntary self-disclosures by companies and individuals seeking to cooperate. The Division simultaneously issued an updated advisory on "self-reporting and full cooperation" (the September 2017 Advisory)<sup>2</sup> (together with Director McDonald's September 25, 2017, announcement, the Updated Self-Reporting and Cooperation Program). Specifically, the Updated Self-Reporting and Cooperation Program states that the Division will provide "substantial reductions" in civil penalties for companies that self-report wrongdoing, cooperate with the Division's investigation, and remediate flaws in their controls and compliance programs.

Although voluntary self-disclosure was previously a factor in the Division's assessment of the level of cooperation, it is now the most significant driver in the Division's cooperation program. Director McDonald announced that the Division would provide "substantial credit" for a self-reported violation, but less credit for cooperation during an investigation already underway. Specifically, Director McDonald explained that the Division is hopeful that by "spelling out the substantial benefit, in the form of a significantly reduced penalty," companies and individuals will be more motivated to self-report misconduct.<sup>3</sup> These updates must be carefully considered by any company that discovers wrongdoing under the Commodity Exchange Act or Commission regulations.

### Background

The CFTC's January 2017 Advisories, while valuing timely self-disclosure in the consideration of cooperation credit, did not specify the benefits of such self-reporting.<sup>4</sup> The Updated Self-Reporting and Cooperation Program aims to "provide greater transparency" about the necessary requirements and rewards for companies and individuals that "voluntarily self-report misconduct, fully cooperat[e] with an investigation, and remediat[e] issues."<sup>5</sup> Taking cues from "organized crime and gang prosecutions" by the Department of Justice (DOJ), the Division's updated self-reporting

and cooperation program hopes to encourage companies and individuals “to voluntarily comply with the law in the first place and to look for misconduct and report it [ ] when they see it.”<sup>6</sup>

### **Updated Self-Reporting and Cooperation Program**

There are three basic elements outlined in the Division's announcement this week: (i) voluntary disclosure of misconduct to the Division, (ii) full cooperation during an investigation, and (iii) timely and appropriate remediation of flaws in compliance and control programs.<sup>7</sup> Director McDonald stated that if companies follow these requirements, the Division would commit to clear communication with self-reporters and coordination with companies on their remediation efforts.

The CFTC's recent steps to enhance its self-reporting and cooperation guidelines also reflect an attempt to harmonize its practices with those of other law enforcement agencies “so companies covered by multiple regulators don't have to work within multiple, sometimes conflicting, self-reporting and cooperation regimes.”<sup>8</sup> Specifically, the CFTC's emphasis on self-reporting, cooperation and remediation closely aligns with the DOJ's Foreign Corrupt Practices Act pilot program of 2016, which prioritizes the same three factors in assessing cooperation credit.

### **Conclusion**

The Division's announcement underscores the importance that the Commission places on proactive, robust and timely self-reporting and cooperation. The Updated Self-Reporting and Cooperation Program should cause market professionals and participants to assess carefully their potential settlement and litigation risks if they uncover or suspect wrongdoing.

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<sup>1</sup>See Press Release, [CFTC's Enforcement Division Issues New Advisories on Cooperation](#) (Jan. 19, 2017); Enforcement Advisory: [Cooperation Factors in Enforcement Division Sanction Recommendations for Companies](#) (Jan. 19, 2017); and Enforcement Advisory: [Cooperation Factors in Enforcement Division Sanction Recommendations for Individuals](#) (Jan. 19, 2017).

<sup>2</sup> Enforcement Advisory: [Updated Advisory on Self-Reporting and Full Cooperation](#) (September 25, 2017).

<sup>3</sup>[Speech of James McDonald, Director of the Division of Enforcement, Commodity Futures Trading Commission Regarding Perspectives on Enforcement: Self-Reporting and Cooperation at the CFTC](#) (hereinafter *Speech on Self-Reporting and Cooperation*).

<sup>4</sup>See January 2017 Advisories.

<sup>5</sup> September 2017 Advisory, *supra* note, 2, at 2.

<sup>6</sup> *Speech on Self-Reporting and Cooperation*, *supra* note, 3.

<sup>7</sup> September 2017 Advisory, *supra* note 2, at 2-3.

<sup>8</sup>*Id.*

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