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DEVELOPMENTS IN CFTC COOPERATION PROGRAM

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I. Introduction

The Commodity Futures Trading Commission (CFTC or Commission) recently took several steps to further encourage cooperation with and self-reporting to the Commission's Division of Enforcement (Division). In 2017, the Commission issued its first non-prosecution agreement (NPA) and published an *Updated Advisory on Self-Reporting and Full Cooperation*.[1] Additionally, the newly appointed Director of the Division of Enforcement, James McDonald, made a number of public statements signaling that the Division was changing its approach to cooperation and self-reporting.[2] The Updated Advisory and the Director's statements provide useful context regarding how the Commission will assess and reward self-reporting and cooperation in future investigations and enforcement actions.

Market participants may welcome the Updated Advisory, which largely harmonizes the Commission's guidance with that of other federal agencies, including the Securities and Exchange Commission (SEC) and the Department of Justice (DOJ). Nevertheless, the updated guidelines and uncertainty regarding how they will be administered raise broad practical considerations for practitioners and their clients. The decision to cooperate will remain a complicated one.

II. CFTC Cooperation Program

A. Overview

The Updated Advisory is a continuation of recent changes in the Commission's policies on cooperation. Although voluntary self-disclosure was previously a factor in the Division's cooperation assessment, it is now the single most significant driver. Director McDonald announced that the Division would provide "substantial credit" for a self-reported violation, but less so 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.[3] Further, the Updated Advisory provides that the Division will provide "substantial reduction[s]" in civil penalties for companies that self-report wrongdoing, cooperate with the Division's investigation, and remediate flaws in their controls and compliance

programs. No less significant, the Division outlined heightened expectations for "full cooperation," including identification of potentially culpable individuals.

B. Prior Guidance

The Division emphasized cooperation and voluntary disclosure in a number of prior enforcement advisories. Specifically, the Division issued two prior enforcement advisories for companies on August 11, 2004 and March 1, 2007 (respectively, the 2004 Advisory[4] and the 2007 Advisory[5]).

The 2004 Advisory set forth three primary factors the Division would consider in recommending sanctions against a company: (i) the nature of the company's efforts to uncover and investigate violations; (ii) the quality of the company's efforts in cooperating with the Division and managing the aftermath of the misconduct; and (iii) corporate efforts to prevent future wrongdoing.

The 2004 Advisory noted that the Division would consider respondents' cooperation credit in enforcement actions, including whether the misconduct arose because of pressure from superiors and the level at which the misconduct occurred, when evaluating cooperation. Further, the 2004 Advisory provided examples of "uncooperative conduct" that would counteract the cooperation credit that a company might otherwise receive, such as misrepresenting the nature or extent of the company's misconduct.

Building on the 2004 Advisory, the 2007 Advisory clarified that the Division's cooperation policy did not intend to "erode[] or heighten[]" attorney-client privilege and work product protections.[6] But, the Division noted that it would look favorably on companies that avoided entering into joint defense agreements with counsel for its employees or for other entities.

C. Recent Developments

1. January 2017: Enforcement Advisories on Cooperation

On January 19, 2017, the Division issued revised cooperation credit guidelines for companies,[7] as well as its first cooperation credit guidelines for individuals[8] (together, the January 2017 Advisories).[9]

These Advisories are intended to further incentivize firms and individuals to proactively provide evidence to the CFTC of misconduct, with rewards ranging from no enforcement action to reduced charges or sanctions.

The 2017 Advisory for Companies lists four factors that the Division will consider in determining whether to extend cooperation credit: (i) the value of the company's cooperation to the CFTC's investigation(s) or enforcement action(s); (ii) the value of the company's cooperation to the CFTC's broader law enforcement interests; (iii) the company's culpability, culture, and other company-specific factors; and (iv) any uncooperative conduct.

There are several key differences between the 2017 Advisory for Companies and the 2007 Advisory. Most prominently, the 2017 Advisory for Companies specifically discusses the CFTC's interest in a company's efforts to identify culpable individuals. In addition, it adds a qualitative assessment of whether and how the company's cooperation assisted the CFTC in identifying other wrongdoers both within and outside of the organization. Finally, unlike the 2007 Advisory,

the 2017 Advisory for Companies does not include any discussion discouraging joint defense agreements.

The Commission issued a parallel 2017 Advisory for Individuals, which outlined the same four factors as the 2017 Advisory for Companies that the Division will consider in determining whether to extend cooperation credit to individuals. The 2017 Advisory for Individuals underscores the value the Division places on cooperation by individuals and builds on the Commission's Whistleblower Program.

2. September 2017: Updated Advisory on Self-Reporting and Full Cooperation

While the January 2017 Advisories noted that the Commission would consider timely self-disclosure when calculating cooperation credit, they did not quantify how that credit would be awarded in practice to address those issues. The Updated Advisory 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.[10] Taking cues from organized crime and gang prosecutions by the DOJ, the Commission'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 to [the CFTC] when they see it."[11]

The Updated Advisory outlines three requirements for full self-reporting and cooperation credit: (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.[12] If companies follow these requirements, Director McDonald stated that the Division would commit to clearly communicate with self-reporters and coordinate with companies on their remediation efforts. Director McDonald stressed that self-reporting will not short-circuit the Division's process and that an investigation will still be initiated to confirm the scope of the wrongdoing and its remediation. However, Director McDonald promised that such investigations will be conducted expeditiously. Further, substantial cooperation during an investigation, absent self-reporting, will also be credited, at a reduced level. Lastly, Director McDonald emphasized that the Division has no "plans of slowing down" and that Enforcement will continue to "aggressively prosecut[e] not just the company ultimately responsible for the misconduct, but also the individuals involved."[13]

D. Illustrative Cases

On January 19, 2017, the CFTC fined a large futures commission merchant and provisionally registered swap dealer $25 million for spoofing of U.S. Treasury futures. On June 29, 2017, the Commission issued its first NPA with three of the company's former traders.[14] The Commission entered into the NPAs based, in part, on each of the trader's timely and substantial cooperation in the investigation, their immediate willingness to accept responsibility for their misconduct, the material assistance they provided to the Division, including implicating others, and the traders' lack of prior misconduct. Director McDonald stated that "[t]hese traders readily admitted their own wrongdoing, identified misconduct of others, and provided other valuable information, all of which expedited our investigation and strengthened our cases against the other wrongdoers."[15]

The Commission extended cooperation credit to a junior trader in another recent spoofing case.[16] The CFTC found that David Liew, a junior trader on a precious metals desk at a large financial institution, engaged in spoofing and manipulation of gold and silver futures contracts, and permanently banned Liew from trading commodity interests.[17] The Order acknowledged that "the Commission recognizes Liew's cooperation . . . including his entry into a formal Cooperation Agreement . . . with the Division, his provision of substantial assistance to the investigation and his undertaking to continue to cooperate . . . ."[18] Director McDonald commented that "[this] enforcement action demonstrates that the Commission will aggressively pursue individuals who manipulate and spoof in our markets" and "shows that while holding individuals accountable for their conduct, the Commission will give meaningful cooperation credit to those who acknowledge their own wrongdoing, enter into a Cooperation Agreement and provide substantial assistance to the Division in its investigations and enforcement actions against others who have engaged in illegal conduct."[19]

In addition to cooperation credit for individuals, the Commission issued similar credit to Bank of Tokyo-Mitsubishi UFJ, Ltd. (BTMU) in recognition of its significant cooperation.[20] The CFTC ordered BTMU to pay $600,000 for spoofing in a variety of Chicago Mercantile Exchange and Chicago Board Of Trade contracts, including futures contracts based on U.S. Treasury notes and Eurodollars.[21] Touting the benefits of cooperation, Director McDonald said "[t]his case shows the benefits of self-reporting and cooperation, which I anticipate being an important part of our enforcement program going forward."[22] Further, the Order expressly recognized BTMU's cooperation, noting that "the Respondent promptly self-reported the misconduct and proactively implemented large-scale remedial measures and process improvements to deter and detect similar misconduct."[23] Specifically, the Order found that BTMU started a large-scale internal review, assisted the Division's investigation of the conduct, enhanced its systems and controls, made a variety of enhancements to detect and prevent similar misconduct, and revised and updated its policies and training materials.

III. Comparisons to SEC Cooperation Program

In many respects, the CFTC's self-reporting and cooperation guidelines are similar to the factors historically used by the SEC to evaluate cooperation by individuals and companies in its respective investigations and enforcement actions. Both programs are designed to reward firms that self-report and cooperate fully with each agency, and both are based on similar strategies employed by federal law enforcement. Nevertheless, it is unclear whether and to what extent the CFTC's program will further align or differ in practice from the SEC's approach.

The SEC officially announced its formal cooperation initiative in January 2010, setting forth three key elements.[24] First, the SEC's Division of Enforcement authorized its staff to use—for the first time—cooperation agreements, deferred prosecution agreements, and NPAs to encourage individuals and companies to cooperate and assist in investigations.[25] Second, the SEC streamlined its process for submitting witness immunity requests to the Justice Department. Third, the SEC published its *Policy Statement Concerning Cooperation by Individuals*,[26] which outlined the four factors that it would consider in determining

cooperation by individuals: (i) assistance provided by the individual; (ii) importance of the underlying matter; (iii) interest in holding the individual accountable; (iv) profile of the individual. Consistent with the CFTC's cooperation factors, the SEC's guidelines emphasize quality and timeliness of assistance, the importance of the underlying investigation, and remediation efforts, among several other similarities. The SEC's guidelines do not, however, describe what constitutes "uncooperative conduct," which the Division addresses in detail in the January 2017 Advisories.

In practice, the decision whether to cooperate with the SEC is often difficult. The SEC has not adopted objective criteria to measure a firm's level of cooperation or to apply in the determination of monetary sanctions. As a result, the actual benefits of cooperation and self-reporting are rarely quantifiable. Indeed, the SEC itself has acknowledged that there is no guarantee that cooperation will yield any benefit at all, noting that "there may be circumstances where conduct is so egregious, and harm so great, that no amount of cooperation or other mitigating conduct can justify a decision not to bring any enforcement action at all."[27] Time will tell how the CFTC applies its new self-reporting and cooperation guidelines, and whether its program will alleviate or otherwise address the uncertainty that many firms face in determining whether to cooperate with the SEC.[28]

Another similarity between the CFTC and SEC's respective cooperation programs relates to disgorgement. Under the CFTC's new guidelines, cooperation credit explicitly does not extend to disgorgement. Specifically, the CFTC guidelines state that, "[i]n all instances, the company or individual will be required to disgorge profits (and, where applicable, pay restitution) resulting from any violations."[29] The CFTC's stated approach is perhaps more unequivocal than the SEC's historical practice. As described by Director Ceresney, the SEC's flexibility to provide monetary relief for cooperation "ordinarily does not extend to disgorgement," however, "in some cases there is flexibility as to how to calculate disgorgement, and the Enforcement staff might take a narrower view of what should be disgorged in recognition of cooperation."[30] Again, it is unsettled how the CFTC's cooperation program will compare in practice to the SEC's historical approach in this regard and how disgorgement will continue to be used in the enforcement program following the Supreme Court's decision in *Kokesh v. SEC*.[31]

IV. Comparisons to DOJ Cooperation Program

The CFTC's program has also drawn comparisons to the September 2015 DOJ memorandum, *Individual Accountability for Corporate Wrongdoing* (the Yates Memo).[32] The Yates Memo outlines six key steps designed to guide DOJ attorneys when investigating corporate misconduct.[33]

Notably, in contrast to the CFTC's and SEC's approach to cooperation, the Yates Memo explicitly requires that, "for a company to receive any consideration for cooperation . . . the company must completely disclose to the Department all relevant facts about individual misconduct."[34] Indeed, in a speech announcing this policy, then-Deputy Attorney General Sally Yates emphasized: "It's all or nothing. No more picking and choosing what gets disclosed. No more partial credit for cooperation that doesn't include information about individuals."[35]

The CFTC's cooperation guidelines appear to be more nuanced than the DOJ's stated "all or nothing" standard. Instead, the CFTC guidelines state that, in order to receive full self-reporting and cooperation credit, voluntary disclosure "must include all relevant facts known to the company or individual at the time of the disclosure, including all relevant facts about the individuals involved in the misconduct."[36] Moreover, the Division expressly acknowledged that it "will still recommend full credit for the company or individual—assuming compliance with the other requirements—where the company or individual made best efforts to ascertain the relevant facts at the time of disclosure, fully disclosed the facts known at that time, continued to investigate, and disclosed additional relevant facts as they came to light."[37]

In addition, the CFTC's emphasis on self-reporting, cooperation and remediation draws certain similarities to the DOJ's new Foreign Corrupt Practices Act (FCPA) Corporate Enforcement Policy.[38] However, while the CFTC has not quantified the benefits it will extend in exchange for cooperation and voluntary disclosure, the FCPA Enforcement Guidance expressly offers partial reductions in fines for companies that voluntarily disclose a potential FCPA violation to DOJ. Specifically, the FCPA Enforcement Guidance states that "[w]hen a company has voluntarily self-disclosed misconduct in an FCPA matter, fully cooperated, and timely and appropriately remediated . . . there will be a presumption that the company will receive a declination absent aggravating circumstances involving the seriousness of the offense or the nature of the offender."[39] Where a company "has voluntarily self-disclosed, fully cooperated, and timely and appropriately remediated, the Fraud Section . . . will accord, or recommend to a sentencing court, a 50% reduction off of the low end of the U.S. Sentencing Guidelines (U.S.S.G.) fine range, except in the case of a criminal recidivist."[40] Where a company "did not voluntarily disclose its misconduct . . . but later fully cooperated and timely and appropriately remediated . . . the company will receive, or the Department will recommend to a sentencing court, up to a 25% reduction off of the low end of the U.S.S.G. fine range."[41]

V. Practical Considerations

Although market participants may welcome the CFTC's attempts to provide transparency in formulating its new guidelines, the new guidelines nevertheless raise broad practical considerations. The decisions whether to self-report and to cooperate remain difficult. Given the infancy of the CFTC's program, it is especially difficult to evaluate the potential costs and risks of self-reporting and cooperation against the possible benefits. In particular, there are three factors that contribute to this uncertainty.

1. It is unclear how the CFTC will interpret and apply its new guidelines in practice—particularly with respect to timeliness and completeness. In order to qualify for "full self-reporting and cooperation credit," the CFTC requires voluntary disclosure "within a reasonably prompt time after the company or individual becomes aware of the misconduct" of "all relevant facts known to the company or individual at the time of the disclosure."[42] However, the CFTC does not address how it intends to evaluate the timeliness or completeness of disclosure, and it is uncertain how much discretion line attorneys in the Division of Enforcement will

have in making these determinations. This is important because unlike the SEC's cooperation guidelines, which state that the SEC will consider timeliness among several other factors,[43] the CFTC's guidelines are more restrictive, expressly stating that disclosure "within a reasonably prompt time" is required for full credit.

The CFTC's Whistleblower Program[44] further complicates the question of timeliness. If a whistleblower reports a potential violation internally, is the company thus sufficiently "aware of the misconduct" and obligated to report such misconduct to the CFTC "within a reasonably prompt time" to qualify for cooperation credit?[45] Alternatively, will a company's report to the CFTC be considered "reasonably prompt" if submitted after an internal review, even if the whistleblower already reported the conduct to the CFTC in the interim? It remains to be seen how the Commission will apply its cooperation guidelines to these types of scenarios or how the Commission will amend its whistleblower guidance to account for the new cooperation program.

Similarly, it is unclear how strictly the Commission will interpret the requirement that self-disclosure be voluntary. Many firms operating within the CFTC's jurisdiction may have competing disclosure obligations. For example, broker-dealers subject to FINRA Rule 4530 may be required to disclose misconduct involving both securities and products overseen by the Commission. Similarly, public companies could be required to file a Form 8-K disclosing misconduct that materially affected the companies' financial statements or resulted in the departure of senior executives. In these cases, it is unclear whether the CFTC would reduce a company's self-reporting credit, because the company was independently required to disclose the conduct to another regulator or shareholder.

2. The potential monetary benefits of cooperation are not expressly quantified, complicating any potential cost-benefit analysis. Instead, the CFTC promises that, "[i]f the company or individual self-reports, fully cooperates, and remediates, the Division will recommend the most substantial reduction in the civil monetary penalty that otherwise would be applicable."[46] The meaning of "the most substantial reduction" is not expressly quantified, and the CFTC has not published guidelines explaining how baseline fines are calculated.

   Notably, in a draft speech announcing the CFTC's cooperation program and in an interview with *The New York Times*, Director McDonald initially indicated that the CFTC would reduce penalties by 75 percent for those firms that fully cooperated, and, in extraordinary cases, would take no enforcement action at all.[47] However, the CFTC ultimately abandoned this 75 percent target, instead stating that it will reduce penalties by a "substantial" amount. In light of this approach, some of the uncertainty relating to the calculation of cooperation credit that is present in the SEC context is likely to extend to the CFTC's program as well.

   However, certain historical examples are

instructive. For example, in 2015, a global banking and financial services company and provisionally registered swap dealer agreed to pay an $800 million penalty to settle CFTC charges of manipulation of the LIBOR benchmark, a significantly higher fine than what the CFTC had imposed on other firms for similar conduct.[48] In particular, the CFTC's Order noted that the firm did not cooperate sufficiently at the outset of the CFTC's investigation.[49] Former Division of Enforcement Director Aitan D. Goelman later noted that the firm would have faced a "much, much higher penalty" had it never cooperated.[50]

While it is apparent that the CFTC does reward cooperation in certain circumstances, it is not clear if and how cooperation is precisely quantified as a reduced monetary penalty. As a result, it may be difficult for firms or individuals to weigh the expense of an internal investigation and other costs associated with self-reporting against the possibility of higher or potentially reduced penalties. The general increase in civil monetary penalties in recent years, and the risk that such penalties will continue to increase in the future, further complicates the difficulty of this assessment.

3. The CFTC's new guidelines do not provide a materiality standard for disclosure. Consequently, firms may be incentivized to self-report even minor, technical rule violations to reserve their right to potential cooperation credit as a matter of course. It is unclear whether it was the Commission's intent that firms submit non-material reports, or whether it is equipped to review and respond to an influx of such reports.

There are steps that the Commission could take to assist counsel and their clients in assessing the risks and possible benefits of self-reporting and cooperation. As an initial matter, the CFTC could clarify that it will employ a more objective standard for timeliness and materiality. For example, the CFTC could require that firms self-report within a certain time period after they have determined, or should have reasonably determined, that a violation has taken place. Similarly, the CFTC could simply assert that it only expects firms to self-report material violations. In addition, the CFTC could provide explicit guidance on how the Whistleblower Program fits into this process.

VI. Conclusion

The Division's announcement underscores the importance that the Commission places on proactive, robust and timely self-reporting and cooperation. Serious questions remain how the guidelines will be applied in practice. Accordingly, the decision to self-report will remain difficult, causing market participants and their counsel to carefully consider the potential settlement and litigation risks when, and if, they discover wrongdoing.

ENDNOTES:

[1]CFTC Enforcement Advisory, Updated Advisory on Self-Reporting and Full Cooperation (Sept. 25, 2017), http://www.cftc.gov/idc/groups/public/@lrenforcementactions/documents/legalpleading/enfadvisoryselfreporting0917.pdf [hereinafter the "Updated Advisory"].

[2]*See, e.g.*, James McDonald, CFTC Director of Enforcement, Perspectives on Enforcement:

Self-Reporting and Cooperation at the CFTC, Speech at the NYU Program on Corp. Compliance & Enforcement / Inst. for Corp. Governance & Fin. (Sept. 25, 2017), http://www.cftc.gov/PressRoom/SpeechesTestimony/opamcdonald092517 [hereinafter "Speech on Self-Reporting and Cooperation"]. *See also*, Interview by CFTC Talks with James McDonald, CFTC Director of Enforcement, Ep. 0005 (July 2017), https://secure-hwcdn.libsyn.com/p/2/2/1/221a3c555a7ecbd9/CFTC_Talks_Ep_5_Transcript.pdf?c_id=16566154&expiration=1512685327&hwt=6e79c84976d336cd14e88f92b3ea3d6a. Director McDonald stated that the Commission wants to "[g]iv[e] companies and individuals the incentive, the right incentives to comply with the law while holding the people who violated the law accountable." *Id.* at 15.

[3]Speech on Self-Reporting and Cooperation, *supra* n.2.

[4]CFTC Enforcement Advisory, Cooperation Factors in Enforcement Division Sanction Recommendations (Aug. 11, 2004), http://www.cftc.gov/files/enf/enfcooperation-advisory.pdf.

[5]CFTC Enforcement Advisory, Cooperation Factors in Enforcement Division Sanction Recommendations (Mar. 1, 2007), http://www.cftc.gov/idc/groups/public/@cpdisciplinaryhistory/documents/file/enfcooperation-advisory.pdf.

[6]*Id.*

[7]CFTC Enforcement Advisory, Cooperation Factors in Enforcement Division Sanction Recommendations for Companies (Jan. 19, 2017), http://www.cftc.gov/idc/groups/public/@lrenforcementactions/documents/legalpleading/enfadvisorycompanies011917.pdf [hereinafter the "2017 Advisory for Companies"].

[8]CFTC Enforcement Advisory, Cooperation Factors in Enforcement Division Sanction Recommendations (Jan. 19, 2017), http://www.cftc.gov/files/enf/enfcooperation-advisory.pdf [hereinafter the "2017 Advisory for Individuals"].

[9]These advisories were discussed in the July/August 2017 issue of the Futures and Derivatives Law Report. *See* Stacie R. Hartman & Ken W. McCracken, *Can Cooperation be Further Incentivzed? A Proposal for More Tools in Resolving CFTC Investigations*, 37:7 Futures & Derivs. L. Rep., July/August 2017 at 17. Hartman and McCracken encouraged the CFTC to emulate the cooperation and self-disclosure frameworks developed by the SEC and DOJ, including by using NPAs and developing and more rigorous and transparent framework or measuring a potential respondent's cooperation. As discussed below, the Commission's subsequent actions are largely consistent with these recommendations.

[10]Updated Advisory, *supra* n.1, at 2.

[11]Speech on Self-Reporting and Cooperation, *supra* n.2.

[12]Updated Advisory, *supra* n.1, at 2-3.

[13]Speech on Self-Reporting and Cooperation, *supra* n.2.

[14]*See* CFTC Press Release 7581-17 (June 29, 2017), http://www.cftc.gov/PressRoom/PressReleases/pr7581-17.

[15]*Id.*

[16]CFTC Press Release 7567-17 (June 2, 2017), http://www.cftc.gov/PressRoom/PressReleases/pr7567-17 [hereinafter "Liew Case Press Release"].

[17]Order, *In the Matter of David Liew*, CFTC No. 17-14 (June 2, 2017), http://www.cftc.gov/idc/groups/public/@lrenforcementactions/documents/legalpleading/enfdavidlieworder060217.pdf. In addition, on June 1, 2017, Liew pleaded guilty to one count of conspiracy to commit wire fraud and spoofing. *United States. v. Liew*, Case No. 17-CR-001, ECF No. 22 (N.D. Ill., June 1, 2017).

[18]*Id.*

[19]Liew Case Press Release, *supra* n.16.

[20]*See* CFTC Press Release 7598-17 (Aug. 7, 2017), http://www.cftc.gov/PressRoom/PressReleases/pr7598-17.

[21]*Id.*

[22]*Id.*

[23]Order, *In the Matter of The Bank of Tokyo-Mitsubishi UFJ, Ltd.*, CFTC No. 17-21 (Aug. 7, 2017), http://www.cftc.gov/idc/groups/public/@lrenforcementactions/documents/legalpleading/e

nftokyomitsubishiorder080717.pdf.

[24]Press Release 2010-6, SEC Announces Initiative to Encourage Individuals and Companies to Cooperate and Assist in Investigations (Jan. 13, 2010), https://www.sec.gov/news/press/2010/2010-6.htm. The SEC's cooperation initiative evolved from its October 2001 Seaboard Report, which set forth four broad criteria—self-policing, self-reporting, remediation, and cooperation—that the SEC would consider when determining appropriate enforcement charges against companies. The Seaboard Report listed several questions that the SEC would ask in evaluating how to credit these broad categories, "from the extraordinary step of taking no enforcement action to bringing reduced charges, seeking lighter sanctions, or including mitigating language" in charging documents. SEC, Report of Investigation Pursuant to Section 21(a) of the Securities Exch. Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions, Exchange Act Release No. 44969 (Oct. 23, 2001), https://www.sec.gov/litigation/investreport/34-44969.htm.

[25]In 2015, the SEC's Division of Enforcement announced that "going forward, a company must self-report misconduct in order to be eligible for the Division to recommend a DPA or NPA to the Commission in an FCPA case." *See* Andrew Ceresney, SEC Director of Enforcement, SEC, ACI's 32nd FCPA Conference Keynote Address Before the SEC (Nov. 17, 2015), https://www.sec.gov/news/speech/ceresney-fcpa-keynote-11-17-15.html. As discussed above, the CFTC entered into its first NPA this year.

[26]Policy Statement Concerning Cooperation by Individuals in its Investigations and Related Enforcement Actions, Exchange Act Release No. 61340, 17 C.F.R. ¶ 202 (Jan. 19, 2010), https://www.sec.gov/rules/policy/2010/34-61340.pdf [hereinafter "SEC Policy Statement"].

[27]SEC, 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, Exchange Act Release No. 44969 (Oct. 23, 2001), https://www.sec.gov/litigation/investreport/34-44969.htm.

[28]In a recent speech, former SEC Director of Enforcement Andrew Ceresney attempted to address these concerns, urging that the SEC's "history over the last five years demonstrates that the benefits [of cooperation] are real in terms of charging decisions, monetary relief, and bars." In particular, he noted that, although the SEC "does not normally announce instances where, in the exercise of discretion, it determines that no charges are appropriate," the Division declined to recommend charges in "a significant percentage" of cooperation agreements. He further cited examples where the Commission decided against seeking monetary relief due to cooperation, and noted that cooperation "bears directly" on factors relevant to whether industry suspensions or bars are necessary. At the same time, he noted that "the bar has been raised for what counts as good corporate citizenship in the last 15 years or so," suggesting that what qualifies as cooperation is in some ways a moving target, and underscoring a certain subjectivity in SEC cooperation determinations. *See* Andrew Ceresney, SEC Director of Enforcement, The SEC's Cooperation Program: Reflections on Five Years of Experience, Remarks at University of Texas School of Law's Government Enforcement Institute in Dallas, Texas (May 13, 2015), https://www.sec.gov/news/speech/sec-cooperation-program.html [hereinafter "Ceresney Remarks"].

[29]Updated Advisory, *supra* n.1, at 3.

[30]Ceresney Remarks, *supra* n.28.

[31]*Kokesh v. SEC*, 137 S. Ct. 1635 (2017). The Court unanimously found that disgorgement is a "penalty" within the meaning of 28 U.S.C. § 2462, thus requiring the SEC to commence any claim for disgorgement within five years of the date the claim accrued.

[32]Memorandum from Sally Yates, Deputy Attorney General, Individual Accountability for Corporate Wrongdoing (Sept. 9, 2015), https://www.justice.gov/archives/dag/file/769036/download [hereinafter "Yates Memo"].

[33]The Yates Memo sets forth the following six key steps: (l) in order to qualify for any cooperation credit, corporations must provide to

DOJ all relevant facts relating to the individuals responsible for the misconduct; (2) criminal and civil corporate investigations should focus on individuals from the inception of the investigation; (3) criminal and civil attorneys handling corporate investigations should be in routine communication with one another; (4) absent extraordinary circumstances or approved departmental policy, DOJ will not release culpable individuals from civil or criminal liability when resolving a matter with a corporation; (5) DOJ attorneys should not resolve matters with a corporation without a clear plan to resolve related individual cases, and should memorialize any declinations as to individuals in such cases; and (6) civil attorneys should consistently focus on individuals as well as the company and evaluate whether to bring suit against an individual based on considerations beyond that individual's ability to pay.

[34]Yates Memo, *supra* n.32, at 3 (emphasis in original).

[35]Sally Yates, Deputy Attorney General, Remarks at New York University School of Law Announcing New Policy on Individual Liability in Matters of Corporate Wrongdoing (Sept. 10, 2015), https://www.justice.gov/opa/speech/deputy-attorney-general-sally-quillian-yates-delivers-remarks-new-york-university-school.

[36]Updated Advisory, *supra* n.1, at 3.

[37]*Id*.

[38]DOJ FCPA Corporate Enforcement Policy 9-47.120 (Nov. 2017), https://www.justice.gov/criminal-fraud/file/838416/download. The new policy was announced in November 2017 and effectively makes permanent the FCPA Pilot Program announced in April 2016. *See* U.S. Department of Justice, Criminal Division, Fraud Section's Foreign Corrupt Practices Act Enforcement Plan and Guidance (Apr. 5, 2016), https://www.justice.gov/criminal-fraud/file/838416/download.

[39]DOJ FCPA Corporate Enforcement Policy 9-47.120.

[40]*Id.*

[41]*Id.*

[42]Updated Advisory, *supra* n.1, at 2-3.

[43]SEC Policy Statement, *supra* n.26, at 3-4 ("The Commission assesses the assistance provided by the cooperating individual in the Investigation by considering, among other things: . . . (ii) The timeliness of the individual's cooperation . . . .").

[44]On May 22, 2017, the CFTC amended its whistleblower rules to enhance protections for whistleblowers against retaliation and assert its own authority to bring enforcement actions against retaliation. The amendments revised certain aspects of the CFTC's whistleblower award review process, bolstered staff authority to administer the program, and enabled whistleblowers to receive an award for judgments obtained in related actions. *See* Paul Architzel, Yevedzo Chitiga, *CFTC Increases Anti-Retaliation Protections for Whistleblowers*, WilmerHale Publications & News (May 24, 2017), https://www.wilmerhale.com/pages/publicationsandnewsdetail.aspx?NewsPubId=17179884591.

[45]It is not clear from existing guidance whether the obligation to disclose is triggered by the identification of a potential violation, or a conclusion that a violation has taken place. In a similar context, FINRA Rule 4530 (Reporting Requirements) requires disclosure where a firm "has concluded or reasonably should have concluded on its own that violative conduct has occurred," not when a potential violation has been identified.

[46]Updated Advisory, *supra* n.1, at 3.

[47]David Enrich, *Regulator Wants Financial Industry to Self-Report Wrongdoing*, N.Y. TIMES (Sept. 24, 2017), https://www.nytimes.com/2017/09/24/business/cftc-commodity-futures-trading-commission.html.

[48]*In re Deutsche Bank AG*, CFTC No. 15-20 (Apr. 23, 2015), http://www.cftc.gov/idc/groups/public/@lrenforcementactions/documents/legalpleading/enfdeutscheorder042315.pdf. From 2012 to 2014, the CFTC imposed penalties ranging from $105 million to $700 million on six multinational financial institutions for similar misconduct relating to interest rate benchmarks.

[49]*Id.* at 5. ("The Commission notes that at the outset of the Division of Enforcement's investigation in April 2010 and continuing until mid-2011, Deutsche Bank's cooperation was not sufficient, and, in part, this affected a timely resolution of this matter.").

[50]*See* Megan Leonhardt, *The Pros and Cons of Cooperating with Regulators*, WealthManagement.com (Apr. 24, 2015), http://www.wealthmanagement.com/regulation-compliance/pros-and-cons-cooperating-regulators.