CFTC UPDATES SELF-REPORTING AND COOPERATION GUIDELINES

On September 25, 2017, the U.S. Commodity Futures Trading Commission ("CFTC") issued an Enforcement Advisory outlining requirements and resulting benefits for companies and individuals that voluntarily self-report wrongdoing to the CFTC and fully cooperate with the Enforcement Division's investigation (the "Updated Advisory"). The Updated Advisory is an expansion of the CFTC's January 2017 Enforcement Advisory (see our January 2017 client briefing). The new self-reporting and cooperation program promises meaningful reductions in penalties. Specifically, where a company or individual self-reports, fully cooperates, and takes remedial measures, the Enforcement Division will recommend that the CFTC consider a "substantial reduction" from the civil monetary penalty that would otherwise be imposed. In informal comments following the rollout of the Updated Advisory, CFTC Division of Enforcement Director James McDonald suggested that companies and individuals meeting the Updated Advisory's requirements could see a 50 to 75 percent reduction in civil monetary penalties, and also suggested that self-reporting should occur "right away" upon learning of potential misconduct, even if the illegality is ambiguous and the extent of the misconduct is not clear. Although companies and individuals who do not self-report, but otherwise fully cooperate and remediate, may also receive reduced penalties, the Updated Advisory makes clear that the Enforcement Division will reserve recommendations for the most substantial reductions where self-reporting is exhibited along with cooperation and remediation.

The Updated Advisory is an outgrowth of the CFTC's January 2017 Enforcement Advisory, which identified the value of cooperation to: (1) CFTC investigations or enforcement actions, and (2) the CFTC's broader law enforcement interests, as factors that the CFTC will consider in evaluating cooperation. The January 2017 Enforcement Advisory also enumerated factors suggesting what constitutes uncooperative conduct.

The Updated Advisory sets forth additional information outlining requirements for full self-reporting and cooperation credit, which include:

- Voluntary disclosure to the CFTC prior to an imminent threat of exposure. Disclosure must be made within a reasonably prompt time after becoming aware of the misconduct, and include all relevant facts known at the time, including facts about individuals involved;
- Full cooperation in line with the requirements set forth in the January 2017 Enforcement Advisory; and
- Timely and appropriate remediation of flaws in compliance and control programs.

The Updated Advisory provides that where a company or individual self-reports, fully cooperates, and remediates, the Enforcement Division will recommend "the most substantial reduction" to the civil monetary penalty that would have been applied and, in extraordinary circumstances, may recommend a declination of prosecution. However, the Updated Advisory makes clear that, in all instances, the company or individual will be required to disgorge profits (and pay restitution where applicable) resulting from any violations.

A CARROT AND STICK APPROACH TO ENFORCEMENT

In remarks delivered on September 25, 2017 announcing the Updated Advisory, CFTC Division of Enforcement Director James McDonald characterized the CFTC's updated cooperation and self-reporting program as being designed to "achieve optimal deterrence" by "incentiviz[ing] voluntary disclosure at the earliest possible time." McDonald stated that the CFTC recognizes that the "decision whether to voluntarily report [misconduct] often comes down to a business decision" that weighs risks of detection and possible fines, and that the CFTC wants "to shift this analysis in favor of self-reporting." McDonald, who was appointed in March and previously served as a U.S. prosecutor in the Southern District of New York, emphasized "that companies and individuals have a choice" and that while self-reporting and cooperation can be beneficial, those that choose not to do so should not "be surprised when they're met with vigorous, aggressive prosecution, accompanied by full monetary penalties."

CFTC'S GOAL OF HARMONIZING INCENTIVE STRUCTURES AND ENFORCEMENT POLICIES

In his September 25, 2017 remarks, McDonald stated that one goal of outlining the CFTC's self-reporting and cooperation program is to bring the basic requirements of self-reporting, cooperation, and remediation in line with other law enforcement agencies, particularly the U.S. Department of Justice ("DOJ"). An intended benefit of the Updated Advisory for companies and individuals is to minimize conflicting incentives when navigating multiple self-reporting and cooperation regimes.

Echoing DOJ guidance stressing individual accountability in prosecutions related to corporate wrongdoing, McDonald emphasized that full cooperation includes disclosing all facts related to the involvement of any individuals, stating "[p]articular facts should be attributed to particular people."

AN ARTICULABLE SELF-REPORTING AND COOPERATION PROGRAM, WITH ITEMS FOR FUTURE CLARIFICATION

Companies and individuals can expect concrete benefits in exchange for proactive self-reporting of potential misconduct and complete cooperation with CFTC investigation and enforcement, but risk substantial penalties where such cooperation is lacking. As with the January 2017 Enforcement Advisory and earlier guidance issued in 2007, the Updated Advisory suggests that the CFTC wants companies to provide more robust and proactive cooperation during investigations and to improve systems and controls to prevent misconduct from occurring.

In informal comments following the rollout of the Updated Advisory, McDonald suggested that, through the Updated Advisory, the CFTC seeks to encourage self-reporting of suspicious conduct even where illegality is ambiguous and the extent of misconduct is unclear. It is likely that, conversely, the passage of time from learning about potential misconduct to reporting could lessen or eliminate the amount of self-reporting credit that a company or individual may receive.

Unlike prior enforcement advisories, the Updated Advisory identifies substantial penalty reductions as a particular benefit for those who meet the CFTC's requirements for self-reporting and cooperation credit. The lack of a specific percentage reduction target (which was eliminated from McDonald's draft remarks)[i] indicates that credit will be evaluated on a case-by-case basis. In his informal comments, McDonald suggested those who self-reported and fully cooperated and remediated in accordance with the Updated Advisory guidelines could generally enjoy a 50 to 75 percent reduction in penalty. Future enforcement actions should indicate what facts and circumstances lead to more substantial reductions, and also provide transparency in how the CFTC calculates the baseline penalty that is subsequently reduced.

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[i] The New York Times has reported that Mr. McDonald "said in the draft speech and in an interview that the agency expected to reduce penalties by roughly 75 percent for those that fully cooperate." Subsequently, however, "Mr. McDonald told The Times that he and the commission's chairman, J. Christopher Giancarlo, had changed their minds and decided against setting a 75 percent target. Instead, he said, they will reduce penalties by a 'substantial' amount case by case." David Enrich, *A Wall Street Watchdog Hopes to Encourage Self-Reporting With Smaller Penalties*, N.Y. Times, Sept. 24, 2017, at B1, *available at* https://www.nytimes.com/2017/09/24/business/cftc-commodity-futures-trading-commission.html?_r=1

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