

CLIENT ALERT

CFTC Enforcement Division Dangles Self-Reporting Carrot: Is it Worth Taking a Bite?

September 28, 2017

AUTHORS

Paul J. Pantano, Jr. | Sohair A. Aguirre | Neal E. Kumar | Thomas R. Millar

On September 25, 2017, the Division of Enforcement (the “**Division**”) of the Commodity Futures Trading Commission (the “**Commission**” or “**CFTC**”) published a brief advisory (the “**Advisory**”) updating its January 2017 guidelines explaining how the Division recognizes individuals and companies for cooperative conduct (the “**January 2017 Cooperation Guidelines**”).¹ The Advisory does not alter the January 2017 Cooperation Guidelines, but rather is designed to emphasize the “substantial benefit” of self-reporting potential violations, cooperating with the Division during an investigation, and implementing timely remedial measures to ensure that certain misconduct does not occur again.²

Historically, it has been difficult for non-CFTC registrants to ascertain the tangible benefits of self-reporting potential violations to the CFTC.³ Although the Advisory announces a general commitment to providing “substantial” benefits for self-reporting, the Advisory is not specific. For this reason, it is unclear whether the Division’s promise of undefined “substantial” penalty reductions will provide companies with sufficient information to meet the Division Director’s goal of “shift[ing] this

¹ See Willkie Farr & Gallagher LLP memorandum summarizing the CFTC’s January 2017 Cooperation Guidelines, [available here](#).

² 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 (the “**McDonald Speech**”), [available here](#).

³ Non-CFTC registrants are the main focus of our summary because many CFTC registrants are required to disclose material non-compliance issues in their CCO annual reports. Note, however, that Mr. McDonald stated in his speech that to be considered voluntary under the Advisory, a self-report must be made independent of any other legal obligation.

CFTC Enforcement Division Dangles Self-Reporting Carrot: Is it Worth Taking a Bite?

analysis in favor of self-reporting.”⁴ If market participants observe an objectively measurable drop in the amount of civil penalties for self-reported conduct, their calculus might change.

Below is a summary of the key takeaways from the Advisory.⁵

- To receive the “most substantial reduction in a civil monetary penalty,” the Division expects a company to self-report the potential violation, fully cooperate with the Division’s investigation, and undertake timely and sufficient remedial measures. The Division may still “recommend a reduced civil monetary penalty even where a company or individual did not self-report wrongdoing but otherwise fully cooperated with the Division’s investigation and remediated deficiencies in its compliance or control programs.”
- To receive credit for self-reporting a potential violation, the self-report must:
 - occur prior to an imminent threat of exposure of the misconduct;⁶
 - be made “within a reasonably prompt time” after the company discovers the misconduct;⁷ and
 - include all relevant facts that are known at the time of the self-report. The Advisory acknowledges that the company might not know all relevant facts at the time of the self-report, but “[t]o encourage voluntary disclosure at the earliest possible time,” the Division nevertheless will recommend full credit if the company has: (1) used “best efforts” to uncover all relevant facts at the time of the self-report; (2) reported all of the facts known at that time; and (3) continued to investigate the misconduct and provided additional relevant facts as part of that internal investigation.⁸
- The Advisory cross-references the Division’s January 2017 Cooperation Guidelines as to when the Division recognizes cooperative conduct during the course of an investigation. Mr. McDonald added in his speech about the Advisory, however, that a self-report should attribute particular facts to particular people and substantial cooperation is “the type [of cooperation] that allows us to bring charges against others.”⁹
- The Division will evaluate whether a company took sufficient remediation efforts on a “fact and circumstance” basis.

⁴ McDonald Speech at 3.

⁵ A copy of the Advisory is [available here](#).

⁶ Advisory at 2.

⁷ Advisory at 2.

⁸ Advisory at 3.

⁹ McDonald Speech at 3-4.

CFTC Enforcement Division Dangles Self-Reporting Carrot: Is it Worth Taking a Bite?

- Only in “extraordinary circumstances” will the Division recommend that the Commission *not* move forward with an enforcement action related to the self-report. One example of an “extraordinary” circumstance is misconduct that is pervasive throughout the industry and the company is the first to report the misconduct.
- Notably, the Division will always require companies to disgorge profits and pay restitution resulting from any violations.

If you have any questions regarding this client alert, please contact the following attorneys or the attorney with whom you regularly work.

Paul J. Pantano, Jr.

202 303 1211

ppantano@willkie.com

Sohair A. Aguirre

202 303 1140

saguirre@willkie.com

Neal E. Kumar

202 303 1143

nkumar@willkie.com

Thomas R. Millar

202 303 1144

tmillar@willkie.com

Copyright © 2017 Willkie Farr & Gallagher LLP.

This alert is provided by Willkie Farr & Gallagher LLP and its affiliates for educational and informational purposes only and is not intended and should not be construed as legal advice. This alert may be considered advertising under applicable state laws.

Willkie Farr & Gallagher LLP is an international law firm with offices in New York, Washington, Houston, Paris, London, Frankfurt, Brussels, Milan and Rome. The firm is headquartered at 787 Seventh Avenue, New York, NY 10019-6099. Our telephone number is (212) 728-8000 and our fax number is (212) 728-8111. Our website is located at www.willkie.com.