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Commodity Futures Trading Commission Announces New System to Incentivize Self-Reporting, Cooperation, and Remediation

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Shelleah M. Jackson*

In this article, the authors provide an overview of an enforcement advisory released recently by the Commodity Futures Trading Commission's Division of Enforcement, introducing metrics the DOE will use to evaluate a company's or individual's conduct before and leading up to the discovery of a potential violation of the Commodity Exchange Act and throughout the investigation process as well as certain key takeaways that may be considered when contemplating a self-report.

In February 2025, the Division of Enforcement (DOE) of the Commodity Futures Trading Commission (CFTC) has released an Enforcement Advisory on Self-Reporting, Cooperation, and Remediation (Advisory),¹ introducing metrics the DOE will use to evaluate a company's or individual's conduct before and leading up to the discovery of a potential violation of the Commodity Exchange Act and throughout the investigation process. The metrics contemplate whether the company or individual (collectively, the Person) voluntarily self-reported the potential violation and the extent to which the Person cooperated in the CFTC's investigation. The nature and quality of the Person's self-reporting and their level of cooperation will be ranked, and higher rankings in each category will earn the Person a higher "discount" on the DOE's recommended penalty, with the highest discount being 55 percent off the initial calculation of the civil monetary penalty.

Motivated by the CFTC's desire to create more transparent and efficient enforcement, the Advisory not only rescinds prior CFTC guidance but is also a departure from them in many respects.

Specifically, the new guidance provides credit for self-reports to divisions other than the DOE and creates a safe harbor for good faith reporting that is corrected later.

This article provides an overview of the new guidance as well as certain key takeaways that may be considered when contemplating a self-report.

Mitigation Credits: Penalty Reductions Based on Self-Reporting and Cooperation

The DOE may, subject to its discretion and the facts of each case, apply a discount on civil monetary penalties where a company or individual's conduct "provide[s] material assistance" to the DOE in support of its efforts to "conserve resources." The DOE will recommend this reduced penalty, called a "Mitigation Credit," for self-reporting and cooperation. Mitigation Credits or discounts do not apply to disgorgement of profits or payment of restitution.

Moreover, such payments are not credited against penalties. Mitigation Credit for self-reporting is assessed separately from Mitigation Credit for cooperation; thus, a Person could be eligible for Mitigation Credit based on self-reporting, cooperation, both, or neither, depending on the Person's conduct before and during an investigation. That said, the DOE may also consider other factors when making recommendations to the CFTC, including the culpability of the actors; recidivism (if any) with respect to the same violation, and facts and circumstances not involving fraud, manipulation, or other abuse(s); and the severity of the violation.

Self-Reporting Considerations and Tiers

The DOE will evaluate self-reporting pursuant to a three-tier scale:

- *Tier 1: No Self-Report.* This tier is assigned when there was no self-report, the self-report was not reasonably related to or not designed to truly alert the CFTC of the potential violation, or where the potential violation was known to the CFTC from other sources.
- *Tier 2: Satisfactory Self-Report.* This tier is assigned when there was a self-report that notified the CFTC of the

potential violation but failed to include all material information reasonably related to the potential violation that was known to the Person at the time of the self-report.

- *Tier 3: Exemplary Self-Report.* This tier is assigned when the self-report notified the CFTC of the potential violation, included all material information known to the Person at the time of the self-report, and provided additional information that assisted the DOE with conserving resources in its investigation.

In furtherance of this analysis, the DOE emphasized specific factors to be considered when awarding credit for self-reporting:

1. The voluntariness of the self-report (reported prior to an imminent threat of exposure);
2. To whom the self-report was made (a report made to an appropriate division of the CFTC or the DOE itself);
3. The timeliness of the report (the report must be “reasonably prompt,” considering steps taken to uncover the existence of a potential violation); and
4. The completeness of the self-report (the report contains all material information known to the Person at the time of the report, or the Person discloses relevant information as it becomes known).

To further encourage voluntary, complete self-reporting, the DOE also provides a safe harbor for good faith reporting or voluntary disclosure. Specifically, if a Person voluntarily self-reports in good faith but the information is later found to be inaccurate after further investigation, the DOE will not recommend charges so long as the Person supplemented and corrected the inaccurate information.

Cooperation Considerations and Tiers

The DOE will evaluate cooperation credit pursuant to a four-tier scale:

- *Tier 1: No Cooperation.* This tier is assigned when a Person has fully complied with subpoenas or other compulsory

processes but did not provide substantial assistance to the DOE.

- *Tier 2: Satisfactory Cooperation.* This tier is assigned when a Person has fully complied with subpoenas or other compulsory processes and also provides substantial, voluntary assistance to the DOE's investigation. This assistance can include providing documents, making presentations to the DOE, and making witnesses available for interviews or testimony.
- *Tier 3: Excellent Cooperation.* This tier is assigned when a Person consistently provided substantial assistance to the DOE's investigation. In addition to the acts under Satisfactory Cooperation, the Person must also have engaged in conduct such as performing internal investigations or reviews; providing the DOE with thorough analysis of the potential violation, its root cause(s), and remedial action; and consistently and voluntarily providing documents and information.
- *Tier 4: Exemplary Cooperation.* This tier is assigned when a Person consistently and voluntarily provided material assistance to the DOE's investigation and the cooperation provided an exceptionally high degree of value. In addition to the acts under Excellent Cooperation, a Person may receive this tier when it proactively engaged in and used significant resources to provide material assistance to the DOE's investigation. Additionally, this tier includes significant completion of remediation and use of accountability measures.

As part of this analysis, the DOE will consider a non-exhaustive list of factors, including:

1. Whether the Person's cooperation resulted in material assistance to the DOE's investigation;
2. The timeliness and nature of the cooperation;
3. The voluntariness of the cooperation;
4. The thoroughness and quality of the submissions to the DOE to assist in its investigation; and
5. The extent of the cooperation, including whether the Person took steps to timely preserve documents and records, or whether it encouraged high-quality cooperation of its directors, officers, and employees.

Remediation

The Advisory includes remediation in its cooperation scale, although it is careful to note that Mitigation Credit will be given only where the DOE and another of the CFTC’s divisions—including, for example, the Division of Market Oversight, Division of Clearing and Risk, and Market Participants Division (the Operating Divisions)—find that the potential violation and its root cause have either been remediated or that the remediation plan in place is appropriate, given the facts and circumstances. In evaluating whether a Person engaged in substantial efforts to prevent a future violation, the DOE will consider whether certain accountability measures were enacted, “gap analyses” were performed to identify similar potential violations, enhancements were made to policies and procedures, and certain accountability measures were implemented for responsible personnel or management.

The Mitigation Credit Matrix

Based on the aforementioned criteria, the DOE will recommend a civil monetary penalty that may be subject to a discount as set forth by the Advisory in a first-of-its-kind Mitigation Credit Matrix. Nevertheless, the DOE’s assessment of cooperation remains discretionary, and the Advisory should not be read to require the recommendation of the imposition or reduction of penalties based on the presence or absence of particular cooperation factors. Moreover, these discounts, should they be applied, will only offset civil monetary penalties, as opposed to discouragement or restitution.

	Tier 1: No Cooperation	Tier 2: Satisfactory Cooperation	Tier 3: Excellent Cooperation	Tier 4: Exemplary Cooperation
Tier 1: No Self-Report	0%	10%	20%	35%
Tier 2: Satisfactory Self-Report	10%	20%	30%	45%
Tier 3: Exemplary Self-Report	20%	30%	40%	55%

Further Guidance from the CFTC

The Advisory promises to be a significant step toward promoting compliance with the law and ensuring accountability for those in violation by upholding the principles of regulatory consistency, transparency and clarity. Acting CFTC Chair Caroline D. Pham celebrated the CFTC's adoption of a metric system in her statement embedded within the Advisory, noting that it will "enable the CFTC to do more with less" and allow the CFTC to "focus relentlessly on catching fraudsters and scammers, helping victims, and promoting market integrity."²

During her keynote address at the Futures Industry Association conference on March 11, 2025,³ Pham remarked on the "overwhelmingly positive response" the Advisory received from the investing public, although certain questions remained on its implementation. While it is now the DOE's policy that self-reporting is permitted not only to the DOE, but other operating divisions at the CFTC, Pham noted perceived inconsistencies in how material noncompliance issues have historically been referred for enforcement and, thus, provided a number of clarifying remarks, including that the CFTC would issue a further advisory that will speak to materiality criteria for a CFTC operating division to consider. She believes this new advisory will (1) provide more clarity to Persons contemplating a self-report on a noncompliance issue without fear of a referral for enforcement action, and (2) ensure the operating divisions will appropriately address supervisory of compliance issues that are not material directly with the registrant or entity.

The CFTC released this new advisory, "Materiality or Other Criteria That Operating Divisions Will Use to Determine Referrals to the Division of Enforcement" on April 17, 2025 (the April Advisory). The April Advisory clarifies that the Operating Divisions may refer material violations to the DOE, which include violations involving harm to clients, counterparties or customers, or members or participants; harm to market integrity; or significant financial losses. Given this, the Operating Divisions note that registrants and registered entities should "use their own judgment" to determine whether it is appropriate to self-report a material violation, including those involving fraud, manipulation, or abuse, directly to the DOE. The Operating Divisions, however, will address supervision or non-compliance issues that are not material directly with the registrant or registered entity without a referral to the DOE.

The April Advisory also provides key information on how the Operating Divisions will determine materiality of a supervision or non-compliance issue, for example, those related to systems and controls and risk management and compliance programs. The analysis considers (1) especially egregious or prolonged systemic deficiencies or material weakness of the supervisory system, controls, or program; (2) knowing and willful misconduct by management; or (3) lack of substantial progress toward completion of remediation for an unreasonably lengthy period of time, particularly after a continuous process with a CFTC division regarding the remediation. In all circumstances, the appropriate division, when conducting its assessment, will apply a reasonableness standard and consider the registrant or registered entity's size, activity, and complexity. Notably, the April Advisory says the "mere failure to meet, or extension of, a deadline for corrective action or remediation plan, on its own, will not be sufficient for a referral to [the DOE]."

Acting Chair Pham also noted that questions have been raised on how the Mitigation Credit Matrix will operate, especially where, in recent years, the CFTC has dramatically increased the amount of civil monetary penalties levied against wrongdoers. Accordingly, Pham announced a 30-day compliance and remediation initiative or what she called, an "enforcement sprint," where the CFTC will undertake a comprehensive review of open investigations and enforcement matters concerning compliance violations so that, at the very least, the CFTC can expeditiously resolve these matters to shift resources to policing fraud and abuse cases.

Although perception of the advisories is seemingly favorable, Commissioner Kristin N. Johnson issued a statement⁴ to express concerns, particularly as it implicates multiple CFTC divisions. Specifically, she noted that the CFTC has a responsibility to offer "clear, consistent guidance" in light of the CFTC's mandates pursuant to statute and regulation.

In Summary

- The CFTC's Division of Enforcement has issued an advisory (the Advisory) on how the DOE will evaluate self-reporting, cooperation, and remediation when recommending enforcement actions.
- The Advisory rescinds prior CFTC policies concerning self-reporting and cooperation and introduces a first-of-its-kind

“Mitigation Credit Matrix” the DOE will use to determine the appropriate penalty reduction. As part of its analysis, the DOE will consult rubrics to evaluate the quality and value of the market participant’s self-reporting, cooperation, and remediation efforts and key these assessments to the Matrix to determine whether credit will be awarded.

- This mitigation credit system is designed to create meaningful incentives for market participants to come forward and create more efficient pathways to case resolution. The new system also aligns CFTC policy with that of the U.S. Department of Justice and other financial regulators, with the hope that a more “straightforward” approach will better conserve government resources so that the CFTC may “do more with less.”
- Market participants should review the Advisory to best understand its implications and consult with counsel as soon as a potential violation is discovered or suspected in order to receive the most benefit from this new system, including whether to consider a self-report.

Conclusion

Market participants should be advised to update compliance programs, including relevant policies, to account for the Advisory and its enumerated expectations for self-reporting, cooperation and remediation. This includes enhancing specific policies and procedures to detect and investigate wrongdoing and assessing whether, pursuant to such investigation, a voluntary disclosure is warranted. Competent legal counsel should be considered in evaluating and/or enhancing current compliance programs to ensure regulatory guidance is appropriately taken into account. Additionally, it is critical that companies and individuals consult with counsel as soon as practical on whether to self-report after a potential violation is detected, especially where the CFTC will consider the timing of such reports.

It is important to keep in mind, however, that while the Advisory provides guidance on potential penalty reductions, there remains significant discretion in the calculation of those penalties. The CFTC may apply the same principles and factors in calculating penalties, which may mean exemplary self-reporting and

cooperation would result in a lower penalty with a higher discount applied. However, history has shown that there is some significant unpredictability in penalties, even under prior guidance. Market participants would be well advised to regularly monitor CFTC guidance to ensure ongoing compliance as implementation of this Advisory continues to crystallize.

Notes

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1. Commodity Futures Trading Comm'n, CFTC Releases Enforcement Advisory on Self-Reporting, Cooperation, and Remediation (Feb. 25, 2025), <https://www.cftc.gov/PressRoom/PressReleases/9054-25>.

2. Commodity Futures Trading Comm'n, CFTC Releases Enforcement Advisory on Self-Reporting, Cooperation, and Remediation (Feb. 25, 2025), <https://www.cftc.gov/PressRoom/PressReleases/9054-25>.

3. Commodity Futures Trading Comm'n, Keynote Address by Acting Chairman Caroline D. Pham, FIA BOCA50 (Mar. 11, 2025), <https://www.cftc.gov/PressRoom/SpeechesTestimony/opapham13>.

4. U.S. Comm. Fut. Trad. Comm'n, Public Statements & Remarks, Statement of Commissioner Kristin N. Johnson on the Enforcement Advisory on Self-Reporting, Cooperation and Remediation (Feb. 25, 2025), <https://www.cftc.gov/PressRoom/SpeechesTestimony/johnsonstatement022525>.