

Client Alert: CFTC Updates Enforcement Guidance Regarding Monetary Penalties, Third-Party Monitorships, and Admissions of Wrongdoing

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In October 2023, the Division of Enforcement of the Commodity Futures Trading Commission (“CFTC” or the “Commission”) issued an Enforcement Advisory clarifying the Commission’s approach to negotiated resolutions of enforcement actions.^[1] In general, the Advisory:

- indicates the Commission is likely to seek higher civil monetary penalties, particularly for recidivists;
- clarifies when the Commission will require third-party compliance “monitors” or “consultants;” and
- announces that respondents will be required in more instances to admit to wrongdoing to reach a negotiated settlement.

The Enforcement Advisory is part of an effort to combat recidivism and to counter the reputation of the CFTC as “friendly” when it comes to enforcement,” as Enforcement Director Ian McGinley stated in recent remarks. With respect to penalties, McGinley stressed that “the penalties need to exceed the costs of compliance, to avoid the risk of institutions viewing penalties as an acceptable cost of doing business.” The Commission’s reliance on third-party monitorships is designed to provide “confidence that ... unlawful conduct will not be repeated” and that entities will remediate pervasive misconduct. The announcement that “no-admit, no-deny” resolutions are no longer the “default” settlement practice is aimed at “promot[ing] accountability” and “deter[ring] future misconduct.”^[2]

Taken together, these steps have the potential to increase the costs for firms of settling CFTC enforcement proceedings, particularly where the firm has already been the subject of an enforcement action. In addition to the possibility of higher monetary penalties and the imposition of a consultant or monitor, a respondent considering a negotiated resolution will also need to consider

the potential for admissions of wrongdoing to result in follow-on civil liability, the size of which may exceed the CFTC penalty. While these new enforcement measures may further the CFTC's goal of deterring wrongdoing, they could also make respondents more reluctant to seek a negotiated resolution.

We discuss each of these points in turn.

Enhancing Civil Monetary Penalties for Recidivist Respondents

Although the CFTC prosecutes enforcement actions through its Enforcement Division, the Division does not possess independent settlement authority, and must recommend settlement offers to the Commission itself.^[3] When recommending civil monetary penalties, the Division considers several factors, including “the need to achieve general and specific deterrence.”^[4]

Going forward, the Division is “recalibrating how it is assessing proposed [penalties] to ensure that the [penalties] are at the level necessary to achieve” deterrence. This will likely result in the Division seeking higher penalties, “[p]articularly where the Division observes multiple similarly situated respondents violating similar laws in similar ways over time.”^[5]

The Enforcement Division is especially focused on targeting “recidivism—*i.e.*, repeated violations of law by the same” person or entity and will consider recidivism to be a “heav[ily]” aggravating factor in its proposed penalties. To determine whether a person or entity is a recidivist, the Division will consider: (a) the extent to which the current CFTC enforcement action overlaps with prior actions, *e.g.*, whether the actions result from the same root cause; (b) the passage of time between repeat offenses; (c) whether overlapping corporate officers were involved in the underlying violations; (d) the pervasiveness of the new misconduct; and (e) the remedial steps taken since the prior enforcement action.^[6]

The Enforcement Division is likely to recommend to the Commission that a Monitor or Consultant be imposed as part of any resolution with a “recidivist” entity.^[7]

Clarifying the Role of “Monitors” and “Consultants”

When the Commission lacks confidence that an entity will remediate misconduct on its own, it will require the settling respondent to enlist a third party to assist with remediation.^[8] The Enforcement Advisory clarifies the CFTC's approach to third-party compliance “Monitors” and “Consultants,” and the roles and responsibilities of each. Going forward, the Division will seek to impose “Monitors” in cases involving the “most significant and/or pervasive compliance and control failures,” and “Consultants” in “less severe cases.”^[9]

When a Monitor is imposed as part of a resolution to an enforcement action, the Monitor (who must be approved by the Division) is tasked with (1) testing the sufficiency of the respondent's policies,

procedures, and controls to prevent recurrence of the misconduct; (2) drafting recommendations; and (3) evaluating the respondent's implementation of those recommendations. The Monitor submits reports to the CFTC describing the remediation plan and must certify the entity's completion of the plan.^[10]

Consultants will be appointed in cases requiring less oversight. Consultants advise the respondent regarding implementation of remedial measures, but the respondent entity itself reports to the Division on its progress and certifies its completion of remediation.^[11]

Ending the Default Practice of “No-Admit, No-Deny” Resolutions

Finally, the Enforcement Division states that it will pursue, to a greater degree than previously, admissions of wrongdoing in negotiated CFTC settlements. Under the prior “routine settlement practice,” a respondent could often resolve an enforcement action with a “no-admit, no-deny” resolution rather than admitting to the Commission's factual allegations of misconduct.^[12]

That is changing. Going forward, the Division will evaluate whether admissions should be required as part of each individual resolution.^[13] In public remarks accompanying the release of the Enforcement Advisory, the CFTC Enforcement Director stated that potential respondents “should be prepared for ... admissions.”^[14] This new approach is consistent with the proposals made by CFTC Commissioner Christy Goldsmith Romero since her 2022 confirmation.^[15]

Factors counseling *in favor of* requiring admissions of wrongdoing will include: (1) the existence of parallel criminal proceedings in which the respondent admits to the underlying misconduct; (2) the strength of the evidence establishing misconduct; (3) the respondent's pursuit of cooperation credit; and (4) the strict-liability nature of the offense. By contrast, factors counseling *against* admissions include: (1) the risk of criminal exposure that would result from an admission; (2) the existence of legitimate factual disputes between the Commission and the respondent.^[16]

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Footnotes

[1] See CFTC Division of Enforcement, *Advisory Regarding Penalties, Monitors and Consultants, and Admissions in CFTC Enforcement Actions* (Oct. 17, 2023), available at https://www.cftc.gov/media/9466/EnfAdv_Resolutions/download (hereinafter “Enforcement Advisory”).

[2] See CFTC, *Remarks of Enforcement Director Ian McGinley at the New York University School of Law Program on Corporate Compliance and Enforcement: “The Right Touch: Updated Guidance on Penalties, Monitors, and Admissions”* (October 17, 2023), available at <https://www.cftc.gov/PressRoom/SpeechesTestimony/opamcginley2> (hereinafter “McGinley Remarks”).

[3] See CFTC Enforcement Manual §§ 6.5; 6.8.

[4] Enforcement Advisory at 2.

[5] Enforcement Advisory at 2.

[6] Enforcement Advisory at 2-3.

[7] Enforcement Advisory at 3.

[8] See CFTC Enforcement Manual § 6.2.1.

[9] Enforcement Advisory at 4-5.

[10] Enforcement Advisory at 4.

[11] Enforcement Advisory at 4.

[12] See CFTC, *Statement of Commissioner Christy Goldsmith Romero* (October 17, 2023), available at <https://www.cftc.gov/PressRoom/SpeechesTestimony/romerostatement101723/>

[13] Enforcement Advisory at 5-7.

[14] See McGinley Remarks, *supra*; see also Aislinn Keely, *CFTC’s Top Enforcer Warns: ‘Be Prepared for Admissions’*, Law360 (October 17, 2023), available at <https://www.law360.com/articles/1734033>.

[15] See Goldsmith Romero Statement, *supra*.

[16] Enforcement Advisory at 6.

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