

CFTC Issues New Enforcement Advisory Aiming to Incentivize Self-Reporting and Cooperation

Client Alerts

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On February 25, 2025, the Division of Enforcement (the “Division”) of the Commodity Futures Trading Commission (the “CFTC” or “Commission”) issued an Enforcement Advisory which quantifies the monetary credit that entities can expect to receive for self-reporting and cooperation in connection with Division inquiries. The Commission asserts that the Advisory’s newly announced system will conserve enforcement resources by incentivizing more self-reporting and cooperation, but it is not clear that market participants will see meaningful changes when negotiating a monetary settlement with Division staff.

The current political climate also gives rise to additional considerations. On one hand, the Advisory may provide some greater insight into how self-reporting and cooperation will be rewarded during settlement negotiations with the Commission. However, market participants are facing a regulator that has signaled a reduced appetite for aggressive enforcement, particularly in areas where conduct is not flagrantly fraudulent.¹ Given the uncertainty about the scope and extent of enforcement actions under the current administration, it is even more critical that market participants conduct a robust assessment of their potential liability and financial exposure early in a matter, to make better-informed decisions on the potential benefits of self-reporting and cooperation.

In this alert, we first summarize the Advisory’s mitigation credit matrix and quantified tiers for self-reporting and cooperation. Then, we explore the Advisory’s implications for market participants that operate in the derivatives markets that the Commission oversees.

Emphasis on Self-Reporting Through Clear Guidelines and Incentives

According to Acting Chairman Caroline D. Pham, the Advisory seeks to promote “fair treatment under the law and principles of regulatory consistency, transparency, and clarity”² by “incentivizing self-reporting, cooperation, and remediation of potential violations.”³ With an aim of letting potential enforcement targets know what to expect from the Commission, the Advisory describes (1) a 3-tier

metric to measure the level of self-reporting; (2) a 4-tier metric to evaluate the degree of cooperation; and (3) a quantifiable mitigation credit matrix based on these two variables of self-reporting and cooperation.

Self-Reporting means voluntarily coming forward to the Commission in a timely manner with substantially complete information about a potential violation, and involves three tiers of self-reporting:⁴

- **No Self-Report:** This category applies where there was no self-report at all, or the self-report involved information already known to the Commission.
- **Satisfactory Self-Report:** This category applies where there was a self-report, but it did not include all material information known to the market participant at the time of the report.
- **Exemplary Self-Report:** This category applies to a self-report of all material information, specifically including information that helps the Division conserve its enforcement resources.

Cooperation concerns assistance to the Division regardless of whether it is in connection to an investigation initiated with a self-report to the Commission, and involves four tiers of cooperation:⁵

- **No Cooperation:** This category applies where the market participant fully complied with subpoenas but did nothing else to assist the Division.
- **Satisfactory Cooperation:** This category involves full subpoena compliance and also extra steps such as voluntarily providing documents, making presentations to the Division, or making witnesses available.
- **Excellent Cooperation:** This category includes all of the elements needed for Satisfactory, plus some extra step, which could include a root cause analysis or corrective action for remediation.
- **Exemplary Cooperation:** This category includes all of the elements needed for Excellent, but at a “consistently high level,” including “proactive engagement and use of significant resources to provide material assistance to the Division’s investigation,” and also with remediation steps well under way.

With these two separate Self-Reporting and Cooperation dimensions, the Advisory offers a matrix quantifying the mitigation credit the Commission would likely recommend as a discount from any civil monetary penalty calculated by the Division:⁶

	Tier 1: No Cooperation	Tier 2: Satisfactory Cooperation	Tier 3: Excellent Cooperation	Tier 4: Exemplary Cooperation
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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%

Notwithstanding these newly delineated categories of Self-Reporting and Cooperation, the Advisory is careful to leave the Division with discretion by not guaranteeing that all actions will result in a specific discount. Likewise, the Advisory notes that “[t]he Division retains the discretion to deviate from the Matrix ... in its recommendation to the Commission given the unique facts and circumstances of a particular case.”⁷ Finally, as detailed below, practitioners in this space are well aware that the “top-line” number to which this credit might be applied is often a moving target, and therefore the real-world impact of the Advisory is unclear.

Takeaways for Market Participants

The Advisory and its accompanying press release reflect the Commission’s view that providing clearer guidance on the monetary credit available to market participants should result in more self-reporting and cooperation, reduce the burden on the Division, and require fewer enforcement resources. Indeed, the accuracy of that prediction may be critical to the Commission’s operations going forward if its resources become more limited under the current administration. Below, we discuss several issues for market participants to consider when making self-reporting and cooperation decisions in light of the new guidance.

- **How will the newly announced metrics factor into settlements with the CFTC?**

Because this most recent Advisory reflects the fifth time the Commission has issued new guidance on self-reporting and cooperation since 2017, it is fair to ask whether anything will change when it comes to negotiating resolutions with the CFTC. Although only time will tell, market participants may understandably be skeptical that the new guidance will result in a material decrease in settlement amounts paid as a result of self-reporting or cooperation credit.

First, the standards to obtain credit are high, and the interpretation of the standards remains firmly within the CFTC’s discretion. This discretion extends to interpreting the conditions precedent for receiving credit—such as deciding what constitutes “prompt” self-reporting—and the ultimate amount, which Division staff may reduce based on the “unique facts and circumstances in every case,” such as the culpability of the respondent.

Second, it is not clear that the new guidance will yield results that a market participant could not otherwise obtain through vigorous negotiation. In our experience, settlement discussions with

Division staff typically start with widely divergent calculations of the appropriate civil monetary penalty based on differing views of the conduct, economic gain, and impact on the market. And Division staff typically state that their numbers already weigh self-reporting and cooperation. These initial calculations often set the brackets for negotiating a final penalty amount, which is ultimately a product of bargaining rather than a formulaic application of any particular rubric (including mitigation credit). One area where the matrix may help, however, is providing defense lawyers with support to make more principled quantitative arguments in the course of negotiating any penalty.

- **The risks of self-reporting and cooperation remain.**

Voluntary reporting and cooperation are important tools for any regulator, and they remain important strategic considerations for companies which use derivatives markets. Given the uncertainty about whether the new guidelines will result in any meaningful credit, however, companies considering whether to self-report or cooperate with the Commission must carefully weigh the risks using all known and knowable information when formulating their overall legal strategy.

Cooperation can be costly. Depending on the conduct and Division staff's interests, cooperation can open the gates to voluminous document requests and numerous witness depositions, all of which multiply expenses—sometimes far beyond the statutory penalties available to the CFTC, and often far beyond any discount that this cooperation might engender. It is therefore critical for market participants to perform a rigorous and clear-eyed assessment of their exposure at the outset of a matter, including in appropriate cases the involvement of economists and other outside experts.

Self-reporting and cooperation also can have collateral consequences. CFTC enforcement actions can trigger private class action litigation, actions by other regulators, and even criminal inquiries from the Department of Justice. The information flows resulting from increased cooperation can in some cases increase the likelihood of such ancillary proceeding.

Finally, Acting Chairman Pham announced, in accordance with the current administration's enforcement guidance, that the Advisory "will enable the CFTC to do more with less and free up enforcement resources to focus relentlessly on catching fraudsters and scammers."⁸ This emphasis on fraud and scams reflects Pham's previously expressed views that the CFTC should focus enforcement on clearly illegal fraud and manipulation with measurable harm.⁹ While Pham will likely soon be replaced by Brian Quintenz, President Trump's nominee for Chairman, the focus on black-and-white issues is consistent with the Commission's trajectory of reducing enforcement costs. In this environment, conduct lying in more of a grey area may not be an enforcement priority, and there may be less benefit to self-reporting these borderline situations.

Market participants that identify potential compliance and other violations can look to the Advisory as an opportunity for greater clarity on what to expect from the CFTC if they self-report or cooperate

in clear-cut violation situations. But they should be mindful that the Advisory’s practical benefits may very well be limited, while many of the downsides of self-reporting and cooperation remain and in fact may be magnified in the current political climate.

Footnotes

[1] Acting Chairman Pham said that the Advisory seeks to “free up enforcement resources to focus relentlessly on catching fraudsters and scammers.” CFTC, *CFTC Releases Enforcement Advisory on Self-Reporting, Cooperation, and Remediation*, press release 9054-25 (Feb. 25, 2025), available at <https://www.cftc.gov/PressRoom/PressReleases/9054-25> [*hereinafter* “Advisory Press Release”].

[2] *Id.*

[3] CFTC Division of Enforcement, *Advisory on Self-Reporting, Cooperation, and Remediation* (Feb. 25, 2025), at 1, available at https://www.cftc.gov/media/11821/EnfAdv_Resolutions022525/download.

[4] *Id.* at 3-7.

[5] *Id.* at 7-8.

[6] *Id.* at 13.

[7] *Id.* at 13-14.

[8] Advisory Press Release.

[9] *See, e.g.*, CFTC, *Statement of Commissioner Caroline D. Pham on Swap Data Reporting Settlement Order and the Examination Process* (Oct. 1, 2024), available at <https://www.cftc.gov/PressRoom/SpeechesTestimony/phamstatement100124> (decrying that, in her view, the CFTC “has shifted its enforcement program to focus on registration and compliance instead of the CFTC’s mission to prevent fraud, manipulation, and abuse in our markets”).

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