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CFTC Releases New Enforcement Cooperation Guidelines

The agency's updated advisory for companies and first-ever guidance for individuals shed additional light on its approach for recognizing cooperation.

On January 19, 2017, the Division of Enforcement (Division) of the U.S. Commodity Futures Trading Commission (CFTC or Commission) issued two Enforcement Advisories outlining its approach for evaluating cooperation by corporations and individuals in the agency's investigations and enforcement actions. The Division investigates and prosecutes alleged violations of the Commodity Exchange Act and Commission regulations involving registered firms and other market participants across the financial, energy, and agricultural sectors as well as other commodities markets. The new Enforcement Advisories are the first update to the CFTC's corporate cooperation guidelines since 2007 and the Division's first statement of its policy for cooperating individuals. In the continually evolving landscape for engaging with civil and criminal enforcement authorities, this *Client Alert* highlights important lessons for all parties facing the possibility of a CFTC investigation or action.

A Multifactor, Case-by-Case Determination

In announcing the new guidelines, the CFTC stated that it intends "to further incentivize individuals and companies to cooperate fully and truthfully."¹ By articulating factors that it may consider in evaluating a party's cooperation, the Division hopes to emphasize the "high value" it places on cooperation and make the benefits of cooperation "more transparent."² The Division has stated that the leniency potentially available for cooperation may include reduced charges or sanctions or even a recommendation that no enforcement action be taken.

For both corporations and individuals, the guidelines articulate several factors the Division may consider in a discretionary, case-by-case determination of whether and how to award credit for cooperation. The advisories note that cooperation credit will not be given merely for following the law, but rather for what an individual or corporation "voluntarily does, beyond what it is required to do."³ The Division also states that it is more likely to grant credit for conduct that is "sincere, robustly cooperative, and indicative of a willingness to accept responsibility for misconduct, where appropriate."⁴

The corporate and individual guidelines both outline three sets of factors the Division may use in evaluating a party's cooperation. These factors, discussed further below, include (1) the value of the cooperation to the Division's investigation or enforcement action; (2) the value of the cooperation in the context of the Division's broader enforcement interests; and (3) the balance of culpability and any history of misconduct against acceptance of responsibility and mitigation or remediation. The Division also may consider offsetting uncooperative conduct.

Value of Cooperation to the Division's Investigation or Enforcement Action

Under the first set of factors, the Division may consider four interrelated criteria: (a) whether the cooperation resulted in material assistance; (b) the timeliness of the cooperation; (c) the nature of the cooperation; and (d) the quality of the cooperation. The materiality of the assistance turns on the Division's assessment of how the cooperator aided, advanced or contributed to the success of an investigation or enforcement action. The timeliness of cooperation may be judged by how quickly a party made appropriate disclosure of misconduct and whether it did so prior to or without knowing of the commencement of an investigation. The Division's assessment of the nature of cooperation may focus on the voluntariness of the cooperation and the specific steps taken. For corporations, this may include an examination of how the company uncovered and investigated potential violations and whether it encouraged employees to cooperate. For individuals, the Division may consider whether cooperation resulted in any unique personal hardship.

In addition, the Division will assess the quality of the assistance provided, which may include the extent of non-privileged information produced, how well information was preserved and how responsive the cooperator was to the Division's requests for information. For corporations, the Division may also consider characteristics of the company's investigation and any resulting report, such as whether the investigation was performed by an independent entity, and whether the report fully disclosed the scope of any violations and the identity of wrongdoers both inside and outside of the company.

Unlike the policy announced by the Department of Justice in the "Yates Memo" in September 2015,⁵ the CFTC's cooperation guidelines do not explicitly require a corporation to provide all relevant facts relating to the individuals responsible for misconduct as a prerequisite to qualify for any cooperation credit. Instead, the CFTC's stated approach is to consider as one important factor in its analysis that a corporation has provided facts relating to individuals' roles in corporate misconduct. The Securities and Exchange Commission (SEC) takes a similarly holistic approach in its cooperation guidelines.⁶ It remains to be seen how the agencies' policies may differ or converge in practice.

Like other agencies,⁷ the CFTC states that it recognizes the importance of the attorney-client privilege and the work product doctrine, noting that "[t]hese rights are not intended to be eroded or heightened" by the cooperation guidelines.⁸ The guidelines ascribe value, however, to a company's decision to share the full results of an internal investigation and information about steps the company took upon learning of misconduct and the processes it used to gather information.⁹ In practice, these interests may at times prove to be in tension with maintaining attorney-client privilege and work product protection. Parties may need to consider the advisability of a strategic privilege waiver in order to maximize credit under the cooperation guidelines.

Value of Cooperation to Broader Law Enforcement Interests

Beyond the particular action at issue, the Division's determination of cooperation credit may also account for the value of the cooperation in advancing the Division's broader enforcement interests.¹⁰ This may include whether the Division believes that the cooperation will incentivize others to cooperate, whether the cooperation enabled the Division to conserve resources and whether the cooperation enhanced the Division's ability to detect and prosecute other violations. The Division may also take account of the nature of the misconduct at issue, the harm that it causes, and whether it is an enforcement priority for the Division at the time. The Division's emphasis on these broader enforcement interests may reflect a view that misconduct involving fraud or manipulation – particularly in complex instruments or trading patterns – may be difficult to detect and resource-intensive to investigate, and that cooperation can play an important role in identifying misconduct by other market participants.

Balancing Misconduct and Acceptance of Responsibility

The Division's determination of cooperation credit may also include a balancing of characteristics of the misconduct against a party's acceptance of responsibility.¹¹ These characteristics may include the cooperator's culpability, the severity and duration of the misconduct, any benefit that accrued to the cooperator from the misconduct and the number of violations committed. When the cooperator is an individual, the Division may also look at education level and standing within a company and whether the individual undermined the efficacy of a company's internal compliance programs. The Division may weigh these characteristics against the nature and extent of the cooperator's acceptance of responsibility and any steps the cooperator took to mitigate the misconduct. For individuals, the Division may consider the degree to which the individual would have an opportunity to commit future misconduct.

For corporations, the Division may also take particular account of any remediation efforts that the corporation has undertaken, taking a broad view of what steps may be appropriate to address misconduct. The guidelines emphasize prompt, thorough and proactive steps to address the specific misconduct at issue and avoid similar types of misconduct in the future. Of note, the Division states that it may look to see whether the company "adequately addressed the employment of the persons responsible for the misconduct," but the guidelines do not specify what actions a company may need to take to meet this expectation.¹²

Uncooperative Conduct

Finally, for both corporations and individuals, the Division may consider conduct that it considers uncooperative to offset or limit cooperation credit. Such conduct may include failing to respond to requests in a complete and timely manner; misrepresenting or minimizing the conduct at issue; failing properly to preserve, search for, or produce relevant information; and limiting access to or cooperation by individuals.¹³ The list of potentially uncooperative conduct also includes such specific examples as "issuing questionnaires to employees or conducting interviews that offer suggestive responses," "providing employees or former employees access to corporate documents or data beyond what those individuals would have been privy to in the course of their employment" and failing to comply with the Division's data delivery standards.¹⁴ All of the examples underscore the importance of a party and its counsel communicating effectively with the Division during an investigation.

A Further Effort to Encourage Information Sharing

The Division's new guidelines to incentivize cooperation stand as a companion to the CFTC's whistleblower program, which the Dodd-Frank Act created in 2010 to provide monetary awards to eligible whistleblowers for original information that leads to a successful enforcement action.¹⁵ If an action results in sanctions greater than US\$1 million, an eligible whistleblower may receive an amount equal to 10-30% of the total sanctions.¹⁶ The whistleblower program also provides protections against retaliation, for which the Commission recently proposed to adopt enforcement authority (for additional information, see our recent [Client Alert on the evolution of the CFTC's whistleblower program](#)).

As part of the whistleblower program, while maintaining the anonymity of the whistleblowers themselves, the CFTC publicizes the awards that whistleblowers receive.¹⁷ In April 2016, the CFTC announced its largest ever award to a whistleblower of more than US\$10 million.¹⁸

Similarly, to incentivize cooperation with enforcement investigations, the Division's settlement orders and accompanying press releases often note when a party has cooperated, in order to indicate when a party may have received reduced charges or sanctions as a result of such cooperation. To date, the Division generally has not quantified the credit that resulted from cooperation, nor stated publicly if or when cooperation has resulted in a decision not to charge a party. Consistent with this practice, the new

advisories do not require the Division to do so. It remains to be seen whether the Division will provide more specifics about its cooperation credit decisions now that it has adopted more comprehensive guidelines for those decisions.

Navigating the Evolving Enforcement Landscape

The CFTC's announcement of its new cooperation guidelines serves as a reminder that decisions made in the earliest stages of an investigation may impact its ultimate outcome. The agency's multifactor approach may inform a corporation's decisions about how to investigate a potential violation, whether and when to self-report and how to respond to a Division investigation. A proactive party will track its communications with the Division, the actions it takes in an investigation and any benefits that accrue to the Division as a result, in order to be prepared to make its case for cooperation credit if an investigation leads to an enforcement action. As the direction of the CFTC evolves in the new administration, the extent of cooperation credit given in future cases – and the clarity of the CFTC's statements about its credit decisions – will determine how useful the cooperation guidelines will be for the Commission and for the parties it regulates.

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Endnotes

- ¹ CFTC Release No. 7518-17, *CFTC's Enforcement Division Issues New Advisories on Cooperation* (Jan. 19, 2017), available at <http://www.cftc.gov/PressRoom/PressReleases/pr7518-17>.
- ² See *id.*
- ³ CFTC Enforcement Advisory: Cooperation Factors in Enforcement Division Sanction Recommendations for Companies, at 1 (Jan. 19, 2017), available at <http://www.cftc.gov/idc/groups/public/@lrenforcementactions/documents/legalpleading/enfadvisorycompanies011917.pdf> ("CFTC Corporate Cooperation Guidelines"); CFTC Enforcement Advisory: Cooperation Factors in Enforcement Division Sanction Recommendations for Individuals, at 1 (Jan. 19, 2017), available at <http://www.cftc.gov/idc/groups/public/@lrenforcementactions/documents/legalpleading/enfadvisoryindividuals011917.pdf> ("CFTC Individual Cooperation Guidelines").
- ⁴ See *id.*
- ⁵ Memorandum from Sally Quillian Yates, Deputy Attorney General, US Department of Justice, to Heads of Department Components, U.S. Attorneys, Regarding Individual Accountability for Corporate Wrongdoing, at 3 (Sept. 9, 2015), available at <https://www.justice.gov/dag/file/769036/download> (Yates Memo).
- ⁶ 17 C.F.R. § 202; US Securities and Exchange Commission Release No. 44969, Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions (Oct. 23, 2001) (Seaboard Report); see also US Securities and Exchange Commission, Enforcement Cooperation Program (updated Sept. 20, 2016), available at <https://www.sec.gov/spotlight/enforcement-cooperation-initiative.shtml>.
- ⁷ Yates Memo, at 4; Office of the United States Attorneys, U.S. Attorneys' Manual § 9-28.710 ("waiving the attorney-client and work product protections has never been a prerequisite under the Department's prosecution guidelines for a corporation to be viewed as cooperative"); see also 17 C.F.R. § 202.12(a)(2)(iii) (noting as a factor in SEC cooperation credit determinations "[w]hether the individual provided non-privileged information"); Seaboard Report at n.3 ("The [SEC] recognizes that these privileges, protections and exemptions serve important social interests. In this regard, the Commission does not view a company's waiver of a privilege as an end in itself, but only as a means (where necessary) to provide relevant and sometimes critical information to the Commission staff.").
- ⁸ CFTC Corporate Cooperation Guidelines, at 7.
- ⁹ CFTC Corporate Cooperation Guidelines, at 3.
- ¹⁰ CFTC Corporate Cooperation Guidelines, at 4; CFTC Individual Cooperation Guidelines, at 3.
- ¹¹ CFTC Corporate Cooperation Guidelines, at 4-6; CFTC Individual Cooperation Guidelines, at 3-4.
- ¹² CFTC Corporate Cooperation Guidelines, at 6.
- ¹³ CFTC Corporate Cooperation Guidelines, at 6-7; CFTC Individual Cooperation Guidelines, at 4-5.
- ¹⁴ CFTC Corporate Cooperation Guidelines, at 7.
- ¹⁵ 7 U.S.C. § 26; 17 C.F.R. § 165.
- ¹⁶ 17 C.F.R. § 165.8; see also CFTC Whistleblower Program, available at <http://www.cftc.gov/consumerprotection/whistleblowerprogram/index.htm>.
- ¹⁷ 17 C.F.R. § 165.4; 17 C.F.R. § 165.7; see also CFTC Whistleblower Program Final Orders/Award Determinations, available at <https://www.whistleblower.gov/orders/>.
- ¹⁸ CFTC Release No. 7518-17, *CFTC Announces Whistleblower Award of More Than \$10 Million* (Apr. 4, 2016), available at <http://www.cftc.gov/PressRoom/PressReleases/pr7351-16>; CFTC Whistleblower Award Order No. 16-WB-06 (Mar. 28, 2016).