

CFTC's Demanding New Cooperation Guidelines For Companies And Individuals

January 24, 2017

On January 19, 2017, U.S. Commodity Futures Trading Commission (the “CFTC”) Division of Enforcement (the “Division”) issued two Enforcement Advisories setting forth the factors that the Division may consider in assessing cooperation by companies and individuals in the context of CFTC enforcement proceedings.

The Enforcement Advisories provide greater guidance on the Division’s view as to what constitutes effective cooperation by a company and/or an individual in a CFTC investigation and enforcement action. They also continue a broader trend of authorities, both in the U.S. and abroad, articulating demanding standards that a company must meet to gain credit for cooperation with an enforcement proceeding.

The new Advisories make clear that merely complying with requests for information from the CFTC staff will not be sufficient; a company or individual seeking cooperation credit as part of a resolution with the CFTC must go above and beyond its legal obligations in order to qualify for credit. The Advisories provide relatively general guidance regarding how the CFTC will credit companies’ or individuals’ cooperation, and (unlike the guidance issued by certain other authorities) do not provide a specified structure for determining how any cooperation-related fine reduction will be calculated.

Background

On January 19, 2017, the Division issued two Enforcement Advisories setting forth the factors that the Division would consider in assessing cooperation by companies and individuals, respectively. The Enforcement Advisory for Companies supersedes the Division’s former enforcement advisory, issued in March 2007 (the “2007 Enforcement Advisory”),¹ while the Enforcement

If you have any questions concerning this memorandum, please reach out to your regular firm contact or the following authors

NEW YORK

Breon S. Peace
+1 212 225 2059
bpeace@cgsh.com

Jennifer Kennedy Park
+1 212 225 2357
jkpark@cgsh.com

NEW YORK
One Liberty Plaza
New York, NY 10006-1470
T: +1 212 225 2000
F: +1 212 225 3999

WASHINGTON

Robin M. Bergen
+1 202 974 1514
rbergen@cgsh.com

Nowell D. Bamberger
+1 202 974 1752
nbamberger@cgsh.com

WASHINGTON
2000 Pennsylvania Avenue, NW
Washington, DC 20006-1801
T: +1 202 974 1500
F: +1 202 974 1999

¹ “Cooperation Factors in Enforcement Division Sanction Recommendations” (2007), <http://www.cftc.gov/idc/groups/public/@cpdisciplinaryhistory/documents/file/enfcooperation-advisory.pdf>.



Advisory for Individuals represents the first instance in which the Division formally sets forth the factors that it will consider in assessing cooperation from individuals. Both Enforcement Advisories are particularly important as they provide greater guidance how the Division will evaluate cooperation in the context of resolving enforcement proceedings going forward.

The Enforcement Advisory for Companies²

The Enforcement Advisory for Companies is intended to assist companies which may be or have been charged by the CFTC in “assessing possible settlement positions and litigation risks,” by setting forth the factors that the Division would consider in assessing their cooperation and whether they should be granted any credit for such cooperation. In doing so, the new Enforcement Advisory significantly expands on the guidance that the Division provided in the 2007 Enforcement Advisory.

As set out in the Enforcement Advisory, “[t]he rewards for cooperation by companies can range from the Division recommending no enforcement action to recommending reduced charges or sanctions in connection with enforcement actions.” The Advisory does not specify in any greater detail how the CFTC will determine the extent of the discount off of financial penalties in any particular case, and in particular does not specify a mechanism for calculating reductions in applicable fines.

The Advisory describes the following three policy-based considerations that the Division will weight in assessing whether and to what extent a company might qualify for cooperation credit:

- (1) The value of the company’s cooperation to the Division’s investigation(s) and enforcement actions;

- (2) The value of the company’s cooperation to the CFTC’s broader law enforcement interests; and
- (3) The balancing of the level of the company’s culpability and history of prior misconduct with the acceptance of responsibility, mitigation and remediation.

Importantly, the new Enforcement Advisory makes clear that a company seeking cooperation credit as part of a resolution with the CFTC cannot rely on having merely complied with its legal obligations. Rather, in assessing whether a company has cooperated with its investigations, the Division will look “for more than ordinary cooperation or mere compliance with the requirement of law,” and would look “to what a company voluntarily does.”

The Value of the Company’s Cooperation to the Division’s Investigation(s) and Enforcement Actions

The new Enforcement Advisory does not radically alter the standards articulated in the 2007 Enforcement Advisory describing how the CFTC will assess whether a company’s cooperation has provided value to the Division. It does, however, expand and provide more clarity on the existing factors and articulates a few additional factors that may be considered.

In particular, the Enforcement Advisory indicates that the Division will consider the materiality, timeliness, nature, and quality of the cooperation provided by the company.

- **Materiality**: The Division will consider whether the cooperation provided by the company resulted in material assistance to the Division’s investigation and enforcement action, and their success.
- **Timeliness**: To qualify for cooperation credit, companies must quickly and appropriately inform the Division of any misconduct. In assessing the timeliness of the company’s cooperation, the Division may also take into account whether the company was the first to report the misconduct or to offer its cooperation, whether the cooperation

² “Cooperation Factors in Enforcement Division Sanction Recommendations for Companies”, www.cftc.gov/idc/groups/public/@lrenforcementactions/documents/legalpleading/enfadvisorycompanies011917.pdf.

commenced before or after the company became aware of a pending investigation or enforcement action, as well as whether the investigation and enforcement action(s) were initiated on the basis of the information provided by the company.

- Nature: Whether the company independently investigated the misconduct continues to be a factor that the Division may take into account in assessing cooperation. The new Enforcement Advisory further clarifies that the Division will take into account whether the company cooperated voluntarily or on the basis of an agreement with another law enforcement or regulatory entity, as well as whether the company encouraged high-quality cooperation with the Division of all of its directors and employees.
- Quality: Meeting with the Division staff to review and explain “known facts” is identified as a key factor that the Division will consider in assessing the quality of a company’s cooperation with its investigations and enforcement actions. To qualify for credit, a company must use “all available means” to facilitate cooperation, including (for example) dedicating adequate resources to quickly respond to subpoenas and requests, providing financial analyses of their gains from the misconduct, and explaining transactions and assisting the CFTC to interpret key information.

Together, these factors outline a demanding standard for cooperation with CFTC enforcement cases that emphasizes early and pro-active disclosure of potential misconduct, substantive engagement with the Division staff outside the framework of responding to formal subpoenas, and commitment of significant resources to assisting and advancing the Division’s investigations.

In addition, the new Enforcement Advisory places an enhanced focus on the extent to which the company’s cooperation results in identification of individual wrongdoers. In particular, in addition to clarifying that “known facts” to be reviewed and explained when

meeting with the Division’s staff also include all relevant facts relating to individuals responsible for the misconduct, the Enforcement Advisory also clarifies that the Division would consider whether (i) independent investigations were conducted, *inter alia*, “seeking to identify all responsible individuals,” and (ii) the company fully disclosed the identities not just of the individual wrongdoers within its organization, but also, if applicable, of “known or suspected wrongdoers outside the organization.”

The Value of the Company’s Cooperation to the Commission’s Broader Law Enforcement Interests

Unlike the 2007 Enforcement Advisory, the new Enforcement Advisory now provides that the Division will consider factors related to its “broader programmatic interest in enforcing the Commodity Exchange Act and Regulations,” when assessing companies’ cooperation.

In practice, this means that the Division will now also consider whether granting (or the extent to which granting) cooperation credit “encourages high-quality cooperation from other entities,” or “otherwise enhances the [CFTC’s] ability to detect and pursue violation of the Act and Regulations,” as well as the “time and resources conserved as a result of the company’s cooperation.” The Enforcement Advisory also provides that the Division will take into account the relevance and nature of the specific investigation, *i.e.* whether the subject matter of the investigation is a priority for the CFTC, the misconduct involves regulated entities, or relates to an industry-wide practice.

By focusing on factors outside of the company’s knowledge or control – and potentially divorced from the facts of any particular case or investigation – this factor introduces an additional layer of uncertainty for companies attempting to predict how cooperation may be received by the Division. It creates an impetus for careful consideration not only of the specific facts that have been identified, but also of how the nature of the conduct at issue fits within the CFTC’s broader enforcement priorities.

The Company's Culpability, Culture, and Other Relevant Factors

As it has traditionally done, the Division will continue to assess the nature of the company's misconduct and its causes in assessing whether and to what extent to provide credit for cooperation. In particular, the new Enforcement Advisory confirms that the Division would consider the following:

- The specific circumstances of the misconduct, such as the level of the organization at which the misconduct occurred and how long it lasted after the supervisors became aware of it, as well as its egregiousness and the level of intent. Expanding on the factors indicated in the 2007 Enforcement Advisory, the Enforcement Advisory now also expressly specifies that the Division will also take into account "how the misconduct was addressed (or not) under compliance policies in place at the time of the misconduct."
- The measures undertaken by the company to mitigate any losses caused by the misconduct, as well as to remediate the misconduct and prevent wrongdoing from occurring in the future, such as implementing additional internal controls and procedures (including explaining how these would have addressed the misconduct from occurring had they been in place at the relevant time), and addressing the employment of the employees involved.

Unlike prior guidance, the new Enforcement Advisory now provides that the Division will take into account two additional categories of factors:

- Any prior violation of the Commodity Exchange Act and its regulations as well as any other federal or state statutes by the company, and
- Whether the company "has admitted or otherwise demonstrated an acceptance of responsibility for its past misconduct." While it does not state as much, the Advisory strongly suggests that a company willing to concede a substantive violation of the

Commodity Exchange Act may stand to gain more significant cooperation credit than a company seeking to resolve a matter on a "neither admit nor deny basis."

Uncooperative Conduct

In addition to setting out what the Division will consider to be cooperative, the Enforcement Advisory also describes conduct that the Division will view as *uncooperative* – generally described as any conduct that may "limit or offset the credit a company might otherwise receive."

The examples of uncooperative conduct set out in the Enforcement Advisory include misrepresenting or minimizing the nature or extent of the misconduct or providing specious explanations for instances of misconduct that are uncovered, failing to timely respond to subpoenas and document requests and to preserve documents under the company's control, issuing questionnaires to employees or conducting interviews that offer suggestive responses, as well as 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."

Finally, the Enforcement Advisory reiterates the CFTC's longstanding policy of recognizing the role of the attorney/-client privilege, and makes clear that "[t]hese rights are not intended to be eroded or heightened by this advisory."

The Enforcement Advisory for Individuals³

In a parallel Enforcement Advisory, the Division also provided guidance with respect to evaluating cooperation by individuals. Like the Enforcement Advisory for Companies, the Enforcement Advisory for Individuals is intended to "assist individuals who want to cooperate with the Commission," as well as "their counsel in assessing possible settlement positions and litigation risk." The Enforcement

³ "Cooperation Factors in Enforcement Division Sanction Recommendations for Individuals", <http://www.cftc.gov/idc/groups/public/@lrenforcementactions/documents/legalpleading/enfadvisoryindividuals011917.pdf>.

Advisory for Individuals has substantially the same structure as the Enforcement Advisory for Companies, and the factors (including the examples of uncooperative conduct) set forth therein are substantially the same.

Although this is the first time the Division has issued formal guidance with respect to cooperation by individuals, its practice has traditionally been to evaluate individuals' and companies' cooperation in similar terms.

Continuing a Trend of Demanding Cooperation Standards

The Division's new guidance should be read against a broader trend of enforcement authorities in the U.S. and abroad issuing guidance (both formal and informal) suggesting that cooperation requires substantially more than simply not obstructing a government investigation or complying with regulatory requests. In introducing the new Enforcement Advisories, the Director of the Division Aitan Goelman emphasized that the purpose of the new guidance was to promote greater efforts by companies and individuals to engage pro-actively with the Division:

“By making the benefits of cooperation with the CFTC more transparent, we will further incentivize insiders to provide us with first-hand evidence and strengthen our ability to efficiently investigate potential misconduct and fulfill our mission of combating fraud and ensuring the integrity of our markets. As the Advisories make clear, credit will be given where the cooperation is foremost sincere, robust, and indicative of willingness to accept responsibility for misconduct, where appropriate.”⁴

Other authorities have similarly revised their guidance on cooperation with investigations in recent years. For

⁴ CFTC's Enforcement Division Issues New Advisories on Cooperation, January 19, 2017, <http://www.cftc.gov/PressRoom/PressReleases/pr7518-17>.

example, as has been well-publicized, the Department of Justice's position with respect to cooperation has evolved in recent years to include a focus on disclosure of specific information relevant to wrongdoing by individuals, which the September 2015 “Yates Memorandum” characterizes as a prerequisite to receive “any” cooperation in federal prosecutions. Leslie Caldwell, head of the Criminal Division of the US Justice Department has characterized a cooperating company's obligations as follows: “[p]ut simply, if a company wants cooperation credit, we expect that company to conduct a thorough internal investigation and to turn over evidence of wrongdoing to our prosecutors in a complete and timely way.”⁵

Consistent with a policy of encouraging companies to engage proactively when they discover potential wrongdoing, in April 2016 the Department of Justice's Fraud Section implemented a one-year pilot program for enforcement under the Foreign Corrupt Practices Act providing access to significant potential penalty reductions in cases where companies voluntarily disclose the existence of a violation, fully cooperate with the government's investigation, engage in timely and appropriate remediation, and disgorge any gains resulting from misconduct.⁶ Notably, unlike the CFTC's new guidance, the Fraud Section's pilot program outlines concrete financial benefits that may attach to voluntary cooperation – including a 50% reduction off the bottom end of the United States Sentencing Guidelines range, if a fine is sought, and (in most cases) no appointment of a federal monitor as part of a resolution.

An enhanced focus on the value of cooperation is consistent with the developing culture of enforcement

⁵ Assistant Attorney General Leslie R. Caldwell Delivers Remarks at New York University Law School's Program on Corporate Compliance and Enforcement, April 17, 2015, <https://www.justice.gov/opa/speech/assistant-attorney-general-leslie-r-caldwell-delivers-remarks-new-york-university-law>.

⁶ U.S. Department of Justice, Criminal Division, Fraud Section's Foreign Corrupt Practices Act Enforcement Plan and Guidance, April 5, 2016, <https://www.justice.gov/criminal-fraud/file/838416/download>.

in other jurisdictions. For example, the Serious Fraud Office (the “SFO”) in the U.K. has made clear that companies and individuals hoping to benefit from reduced penalties or resolution through a deferred prosecution agreement rather than prosecution must do more than simply comply with their legal obligations. As Ben Morgan, the Joint Head of Bribery and Corruption explained in a recent speech, “[t]hat is the difference between cooperating with us, in the way we want, and being investigated by us in the traditional way.”⁷ At the same time, the potential benefits of cooperation with the SFO, like the benefits of participating in the Fraud Section’s pilot program are somewhat more clearly defined: Only a cooperating company is eligible to be considered for a deferred prosecution agreement, and under the Code of Practice for such agreements in the U.K. and the relevant sentencing statutes, a cooperating company may qualify to have any criminal penalty reduced by up to one third.⁸

Likewise, in Brazil, the so-called Clean Company Act, which entered into force on January 29, 2014, and its implementing decrees outline a formal rubric for assessing fines in criminal corruption matters, as well as a leniency program under which qualified companies that (a) approach the public authorities pro-actively, (b) cease involvement in the misconduct, (c) admit participation in the misconduct, (d) “fully and permanently cooperate” with the authorities, and (e) provide proof of misconduct qualify for specific and concrete benefits, including reductions in fines, exemptions from disqualification from certain types of businesses, and potential exemption or mitigation from administrative sanctions.⁹

The Division’s new Enforcement Advisories chart something of a middle course among the approaches taken by these and other authorities. On the one hand, they impose significant and demanding standards on companies and individuals hoping to benefit from cooperation credit as part of a resolution with the CFTC. On the other, it is difficult to assess how the Division will apply some of the factors it has said it will consider (including, in particular, its “broader programmatic interest”) and the benefits of cooperation in any particular case remain entirely in the discretion of the Division, subject to little concrete guidance regarding how that discretion will be exercised.

For companies and individuals that have become aware of potentially concerning conduct, these standards suggest that careful consideration should be given to early and pro-active disclosure to relevant authorities. While credit for cooperation may not be foreclosed in most cases by a failure to pro-actively disclose wrongful conduct, the CFTC does indicate that considerably more cooperation credit may be available to companies and individuals that self-disclose, as opposed to those who merely cooperate with an investigation once commenced.

For companies and individuals who find themselves under investigation by the CFTC or other authorities, and who wish to achieve significant cooperation credit as part of any resolution, a pro-active approach to cooperation is required. Going forward, regular consideration should be given to identifying opportunities to materially assist and advance the authority’s investigation. At a minimum, full and frank disclosure of all relevant facts, and in particular facts concerning individuals whose conduct may be implicated, will likely enhance the company’s chances of receiving meaningful cooperation credit.

⁷ Ben Morgan at the Annual Anti Bribery & Corruption Forum, Oct. 29, 2015, <https://www.sfo.gov.uk/2015/10/29/ben-morgan-at-the-annual-anti-bribery-corruption-forum/>.

⁸ Deferred Prosecution Agreements Code of Practice, https://www.cps.gov.uk/publications/directors_guidance/dpa_cop.pdf; see also s.144, Criminal Justice Act 2003.

⁹ Law No. 12,846 (2013); Decree No. 8,420 (March 18, 2015).

...
CLEARY GOTTLIB