

INSIGHTS

The Commodity Futures Trading Commission Guidance

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The Commodity Futures Trading Commission (“CFTC” or “Commission”) Division of Enforcement (“Division”) today issued “[Civil Monetary Penalty Guidance](#)” regarding factors staff will consider when recommending civil monetary penalties to the Commission. The guidance tracks with prior guidance and current practices but can serve as a helpful resource for measuring and mitigating enforcement risk.

The guidelines identify three broad categories of factors staff considers:

1. Gravity of the Violation

The Division will consider the (a) nature and scope of the violation (e.g., duration and degree of the violation, role in the violation, efforts to collude or conceal, whether any victims); (b) the state of mind (e.g., intentional or willfulness); and (c) level of harm (e.g., potential benefit/harm and impact on markets).

Takeaway – Although these factors all are apparent only once a violation occurs, companies can assess the risk of each factor associated with its activities and focus efforts on establishing controls to prevent and detect violations that bear the greatest risk of severity, duration, and harm.

2. Mitigating and Aggravating Circumstances

The Division also will consider a variety of mitigating and aggravating factors, including: (a) post-violation conduct (e.g., remedial efforts or attempts to conceal or obstruct); (b) cooperation (including self-reporting); (c) timing of any remediation; (d) adequacy of any pre-violation compliance program; (e) prior misconduct; (f) management involvement (or pervasiveness of misconduct); and (g) nature of any disciplinary action taken by the company (e.g., termination of employment).

Takeaway – The first objective of an effective compliance program should be to mitigate compliance risk and nurture a culture of compliance. A second objective should be to obtain credit for compliance efforts and mitigate penalty exposure in the event of violations. Importantly, how companies respond to violations can weigh heavily on how regulators will approach penalties. Thinking ahead can help avoid mistakes early in the aftermath of a violation and allow remedial measures to be more effective.

3. Other Considerations

Finally, the Division will consider other circumstances surrounding the violation and inquiry, including: (a) the mix of remedies and sanctions imposed by others (e.g., criminal authorities, other agencies, or self-regulatory organizations); analogous cases; and conservation of Commission resources (e.g., timing settlement).

Takeaway – Most violations pose the potential for overlapping investigations and sanctions. Recognizing this early and thinking strategically about what regulators to involve and when to involve them can dramatically change the ultimate outcome.

Conclusion

Although the Division's guidance applies post-violation, the factors are important to consider when developing controls to prevent or mitigate violations. Identifying risks and considering the probability of each factor associated with each risk can help companies direct efforts to maximize the effectiveness of their compliance programs.