



COMMODITY FUTURES TRADING COMMISSION

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Division of
Enforcement

MEMORANDUM

TO: Division of Enforcement Staff

FROM: James M. McDonald
Director, Division of Enforcement

DATE: September 10, 2020

SUBJECT: Guidance on Evaluating Compliance Programs in Connection with Enforcement Matters

As part of any enforcement matter, Commodity Futures Trading Commission (“CFTC” or “Commission”) Division of Enforcement (“Division”) staff may undertake a review and assessment of compliance programs of Commission registrants or other participants in our markets. To ensure consistency and transparency, this guidance provides a framework for Division staff conducting such a review (“Compliance Guidance”). This Compliance Guidance will be set forth in the Enforcement Manual,¹ and will be binding on Division staff.²

In May 2020, the Division provided guidance to staff concerning factors that should be considered in recommending an appropriate civil monetary penalty to the Commission in an enforcement action (“Penalty Guidance”).³ Among other factors, the Penalty Guidance directs staff to consider any relevant mitigating or aggravating circumstances, including “the [e]xistence and effectiveness of the company’s pre-existing compliance program” and post-violation “efforts to improve a compliance program.”⁴ Staff may also evaluate a company’s compliance program in connection with non-monetary terms of a resolution, such as remediation or other undertakings.

In evaluating a corporate compliance program, the Division will consider, among other things, whether the compliance program was reasonably designed and implemented to achieve three goals: (1)

¹ See Commodity Futures Trading Commission, Enforcement Manual (2020) <https://www.cftc.gov/LawRegulation/Enforcement/EnforcementManual.pdf>.

² This Compliance Guidance is not binding on the Commission or any other Division or office of the Commission. It is not intended to be, and may not be, relied upon to create any rights, substantive or procedural, enforceable at law by any party, nor does it create any specific obligations or safe harbors for Commission registrants or other market participants. This Compliance Guidance represents the current views of the Division and does not mandate a particular outcome in any specific case.

³ Memorandum from James M. McDonald, Director CFTC, Civil Monetary Penalty Guidance (May 20, 2020), <https://www.cftc.gov/media/3896/EnfPenaltyGuidance052020/download>; see also Enforcement Manual § 6.8.1.

⁴ *Id.* at Section II, A and D.

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prevent the underlying misconduct at issue; (2) detect the misconduct; and (3) remediate the misconduct. The Division will further consider whether, upon discovery of any misconduct, the compliance program itself has been reviewed and modified to address any deficiencies. At all points, the Division will conduct a risk-based analysis, taking into consideration a variety of factors such as the specific entity involved, the entity's role in the market, and the potential market or customer impact of the underlying misconduct.

Division staff shall consult as appropriate with other Divisions that have relevant knowledge, experience, or expertise.⁵ An assessment of whether the relevant aspects of a compliance program adequately met the goals of preventing, detecting, and remediating misconduct will depend on the specific facts and circumstances.

In conducting its analysis, Division staff should consider the following:

1. Prevention: Was the program reasonably designed and implemented to effectively prevent the misconduct at issue? Evaluation of this factor should include consideration of, among other things, whether:
 - a. written policies and procedures in effect throughout the period of misconduct reasonably addressed the type of misconduct at issue;⁶
 - b. training of staff, supervisors, and compliance personnel reasonably addressed the type of misconduct at issue;
 - c. a failure to cure any previously identified deficiencies in the compliance program contributed to, or failed to prevent, the misconduct at issue (a failure to satisfactorily address regulatory findings is of particular significance);
 - d. adequate resources, including funds, had been devoted to compliance; and
 - e. the structure, oversight, and reporting of the compliance function is sufficiently independent from the business functions.
2. Detection: Was the program reasonably designed and implemented to effectively detect the misconduct at issue? This analysis will consider whether the misconduct was independently identified through compliance mechanisms as well as the processes and procedures in place

⁵ Division staff will also consider where appropriate and relevant similar guidance issued by other U.S. government agencies or a Self-Regulatory Organization ("SRO") such as the National Futures Association, futures exchanges, and swap execution facilities. See, e.g., U.S. Department of Justice Criminal Division, *Evaluation of Corporate Compliance Programs* (updated April 2019), available at <https://www.justice.gov/criminal-fraud/page/file/937501/download>.

⁶ Staff should also consider whether the compliance policies and procedures were updated to reflect current rules and regulations as well as relevant guidance and other legal developments.

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aimed at detecting misconduct. Evaluation of this factor should include consideration of, among other things, the adequacy of:

- a. internal surveillance and monitoring efforts;
 - b. the organization's internal-reporting system and its handling of complaints (including provisions for anonymous complaints and protection for whistleblowers); and
 - c. procedures for identifying and evaluating unusual or suspicious activity to determine whether any misconduct has occurred, with due regard for the sources, gravity, and extent of the organization's risk of violations.⁷
3. Remediation: Upon discovery of the misconduct, what steps were taken to assess and address both the misconduct and any deficiencies in the compliance program that may have permitted the misconduct to occur or initially evade detection? Evaluation of this factor should include consideration of, among other things, whether, in a sufficient and timely manner, appropriate action was taken to:
- a. effectively address any impact of the misconduct, including to mitigate and cure any financial harm to others and restore integrity to the relevant markets;
 - b. appropriately discipline the individuals directly and indirectly responsible for the misconduct; and
 - c. identify and address any deficiencies in the compliance program that may have contributed to a failure to prevent or quickly detect the misconduct.⁸

If you have questions concerning this guidance, please consult with your Deputy Director and the Office of Chief Counsel.

⁷ Relevant considerations may also include whether efforts to detect and evaluate potential wrongdoing were narrowly tailored (e.g., covering only a specific individual, product, date, etc.) or sufficiently broad to uncover similar misconduct involving other employees, divisions, or products and whether questions and concerns were appropriately elevated.

⁸ See, e.g., 17 C.F.R. § 3.3(e)(5). The Penalty Guidance and the Division's Cooperation Advisories similarly specify mitigation of harm and disciplinary actions taken as factors that will be taken into account in determining the recommended civil monetary penalty. See, e.g., Enforcement Advisory: Cooperation Factors in Enforcement Division Sanction Recommendations for Companies, <https://www.cftc.gov/sites/default/files/idc/groups/public/@lrenforcementactions/documents/legalpleading/enfadvisorycompanies011917.pdf>; Enforcement Advisory: Updated Advisory on Self Reporting and Full Cooperation, <https://www.cftc.gov/sites/default/files/idc/groups/public/@lrenforcementactions/documents/legalpleading/enfadvisoryselfreporting0917.pdf> (together "Cooperation and Self Reporting Advisories").