

CFTC's Enforcement Division Announces New Focus on Self-Reporting

Skadden

10/04/17

If you have any questions regarding the matters discussed in this memorandum, please contact the attorneys listed on the last page or call your regular Skadden contact.

Upon discovering a potential violation, a company is often faced with the dilemma of whether to self-report the incident to its regulator or attempt to deal with the incident through exclusively internal means. On September 25, 2017, the Commodity Futures Trading Commission's (CFTC) Division of Enforcement (Division) issued a new advisory on self-reporting and cooperation that seeks to "shift th[e] analysis" that companies undertake in favor of self-reporting.¹ James McDonald, the new director of the Division, announced the new policy in a speech and question-and-answer session at New York University Law School, at which he highlighted the policy as one of the Division's "priorities going forward."²

Earlier this year, the Division issued two advisories outlining the factors it will consider in evaluating cooperation in the agency's investigations and enforcement actions.³ These advisories listed self-reporting as only one of many factors the Division will consider in weighing cooperation credit and did not quantify the benefits, making it difficult for a company to know whether self-reporting was worth the risk.⁴ McDonald has now elevated self-reporting above other cooperation factors and attempted to make the benefit of doing so more transparent by creating a new tier of cooperation credit for those that self-report. At the same time, McDonald made clear that self-reporting by itself is not sufficient to trigger the full benefits of the new policy. A company must also cooperate "proactive[ly]" throughout the investigation by continuing to disclose relevant information and investigate and "remediate" the violation, including by "fix[ing] the flaws in its compliance and internal controls programs that allowed the misconduct in the first place."⁵

What Self-Reporting Means

To merit full credit for self-reporting, an entity's voluntary disclosure must (1) be made prior to an imminent threat of exposure of the misconduct, (2) be made to the Division⁶ promptly after the entity becomes aware of it, and (3) include all relevant facts known to the entity at the time of the disclosure, including specific facts about individual wrongdoers. If parties self-report before they know all of the relevant facts surrounding the misconduct, they are still eligible for full credit so long as they make best efforts to ascertain the relevant facts at the time of disclosure, fully disclose those facts, continue to investigate and disclose additional facts as they come to light.⁷

¹ James McDonald, director of the Division of Enforcement, CFTC, speech at the NYU Program on Corporate Compliance & Enforcement / Institute for Corporate Governance & Finance: Self-Reporting and Cooperation at the CFTC (Sept. 25, 2017).

² *Id.*

³ CFTC, [Enforcement Advisory: Cooperation Factors in Enforcement Division Sanction Recommendations for Companies](#) (Jan. 19, 2017); CFTC, [Enforcement Advisory: Cooperation Factors in Enforcement Division Sanction Recommendations for Individuals](#) (Jan. 19, 2017).

⁴ See David Meister *et al.*, "[Inside The CFTC's New Advisories On Cooperation](#)" (Feb. 8, 2017) (noting that the January 2017 advisories were silent with respect to the benefits of cooperation).

⁵ McDonald, *supra* note 1.

⁶ The new advisory states that an entity's disclosure must be "made to the Division [of Enforcement]." This suggests a change from past practice where an entity could self-report to other divisions within the CFTC, such as the Division of Market Oversight or the Division of Swap Dealer and Intermediary Oversight, and still receive full credit for self-reporting from the Division of Enforcement. CFTC, [Enforcement Advisory: Updated Advisory on Self Reporting and Full Cooperation](#) (September 25, 2017) [hereinafter "Updated Advisory on Self Reporting"] at 2.

⁷ Updated Advisory on Self Reporting at 2–3.

This memorandum is provided by Skadden, Arps, Slate, Meagher & Flom LLP and its affiliates for educational and informational purposes only and is not intended and should not be construed as legal advice. This memorandum is considered advertising under applicable state laws.

Four Times Square
New York, NY 10036
212.735.3000

skadden.com

CFTC's Enforcement Division Announces New Focus on Self-Reporting

McDonald indicated that he expects the reporting party to contact the Division directly and to do so promptly even when reporting the incident to other regulators.⁸ He also made clear that simply including a disclosure in a compliance report, such as the annual chief compliance officer report that futures commission merchants, swap dealers and major swap participants must file, will not satisfy the Division's expectations for self-reporting.⁹

Benefits of Self-Reporting

A key takeaway from McDonald's announcement is that entities that are true self-reporters will be treated as belonging to a different category from entities that cooperate only after being approached by the Division. McDonald explained that the benefit a nonself-reporting cooperator receives "will be significantly less" than that received by one that does self-report.¹⁰

McDonald also provided numerical guidance, noting that reductions in civil penalties would typically be "in the neighborhood of" 50 to 75 percent — much larger than the reductions available to parties that do not self-report wrongdoing but otherwise cooperate and remediate.¹¹ Of course, knowing the percentage that a fine will be decreased is only useful if one has a good sense of what the starting point will be. On that point, McDonald noted that the Division was considering publishing "civil penalty guidelines" akin to the federal sentencing guidelines, which would give companies a more precise measure of the benefit they would obtain by self-reporting.¹² While such guidelines would take time to develop and may well be subject to Commission approval, McDonald announced that orders imposing civil penalties will delineate whether the subject of the penalty was a self-reporter, a mere cooperator or neither, giving potential self-reporters more data to consider when deciding whether to bring forth a violation not yet known to the CFTC.¹³

The Division seems to have attempted to prove that it means what it says. In its recent settlement with Bank of Tokyo-Mitsubishi UFJ, Ltd. (BTMU), the Division stated that BTMU was

⁸ See McDonald, *supra* note 1 (Q&A session notes on file with the author).

⁹ McDonald cited as insufficient a recent example where a company buried a vague reference to misconduct in the depths of a compliance report and later claimed that the reference constituted a self-report. McDonald, *supra* note 1 (Q&A session notes on file with the author).

¹⁰ See McDonald, *supra* note 1.

¹¹ McDonald, *supra* note 1 (Q&A session notes on file with the author).

¹² *Id.*

¹³ *Id.*

being assessed a "substantially reduced penalty" because it had self-reported and cooperated extensively.¹⁴ Notably, BTMU was fined significantly less than similar violators from recent years that did not self-report.¹⁵

The Division has also made clear that, under certain circumstances, it will even entirely forgo the prosecution of a self-reporting entity. According to the new advisory, "where misconduct is pervasive across an industry and the company or individual is the first to self-report — the Division may recommend a declination of prosecution."¹⁶ This focus on obtaining enforcement results against multiple actors was also apparent in the January 2017 advisories, and it may suggest that the CFTC intends to continue to prioritize industrywide investigations like the ones relating to Libor, FX and ISDAFIX.¹⁷

Internal Investigations and Remediation

Although the Division's emphasis on self-reporting will receive most of the attention, it is important not to overlook McDonald's assertion that continuing cooperation and remediation are also prerequisites for obtaining special dispensation from the Division. The new advisory indicates that, to receive full cooperation credit, entities must "continue[] to investigate" and disclose additional relevant facts as they come to light, even after they self-report.¹⁸ McDonald reinforced this in the Q&A session after his speech, when he said that the Division will often expect entities to engage in internal investigations after their initial reports.¹⁹ He also noted that the Division will advise self-reporters about the extent of internal investigation they must undertake in order to obtain full cooperation credit.²⁰ Under the new policy, self-reporting will thus typically mark the beginning of a company's investigatory role, in contrast to past practice where a company might step aside upon self-reporting for the Division to perform its own investigation.

¹⁴ Press release, CFTC, "CFTC Finds That The Bank of Tokyo-Mitsubishi UFJ, Ltd. Engaged in Spoofing of Treasury Futures and Eurodollar Futures" (Aug. 7, 2017).

¹⁵ Compare *In re Bank of Tokyo-Mitsubishi UFJ, Ltd.*, CFTC No. 17-21 (Aug. 7, 2017) (\$600,000 civil monetary penalty), with *CFTC v. Oystacher*, 15-cv-09196 (N.D. Ill. Dec. 20, 2016) (\$2.5 million civil monetary penalty), *CFTC v. Nav Sarao Futures Ltd. PLC*, 1:15-cv-03398 (N.D. Ill. Nov. 14, 2016) (\$25.7 million civil monetary penalty), and *In re Panther Energy Trading LLC*, CFTC No. 13-26 (Jul. 22, 2013) (\$1.4 million civil monetary penalty).

¹⁶ Updated Advisory on Self Reporting, *supra* note 6, at 3.

¹⁷ See Meister *et al.*, *supra* note 4.

¹⁸ Updated Advisory on Self Reporting, *supra* note 6, at 3.

¹⁹ McDonald, *supra* note 1 (Q&A session notes on file with the author).

²⁰ *Id.*

CFTC's Enforcement Division Announces New Focus on Self-Reporting

The new advisory further explains that the Division expects self-reporting entities not only to investigate and report on what they uncover but also to remediate the violation. McDonald acknowledged that the particular form of remediation would vary depending on the facts and circumstances, but firms must be prepared to demonstrate that they have taken steps “to ensure the misconduct doesn’t happen again.”²¹

Although only time will tell the extent of the benefits that will accrue to companies that choose to take the Division up on its apparent offer, the Division’s announced intention to substantially reward self-reporters should undoubtedly form part of the calculus for a company that uncovers potential Commodity Exchange Act violations.

²¹ McDonald, *supra* note 1.

Contacts

David Meister

Partner / New York
212.735.2100
david.meister@skadden.com

Mark D. Young

Partner / Washington, D.C.
202.371.7680
mark.d.young@skadden.com

Jonathan Marcus

Of Counsel / Washington, D.C.
202.371.7596
jonathan.marcus@skadden.com

Theodore M. Kneller

Counsel / Washington, D.C.
202.371.7264
ted.kneller@skadden.com

Chad E. Silverman

Counsel / New York
212.735.3463
chad.silverman@skadden.com

Andrew I. Haddad

Associate / New York
212.735.3332
andrew.haddad@skadden.com