

CFTC Division of Enforcement Publishes New Civil Monetary Penalty Guidance

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In a memorandum dated May 20, 2020, the Commodity Futures Trading Commission's (CFTC) Division of Enforcement issued guidance outlining factors that CFTC staff will consider when recommending civil monetary penalties (CMPs) to the Commission in enforcement actions.¹ The guidance marks the first time that the Division has formally issued comments on the subject. The memo does not say why the Division has chosen to do so now but does note that the guidance advances "clarity," which is one of the Commission's recently articulated four core agency values.

There are no major surprises in the memo, as some of it is a restatement of the Commission's 1994 penalty guidelines, albeit with more detail. Additionally, the guidance generally explains relatively broad principles and lacks precision in various respects, and it explicitly preserves the Division's discretion and flexibility. Nonetheless, there are nuances to be noted that should be helpful when engaging with the Division, and the swaps and futures industry should welcome any efforts the regulator makes to be more transparent when determining sanctions.

The guidance groups the penalty factors into three categories: (i) gravity of the violation; (ii) mitigating and aggravating circumstances; and (iii) "other considerations." Here are some of the highlights:

Gravity of the Violation

- Gravity remains the Division's "primary consideration" when determining penalties, as the CFTC stated in its 1994 penalty guidelines.
- Gravity encompasses the "nature and scope" of the violation, the respondent's state of mind with regard to the conduct, and the external consequences of the violation.
- The Division will consider the "number" of violations when determining penalties. Unfortunately, this leaves open the recurring question of how the Division counts violations (e.g., per act, per trade, per communication, per day, etc.), thereby retaining broad flexibility over this important consideration.
- Gravity also focuses on whether acts were intentional or willful, whether they were done in concert with others, and what the respondent's role in the violation was. The Division also will consider whether the respondent stood to, or did, benefit from the violation but does not explain how that benefit will be measured.
- Additionally, the Division will evaluate whether there was risk of, or actual, harm to victims, and the "type" and number of victims, although the guidance does not explain how harm will be measured or how victims will be counted.

Mitigating and Aggravating Circumstances

- The memo confirms that the CFTC "typically" considers mitigating and aggravating circumstances.
- These circumstances include certain post-violation conduct (whether mitigating, such as attempts to cure, voluntary restitution or compliance program improvement; or

¹ See Press Release, "CFTC Division of Enforcement Issues Civil Monetary Penalty Guidance," CFTC (May 20, 2020); see also Memorandum to Division of Enforcement Staff from James M. McDonald, Director, Division of Enforcement re: Civil Monetary Penalty Guidance (May 20, 2020). The Division noted that it has incorporated the new guidance into its [Enforcement Manual](#).

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aggravating, such as obstruction), self-reporting, timeliness of remediation, prior misconduct, effectiveness of a compliance program and responsibility of management.²

- While both the new guidance and the 1994 guidance cite the impact of the violations on market integrity and customer protection as factors, the new guidance expands the impacts considered to include an amorphous category — how “the mission and priorities of the Commission” are affected.
- The Division also will consider what, if any, disciplinary action was taken against individuals who engaged in the misconduct, a factor that leaves open some questions, including:
 - Does this mean both lower penalties for discipline imposed *and* higher penalties for discipline *not* imposed?
 - If a company and the Division have a different view of individual culpability, will that be held against the company?
- While both the new guidance and the 1994 guidance cite cooperation, conservation of Commission resources and settlement as factors in assessing CMPs, the new guidance also focuses on whether the settlement was “timely,” indicating a willingness to grant a discount for settlements reached earlier in an investigation.

² In other guidance issued in recent years, and through recent settlements, the division has made clear that whether a respondent self-reports its own violations is a factor that weighs heavily in determining its CMP. *See, e.g.*, CFTC, [Updated Advisory on Self Reporting and Full Cooperation](#) (Sept. 25, 2017); CFTC, [Advisory on Self Reporting and Cooperation for CEA Violations Involving Foreign Corrupt Practices](#) (Mar. 6, 2019); CFTC, [FY2019 Division of Enforcement Annual Report](#) at 12 (Nov. 25, 2019).

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“Other Considerations”

This catchall category, which contains a lawyerly “including but not limited to” qualification, sets forth other factors worthy of attention.

- The Division will consider “the total mix of remedies and monetary relief” in parallel actions by other authorities, suggesting that the Division might reduce its own penalties as a result of penalties imposed by other authorities in parallel cases.
- The Division will consider penalties imposed against others in similar cases, suggesting that it might look outside of its own precedent to develop penalty determinations. How the Division would, in practice, apply external authorities to CFTC-governed conduct is not explained.

In announcing the guidance, CFTC Chairman Heath P. Tarbert remarked that it reflects his commitment to “transparency,” with Director of Enforcement James McDonald similarly saying that “[e]xplaining how and why we punish is a significant part of” the agency’s efforts to promote such transparency. While the guidance still leaves some questions unanswered, it provides greater clarity into the Division’s thought process in determining CMP recommendations — hopefully helpful insight for companies and individuals facing ongoing or prospective CFTC enforcement actions, as well as guidance regarding specific criteria on which to engage the Commission and Division staff.