

# Commodity Futures Trading Commission

## Division of Enforcement



## Enforcement Manual

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## 1. Introduction

This Enforcement Manual (“Manual”) provides an overview of the Commodity Futures Trading Commission (“CFTC” or “Commission”) and the Division of Enforcement (“Division” or “Enforcement”) of the CFTC, and it sets forth certain general policies and procedures that guide the work of Division staff in detecting, investigating, and prosecuting violations of the Commodity Exchange Act (“CEA”) and the Commission Regulations (“Regulations”).<sup>1</sup>

## 2. The Commodity Futures Trading Commission

### 2.1 Mission, Vision and Values of the CFTC

The mission of the CFTC is to promote the integrity, resilience, and vibrancy of the U.S. derivatives markets through sound regulation. Through its commitment to this mission, the CFTC aims to be the global standard for sound derivatives regulation and endeavors to achieve this goal by upholding the following core values:

- **Commitment** - Bringing our best to work every day and holding ourselves to the highest professional standards.
- **Forward-thinking** - Challenging ourselves to stay ahead of the curve.
- **Teamwork** - Valuing diverse skill sets and backgrounds to achieve our mission.
- **Clarity** - Providing transparency to market participants about our rules and processes.

### 2.2 Overview of the CFTC and Its Markets

The CFTC is overseen by a Commission consisting of five Commissioners appointed by the President, with the advice and consent of the Senate, to serve staggered five-year terms. The President designates one of the Commissioners to serve as Chairman. No more than three Commissioners at any one time may be from the same political party. The Commission has offices in Washington, D.C., Chicago, Kansas City, and New York.

Established in 1974, the CFTC oversees the U.S. derivatives markets, which include futures, options, and swaps. These markets have existed since the 1860s, beginning with agricultural commodities such as wheat, corn, and cotton. The markets grew to include energy and metal commodities, such as crude oil, heating oil, gasoline, copper, gold, and silver. Over time, market participants developed financial instruments based on interest rates, stock indexes, foreign currency, and other products, which today exceed agricultural contracts in trading volume. In the aftermath of the 2008 financial crisis, the CFTC’s mandate was significantly expanded to include most over-the-counter (“OTC”) derivatives markets and swaps.

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<sup>1</sup> The Manual provides general guidance only. Decisions about specific investigations, recommendations, and litigations are made based on the facts and circumstances of the particular matter.



The futures and swaps markets are essential to the U.S. and global economies and the way that businesses and individuals manage risk. Farmers, ranchers, producers, commercial companies, municipalities, pension funds, and others use these markets to lock in a price or a rate. This helps them focus on what they do best: innovating, producing goods and services for the economy, and creating jobs. The CFTC works to ensure these hedgers and other market participants can use the markets with confidence.

The CFTC also works to protect the retail customers who too often are subject to unscrupulous fraudsters who fraudulently solicit and often misappropriate their money based on claims of quick riches and successful trading.

### **2.3 Commodity Exchange Act and Regulations**

The CFTC is charged with the administration and enforcement of the CEA, 7 U.S.C. §§ 1–26, and the Regulations, 17 C.F.R. pts. 1–190, which it issues pursuant to its statutory authority. Under the CEA, the CFTC has exclusive jurisdiction over futures, commodity options, and leverage contracts, with certain exceptions. The CFTC also has exclusive jurisdiction over certain swaps contracts and broad-based security index products. Certain anti-fraud and other specified provisions of the CEA apply to retail forex transactions and retail commodity transactions entered into on a leveraged, margined, or financed basis. In addition, the CFTC has authority to prosecute fraud and manipulation in connection with commodities in interstate commerce.

## **3. The Division of Enforcement**

### **3.1 Mission of the Division**

The mission of the Division is to protect the public and preserve market integrity by detecting, investigating, and prosecuting violations of the CEA and the Regulations.

### **3.2 Organization of the Division**

The Division is led by the Director, who reports to the Chairman. The Director leads an Enforcement staff that includes attorneys, paralegals, investigators, forensic economists, surveillance analysis, and administrative staff located in each of the four CFTC offices.

The Division has five teams of attorneys and investigators dedicated to the investigation and litigation of matters, each led by a Deputy Director (“Deputy”), with one team in each CFTC regional office, and two in the Washington, D.C. office. The work of Enforcement is supported by the Office of the Director, which includes the Principal Deputy Director, the Office of Chief Counsel (“OCC”) (responsible for review of legal, policy and programmatic issues), and a Special Counsel to the Director. The work of the Division is further supported by the Office of Cooperative Enforcement (provides coordination with and assistance to the Division’s federal and state partners), Office of Forensic Economists (provides analytical support to specific matters), and Litigation, Intake and Triage (led by a Deputy Director and conducts the review and analysis of leads and provides general litigation guidance). The Division also houses the Surveillance group, led by a Deputy Director, which monitors

markets and market participants for potential unlawful conduct.<sup>2</sup> Finally, the Whistleblower Office also sits in the Division, and is responsible for administering the Whistleblower Program established under the CEA and Regulations. *See* Section 11 of the Manual (Whistleblower Program).

### **3.3 Overview of Division Enforcement Program**

The Division may pursue, with the approval of a majority of the Commission, enforcement actions against individuals and companies whose conduct violates the CEA or the Regulations. The Division may file these enforcement actions either in federal court or in administrative proceedings.

The Division may obtain information relevant to its investigations through a number of avenues, including other CFTC Divisions, industry self-regulatory organizations, other governmental authorities, whistleblowers, victims, cooperating witnesses, self-reports, customer complaints, and members of the general public, as well as through the use of tools, means, and methods the Division has developed internally.

At the conclusion of an investigation, the Division may recommend that the Commission initiate administrative proceedings or seek injunctive and ancillary relief in federal court. Sanctions may include civil monetary penalties; the suspension, denial, revocation, or restriction of registration and trading privileges; and injunctions or cease-and-desist orders. In addition, the Division may recommend pursuing other remedies such as restitution or disgorgement.

When the Division obtains evidence that gives it reason to suspect criminal violations of the CEA may have occurred, it may refer the matter to the Department of Justice or the appropriate state authority for prosecution. Criminal activity involving commodity-related instruments can result in prosecution for criminal violations of the CEA and for violations of other federal criminal statutes, including mail fraud, wire fraud, and conspiracy.

### **3.4 Division Investigations**

**Authority:** The statutory authority for the Division to conduct investigations into potential violations of the CEA or the Regulations is found in Sections 6(c)(5), 8(a)(1), and 12(f) of the CEA, 7 U.S.C. §§ 9, 15, 12(a)(1), 16(f). The authority to conduct investigations is delegated to the Director of the Division of Enforcement under Part 11 of the Regulations, 17 C.F.R. pt. 11. Additionally, Section 12(f) of the CEA, 7 U.S.C. § 16(f), authorizes the Division to conduct investigations on behalf of foreign futures authorities even if such investigations do not involve a violation of the CEA or the Regulations.

**Investigative Powers:** The Division has broad powers to conduct such investigations. These investigative powers include obtaining relevant information and evidence through, among other avenues:

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<sup>2</sup> This Manual focuses on the Division's investigations and prosecutions of violations of the CEA and Regulations. The Division's Surveillance function is not addressed herein.

- voluntary statements, submissions, and productions of documents by customers, industry participants, and the general public;
- inspections of required records of boards of trade, intermediaries, reporting traders, and other entities and persons required by law to register with the CFTC;
- information provided by other federal and state departments or agencies, or self-regulatory organizations, such as the National Futures Association, boards of trade, or swaps execution facilities;
- analysis of market data;
- compelled testimony and/or production of documents through administrative subpoenas; and
- whistleblowers.

**Confidentiality:** Non-public information and documents received by the CFTC during the course of an investigation must be treated by the CFTC as confidential in accordance with Section 8(a) of the CEA, 7 U.S.C. §12(a), and Regulation 11.3, 17 C.F.R. §11.3. *See* Section 9.4 of the Manual (Confidentiality).

**Summary of Types of Prohibited Conduct Subject to Investigation:** Conduct prohibited under the CEA and the Regulations includes, among other things:

- fraud, including fraudulent solicitation, concealment and misappropriation;
- false statements to the CFTC;
- price manipulation;
- use of a manipulative or deceptive device;
- misappropriation of material, confidential, non-public information;
- disruptive trading practices, including disregard of orderly execution during the closing period and spoofing;
- fraudulent trade allocation;
- trade-practice violations (trading ahead, prearranged trading, bucketing, trading at other than bona-fide prices, wash sales, and position limits);
- false reporting;
- undercapitalization;

- failure to segregate customer funds;
- registration violations;
- failure to maintain or produce required records;
- failure to make required reports;
- a registrant’s failure to supervise;
- failure to comply with business conduct standards; and
- illegal off-exchange activity.

In addition, under the CEA and Regulations, some market participants may be held liable for the acts and/or violations of others.

### **3.5 Life Cycle of an Enforcement Matter**

Each enforcement matter has four potential phases. A matter is tracked through each phase in the Division’s Case Management System. The Director of the Division, along with other members of the Office of the Director, regularly reviews the docket of matters assigned to each Deputy with the responsible Deputy to ensure consistency in approach and proper allocation of Division resources. Deputies also routinely meet with the teams assigned to each matter. Regular review also ensures that investigations are proceeding on course, adjustments to the investigative approach or plan are made, as appropriate, target deadlines are established, and major open issues are brought to the attention of the Director. The life cycle of an enforcement matter may include:

- **Lead.** Information concerning a possible enforcement matter can come to the Division from many different sources. After initial assessment, a lead may be closed, converted to a preliminary inquiry or investigation for further evaluation, or referred to another agency (e.g., where the CFTC lacks jurisdiction). *See* Section 4 of the Manual (Leads: Tips, Complaints, and Referrals).
- **Preliminary Inquiry.** In the preliminary inquiry (“PI”) stage, Division staff conduct an initial review, take some investigatory steps to further assess the viability of the lead, and determine whether to commit additional Division resources. *See* Section 5.1 of the Manual (Preliminary Inquiries).
- **Investigation.** During this phase, Division staff conduct an in-depth investigation to confirm jurisdiction, if necessary, and to obtain full understanding of the facts and determine whether enforcement action should be recommended, including whether emergency action is needed to protect customers from further harm or to protect the integrity of the markets, or whether the matter should instead be closed.
  - Staff may recommend to the Commission that it file an action, either on an emergency or non-emergency basis. For non-emergency matters, staff may give

proposed defendants notice of the recommendation and an opportunity to submit a written statement addressing any relevant factual, legal, or policy issues. If the Commission authorizes the filing of an action, the matter proceeds to the litigation phase. *See* Section 5.2 of the Manual (Investigations).

- **Litigation.** If the Division determines that the conduct violates the CEA and/or the Regulations, and the Division obtains Commission authorization, staff may file an injunctive action in federal court or an administrative action, under Section 6(c) and 6(d) of the CEA, 7 U.S.C. §§ 9, 13b. *See* Section 6.1 of the Manual (Litigation).

### **3.6 Commission Consideration of Enforcement Matters**

The Commission authorizes certain actions of the Division, including authorizing the Division to file and settle enforcement actions. The Division ordinarily prepares a written recommendation setting out the factual and legal basis for the proposed action. The Commission considers Division recommendations either through a seriatim process or at a closed meeting of the Commission. Through the seriatim process, the Commission considers and votes by written procedure pursuant to which the recommendations are considered separately by each Commissioner in turn (i.e., in seriatim). Each participating Commissioner will report her or his vote on the recommendation to the Secretary of the Commission. The Commission may also consider and vote on Division's recommendations in "closed meetings," which are meetings that, pursuant to exemptions in the Government in the Sunshine Act ("Sunshine Act"), 5 U.S.C. § 552b, the Commission has voted to close to the public. At a closed meeting, Division staff may orally present the recommendation to the Commission and answer any questions of the Commissioners before the Commission votes on the matter.

## **4. Leads: Tips, Complaints, and Referrals**

### **4.1 Triage Function**

The Division's Litigation, Intake, and Triage Unit ("Triage") processes referrals and leads received by the Division. Triage conducts an initial analysis of each referral or lead to determine whether it merits closer scrutiny. For those matters that warrant further inquiry, Triage forwards the lead to a Deputy for further assessment and staffing, if appropriate.<sup>3</sup> If the Deputy determines that no further information or work is required to determine that no violations have occurred, the lead is closed. Otherwise, if the Deputy determines that the initial information indicates potential violations of the CEA or Regulations, the matter is opened as either a PI or an Investigation. If a matter appears to fall outside the jurisdiction of the CFTC, but within the jurisdiction of another federal or state agency, a referral may be made at this time. *See* Section 8.1.1 of the Manual (Referring Matters to Other Government Agencies).

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<sup>3</sup> If the referral or lead relates to an existing matter, it is generally forwarded to the staff assigned to the existing matter.

## **4.2 Sources**

The Division receives leads from a wide variety of sources. Among the most significant sources of leads are those listed below.

### **4.2.1 Customer Complaints**

Information provided by the public is an important source on which the Division relies for initiating and developing investigations of potentially unlawful activities. To assist the public in reporting possible violations, the Division has prepared a form, which appears on the CFTC website at <http://www.cftc.gov/ConsumerProtection/FileaTiporComplaint/index.htm> and may be submitted by email or mail.

### **4.2.2 Congress**

The CFTC may receive complaints and other information from members of Congress on behalf of the constituents whom they represent. This information can produce new leads for the Division or information relating to an on-going investigation or litigation.

### **4.2.3 Market Surveillance**

Suspicious activity discovered by Market Surveillance may be referred to the Division for investigation and prosecution of possible violations of the CEA and Regulations.

### **4.2.4 Data Analytical Tools**

The Division also develops leads using data analytical tools developed internally, including by Market Surveillance, to identify suspicious activity that could indicate a violation of the CEA or Regulations.

### **4.2.5 Bank Secrecy Act Information**

The Bank Secrecy Act (“BSA”), 31 U.S.C. §§ 5311–5332, is designed to prevent, detect, and prosecute international money laundering and the financing of terrorism. The BSA and related regulations require certain registrants to establish anti-money laundering (“AML”) programs, report suspicious activity in Suspicious Activity Reports (“SARs”), verify the identity of customers, and apply enhanced due diligence to certain types of accounts involving foreign persons.

BSA information can provide valuable leads in investigations.

### **4.2.6 Whistleblowers**

The Division also relies on information from whistleblowers to uncover possible misconduct, as whistleblowers may possess intimate knowledge of a business’s inner workings or specialized market knowledge, often enabling the Division to conduct more efficient investigations. The CFTC’s Whistleblower Program provides monetary incentives and anti-retaliation protections to individuals who come forward to report to the CFTC possible violations of the CEA and the

Regulations. *See generally* 17 C.F.R. pt. 165. *See* Section 11 of the Manual (Whistleblower Program).

#### **4.2.7 Cooperating Witnesses and Self-Reports**

Under the Division’s cooperation and self-reporting programs, the Division may receive information about misconduct from individual cooperating witnesses or through voluntary self-reports by companies or individuals. This information could be used to generate new leads for the Division. *See* Section 7 of the Manual (Consideration of Cooperation, Self-Reporting, and Remediation).

#### **4.2.8 National Futures Association**

National Futures Association (“NFA”) is a self-regulatory organization whose members include CFTC registrants, commercial firms, and banks. NFA is responsible—under CFTC oversight—for certain aspects of the regulation of registrants, such as Futures Commission Merchants, Commodity Pool Operators, Commodity Trading Advisors, Introducing Brokers, Retail Foreign Exchange Dealers, Swaps Dealers, and their associated persons. NFA focuses primarily on CFTC registration and on the qualifications and proficiency, financial condition, retail sales practices, and business conduct of these futures professionals. NFA administers its own disciplinary program for violations of its rules by its members, and may refer information to the Division regarding potential violations of the CEA and the Regulations.

NFA maintains a database of registration and disciplinary history, as well as copies of registration applications, required notifications, and audit results. *See* <https://www.nfa.futures.org/basicnet/>. For additional information, see the NFA website, [www.nfa.futures.org](http://www.nfa.futures.org).

#### **4.2.9 Self-Regulatory Organizations**

Each registered entity, e.g., Designated Contract Market, Designated Clearing Organization, or Swap Execution Facility, is responsible for monitoring its respective markets and taking disciplinary actions for violations of its rules and regulations. When these self-regulatory organizations (“SROs”) discover potentially illegal activities that fall outside the scope of their regulatory authority or that also violates the CEA or the Regulations, they may refer such activities to the Division. At times, the SRO and the Division may engage in parallel investigations and disciplinary/enforcement actions. In addition, each SRO maintains records that could be relevant to an enforcement investigation.

#### **4.2.10 Other Federal, State, or Local Governmental Agencies**

When other federal, state or local government agencies discover potentially illegal activity that might fall within the CFTC’s jurisdiction, they may refer the matter to the Division. The Division can seek and gain access to their files. When their jurisdiction overlaps the jurisdiction of the CFTC, the Division and the other governmental authorities may initiate parallel enforcement efforts. *See* Section 8.1 of the Manual (Domestic Cooperative Enforcement).

#### **4.2.11 Foreign Governmental Agencies and Foreign Futures Authorities**

The Division may receive a referral or information concerning cross-border violations from foreign governmental agencies or foreign futures authorities. Staff work closely with OCC in such matters. *See* Section 8.2 of the Manual (International Cooperative Enforcement).

### **5. Preliminary Inquiries and Investigations**

#### **5.1 Preliminary Inquiries**

A PI may be opened when a lead has sufficient viability to merit further investigatory steps to evaluate whether there are potential violations of the CEA or the Regulations. Deputies are responsible for approving the opening of a PI.

#### **5.2 Investigations**

An investigation may be opened either when a PI is converted to an investigation (i.e., where evidence has been developed suggesting that further investigation is warranted), or independently (i.e., directly from a lead, including a referral). Deputies are responsible for approving the opening of an investigation. Part 11 of the Regulations, 17 C.F.R. pt. 11, sets forth rules relating to investigations, which also govern the preliminary inquiry stage.

##### **5.2.1 No Targets or Subjects of Investigations**

The CFTC's investigative process does not designate "targets" or "subjects" of preliminary inquiries or investigations. Moreover, Division staff are not required to, nor do they, provide any type of target notification when issuing subpoenas to parties for document production or to witnesses for testimony in nonpublic investigations of possible violations of the CEA or the Regulations. This differs from the criminal grand jury process in which targets of an investigation are often identified.<sup>4</sup>

##### **5.2.2 Investigative Planning**

At the outset of a matter, Division staff develop an investigatory approach or plan and throughout the matter modify the approach as necessary, depending upon the facts and circumstances of each matter. For any matter, the investigatory approach includes an assessment of potential violations of the CEA and the Regulations; identification of necessary documents and information, and the means and timing of obtaining such documents and information; identification of any legal issues, including any statute of limitations issues; and coordination with any related investigations by other government agencies or SROs.

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<sup>4</sup> *Cf. SEC v. O'Brien*, 467 U.S. 735, 750 (1984) (noting that "the imposition of a notice requirement on the SEC would substantially increase the ability of persons who have something to hide to impede legitimate investigations by the Commission," and citing the SEC's broad investigatory responsibility under the federal securities laws, finding no statutory, due process, or other standard regarding judicial enforcement of such subpoenas to support the proposition that notice is required).



### **5.3 Statute of Limitations and Tolling Agreements**

Title 28 U.S.C. § 2462 states that “[e]xcept as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon.” Some courts have held that the five-year statute of limitations in § 2462 applies to certain claims brought by the CFTC under the CEA and the Regulations. The statute of limitations is an affirmative defense that is waived if it is not raised in timely fashion, or may be waived by agreement.

If there is a potential statute of limitations issue, Division staff may ask the potential defendant or respondent to sign a “tolling agreement.” By signing a tolling agreement, the potential defendant or respondent agrees to the suspension of the running of any statute of limitations period for an agreed upon length of time. The use of a tolling agreement in a particular matter must be approved by the Director or a Deputy who also must sign the tolling agreement. Division staff should consult with OCC concerning any statute of limitations or tolling agreement issues that arise.

### **5.4 Obtaining Information – In General**

#### **5.4.1 Voluntary Statements and Productions**

Division staff may obtain documents or statements from any person or entity willing to provide them voluntarily. In preparing to take a statement from a witness, Division staff consider whether to take the statement as part of an interview or in the form of voluntary testimony recorded by an official reporter. The taking of non-subpoenaed voluntary testimony recorded by an official reporter is governed by Part 11 of the Regulations, 17 C.F.R. pt. 11. *See* Section 5.10 of the Manual (Investigative Testimony). Staff provide the Statement to Persons Providing Information about Themselves to the CFTC to any witness providing information about themselves. *See* Section 9.5 of the Manual (Statement to Persons).

#### **5.4.2 Use of Compulsory Process / Formal Order of Investigation**

The CFTC’s power to subpoena testimony and documents in connection with its investigatory proceeding derives from Section 6(c)(5) of the CEA, 7 U.S.C. § 9(5). That provision, in pertinent part, states:

[F]or the purpose of any investigation . . . under this Act, and for the purpose of any action taken under section 12(f), any member of the Commission . . . or other officer designated by the Commission . . . may administer oaths and affirmations, subpoena witnesses, compel their attendance, take evidence, and require the production of any books, papers, correspondence, memoranda, or other records that the Commission deems relevant or material to the inquiry.

*Id.* Pursuant to Section 6(c)(6) of the CEA, the Commission can require the attendance of subpoenaed witnesses or the production of subpoenaed records “from any place in the United

States, any State, or any foreign country or jurisdiction.” *Id.* § 9(6). The Division’s authority to issue subpoenas is pursuant to Regulation 11.4, 17 C.F.R. § 11.4.

#### **5.4.2.1 Request To Examine and/or for a Copy of the Formal Order**

Pursuant to Regulation 11.7(a), 17 C.F.R. § 11.7(a), any person upon whom a subpoena has been served compelling her or him to furnish documentary evidence or testimony in an investigation shall, upon her or his request, be permitted to examine a copy of the Commission’s order pursuant to which the subpoena has been issued. However, a copy of the order shall not be furnished for her or his retention except with the approval of the Director or other senior officers in the Division. Approval shall not be given unless it has been shown by the person seeking to retain a copy that her or his retention of a copy would be consistent both with the protection of the privacy of persons involved in the investigation and with the unimpeded conduct of the investigation. Such request should be made in writing.

#### **5.4.2.2 Subpoena Enforcement Action**

Whether seeking to compel testimony, the production of documents, or both, CFTC investigative subpoenas are not self-enforcing. Pursuant to delegated authority, the Director of the Division, with the concurrence of the General Counsel or her or his designee, may bring an action in an appropriate district court of the United States to enforce any subpoena issued as part of a Division investigation. *See* 7 U.S.C. § 9(8); 17 C.F.R. § 11.4(e). Such an action may be used to enforce subpoenas issued during an investigation and those issued to compel testimony or documents at an administrative hearing.

#### **5.4.2.3 Service of Subpoenas**

Service of Commission subpoenas issued for investigatory purposes is governed by Regulation 11.4(c), 17 C.F.R. § 11.4(c). If the subpoena names a natural person, service can be accomplished by:

- handing a copy of the subpoena to the person;
- leaving a copy at her or his office with the person in charge of the office or, if there is no one in charge, in a conspicuous place within the office;
- leaving a copy at her or his dwelling place or usual place of abode with a person of suitable age and discretion; or
- any other method that results in actual notice being given.

If the subpoena names a person other than a natural person (for example, a business entity), service can be accomplished by:

- handing a copy of the subpoena to a registered agent for service, or to any officer, director, or agent in charge of any office of the person subpoenaed;
- delivering a copy by registered or certified mail to any such representative at her or his last known address; or
- any other method whereby actual notice is given to the representative.

*See also* Regulation 15.05, 17 C.F.R. § 15.05 (allowing service upon the U.S. intermediary of foreign traders or brokers, and the customers of such brokers). If an individual or entity is represented by counsel, the lawyer may be authorized to accept service on behalf of the individual or entity.

Section 6(c)(6) of the CEA, 7 U.S.C. § 9(6), provides that the attendance of witnesses and production of records can be required from any place in the United States, any State, or any foreign country or jurisdiction at any designated place of hearing.

#### **5.4.2.4 Compelling Production of Documents in Foreign Jurisdictions**

A number of special considerations apply to the service of investigative subpoenas in foreign countries or jurisdictions. In general, there are two avenues open to Division staff who need to compel the production of documents by individuals or entities located abroad: through a Memorandum of Understanding or the procedure set out in Section 6(c) of the CEA, 7 U.S.C. § 9. Division staff should consult with OCC in connection with any request to compel the production of documents located abroad. *See* Section 8.2 of the Manual (International Cooperative Enforcement).

### **5.4.3 Required Records Under the CEA and the Regulations**

#### **5.4.3.1 Inspection Powers**

Registrants, registered entities, and reportable traders are required to make certain filings with and disclose certain information to the CFTC, and keep a variety of books, records, and other information on their commodity interest-related activities open to inspection by CFTC representatives. These filings, disclosures, books, and records are required to be readily available to the Division without compulsory process.

The Division typically obtains copies of these required documents by written request, pursuant to the applicable recordkeeping provisions of the CEA. Division staff can send a document request to entities (typically to a custodian of records) required to make records available describing the types of documents or information requested, as well as the time frame for production and the format of the records to be produced. *See* Section 5.4.4 of the Manual (Data Delivery Standards), Section 9.5 of the Manual (Statement to Persons). With approval, Staff also on occasion may inspect required records by visiting the premises where they are kept.

#### **5.4.3.2 Recordkeeping Obligations of Registrants, Registered Entities, and Reportable Traders**

The CFTC has statutory authority to inspect books and records that registrants, registered entities, and reportable traders are required to make and/or keep under the following provisions of the CEA and the Regulations:

- The general recordkeeping provision regarding all books and records required to be kept under the CEA and the Regulations is Regulation 1.31, 17 C.F.R. § 1.31.

- **Futures Commission Merchants, Retail Foreign Exchange Dealers, Introducing Brokers, Floor Brokers and Floor Traders.** The recordkeeping obligations are primarily found in Sections 4f and 4g of the CEA, 7 U.S.C. §§ 6f, 6g, as well as in a number of separate provisions in the Regulations, including in particular Regulations 1.35, 5.14, and 22.12, 17 C.F.R. §§ 1.35, 5.14, 22.12.
- **Commodity Trading Advisors and Commodity Pool Operators.** The recordkeeping obligations are primarily found in Section 4n of the CEA, 7 U.S.C. § 6n, and Regulations 4.23 and 4.33, 17 C.F.R. §§ 4.23, 4.33.
- **Designated Contract Markets.** The recordkeeping obligations are primarily found in Section 5(d)(18) of the CEA, 7 U.S.C. § 7(d)(18), and Regulation 38.950, 17 C.F.R. § 38.950.
- **Derivatives Clearing Organizations.** The recordkeeping obligations are primarily found in Section 5b(c)(2)(J) of the CEA, 7 U.S.C. § 7a-1(c)(2)(J), and Regulation 39.20, 17 C.F.R. § 39.20.
- **Swap Dealers and Major Swap Participants.** The recordkeeping obligations are primarily found in Section 4s of the CEA, 7 U.S.C. § 6s, and Regulation 23.201–.202, 17 C.F.R. §§ 23.201–.202.
- **Swap Execution Facilities.** The recordkeeping obligations are primarily found in Section 5h(f)(10) of the CEA, 7 U.S.C. § 7b-3(f)(10), and Regulation 37.1001, 17 C.F.R. § 37.1001.
- **Swap Data Repositories.** The recordkeeping obligations are primarily found in Section 21(c)(3) of the CEA, 7 U.S.C. § 24a(c)(3), and Regulation 49.12 and Part 45 of the Regulations (regarding swap data reporting), 17 C.F.R. § 49.12, pt. 45.
- **Traders Holding Reportable Futures Or Options Positions On Commission-Designated Contract Markets, or Reportable Swaps Positions.** The recordkeeping requirements are primarily found in Sections 4i and 4s of the CEA, 7 U.S.C. §§ 6i, 6s, and Regulations 18.05 and 20.6, 17 C.F.R. §§ 18.05, 20.6.

#### 5.4.4 Data Delivery Standards

The Commission has developed Data Delivery Standards, which are available on the CFTC website at <https://www.cftc.gov/sites/default/files/2019-05/enfdatadeliverystandards.pdf>, and which identify the required format for production of electronic records, including those for:

- Native File Production
  - Emails
  - Account Statements
  - Instant Messages (IMs)
  - Audio Files

- Video Files
- Transcripts
- Imaged Collections
  - Images
  - Concordance Image® Cross-Reference File
  - Data File
  - Text
  - Linked Native Files
- Productions of Adobe PDF Files
- Productions of Website Content
- Productions of Forensic Images of Computer Media
- Productions of Forensically Acquired Mobile Device Data
- FTP (File Transfer Protocol) Submission

Moreover, Regulation 1.31(a), 17 C.F.R. § 1.31(a), provides that a request to a records entity for electronic regulatory records should specify a reasonable form and medium in which the records entity must produce such regulatory records. The Data Delivery Standards are periodically revised; Division staff provide a copy of the standards to persons requested to provide electronic data, and parties producing such data should consult with staff as necessary when making a production.

## **5.5 Statutory Protections and Privileges**

In connection with any request for document production, the Division complies with relevant law, including the Privacy Act of 1974 (“Privacy Act”), the Right to Financial Privacy Act of 1978 (“RFPA”), and the Electronic Communications Privacy Act of 1986 (“ECPA”), when applicable. For a comprehensive discussion of statutory protections and legal privileges available in CFTC investigations, *see* Section 11 of the Manual (Privileges and Confidentiality).

## **5.6 Bank Secrecy Information and Handling**

BSA information often contains sensitive data or Personally Identifiable Information (“PII”), and thus is sensitive and must be safeguarded. In addition, SARs are protected by the BSA and related regulations that prohibit improper disclosure. The Division’s BSA Review Team addresses staff questions concerning BSA issues that may arise.

## **5.7 Witness Interviews**

Witness interviews are an important tool for developing relevant evidence in investigations.

- Division staff may take written notes of the interview. With the witness’s consent, staff also may make an audio recording of the interview.
- In connection with any witness interviews or testimony, staff must comply with the Privacy Act. *See* Section 9.5 of the Manual (Statement to Persons).
- A witness may seek information about the investigation. Because CFTC investigations are non-public and confidential, staff may refer a witness to publicly available information, but cannot offer any non-public information developed in the investigation.
- A witness may request immunity for her or his testimony. *See* Section 10.1.2.4 of Manual (Immunity).
- Division staff do not give legal advice. If asked, staff will state that they are prohibited from giving legal advice and that the individual may wish to consult with a private attorney. Division staff may also refer a witness asserting losses resulting from violations of the CEA or the Regulations by a registrant to the CFTC’s Reparations Program. *See* Section 10.5 of the Manual (Reparations Program).

## **5.8 Customer Surveys**

As part of an investigation, or even during litigation, staff may seek to conduct written customer surveys to gather additional information regarding possible violations of the CEA or the Regulations. The Paperwork Reduction Act of 1980 (“PRA”), 44 U.S.C. §§ 3502–3507, and implementing regulations issued by the Office of Management and Budget (“OMB”), 5 C.F.R. §§ 1320.3–.5, require surveys “obtaining or soliciting of information by an agency from ten or more persons by means of identical questions” to be submitted to and approved by OMB prior to their use. However, collections of information made during a civil action to which a government agency is a party or during an administrative action or investigation involving an agency against specific individuals or entities are specifically exempted from the PRA. 44 U.S.C. § 3518(c)(1)(B). To comply with the PRA exception, before a survey of ten or more customers can be conducted without submission to OMB, there must be a documented open investigation, or a pending litigation.

Before survey forms are distributed, staff must obtain signed approval to conduct the survey from the Deputy supervising the investigation or litigation. All survey forms must be accompanied by a cover letter also signed by the supervising Deputy. Staff also must provide the Statement to Persons Providing Information about Themselves to the CFTC to requested customers. *See* Section 9.5 of the Manual (Statement to Persons). All customer responses become part of the Division’s investigation or litigation files.

## **5.9 Sworn Investigative Testimony**

### **5.9.1 General Provisions Regarding Investigative Testimony**

Part 11 of the Regulations, 17 C.F.R. pt. 11, governs the taking of sworn investigative testimony. Those regulations address matters such as the rights of witnesses, access to transcripts, oaths and false statements, and the possible sequestration of witnesses or counsel.

Regarding the right to counsel in particular, Regulation 11.7(c)(1), 17 C.F.R. § 11.7(c)(1), provides as follows:

*(c) Right to counsel.* A person compelled to appear, or who appears in person by request or permission of the Commission or its staff during an investigation, may be accompanied, represented, and advised by counsel. Subject to the provisions of §11.8(b) of this part, he may be represented by any attorney-at-law who is admitted to practice before the highest court in any State or territory or the District of Columbia, who has not been suspended or disbarred from appearance and practice before the Commission in accordance with the provisions of part 14 of this title, and who has not been excluded from further participation in the particular investigatory proceeding for good cause established in accordance with paragraph (c)(2) of this section.

(1) The right to be accompanied, represented and advised by counsel shall mean the right of a person testifying to have an attorney present with him during any aspect of an investigative proceeding and to have this attorney advise his client before, during and after the conclusion of such examination. At the conclusion of the examination, counsel may request the person presiding to permit the witness to clarify any of his answers that may need clarification in order that his answers not be left equivocal or incomplete on the record. For his use in protecting the interests of his client with respect to that examination counsel may make summary notes during the examination.

Any person making false statements under oath during the course of a Commission investigation is subject to the criminal penalties for perjury in 18 U.S.C. § 1621. Any person who knowingly and willfully makes false or fraudulent statements, whether under oath or otherwise, or who falsifies, conceals or covers up a material fact, or submits any false writing or document, knowing it to contain false, fictitious or fraudulent information, is subject to the criminal penalties set forth in 18 U.S.C. § 1001. In addition, Section 6(c)(2) of the CEA, 7 U.S.C. § 9(2), states:

It shall be unlawful for any person to make any false or misleading statement of a material fact to the Commission, including in any registration application or any report filed with the Commission under this chapter, or any other information relating to a swap, or a contract of sale of a commodity, in interstate commerce, or for future delivery on or subject to the rules of any registered entity, or to omit to state in any such statement any material fact that is necessary to make any

statement of a material fact made not misleading in any material respect, if the person knew, or reasonably should have known, the statement to be false or misleading.

Accordingly, any person making false or misleading statements of material fact to the Division during investigative testimony violates the CEA, and may be subject to enforcement action and imposition of civil penalties and other relief.

Before any substantive questioning, the witness should be provided the appropriate “Statement to Persons Providing Information about Themselves to the CFTC” with the applicable perjury, false statements, and Privacy Act warnings, along with provisions addressing a witness’s right to counsel and other matters relating to her or his testimony. *See* Section 9.5 of the Manual (Statement to Persons).

### **5.9.2 Background Questionnaires**

Division staff may use a background questionnaire in advance of testimony in order to expedite the taking of testimony. The questionnaire solicits certain personal information from the witness, including, among other things, the witness’s date and place of birth, the names and account numbers for all commodity interest and other financial accounts, a list of all educational institutions attended and degrees received, and an employment history. The information solicited in the background questionnaire is routinely otherwise asked for in testimony.

The witness is not required as a matter of law to comply with the staff’s request to complete the background questionnaire. Disclosure of the information is voluntary on the witness’s part. There are no sanctions and thus no effects for failing to provide all or any part of the requested information. However, this information may then be asked for in testimony. If the witness chooses to provide a background questionnaire, Division may examine the witness about the document and have it entered as an exhibit to investigative testimony.

### **5.9.3 Witness Assertions of the Right Against Self-Incrimination and Other Refusals To Provide Testimony**

If a witness is appearing voluntarily, the staff cannot compel the witness to answer any questions. A witness appearing to testify pursuant to a subpoena is compelled to testify, but may refuse to answer questions by invoking her or his right against self-incrimination. Regulation 11.7(d)(1), 17 C.F.R. § 11.7(d)(1), provides as follows:

Except as provided in paragraph (d)(2) of this section [regarding immunity], a witness testifying or otherwise giving information in an investigation may refuse to answer questions on the basis of the right against self-incrimination granted by the Fifth Amendment of the Constitution of the United States.

*See* Section 9.1.3 of the Manual (The Fifth Amendment Privilege Against Self-Incrimination). Other grounds for refusal to answer questions may include asserting various evidentiary or testimonial privileges. *See* Section 9.1 of the Manual (Preservation and Assertion of Privileges).



However, if an assertion of the right against self-incrimination or other privileges is not valid, a witness may be subject to subpoena enforcement proceedings in federal court to obtain the information. *See* Section 5.4.2.2 of the Manual (Subpoena Enforcement Action). Division staff ordinarily require the person taking the Fifth Amendment to do so on the record in response to specific questions.

#### **5.9.4 Going “Off the Record”**

Division staff taking investigative testimony control the record. The purpose of taking testimony is to make a record of what the witness says. Thus, as a general rule, Division staff keep discussions with the witness or counsel on the record. If a witness desires to go off the record, the witness must indicate this to Division staff taking the testimony, who will then determine whether to grant the witness’s request.

If Division staff agree to go “off-the-record,” staff typically summarize any substantive “off-the-record” conversations when the record is reopened. If no such discussions occurred, the fact that no substantive discussions concerning the matter occurred is made on the record.

#### **5.9.5 Transcript Availability**

Regulation 11.7(b), 17 C.F.R. § 11.7(b), provides that a witness is entitled to retain or procure (upon payment of the appropriate fees) a copy or transcript of her or his own testimony, unless the Commission has “good cause” to limit the request, in which case the witness may only inspect the official transcript of her or his testimony. The decision to grant or deny a witness a copy of the transcript of her or his investigative testimony shall be made by the staff attorney conducting the investigation in consultation with, and with the approval of, her or his immediate supervisor and Deputy.

#### **5.10 Litigation Holds and Preservation Demands**

At certain times, Division may need to ensure preservation of records for litigation with respect to records held within the CFTC and records held by third parties.

A “litigation hold” is a directive to witnesses and document custodians at the CFTC to preserve documents (including electronically stored information (“ESI”)) and any other information relevant to litigation or potential litigation. Failure to preserve relevant documents and information can result in court sanctions in litigation. Division staff issue litigation holds to anyone at the CFTC who possesses, at that time, relevant records and information, and also to any individuals who later become involved in the matter.

A preservation letter may be delivered to third parties that may have relevant documents or information during the preliminary inquiry or investigation phase of an enforcement matter, as well as in litigation. Division staff may make follow-up inquiries on those demands, seeking assurances that they are being complied with along with explanations of the steps being taken to ensure such compliance.

## **5.11 Informal Procedure Relating to the Recommendation of Enforcement Proceedings**

### **5.11.1 Notice of Proposed Enforcement Action (“Wells Notices”)**

Appendix A to Part 11 of the Regulations, 17 C.F.R. pt. 11 app. A, gives the Division authority to inform persons who may be named in a proposed enforcement action of the nature of the allegations against them before the action is filed. This process is often referred to as a “Wells Notice,” because it was patterned after a similar notification process having that name at the SEC. Appendix A does not make this disclosure mandatory, and the Division has the discretion whether and to whom to issue a Wells Notice. The Director of the Division must approve issuance of a Wells Notice in any particular matter.

To determine whether, when, and to whom to issue a Wells Notice, staff consider all of the relevant facts and circumstances, including, but not limited to:

- whether the investigation is substantially complete as to the recipient of the Wells Notice;
- whether immediate enforcement action is necessary;
- whether providing a Wells Notice may alert potential defendants to a possible asset freeze or otherwise put at risk funds that the recommendation is intended to protect;
- whether there is a parallel criminal investigation that may be adversely affected by providing a Wells Notice; and
- whether a Wells Submission would be useful to the Division and Commission in evaluating complicated factual, legal or policy issues.

Although the particulars of the Wells Notice will vary based on the facts and circumstances of each case, in general the Wells Notice will inform the potential respondent or defendant, or her or his counsel, of the nature of the allegations pertaining to them.

### **5.11.2 Wells Submissions and Other Submissions (“White Papers”)**

Appendix A to Part 11 also sets forth a procedure that allows persons who have been provided a Wells Notice by the Division to submit a written statement, setting forth their views on any factual, legal, or policy matters relevant to the particular investigation or proposed enforcement action. Similarly, persons who become involved in an investigation may submit written statements on their own initiative, which are often referred to as White Papers. Regardless of whether they are submitting a Wells Submission or a White Paper, potential respondents or defendants must follow the applicable procedures described in Appendix A and summarized below.

If a potential respondent or defendant chooses to file a written statement, the statement must:

- be submitted to the Division within fourteen days after the potential respondent or defendant or her or his counsel has been informed of the nature of the allegations against them;
- be double spaced on 8.5 x 11 inch paper and not exceed twenty pages;
- be addressed to the Director of the Division with copies to the staff conducting the investigation;
- clearly identify the investigation to which the statement pertains;
- include affidavits or other sworn affirmations as to each statement of fact by a person with personal knowledge of that fact; and
- contain a specific request that the statement be forwarded to the Commission if the potential respondent or defendant, or her or his counsel, wants the Commission to review and consider the submission.

Any statement that does not comply with the requirements set forth in Appendix A may be rejected and not otherwise considered or forwarded to the Commission by the Division. If a request is made to forward a statement to the Commission, the Division will do so only at such time as the Division recommends the commencement of an enforcement action against a potential respondent or defendant, along with the Division's response.

A statement as described in this subsection is not required, but, if one is made, may be used as an admission, or in any other permissible manner in an administrative or judicial proceeding by the Division, as well as by another governmental agency, self-regulatory organization, or private party who may obtain the submission under the Freedom of Information Act.

### **5.11.3 Wells Timing and Settlement Discussions**

The fourteen-day period within which to make a submission will continue to apply in instances where the potential respondent or defendant, or her or his counsel is discussing with Division staff possible settlement, or expresses a desire to begin such discussions. In such cases, staff should inform the person that the fourteen-day period will not be tolled due to ongoing settlement discussions. However, extensions of the fourteen-day period may be approved in instances where settlement discussions are in progress and the staff participating in the discussions believes that the extension will facilitate those discussions.<sup>5</sup>

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<sup>5</sup> The procedure does not preclude the Division from conducting settlement discussions with a person who may be the subject of a proposed enforcement action before notifying that person of the opportunity to file a submission, especially in those instances where the person or her or his counsel previously has indicated a desire to discuss possible settlement.

#### **5.11.4 Post-Wells Process**

Recipients of Wells Notices may request meetings with Division staff to discuss the substance of staff's proposed recommendation to the Commission. It is at the discretion of the Division whether to hold such a meeting. Assigned staff should consult with their Deputy if a request is made. A Wells Notice recipient generally will not be accorded more than one post-Wells Notice meeting. The staff may engage in appropriate settlement discussions with the recipient of the Wells Notice. *See* Section 6.5 of the Manual (Settlement).

With consultation and approval of the supervising Deputy and depending upon the facts and circumstances of the matter, Division staff may continue to investigate after providing Wells Notice to an individual or entity and after receiving any Wells Submission or White Paper.

#### **5.12 Closing Investigations**

Closing an enforcement matter, including an investigation, triggers other CFTC operations and duties, including recordkeeping and record destruction mechanisms, and sanction reporting and collection efforts. *See* Section 10.3 of the Manual (Closing an Enforcement Matter). For these reasons, how and when Division staff closes a matter carry significant consequences and staff must use the appropriate documentation procedures in a timely fashion.

Generally, factors that should be considered in deciding whether to close an investigation include:

- the seriousness and scope of the conduct and potential violations;
- the sufficiency and strength of the evidence;
- the extent of potential harm if an action is not commenced;
- the applicable statute of limitations; and
- whether there are any prior enforcement actions by the CFTC or other governmental agency or SRO or criminal prosecutions of the individual or entity;

##### **5.12.1 Closing Letters**

The Division may send a Closing Letter to notify individuals and entities as early as practicable when staff has decided to close an investigation as it relates to them and thus not to recommend an enforcement action against them to the Commission. The staff may send closing letters to certain individuals or entities before the entire investigation is closed and before a determination has been made as to every potential defendant or respondent. Closing Letters may be sent regardless of whether the investigation was conducted pursuant to a Formal Order. Whether to send a Closing Letter will depend on the particular facts and circumstances of each case; in general, the Division will consider sending a Closing Letter to anyone who:

- is identified in the caption of a formal order;

- submitted or was solicited to submit a Wells Submission;
- asks for such notice (assuming staff has decided no enforcement recommendation will be recommended against that person or entity); or
- to the staff's knowledge, reasonably believes that the staff was considering recommending an enforcement action against them.

The Deputy supervising the matter must approve the Closing Letter, as well as any decision not to send a Closing Letter to individuals or entities that fall into any of these categories. It is the Division's determination and within its discretion whether to issue Closing Letters in any particular matter.

A Division Closing Letter will state that the Division is closing the investigation as to that individual or entity; however, it will also make clear that the Division retains the discretion to reopen the investigation at any time in the future, and that an enforcement action could result from any reopened investigation. A Closing Letter will also note that receipt of the Closing Letter does not imply that the conduct at issue was lawful or otherwise in compliance with the Act and Regulations.

## **6. Litigation**

### **6.1 Litigation in General**

The CFTC may bring enforcement actions either in federal court or as administrative proceedings. Section 6c of the CEA, 7 U.S.C. § 13a-1, authorizes the CFTC to bring actions in federal court for violations of the CEA, the Regulations, or Commission orders. Sections 6(c), 6(d), and 8a of the CEA, 7 U.S.C. §§ 9, 13b, 12a, authorize various administrative proceedings.

### **6.2 Types of Actions Authorized Under the CEA**

Under the CEA and the Regulations, the Commission must authorize all enforcement actions. *See* Section 3.6 of the Manual (Commission Authorization). The CEA grants the CFTC the power to bring enforcement actions in federal court and before Administrative Law Judges ("ALJs") or other appointed Presiding Officers. The kinds of relief available in federal court and in the various administrative proceedings differ to some extent, and accordingly, Division recommendations to the Commission for enforcement actions must specify which forum is recommended and the nature of relief that will be sought.

## **6.2.1 Civil Injunctive Actions in Federal Court**

Section 6c of the CEA, 7 U.S.C. § 13a-1, authorizes the CFTC to bring actions in federal court for violations of the CEA, the Regulations, or Commission orders. The relief available in federal court generally includes the remedies expressly authorized under the CEA as well as those available under a federal court's general equitable powers. The relief available in federal court actions includes, but is not limited to:

- preliminary and permanent injunctions barring future violations of the CEA and the Regulations and enforcing compliance with the CEA and the Regulations;
- an ex parte restraining order;
- imposition of civil monetary penalties;
- appointment of a receiver to administer a defendant's estate;
- disgorgement of ill-gotten gains;
- restitution;
- rescission of all contracts entered into by a defendant related to the enforcement action;
- an accounting of the defendant's estate;
- pre-judgment or post-judgment interest on any monetary sanctions as appropriate;
- an award to the CFTC of its fees and costs;
- imposition of commodity trading, solicitation, and registration bans;
- remediation, including the imposition of a monitor to oversee remedial efforts; and
- such other and further relief as the court may deem necessary and appropriate under the circumstances.

## **6.2.2 Administrative Enforcement Proceedings**

Complaints initiating an administrative enforcement action pursuant to Sections 6(c) and 6(d) of the CEA, 7 U.S.C. §§ 9, 13b, are conducted under the CFTC's Rules of Practice contained in Part 10 of the Regulations, 17 C.F.R. pt. 10. The relief available in administrative actions includes, but is not limited to:

- an order directing a respondent to cease and desist from violating the CEA or the Regulations;
- imposition of civil monetary penalties;

- restitution;
- pre- and post-judgment interest;
- prohibition from trading on, or subject to the rules of, any contract market and requiring all contract markets to refuse such person all trading privileges thereon for a specified period of time;
- suspension (for a period not to exceed six months), revocation, or restriction of a respondent's registration with the CFTC; and
- an order directing a respondent to comply with undertakings regarding, for example, commodity trading, solicitation, and registration bans; the disgorgement of any ill-gotten gains; or remediation, including the imposition of a monitor to oversee remedial efforts.

### **6.2.3 Statutory Disqualification Proceedings Against Registrants**

Statutory disqualification proceedings against registrants can be brought pursuant to Section 8a of the CEA, 7 U.S.C. § 12a, and Subpart C of Part 3 of the Regulations, 17 C.F.R. §§ 3.50–.64. The remedies available in statutory disqualification proceedings are limited to the denial, conditioning, suspension, restriction, or revocation of registration. The CFTC has delegated to NFA the authority to take adverse registration actions against all categories of CFTC registrants and applicants, and thus, in addition to CFTC authority, NFA may also bring such actions.

### **6.2.4 Administrative Disbarment Proceedings Against Attorneys or Accountants**

Under certain circumstances, the CFTC can suspend or disbar a person from appearing and/or practicing before the Commission as an attorney or accountant. Part 14 of the Regulations, 17 C.F.R. pt. 14, sets forth the rules governing when such a suspension or disbarment may be appropriate and the procedures to be followed in a suspension or disbarment action. Examples of circumstances supporting an action for suspension or debarment include, but are not limited to:

- the finding by the Commission or a court of competent jurisdiction that the person violated, caused, or aided and abetted any violation of the CEA or the Regulations;
- a criminal conviction of that person;
- disbarment or suspension of the person by the appropriate professional licensing authority; and
- the finding by the Commission, by a preponderance of the evidence, that the person lacks the requisite qualifications to represent others, lacks character or integrity, or has engaged in unprofessional conduct that was unethical or improper.

### **6.2.5 Seeking Preliminary Relief in Federal Court**

In appropriate circumstances where there is good cause for concern about the possible dissipation of customer funds and/or destruction of relevant records, the Division may seek ex

parte relief in federal court pursuant to Section 6c of the CEA, 7 U.S.C. § 13a-1, and in accordance with Rule 65 of the Federal Rules of Civil Procedure. Under Section 6c of the CEA, the CFTC may seek an ex parte restraining order: (1) prohibiting any person from destroying, altering or disposing of, or refusing to permit authorized representatives of the CFTC to inspect, when and as requested, any books and records or other documents; (2) prohibiting any person from withdrawing, transferring, removing, dissipating, or disposing of any funds, assets, or other property; and (3) appointing a temporary receiver to administer such restraining order. *Id.*

The Division may request additional temporary relief, such as orders for an accounting and repatriation of assets held overseas, when seeking a restraining order on notice or a preliminary injunction.

#### **6.2.5.1 Issues Related to Foreign-Held Assets**

When staff suspects that a defendant in a civil enforcement action is maintaining assets abroad, a provision should be added to the proposed restraining order or preliminary injunction that freezes property under the court's control wherever the property is located. A federal district court with personal jurisdiction over a party has the authority to freeze all assets under that party's control, even if held in a foreign country. In some jurisdictions, the foreign regulator has the power to freeze assets on behalf of a counterpart regulator (such as the CFTC) under certain circumstances. *See also* Section of the Manual 8.2.1.1 (Assistance from Foreign Authorities).

### **6.3 Ongoing Investigation During Related Litigation**

Division Staff may continue to investigate and issue investigative subpoenas pursuant to a Commission order of investigation while simultaneously litigating a related civil enforcement action if there is an independent, good-faith basis for the continued or related investigation. An independent, good-faith basis may include the possible involvement of additional persons or entities in the violations alleged in the complaint or related thereto, or additional potential violations by one or more of the defendants in the litigation. However, staff may not use such subpoenas solely to conduct discovery for pending litigation.

### **6.4 Discovery in Enforcement Actions**

In federal court enforcement cases, the Federal Rules of Civil Procedure set out the general rules for discovery and specific procedures for production of relevant factual information to parties in litigation. In CFTC administrative enforcement cases, Part 10 of the Regulations, 17 C.F.R. pt. 10, entitled the "Rules of Practice," sets out the provisions regarding disclosure of information to respondents.

### **6.5 Settlement**

#### **6.5.1 Settling an Administrative Enforcement Proceeding or Amending a Commission Order Accepting an Offer of Settlement**

Administrative enforcement proceedings can only be settled by order of the Commission. *See* Section 3.6 of the Manual (Commission Authorization). Further, Commission settlement orders can only be amended by further order of the Commission. *Id.* The Division recommends the



settlement of an administrative complaint, or the amendment of a settlement, by circulating a memorandum setting forth the reasons for the recommendation as well as a recommended order, and attaching the respondent's offer of settlement. *Id.*

### **6.5.2 Settling a Civil Injunctive Action or Amending a Consent Order Previously Approved by the Commission**

Commission authorization is required to settle a civil injunctive case in federal district court, or to amend a Consent Order previously authorized by the Commission. *See* Section 3.6 of the Manual (Commission Authorization). Similar to an administrative enforcement proceeding, a memorandum ordinarily must be sent to the Commission. *Id.*

### **6.5.3 Settlement Conferences in Federal Court**

During a civil injunctive proceeding, a district court may schedule a settlement conference and require attendance by parties possessing ultimate decision-making authority with respect to settlement. Because the Commission itself is the ultimate decision maker with respect to settlement offers in these proceedings, the Division must apprise the Court of the CFTC's structure, rules, and procedures in connection with settlements to determine how to proceed.

In particular, staff should notify the Court that, although the CFTC prosecutes actions through the Division, the Division does not possess independent settlement authority. Rather, the Division presents executed offers of settlement to the Commission with specific recommendations that any such offer be accepted or declined, and in the case of federal litigation, to grant the Division authority to enter into the proposed settlement. Counsel should then request that the Division be allowed to work within this administrative framework, and be allowed to participate in the settlement conference with a Division attorney possessing authority to negotiate the terms of a settlement, which the Division will affirmatively recommend the Commission accept. The Director, or her or his designee, must approve proposed settlement terms. Similar considerations apply in the case of court-ordered mediation.

### **6.5.4 Settlement Terms and Considerations**

#### **6.5.4.1 Settlement Terms – General**

For purposes of discussing proposed settlement terms for recommendation to the Commission, the Division may consider any of the monetary and remedial relief available in civil injunctive actions and administrative proceedings, respectively. *See* Section 6.2.1 of the Manual (Civil Injunctive Actions in Federal Court), Section 6.2.2 of the Manual (Administrative Enforcement Proceedings), Section 6.8.1 of the Manual (Civil Monetary Penalty Guidance).

#### **6.5.4.2 Financial Analysis of Ability To Pay**

Settlements of proposed or pending enforcement actions may include restitution, disgorgement, and a civil monetary penalty, in addition to an injunction (or cease-and-desist order) and ancillary relief. If a respondent or defendant claims either a partial or total inability to pay, Division staff will confirm this information, and ascertain the maximum amount that can be paid

at the time of settlement, as well as over time using various sources of information. The following materials could be used to assess a respondent or defendant's claim of inability to pay:

- credit reports (authorized by the respondent/defendant);
- a completed Division Financial Disclosure Statement, which requires a respondent/defendant to provide substantial personal information and financial history, including an extensive detailing of assets and liabilities, and income and expenses;
- attachments to a completed Division Financial Disclosure Statement, including specific document requests to support claims made in the Financial Disclosure Statement, such as bank statements, brokerage statements, etc.;
- a copy or transcript of taxes filed with the IRS; and
- database searches, including, e.g., of real property, vehicle ownership, corporate interests, UCC searches, stock ownership (10% ownership), bankruptcies, liens, and judgments.

The Division will not recommend a proposed settlement to the Commission where a respondent or defendant is claiming an inability to pay the monetary sanctions unless the respondent or defendant has provided a completed Financial Disclosure Statement with attachments, or, with the approval of the Director, the Division has obtained other comparable, detailed, and verifiable information supporting the claims of inability to pay.

#### **6.5.4.3 Equal Access to Justice Act Considerations**

The Equal Access to Justice Act ("EAJA"), 5 U.S.C. § 504 and 28 U.S.C. § 2412, allows a court to award legal fees and expenses to a prevailing party if the court finds that the position of an agency was not "substantially justified" or if the demand for relief is "unreasonable." The CFTC typically requires a respondent or defendant settling with the CFTC to waive any and all claims under EAJA. The CFTC's rules for EAJA claims arising out of administrative enforcement cases can be found at Part 148 of the Regulations. 17 C.F.R. pt. 148.

#### **6.5.4.4 Small Business Regulatory Enforcement Fairness Act Considerations**

The Small Business Regulatory Enforcement Fairness Act ("SBREFA"), Pub. L. No. 104-121, tit. II, §§ 201–253, 110 Stat. 847, 857–74 (codified as amended at 28 U.S.C. § 2412 and in scattered sections of 5 U.S.C. and 15 U.S.C.), is an amendment to the Regulatory Flexibility Act of 1980, which requires that each agency regulating the activities of small entities establish a policy or program to reduce and, when appropriate, to waive civil penalties for violations of statutory or regulatory requirements by small entities. SBREFA § 223, 110 Stat. at 862. The CFTC established such a program through its CFTC Policy Statement Relating to the Commission's Authority to Impose Civil Monetary Penalties and Futures Self-Regulatory Organization's Authority to Impose Sanctions Guidelines; Penalty Guidelines, [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,265 (Nov. 1, 1994) ("Penalty Guidelines"). Division attorneys perform a SBREFA analysis any time they are making a recommendation to

impose a civil penalty as part of a proposed settlement. The CFTC typically requires a respondent or defendant settling with the CFTC to waive any and all claims under SBREFA.

## **6.6 Appeals of Orders**

Appeals in CFTC enforcement actions are handled differently depending on whether they arise in administrative proceedings or federal court litigation.

### **6.6.1 Appeals in Administrative Proceedings**

OCC represents the Division in initiating or responding to appeals from initial decisions in administrative enforcement proceedings. In administrative proceedings, appeals are taken to the Commission. After the Commission issues its decision, the respondent may appeal to the United States Court of Appeals for the circuit in which he or she is doing business. 7 U.S.C. § 9. Appeals to a Court of Appeals are handled by OGC.

### **6.6.2 Appeals in Federal Court Litigation**

OGC represents the CFTC in initiating and responding to appeals taken from all United States District Court decisions. Affirmative appeals of a ruling adverse to the CFTC require Commission approval. After an appealable order or judgment is entered in a civil injunctive action, the responsible Division staff and OCC coordinate with OGC regarding, in the case of an affirmative appeal, whether to recommend that the Commission authorize appeal of an adverse ruling, and in the case of a defendant's appeal, how to respond.

## **6.7 Receivers**

In appropriate circumstances, a court-appointed receiver can maximize restitution for injured customers. A receiver can do this through a number of avenues, including by seizing control of and managing a business, marshaling assets held in domestic and foreign financial institutions and other third parties, liquidating receivership assets through auctions or other sales, initiating actions against third parties, negotiating with third parties and creditors to limit the depletion of assets, taking responsibility for filings required under state and federal tax law, and providing the court with an independent perspective on the receivership defendant's operation, receipts, and expenditures. The CFTC typically recommends the appointment of receivers in cases where the defendants have engaged in fraud or are otherwise not competent to manage assets. However, a receiver may not be appropriate in every case, and the decision whether to seek appointment of a receiver requires careful analysis of the specific facts and circumstances present. Division staff typically nominate one or more potential receivers, with ultimate selection and appointment made by the Court. Division staff are also responsible for monitoring the activities and effectiveness of a receiver.

### **6.7.1 Monitoring Receivers and Their Fee Petitions**

#### **6.7.1.1 In General**

Division staff should monitor receivers to encourage them to perform their duties in a diligent and cost-effective manner. To that end, Division staff should maintain regular contact with the

receiver to, among other things, ensure that the receiver is focused on the case and diligently pursuing assets, and promptly provide the receiver with new information that will assist the receiver in discharging her or his duties (such as discovery responses regarding a defendant's assets).

The proposed order appointing the receiver typically will require the receiver to file periodic reports and keep written records itemizing receipts and expenditures of the receivership estate. These accounts should be open to inspection by the CFTC.

#### **6.7.1.2 Fee Petitions**

The district court appointing a receiver has discretion over who will pay the costs of the receiver. Typically, however, receiver fees and expenses are paid out of funds controlled by the receiver and any compensation plan proposed to the court should provide this.

To help ensure that fees are reasonable and thus do not deplete the pool of frozen assets, Division staff should address compensation in the proposed order appointing the receiver. The order should create a billing procedure that requires court approval of all fees and costs, permits the receiver to be compensated only for those services that benefit the estate, and requires the receiver to provide detailed monthly billing statements to the court and the CFTC.

Division staff should review the receiver's fee applications and raise concerns regarding fee petitions directly with the receiver, and staff should explore ways to reduce fees and expenses before the petition is filed with the court.

### **6.8 Civil Monetary Penalties**

The Division may obtain civil monetary penalties among other forms of relief, in both administrative and district court proceedings. Other remedies and monetary relief available in Commission enforcement proceedings include restitution and disgorgement, statutory disqualification from registration, bans on certain forms of trading, bans on registration with the Commission, as well as other appropriate undertakings and equitable remedies. Division staff make recommendations to the Commission about appropriate remedies and monetary relief to impose or seek in particular matters.

#### **6.8.1 Civil Monetary Penalty Guidance**

Civil monetary penalties are imposed in enforcement proceedings to further the CEA's remedial purposes. The CEA authorizes civil monetary penalties for each violation of the CEA and Regulations, and it sets the maximum penalty per violation. *See* Sections 6(c)(10), 6b, and 6c(d) of the CEA, 7 U.S.C. §§ 9(10), 13a, 13a-1(d).<sup>6</sup> Generally, penalties may be determined on a per violation basis or up to triple the monetary gain to the Respondent,<sup>7</sup> whichever is greater. The

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<sup>6</sup> *See also* <https://www.cftc.gov/LawRegulation/Enforcement/InflationAdjustedCivilMonetaryPenalties/index.htm>.

<sup>7</sup> The Commission brings charges against "respondents" in administrative enforcement actions before the Commission and against "defendants" in civil enforcement actions in U.S. District Courts. For purposes of Section 6.8.1 of the Manual (Civil Monetary Penalty Guidance), "Respondent" is used as a generic descriptor for a person charged.

CEA and Commission precedent require that penalties be assessed in relation to the gravity of the violation. *See, e.g.*, Sections 6(e)(1), 6b of the CEA, 7 U.S.C. §§ 9a(1), 13a.

In 1994, the Commission published guidelines listing factors that influence its assessments of civil monetary penalties (“Commission Guidelines”). *See* CFTC Policy Statement Relating to the Commission’s Authority To Impose Civil Money Penalties, [1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,265 (Nov. 1, 1994). The Commission Guidelines remain in place today. In formulating recommendations for the Commission, Division staff are guided by the statute, the Commission Guidelines, and relevant case law, among other things, and considers how those precedents and authorities apply to the facts and circumstances of each case. The factors set forth below are informed by and consistent with these authorities.

The list of factors below provides a framework through which Division staff will evaluate the appropriate penalty to recommend to the Commission. Specifically, in recommending civil monetary penalties to the Commission, Division staff will take into account, as enumerated below, the gravity of the violation, any mitigating and aggravating circumstances, and other considerations. Each of these factors may be more or less relevant to the facts and circumstances of a particular matter and the type of violation at issue. In applying the factors identified below, staff will be guided by the overarching consideration of ensuring the proposed penalty achieves the dual goals of specific and general deterrence.

**Gravity of the Violation:** By the express terms of the CEA, and as set forth in the Commission Guidelines and precedent, the gravity of the violation is the primary consideration in determining the appropriate civil monetary penalty. Division staff will consider the following factors in evaluating the gravity of the violation. Staff should understand, however, that no factor listed below is dispositive, and a case may present additional factors not listed that Division staff will deem applicable to this inquiry. Nevertheless, the following considerations are illustrative of the analysis in most cases:

- Nature and scope of the violations, including:
  - the number, duration, type and degree of the violations;
  - the Respondent’s role in the violations;
  - whether the Respondent acted in concert with others;
  - any efforts to conceal the ongoing violations; and
  - whether the violations resulted in harm to victims and, if so, the number and type of victims;
- The Respondent’s state of mind, including whether the conduct was intentional or willful; and
- Nature and scope of any consequences flowing from the violations, including any:
  - harm (or risk of harm) to victims and market participants;

- benefit or potential benefit to the Respondent; and
- impact on market integrity, customer protection, or the mission and priorities of the Commission in implementing the purposes of the CEA.

**Mitigating and Aggravating Circumstances:** The Commission has typically considered mitigating and aggravating circumstances when determining the appropriate civil monetary penalty. In making its recommendations to the Commission, Division staff will continue to consider all relevant mitigating and aggravating circumstances, including the following:

- Post-violation conduct, including:
  - mitigating conduct, such as attempts to cure, return of victim funds, or efforts to improve a compliance program; and
  - aggravating conduct, such as concealment or obstruction of an ongoing investigation;
- Whether the Respondent self-reported the misconduct, as well as the extent of cooperation and remediation, as detailed in the Division’s Enforcement Advisories;
- Timeliness of remediation;
- Existence and effectiveness of the company’s pre-existing compliance program;<sup>8</sup>
- Prior misconduct, such as whether the Respondent is a recidivist;
- Pervasiveness of misconduct within the company, including responsibility of management; and
- Nature of any disciplinary action taken by the company with respect to the individuals engaged in misconduct.

**Other Considerations:** Division staff will also evaluate other considerations, including but not limited to the following:

- The total mix of remedies and monetary relief to be imposed on the Respondent in the recommended Commission enforcement action, in addition to the remedies and relief to be imposed in parallel cases involving criminal authorities (including incarceration), other regulatory entities, or self-regulatory organizations;
- Monetary and non-monetary relief in analogous cases; and
- Conservation of Commission resources, including timely settlement.

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<sup>8</sup> A “company” as used in Section 6.8.1 of the Manual (Civil Monetary Penalty Guidance) means any type of business entity except for a sole proprietorship.

## **6.8.2 Collection of Civil Monetary Penalties**

As an initial matter, Division staff may, as a matter of course, obtain information regarding a defendant's assets throughout the life cycle of an enforcement matter, and should take steps as appropriate to identify any additional assets in order to satisfy potential civil monetary sanctions.

Part 143 of the Regulations, 17 C.F.R. pt. 143, provides procedures for the collection of debts owed to the United States arising from activities under the CFTC's jurisdiction. Administrative oversight for the collection of debts is delegated to the CFTC's Financial Management Branch ("FMB"). 17 C.F.R. § 143.7. If FMB's efforts to collect are not successful, the Regulations provide that FMB may refer debts to Treasury or DOJ for collection. 17 C.F.R. §§ 143.2(c), 143.6.

The CFTC itself also may invoke post-judgment discovery and other proceedings to identify and execute against assets of respondents or defendants. Because monetary sanctions are imposed by order of the Commission or a court, they may be subject to enforcement through contempt proceedings as well as through ordinary debt collection procedures.

## **7. Consideration of Self-Reporting, Cooperation, and Remediation**

The Division encourages self-reporting, cooperation, and remediation by individuals and companies in furtherance of its investigations and related enforcement actions. The Division has issued a series of advisories and updates setting out the various factors the Division considers in evaluating self-reporting, cooperation, and remediation. The Division also has developed various tools to facilitate cooperation.

Self-reporting, full and proactive cooperation, and appropriate remediation will be considered by the Division in determining whether to recommend that an enforcement action be brought and, if so, what charges and sanctions to impose. At the outset of a matter, Division staff should explain the Division's Self-Reporting, Cooperation, and Remediation program to allow the individuals or companies involved to determine what level of cooperation they want to provide, if any.

### **7.1 Cooperation Advisories**

#### **7.1.1 Cooperation Factors in Enforcement Division Sanction Recommendations for Companies and Individuals**

The Enforcement Advisory regarding Cooperation Factors in Enforcement Division Sanction Recommendations for Companies is found at:

<https://www.cftc.gov/sites/default/files/idc/groups/public/@lrenforcementactions/documents/legalpleading/enf advisorycompanies011917.pdf>.

The Enforcement Advisory regarding Cooperation Factors in Enforcement Division Sanction Recommendations for Individuals is found at:

<https://www.cftc.gov/sites/default/files/idc/groups/public/@lrenforcementactions/documents/legalpleading/enf advisoryindividuals011917.pdf>.

These Advisories state that the Division considers three broad policy issues in its assessment of whether cooperation was provided and the quality of that cooperation: (1) the value of the cooperation to the Division's investigation and related enforcement actions; (2) the value of the cooperation to the Commission's broader law enforcement interests; and (3) the balancing of the level of culpability and history of prior misconduct with the acceptance of responsibility, mitigation, and remediation. The rewards for cooperation can range from the Division recommending no enforcement action to recommending reduced charges or sanctions in connection with enforcement actions.

### **7.1.2 Advisory on Self-Reporting and Full Cooperation**

The Enforcement Advisory regarding on Self-Reporting and Full Cooperation<sup>9</sup> is found at: <https://www.cftc.gov/sites/default/files/idc/groups/public/@lrenforcementactions/documents/legalpleading/enfadvisoryselfreporting0917.pdf>.

This Advisory supplements the above Advisories by providing additional information regarding voluntary disclosures and the substantial credit companies and individuals can expect from the Division if they timely and voluntarily disclose misconduct, fully cooperate with the Division's investigation, and appropriately remediate.

In sum, if a company or individual self-reports, fully cooperates, and remediates, the Division will recommend that the Commission consider a substantial reduction from the otherwise applicable civil monetary penalty. Consistent with the above Advisories, the Division may recommend a reduced civil monetary penalty even where a company or individual did not self-report wrongdoing but otherwise fully cooperated with the Division's investigation and remediated deficiencies in its compliance or control programs. The Division will reserve its recommendations for the most substantial reductions in civil monetary penalty for those instances where a company or individual has self-reported the misconduct *and* fully cooperated with the Division's investigation and remediated.

### **7.1.3 Advisory on Self Reporting and Cooperation for CEA Violations Involving Foreign Corrupt Practices**

The Enforcement Advisory on Self Reporting and Cooperation for CEA Violations Involving Foreign Corrupt Practices<sup>10</sup> is found at: <https://www.cftc.gov/sites/default/files/2019-03/enfadvisoryselfreporting030619.pdf>.

This Advisory applies to companies and individuals not registered (or required to be registered) with the CFTC that timely and voluntarily disclose to the Division violations of the CEA involving foreign corrupt practices, where the voluntary disclosure is followed by full cooperation and appropriate remediation, in accordance with the above Advisories. In those circumstances, the Division will apply a presumption that it will recommend to the Commission

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<sup>9</sup> See James M. McDonald, *Speech Regarding Perspectives on Enforcement: Self-Reporting and Cooperation at the CFTC* (Sept. 25, 2017), <https://www.cftc.gov/PressRoom/SpeechesTestimony/opamcdonald092517>

<sup>10</sup> See James M. McDonald, *Remarks* (Mar. 6, 2019), <https://www.cftc.gov/PressRoom/SpeechesTestimony/opamcdonald2>.



a resolution with no civil monetary penalty, absent aggravating circumstances involving the nature of the offender or the seriousness of the offense. In its evaluation of any aggravating circumstances, the Division will consider, among other things, whether: executive or senior level management of the company was involved; the misconduct was pervasive within the company; or the company or individual has previously engaged in similar misconduct. The presumption of the recommendation of no civil monetary penalty will not be applied to registrants; however, the Division will nonetheless recommend a substantial reduction in the civil monetary penalty where the registrant timely and voluntarily self-reports, provides full cooperation, and undertakes appropriate remediation. *See also* Section 6.8.1 of the Manual (Civil Monetary Penalty Guidance).

## **7.2 Cooperation Tools**

The Division has various means for facilitating and recognizing self-reporting, cooperation, and remediation. Certain tools are described below. Division staff carefully consider the facts and circumstances of each matter to determine what approach is the most appropriate. At times, more than one tool may be utilized in a matter.

Director approval is required for use of any these tools. As described below, use of certain cooperation tools requires Commission approval. Division staff should prepare a memorandum setting out the nature of the case; the cooperation that has resulted, or will likely result, in substantial assistance; and the reasons why the particular case is appropriate to utilize the proposed approach. Staff should consult with OCC when using any of these tools.

### **7.2.1 Division Cooperation Agreement**

A cooperation agreement is a written agreement between the Division and a potential cooperating individual who is prepared to provide substantial assistance to the CFTC's investigation and related enforcement actions. Specifically, in a cooperation agreement, the Division agrees to recommend to the Commission that the individual receive credit for cooperating in its investigation and related enforcement actions and, under certain limited circumstances, to make specific enforcement recommendations if, among other things:

- the Division concludes that the individual has provided or is likely to provide substantial assistance to the CFTC;
- the individual agrees to cooperate truthfully and fully in the CFTC's investigation and related enforcement actions and waive the applicable statute of limitations, including entering into tolling agreements if necessary; and
- the individual satisfies all of her or his obligations under the agreement.

If the agreement is violated, Division staff may recommend an enforcement action to the Commission against the individual without any limitation.

The Director or senior managers designated by the Director execute such cooperation agreements on behalf of the Division.

### **7.2.2 Deferred Prosecution Agreement**

A deferred prosecution agreement (“DPA”) is a written agreement between the Commission, acting through the Division, and a potential cooperating individual or company, in which the Division typically agrees to forego recommending an enforcement action against the individual or company if the individual or company agrees to, among other things:

- cooperate truthfully and fully in the CFTC’s investigation and related enforcement actions;
- enter into a long-term tolling agreement;
- comply with express prohibitions and/or undertakings during a period of deferred prosecution; and
- agree either to admit or not to contest underlying facts that the CFTC could assert to establish a violation of the CEA.

If the agreement is violated during the period of deferred prosecution, typically not to exceed five years, Division staff may recommend an enforcement action to the Commission against the individual or company without limitation for the original misconduct as well as any additional misconduct. Furthermore, if the Commission authorizes the enforcement action, staff may use any factual admissions made by the cooperating individual or company to file a motion for summary judgment, while maintaining the ability to bring an enforcement action for any additional misconduct at a later date.

Commission authorization is required to enter a DPA, and this authorization grants authority to the Director to execute the DPA on behalf of the Commission.

### **7.2.3 Non-Prosecution Agreement**

A non-prosecution agreement (“NPA”) is a written agreement between the Commission, acting through the Division, and a potential cooperating individual or company, entered in appropriate, but generally very limited, circumstances, typically providing that the Division will not recommend an enforcement action against the individual or entity if the individual or company agrees to, among other things:

- cooperate truthfully and fully in the CFTC’s investigation and related enforcement actions; and
- comply, under certain circumstances, with express undertakings.

If the agreement is violated, Division staff may recommend an enforcement action to the Commission against the individual or company without limitation.

Commission authorization is required to enter an NPA, and this authorization grants the Director authority to execute the NPA on behalf of the Commission.

## **7.3 Additional Provisions Regarding Cooperation**

### **7.3.1 Immunity**

Witnesses may occasionally ask Division staff for an immunity agreement, either from criminal or civil liability. Most frequently, a witness seeks a limited grant of immunity with respect to the testimony or information conveyed during a “proffer session” in the form of a written proffer agreement, sometimes referred to as a “queen-for-a-day” agreement. *See* Section 8.1.2.4 of the Manual (Immunity).

### **7.3.2 Acknowledgement of Cooperation in an Administrative Consent Order**

Cooperation by individuals and entities who are settling enforcement actions with the Commission may be acknowledged in administrative consent orders. For higher levels of cooperation, the acknowledgement may specifically state that the cooperation has resulted in a partial or significant reduction of the civil monetary penalty being imposed. *See also* Section 6.8.1 of the Manual (Civil Monetary Penalty Guidance).

## **8. Cooperative Enforcement**

Working cooperatively and in parallel with criminal authorities and other federal, state, or international regulators is a cornerstone to the Enforcement Program. The Division cooperates in various ways, including through a robust referral process, information sharing, providing technical assistance and subject matter training, and at times, working on parallel investigations.

### **8.1 Domestic Cooperative Enforcement**

#### **8.1.1 Referring Matters to Other Government Agencies**

Section 6c(f) of the CEA, 7 U.S.C. § 13a-1(f), authorizes the CFTC to refer matters to the Department of Justice for potential criminal prosecution. As a matter of policy and consistent with these statutory provisions, the Division refers matters for criminal prosecution. These include willful violations of the CEA and the Regulations, as well as false statements to the CFTC, perjury, and obstruction of justice.

In addition, Sections 8(a)(2) and 12(a) of the CEA, 7 U.S.C. §§ 12(a)(2), 16(a), authorize the CFTC to cooperate with other federal, state, and local agencies and foreign agencies in conducting its investigations, including by referring appropriate matters to those agencies.

The Director determines whether, when, where, and to whom a referral is made. In making this determination, the Director considers the recommendations of the Division staff assigned to the matter and the Division’s Office of Cooperative Enforcement. Such recommendations should be made in writing to the Director, the Principal Deputy Director, and Special Counsel to the Director. Written referral letters are signed by the Director or her or his designee. The Director may make a referral at any stage in the life of a matter: lead, preliminary inquiry, investigation, litigation, or post-litigation.

## **8.1.2 Sharing Information**

### **8.1.2.1 Access to the Investigative Files of Other Government Agencies, Registered Futures Associations, and Self-Regulatory Organizations**

Division staff may find useful information about persons under investigation for possible violations of the CEA or the Regulations in the investigative files of criminal authorities; governmental agencies at the federal, state, and local level; as well as registered futures associations (e.g., the NFA) and SROs (e.g., DCMs, DCOs, or SEFs). The CFTC has signed MOUs or similar cooperative enforcement arrangements with certain government agencies, such as FERC and the Federal Trade Commission, which also address the sharing of confidential information. Thus, in conducting investigations, Division staff considers requesting access to the investigative files of criminal authorities and other agencies and entities that may have information relating to the same persons, entities, or activities.

In the ordinary course, requests for access to such investigative files should be made in writing and addressed to an appropriate official in the other agency. A written request for access to another agency's files may be signed by a Deputy on behalf of the Director. To the extent the other agency places use restrictions on the disclosure or use of such information, Division staff should consult with the other agency on any such restrictions and raise any issues or questions with OCC.

### **8.1.2.2 Access to the Investigative Files of the CFTC by Other Government Agencies, Registered Entities, Registered Futures Associations, and SROs**

Section 8 of the CEA, 7 U.S.C. § 12, generally prohibits the CFTC from disclosing information obtained in connection with its investigations. Federal or state agencies, foreign authorities, and designated officials of certain authorized industry organizations may request access to the Division's investigative files. Section 8(e) of the CEA, 7 U.S.C. § 12(e), permits the sharing of confidential information with any department or agency of the federal government or a State or any political subdivision thereof or any foreign government or any political subdivision thereof, and Section 8a(6), 7 U.S.C. § 12a(6), permits such sharing with registered entities, NFA, or an SRO. Authorized entities seeking access must obtain permission from the Director of the Division, in accordance with Section 8(e) of the CEA, 7 U.S.C. § 12(e), and Regulation 140.73, 17 C.F.R. § 140.73, for domestic and foreign authorities, or Section 8a(6) of the CEA, 7 U.S.C. § 12a(6), and Regulation 140.72, 17 C.F.R. § 140.72, for registered entities, the NFA, or an SRO. Access requests are considered separate and distinct from subpoenaed documents, testimony, or other demands of a court, which are addressed in Part 144 of the Regulations, 17 C.F.R. pt. 144.

Division referrals to an authorized entity usually include an invitation to the authorized entity to seek access to the Division's non-public investigative files.

In sharing information, Division staff may take into consideration many factors, including the following:

- if the CFTC seeks to preserve a privilege with respect to the information, Division staff consider whether sharing it would constitute a waiver, *see* Section 9.1 of the Manual (Preservation and Assertion of Privileges);
- the Division may be restricted from sharing some information that is subject to an arrangement with a foreign authority;
- Sections 8(e) and 8a(6) of the CEA, 7 U.S.C. §§ 12(e), 12a(6), prohibit authorized entities from disclosing non-public information, including information relating to business transactions or market positions of any person or trade secrets or names of customers, except in an action or proceeding in which the federal, state, or authorized industry entity is a party, *see* Section 9.4 of the Manual (Confidentiality);
- the RFPA may require Division staff to give customer notice regarding sharing of financial records, *see* Section 9.4.3 of the Manual (RFPA);
- the safeguarding of confidential information and documents containing personally identifiable information, *see* Section 9.4 of the Manual (Confidentiality); and
- the Division's sharing of whistleblower information, in certain circumstances, could reasonably be expected to reveal the identity of the whistleblower, *see* 7 U.S.C. § 26(h)(2)(C); 17 C.F.R. § 165.4.

### **8.1.2.3 Parallel Proceedings**

The Division often has investigations and litigation in parallel with criminal investigations and proceedings. Division staff work cooperatively and in parallel with criminal agencies when appropriate. When the Division conducts an investigation or enforcement action in parallel with a criminal investigation or proceeding, or when there is potential for such parallel action, Division staff consider the unique considerations raised by such parallel activity. At all points, it is necessary that the civil investigation has its own independent civil investigative purpose and not be initiated to obtain evidence for a criminal prosecution. Division staff should consult with their supervisors at the outset of any parallel proceeding.

#### **8.1.2.3.1 Testimony of CFTC Employees in Other Proceedings**

Division staff, often investigators or economists, may be asked to provide testimony in proceedings to which the CFTC is not a party. This typically involves proceedings by other governmental agencies or criminal authorities. Provision of such testimony requires Commission authorization. *See* 17 C.F.R. § 144.3.

#### **8.1.2.4 Immunity**

At times, witnesses in Division enforcement matters may become concerned about their own exposure, either criminally or civilly, and ask Division staff for an immunity agreement.

In most circumstances where the Division staff considers that a witness may have useful information, Division staff may seek approval from the Director or a delegate to offer a limited grant of immunity with respect to the testimony or information conveyed during the proffer session in the form of a written proffer agreement. These agreements offer only limited immunity because they are limited in duration to the proffer session, and because the grant of immunity contains exceptions under which the Division may use the information provided.

In some instances, however, witnesses may want full immunity from criminal prosecution. The CFTC lacks the independent authority to provide immunity from criminal prosecution. But, pursuant to Regulation 11.7(d), 17 C.F.R. § 11.7(d), the CFTC may ask the Attorney General to approve issuance of a Commission order requiring a witness to provide the testimony or other information which he or she previously refused to give on the basis of self-incrimination. Such testimony or information may not be used against the witness in any criminal case, except for a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order. *Id.*

## **8.2 International Cooperative Enforcement**

International issues can arise at any point during a Division matter. Division staff should identify potential issues and consult with OCC before making contact with individuals or entities in any foreign jurisdiction.

### **8.2.1 Obtaining Information from Foreign Sources**

When conducting a matter, Division staff may discover that relevant information, documents, or witnesses are located in foreign jurisdictions. Many foreign jurisdictions consider unauthorized contact by foreign authorities with residents within their jurisdiction to be an extra-territorial act requiring authorization by or involvement of an authority in the home jurisdiction.

Attempts (whether by telephone, e-mail, letter in person, or any other means) by Division staff to contact an individual or entity found in a foreign jurisdiction are made through OCC. Many of the documents (bank records, trading records, etc.) and much of the testimony typically available domestically may be obtained from foreign authorities through the appropriate channels.

#### **8.2.1.1 Assistance from Foreign Authorities**

In those jurisdictions with which the CFTC has signed a Memorandum of Understanding (“MoU”) or similar cooperative enforcement arrangement, OCC can transmit a request for assistance, in accordance with the applicable laws and particular procedures set forth in the MoU. In foreign jurisdictions without a signed MoU or other arrangement, each request will be evaluated on a case-by-case basis.

The most commonly used enforcement MoUs are the Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information (“MMoU”) developed by the International Organization of Securities Commissions, and the subsequently executed Enhanced MMoU (“EMMoU”).

### **8.2.2 Issuing and Serving an Investigative or Administrative Subpoena on Persons Located Outside of the United States**

If, during an investigation or in an administrative action, Division staff desire to obtain information from a person found in a foreign jurisdiction via subpoena—rather than through an MoU or other cooperative assistance arrangement—and where there either is no U.S. counsel or that counsel refuses to accept service, Division staff follow the procedure set out in Section 6(c) of the CEA, 7 U.S.C. § 9. Under this Section, with the prior approval of the Commission, such a subpoena “may be served . . . in such manner as the Federal Rules of Civil Procedure prescribe for service of process in a foreign country.” *See id.* § 9(5). Commission approval is needed in investigative and administrative actions to issue and serve a subpoena on “any person who is not found within the territorial jurisdiction of any court of the United States.” OCC assists Division staff in preparing the memorandum and serving any such subpoena approved by the Commission. *See* Section 5.4.2.4 of the Manual (Compelling Production of Documents in Foreign Jurisdictions).

### **8.2.3 Obtaining Local Counsel in Foreign Jurisdictions**

Division staff consults with OCC for advice on obtaining local counsel abroad. Almost always, a written agreement is prepared, which specifies in detail the duties to be assumed by local counsel and the compensation to be paid. Any such agreement requires Director approval.

### **8.2.4 Providing Assistance to Foreign Authorities**

At times the Division receives requests from foreign authorities for the CFTC to provide assistance in foreign enforcement matters, which it is authorized to provide under the CEA. *See* 7 U.S.C. §§ 12(e), 16(a), (f).

The Division is authorized to grant access to non-public information already contained in its files. *Id.* § 12(e). Where access is granted, but before information or assistance is provided, the Division receives assurances from the requesting authority regarding the use and confidentiality of the files and information.

The CFTC also has authority to use its investigation powers on behalf of foreign futures authorities. Accordingly, pursuant to Section 12(f) of the CEA, 7 U.S.C. § 16(f), and Regulations 11.1 and 11.2, 17 C.F.R. §§ 11.1, 11.2, the Division may conduct an investigation, including using its compulsory powers, on behalf of an appropriate foreign authority. In determining whether to provide this assistance, the Commission considers, among other things, whether: (1) the requesting authority has agreed to provide reciprocal assistance in futures matters to the Division, and (2) compliance with the request would prejudice the public interest of the United States. 7 U.S.C. § 16(f)(2).

OCC is responsible for handling such requests. If such requests are related to Division investigations or litigations, OCC works with the responsible Division staff to gather responsive information, such as taking testimony of a witness. If the request is unrelated to a Division investigation or litigation, OCC may gather the responsive information, including issuing subpoenas and taking testimony, as necessary.

## **9. Privileges and Confidentiality**

### **9.1 Preservation and Assertion of Privileges**

Over time, many privileges that protect material from discovery have been established. Most privileges, e.g., the attorney-client privilege, the clergy-communicant privilege, and the marital privilege, are available to all parties. But some privileges belong solely to the government, and may be asserted by the CFTC in addition to the other available privileges.

#### **9.1.1 Attorney-Client Privilege**

The attorney-client privilege is intended to ensure that confidences shared by a client with an attorney during the course of seeking legal advice are protected from disclosure. The purpose of the privilege is to foster open and honest communication between attorney and client. The privilege is not limited to communications made in the context of a litigation or dispute, but extends to all circumstances where an attorney's counsel is sought on a legal matter. The scope of the privilege includes communications from an attorney to her or his client within this framework.

Information that typically does not involve a confidential communication and therefore is not privileged includes:

- the identity of the client;
- the existence of the attorney-client relationship;
- the general reason why the attorney was retained;
- the fee arrangement between attorney and client; and
- any billing statements, unless they include narrative descriptions that satisfy the elements of a privilege.

##### **9.1.1.1 Corporate Clients**

The attorney-client privilege can be asserted by a corporation to protect communications between corporate employees and in-house or outside counsel. Courts have held that to assert the attorney-client privilege, a corporation must show that the communication came from a person who was employed with the corporation at the time of the communication, the employee was seeking legal advice from an attorney, and the communication was made within the scope of the employee's duties.

##### **9.1.1.2 Multiple Representations**

A witness in a Division investigation or enforcement action may be represented by counsel who represents other persons involved in the Division's investigation. This multiple representation, however, presents a potential conflict of interest if one client's interests are or may be adverse to another's. The choice of counsel, and the responsibility for that choice, is the witness's. Note,



however, that the Regulations provide that “[w]hen a reasonable basis exists to believe that an investigation may be obstructed or impeded, directly or indirectly, by an attorney’s representation of more than one witness during the course of an investigation, . . . [the] attorney [may be prohibited from attending] the testimony of any witness other than the witness in whose behalf [the attorney] first appeared in the investigatory proceeding.”<sup>11</sup> 17 C.F.R. § 11.8(b).

### **9.1.1.3 Advice-of-Counsel Defense**

An individual or entity being investigated by the Division may wish to assert an advice-of-counsel defense. To validly assert the defense, the party asserting it must provide evidence sufficient to substantiate the defense, which could include privileged information. To assert a valid advice-of-counsel defense, courts have held that the party must establish that she or he: (1) made complete disclosure to counsel; (2) requested counsel’s advice as to the legality of the contemplated action; (3) received advice that it was legal; and (4) relied in good faith on that advice.

### **9.1.1.4 Crime-Fraud Exception**

Communications otherwise protected by the attorney-client privilege may nevertheless be subject to disclosure where those communications were in furtherance of a crime or fraud. Most courts require the party seeking to invoke the crime-fraud exception to make a prima facie showing that the client was engaged in a criminal or fraudulent act when the client sought the advice of counsel, and that the communications in question were in furtherance of, or closely related to, the crime or fraud.

## **9.1.2 Attorney Work-Product Doctrine**

An individual or entity may believe that information is protected from disclosure on the basis of the attorney work-product doctrine. The work-product doctrine provides that material collected by counsel in anticipation of litigation is protected from disclosure. For material to be prepared in “anticipation of litigation,” the prospect of litigation must be identifiable, although litigation need not have already commenced. The work-product protection is not absolute, however, and disclosure may be compelled where the opposing party can show substantial need for the material, and where it cannot without undue hardship otherwise obtain the material (e.g., where the material is otherwise unavailable and relevant to the matter). “Opinion” work product (e.g., related to an attorney’s mental impressions, conclusions, opinions, or legal theories) is generally subject to a heightened standard for disclosure.

## **9.1.3 The Fifth Amendment Privilege Against Self-Incrimination**

A witness testifying before the CFTC may assert her or his Fifth Amendment privilege against self-incrimination. The Fifth Amendment privilege may not be asserted where immunity has been granted. *See* Section 8.1.2.4 of the Manual (Immunity). In order to assert the privilege, staff ordinarily will require a witness to appear in person, and will not allow a blanket assertion

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<sup>11</sup> “To the extent practicable, consistent with the integrity of the investigation, the attorney will be advised of the reasons for his having been sequestered.” 17 C.F.R. § 11.8(b).

of privilege. An adverse inference may be drawn in a civil or administrative proceeding from such a refusal to testify.

In addition to testimony, the act of producing documents in response to a subpoena may also be covered by the privilege if, by producing the document, the holder performs an act that has testimonial aspects and an incriminating effect. However, under the required records doctrine, the Fifth Amendment privilege against self-incrimination does not apply to records required to be kept by an individual under government regulation, such as records required to be kept under the CEA and the Regulations.

A corporation or other collective entity generally may not assert the Fifth Amendment privilege.

#### **9.1.4 Governmental Privileges that May Be Asserted by the CFTC**

In general, the governmental privileges most relevant<sup>12</sup> to the CFTC are:

- the deliberative process privilege;
- the investigatory files or law enforcement privilege;
- the information given to the government on a pledge of confidentiality privilege;
- the informant privilege; and
- the confidential report privilege.

These governmental privileges, in essence, provide that certain confidential information in the government's possession is protected from disclosure, in litigation and elsewhere. In practice, the two governmental privileges most often asserted by the Commission are the deliberative process privilege and the investigatory files privilege.

## **9.2 Inadvertent Production of Privileged or Non-Responsive Documents**

Under Rule 502(b) of the Federal Rules of Evidence, a disclosure to a federal agency of information covered by the attorney-client privilege or work-product protection does not operate as a waiver in a federal (or state) proceeding if:

- the disclosure is inadvertent;
- the holder of the privilege or protection took reasonable steps to prevent disclosure; and
- the holder promptly took reasonable steps to rectify the error.

If a person who has produced documents, whether in an investigation or in a proceeding, believes he or she has inadvertently disclosed information protected by the attorney-client

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<sup>12</sup> Other governmental privileges, not typically asserted by the CFTC, are the presidential communications privilege, the bank examination privilege, and the state secret privilege.

privilege or the work-product protection, it should notify Division staff. If a potentially inadvertent production is discovered by staff, staff should notify the party through her or his counsel of the CFTC's receipt of potentially inadvertently produced documents.

### **9.3 Waiver of Privilege**

The Division respects legitimate assertions of the attorney-client privilege and work-product protection, and does not expect persons from whom information is sought to waive such privilege or protection (whether to obtain cooperation credit or otherwise). The Division's objective in investigations and proceedings is to obtain relevant information, and persons from whom information is sought may be required to produce all relevant, non-privileged information and documents. Pure factual material, even those facts that may have been conveyed to an attorney or contained within an attorney's work-product, are not privileged, and the Division does require disclosure of facts. Staff should not ask a party to waive the attorney-client privilege or work-product protection without prior approval of the Director or the supervising Deputy.

In general, the attorney-client privilege or work-product protection may be waived either expressly or by implication. Waiver is implied where testimony concerning privileged or protected communications or documents has been offered, or where the communications or documents have been disclosed to a third party. As noted above, waiver may also be required where an advice-of-counsel defense has been asserted, or where some other exception applies. Finally, the privilege or protection may be waived as to communications or documents belonging to an entity where a receiver has been appointed to manage that entity.

#### **9.3.1 Privilege Non-Waiver Agreements**

From time to time, a party may wish to voluntarily disclose privileged or protected communications or documents to the CFTC, but may wish to argue that such disclosure does not constitute a waiver as to other parties or as to other communications or documents (not disclosed) concerning the same subject matter. The Division will consider entering into a privilege non-waiver agreement in such circumstances, in which the Division agrees that it will not argue that such disclosure constitutes a waiver of the attorney-client privilege or the work-product protection as to any third party, or that the disclosure effects a subject matter waiver as against the CFTC. The Division also agrees to maintain the confidentiality of the materials, except to the extent that it determines that disclosure is required by law or that disclosure would be in furtherance of the CFTC's discharge of its duties and responsibilities. Notably, some courts have held that production of documents to agencies like the CFTC, even pursuant to an agreement that purports not to waive applicable privileges or protections, nevertheless does constitute a waiver.

### **9.4 Confidentiality**

The Commission is generally required by statute and regulation to maintain the confidentiality of non-public information and documents it obtains in the course of its investigations. *See* 7 U.S.C. § 12(a); 17 C.F.R. § 11.3. Such information and documents may only be disclosed where the Commission directs or authorizes the public disclosure of the investigation (e.g., by authorizing

the filing of a complaint in federal court), where the information and documents are made a matter of public record during the course of an adjudicatory proceeding, or where disclosure is required by the Freedom of Information Act, 5 U.S.C. § 552, the Regulations thereunder, 17 C.F.R. pt. 145, other statute or regulation, or court order. Certain other statutes provide additional confidentiality protections, as described below.

#### **9.4.1 The Privacy Act of 1974**

The Privacy Act, 5 U.S.C. § 552a, establishes requirements for the solicitation and maintenance by agencies of personal information regarding members of the public.

When obtaining information from the public, the Privacy Act generally requires Division staff to provide notice with respect to the authority for the solicitation and whether disclosure is voluntary or mandatory; the principal purposes for seeking the information; the effect of refusing to provide the information; and the “routine uses” of the information. *See* Section 9.5 of the Manual (Statement to Persons). The statute generally prohibits any disclosure of personal information unless the disclosure is within one of the statute’s exemptions (including the exemption for “routine uses”).

The CFTC publishes such notice on its website, <https://www.cftc.gov/Transparency/PrivacyOffice/SORN/index.htm>, and in the Federal Register, including notice specific to the Division’s investigatory files (System of Records CFTC-10: Investigatory Records). *See* Notice; Publication of the Systems of Records Managed by the Commodity Futures Trading Commission, 76 Fed. Reg. 5974, 5982–83 (Feb. 2, 2011); *see generally* Section 10.2.2 of the Manual (The Division’s Recordkeeping Systems). The notice includes a listing of the CFTC’s routine uses of personal information, including for the routine operations of the CFTC. *See* 76 Fed. Reg. at 5975–76. This includes use in administrative or court proceedings, sharing with other regulators (including foreign regulators) or criminal authorities, and use during an investigation. *Id.*

#### **9.4.2 The Freedom of Information Act**

The Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, provides that any person has a right of access to federal records, and that this right is enforceable by the courts if an agency fails to comply and the requester has exhausted all administrative appeals. However, access is limited, in whole or in part, if records are protected from disclosure by various exemptions. For example, the investigatory records described in Section 9.4.1 of the Manual above are covered by one or more of the exemptions. A FOIA request generally can be made by “any person,” a broad term that encompasses individuals (including foreign citizens), partnerships, corporations, associations, and foreign or domestic governments; requests may also be made through an attorney or other representative on behalf of any person.

FOIA requests can be made for any reason. However, the request must be made in accordance with the respective agency’s published procedural regulations, which, for the CFTC, are found at Part 145 of the Regulations, 17 C.F.R. pt. 145. Specific instructions for making FOIA requests are located online at <https://www.cftc.gov/FOI/foiarequests.html>. FOIA requests are processed

by the CFTC’s FOIA Compliance Office, which sits within OGC. Division staff may assist OGC in evaluating and responding to FOIA requests.

### **9.4.3 The Right to Financial Privacy Act of 1978**

The Right to Financial Privacy Act (“RFPA”), 12 U.S.C. §§ 3401–3422, is intended to protect the customers of financial institutions<sup>13</sup> from “unwarranted intrusions into their records while at the same time permitting legitimate law enforcement activity.” To achieve these goals, the RFPA grants customers of financial institutions a right to notice of most government requests to a financial institution for their financial records, and affords them an opportunity to challenge such requests. Jurisdiction for actions under the RFPA is in the United States District Courts.

The RFPA generally prohibits a “government authority,” which includes the CFTC, from gaining access to or obtaining copies of the financial records of customers,<sup>14</sup> or the information contained therein, from a financial institution unless the financial records are reasonably described and the agency obtains the records in accordance with procedures authorized by the RFPA.

Under the RFPA, the Commission may lawfully obtain financial information by:

- judicial subpoena (12 U.S.C. § 3407);
- administrative subpoena (12 U.S.C. § 3405); and
- voluntary, written customer authorization (in the form specifically described in 12 U.S.C. § 3404). Any joint account holder can authorize the financial institution to release the records of a joint account by executing a voluntary, written customer authorization.

The RFPA also provides for a delay in service of the customer notice for ninety days (which can be renewed for additional ninety-day periods), upon a showing that notice would result in:

- endangering a person’s life or physical safety;
- flight from prosecution;
- destruction or tampering with evidence;
- intimidation of potential witnesses; or

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<sup>13</sup> “Financial institution” is defined, in relevant part, as a bank, credit union, or consumer finance institution. 12 U.S.C. § 3401(1). Accordingly, it does not include payment processors (such as PayPal or Square), regulated entities such as futures commission merchants or introducing brokers, or a commodities dealer whose consumer financing is incidental to its business.

<sup>14</sup> “Customers” include individuals and partnerships of five or less individuals. It does not include corporations or larger partnerships. As a result, Commission requests to a regional Federal Reserve Bank for wire transfer information are typically not covered by the RFPA because those entities mostly carry accounts for depository institutions and do not maintain accounts for individuals.

- otherwise seriously jeopardizing an investigation or official proceeding or unduly delaying a trial or ongoing official proceeding.

12 U.S.C. § 3409.

The RFPA also imposes certain restrictions on the ability of the CFTC to share materials obtained from a financial institution to another federal agency. *See* Section 8.1.2.2 of the Manual (Access to the Investigative Files of the CFTC by Other Government Agencies, Registered Entities, Registered Futures Associations, and SROs). The RFPA generally requires that the Division provide notice to customers of financial institutions before transferring a customer’s financial records to another federal agency, but contains exceptions for sharing with the Department of Justice regarding potential criminal violations, 12 U.S.C. § 3412(f), and sharing with certain federal financial regulators, *id.* § 3412(e).

#### **9.4.4 The Electronic Communications Privacy Act of 1986**

The Electronic Communications Privacy Act of 1986 (“ECPA”), 18 U.S.C. §§ 2510–2711, provides protection against unauthorized government interception of electronic communications. An electronic communication is “any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photo electronic or photo optical system that affects interstate or foreign commerce.” 18 U.S.C. § 2510(12). Common examples of electronic communications are transfers of email or other electronic data or images over the Internet.

The ECPA consists of three federal statutes: the Stored Communications Act (“SCA”), the Wiretap Act, and the Pen Register statute. The SCA regulates government access to stored communications and does not apply to messages that are still in transmission. The Wiretap Act regulates efforts to collect evidence by intercepting the contents of communications (including internet communications) in real time. The Pen Register Act regulates the collection of evidence by obtaining non-content information in real time.

The SCA is the statute most often relevant to CFTC investigations. The SCA was intended to protect electronic communications in the hands of communications service providers and remote computing services. The SCA does not, however:

- protect communications in the hands of a user, subscriber or customer<sup>15</sup> of the service provider (including a sender or a receiver of an email);
- protect communications maintained for a corporation’s own purposes in its own computers or local area network; or

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<sup>15</sup> The ECPA defines “user” as any person or entity that “uses an electronic communications service” with the authorization of the service provider. 18 U.S.C. § 2510(13). The ECPA does not, however, define the terms “subscriber” or “customer.” For convenience, subscribers and customers of service providers will hereafter be referred to collectively as “subscribers.”

- affect a CFTC registrant’s obligations to make certain books and records available to CFTC staff upon request, even if they are stored on a computerized system and maintained by a third-party service provider.

However, when a government regulatory agency without criminal powers, such as the CFTC, seeks information directly from a service provider, the SCA generally:

- *prohibits* obtaining the contents<sup>16</sup> of electronic communications and postings to electronic bulletin boards from electronic communications services and remote computing services without a warrant (which generally is not available to the CFTC);
- permits obtaining the contents of electronic communications and postings to electronic bulletin boards from a service provider with the consent of a party to the communication and with reimbursement to the service provider;
- permits obtaining subscriber information (e.g., name; address; local and long distance telephone connection records or records of session times and durations; length of service and types of service utilized; telephone or instrument number or other subscriber number or identity, including any temporarily assigned network address; and means and source of payment, including credit card or bank account number) pursuant to an administrative or trial subpoena without notice to the subscriber and without reimbursement to the service provider; and
- permits obtaining the contents of electronic communications of any age if communications are “readily accessible to the general public.” 18 U.S.C. § 2511(2)(g).

## **9.5 Statement to Persons Providing Information About Themselves to the CFTC**

When the CFTC solicits information from an individual about him or herself, including information that describes the person in some way or information about her or his personal actions that may violate the CEA, the Privacy Act and CFTC policy require that certain notices be provided. In this situation, the Division provides individuals a standardized “Statement to Persons Providing Information about Themselves to the CFTC” (“Required Notice”), which informs the individual of certain legal rights and responsibilities he or she may have before the individual provides information about him/herself to the CFTC. The Required Notice is given whether information is provided voluntarily or pursuant to subpoena, whether the information is in the form of documents or oral statements, and whether information is provided during investigative testimony, a deposition, or in less formal contexts.

In accordance with the notice requirements of the Privacy Act, the Required Notice explains in detail the CFTC’s authority for, and purpose in, soliciting the information being sought, its routine uses by the CFTC, and the effect of not supplying the information. When the notices described here must be given orally (for example, during a telephone call), Division staff will

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<sup>16</sup> The “contents” of a communication means “any information concerning the substance, purport, or meaning” of the communication. 18 U.S.C. § 2510(8).

subsequently send a written copy of the Required Notice to the individual. The Required Notice discusses a number of applicable procedural safeguards, including:

- the authority for the solicitation of information and whether disclosure of information is mandatory or voluntary;
- the purpose of the solicitation of information;
- the effect of not supplying information;
- the routine uses of supplied information;
- relevant provisions of Freedom of Information Act, 5 U.S.C. § 552, and the CFTC's rules and regulations pursuant thereto;
- the person's right to be accompanied, represented and advised by counsel;
- her or his rights under the Fifth Amendment;
- the potential consequences of making false or fraudulent statements (or the submission of false documents), which violates Section 6(c)(2) of the CEA, 7 U.S.C. § 9(2), and also constitutes felonies punishable by fines and/or imprisonment (*see* 18 U.S.C. § 1001 and 18 U.S.C. § 1621, respectively);
- the disclosure requirements of the Freedom of Information Act, 5 U.S.C. § 552, and Regulation 145.9, 17 C.F.R. § 145.9; and
- the CFTC's "Informal Procedure Relating to the Recommendation of Enforcement Proceedings," found in Appendix A to the Part 11 Regulations.

Persons providing sworn investigatory testimony or litigation deposition testimony are also provided with an additional notice with information relevant to those proceedings.

Neither the Privacy Act of 1974 nor CFTC policy requires provision of the Required Notice in the context of information requests to corporations or other business entities, or individuals acting as an agent of a business entity.

## **10. Other**

### **10.1 Ethics**

#### **10.1.1 General Principles and Standards**

Division staff, along with all other staff of the CFTC, are expected to adhere to the highest standards of integrity and ethical conduct. Those standards emanate from a number of sources. All federal employees are bound by certain federal statutes and regulations, which apply to issues such as financial disclosure, conflicts of interest, acting impartially when performing



official duties, misuse of public office for private gain, gifts and invitations, seeking or engaging in outside employment or activities whether paid or unpaid, and the Hatch Act limitations on certain political activities. The CFTC has supplemented the general federal provisions with additional regulations regarding the conduct of both current and former members of the CFTC at 5 C.F.R. pt. 5101 and 17 C.F.R. pt. 140, subpt. C. The CFTC Ethics Office resides in the General Law Division of OGC. Moreover, the General Counsel in OGC is the CFTC's Designated Agency Ethics Official ("DAEO"), and the Deputy General Counsel of the General Law Division within OGC is her or his Alternate DAEO. The DAEO or Alternate DAEO provides advice on any federal ethics question a staff member may have regarding ethical issues.

If a potential ethical issue arises, Division staff should seek guidance from the DAEO or Alternate DAEO.

Division attorneys have additional ethical obligations, which are set forth in the Rules of Professional Responsibility of the state in which the attorney is licensed to practice, and the Rules of Professional Responsibility of the state in which the attorney is practicing or appearing on behalf of the CFTC. Division staff and OCC may coordinate with OGC if additional assistance is necessary.

## **10.2 Records Management and Document Control**

### **10.2.1 General Policies**

As a federal agency, the CFTC is required to retain Federal records. The Federal Records Act defines federal records as "all recorded information, regardless of form or characteristics, made or received by a Federal agency under Federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the United States Government or because of the informational value of data in them." *See* 44 U.S.C. § 3301(a)(1)(A). CFTC policy states that information may be covered as a "federal record" if it:

- documents significant CFTC decisions or commitments;
- adds to a proper understanding of the formulation or execution of CFTC actions, operations, or responsibilities;
- conveys information of value on important CFTC activities;
- facilitates action by staff;
- provides key substantive comments on a draft;
- makes possible a proper scrutiny by Congress, CFTC, or its auditors;
- is required by CFTC to be created or received; or
- protects the financial, legal, and other rights of the government and persons directly affected by the government's actions.

The Commission has established and maintains a Records Management Program to create and maintain authentic, reliable, retrievable, and useable records for as long as they are required by Federal records laws and regulations and authorized records disposition schedules. Files relating to Leads, PIs, and Investigations closed without filing an enforcement action are generally retained for five years. Files relating to Litigations are generally retained for fifteen years. *See generally* Records Disposition Schedule, <https://www.cftc.gov/idc/groups/public/documents/file/recordsdispositionschedulepdf.pdf>. *Cf.* Section 10.2.3 of the Manual (Historically Significant Matters).

## **10.2.2 The Division's Recordkeeping Systems**

The Division receives records in various forms, including, but not limited to, data in electronic, paper, or other media forms. Generally, the CFTC's Office of Data and Technology's Legal Technology Services Program provides the Division with various database and electronic storage systems in conformity with the CFTC-wide Records Management Program. Non-electronic materials are also maintained in a secure manner that ensures the CFTC meets all applicable confidentiality obligations and requirements.

## **10.2.3 Historically Significant Matters**

The National Archives and Records Administration ("NARA") approves the CFTC's records disposition schedule, which defines certain "permanent records." These are records that are determined to have sufficient historical or other value to warrant permanent preservation by NARA. When an investigative or litigation matter is closed, the Division evaluates whether the matter is historically significant one under the NARA.

## **10.3 Closing an Enforcement Matter**

Closing an enforcement matter (whether a lead, PI, investigation, or a litigation) triggers various Commission requirements, including those concerning recordkeeping, record destruction, and sanction reporting. As a general matter, Division staff are responsible for: (1) ensuring that the matter is closed appropriately and CFTC recordkeeping obligations are completed within the requisite periods; (2) completing the appropriate closing reports; and (3) providing the completed closing reports to the assigned Deputy within the requisite periods.

## **10.4 Press Releases**

A press release is customarily issued at the initiation and conclusion or settlement of either a federal court or administrative enforcement action. The press release is issued at the time of the filing of a complaint, unless the complaint is filed under seal, an ex parte restraining order to freeze assets and preserve documents is sought, or a consent order is submitted with the complaint for immediate consideration by the court. At times the Commission will enter orders filing and simultaneously settling administrative enforcement actions and will issue one press release announcing the entry of the order.

Releases may also be issued for significant developments in litigation, such as the issuance of a preliminary injunction, orders of contempt, important subpoena enforcement actions, issuance of

a restraining order, issuance of a decision in federal court, final Commission orders, or any other development that may be of public interest.

The Office of External Affairs (“OEA”) is responsible for the issuance of the CFTC’s public announcements. The Division works with OEA on press releases relating to enforcement activities. Press releases are subject to review and approval by the Director or a delegate, OEA, OGC, and the Office of the Chairman. Press releases are not subject to negotiation.

## **10.5 Repairs Program**

The CFTC has a Repairs Program, authorized under Section 14 of the CEA, 7 U.S.C. § 18, which allows customers of persons registered with the CFTC to seek compensation for damages caused by violations of the CEA or the Regulations by those registered persons. Division staff may inform a customer about the Repairs Program, but do not advise whether the customer should use the Program or otherwise comment on the viability of any claims the customer may have. Information regarding the eligibility requirements for the Repairs Program is set out on the CFTC Repairs Program webpage, available at <https://www.cftc.gov/ConsumerProtection/repairsprogram/index.htm> or may be obtained by calling (202) 418-5250. In addition, information describing the arbitration and mediation programs of NFA may be obtained by calling the NFA Information Center at (800) 621-3570 or, in Illinois, (312) 781-1410.

## **11. Whistleblower Program**

The CFTC’s Whistleblower Program provides monetary incentives to individuals who come forward to report violations of the CEA. It also provides anti-retaliation and confidentiality protections for whistleblowers. The Division’s Whistleblower Office (“WBO”) administers the program.

### **11.1 General Description of the Whistleblower Program**

In general, the CFTC will pay monetary awards, based on collected monetary sanctions and under regulations prescribed by the Commission, to eligible whistleblowers who voluntarily provide the CFTC with original information about violations of the CEA that leads the CFTC to bring a successful enforcement action resulting in the imposition of monetary sanctions exceeding \$1,000,000.

The CFTC will also pay monetary awards to eligible whistleblowers whose information leads to the successful enforcement of a Related Action brought by another governmental entity (or certain other entities) that is based on original information voluntarily submitted by a whistleblower to the CFTC that led to the successful resolution of an action brought by the CFTC.

The total amount of an award for an eligible whistleblower is between 10% and 30% of the amount of monetary sanctions collected in the CFTC’s enforcement action or a Related Action. If multiple whistleblowers are granted awards in an action, the total award amount is still limited to between 10% and 30% of the amount of the monetary sanctions collected.

Submitting a tip alone will not be sufficient to obtain an award. In order to be considered for an award, a whistleblower must also submit an award application when the WBO releases a Notice of Covered Action, or when a qualifying resolution is reached in a Related Action.

## **11.2 Qualifying as a Whistleblower**

In order to be eligible for the monetary awards and protections afforded by the Whistleblower Program, an individual (or group of individuals) must submit to the CFTC information relating to a potential violation of the CEA on a Form TCR (Tip, Complaint, or Referral). The Form TCR may be submitted electronically via the Whistleblower Program website, <https://www.whistleblower.gov/overview/submitatip/>, or by fax or mail.

A whistleblower can be any individual who sends the CFTC a Form TCR containing information about a potential violation of the CEA. Examples range from a corporate officer or insider, to a trader or market observer, to a customer or fraud victim; but a company or other entity is not eligible to be a whistleblower. Certain persons—for example, certain government and self-regulatory personnel, and persons convicted of a crime related to the conduct at issue in the whistleblower matter—are ineligible for award, but they still qualify for anti-retaliation and confidentiality protections.

## **11.3 Protecting the Identity of Whistleblowers**

Section 23(h) of the CEA, 7 U.S.C. § 26(h)(2), provides, in relevant part:

### (2) CONFIDENTIALITY

(A) IN GENERAL—Except as provided in subparagraphs (B) and (C), the Commission, and any officer or employee of the Commission, shall not disclose any information, including information provided by a whistleblower to the Commission, which could reasonably be expected to reveal the identity of a whistleblower . . . .

*See also* 17 C.F.R. § 165.4. Division staff should consult with OCC and the WBO in connection with any concerns regarding confidentiality.

### **11.3.1 Handling of Information and Documents**

The confidentiality protections of the CEA and the Regulations require the CFTC not to disclose information that “could reasonably be expected to reveal the identity of the whistleblower.” Division staff take measures to ensure that information that could reasonably be expected to reveal a whistleblower’s identity is not disclosed.

### **11.3.1.1 Referrals and Requests to Domestic or Foreign Authorities**

The CFTC may provide whistleblower-identifying information in appropriate circumstances to: criminal authorities; federal, state, and local agencies; foreign authorities; and registered entities, the NFA, or an SRO. *See generally* Section 8 of the Manual (Cooperative Enforcement). Note that if a whistleblower's identity is disclosed in the referral or request, the receiving authority must keep the whistleblower's identity confidential. 7 U.S.C. § 26(h)(2)(C)(ii); 17 C.F.R. § 165.4(a)(2).

### **11.3.1.2 Investigations**

- *Freedom of Information Act (FOIA) Requests*: If there is a FOIA request for documents that may contain whistleblower identifying information, Division staff must contact the WBO for assistance to ensure that responsive documents are redacted.
- *Drafting Subpoenas (Document Requests)*: Whistleblowers often provide very specific and timely information relating to documents in the possession of an individual or entity that contain evidence of violations of the CEA. In drafting subpoenas and document requests, staff should ensure that they do not inadvertently reveal the existence or identity of a whistleblower, e.g., requests that reveal the drafter of the subpoena has knowledge that only a specific person (or persons) would possess.

### **11.3.1.3 Litigation**

In federal court litigation or an administrative proceeding, the CFTC's disclosure obligations have the potential to involve whistleblowers or whistleblower identifying information in general. If a matter involving a whistleblower goes into litigation or an administrative proceeding, Division staff should consult OCC and the WBO about any issues arising with discovery.

## **11.4 Additional Whistleblower Protections**

Whistleblowers have certain protections in addition to confidentiality of their identity, including:

- employers may not impede would-be whistleblowers from communicating directly with the CFTC's staff about possible violations of the CEA;
- employers may not retaliate against whistleblowers for reporting violations of the CEA; and
- a whistleblower who has been retaliated against has the right to sue an employer in federal court.

In addition, the CFTC has authority to enforce the anti-retaliation provisions of the CEA by bringing an enforcement action against an offending employer.

## 11.5 Whistleblower Awards

When the CFTC obtains a judicial or administrative order that—by itself or together with judgments or orders in related CFTC enforcement actions or Related Actions brought by certain other entities—imposes monetary sanctions exceeding \$1,000,000, then the order becomes a covered judicial or administrative action upon which the CFTC may pay out whistleblower awards. The WBO will then post a Notice of Covered Action, and whistleblowers may begin applying for awards. The CFTC may also pay out whistleblower awards based on monetary sanctions collected in Related Actions brought by certain other entities, as long as those Related Actions are based on information provided by a CFTC whistleblower.

To apply for an award, a whistleblower must complete and submit a copy of the award application, Form WB-APP (Application for Award For Original Information Submitted Pursuant to Section 23 of the Commodity Exchange Act), to the WBO. For further information regarding the award determinations process, *see* <https://www.whistleblower.gov/overview/>.