

CFTC Issues Compliance Program Guidance

09 / 10 / 20

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On September 10, 2020, the Commodity Futures Trading Commission (CFTC) published Staff guidance (Guidance) from the director of the Division of Enforcement (Division) that outlines factors the Division will consider when evaluating compliance programs in connection with enforcement actions.¹ The Guidance, which is binding on Division staff and will be published in the CFTC's Enforcement Manual, is the first of its kind issued by the Division.²

The Guidance supplements guidance that the Division published in May 2020 concerning factors that Division staff consider in recommending civil monetary penalties to the Commission in enforcement actions. That guidance instructed Division staff to consider "mitigating and aggravating circumstances," including the "[e]xistence and effectiveness of [a] company's pre-existing compliance program" and post-violation "efforts to improve a compliance program."³ In summary, the Guidance directs Division staff to consider whether a company's compliance program was reasonably designed and implemented to:

- **Prevent the underlying misconduct at issue.** Evaluation of this factor can include consideration of:
 - Written policies and procedures
 - Training
 - Failures to remediate previously identified compliance issues
 - Compliance resources
 - Independence of a company's compliance program from its business functions
- **Detect the misconduct.** The Guidance directs Division staff to evaluate a company's:
 - Internal surveillance and monitoring efforts
 - Internal reporting and complaint handling systems
 - Procedures for identifying and evaluating unusual or suspicious activity
- **Remediate the misconduct.** This analysis includes whether a company timely and sufficiently took appropriate action to:
 - Effectively address the impact of misconduct
 - Discipline the responsible individuals
 - Identify and address compliance deficiencies

¹ See Press Release, "CFTC Issues Guidance on Factors Used in Evaluating Corporate Compliance Programs in Connection with Enforcement Matters," CFTC (Sept. 10, 2020) (Press Release); CFTC, "Guidance on Evaluating Compliance Programs in Connection with Enforcement Matters" (Sept. 10, 2020) (Guidance).

² See CFTC, "Enforcement Manual" (May 20, 2020).

³ See CFTC, "Civil Monetary Penalty Guidance" at 2-4 (May 20, 2020). The Guidance leaves open the question of whether Division staff will consider weaknesses in a company's compliance program an aggravating factor that would support a higher civil monetary penalty than the Division would otherwise recommend, rather than merely militating against a reduced penalty. For more on the CFTC's civil monetary penalty guidance, see Skadden's May 22, 2020 [client alert](#). The Guidance notes that the Division "may also evaluate a company's compliance program in connection with non-monetary terms of a resolution, such as remediation or other undertakings." Guidance at 1.

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CFTC Chairman Heath P. Tarbert stated that the Guidance serves to highlight the CFTC’s “commitment to transparency and clarity” by ensuring that the agency is “clear about how and what [it will] evaluate.”⁴ Division of Enforcement Director James McDonald also noted in a press interview that, in adopting the Guidance — which directs Division staff to conduct a “risk-based analysis” — the agency sought to avoid an “overly prescriptive” or “one-size-fits-all” approach.⁵

⁴ Press Release.

⁵ See Dylan Tokar, “CFTC Issues Guidance on Corporate Compliance Programs,” *Wall Street Journal* (Sept. 10, 2020). See also Guidance at 2.

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