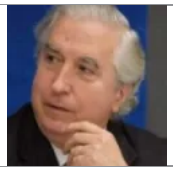

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# Skadden Discusses New CFTC Enforcement Advisory on Penalties, Monitors, and Admissions

*By David Meister, Chad E. Silverman and Peter A. Varlan* October 24, 2023

**Comment**

On October 17, 2023, the Division of Enforcement (the Division) of the Commodity Futures Trading Commission (CFTC or the Commission) issued an advisory to Division staff providing guidance on what recommendations the Division will make to the Commission regarding penalties, monitors/consultants and admissions in future CFTC enforcement actions.

The newly issued advisory reflects recent trends in CFTC enforcement actions and supplements earlier advisories and guidance, including the Division's Enforcement Manual and guidance on self-reporting, cooperation and remediation.

## Penalties

The advisory states that the Division is "recalibrating how it is assessing" civil penalties in enforcement actions to achieve general and specific deterrence. Though the advisory does not provide specific guidance on how penalties will be calculated, it suggests that the Division will seek higher penalties in certain circumstances, particularly in cases involving recidivism.

The Division has for years considered recidivism an aggravating penalty factor, and for the first time, it has identified the following factors for determining whether a penalty should be increased for this reason:

- Whether the previous and current violations overlap, meaning that they involve the same kind of violations, result from the same root cause or involve the same general subject matter.
- How recently the prior conduct occurred.
- Whether the same management was involved in both violations.
- How pervasive the new misconduct is.
- Whether adequate remediation efforts were undertaken since the prior violation.

Notably, these factors provide respondents to enforcement actions room to argue against an enhancement for recidivism on multiple grounds.

## Monitors and Consultants

The advisory also provides guidance on the imposition and role of consultants and monitors; the CFTC has previously required such imposition in some settlements despite the lack of any policy on this subject. The advisory distinguishes between consultants and monitors, the latter being far more onerous.

The Division will recommend the imposition of a third-party consultant where it believes that the respondent requires the assistance of a neutral third party to offer advice regarding remediation. The consultant will be responsible for advising the respondent regarding implementation of remedial efforts, and the respondent will be required to make periodic reports to the Division on its progress. The consultant need not be approved by the Division.

In cases where the pervasiveness, severity or lack of effective controls is significant enough that the Division lacks confidence that the respondent will remediate the misconduct on its own, the Division will seek the imposition of a monitor instead of a consultant. The monitor must be approved by the Division (whereas a consultant does not) and is different from a consultant in important ways:

- Whereas a consultant's responsibilities are limited to providing advice regarding implementation, a monitor must: (1) conduct initial testing to identify issues, (2) recommend specific enhancements to address them and (3) test the enhancements for sufficiency.
- A monitor will submit reports to the Division describing the remediation plan and progress in implementing it. Where a consultant is required, only the respondent will make reports to the Division.

- A respondent is required to notify the Division if it chooses not to adopt one of the monitor's recommendations.

Where a monitor or consultant is required, the chief compliance officer or other senior business executive will be expected to certify the completion of the remediation work.

Given the intention to increase the imposition of monitors and consultants as part of CFTC settlements, firms that are subject to enforcement actions may consider independently hiring a consultant before reaching a resolution with the CFTC to give the Division confidence that it can adequately remediate its issues without the CFTC's involvement.

## Admissions

Lastly, the advisory sets out the Division's new approach to admissions, explaining that admissions will be part of all settlement discussions. This puts an end to the presumption that no-admit, no-deny resolutions are the default for settlements. The Division will consider a number of non-exhaustive factors in determining whether admissions are appropriate, including:

- **Related criminal actions.**Respondents who face a realistic risk of criminal exposure based on the misconduct will be able to argue that requiring admissions will jeopardize their defense in the criminal case. However, respondents who are resolving a parallel criminal action that involves an admission may be expected to make admissions in their CFTC resolution.
- **Existence of factual disputes.**Legitimate factual disputes that the Division believes are contestable at trial will weigh against admissions, while evidence that conclusively establishes the misconduct will weigh in favor of admissions. Similarly, if the offense is a strict violation offense, where there is no need to assess state of mind, the CFTC is more likely to require admissions.
- The advisory seems to incentivize respondents to make admissions, by noting that making an admission will positively impact the Division's assessment of the respondent's cooperation and whether it should receive credit in the form of a reduced monetary penalty.

Although the advisory acknowledges the risk admissions pose when there is criminal exposure for the misconduct, the Division did not specifically address how it will approach cases where admitting the misconduct creates significant civil exposure for the respondent. In those cases, respondents may want to argue that significant civil liability is akin to potential criminal exposure and should also weigh against admissions.

In any event, depending on the nature of the case, respondents will continue to be confronted with the question of whether the collateral costs of making admissions are so high that litigation becomes a more attractive alternative.

*This post comes to us from Skadden, Arps, Slate, Meagher & Flom LLP. It is based on the firm's recent memorandum, "CFTC Issues New Enforcement Advisory on Penalties, Monitors and Admissions," dated October 20, 2023, and available here.*