

# White Collar Defense and Investigations



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## CFTC Enforcement Director Addresses Self-Reporting Benefits

On April 11, 2024, Ian McGinley, the director of enforcement at the Commodity Futures Trading Commission (CFTC) [addressed the New York City Bar Association Futures and Derivatives Committee](#) to present the benefits of self-reporting violations to the CFTC Division of Enforcement (the Division). Mr. McGinley appeared to seek to address concerns that the CFTC has not clearly articulated the benefits of self-reporting, making it difficult for potential respondents to decide whether the potential benefits of self-reporting outweigh the cost. As we discussed in a blog post at the time,<sup>1</sup> a [recent enforcement advisory](#) that announced an intent to aggressively seek higher penalties for repeat violations might raise concerns that the potential benefit of self-reporting credit could be outweighed by the risk of a recidivism-enhanced penalty.

Mr. McGinley advocated for self-reporting, crafting an argument based on: (i) the Division's guidance on self-reporting; (ii) CFTC enforcement orders where self-reporting credit was granted as compared to orders without self-reporting credit; and (iii) the risks to non-self-reporters generated by the CFTC's Whistleblower Program.

### Division of Enforcement Guidance

Citing the Division's guidance, Mr. McGinley noted that, to qualify for self-reporting credit, a respondent must: (i) voluntarily disclose the violative conduct prior to an imminent threat of exposure; (ii) within a reasonably prompt period of time; and (iii) include all the relevant facts. Given that the CFTC program is designed to encourage reporting of misconduct that would otherwise not be imminently exposed, he emphasized that credit is not available if a company self-reports after learning of a forthcoming whistleblower report or on the eve of a required disclosure in a chief compliance officer (CCO) report. Mr. McGinley advised that:

- Reports made to another CFTC division should also be reported to the Division contemporaneously.
- Respondents should self-report as early as possible, even if facts are still being developed.

### CFTC Orders

Acknowledging that guidance alone does not address the specific benefits and risks, Mr. McGinley observed that a comparative analysis of CFTC orders in similar cases illustrates the benefits of self-reporting. Highlighting examples of the commission's resolutions in its spoofing, swap dealer reporting and recordkeeping cases, he contrasted the lower civil penalties imposed in cases involving self-reporting with those cases where

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<sup>1</sup> David Meister, Chad Silverman, Peter Varlan; "[More Clarity Is Needed on the Benefits of Self-Reporting.](#)" Program on Corporate Compliance and Enforcement (Nov. 4, 2023).

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no self-reporting credit was given by the Division. Although he caveated that it “may not be possible to formulaically say with precision exactly how much of a discount the Commission will award for self-reporting,” his examples demonstrated self-reporting discounts in the range of 30%<sup>2</sup> to 55%.<sup>3</sup>

## Whistleblower Program

Mr. McGinley finished his remarks by referencing the CFTC’s Whistleblower Program as the “stick” to the self-reporting credit’s “carrot.” He noted that the CFTC proactively seeks and encourages whistleblowers to report misconduct by providing large rewards

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<sup>2</sup> Compare CFTC Press Release No. 8595-22, “[CFTC Orders California Trader and Prop Firm To Pay \\$750,000 for Spoofing in Treasury Futures](#)” (Sept. 22, 2022), with CFTC Press Release No. 8015-19, “[CFTC Charges Futures Trader and Industrial Firm With Spoofing in Precious Metals Futures](#)” (Sept. 16, 2019).

<sup>3</sup> Compare CFTC Press Release No. 8429-21, “[CFTC Orders Mizuho Capital Markets LLC To Pay \\$1.5 Million for Swap Portfolio Reconciliation, Other Compliance and Supervision Failures](#)” (Sept. 27, 2021), with CFTC Press Release No. 8501-22, CFTC, “[CFTC Orders London-Based Swap Dealer To Pay \\$3.25 Million for Swap-Data Reporting, Conflicts of Interest, Mid-Market Mark, and Supervision Failures](#)” (Mar. 15, 2022).

(approximately \$365 million since 2014). He observed that this should incentivize potential respondents to “get out ahead” of whistleblower reports because, if a whistleblower reports first, the respondent’s self-reporting credit and the degree of the company’s cooperation credit is jeopardized.

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Mr. McGinley gave no indication that the Division would start providing more details that would be useful to the self-reporting calculus, such as the amount of credit given for self-reporting in particular enforcement cases or more public declinations based on self-reporting, full cooperation and remediation. Time will tell whether Mr. McGinley’s actions in crediting self-reporting are strong enough to overcome these remaining uncertainties. His assurances that self-reporting will be credited should factor into the decisions for individuals or firms facing the persistent question of whether the benefit of self-reporting outweighs the risk of not doing so as they consider the CFTC’s emphasis on enhanced penalties for recidivist conduct.