

# White Collar Defense and Investigations



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If you have any questions regarding the matters discussed in this memorandum, please contact the following attorneys or call your regular Skadden contact.

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## CFTC Issues Advisory on Referrals to the Division of Enforcement

On April 17, 2025, three operating divisions<sup>1</sup> of the Commodity Futures Trading Commission (CFTC) jointly issued an advisory to provide guidance on the materiality or other criteria they will use in deciding whether to make a referral to the Enforcement Division (DOE). This guidance fills an important piece of the puzzle for registrants considering where to self-report violations. The guidance follows from the DOE's February 25, 2025, advisory announcing that registrants who self-report violations to an operating division can be eligible for self-reporting credit, which reversed prior DOE policy that had limited credit to self-reports made directly to DOE.

Not surprisingly, this advisory indicates that violations that involve harm to clients and other market participants, that harm market integrity, or that involve significant losses are likely to be deemed material. For these, the advisory suggests that parties should "use their own judgment" in deciding whether to self-report the matter directly to DOE, "particularly [those violations] involving fraud, manipulation, or abuse."

For less egregious conduct that is reported to the operating divisions, the advisory provides helpful insight into how the operating divisions will decide whether to bring in DOE. These divisions will refer a supervision or non-compliance issue to DOE only where the potential violation is "material." To determine materiality, the operating division will apply a reasonableness standard, while considering the registrant's size, activity and complexity, to the following criteria:

1. Especially egregious or prolonged systematic deficiencies or material weakness of the supervisory system or controls, or program;
2. Knowing and willful misconduct by management, such as conduct evidencing an intent to conceal a potential violation, or supervision or non-compliance issue; or
3. Lack of substantial progress toward completion of a remediation plan for an unreasonably lengthy period of time, such as several years, particularly after a sustained and continuous process with the appropriate division. However, the failure to meet a deadline for corrective action, on its own, will not be sufficient to warrant a referral to the Enforcement Division.

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<sup>1</sup> The operating divisions that issued the advisory jointly are the Market Participants Division, the Division of Clearing and Risk, and the Division of Market Oversight.

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Notably, the advisory explains that, generally, one-off control, technical and operation issues would not be material. In determining whether such issues are material, the CFTC will consider whether they involve:

1. Widespread impact to the registrant or its clients, counterparties or customers, or to the registered entity, or to the markets; or
2. Failure of the registrant's systems, policies or practices that involves numerous persons, multiple errors, or significant dollar amounts given the size, activity or complexity of the registrant or registered entity.

In addition to helping registrants determine whether and where to self-report violations, this guidance also provides chief compliance officers criteria to consider when deciding whether an issue qualifies as a material non-compliance issue for inclusion in required annual compliance reports. While the advisory clearly states that it “may not be relied upon to create any rights,” the spirit of the advisory may well suggest that the CFTC is more open to the view that one-off technical or operational issues do not warrant charges for violations of CFTC rules.