

CFTC's Enforcement Division Issues New Advisories on Cooperation

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On January 19, 2017, the U.S. Commodity Futures Trading Commission's (CFTC) Division of Enforcement issued two new enforcement advisories outlining the factors the Enforcement Division will consider in evaluating cooperation in the agency's investigations and enforcement actions.¹ One advisory addresses factors the CFTC will consider in assessing cooperation credit for companies,² and the other addresses the applicable factors for individuals.³ It has been almost 10 years since the CFTC has issued an advisory for cooperation by companies, and this is the first time the CFTC has issued such an advisory for cooperation by individuals. This commentary will examine the contents of those advisories, how the CFTC's policy toward cooperation has changed over time and some practical considerations to apply to these pronouncements.

Company Cooperation

The advisory for cooperation by companies (Company Cooperation Advisory) lists four categories of factors that the Enforcement Division (Division) may consider in judging whether cooperation credit should be granted to a company:

1. **The value of the company's cooperation to the CFTC's investigation(s) or enforcement action(s).** Factors within this category include: (i) whether the company's cooperation materially assisted the investigation(s) and enforcement action(s); (ii) the timeliness of the company's initial cooperation; (iii) the nature of the company's cooperation; and (iv) the quality of the company's cooperation. Notably, companies will be viewed favorably if they conduct good-faith internal investigations aimed at identifying all responsible individuals and produce full reports of any such investigations to the Division.⁴
2. **The value of the company's cooperation to the CFTC's broader law enforcement interests.** Factors within this category include: (i) the degree to which cooperation credit for the company would encourage high-quality cooperation from other entities; (ii) the importance of the investigation(s) and action(s); (iii) the time and resources conserved as a result of the company's cooperation; and (iv) the extent to which cooperation credit otherwise enhances the CFTC's ability to detect and pursue legal violations.⁵
3. **The company's culpability, culture and other company-specific factors.** Factors within this category include: (i) the circumstances of the misconduct; (ii) the company's prior misconduct; (iii) whether the company took actions to mitigate losses caused by the misconduct; (iv) whether the company engaged in meaningful remedial efforts to prevent future wrongdoing; and (v) whether the company has accepted responsibility for the misconduct.⁶
4. **Uncooperative conduct.** The Division also will consider any uncooperative conduct on the part of the company, including actions taken to mislead, obstruct or delay the Division's investigation, in assessing whether to offset any cooperation credit the company otherwise would have received.⁷

¹ See Press Release, CFTC, CFTC's Enforcement Division Issues New Advisories on Cooperation (Jan. 19, 2017), <http://www.cftc.gov/PressRoom/PressReleases/pr7518-17>.

² CFTC, Enforcement Advisory: Cooperation Factors in Enforcement Division Sanction Recommendations for Companies (Jan. 19, 2017) [hereinafter 2017 CFTC Advisory for Companies], <http://www.cftc.gov/idc/groups/public/@lrenforcementactions/documents/legalpleading/enfadvisorycompanies011917.pdf>.

³ CFTC, Enforcement Advisory: Cooperation Factors in Enforcement Division Sanction Recommendations for Individuals (Jan. 19, 2017) [hereinafter 2017 CFTC Advisory for Individuals], <http://www.cftc.gov/idc/groups/public/@lrenforcementactions/documents/legalpleading/enfadvisoryindividuals011917.pdf>.

⁴ 2017 CFTC Advisory for Companies, *supra* note 2, at 2–4.

⁵ *Id.* at 4.

⁶ *Id.* at 4–6.

⁷ *Id.* at 6–7.

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Substantive Changes to the Company Cooperation Advisory

This is the third enforcement advisory for cooperation by companies that the CFTC has issued.⁸ The previous advisories were released in 2004⁹ and 2007.¹⁰

There are several substantive differences between the Company Cooperation Advisory and the 2007 version, which may indicate how the Division's enforcement priorities have changed over time and where its focus currently lies:

1. Perhaps the most significant change from former policies is that, under the Company Cooperation Advisory, the Division will now assess the value of the company's cooperation, not only with regard to how that cooperation affects the Division's ability to prosecute a case against the company itself, but also with regard to how that cooperation enhances the Division's ability to take action with regard to other actors. In particular, the Division will consider the degree to which the company's cooperation "expose[s] an industry-wide practice" and whether awarding cooperation credit will likely encourage other entities to cooperate.¹¹ In the past few years, through the Division's investigations into industrywide manipulations relating to LIBOR, FX and ISDAFIX, the Division has demonstrated a heightened interest in pursuing actions against broad groups of industry participants. By emphasizing that it will be more likely to assign cooperation credit where doing so will lead to enforcement results with regard to other actors, the CFTC may be revealing its desire to continue to prioritize such industrywide investigations.
2. The 2017 advisory also places an emphasis on the identification of culpable individuals, which is not conspicuous in prior iterations of the policy. Specifically, it states that companies will be evaluated based on whether they: (i) promptly met with the Division staff to review and explain all relevant facts relating to individuals responsible for the misconduct; (ii) independently investigated the misconduct in a manner designed to identify all responsible individuals; (iii) provided

full disclosure of the identities of individual wrongdoers, both inside and outside the organization; and (iv) provided full disclosure of all relevant facts about individual wrongdoers, including relevant communications and other documents evidencing misconduct.¹² In this respect, the new advisory seems to echo themes from the 2015 Department of Justice (DOJ) memorandum by former Deputy Attorney General Sally Yates (the Yates Memo), with some distinctions. For example, while the Yates Memo states that reporting all relevant facts concerning individuals' misconduct is a *prerequisite* for a corporation to receive *any* DOJ cooperation credit,¹³ the CFTC is less black and white, describing such a step as one factor that the CFTC may take into consideration.¹⁴ Nonetheless, the CFTC's guidance with regard to individuals may indicate the Division's intent to at least maintain parity with other regulators in its ability to pursue cases against individual wrongdoers, rather than just their corporate employers. That conclusion is only further underscored by the Division's decision to, for the first time, count certain assistance that a company might provide to former or current employees in a CFTC investigation — namely, providing them access to corporate documents beyond what they would have been privy to during their employment — as a factor that weighs *against* awarding cooperation credit to the company.¹⁵

3. Unlike the 2007 advisory, the 2017 advisory indicates that there will be some misconduct that the Division will consider to be so egregious that no credit will be given for cooperation, no matter how extensive. The 2007 advisory focused on the quality of companies' cooperation and its efforts to prevent future violations in isolation from the nature of the conduct at issue.¹⁶ The new advisory, on the other hand, explicitly states that the Division will weigh the company's cooperation and remediation efforts against the extent of its misconduct in the present case, as well as any *prior* misconduct by the company, in assessing the appropriate level of cooperation credit the company should receive.¹⁷ Obviously, a corporation will need to consider this guidance in deciding whether or not to self-report.
4. To the extent the nature of the company's misconduct does not disqualify it from receiving cooperation credit, the Division

⁸ The CFTC first announced that it would give cooperation credit in 1994. 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). It did not issue an enforcement advisory outlining the factors the Division would consider in evaluating cooperation, however, until 2004.

⁹ CFTC, Enforcement Advisory: Cooperation Factors in Enforcement Division Sanction Recommendations (Aug. 11, 2004), <http://www.cftc.gov/files/enf/enfcooperation-advisory.pdf>.

¹⁰ CFTC, Enforcement Advisory: Cooperation Factors in Enforcement Division Sanction Recommendations (Mar. 1, 2007) [hereinafter 2007 CFTC Advisory], <http://www.cftc.gov/idc/groups/public/@cpdisciplinaryhistory/documents/file/enfcooperation-advisory.pdf>. The 2007 CFTC Advisory was a minor update to the 2004 version, only removing and adding provisions about attorney-client privilege and work-product protection. The new Company Cooperation Advisory, in contrast, contains a new, restructured list of factors with several substantive changes.

¹¹ 2017 CFTC Advisory for Companies, *supra* note 2, at 4.

¹² *Id.* at 3–4.

¹³ Memorandum from Sally Quillian Yates, Deputy Att'y Gen., U.S. Dep't of Justice, to Heads of Dep't Components & All U.S. Attorneys, *Individual Accountability for Corporate Wrongdoing*, at 2 (Sept. 9, 2015), <https://www.justice.gov/dag/file/769036/download>.

¹⁴ See 2017 CFTC Advisory for Companies, *supra* note 2, at 3–4.

¹⁵ *Id.* at 7.

¹⁶ See 2007 CFTC Advisory, *supra* note 10, at 2 ("Broadly speaking, the Division looks to cooperative factors in three general areas of the company's conduct ... (i) good faith in uncovering and investigating misconduct; (ii) cooperation with the Division's staff in reporting the misconduct and the company's action with respect to it; and (iii) efforts to prevent future violations.")

¹⁷ 2017 CFTC Advisory for Companies, *supra* note 2, at 4–5.

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has provided additional clarity in its new advisory on two factors for which it has long awarded credit: timely self-reporting and remediation.

- (a) While the 2007 guidance noted that credit would be given where misconduct was “promptly” reported to the Division, the 2017 advisory specifies that the Division will consider whether the company was the Division’s first source of information about the misconduct, or whether the Division first learned of the issue from some other source.¹⁸ This factor encourages companies to not only report quickly, but also to have sufficiently robust internal controls and compliance procedures to facilitate the prompt detection of misconduct.
 - (b) With regard to remediation, the 2007 advisory stated that companies would be viewed favorably if they simply implemented additional measures to reduce the likelihood of recurrence of the misconduct at issue.¹⁹ The 2017 advisory makes clear that the Division also will consider whether the company prophylactically implemented measures intended to anticipate and avoid “similar, even if not identical,” misconduct in different divisions, specialties, product lines or groups across the organization.²⁰ To satisfy this factor, companies may accordingly have to broaden the scope of their remediation efforts.
5. The 2017 advisory is also notable for what it omits. The 2007 advisory suggested that companies would be looked upon favorably if they avoided entering into joint defense agreements with counsel for its employees or for other entities.²¹ The new advisory, however, is silent on joint defense agreements.²² Although no explanation for the dropped reference is given, it is conceivable that the Division had a concern about being seen as infringing upon the attorney-client privilege. The Division has shown sensitivity to this issue in at least two other respects. First, the Division explicitly issued the 2007 advisory to remove language from the 2004 advisory that had suggested that companies could be rewarded for waiving attorney-client and work-product privileges.²³ Second, the CFTC’s Company Cooperation Advisory clearly states that

it was not intended to erode attorney-client privilege and work-product protections.²⁴

Individual Cooperation

The advisory for cooperation by individuals (Individual Cooperation Advisory) lists the same four categories of factors that the Division may consider in judging whether cooperation credit should be awarded to companies: the value of the individual’s cooperation to the CFTC’s investigation(s) or enforcement action(s); the value of the individual’s cooperation to the CFTC’s broader law enforcement interests; the cooperating individual’s culpability and other relevant individual-specific factors; and the degree of uncooperative conduct the individual engaged in, which might offset cooperation credit he or she might otherwise receive.²⁵ Although there are slight differences in the subfactors used to describe these categories for individuals as compared to those used for companies, what is important is that the Division saw fit to issue cooperation guidelines for individuals at all, a step the Division has never previously taken.

The pronouncement of a separate cooperation policy for individuals demonstrates that the Division recognizes the high value that information from individuals can add to its investigations. The Division has now had a number of years to experience the value of this cooperation through its own whistleblower program, and recent whistleblower reward announcements show that the program has been fruitful. For example, last year the CFTC issued a \$10 million whistleblower reward for providing “key original information that led to a successful CFTC enforcement action.”²⁶ However, considering that not every individual will be eligible for a whistleblower award, the Individual Cooperation Advisory seems to fill a gap in the enforcement program by providing an incentive for individuals to provide information to the CFTC even where they are ineligible for such an award.

What the Advisories Do Not Include

For all the additional guidance that these new advisories give to potential cooperators, one of the most important pieces of information to potential cooperators is still missing. Even if companies and individuals know precisely the criteria on which their cooperation will be evaluated, their decision to cooperate will still be driven in large part by what they perceive the benefit of their cooperation to be. Unfortunately, the advisories are silent in this regard, even while other regulators have taken steps to provide such guidance. For example, the DOJ Criminal Fraud

¹⁸ See *id.* at 2.

¹⁹ See 2007 CFTC Advisory, *supra* note 10, at 3.

²⁰ 2017 CFTC Advisory for Companies, *supra* note 2, at 5–6.

²¹ 2007 CFTC Advisory, *supra* note 10, at 2.

²² See 2017 CFTC Advisory for Companies, *supra* note 2.

²³ See Press Release, CFTC, CFTC’s Division of Enforcement Clarifies Cooperation Advisory With Respect to the Attorney-Client and Work-Product Privileges (Mar. 1, 2007), <http://www.cftc.gov/PressRoom/PressReleases/pr5296-07> (“The [CFTC] Division of Enforcement issued amendments to its 2004 Enforcement Advisory on Cooperation to clarify that the factors contained in the Advisory are meant to encourage strong cooperation among parties in enforcement discussions without eroding the protections of the attorney-client or work product privileges.”).

²⁴ See 2017 CFTC Advisory for Companies, *supra* note 2, at 7.

²⁵ 2017 CFTC Advisory for Individuals, *supra* note 3, at 2–4.

²⁶ See Press Release, CFTC, CFTC Announces Whistleblower Award of More Than \$10 Million (Apr. 4, 2016), <http://www.cftc.gov/PressRoom/PressReleases/pr7351-16>.

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Section has recently begun offering companies up to a 50 percent reduction off the low end of the applicable U.S. Sentencing Guidelines fine range in exchange for meeting certain criteria, including voluntary self-disclosure of misconduct.²⁷ Companies who cooperate but do not self-disclose, on the other hand, are only eligible for a 25 percent reduction under the terms of this program.²⁸ Similarly, the European Commission offers standardized reductions in fines for companies that provide information about cartels, with the first companies to report receiving the

largest reductions.²⁹ Thus, while the CFTC's new guidance is helpful to companies and individuals in knowing what factors the Division will look to in assessing the extent of their cooperation, this in some ways puts the proverbial cart before the horse. Until an entity knows with greater certainty what benefit it can expect to receive in return for self-reporting information to the CFTC, the utility and effectiveness of this new guidance will naturally be limited.

²⁷ See Memorandum from Andrew Weissmann, Chief, Fraud Section, Criminal Div., U.S. Dep't of Justice, to Heads of Dep't Components & All U.S. Attorneys, *The Fraud Section's Foreign Corrupt Practices Act Enforcement Plan and Guidance*, at 8–9 (Apr. 5, 2016), <https://www.justice.gov/criminal-fraud/file/838416/download> (describing how defendants can receive reductions to their U.S. Sentencing Guidelines ranges in exchange for different levels of cooperation).

²⁸ See *id.* at 8.

²⁹ According to this policy, the first company involved in a cartel to provide "significant added value" to an investigation into a cartel receives a fine reduction of between 30–50%. The second company to provide "significant added value" regarding the same cartel receives a 20–30% reduction. Subsequent companies providing evidence are only eligible for, at most, a 20% reduction. See Commission Notice on Immunity from fines and reduction of fines in cartel cases, 2006 O.J. (C 298) 17, 20.