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Division of
Enforcement

ENFORCEMENT ADVISORY

Cooperation Factors in Enforcement Division Sanction Recommendations for Companies

The U.S. Commodity Futures Trading Commission (“CFTC” or “Commission”) has long given credit to companies who cooperate in the Commission's investigations and enforcement actions.¹ Cooperation by companies² can contribute significantly to the agency's mission by enhancing the Commission's ability to detect and pursue violations of the Commodity Exchange Act (“Act”) or Commission Regulations. More specifically, it can increase the effectiveness and efficiency of the Commission's investigations and provide the Commission with important evidence in its enforcement actions. To assist companies who want to cooperate with the Commission, the Division of Enforcement (“Division”) sets forth here factors that the Division considers in assessing cooperation by companies which may be or have been charged by the Commission with violating the Act or its Regulations.³ The purpose of this Advisory is to assist them and their counsel in assessing possible settlement positions and litigation risks.

The Division looks for more than ordinary cooperation or mere compliance with the requirements of law. In particular, the Division looks to what a company voluntarily does, beyond what it is required to do. Recognition for cooperation is most likely to be given to a company for conduct that is sincere, robustly cooperative, and indicative of a willingness to accept responsibility for the misconduct, where appropriate. The Division considers three broad policy issues in its assessment of whether cooperation was provided and the quality of that cooperation: (1) the value of the company's cooperation to the Division's investigation(s) and enforcement actions; (2) the value of the company's cooperation to the Commission's broader law enforcement interests; and (3) the balancing of the level of the company's culpability and history of prior misconduct with the acceptance of responsibility, mitigation and remediation. The rewards for cooperation by companies can range from the Division recommending no

¹ 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 (November 1, 1994).

² “Company” as used herein means any type of business entity except for a sole proprietorship.

³ In August 2004, the Division issued an Enforcement Advisory, which outlined factors considered in evaluating cooperation by a company. In March 2007, DOE issued an amended Enforcement Advisory, which added clarification regarding the attorney-client and work product privileges. This Enforcement Advisory is intended to update and replace the 2007 Advisory.

enforcement action to recommending reduced charges or sanctions in connection with enforcement actions.

The following are factors that the Division may consider, on a discretionary basis, when determining whether a company has cooperated, the quality of that cooperation and what credit, if any, should be awarded to the company for such cooperation with such factors being considered in the context of the unique facts and circumstances of each case.

I. The Value of the Company's Cooperation to the Commission's Investigation(s) or Enforcement Action(s)

The Division may assess the value of the company's cooperation and assistance to the Commission's investigation(s) or enforcement action(s) by considering, among other things—

- A. Material Assistance.** Whether the company's cooperation resulted in material assistance to the Commission's investigation(s) and enforcement action(s) and the success thereof.
- B. Timeliness.** The timeliness of the company's initial cooperation, such as whether-
 - 1. the company quickly made appropriate disclosure of the misconduct and notified the Division;
 - 2. the company was first to report the misconduct to the Commission or to offer its cooperation in the investigation(s) and enforcement action(s);
 - 3. the cooperation was provided before the company had any knowledge of a pending investigation or enforcement action; and
 - 4. the investigation(s) and enforcement action(s) were initiated based on information or other cooperation provided by the company.
- C. Nature.** The nature of the company's cooperation, including—
 - 1. whether the cooperation was truthful, specific, complete, and reliable;
 - 2. the means by which the company uncovered the misconduct;
 - 3. whether the company independently investigated the misconduct before and/or during any Division investigation;
 - 4. whether the cooperation was voluntary or required by the terms of an agreement with another law enforcement or regulatory organization;
 - 5. whether the company encouraged high-quality cooperation of all its directors, officers and employees, including their provision of complete and truthful sworn statements and testimony during the investigation or in any related enforcement litigation or proceeding to which the Commission is a party; and

6. the various types of assistance provided.

D. Quality. The quality of the company's cooperation, including whether the company provided ongoing, extensive, timely, and meaningful cooperation and assistance. For example, whether—

1. the company promptly met with Division staff to review and explain the known facts about the misconduct, including all relevant facts relating to individuals responsible for the misconduct;
2. the company willingly used all available means to:
 - a. preserve relevant information under the company's appropriate control, including documents and electronically stored information ("ESI") as kept in the normal course of business;
 - b. make employee testimony or other relevant corporate documents, ESI, and data available in a timely manner (and in compliance with the Commission's Data Delivery Standards whenever possible);
 - c. explain transactions and interpret key information;
 - d. provide a financial analysis of its gain from the unlawful activities; and
 - e. enable it to respond quickly to requests and subpoenas for information, including, to the extent necessary, hire or designate adequate staff and resources.
3. to the extent that the company independently investigated the misconduct, the investigation was conducted meaningfully, in good faith, and in a manner designed to uncover all relevant facts, such as, for example, by:
 - a. using an independent entity where appropriate to investigate and report on the misconduct;
 - b. identifying, securing, and reviewing potentially relevant documents and data; and
 - c. seeking to identify all responsible individuals.
4. the company outlined findings and relevant evidence regarding the misconduct, and produced full and complete reports of any internal investigations to the Division, including full disclosure of the:
 - a. scope of the wrongdoing;
 - b. identities of individual wrongdoers within the organization, including culpable senior executives, where applicable;
 - c. identities of known or suspected wrongdoers outside of the

organization, where applicable;

- d. all relevant facts about individual wrongdoers, including:
 - i. relevant communications involving officers, directors, and employees; and
 - ii. documents and data evidencing the misconduct;
- e. steps taken upon learning of the misconduct;
- f. processes followed to ferret out necessary information; and
- g. measures taken to address and ameliorate the misconduct.

II. The Value of the Company's Cooperation to the Commission's Broader Law Enforcement Interests

The Division may assess the value of the company's cooperation in the investigation(s) and action(s) to the Commission's broader programmatic interest in enforcing the Commodity Exchange Act and Regulations, by considering, among other things—

- A. **Encouragement.** The degree to which appropriate cooperation credit in the company's particular instance encourages high-quality cooperation from other entities.
- B. **Importance of the Investigation(s) and Action(s).** The nature of the investigation(s) and action(s), including-
 - 1. whether the subject matters of the investigation(s) and action(s) are a Commission priority;
 - 2. whether the reported misconduct involves regulated entities or fiduciaries;
 - 3. whether the company exposed an industry-wide practice;
 - 4. the type, age, duration and egregiousness of the misconduct; and
 - 5. the harm or potential harm caused by the particular type of misconduct, including danger to others.
- C. **Resources Conserved.** The time and resources conserved as a result of the company's cooperation in the investigation(s) and enforcement action(s).
- D. **Enhancement.** The extent to which cooperation credit otherwise enhances the Commission's ability to detect and pursue violations of the Act and Regulations.

III. The Company's Culpability, Culture, and Other Relevant Factors

In assessing the appropriate level of cooperation credit for a company, the Division may

take into account the company's relative culpability in connection with the misconduct being investigated or charged, the company's culture, and other company-specific factors including, among other things—

A. Circumstances of the Misconduct. The Division may assess the circumstances of the misconduct, by considering, for example—

1. the number of instances of misconduct, the duration of misconduct, and the isolated, repetitive, or ongoing nature of the misconduct;
2. the levels of the organization at which the misconduct occurred, particularly whether the misconduct arose at or involved senior and/or supervisory levels of the company;
3. how long the misconduct lasted after supervisors learned of it;
4. how the misconduct was addressed (or not) under compliance policies in place at the time of the misconduct;
5. to what extent the company or the directors, officers or employees benefitted, financially or otherwise, from the misconduct;
6. the egregiousness of any misconduct; and
7. the level of intent, for example, whether the misconduct was inadvertent, negligent, reckless, intentional, or willful.

B. Prior Misconduct. Including prior violations of the Act and Regulations or similar conduct charged as violations of other federal or state statutes.

C. Mitigation. Whether the company took available actions to mitigate any losses caused by the misconduct.

D. Remediation. Whether the company engaged in meaningful remedial efforts to prevent future wrongdoing. For example, whether the company—

1. took immediate steps to address the misconduct and implement an effective response to it;
2. provided sufficient, credible assurances to the Division that the conduct is unlikely to recur;
3. implemented additional internal controls, procedures, and oversight, or took other reasonable steps targeted and specific to the misconduct at issue, in order to reduce the likelihood of recurrence of the misconduct;
4. provided an explanation of how such additional measures would have addressed the specific misconduct at issue, had they been in place at the

time of the misconduct;

5. implemented measures intended to anticipate and avoid similar, even if not identical, misconduct in the future (e.g., in different divisions, specialties, product lines, or groups across the organization);
6. adequately addressed the employment of the persons responsible for the misconduct, to the extent they were employed by the company when the conduct was discovered, including supervisors overseeing areas in which misconduct occurred.

E. Acceptance of Responsibility. Whether the company has admitted or otherwise demonstrated an acceptance of responsibility for its past misconduct.

IV. Uncooperative Conduct

Even when a company can demonstrate that other factors identified herein warrant credit for cooperation, certain actions by the company or its counsel may limit or offset the credit a company might otherwise receive. For example, if a company, while purporting to cooperate or taking certain cooperative steps, engages in conduct that actually impedes the Division's investigation or inappropriately consumes government resources, the Division may conclude that the company's cooperation does not warrant credit.⁴ Uncooperative conduct includes, among others, such things as:

- A.** failing to respond to requests and subpoenas for documentary information and testimony in a complete and timely manner;
- B.** misrepresenting or minimizing the nature or extent of the company's misconduct;
- C.** claiming that information is not available when it is;
- D.** failing to preserve relevant information under the company's appropriate control, including documents and ESI as kept in the normal course of business, and/or to produce such information;
- E.** directing company counsel or others to limit Division staff access to employees;
- F.** inappropriately advising or directing employees or their counsel not to cooperate fully or openly with the investigation;
- G.** engaging in evasive, misleading or obstructive conduct during investigative testimony, interviews, or otherwise interfering in any other part of the investigation(s) or action(s);

⁴ Additionally, uncooperative conduct may subject the entity to criminal penalties for providing false information (18 U.S.C. § 1001), providing false information to the Commission in violation of Section 6(c)(2) of the Commodity Exchange Act (7 U.S.C. § 9), contempt (18 U.S.C. §§ 401-402), perjury (18 U.S.C. § 1621), making false statements or declarations in court proceedings (18 U.S.C. § 1623) and/or obstructing justice (18 U.S.C. § 1503 et seq.).

- H.** providing specious explanations for instances of misconduct that are uncovered;
- I.** issuing questionnaires to employees or conducting interviews that offer suggestive responses;
- J.** providing employees or former employees access to corporate documents or data beyond what those individuals would have been privy to in the course of their employment;
- K.** failing to search computer hard drives properly for documents, data, and electronic images; and
- L.** failing to comply with CFTC Data Delivery Standards.

A company's conduct in response to a Commission investigation can also be deemed uncooperative even in the absence of any unnecessary expenditure of government resources. For example, if a company turned a blind eye to warnings or indications that its employees had acted in violation of the law and failed to report such warnings to the Commission, the conduct can reduce the credit the Division would be willing to recommend. Similarly, if a company has seen or received indications of wrongdoing, but waited for a governmental inquiry to take action to uncover ongoing misconduct, such inaction may suggest to the Division that the company has little interest in recognizing and taking responsibility for its misconduct.

V. Attorney-Client Privilege and Work Product Protections

With these cooperation factors in mind, the Division recognizes that the attorney-client privilege and the work product doctrine are fundamental to the American legal system and the administration of justice. These rights are no less important for an organizational entity than for an individual. The Division further recognizes that these protections can promote a client's communications with counsel and thereby serve to promote the client's compliance with the law. These rights are not intended to be eroded or heightened by this advisory. Moreover, actions by an entity recognizing the legal rights of its employees are not inconsistent with these factors.

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The Division's assessment of cooperation in any matter is a discretionary function of the Division's Director and staff and requires a case-by-case analysis of the specific facts and circumstances of each matter. Nothing in this Advisory should be deemed to oblige the Division or the Commission to consider one or more cooperation factors, or to give certain factors more weight than others. The Advisory also should not be read as requiring the Division staff to recommend, or the Commission to impose or authorize, a reduction of sanctions based on the presence or absence of particular cooperation factors. Further, nothing in the Advisory is intended to waive any pre-decisional or other privileges that may apply to the Commission's or Division's deliberations or decision-making regarding cooperation or otherwise.