U.S. COMMODITY FUTURES TRADING COMMISSION
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CFTC Staff Advisory
Market Participants Division
Division of Clearing and Risk
Division of Market Oversight
Division of Enforcement

Staff Advisory on Materiality or Other Criteria That Operating Divisions Will Use to Determine Referrals to the Division of Enforcement

The Market Participants Division ("**MPD**"), the Division of Clearing and Risk ("**DCR**"), and the Division of Market Oversight ("**DMO**", together the "**Operating Divisions**"), and the Division of Enforcement ("**DOE**") of the Commodity Futures Trading Commission ("**CFTC**" or "**Commission**"), are issuing this advisory ("**Advisory**") to further the implementation of the DOE recent advisory addressing self-reporting, cooperation, and remediation ("**DOE Advisory**").[1] Specifically, the Divisions are issuing this Advisory to provide guidance on the materiality or other criteria that the Divisions will use to determine whether to make a referral to DOE for self-reported violations, or supervision or non-compliance issues.

I. Background

The DOE Advisory included guidance on, among other things, how DOE staff will evaluate self-reporting, cooperation, or remediation by a registrant or registered entity[2] when recommending an investigation or enforcement action to the Commission, including the factors

[1] *See* CFTC Enforcement Advisory: Advisory Regarding Self-Reporting, Cooperation, and Remediation (Feb. 25, 2025), https://www.cftc.gov/media/11821/EnfAdv_Resolutions022525/download.

[2] *See* 17 C.F.R. § 1.3 (defining "registered entity" to include a board of trade designated as a contract market under section 7 of the Commodity Exchange Act ("Act"); a derivatives clearing organization registered under section 7a-1 of the Act; a swap execution facility registered under section 7b-3 of the Act; and a swap data repository registered under section 24a of the Act.); *see also id.* (defining "registrant" as "a commodity pool operator; commodity trading advisor; futures commission merchant; introducing broker; leverage transaction merchant; floor broker; floor trader; major swap participant; retail foreign exchange dealer; or swap dealer that is subject to these regulations; or an associated person of any of the foregoing other than an associated person of a swap dealer or major swap participant."). The Act is available at 7 U.S.C. § 1 *et seq*.

DOE staff will consider in evaluating whether to reduce the proposed civil monetary penalties in enforcement actions where there has been self-reporting, cooperation, or remediation.

Consistent with the Commission's regulatory scheme, the DOE Advisory permits registrants and registered entities to self-report a potential violation to the appropriate Operating Division (the "Appropriate Division")[3] responsible for the interpretation and application, as well as ongoing monitoring and oversight, of the particular provision of the Act or Commission regulation that is the subject of the potential violation. This represents a new approach to self-reporting, as historically DOE would generally only give credit for self-reports that were made directly to DOE.[4]

In order to provide registrants and registered entities with fair notice and greater transparency, the Divisions are issuing this Advisory to provide guidance on the materiality or other criteria that the Operating Divisions will use to determine whether to make a referral to DOE.

II. Enforcement Referrals and Recommendations from the Operating Divisions

The Operating Divisions may refer violations that are material to DOE, for example those that involve harm to clients, counterparties or customers, or members or participants, as applicable; harm to market integrity; or significant financial losses. Registrants and registered entities should use their own judgment to determine whether it is appropriate to self-report a material violation – particularly involving fraud, manipulation, or abuse – directly to DOE in the first instance, rather than to the Operating Divisions.

The Operating Divisions will address supervision or non-compliance issues[5] that are not material directly with the registrant or registered entity without referral to DOE. In the Operating Divisions' view, this approach should facilitate open and transparent engagement by registrants and registered entities with the Operating Divisions to more effectively fulfill the Commission's oversight responsibilities and identify emerging issues, risks, or trends earlier.

Accordingly, the Operating Divisions will only make a referral to DOE for a material supervision issue or material non-compliance issue. To determine the materiality of a supervision or non-compliance issue, such as an issue involving a registrant or registered entity's supervisory system or controls, risk management program, compliance program, or other system or program to achieve compliance with the Act or Commission regulation, an Appropriate Division will apply

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[3] *See* DOE Advisory, *supra* note 1, at 4 (defining "Appropriate Division" as the operating division that is the "primary division" and "responsible for the interpretation and application of each regulation, as applicable, that is the subject of the potential violation."). The Division of Data ("**DOD**") is not an Operating Division that would make a referral to DOE; rather, DOD must consult with an Appropriate Division, who will then determine whether to make a referral to DOE.

[4] *See* DOE Advisory at 2.

[5] For a registrant, a supervision or non-compliance issue may involve a potential violation of regulation § 166.3, 17 C.F.R. § 166.3, or section 4s(h)(1)(B) of the Act, 7 U.S.C. § 6s(h)(1)(B); regulation § 23.602, 17 C.F.R. § 23.602, as applicable. In the past, charges of failure to diligently supervise in Commission administrative orders have frequently involved technical or operational issues.

a reasonableness standard to the following criteria, with consideration of a registrant or registered entity's size, activity, and complexity: (1) especially egregious or prolonged systematic deficiencies or material weakness of the supervisory system or controls, or program;[6] (2) knowing and willful misconduct by management, such as conduct evidencing an intent to conceal a potential violation, or supervision or non-compliance issue; (3) or lack of substantial progress towards 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 regarding the lack of substantial progress. The mere failure to meet, or extension of, a deadline for corrective action or remediation plan, on its own, will not be sufficient for a referral to DOE.

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This Advisory is not intended to, does not, and may not be relied upon to create any rights, substantive or procedural, enforceable by law by any party in any matter. Further, this Advisory is not intended to, does not, and may not be relied upon to create any new binding rules or regulations, or to amend existing rules or regulations. This Advisory represents only the views of the Divisions and does not necessarily represent the views of the Commission.

Questions concerning this Advisory may be directed to Thomas J. Smith, Acting Director, MPD, tsmith@cftc.gov; Richard Haynes, Acting Director, DCR, rhaynes@cftc.gov; Rahul Varma, Acting Director, DMO, rvarma@cftc.gov; Brian Young, Director, DOE, byoung@cftc.gov; or Dina Moussa, Special Counsel, MPD, dmoussa@cftc.gov.

Sincerely,

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Thomas J. Smith
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Richard Haynes

[6] Such issues are, in some circumstances, already required to be disclosed as a material non-compliance issue in an annual compliance report of a registrant or registered entity. *E.g.*, 17 C.F.R. § 3.3(e)(5). Generally, a single instance of an issue or failure involving a control or a technical or operational issue, is not a supervision or non-compliance issue that is material, or would constitute an inadequate supervisory system, unless it involves (1) widespread or potential widespread impact to the registrant or its clients, counterparties or customers, or to the registered entity or its members or participants, or to the markets, as applicable; or (2) a failure of the registrant or registered entity'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. The Divisions will consider the totality of the circumstances in applying these criteria.

Acting Director
Division of Clearing and Risk

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