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markets and market participants for potential unlawful conduct.² Finally, the Whistleblower Office also sits in the Division, and is responsible for administering the Whistleblower Program established under the CEA and Regulations. *See* Section 11 of the Manual (Whistleblower Program).

3.3 Overview of Division Enforcement Program

The Division may pursue, with the approval of a majority of the Commission, enforcement actions against individuals and companies whose conduct violates the CEA or the Regulations. The Division may file these enforcement actions either in federal court or in administrative proceedings.

The Division may obtain information relevant to its investigations through a number of avenues, including other CFTC Divisions, industry self-regulatory organizations, other governmental authorities, whistleblowers, victims, cooperating witnesses, self-reports, customer complaints, and members of the general public, as well as through the use of tools, means, and methods the Division has developed internally.

At the conclusion of an investigation, the Division may recommend that the Commission initiate administrative proceedings or seek injunctive and ancillary relief in federal court. Sanctions may include civil monetary penalties; the suspension, denial, revocation, or restriction of registration and trading privileges; and injunctions or cease-and-desist orders. In addition, the Division may recommend pursuing other remedies such as restitution or disgorgement.

When the Division obtains evidence that gives it reason to suspect criminal violations of the CEA may have occurred, it may refer the matter to the Department of Justice or the appropriate state authority for prosecution. Criminal activity involving commodity-related instruments can result in prosecution for criminal violations of the CEA and for violations of other federal criminal statutes, including mail fraud, wire fraud, and conspiracy.

3.4 Division Investigations

Authority: The statutory authority for the Division to conduct investigations into potential violations of the CEA or the Regulations is found in Sections 6(c)(5), 8(a)(1), and 12(f) of the CEA, 7 U.S.C. §§ 9, 15, 12(a)(1), 16(f). The authority to conduct investigations is delegated to the Director of the Division of Enforcement under Part 11 of the Regulations, 17 C.F.R. pt. 11. Additionally, Section 12(f) of the CEA, 7 U.S.C. § 16(f), authorizes the Division to conduct investigations on behalf of foreign futures authorities even if such investigations do not involve a violation of the CEA or the Regulations.

Investigative Powers: The Division has broad powers to conduct such investigations. These investigative powers include obtaining relevant information and evidence through, among other avenues:

² This Manual focuses on the Division's investigations and prosecutions of violations of the CEA and Regulations. The Division's Surveillance function is not addressed herein.

4.2 Sources

The Division receives leads from a wide variety of sources. Among the most significant sources of leads are those listed below.

4.2.1 Customer Complaints

Information provided by the public is an important source on which the Division relies for initiating and developing investigations of potentially unlawful activities. To assist the public in reporting possible violations, the Division has prepared a form, which appears on the CFTC website at <http://www.cftc.gov/ConsumerProtection/FileaTiporComplaint/index.htm> and may be submitted by email or mail.

4.2.2 Congress

The CFTC may receive complaints and other information from members of Congress on behalf of the constituents whom they represent. This information can produce new leads for the Division or information relating to an on-going investigation or litigation.

4.2.3 Market Surveillance

Suspicious activity discovered by Market Surveillance may be referred to the Division for investigation and prosecution of possible violations of the CEA and Regulations.

4.2.4 Data Analytical Tools

The Division also develops leads using data analytical tools developed internally, including by Market Surveillance, to identify suspicious activity that could indicate a violation of the CEA or Regulations.

4.2.5 Bank Secrecy Act Information

The Bank Secrecy Act (“BSA”), 31 U.S.C. §§ 5311–5332, is designed to prevent, detect, and prosecute international money laundering and the financing of terrorism. The BSA and related regulations require certain registrants to establish anti-money laundering (“AML”) programs, report suspicious activity in Suspicious Activity Reports (“SARs”), verify the identity of customers, and apply enhanced due diligence to certain types of accounts involving foreign persons.

BSA information can provide valuable leads in investigations.

4.2.6 Whistleblowers

The Division also relies on information from whistleblowers to uncover possible misconduct, as whistleblowers may possess intimate knowledge of a business’s inner workings or specialized market knowledge, often enabling the Division to conduct more efficient investigations. The CFTC’s Whistleblower Program provides monetary incentives and anti-retaliation protections to individuals who come forward to report to the CFTC possible violations of the CEA and the

Regulations. *See generally* 17 C.F.R. pt. 165. *See* Section 11 of the Manual (Whistleblower Program).

4.2.7 Cooperating Witnesses and Self-Reports

Under the Division’s cooperation and self-reporting programs, the Division may receive information about misconduct from individual cooperating witnesses or through voluntary self-reports by companies or individuals. This information could be used to generate new leads for the Division. *See* Section 7 of the Manual (Consideration of Cooperation, Self-Reporting, and Remediation).

4.2.8 National Futures Association

National Futures Association (“NFA”) is a self-regulatory organization whose members include CFTC registrants, commercial firms, and banks. NFA is responsible—under CFTC oversight—for certain aspects of the regulation of registrants, such as Futures Commission Merchants, Commodity Pool Operators, Commodity Trading Advisors, Introducing Brokers, Retail Foreign Exchange Dealers, Swaps Dealers, and their associated persons. NFA focuses primarily on CFTC registration and on the qualifications and proficiency, financial condition, retail sales practices, and business conduct of these futures professionals. NFA administers its own disciplinary program for violations of its rules by its members, and may refer information to the Division regarding potential violations of the CEA and the Regulations.

NFA maintains a database of registration and disciplinary history, as well as copies of registration applications, required notifications, and audit results. *See* <https://www.nfa.futures.org/basicnet/>. For additional information, see the NFA website, www.nfa.futures.org.

4.2.9 Self-Regulatory Organizations

Each registered entity, e.g., Designated Contract Market, Designated Clearing Organization, or Swap Execution Facility, is responsible for monitoring its respective markets and taking disciplinary actions for violations of its rules and regulations. When these self-regulatory organizations (“SROs”) discover potentially illegal activities that fall outside the scope of their regulatory authority or that also violates the CEA or the Regulations, they may refer such activities to the Division. At times, the SRO and the Division may engage in parallel investigations and disciplinary/enforcement actions. In addition, each SRO maintains records that could be relevant to an enforcement investigation.

4.2.10 Other Federal, State, or Local Governmental Agencies

When other federal, state or local government agencies discover potentially illegal activity that might fall within the CFTC’s jurisdiction, they may refer the matter to the Division. The Division can seek and gain access to their files. When their jurisdiction overlaps the jurisdiction of the CFTC, the Division and the other governmental authorities may initiate parallel enforcement efforts. *See* Section 8.1 of the Manual (Domestic Cooperative Enforcement).

5.3 Statute of Limitations and Tolling Agreements

Title 28 U.S.C. § 2462 states that “[e]xcept as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon.” Some courts have held that the five-year statute of limitations in § 2462 applies to certain claims brought by the CFTC under the CEA and the Regulations. The statute of limitations is an affirmative defense that is waived if it is not raised in timely fashion, or may be waived by agreement.

If there is a potential statute of limitations issue, Division staff may ask the potential defendant or respondent to sign a “tolling agreement.” By signing a tolling agreement, the potential defendant or respondent agrees to the suspension of the running of any statute of limitations period for an agreed upon length of time. The use of a tolling agreement in a particular matter must be approved by the Director or a Deputy who also must sign the tolling agreement. Division staff should consult with OCC concerning any statute of limitations or tolling agreement issues that arise.

5.4 Obtaining Information – In General

5.4.1 Voluntary Statements and Productions

Division staff may obtain documents or statements from any person or entity willing to provide them voluntarily. In preparing to take a statement from a witness, Division staff consider whether to take the statement as part of an interview or in the form of voluntary testimony recorded by an official reporter. The taking of non-subpoenaed voluntary testimony recorded by an official reporter is governed by Part 11 of the Regulations, 17 C.F.R. pt. 11. *See* Section 5.10 of the Manual (Investigative Testimony). Staff provide the Statement to Persons Providing Information about Themselves to the CFTC to any witness providing information about themselves. *See* Section 9.5 of the Manual (Statement to Persons).

5.4.2 Use of Compulsory Process / Formal Order of Investigation

The CFTC’s power to subpoena testimony and documents in connection with its investigatory proceeding derives from Section 6(c)(5) of the CEA, 7 U.S.C. § 9(5). That provision, in pertinent part, states:

[F]or the purpose of any investigation . . . under this Act, and for the purpose of any action taken under section 12(f), any member of the Commission . . . or other officer designated by the Commission . . . may administer oaths and affirmations, subpoena witnesses, compel their attendance, take evidence, and require the production of any books, papers, correspondence, memoranda, or other records that the Commission deems relevant or material to the inquiry.

Id. Pursuant to Section 6(c)(6) of the CEA, the Commission can require the attendance of subpoenaed witnesses or the production of subpoenaed records “from any place in the United

5.9 Sworn Investigative Testimony

5.9.1 General Provisions Regarding Investigative Testimony

Part 11 of the Regulations, 17 C.F.R. pt. 11, governs the taking of sworn investigative testimony. Those regulations address matters such as the rights of witnesses, access to transcripts, oaths and false statements, and the possible sequestration of witnesses or counsel.

Regarding the right to counsel in particular, Regulation 11.7(c)(1), 17 C.F.R. § 11.7(c)(1), provides as follows:

(c) Right to counsel. A person compelled to appear, or who appears in person by request or permission of the Commission or its staff during an investigation, may be accompanied, represented, and advised by counsel. Subject to the provisions of §11.8(b) of this part, he may be represented by any attorney-at-law who is admitted to practice before the highest court in any State or territory or the District of Columbia, who has not been suspended or disbarred from appearance and practice before the Commission in accordance with the provisions of part 14 of this title, and who has not been excluded from further participation in the particular investigatory proceeding for good cause established in accordance with paragraph (c)(2) of this section.

(1) The right to be accompanied, represented and advised by counsel shall mean the right of a person testifying to have an attorney present with him during any aspect of an investigative proceeding and to have this attorney advise his client before, during and after the conclusion of such examination. At the conclusion of the examination, counsel may request the person presiding to permit the witness to clarify any of his answers that may need clarification in order that his answers not be left equivocal or incomplete on the record. For his use in protecting the interests of his client with respect to that examination counsel may make summary notes during the examination.

Any person making false statements under oath during the course of a Commission investigation is subject to the criminal penalties for perjury in 18 U.S.C. § 1621. Any person who knowingly and willfully makes false or fraudulent statements, whether under oath or otherwise, or who falsifies, conceals or covers up a material fact, or submits any false writing or document, knowing it to contain false, fictitious or fraudulent information, is subject to the criminal penalties set forth in 18 U.S.C. § 1001. In addition, Section 6(c)(2) of the CEA, 7 U.S.C. § 9(2), states:

It shall be unlawful for any person to make any false or misleading statement of a material fact to the Commission, including in any registration application or any report filed with the Commission under this chapter, or any other information relating to a swap, or a contract of sale of a commodity, in interstate commerce, or for future delivery on or subject to the rules of any registered entity, or to omit to state in any such statement any material fact that is necessary to make any

statement of a material fact made not misleading in any material respect, if the person knew, or reasonably should have known, the statement to be false or misleading.

Accordingly, any person making false or misleading statements of material fact to the Division during investigative testimony violates the CEA, and may be subject to enforcement action and imposition of civil penalties and other relief.

Before any substantive questioning, the witness should be provided the appropriate “Statement to Persons Providing Information about Themselves to the CFTC” with the applicable perjury, false statements, and Privacy Act warnings, along with provisions addressing a witness’s right to counsel and other matters relating to her or his testimony. *See* Section 9.5 of the Manual (Statement to Persons).

5.9.2 Background Questionnaires

Division staff may use a background questionnaire in advance of testimony in order to expedite the taking of testimony. The questionnaire solicits certain personal information from the witness, including, among other things, the witness’s date and place of birth, the names and account numbers for all commodity interest and other financial accounts, a list of all educational institutions attended and degrees received, and an employment history. The information solicited in the background questionnaire is routinely otherwise asked for in testimony.

The witness is not required as a matter of law to comply with the staff’s request to complete the background questionnaire. Disclosure of the information is voluntary on the witness’s part. There are no sanctions and thus no effects for failing to provide all or any part of the requested information. However, this information may then be asked for in testimony. If the witness chooses to provide a background questionnaire, Division may examine the witness about the document and have it entered as an exhibit to investigative testimony.

5.9.3 Witness Assertions of the Right Against Self-Incrimination and Other Refusals To Provide Testimony

If a witness is appearing voluntarily, the staff cannot compel the witness to answer any questions. A witness appearing to testify pursuant to a subpoena is compelled to testify, but may refuse to answer questions by invoking her or his right against self-incrimination. Regulation 11.7(d)(1), 17 C.F.R. § 11.7(d)(1), provides as follows:

Except as provided in paragraph (d)(2) of this section [regarding immunity], a witness testifying or otherwise giving information in an investigation may refuse to answer questions on the basis of the right against self-incrimination granted by the Fifth Amendment of the Constitution of the United States.

See Section 9.1.3 of the Manual (The Fifth Amendment Privilege Against Self-Incrimination). Other grounds for refusal to answer questions may include asserting various evidentiary or testimonial privileges. *See* Section 9.1 of the Manual (Preservation and Assertion of Privileges).

However, if an assertion of the right against self-incrimination or other privileges is not valid, a witness may be subject to subpoena enforcement proceedings in federal court to obtain the information. *See* Section 5.4.2.2 of the Manual (Subpoena Enforcement Action). Division staff ordinarily require the person taking the Fifth Amendment to do so on the record in response to specific questions.

5.9.4 Going “Off the Record”

Division staff taking investigative testimony control the record. The purpose of taking testimony is to make a record of what the witness says. Thus, as a general rule, Division staff keep discussions with the witness or counsel on the record. If a witness desires to go off the record, the witness must indicate this to Division staff taking the testimony, who will then determine whether to grant the witness’s request.

If Division staff agree to go “off-the-record,” staff typically summarize any substantive “off-the-record” conversations when the record is reopened. If no such discussions occurred, the fact that no substantive discussions concerning the matter occurred is made on the record.

5.9.5 Transcript Availability

Regulation 11.7(b), 17 C.F.R. § 11.7(b), provides that a witness is entitled to retain or procure (upon payment of the appropriate fees) a copy or transcript of her or his own testimony, unless the Commission has “good cause” to limit the request, in which case the witness may only inspect the official transcript of her or his testimony. The decision to grant or deny a witness a copy of the transcript of her or his investigative testimony shall be made by the staff attorney conducting the investigation in consultation with, and with the approval of, her or his immediate supervisor and Deputy.

5.10 Litigation Holds and Preservation Demands

At certain times, Division may need to ensure preservation of records for litigation with respect to records held within the CFTC and records held by third parties.

A “litigation hold” is a directive to witnesses and document custodians at the CFTC to preserve documents (including electronically stored information (“ESI”)) and any other information relevant to litigation or potential litigation. Failure to preserve relevant documents and information can result in court sanctions in litigation. Division staff issue litigation holds to anyone at the CFTC who possesses, at that time, relevant records and information, and also to any individuals who later become involved in the matter.

A preservation letter may be delivered to third parties that may have relevant documents or information during the preliminary inquiry or investigation phase of an enforcement matter, as well as in litigation. Division staff may make follow-up inquiries on those demands, seeking assurances that they are being complied with along with explanations of the steps being taken to ensure such compliance.

parte relief in federal court pursuant to Section 6c of the CEA, 7 U.S.C. § 13a-1, and in accordance with Rule 65 of the Federal Rules of Civil Procedure. Under Section 6c of the CEA, the CFTC may seek an ex parte restraining order: (1) prohibiting any person from destroying, altering or disposing of, or refusing to permit authorized representatives of the CFTC to inspect, when and as requested, any books and records or other documents; (2) prohibiting any person from withdrawing, transferring, removing, dissipating, or disposing of any funds, assets, or other property; and (3) appointing a temporary receiver to administer such restraining order. *Id.*

The Division may request additional temporary relief, such as orders for an accounting and repatriation of assets held overseas, when seeking a restraining order on notice or a preliminary injunction.

6.2.5.1 Issues Related to Foreign-Held Assets

When staff suspects that a defendant in a civil enforcement action is maintaining assets abroad, a provision should be added to the proposed restraining order or preliminary injunction that freezes property under the court's control wherever the property is located. A federal district court with personal jurisdiction over a party has the authority to freeze all assets under that party's control, even if held in a foreign country. In some jurisdictions, the foreign regulator has the power to freeze assets on behalf of a counterpart regulator (such as the CFTC) under certain circumstances. *See also* Section of the Manual 8.2.1.1 (Assistance from Foreign Authorities).

6.3 Ongoing Investigation During Related Litigation

Division Staff may continue to investigate and issue investigative subpoenas pursuant to a Commission order of investigation while simultaneously litigating a related civil enforcement action if there is an independent, good-faith basis for the continued or related investigation. An independent, good-faith basis may include the possible involvement of additional persons or entities in the violations alleged in the complaint or related thereto, or additional potential violations by one or more of the defendants in the litigation. However, staff may not use such subpoenas solely to conduct discovery for pending litigation.

6.4 Discovery in Enforcement Actions

In federal court enforcement cases, the Federal Rules of Civil Procedure set out the general rules for discovery and specific procedures for production of relevant factual information to parties in litigation. In CFTC administrative enforcement cases, Part 10 of the Regulations, 17 C.F.R. pt. 10, entitled the "Rules of Practice," sets out the provisions regarding disclosure of information to respondents.

6.5 Settlement

6.5.1 Settling an Administrative Enforcement Proceeding or Amending a Commission Order Accepting an Offer of Settlement

Administrative enforcement proceedings can only be settled by order of the Commission. *See* Section 3.6 of the Manual (Commission Authorization). Further, Commission settlement orders can only be amended by further order of the Commission. *Id.* The Division recommends the

settlement of an administrative complaint, or the amendment of a settlement, by circulating a memorandum setting forth the reasons for the recommendation as well as a recommended order, and attaching the respondent's offer of settlement. *Id.*

6.5.2 Settling a Civil Injunctive Action or Amending a Consent Order Previously Approved by the Commission

Commission authorization is required to settle a civil injunctive case in federal district court, or to amend a Consent Order previously authorized by the Commission. *See* Section 3.6 of the Manual (Commission Authorization). Similar to an administrative enforcement proceeding, a memorandum ordinarily must be sent to the Commission. *Id.*

6.5.3 Settlement Conferences in Federal Court

During a civil injunctive proceeding, a district court may schedule a settlement conference and require attendance by parties possessing ultimate decision-making authority with respect to settlement. Because the Commission itself is the ultimate decision maker with respect to settlement offers in these proceedings, the Division must apprise the Court of the CFTC's structure, rules, and procedures in connection with settlements to determine how to proceed.

In particular, staff should notify the Court that, although the CFTC prosecutes actions through the Division, the Division does not possess independent settlement authority. Rather, the Division presents executed offers of settlement to the Commission with specific recommendations that any such offer be accepted or declined, and in the case of federal litigation, to grant the Division authority to enter into the proposed settlement. Counsel should then request that the Division be allowed to work within this administrative framework, and be allowed to participate in the settlement conference with a Division attorney possessing authority to negotiate the terms of a settlement, which the Division will affirmatively recommend the Commission accept. The Director, or her or his designee, must approve proposed settlement terms. Similar considerations apply in the case of court-ordered mediation.

6.5.4 Settlement Terms and Considerations

6.5.4.1 Settlement Terms – General

For purposes of discussing proposed settlement terms for recommendation to the Commission, the Division may consider any of the monetary and remedial relief available in civil injunctive actions and administrative proceedings, respectively. *See* Section 6.2.1 of the Manual (Civil Injunctive Actions in Federal Court), Section 6.2.2 of the Manual (Administrative Enforcement Proceedings), Section 6.8.1 of the Manual (Civil Monetary Penalty Guidance).

6.5.4.2 Financial Analysis of Ability To Pay

Settlements of proposed or pending enforcement actions may include restitution, disgorgement, and a civil monetary penalty, in addition to an injunction (or cease-and-desist order) and ancillary relief. If a respondent or defendant claims either a partial or total inability to pay, Division staff will confirm this information, and ascertain the maximum amount that can be paid

impose a civil penalty as part of a proposed settlement. The CFTC typically requires a respondent or defendant settling with the CFTC to waive any and all claims under SBREFA.

6.6 Appeals of Orders

Appeals in CFTC enforcement actions are handled differently depending on whether they arise in administrative proceedings or federal court litigation.

6.6.1 Appeals in Administrative Proceedings

OCC represents the Division in initiating or responding to appeals from initial decisions in administrative enforcement proceedings. In administrative proceedings, appeals are taken to the Commission. After the Commission issues its decision, the respondent may appeal to the United States Court of Appeals for the circuit in which he or she is doing business. 7 U.S.C. § 9. Appeals to a Court of Appeals are handled by OGC.

6.6.2 Appeals in Federal Court Litigation

OGC represents the CFTC in initiating and responding to appeals taken from all United States District Court decisions. Affirmative appeals of a ruling adverse to the CFTC require Commission approval. After an appealable order or judgment is entered in a civil injunctive action, the responsible Division staff and OCC coordinate with OGC regarding, in the case of an affirmative appeal, whether to recommend that the Commission authorize appeal of an adverse ruling, and in the case of a defendant's appeal, how to respond.

6.7 Receivers

In appropriate circumstances, a court-appointed receiver can maximize restitution for injured customers. A receiver can do this through a number of avenues, including by seizing control of and managing a business, marshaling assets held in domestic and foreign financial institutions and other third parties, liquidating receivership assets through auctions or other sales, initiating actions against third parties, negotiating with third parties and creditors to limit the depletion of assets, taking responsibility for filings required under state and federal tax law, and providing the court with an independent perspective on the receivership defendant's operation, receipts, and expenditures. The CFTC typically recommends the appointment of receivers in cases where the defendants have engaged in fraud or are otherwise not competent to manage assets. However, a receiver may not be appropriate in every case, and the decision whether to seek appointment of a receiver requires careful analysis of the specific facts and circumstances present. Division staff typically nominate one or more potential receivers, with ultimate selection and appointment made by the Court. Division staff are also responsible for monitoring the activities and effectiveness of a receiver.

6.7.1 Monitoring Receivers and Their Fee Petitions

6.7.1.1 In General

Division staff should monitor receivers to encourage them to perform their duties in a diligent and cost-effective manner. To that end, Division staff should maintain regular contact with the

receiver to, among other things, ensure that the receiver is focused on the case and diligently pursuing assets, and promptly provide the receiver with new information that will assist the receiver in discharging her or his duties (such as discovery responses regarding a defendant's assets).

The proposed order appointing the receiver typically will require the receiver to file periodic reports and keep written records itemizing receipts and expenditures of the receivership estate. These accounts should be open to inspection by the CFTC.

6.7.1.2 Fee Petitions

The district court appointing a receiver has discretion over who will pay the costs of the receiver. Typically, however, receiver fees and expenses are paid out of funds controlled by the receiver and any compensation plan proposed to the court should provide this.

To help ensure that fees are reasonable and thus do not deplete the pool of frozen assets, Division staff should address compensation in the proposed order appointing the receiver. The order should create a billing procedure that requires court approval of all fees and costs, permits the receiver to be compensated only for those services that benefit the estate, and requires the receiver to provide detailed monthly billing statements to the court and the CFTC.

Division staff should review the receiver's fee applications and raise concerns regarding fee petitions directly with the receiver, and staff should explore ways to reduce fees and expenses before the petition is filed with the court.

6.8 Civil Monetary Penalties

The Division may obtain civil monetary penalties among other forms of relief, in both administrative and district court proceedings. Other remedies and monetary relief available in Commission enforcement proceedings include restitution and disgorgement, statutory disqualification from registration, bans on certain forms of trading, bans on registration with the Commission, as well as other appropriate undertakings and equitable remedies. Division staff make recommendations to the Commission about appropriate remedies and monetary relief to impose or seek in particular matters.

6.8.1 Civil Monetary Penalty Guidance

Civil monetary penalties are imposed in enforcement proceedings to further the CEA's remedial purposes. The CEA authorizes civil monetary penalties for each violation of the CEA and Regulations, and it sets the maximum penalty per violation. *See* Sections 6(c)(10), 6b, and 6c(d) of the CEA, 7 U.S.C. §§ 9(10), 13a, 13a-1(d).⁶ Generally, penalties may be determined on a per violation basis or up to triple the monetary gain to the Respondent,⁷ whichever is greater. The

⁶ *See also* <https://www.cftc.gov/LawRegulation/Enforcement/InflationAdjustedCivilMonetaryPenalties/index.htm>.

⁷ The Commission brings charges against "respondents" in administrative enforcement actions before the Commission and against "defendants" in civil enforcement actions in U.S. District Courts. For purposes of Section 6.8.1 of the Manual (Civil Monetary Penalty Guidance), "Respondent" is used as a generic descriptor for a person charged.

These Advisories state that 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 cooperation to the Division's investigation and related enforcement actions; (2) the value of the cooperation to the Commission's broader law enforcement interests; and (3) the balancing of the level of culpability and history of prior misconduct with the acceptance of responsibility, mitigation, and remediation. The rewards for cooperation can range from the Division recommending no enforcement action to recommending reduced charges or sanctions in connection with enforcement actions.

7.1.2 Advisory on Self-Reporting and Full Cooperation

The Enforcement Advisory regarding on Self-Reporting and Full Cooperation⁹ is found at: <https://www.cftc.gov/sites/default/files/idc/groups/public/@lrenforcementactions/documents/legalpleading/enfadvisoryselfreporting0917.pdf>.

This Advisory supplements the above Advisories by providing additional information regarding voluntary disclosures and the substantial credit companies and individuals can expect from the Division if they timely and voluntarily disclose misconduct, fully cooperate with the Division's investigation, and appropriately remediate.

In sum, if a company or individual self-reports, fully cooperates, and remediates, the Division will recommend that the Commission consider a substantial reduction from the otherwise applicable civil monetary penalty. Consistent with the above Advisories, the Division may recommend a reduced civil monetary penalty even where a company or individual did not self-report wrongdoing but otherwise fully cooperated with the Division's investigation and remediated deficiencies in its compliance or control programs. The Division will reserve its recommendations for the most substantial reductions in civil monetary penalty for those instances where a company or individual has self-reported the misconduct *and* fully cooperated with the Division's investigation and remediated.

7.1.3 Advisory on Self Reporting and Cooperation for CEA Violations Involving Foreign Corrupt Practices

The Enforcement Advisory on Self Reporting and Cooperation for CEA Violations Involving Foreign Corrupt Practices¹⁰ is found at: <https://www.cftc.gov/sites/default/files/2019-03/enfadvisoryselfreporting030619.pdf>.

This Advisory applies to companies and individuals not registered (or required to be registered) with the CFTC that timely and voluntarily disclose to the Division violations of the CEA involving foreign corrupt practices, where the voluntary disclosure is followed by full cooperation and appropriate remediation, in accordance with the above Advisories. In those circumstances, the Division will apply a presumption that it will recommend to the Commission

⁹ See James M. McDonald, *Speech Regarding Perspectives on Enforcement: Self-Reporting and Cooperation at the CFTC* (Sept. 25, 2017), <https://www.cftc.gov/PressRoom/SpeechesTestimony/opamcdonald092517>

¹⁰ See James M. McDonald, *Remarks* (Mar. 6, 2019), <https://www.cftc.gov/PressRoom/SpeechesTestimony/opamcdonald2>.

7.3 Additional Provisions Regarding Cooperation

7.3.1 Immunity

Witnesses may occasionally ask Division staff for an immunity agreement, either from criminal or civil liability. Most frequently, a witness seeks a limited grant of immunity with respect to the testimony or information conveyed during a “proffer session” in the form of a written proffer agreement, sometimes referred to as a “queen-for-a-day” agreement. *See* Section 8.1.2.4 of the Manual (Immunity).

7.3.2 Acknowledgement of Cooperation in an Administrative Consent Order

Cooperation by individuals and entities who are settling enforcement actions with the Commission may be acknowledged in administrative consent orders. For higher levels of cooperation, the acknowledgement may specifically state that the cooperation has resulted in a partial or significant reduction of the civil monetary penalty being imposed. *See also* Section 6.8.1 of the Manual (Civil Monetary Penalty Guidance).

8. Cooperative Enforcement

Working cooperatively and in parallel with criminal authorities and other federal, state, or international regulators is a cornerstone to the Enforcement Program. The Division cooperates in various ways, including through a robust referral process, information sharing, providing technical assistance and subject matter training, and at times, working on parallel investigations.

8.1 Domestic Cooperative Enforcement

8.1.1 Referring Matters to Other Government Agencies

Section 6c(f) of the CEA, 7 U.S.C. § 13a-1(f), authorizes the CFTC to refer matters to the Department of Justice for potential criminal prosecution. As a matter of policy and consistent with these statutory provisions, the Division refers matters for criminal prosecution. These include willful violations of the CEA and the Regulations, as well as false statements to the CFTC, perjury, and obstruction of justice.

In addition, Sections 8(a)(2) and 12(a) of the CEA, 7 U.S.C. §§ 12(a)(2), 16(a), authorize the CFTC to cooperate with other federal, state, and local agencies and foreign agencies in conducting its investigations, including by referring appropriate matters to those agencies.

The Director determines whether, when, where, and to whom a referral is made. In making this determination, the Director considers the recommendations of the Division staff assigned to the matter and the Division’s Office of Cooperative Enforcement. Such recommendations should be made in writing to the Director, the Principal Deputy Director, and Special Counsel to the Director. Written referral letters are signed by the Director or her or his designee. The Director may make a referral at any stage in the life of a matter: lead, preliminary inquiry, investigation, litigation, or post-litigation.

8.1.2 Sharing Information

8.1.2.1 Access to the Investigative Files of Other Government Agencies, Registered Futures Associations, and Self-Regulatory Organizations

Division staff may find useful information about persons under investigation for possible violations of the CEA or the Regulations in the investigative files of criminal authorities; governmental agencies at the federal, state, and local level; as well as registered futures associations (e.g., the NFA) and SROs (e.g., DCMs, DCOs, or SEFs). The CFTC has signed MOUs or similar cooperative enforcement arrangements with certain government agencies, such as FERC and the Federal Trade Commission, which also address the sharing of confidential information. Thus, in conducting investigations, Division staff considers requesting access to the investigative files of criminal authorities and other agencies and entities that may have information relating to the same persons, entities, or activities.

In the ordinary course, requests for access to such investigative files should be made in writing and addressed to an appropriate official in the other agency. A written request for access to another agency's files may be signed by a Deputy on behalf of the Director. To the extent the other agency places use restrictions on the disclosure or use of such information, Division staff should consult with the other agency on any such restrictions and raise any issues or questions with OCC.

8.1.2.2 Access to the Investigative Files of the CFTC by Other Government Agencies, Registered Entities, Registered Futures Associations, and SROs

Section 8 of the CEA, 7 U.S.C. § 12, generally prohibits the CFTC from disclosing information obtained in connection with its investigations. Federal or state agencies, foreign authorities, and designated officials of certain authorized industry organizations may request access to the Division's investigative files. Section 8(e) of the CEA, 7 U.S.C. § 12(e), permits the sharing of confidential information with any department or agency of the federal government or a State or any political subdivision thereof or any foreign government or any political subdivision thereof, and Section 8a(6), 7 U.S.C. § 12a(6), permits such sharing with registered entities, NFA, or an SRO. Authorized entities seeking access must obtain permission from the Director of the Division, in accordance with Section 8(e) of the CEA, 7 U.S.C. § 12(e), and Regulation 140.73, 17 C.F.R. § 140.73, for domestic and foreign authorities, or Section 8a(6) of the CEA, 7 U.S.C. § 12a(6), and Regulation 140.72, 17 C.F.R. § 140.72, for registered entities, the NFA, or an SRO. Access requests are considered separate and distinct from subpoenaed documents, testimony, or other demands of a court, which are addressed in Part 144 of the Regulations, 17 C.F.R. pt. 144.

Division referrals to an authorized entity usually include an invitation to the authorized entity to seek access to the Division's non-public investigative files.

In sharing information, Division staff may take into consideration many factors, including the following:

- if the CFTC seeks to preserve a privilege with respect to the information, Division staff consider whether sharing it would constitute a waiver, *see* Section 9.1 of the Manual (Preservation and Assertion of Privileges);
- the Division may be restricted from sharing some information that is subject to an arrangement with a foreign authority;
- Sections 8(e) and 8a(6) of the CEA, 7 U.S.C. §§ 12(e), 12a(6), prohibit authorized entities from disclosing non-public information, including information relating to business transactions or market positions of any person or trade secrets or names of customers, except in an action or proceeding in which the federal, state, or authorized industry entity is a party, *see* Section 9.4 of the Manual (Confidentiality);
- the RFPA may require Division staff to give customer notice regarding sharing of financial records, *see* Section 9.4.3 of the Manual (RFPA);
- the safeguarding of confidential information and documents containing personally identifiable information, *see* Section 9.4 of the Manual (Confidentiality); and
- the Division's sharing of whistleblower information, in certain circumstances, could reasonably be expected to reveal the identity of the whistleblower, *see* 7 U.S.C. § 26(h)(2)(C); 17 C.F.R. § 165.4.

8.1.2.3 Parallel Proceedings

The Division often has investigations and litigation in parallel with criminal investigations and proceedings. Division staff work cooperatively and in parallel with criminal agencies when appropriate. When the Division conducts an investigation or enforcement action in parallel with a criminal investigation or proceeding, or when there is potential for such parallel action, Division staff consider the unique considerations raised by such parallel activity. At all points, it is necessary that the civil investigation has its own independent civil investigative purpose and not be initiated to obtain evidence for a criminal prosecution. Division staff should consult with their supervisors at the outset of any parallel proceeding.

8.1.2.3.1 Testimony of CFTC Employees in Other Proceedings

Division staff, often investigators or economists, may be asked to provide testimony in proceedings to which the CFTC is not a party. This typically involves proceedings by other governmental agencies or criminal authorities. Provision of such testimony requires Commission authorization. *See* 17 C.F.R. § 144.3.

8.1.2.4 Immunity

At times, witnesses in Division enforcement matters may become concerned about their own exposure, either criminally or civilly, and ask Division staff for an immunity agreement.

In most circumstances where the Division staff considers that a witness may have useful information, Division staff may seek approval from the Director or a delegate to offer a limited grant of immunity with respect to the testimony or information conveyed during the proffer session in the form of a written proffer agreement. These agreements offer only limited immunity because they are limited in duration to the proffer session, and because the grant of immunity contains exceptions under which the Division may use the information provided.

In some instances, however, witnesses may want full immunity from criminal prosecution. The CFTC lacks the independent authority to provide immunity from criminal prosecution. But, pursuant to Regulation 11.7(d), 17 C.F.R. § 11.7(d), the CFTC may ask the Attorney General to approve issuance of a Commission order requiring a witness to provide the testimony or other information which he or she previously refused to give on the basis of self-incrimination. Such testimony or information may not be used against the witness in any criminal case, except for a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order. *Id.*

8.2 International Cooperative Enforcement

International issues can arise at any point during a Division matter. Division staff should identify potential issues and consult with OCC before making contact with individuals or entities in any foreign jurisdiction.

8.2.1 Obtaining Information from Foreign Sources

When conducting a matter, Division staff may discover that relevant information, documents, or witnesses are located in foreign jurisdictions. Many foreign jurisdictions consider unauthorized contact by foreign authorities with residents within their jurisdiction to be an extra-territorial act requiring authorization by or involvement of an authority in the home jurisdiction.

Attempts (whether by telephone, e-mail, letter in person, or any other means) by Division staff to contact an individual or entity found in a foreign jurisdiction are made through OCC. Many of the documents (bank records, trading records, etc.) and much of the testimony typically available domestically may be obtained from foreign authorities through the appropriate channels.

8.2.1.1 Assistance from Foreign Authorities

In those jurisdictions with which the CFTC has signed a Memorandum of Understanding (“MoU”) or similar cooperative enforcement arrangement, OCC can transmit a request for assistance, in accordance with the applicable laws and particular procedures set forth in the MoU. In foreign jurisdictions without a signed MoU or other arrangement, each request will be evaluated on a case-by-case basis.

The most commonly used enforcement MoUs are the Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information (“MMoU”) developed by the International Organization of Securities Commissions, and the subsequently executed Enhanced MMoU (“EMMoU”).

8.2.2 Issuing and Serving an Investigative or Administrative Subpoena on Persons Located Outside of the United States

If, during an investigation or in an administrative action, Division staff desire to obtain information from a person found in a foreign jurisdiction via subpoena—rather than through an MoU or other cooperative assistance arrangement—and where there either is no U.S. counsel or that counsel refuses to accept service, Division staff follow the procedure set out in Section 6(c) of the CEA, 7 U.S.C. § 9. Under this Section, with the prior approval of the Commission, such a subpoena “may be served . . . in such manner as the Federal Rules of Civil Procedure prescribe for service of process in a foreign country.” *See id.* § 9(5). Commission approval is needed in investigative and administrative actions to issue and serve a subpoena on “any person who is not found within the territorial jurisdiction of any court of the United States.” OCC assists Division staff in preparing the memorandum and serving any such subpoena approved by the Commission. *See* Section 5.4.2.4 of the Manual (Compelling Production of Documents in Foreign Jurisdictions).

8.2.3 Obtaining Local Counsel in Foreign Jurisdictions

Division staff consults with OCC for advice on obtaining local counsel abroad. Almost always, a written agreement is prepared, which specifies in detail the duties to be assumed by local counsel and the compensation to be paid. Any such agreement requires Director approval.

8.2.4 Providing Assistance to Foreign Authorities

At times the Division receives requests from foreign authorities for the CFTC to provide assistance in foreign enforcement matters, which it is authorized to provide under the CEA. *See* 7 U.S.C. §§ 12(e), 16(a), (f).

The Division is authorized to grant access to non-public information already contained in its files. *Id.* § 12(e). Where access is granted, but before information or assistance is provided, the Division receives assurances from the requesting authority regarding the use and confidentiality of the files and information.

The CFTC also has authority to use its investigation powers on behalf of foreign futures authorities. Accordingly, pursuant to Section 12(f) of the CEA, 7 U.S.C. § 16(f), and Regulations 11.1 and 11.2, 17 C.F.R. §§ 11.1, 11.2, the Division may conduct an investigation, including using its compulsory powers, on behalf of an appropriate foreign authority. In determining whether to provide this assistance, the Commission considers, among other things, whether: (1) the requesting authority has agreed to provide reciprocal assistance in futures matters to the Division, and (2) compliance with the request would prejudice the public interest of the United States. 7 U.S.C. § 16(f)(2).

OCC is responsible for handling such requests. If such requests are related to Division investigations or litigations, OCC works with the responsible Division staff to gather responsive information, such as taking testimony of a witness. If the request is unrelated to a Division investigation or litigation, OCC may gather the responsive information, including issuing subpoenas and taking testimony, as necessary.

9. Privileges and Confidentiality

9.1 Preservation and Assertion of Privileges

Over time, many privileges that protect material from discovery have been established. Most privileges, e.g., the attorney-client privilege, the clergy-communicant privilege, and the marital privilege, are available to all parties. But some privileges belong solely to the government, and may be asserted by the CFTC in addition to the other available privileges.

9.1.1 Attorney-Client Privilege

The attorney-client privilege is intended to ensure that confidences shared by a client with an attorney during the course of seeking legal advice are protected from disclosure. The purpose of the privilege is to foster open and honest communication between attorney and client. The privilege is not limited to communications made in the context of a litigation or dispute, but extends to all circumstances where an attorney's counsel is sought on a legal matter. The scope of the privilege includes communications from an attorney to her or his client within this framework.

Information that typically does not involve a confidential communication and therefore is not privileged includes:

- the identity of the client;
- the existence of the attorney-client relationship;
- the general reason why the attorney was retained;
- the fee arrangement between attorney and client; and
- any billing statements, unless they include narrative descriptions that satisfy the elements of a privilege.

9.1.1.1 Corporate Clients

The attorney-client privilege can be asserted by a corporation to protect communications between corporate employees and in-house or outside counsel. Courts have held that to assert the attorney-client privilege, a corporation must show that the communication came from a person who was employed with the corporation at the time of the communication, the employee was seeking legal advice from an attorney, and the communication was made within the scope of the employee's duties.

9.1.1.2 Multiple Representations

A witness in a Division investigation or enforcement action may be represented by counsel who represents other persons involved in the Division's investigation. This multiple representation, however, presents a potential conflict of interest if one client's interests are or may be adverse to another's. The choice of counsel, and the responsibility for that choice, is the witness's. Note,

however, that the Regulations provide that “[w]hen a reasonable basis exists to believe that an investigation may be obstructed or impeded, directly or indirectly, by an attorney’s representation of more than one witness during the course of an investigation, . . . [the] attorney [may be prohibited from attending] the testimony of any witness other than the witness in whose behalf [the attorney] first appeared in the investigatory proceeding.”¹¹ 17 C.F.R. § 11.8(b).

9.1.1.3 Advice-of-Counsel Defense

An individual or entity being investigated by the Division may wish to assert an advice-of-counsel defense. To validly assert the defense, the party asserting it must provide evidence sufficient to substantiate the defense, which could include privileged information. To assert a valid advice-of-counsel defense, courts have held that the party must establish that she or he: (1) made complete disclosure to counsel; (2) requested counsel’s advice as to the legality of the contemplated action; (3) received advice that it was legal; and (4) relied in good faith on that advice.

9.1.1.4 Crime-Fraud Exception

Communications otherwise protected by the attorney-client privilege may nevertheless be subject to disclosure where those communications were in furtherance of a crime or fraud. Most courts require the party seeking to invoke the crime-fraud exception to make a prima facie showing that the client was engaged in a criminal or fraudulent act when the client sought the advice of counsel, and that the communications in question were in furtherance of, or closely related to, the crime or fraud.

9.1.2 Attorney Work-Product Doctrine

An individual or entity may believe that information is protected from disclosure on the basis of the attorney work-product doctrine. The work-product doctrine provides that material collected by counsel in anticipation of litigation is protected from disclosure. For material to be prepared in “anticipation of litigation,” the prospect of litigation must be identifiable, although litigation need not have already commenced. The work-product protection is not absolute, however, and disclosure may be compelled where the opposing party can show substantial need for the material, and where it cannot without undue hardship otherwise obtain the material (e.g., where the material is otherwise unavailable and relevant to the matter). “Opinion” work product (e.g., related to an attorney’s mental impressions, conclusions, opinions, or legal theories) is generally subject to a heightened standard for disclosure.

9.1.3 The Fifth Amendment Privilege Against Self-Incrimination

A witness testifying before the CFTC may assert her or his Fifth Amendment privilege against self-incrimination. The Fifth Amendment privilege may not be asserted where immunity has been granted. *See* Section 8.1.2.4 of the Manual (Immunity). In order to assert the privilege, staff ordinarily will require a witness to appear in person, and will not allow a blanket assertion

¹¹ “To the extent practicable, consistent with the integrity of the investigation, the attorney will be advised of the reasons for his having been sequestered.” 17 C.F.R. § 11.8(b).

privilege or the work-product protection, it should notify Division staff. If a potentially inadvertent production is discovered by staff, staff should notify the party through her or his counsel of the CFTC's receipt of potentially inadvertently produced documents.

9.3 Waiver of Privilege

The Division respects legitimate assertions of the attorney-client privilege and work-product protection, and does not expect persons from whom information is sought to waive such privilege or protection (whether to obtain cooperation credit or otherwise). The Division's objective in investigations and proceedings is to obtain relevant information, and persons from whom information is sought may be required to produce all relevant, non-privileged information and documents. Pure factual material, even those facts that may have been conveyed to an attorney or contained within an attorney's work-product, are not privileged, and the Division does require disclosure of facts. Staff should not ask a party to waive the attorney-client privilege or work-product protection without prior approval of the Director or the supervising Deputy.

In general, the attorney-client privilege or work-product protection may be waived either expressly or by implication. Waiver is implied where testimony concerning privileged or protected communications or documents has been offered, or where the communications or documents have been disclosed to a third party. As noted above, waiver may also be required where an advice-of-counsel defense has been asserted, or where some other exception applies. Finally, the privilege or protection may be waived as to communications or documents belonging to an entity where a receiver has been appointed to manage that entity.

9.3.1 Privilege Non-Waiver Agreements

From time to time, a party may wish to voluntarily disclose privileged or protected communications or documents to the CFTC, but may wish to argue that such disclosure does not constitute a waiver as to other parties or as to other communications or documents (not disclosed) concerning the same subject matter. The Division will consider entering into a privilege non-waiver agreement in such circumstances, in which the Division agrees that it will not argue that such disclosure constitutes a waiver of the attorney-client privilege or the work-product protection as to any third party, or that the disclosure effects a subject matter waiver as against the CFTC. The Division also agrees to maintain the confidentiality of the materials, except to the extent that it determines that disclosure is required by law or that disclosure would be in furtherance of the CFTC's discharge of its duties and responsibilities. Notably, some courts have held that production of documents to agencies like the CFTC, even pursuant to an agreement that purports not to waive applicable privileges or protections, nevertheless does constitute a waiver.

9.4 Confidentiality

The Commission is generally required by statute and regulation to maintain the confidentiality of non-public information and documents it obtains in the course of its investigations. *See* 7 U.S.C. § 12(a); 17 C.F.R. § 11.3. Such information and documents may only be disclosed where the Commission directs or authorizes the public disclosure of the investigation (e.g., by authorizing

the filing of a complaint in federal court), where the information and documents are made a matter of public record during the course of an adjudicatory proceeding, or where disclosure is required by the Freedom of Information Act, 5 U.S.C. § 552, the Regulations thereunder, 17 C.F.R. pt. 145, other statute or regulation, or court order. Certain other statutes provide additional confidentiality protections, as described below.

9.4.1 The Privacy Act of 1974

The Privacy Act, 5 U.S.C. § 552a, establishes requirements for the solicitation and maintenance by agencies of personal information regarding members of the public.

When obtaining information from the public, the Privacy Act generally requires Division staff to provide notice with respect to the authority for the solicitation and whether disclosure is voluntary or mandatory; the principal purposes for seeking the information; the effect of refusing to provide the information; and the “routine uses” of the information. *See* Section 9.5 of the Manual (Statement to Persons). The statute generally prohibits any disclosure of personal information unless the disclosure is within one of the statute’s exemptions (including the exemption for “routine uses”).

The CFTC publishes such notice on its website, <https://www.cftc.gov/Transparency/PrivacyOffice/SORN/index.htm>, and in the Federal Register, including notice specific to the Division’s investigatory files (System of Records CFTC-10: Investigatory Records). *See* Notice; Publication of the Systems of Records Managed by the Commodity Futures Trading Commission, 76 Fed. Reg. 5974, 5982–83 (Feb. 2, 2011); *see generally* Section 10.2.2 of the Manual (The Division’s Recordkeeping Systems). The notice includes a listing of the CFTC’s routine uses of personal information, including for the routine operations of the CFTC. *See* 76 Fed. Reg. at 5975–76. This includes use in administrative or court proceedings, sharing with other regulators (including foreign regulators) or criminal authorities, and use during an investigation. *Id.*

9.4.2 The Freedom of Information Act

The Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, provides that any person has a right of access to federal records, and that this right is enforceable by the courts if an agency fails to comply and the requester has exhausted all administrative appeals. However, access is limited, in whole or in part, if records are protected from disclosure by various exemptions. For example, the investigatory records described in Section 9.4.1 of the Manual above are covered by one or more of the exemptions. A FOIA request generally can be made by “any person,” a broad term that encompasses individuals (including foreign citizens), partnerships, corporations, associations, and foreign or domestic governments; requests may also be made through an attorney or other representative on behalf of any person.

FOIA requests can be made for any reason. However, the request must be made in accordance with the respective agency’s published procedural regulations, which, for the CFTC, are found at Part 145 of the Regulations, 17 C.F.R. pt. 145. Specific instructions for making FOIA requests are located online at <https://www.cftc.gov/FOI/foiarequests.html>. FOIA requests are processed

- affect a CFTC registrant’s obligations to make certain books and records available to CFTC staff upon request, even if they are stored on a computerized system and maintained by a third-party service provider.

However, when a government regulatory agency without criminal powers, such as the CFTC, seeks information directly from a service provider, the SCA generally:

- *prohibits* obtaining the contents¹⁶ of electronic communications and postings to electronic bulletin boards from electronic communications services and remote computing services without a warrant (which generally is not available to the CFTC);
- permits obtaining the contents of electronic communications and postings to electronic bulletin boards from a service provider with the consent of a party to the communication and with reimbursement to the service provider;
- permits obtaining subscriber information (e.g., name; address; local and long distance telephone connection records or records of session times and durations; length of service and types of service utilized; telephone or instrument number or other subscriber number or identity, including any temporarily assigned network address; and means and source of payment, including credit card or bank account number) pursuant to an administrative or trial subpoena without notice to the subscriber and without reimbursement to the service provider; and
- permits obtaining the contents of electronic communications of any age if communications are “readily accessible to the general public.” 18 U.S.C. § 2511(2)(g).

9.5 Statement to Persons Providing Information About Themselves to the CFTC

When the CFTC solicits information from an individual about him or herself, including information that describes the person in some way or information about her or his personal actions that may violate the CEA, the Privacy Act and CFTC policy require that certain notices be provided. In this situation, the Division provides individuals a standardized “Statement to Persons Providing Information about Themselves to the CFTC” (“Required Notice”), which informs the individual of certain legal rights and responsibilities he or she may have before the individual provides information about him/herself to the CFTC. The Required Notice is given whether information is provided voluntarily or pursuant to subpoena, whether the information is in the form of documents or oral statements, and whether information is provided during investigative testimony, a deposition, or in less formal contexts.

In accordance with the notice requirements of the Privacy Act, the Required Notice explains in detail the CFTC’s authority for, and purpose in, soliciting the information being sought, its routine uses by the CFTC, and the effect of not supplying the information. When the notices described here must be given orally (for example, during a telephone call), Division staff will

¹⁶ The “contents” of a communication means “any information concerning the substance, purport, or meaning” of the communication. 18 U.S.C. § 2510(8).

subsequently send a written copy of the Required Notice to the individual. The Required Notice discusses a number of applicable procedural safeguards, including:

- the authority for the solicitation of information and whether disclosure of information is mandatory or voluntary;
- the purpose of the solicitation of information;
- the effect of not supplying information;
- the routine uses of supplied information;
- relevant provisions of Freedom of Information Act, 5 U.S.C. § 552, and the CFTC's rules and regulations pursuant thereto;
- the person's right to be accompanied, represented and advised by counsel;
- her or his rights under the Fifth Amendment;
- the potential consequences of making false or fraudulent statements (or the submission of false documents), which violates Section 6(c)(2) of the CEA, 7 U.S.C. § 9(2), and also constitutes felonies punishable by fines and/or imprisonment (*see* 18 U.S.C. § 1001 and 18 U.S.C. § 1621, respectively);
- the disclosure requirements of the Freedom of Information Act, 5 U.S.C. § 552, and Regulation 145.9, 17 C.F.R. § 145.9; and
- the CFTC's "Informal Procedure Relating to the Recommendation of Enforcement Proceedings," found in Appendix A to the Part 11 Regulations.

Persons providing sworn investigatory testimony or litigation deposition testimony are also provided with an additional notice with information relevant to those proceedings.

Neither the Privacy Act of 1974 nor CFTC policy requires provision of the Required Notice in the context of information requests to corporations or other business entities, or individuals acting as an agent of a business entity.

10. Other

10.1 Ethics

10.1.1 General Principles and Standards

Division staff, along with all other staff of the CFTC, are expected to adhere to the highest standards of integrity and ethical conduct. Those standards emanate from a number of sources. All federal employees are bound by certain federal statutes and regulations, which apply to issues such as financial disclosure, conflicts of interest, acting impartially when performing

official duties, misuse of public office for private gain, gifts and invitations, seeking or engaging in outside employment or activities whether paid or unpaid, and the Hatch Act limitations on certain political activities. The CFTC has supplemented the general federal provisions with additional regulations regarding the conduct of both current and former members of the CFTC at 5 C.F.R. pt. 5101 and 17 C.F.R. pt. 140, subpt. C. The CFTC Ethics Office resides in the General Law Division of OGC. Moreover, the General Counsel in OGC is the CFTC's Designated Agency Ethics Official ("DAEO"), and the Deputy General Counsel of the General Law Division within OGC is her or his Alternate DAEO. The DAEO or Alternate DAEO provides advice on any federal ethics question a staff member may have regarding ethical issues.

If a potential ethical issue arises, Division staff should seek guidance from the DAEO or Alternate DAEO.

Division attorneys have additional ethical obligations, which are set forth in the Rules of Professional Responsibility of the state in which the attorney is licensed to practice, and the Rules of Professional Responsibility of the state in which the attorney is practicing or appearing on behalf of the CFTC. Division staff and OCC may coordinate with OGC if additional assistance is necessary.

10.2 Records Management and Document Control

10.2.1 General Policies

As a federal agency, the CFTC is required to retain Federal records. The Federal Records Act defines federal records as "all recorded information, regardless of form or characteristics, made or received by a Federal agency under Federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the United States Government or because of the informational value of data in them." *See* 44 U.S.C. § 3301(a)(1)(A). CFTC policy states that information may be covered as a "federal record" if it:

- documents significant CFTC decisions or commitments;
- adds to a proper understanding of the formulation or execution of CFTC actions, operations, or responsibilities;
- conveys information of value on important CFTC activities;
- facilitates action by staff;
- provides key substantive comments on a draft;
- makes possible a proper scrutiny by Congress, CFTC, or its auditors;
- is required by CFTC to be created or received; or
- protects the financial, legal, and other rights of the government and persons directly affected by the government's actions.

The Commission has established and maintains a Records Management Program to create and maintain authentic, reliable, retrievable, and useable records for as long as they are required by Federal records laws and regulations and authorized records disposition schedules. Files relating to Leads, PIs, and Investigations closed without filing an enforcement action are generally retained for five years. Files relating to Litigations are generally retained for fifteen years. *See generally* Records Disposition Schedule, <https://www.cftc.gov/idc/groups/public/documents/file/recordsdispositionschedulepdf.pdf>. *Cf.* Section 10.2.3 of the Manual (Historically Significant Matters).

10.2.2 The Division's Recordkeeping Systems

The Division receives records in various forms, including, but not limited to, data in electronic, paper, or other media forms. Generally, the CFTC's Office of Data and Technology's Legal Technology Services Program provides the Division with various database and electronic storage systems in conformity with the CFTC-wide Records Management Program. Non-electronic materials are also maintained in a secure manner that ensures the CFTC meets all applicable confidentiality obligations and requirements.

10.2.3 Historically Significant Matters

The National Archives and Records Administration ("NARA") approves the CFTC's records disposition schedule, which defines certain "permanent records." These are records that are determined to have sufficient historical or other value to warrant permanent preservation by NARA. When an investigative or litigation matter is closed, the Division evaluates whether the matter is historically significant one under the NARA.

10.3 Closing an Enforcement Matter

Closing an enforcement matter (whether a lead, PI, investigation, or a litigation) triggers various Commission requirements, including those concerning recordkeeping, record destruction, and sanction reporting. As a general matter, Division staff are responsible for: (1) ensuring that the matter is closed appropriately and CFTC recordkeeping obligations are completed within the requisite periods; (2) completing the appropriate closing reports; and (3) providing the completed closing reports to the assigned Deputy within the requisite periods.

10.4 Press Releases

A press release is customarily issued at the initiation and conclusion or settlement of either a federal court or administrative enforcement action. The press release is issued at the time of the filing of a complaint, unless the complaint is filed under seal, an ex parte restraining order to freeze assets and preserve documents is sought, or a consent order is submitted with the complaint for immediate consideration by the court. At times the Commission will enter orders filing and simultaneously settling administrative enforcement actions and will issue one press release announcing the entry of the order.

Releases may also be issued for significant developments in litigation, such as the issuance of a preliminary injunction, orders of contempt, important subpoena enforcement actions, issuance of

a restraining order, issuance of a decision in federal court, final Commission orders, or any other development that may be of public interest.

The Office of External Affairs (“OEA”) is responsible for the issuance of the CFTC’s public announcements. The Division works with OEA on press releases relating to enforcement activities. Press releases are subject to review and approval by the Director or a delegate, OEA, OGC, and the Office of the Chairman. Press releases are not subject to negotiation.

10.5 Reparations Program

The CFTC has a Reparations Program, authorized under Section 14 of the CEA, 7 U.S.C. § 18, which allows customers of persons registered with the CFTC to seek compensation for damages caused by violations of the CEA or the Regulations by those registered persons. Division staff may inform a customer about the Reparations Program, but do not advise whether the customer should use the Program or otherwise comment on the viability of any claims the customer may have. Information regarding the eligibility requirements for the Reparations Program is set out on the CFTC Reparations Program webpage, available at <https://www.cftc.gov/ConsumerProtection/reparationsprogram/index.htm> or may be obtained by calling (202) 418-5250. In addition, information describing the arbitration and mediation programs of NFA may be obtained by calling the NFA Information Center at (800) 621-3570 or, in Illinois, (312) 781-1410.

11. Whistleblower Program

The CFTC’s Whistleblower Program provides monetary incentives to individuals who come forward to report violations of the CEA. It also provides anti-retaliation and confidentiality protections for whistleblowers. The Division’s Whistleblower Office (“WBO”) administers the program.

11.1 General Description of the Whistleblower Program

In general, the CFTC will pay monetary awards, based on collected monetary sanctions and under regulations prescribed by the Commission, to eligible whistleblowers who voluntarily provide the CFTC with original information about violations of the CEA that leads the CFTC to bring a successful enforcement action resulting in the imposition of monetary sanctions exceeding \$1,000,000.

The CFTC will also pay monetary awards to eligible whistleblowers whose information leads to the successful enforcement of a Related Action brought by another governmental entity (or certain other entities) that is based on original information voluntarily submitted by a whistleblower to the CFTC that led to the successful resolution of an action brought by the CFTC.

The total amount of an award for an eligible whistleblower is between 10% and 30% of the amount of monetary sanctions collected in the CFTC’s enforcement action or a Related Action. If multiple whistleblowers are granted awards in an action, the total award amount is still limited to between 10% and 30% of the amount of the monetary sanctions collected.

Submitting a tip alone will not be sufficient to obtain an award. In order to be considered for an award, a whistleblower must also submit an award application when the WBO releases a Notice of Covered Action, or when a qualifying resolution is reached in a Related Action.

11.2 Qualifying as a Whistleblower

In order to be eligible for the monetary awards and protections afforded by the Whistleblower Program, an individual (or group of individuals) must submit to the CFTC information relating to a potential violation of the CEA on a Form TCR (Tip, Complaint, or Referral). The Form TCR may be submitted electronically via the Whistleblower Program website, <https://www.whistleblower.gov/overview/submitatip/>, or by fax or mail.

A whistleblower can be any individual who sends the CFTC a Form TCR containing information about a potential violation of the CEA. Examples range from a corporate officer or insider, to a trader or market observer, to a customer or fraud victim; but a company or other entity is not eligible to be a whistleblower. Certain persons—for example, certain government and self-regulatory personnel, and persons convicted of a crime related to the conduct at issue in the whistleblower matter—are ineligible for award, but they still qualify for anti-retaliation and confidentiality protections.

11.3 Protecting the Identity of Whistleblowers

Section 23(h) of the CEA, 7 U.S.C. § 26(h)(2), provides, in relevant part:

(2) CONFIDENTIALITY

(A) IN GENERAL—Except as provided in subparagraphs (B) and (C), the Commission, and any officer or employee of the Commission, shall not disclose any information, including information provided by a whistleblower to the Commission, which could reasonably be expected to reveal the identity of a whistleblower

See also 17 C.F.R. § 165.4. Division staff should consult with OCC and the WBO in connection with any concerns regarding confidentiality.

11.3.1 Handling of Information and Documents

The confidentiality protections of the CEA and the Regulations require the CFTC not to disclose information that “could reasonably be expected to reveal the identity of the whistleblower.” Division staff take measures to ensure that information that could reasonably be expected to reveal a whistleblower’s identity is not disclosed.

11.3.1.1 Referrals and Requests to Domestic or Foreign Authorities

The CFTC may provide whistleblower-identifying information in appropriate circumstances to: criminal authorities; federal, state, and local agencies; foreign authorities; and registered entities, the NFA, or an SRO. *See generally* Section 8 of the Manual (Cooperative Enforcement). Note that if a whistleblower's identity is disclosed in the referral or request, the receiving authority must keep the whistleblower's identity confidential. 7 U.S.C. § 26(h)(2)(C)(ii); 17 C.F.R. § 165.4(a)(2).

11.3.1.2 Investigations

- *Freedom of Information Act (FOIA) Requests*: If there is a FOIA request for documents that may contain whistleblower identifying information, Division staff must contact the WBO for assistance to ensure that responsive documents are redacted.
- *Drafting Subpoenas (Document Requests)*: Whistleblowers often provide very specific and timely information relating to documents in the possession of an individual or entity that contain evidence of violations of the CEA. In drafting subpoenas and document requests, staff should ensure that they do not inadvertently reveal the existence or identity of a whistleblower, e.g., requests that reveal the drafter of the subpoena has knowledge that only a specific person (or persons) would possess.

11.3.1.3 Litigation

In federal court litigation or an administrative proceeding, the CFTC's disclosure obligations have the potential to involve whistleblowers or whistleblower identifying information in general. If a matter involving a whistleblower goes into litigation or an administrative proceeding, Division staff should consult OCC and the WBO about any issues arising with discovery.

11.4 Additional Whistleblower Protections

Whistleblowers have certain protections in addition to confidentiality of their identity, including:

- employers may not impede would-be whistleblowers from communicating directly with the CFTC's staff about possible violations of the CEA;
- employers may not retaliate against whistleblowers for reporting violations of the CEA; and
- a whistleblower who has been retaliated against has the right to sue an employer in federal court.

In addition, the CFTC has authority to enforce the anti-retaliation provisions of the CEA by bringing an enforcement action against an offending employer.

11.5 Whistleblower Awards

When the CFTC obtains a judicial or administrative order that—by itself or together with judgments or orders in related CFTC enforcement actions or Related Actions brought by certain other entities—imposes monetary sanctions exceeding \$1,000,000, then the order becomes a covered judicial or administrative action upon which the CFTC may pay out whistleblower awards. The WBO will then post a Notice of Covered Action, and whistleblowers may begin applying for awards. The CFTC may also pay out whistleblower awards based on monetary sanctions collected in Related Actions brought by certain other entities, as long as those Related Actions are based on information provided by a CFTC whistleblower.

To apply for an award, a whistleblower must complete and submit a copy of the award application, Form WB-APP (Application for Award For Original Information Submitted Pursuant to Section 23 of the Commodity Exchange Act), to the WBO. For further information regarding the award determinations process, *see* <https://www.whistleblower.gov/overview/>.