



## COMMODITY FUTURES TRADING COMMISSION

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Division of  
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### **MEMORANDUM**

**TO:** Division of Enforcement Staff

**FROM:** James M. McDonald  
Director, Division of Enforcement

**DATE:** May 20, 2020

**SUBJECT:** Civil Monetary Penalty Guidance

This memorandum summarizes various factors that Commodity Futures Trading Commission (“CFTC” or “Commission”) Division of Enforcement (“Division”) staff will consider in recommending an appropriate civil monetary penalty to the Commission in an enforcement action, whether administrative or injunctive. This guidance will be set forth in the Enforcement Manual,<sup>1</sup> and will be binding on all Division staff.

Recently, the Commission for the first time articulated a set of core agency values, namely: Commitment, Forward-thinking, Teamwork, and Clarity.<sup>2</sup> In particular, this Division guidance advances the core value of clarity, providing market participants with greater transparency as to Division staff’s decision-making criteria regarding civil monetary penalties. This guidance will facilitate the Division’s efforts to be tough on those who break the rules while striving for fair and consistent outcomes in doing so. As Chairman Tarbert has stated, “[W]e must be transparent in how we enforce the law. One goal of our enforcement program is to change behavior in a positive way by deterring misconduct before it happens. Deterrence requires clarity about how our laws work.”<sup>3</sup>

The factors below generally reflect the existing practice within the Division, which has been refined over time as a result of changes to relevant legal authorities and precedents, as well as lessons learned from the Commission’s enforcement actions.

The Commission, through the Division, acts to protect the public and preserve market integrity by detecting, investigating, and prosecuting violations of the Commodity Exchange Act (“Act”) and Commission Regulations (“Regulations”). In furtherance of that mandate, the Commission may require civil monetary penalties against individuals and companies in

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<sup>1</sup> See <https://www.cftc.gov/LawRegulation/Enforcement/EnforcementManual.pdf>.

<sup>2</sup> CFTC, Mission, Vision, and Values, <https://www.cftc.gov/About/Mission/index.htm>.

<sup>3</sup> Chairman Heath P. Tarbert, CFTC, Statement: “Tripling Down on Transparency” (Dec. 10, 2019), <https://www.cftc.gov/PressRoom/SpeechesTestimony/tarbertstatement121019>.

connection with Commission enforcement actions.<sup>4</sup> Division staff make recommendations to the Commission about appropriate penalties to impose or seek in particular matters.

Civil monetary penalties are imposed in enforcement proceedings to further the Act's remedial purposes. The Act authorizes civil monetary penalties for each violation of the Act and Regulations, and it sets the maximum penalty per violation. *See* Sections 6(c)(10), 6b, and 6c(d) of the Act, 7 U.S.C. §§ 9(10), 13a, 13a-1(d) (2018).<sup>5</sup> Generally, penalties may be determined on a per violation basis or up to triple the monetary gain to the Respondent, whichever is greater.<sup>6</sup> The Act and Commission precedent require that penalties be assessed in relation to the gravity of the violation. *See, e.g.*, Sections 6(e)(1), 6b of the Act, 7 U.S.C. §§ 9a(1), 13a (2018).<sup>7</sup>

In 1994, the Commission published guidelines listing factors that influence its assessments of civil monetary penalties ("Commission Guidelines").<sup>8</sup> The Commission Guidelines remain in place today. In formulating recommendations for the Commission, Division staff are guided by the statute, the Commission Guidelines, and relevant case law, among other things, and considers how those precedents and authorities apply to the facts and circumstances of each case. The factors set forth below are informed by and consistent with these authorities.

The list of factors below is intended to provide a framework through which Division staff will evaluate the appropriate penalty to recommend to the Commission. Specifically, in recommending civil monetary penalties to the Commission, Division staff will take into account, as enumerated below, the gravity of the violation, any mitigating and aggravating circumstances, and other considerations. Each of these factors may be more or less relevant to the facts and circumstances of a particular matter and the type of violation at issue.<sup>9</sup>

In applying the factors identified below, staff will be guided by the overarching consideration of ensuring the proposed penalty achieves the dual goals of specific and general deterrence.

## **I. Gravity of the Violation**

By the express terms of the Act, and as set forth in the Commission Guidelines and precedent, the gravity of the violation is the primary consideration in determining the appropriate civil monetary penalty. Division staff will consider the following factors in evaluating the gravity of the violation. Staff should understand, however, that no factor listed

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<sup>4</sup> A "company" as used herein means any type of business entity except for a sole proprietorship.

<sup>5</sup> *See also* <https://www.cftc.gov/LawRegulation/Enforcement/InflationAdjustedCivilMonetaryPenalties/index.htm>.

<sup>6</sup> 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 this memorandum, "Respondent" is used as a generic descriptor for a person charged.

<sup>7</sup> 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.

<sup>8</sup> CFTC Policy Statement Relating to the Commission's Authority To Impose Civil Money Penalties, [1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,265 (Nov. 1, 1994).

<sup>9</sup> This guidance creates no private rights and is not enforceable in court. Division staff are required to follow the guidance for purposes of formulating penalty recommendations to the Commission; the Commission will continue to exercise its independent judgment and discretion as to the appropriate penalty in each case.

below is dispositive, and a case may present additional factors not listed that Division staff will deem applicable to this inquiry. Nevertheless, the following considerations are illustrative of the analysis in most cases:

- A. Nature and scope of the violations, including:
  - 1. the number, duration, type and degree of the violations;
  - 2. the Respondent's role in the violations;
  - 3. whether the Respondent acted in concert with others;
  - 4. any efforts to conceal the ongoing violations; and
  - 5. whether the violations resulted in harm to victims and, if so, the number and type of victims;
- B. The Respondent's state of mind, including whether the conduct was intentional or willful; and
- C. Nature and scope of any consequences flowing from the violations, including any:
  - 1. harm (or risk of harm) to victims and market participants;
  - 2. benefit or potential benefit to the Respondent; and
  - 3. impact on market integrity, customer protection, or the mission and priorities of the Commission in implementing the purposes of the Act.

## **II. Mitigating and Aggravating Circumstances**

The Commission has typically considered mitigating and aggravating circumstances when determining the appropriate civil monetary penalty. In making its recommendations to the Commission, Division staff will continue to consider all relevant mitigating and aggravating circumstances, including the following:

- A. Post-violation conduct, including:
  - 1. mitigating conduct, such as attempts to cure, return of victim funds, or efforts to improve a compliance program; and
  - 2. aggravating conduct, such as concealment or obstruction of an ongoing investigation;
- B. Whether the Respondent self-reported the misconduct, as well as the extent of cooperation and remediation, as detailed in the Division's Enforcement Advisories;
- C. Timeliness of remediation;

- D. Existence and effectiveness of the company's pre-existing compliance program;
- E. Prior misconduct, such as whether the Respondent is a recidivist;
- F. Pervasiveness of misconduct within the company, including responsibility of management; and
- G. Nature of any disciplinary action taken by the company with respect to the individuals engaged in misconduct.

### **III. Other Considerations**

Division staff will also evaluate other considerations, including but not limited to the following:

- A. The total mix of remedies and monetary relief to be imposed on the Respondent in the recommended Commission enforcement action, in addition to the remedies and relief to be imposed in parallel cases involving criminal authorities (including incarceration), other regulatory entities, or self-regulatory organizations;
- B. Monetary and non-monetary relief in analogous cases; and
- C. Conservation of Commission resources, including timely settlement.