



## U.S. COMMODITY FUTURES TRADING COMMISSION

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Division of  
Enforcement

### ENFORCEMENT ADVISORY

#### Cooperation Factors in Enforcement Division Sanction Recommendations for Individuals

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The U.S. Commodity Futures Trading Commission (“CFTC” or “Commission”) has long given credit to individuals who cooperate in the Commission’s investigations and enforcement actions.<sup>1</sup> Cooperation by individuals can contribute significantly to the agency’s mission by enhancing the Commission’s ability to detect and pursue violations of the Commodity Exchange Act (“Act”) or Commission Regulations. More specifically, it can increase the effectiveness and efficiency of the Commission’s investigations and provide the Commission with important evidence in its enforcement actions. To assist individuals who want to cooperate with the Commission, the Division of Enforcement (“Division”) sets forth here factors that the Division considers in assessing cooperation by individuals who may be or have been charged by the Commission with violating the Act or its Regulations.<sup>2</sup> The purpose of this Advisory is to assist them and their counsel in assessing possible settlement positions and litigation risks.

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

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<sup>1</sup> See CFTC Policy Statement Relating to the Commission’s Authority to Impose Civil Money Penalties., [1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶26,265 (November 1, 1994); CFTC Division of Enforcement Advisory Relating to Cooperation Factors in Enforcement Division Sanction Recommendations (2007).

<sup>2</sup> These factors are intended to apply equally to cooperation by all individuals regardless of whether the individual also qualifies as a Whistleblower, as defined by Commission Regulation 165.2(p), and who may have potential liability for any misconduct. Nothing in this Enforcement Advisory should be construed to modify, supplant, or characterize in any manner whatsoever the Commission’s Whistleblower Rules at 17 C.F.R. Part 165.

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

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

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

- A. Material Assistance.** Whether the individual's cooperation resulted in material assistance to the Commission's investigation(s) and related enforcement action(s) and the success thereof.
- B. Timeliness.** The timeliness of the individual's initial cooperation, such as whether-
  - 1. the individual was first to report the misconduct to the Commission or to offer his or her cooperation in the investigation(s) and related enforcement action(s);
  - 2. the cooperation was provided before he or she had any knowledge of a pending investigation or related action; and
  - 3. the investigation(s) and related enforcement action(s) were initiated based on information or other cooperation provided by the individual.
- C. Nature.** The nature of the individual's cooperation, including—
  - 1. whether the cooperation was truthful, specific, complete, and reliable;
  - 2. whether the cooperation was voluntary or required by the terms of an agreement with another law enforcement or regulatory organization;
  - 3. any unique hardships resulting from, or unique circumstances of, the individual's cooperation; and
  - 4. the various types of assistance provided.
- D. Quality.** The quality of the individual's cooperation, including whether the individual provided ongoing, extensive, and timely cooperation and assistance by, for example—
  - 1. preserving relevant information under the individual's appropriate control, including documents and electronically stored information ("ESI") as kept in the normal course of business, and producing such information (in compliance with the Commission's Data Delivery Standards whenever possible);

2. providing key non-privileged information, particularly if the information was not requested and otherwise might not have been discovered;
3. explaining transactions, interpreting key information or identifying new and productive lines of inquiry; and
4. providing complete and truthful sworn statements and testimony during the investigation or in any related enforcement litigation or proceeding to which the Commission is a party.

## **II. The Value of the Individual's Cooperation to the Commission's Broader Law Enforcement Interests**

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

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

## **III. The Individual's Culpability and Other Relevant Factors**

The Division may assess the cooperating individual's culpability in connection with the misconduct being investigated or charged, as well as other individual-specific factors, including among other things—

- A. Circumstances of the Misconduct.**
  1. the individual's role in the misconduct;
  2. the number of instances of misconduct, the duration of misconduct, and

the isolated, repetitive, or ongoing nature of the misconduct;

3. the individual's education, training, experience, and position of responsibility when the misconduct occurred;
4. to what extent the individual benefitted, financially or otherwise, from the misconduct;
5. the type and egregiousness of any misconduct by the individual;
6. the level of intent, for example, whether the individual acted inadvertently, negligently, recklessly, intentionally, or willfully, both generally and in relation to others who participated in the misconduct; and
7. whether the individual undermined the integrity or effectiveness of a compliance or reporting system by, for example, interfering with a company's established legal, compliance, or audit procedures, or with the company's detection, investigation, or remediation of the misconduct.

- B. Prior Misconduct.** Including prior violations of the Act and Regulations or similar conduct charged as violations of other federal or state statutes.
- C. Mitigation.** Whether, where appropriate, the individual took available actions to mitigate or remediate any harm or losses caused by the misconduct, such as, for example, assisting in the recovery of the fruits and instrumentalities of the misconduct, or to the extent culpable, for example, making restitution to harmed persons or disgorging any gains.
- D. Acceptance of Responsibility.** Whether the individual has admitted or otherwise demonstrated an acceptance of responsibility for the misconduct.
- E. Opportunity for Future Violations.** The degree to which the individual will have an opportunity to commit future misconduct in light of his or her occupation and particular circumstances.

#### IV. Uncooperative Conduct

Even when an individual can demonstrate that other factors identified herein warrant credit for cooperation, certain actions by the individual or the individual's counsel may limit or offset the credit he or she might otherwise receive. For example, if an individual, while purporting to cooperate or taking certain cooperative steps, engages in conduct that actually impedes the Division's investigation or inappropriately consumes government resources, the Division may conclude that the individual's conduct does not warrant credit for cooperation.<sup>3</sup>

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<sup>3</sup>Additionally, uncooperative conduct may subject an individual to criminal penalties for providing false information (18 U.S.C. § 1001), providing false information to the Commission in violation of Section 6(c)(2) of the Commodity Exchange Act (7 U.S.C. § 9), contempt (18 U.S.C. §§ 401-402), perjury (18 U.S.C. § 1621), making false statements or declarations in court proceedings (18 U.S.C. § 1623) and/or obstructing justice (18 U.S.C. § 1503 et seq.).

Uncooperative conduct includes, among others, such things as:

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

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