CFTC issues staff guidance on recognition of self-reporting, cooperation and remediation

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By: Deanna R. Reitman | Jeffrey Bourdon

The strength of a company's internal policies and procedures is important for many reasons.   One reason is that a company placing a significant emphasis on controlling its impact on the environment and in its community, as seen through the company's internal policies and procedures, may have higher ESG ratings. Higher ESG ratings may allow the company certain benefits not available to companies with lower ratings, such as a greater access to capital.

Internal policies and procedures are also important because companies with robust regulatory compliance policies and procedures may be less exposed to regulatory violations than those with ad-hoc regulatory compliance policies and procedures. Recent guidance from the Commodity Futures Trading Commission (the CFTC or the Commission) on the public recognition of a company's self-reporting, cooperation and remediation, in situations of regulatory violations, provides companies an additional benchmark that they may use to demonstrate to the public the strength and effectiveness of their policies and procedures – companies whose internal policies and procedures lead it to self report, substantially cooperate, and remediate regulatory violations may not only see lower civil penalties from the CFTC, but increased public confidence, too.

The CFTC issued binding guidance on October 29, 2020[1] to its Division of Enforcement staff outlining how the staff should recommend that the Commission publicly recognize the respondent's self-reporting, cooperation and remediation in the Commission's enforcement order. [2]

To be clear, the CFTC's guidance does not affect how the Commission evaluates self-reporting, cooperation or remediation, or how it considers reductions in penalties.[3] Instead, the guidance only clarifies the standards that the Commission's Division of Enforcement's staff should use as it considers how to recommend to the Commission how the Commission should publicly recognize the respondent's self-reporting, cooperation or remediation in the Commission's enforcement order. [4]

Previously, a respondent's efforts may have been implicitly recognized in the Commission's enforcement order by the severity of the penalty issued by the Commission. As an earlier Commission advisory states: "if the company or individual self-reports, fully cooperates, and remediates, the Division will recommend the most substantial reduction in civil monetary penalty that otherwise would be applicable."[5]

Now, the respondent's self-reporting, cooperation or remediation may be recommended for recognition through one of four standards:

1. No self-reporting, cooperation or remediation.
2. No self-reporting, but cognizable cooperation and/or remediation that warrant recognition but not a recommended reduction in penalty.
3. No self-reporting, but substantial cooperation and/or remediation resulting in a reduced penalty.
4. Self-reporting, substantial cooperation and remediation resulting in a substantially reduced penalty.

Public recognition under these standards may provide greater transparency into the Commission's decision process because it can show the respondent how the Commission interpreted the respondent's efforts. This can help the respondent revise its policies and procedures going forward. As CFTC Chairman Heath P. Tarbert commented, "ultimately, the purpose of the CFTC's enforcement program is to foster a culture of compliance within the marketplace we regulate. This staff guidance furthers that goal by ensuring the public understands the levels of recognition the CFTC may provide in its enforcement orders."[6]

Accordingly, this transparency reinforces the value of effective internal controls and a culture that promotes compliance. Now, companies that self-report, substantially cooperate, and remediate may not only see lower penalties from the CFTC but may also use the Commission's order to distinguish themselves from their competitors: the CFTC's evaluation presents the company a standard the company may use to validate its statements concerning its controls and culture.

This guidance follows recent updates to the Commission's civil monetary penalty guidance and compliance program evaluation guidance. To learn more on the CFTC's guidance on compliance programs and enforcement please see the alert, available here. To learn more on ESG and internal policies, please see the DLA Piper ESG Handbook and Guide, available here.

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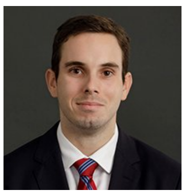
[1] https://www.cftc.gov/PressRoom/PressReleases/8296-20.
[2] The guidance will be published in the CFTC's Enforcement Manual.
[3] See Enforcement Advisory: Cooperation Factors in Enforcement Division Sanction Recommendations for Individuals, https://www.cftc.gov/sites/default/files/idc/groups/public/@lrenforcementactions/documents/legalpleading/enfadvis oryindividuals011917.pdf; Enforcement Advisory: Cooperation Factors in Enforcement Division Sanction Recommendations for Companies, https://www.cftc.gov/sites/default/files/idc/groups/public/@lrenforcementactions/documents/legalpleading/enfadvis orycompanies011917.pdf; Enforcement Advisory: Updated Advisory on Self Reporting and Full Cooperation, https://www.cftc.gov/sites/default/files/idc/groups/public/@lrenforcementactions/documents/legalpleading/enfadvis oryselfreporting0917.pdf
[4] As the Commission comments in footnote 4 of its October 29, 2020 guidance, "This guidance creates no private rights and is not enforceable in court. Division staff are required to follow the guidance for purposes of making

cooperation recognition recommendations to the Commission; the Commission will continue to exercise its independent judgment and discretion as to whether such recognition is merited in any particular matter."
[5] https://www.cftc.gov/sites/default/files/idc/groups/public/@lrenforcementactions/documents/legalpleading/enfadvisoryselfreporting0917.pdf
[6] https://www.cftc.gov/PressRoom/PressReleases/8296-20.

AUTHORS

Deanna R. Reitman
Of Counsel
Houston | T: +1 713 425 8400
New York | T: +1 212 335 4500
deanna.reitman@dlapiper.com



Jeffrey Bourdon
Associate
Houston | T: +1 713 425 8400
jeffrey.bourdon@dlapiper.com