

CFTC SELF-REPORTING AND COOPERATION CONSIDERATIONS

By Paul Andersen, Cliff Histed and Cheryl Isaac¹

Introduction

Derivatives market participants, whether or not they are registered with the Commodity Futures Trading Commission (“CFTC”), and whether they are trading on an exchange or over-the-counter, are subject to regulatory requirements under the Commodity Exchange Act (“CEA”) and CFTC regulations. With those regulatory requirements come numerous compliance obligations, and ample opportunity to unintentionally violate a rule or regulation. In this article, we explore when a market participant, once it has become aware of its violation or potential violation of the CEA or of the CFTC’s regulations, should or must report the violation to the CFTC.

Between 2017 and 2020, the CFTC published guidance on this topic, focused on general self-reporting and cooperation principles,² guidance for individuals and companies,³ CEA violations relating to foreign corrupt practices,⁴ and explanations for how enforcement staff will credit certain types of reporting and cooperation.⁵ Current CFTC leadership, and many market participants, felt that the application of these guidelines was often unpredictable and inflexible.

On February 25, 2025, the CFTC’s existing

guidance on self-reporting and cooperation was rescinded in its entirety and replaced by a new Enforcement Advisory (“Advisory”) published by the Division of Enforcement, under the direction of Acting CFTC Chairman Caroline Pham.⁶ Below, we explore how the new Advisory compares to the CFTC’s prior guidance, and whether the Advisory will actually encourage more self-reporting and cooperation by clarifying how and where to report, broadening what constitutes creditable self-reporting and cooperation, and further defining the potential incentives for self-reporting and cooperating in a new matrix.⁷ Even with the benefit of this new Advisory, the incentive programs discussed below must be weighed against the potential downsides of voluntarily sharing information related to compliance missteps or misconduct.

Changes to the Self-Reporting and Cooperation Guidelines

The Advisory replaces the CFTC’s prior guidance and is now the “exclusive Division policy on self-reporting, cooperation, and remediation.” Even with this change, the general considerations to qualify for the CFTC’s self-reporting and cooperation mitigation credits are similar to prior guidance.

Industry participants must (1) voluntarily self-report in a timely manner, (2) cooperate with the CFTC throughout the investigation and resolution, and (3) take steps to remediate where appropriate. However, the Advisory includes significant new explanations and clarifications that apply within each of these three categories that we discuss below.

¹The authors are all lawyers at K&L Gates LLP. Paul Andersen is an associate in the White Collar Defense and Investigations practice in Washington, D.C., Cliff Histed is a partner in the White Collar Defense and Investigations practice in Chicago, and Cheryl Isaac is a partner in the Asset Management and Investment Funds practice in Washington, D.C.

Voluntary Self-Reporting in a Timely Manner

First, the Advisory expands the definition of creditable self-reporting. Previously, the CFTC would only recognize self-reports made to the Division of Enforcement. Under the new Advisory, the CFTC will recognize “self-reporting made to the relevant Operating Division[.]” meaning the relevant CFTC Division with which a firm is engaged.⁸ The appropriate “Operating Division” is the division that is “responsible for the interpretation and application of each regulation . . . that is the subject of the potential violation.” Beyond this, market participants that self-report in mandatory annual chief compliance officer reports are now eligible for mitigation credit, even though disclosure in those reports already was required, and prior self-reports can be provided to the Division for beneficial consideration.⁹

Second, the Advisory retains many of the same considerations when determining whether a market participant *voluntarily* self-reported. Specifically, the Advisory requires that the disclosure be “made prior to an imminent threat of exposure of the potential violation.” To determine whether this requirement was met, the CFTC will consider whether the potential violation was publicly known, known to other government actors, or whether it is reasonable to believe that the CFTC could have learned of it from another actor.

Third, to be timely, the Advisory requires that the disclosure be “prompt.” The Division will determine whether the report is prompt by considering the “facts and circumstances, including whether the timing of the self-report was reasonably prompt taking into account . . . efforts to determine whether there was a potential violation and its materiality in a timely manner, including discovery of the potential violation and escalation, investigation, management review, and governance requirements.” Comparatively, the prior guidance required market participants to be the first to report and required that the report be made before knowledge of a pending investigation or enforcement action.

Fourth, the Advisory retains the general requirement that the report be “complete.” This means the report must “include all [known] material information regarding the potential violation” at the time of the report. The Advisory retains the Division’s recognition that a market participant “may not yet know all the relevant facts, or the full extent of the potential violation” at the time of the report; and the Division’s recommendation to grant full credit where the participants made best efforts to identify the relevant facts at the time of disclosure, fully disclosed the facts known at the time, continued to investigate, and disclosed additional relevant facts when they became known.

Notably, the Advisory includes a new “safe harbor for good faith self-reporting[.]” meaning the “Division will not recommend charges . . . for any self-report or voluntary disclosure that is later found to be inaccurate after further investigation[.]” This is a significant change from the prior guidance, under which self-reporting firms had been charged when new or different information was discovered following an initial report to the Division of Enforcement.

Fifth, the Advisory established a new three-tier scale for evaluating self-reporting: (1) no self-report; (2) satisfactory self-report; and (3) exemplary self-report. It then outlines what market participant actions constitute classification within each category:

- **Tier 1:** No self-report is defined as either when there “was no self-report” or when the “purported self-report was not reasonably related to the potential violation or not reasonably designed to notify the Commission of the potential violation.” A report that includes information already known by the Commission would fall into this category, but if that report includes “new analysis or insight about facts already known” it will be eligible for self-reporting consideration.
- **Tier 2:** A satisfactory self-report is defined as a report that notified the “Commission of a potential violation but did not include all the material

information . . . known . . . at the time of the self-report.”

- **Tier 3:** An exemplary self-report is defined as a report that notifies the “Commission of the potential violation, provide[s] all material information . . . known . . . at the time of the self-report, and provide[s] additional information that assist[s] the Division with conserving resources[.] An important consideration for classification in this tier is “the quality of th[e] information—not the quantity[.]”

Cooperation

The Advisory also establishes a new four-tier scale for evaluating cooperation: (1) no cooperation; (2) satisfactory cooperation; (3) excellent cooperation; and (4) exemplary cooperation. Like self-reporting, the Advisory outlines what market participant action constitutes classification within each category and provides examples. Notably, the Division no longer considers remediation as its own standalone category, and instead considers remediation during its evaluation of a market participant’s overall cooperation.

- **Tier 1:** No cooperation is “where a Person has complied fully with subpoenas or other compulsory process, but did not provide substantial assistance.”
- **Tier 2:** Satisfactory cooperation is “where a Person complied fully with subpoenas or other compulsory process and provided substantial [voluntary] assistance to the Division” through actions like “providing documents and information”; “making presentations to the Division”; and “making witnesses available for interviews or testimony where consistent with applicable law.”
- **Tier 3:** Excellent Cooperation is where, in addition to the Satisfactory Cooperation steps, a Person “perform[s] internal investigations or reviews; provid[es] . . . thorough analysis of the

potential violation, root cause, and corrective action for remediation, including the use of internal or external expert resources or consultants”; and “provid[es] documents and information on a voluntary basis.”

- **Tier 4:** Exemplary Cooperation is where a Person, in addition to meeting the Satisfactory and Excellent requirements, “consistently provided material assistance to the Division’s investigation and the cooperation provided an exceptionally high degree of value.” This type of cooperation involves “proactive engagement and use of significant resources to provide material assistance to the Division’s investigation.” Further, this classification requires “significant completion of remediation, and use of accountability measures, as appropriate.” This does not mean complete remediation, but does require the completion of a “significant portion” or “significant milestones in the remediation plan.”

The Advisory also includes a list of six factors it “may consider” when determining which tier applies. These factors apply to *all* market participants, which is a change from the CFTC’s prior guidance that provided specific factors for individuals and separately also for companies. Notably, the Advisory states that these factors may be considered “among others” meaning these are not exhaustive.

- **Material assistance and timely resolution:** The first factor is whether the cooperation “resulted in material assistance” to, and “timely resolution” of, the Division’s investigation and conservation of Division resources. While similar to prior guidance, this factor no longer includes consideration of the subsequent success of investigations and related enforcement actions.
- **Timeliness of cooperation:** The second factor is the timeliness of the cooperation. The Division will consider whether the participant is the “first to report the potential violation . . . or to offer

cooperation in the investigation and related enforcement action.” This factor no longer includes language about whether the report occurred before knowledge of a pending investigation or enforcement action, and whether subsequent investigation and enforcement actions are based on the information provided.

- **Nature of cooperation:** The third factor is the nature of the cooperation. Like the prior guidance, the Division considers whether the cooperation was “truthful, specific, complete, credible, and reliable.” However, the Advisory no longer includes other considerations, like whether the party encountered unique hardship because of their cooperation.
- **Voluntary:** The fourth factor is whether the cooperation was voluntary or required by agreement with another law enforcement or regulatory organization. This mirrors the Division’s prior guidance about voluntary cooperation.
- **Quality:** The fifth factor is the “adequacy of resources used for cooperation, including the thoroughness and quality of the analysis, presentations, or submissions provided to the Division.” While this factor existed in the Division’s prior guidance, the Advisory simplified this factor significantly.
- **Extent of cooperation:** The sixth factor is the extent of cooperation. The Division considers the “steps taken to timely preserve documents and records related to the potential violation”; “whether there was consistent timely disclosure of relevant facts”; whether company directors, officers, and employees were encouraged to provide “high-quality cooperation[,]” including “complete and truthful sworn statements and testimony during the investigation or in any related enforcement litigation or proceeding by the Commission”; and whether the admissions conserved Division resources.

Remediation

The Advisory then outlines how the Division considers remediation when assessing cooperation. Importantly, the Advisory states that “as a general matter, the Division will only recommend providing Mitigation Credit . . . where an Operating Division, in consultation with, and in consideration of the views of the Division . . . has concluded that the potential violation and its root cause have either been remediated or that there is a remediation plan in place[.]”

In evaluating remediation, the Division looks for “substantial efforts to prevent a future violation[.]” This could include one or more of the following: (1) taking immediate steps, including correction action, to address the potential violation; (2) “perform[ing] a gap analysis to identify and remediate similar potential violations”; (3) implementing “an appropriate remediation plan”—which can include enhancing policies and procedures, controls, monitoring, testing, and training, and accountability measures where appropriate; and (4) “explain[ing] how the remediation plan is designed to prevent a future violation.”

Further, the “relevant Operating Division will assess and determine whether the remediation plan is appropriate” and “if it is appropriate to recommend the use of a compliance Monitor or Consultant[.]” The Division will approve the selection of any such Monitor, who is required to submit periodic progress reports. Comparatively, consultants do not require Division approval, but still submit periodic progress reports to the relevant CFTC Operating Division.

Uncooperative Conduct

Finally, like in the prior guidance, the Division considers whether market participants engaged in uncooperative conduct using a “standard of objective reasonableness.” Uncooperative conduct includes, but is not limited to: “bad faith conduct that unreasonably impedes the Division’s investigation or requires the use of significant Division resources”; “untimely subpoena compliance”; “bad faith conduct to obscure material

information”; “failure to preserve or produce material information . . . after its discovery”; and “bad faith attempts to improperly shape testimony[.]”

Under the Advisory, market participants’ conduct during an investigation can also be deemed uncooperative. The Advisory provides the examples of being “willfully blind to warnings such as red flags that . . . [there] was a violation of law” and taking no corrective action after becoming aware of a material violation.

Presumptive Mitigation Credits

If market participants meet some or all of the require-

ments outlined above, and the Division identifies the appropriate self-reporting and cooperation tiers, the Advisory requires the Division to utilize a new Mitigation Credit Matrix to determine the presumptive discounts in the civil monetary penalties. Unlike prior guidance, this new matrix provides (1) a presumption that market participants will receive a discount and (2) specific discount percentages—ranging from 0% to 55%. The specific discounts are as follows:

	Tier 1: No Cooperation	Tier 2: Satisfactory Cooperation	Tier 3: Excellent Cooperation	Tier 4: Exemplary Cooperation
Tier 1: No Self-Report	0%	10%	20%	35%
Tier 2: Satisfactory Self-Report	10%	20%	30%	45%
Tier 3: Exemplary Self-Report	20%	30%	40%	55%

While the matrix does provide some guidance on what discounts market participants can expect, there are limitations on its potential value in determining whether to self-report. First, any discounts are based on an initial civil monetary penalty *calculated by the Division* through “an analysis of the facts, the statute and regulation, past Commission precedent . . . , and other applicable law.” The fact that the initial penalty amount is calculated by the Division based on its own analysis means the Division effectively determines the final penalty amount regardless of the percentage discount that ultimately will be applied. For example, the Division could “award” the highest available percentage discount (55%) and still impose a very large penalty simply by calculating the initial penalty amount in an amount higher than it ordinarily would, or higher than it has in previous cases. Second, the Advisory provides the Division “discretion to deviate from the Matrix . . .

given the unique facts and circumstances in a particular case.” This means that even if market participants believe they fall into certain self-reporting and cooperation categories, a perceived unique fact or circumstance could result in a lower or potentially no discount.

Disgorgement

The Advisory appears to significantly limit the circumstances under which market participants are required to disgorge profits, and where applicable, pay restitution from any violations. It states that “in certain circumstances, such as willful misconduct involving fraud or manipulated that resulted in harm to a client, counterparty, or customer” the participant will be required to disgorge all profits and pay restitution where applicable. Comparatively, the prior guidance required that “[i]n all instances, the company or individual . . . disgorge profits (and, where applicable, pay

restitution)” from violations. This change could serve as an incentive for more market participants to self-report and cooperate, particularly when their potential violations do not cause actual harm to a client, counterparty, or customer.

Self-Reporting and Cooperation Considerations

While the Advisory provides significant changes to address critiques of the prior guidance and increase self-reporting and cooperation, market participants should still carefully consider how these changes inform their decision to voluntarily self-report and cooperate.

For example, prior to the Advisory, Acting CFTC Chairman (then a Commissioner) Pham noted in a statement related to self-reporting and cooperation credit in enforcement actions,¹⁰ that the CFTC had taken a “contradictory” approach by creating an “impossible-to-meet standard” for receiving credit, and “the CFTC’s policy on self-reporting looked a lot like bait-and-switch.” Then-Commissioner Pham stated this in response to a CFTC enforcement action in which the respondents—in her view—promptly self-reported, but the CFTC determined not to provide recognition or cooperation credit.¹¹

Then-Commissioner Pham was also critical of the CFTC’s prior “promptness” standard for self-reporting, which in recent cases had not allowed time for a firm to conduct an internal review to determine whether a material non-compliance issue had in fact occurred. She disagreed with the CFTC’s position that self-reporting six months after the initial discovery of a non-compliance issue (during which time the firm conducted an internal review), was not considered to be prompt, and would not result in reduced penalties. Then-Commissioner Pham highlighted how reasonable it is for market participants to conduct due diligence and involve senior or executive management in discussions and review before making a self-report to the CFTC, and how these governance processes—if done correctly—take time.

Said differently, under the prior guidance, there was at least some risk that a well-meaning market participant might self-report to the CFTC, in good faith and in the hopes of demonstrating how seriously it takes its compliance obligations, and the CFTC might determine that the self-report was not “prompt” or fulsome enough, and the firm may be “rewarded” with an enforcement action and substantial fines.

The new Advisory still requires that self-reporting is “reasonably prompt,” but going forward, the Division of Enforcement will consider the facts and circumstances in making this determination, taking into account a market participant’s efforts to determine whether there was a potential violation. If a market participant discovers a non-compliance issue, and takes some time to escalate the matter internally, conduct an internal investigation with a management review, follows its governance requirements, and then self-reports to the CFTC, the Division of Enforcement may still consider this to be “reasonably prompt,” based on the guidance provided.

Despite some improvements, the Advisory may not completely address the issues it seeks to solve, and may introduce new issues for market participants. As described above, the Division still retains considerable discretion when placing market participants into a tier and when determining initial civil monetary penalties. The Advisory also allows the Division to deviate from the described classifications and discounts if they determine a case involves “unique” circumstances or facts. Further, with the introduction of new reporting processes across CFTC Divisions, and involvement of multiple Divisions in making determinations about tier classifications and discount categories, market participants may have less clarity about the potential impact of voluntarily self-reporting and cooperating. Commissioner Kristin N. Johnson chose not to support the new Advisory because of this exact concern.¹²

Finally, derivatives market participants still need to carefully weigh the consequences of not reporting non-compliance issues to the CFTC (or any regulator)

against the possibility that a whistleblower may already have provided information to the CFTC. In other words, market participants should assume that the CFTC may already know about misconduct when the market participant decides not to self-report.

Conclusion

The CFTC has taken significant steps to address prior critiques and provide clarity to market participants about the degree to which their voluntary reporting and cooperation may improve their enforcement outcomes. However, the Division still retains significant discretion when determining civil monetary penalty amounts. The industry will carefully study new settlement orders as they are issued and will decide for itself whether the new Advisory provides meaningful benefits.

ENDNOTES:

²CFTC, UPDATED ADVISORY ON SELF REPORTING AND FULL COOPERATION (2017), <https://www.cftc.gov/sites/default/files/idc/groups/public/@lrenforcementactions/documents/legalpleading/enfadvisoryselfreporting0917.pdf> [hereinafter CFTC UPDATED ADVISORY].

³CFTC, COOPERATION FACTORS IN ENFORCEMENT DIVISION SANCTION RECOMMENDATIONS FOR INDIVIDUALS (2017), <https://www.cftc.gov/sites/default/files/idc/groups/public/@lrenforcementactions/documents/legalpleading/enfadvisoryindividuals011917.pdf> [hereinafter CFTC INDIVIDUAL FACTORS]; CFTC, COOPERATION FACTORS IN ENFORCEMENT DIVISION SANCTION RECOMMENDATIONS FOR COMPANIES (2017), <https://www.cftc.gov/sites/default/files/idc/groups/public/@lrenforcementactions/documents/legalpleading/enfadvisorycompanies011917.pdf> [hereinafter CFTC COMPANY FACTORS]

⁴CFTC, ADVISORY ON SELF REPORTING AND COOPERATION FOR CEA VIOLATIONS INVOLVING FOREIGN CORRUPT PRACTICES (2019), <https://www.cftc.gov/sites/default/files/2019-03/enfadvisoryselfreporting030619.pdf> [here-

inafter CFTC CEA AND FOREIGN CORRUPT PRACTICES]

⁵CFTC, MEMORANDUM RECOGNIZING COOPERATION, SELF-REPORTING, AND REMEDIATION IN COMMISSION ENFORCEMENT ORDERS (2020), <https://www.cftc.gov/media/5181/ENFSelfReportingRemediationGuidance102920/download> [hereinafter CFTC MEMORANDUM].

⁶CFTC, ENFORCEMENT ADVISORY ON SELF-REPORTING, COOPERATION, AND REMEDIATION (2025), https://www.cftc.gov/media/11821/EnfAdv_Resolutions022525/download [HEREINAFTER 2025 ENFORCEMENT ADVISORY].

⁷See, e.g., Ian McGinley, Director of Enforcement, CFTC, Keynote Address before New York City Bar Association Futures and Derivatives Committee Conference (Apr. 11, 2024), <https://www.cftc.gov/PressRoom/SpeechesTestimony/opamcginley3>. The CFTC's increased focus on self-reporting and cooperation mirrors similar trends at Department of Justice and Securities and Exchange Commission.

⁸The Advisory does not describe all circumstances that will constitute a “self-report” to other Operating Divisions. However, in a footnote, the Division of Enforcement committed to working with the Operating Divisions to “develop a future public enforcement advisory to set forth transparent and consistent criteria for enforcement referrals by an Operating Division to the Division of Enforcement.”

⁹This includes required disclosures by a “futures commission merchant, swap dealer, major swap participant, swap execution facility, or swap data repository[.]”

¹⁰See Statement of Commissioner Caroline D. Pham on Self-Reporting and Cooperation Credit in Enforcement Actions (Aug. 19, 2024), <https://www.cftc.gov/PressRoom/SpeechesTestimony/phamstatement081924>.

¹¹See In the Matter of: Raizen Energia SA and Raizen Trading SA, CFTC Docket No. 24-15 (Aug. 19, 2024).

¹²See Statement of Commissioner Kristin N. Johnson on the Enforcement Advisory on Self-Reporting, Cooperation and Remediation (Feb. 25, 2025), <https://www.cftc.gov/PressRoom/SpeechesTestimony/johnsonstatement022525>.

