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CFTC Staff Announces New Approach to Enforcement Referrals, But It's No Free Pass

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Introduction

On April 17, 2025, the staff of the Commodity Futures Trade Commission's (CFTC or Commission) Operating Divisions (Division Staff) issued an advisory (the Advisory) announcing criteria for determining whether to refer compliance matters to the Division of Enforcement (Enforcement Staff). In a nutshell, Division Staff will only refer the most serious, material compliance issues to Enforcement Staff for investigation and possible charges.

This is a welcome development and eliminates the specter of potential charges and fines. But the Advisory seems unlikely to eliminate—or may not even substantially reduce—certain burdens commonly associated with enforcement reviews of compliance matters and introduces new complexities and costs to registered firms' ongoing relationships with and oversight by Division Staff.

Discussion

The CFTC's Market Participants Division, Division of Clearing and Risk, Division of Market Oversight (collectively, the Operating Divisions), and the Division of Enforcement issued Staff Advisory No. 25-13 on April 17, 2025.[1] The Advisory provides guidance on how the Operating Divisions will assess the materiality or other criteria used to determine whether to refer a self-reported violation, or a supervision or non-compliance issue, to Enforcement Staff. The Advisory is intended to implement and support the Division of Enforcement's February 25, 2025, Advisory on self-reporting, cooperation, and remediation (the DOE Advisory), by clarifying expectations and enhancing transparency.[2]

[1] *See* CFTC Letter No. 25-13 (Apr. 17, 2025) (link here).
[2] *See* CFTC Enforcement Advisory: Advisory Regarding Self-Reporting, Cooperation, and Remediation (Feb. 25, 2025) (link here).

The DOE Advisory outlined how self-reporting, and cooperation may influence enforcement decisions, including the factors Enforcement Staff will consider in assessing whether to reduce the proposed civil monetary penalties in enforcement actions where there has been self-reporting, cooperation, or remediation. The DOE Advisory permits registrants and registered entities to self-report potential violations to the appropriate Operating Division primarily responsible for interpreting and applying the relevant provision of the Commodity Exchange Act or CFTC regulation that is subject to a potential violation. The DOE Advisory represents a shift from prior self-reporting practices, in which only violations reported directly to the DOE could earn credit for self-reporting.

To provide registrants with greater transparency and clarity as to the new approach outlined in the DOE Advisory, the Operating Divisions issued the Advisory. Under the Advisory, the Operating Divisions may refer *material* supervision and non-compliance issues, such as issues that cause harm to market participants or result in significant financial losses, to Enforcement Staff. The Advisory encourages entities to use their judgment to determine whether to self-report *material* violations—specifically those involving fraud, manipulation, or abuse—directly to the Enforcement Staff rather than to the Operating Divisions. In contrast, any *non-material supervision or non-compliance issues* will be handled directly by the Operating Divisions—an approach the Advisory contemplates as resulting in more open and transparent engagement between registrants and registered entities and the Operating Divisions to help identify emerging issues earlier.

To assess whether a supervision or non-compliance issue is material, the appropriate Operating Division will apply a reasonableness standard to the following criteria, while also considering the size, activity, and complexity of a registrant or registered entity:

1. Especially egregious or prolonged systematic deficiencies or material weakness in supervisory systems or controls;
2. Knowing and willful misconduct by management, including conduct that demonstrates an intent to conceal violations, or supervision or non-compliance issues; or
3. Lack of substantial progress toward completing a remediation plan over an unreasonably lengthy period, such as several years, particularly after a sustained and continuous process with the appropriate Operating Division regarding the lack of substantial progress.

According to the Advisory, a single missed or extended remediation deadline alone is not sufficient to warrant referral to the Enforcement Staff.

Analysis

The Advisory is a helpful change in Commission operations, but it is no panacea for dealing with compliance matters that come to the attention of Division Staff—whether by self-reporting or through routine examination. As firms evaluate the Advisory and determine how it will affect their regulatory engagement strategies, they may wish to bear the following points in mind.

Border skirmishes over "materiality" are inevitable and may lead to Enforcement-like white papers and presentations to Division Staff. The Advisory may bring to the foreground a process that, in our experience, is often common within the Operating Divisions. Namely, the Advisory appears likely to put the referral question up for debate under the guise of whether a given violation is material. Having been made aware of the "materiality" dividing line, we can foresee firms seeking to persuade Division Staff that issues do not merit referral because they are not material. Efforts to convince Division Staff that referral is not warranted will bear a striking resemblance to submissions that firms have historically made to forestall Enforcement Staff recommendations to the Commission to authorize charges (e.g., *Wells* submissions). What standards apply to those determinations by Division Staff remain to be seen, although prior CFTC pronouncements on materiality for compliance matters will be useful guidance.[3]

The Advisory is an invitation for Division Staff to substitute its judgment for what the law says, or for the business judgment of individual registered companies, potentially without providing needed

[3] *See, e.g.*, 17 CFR. pt. 3 App. C; CFTC Letter No 19-28 at 6-7 (Dec. 4, 2019).

finality. This may happen with Enforcement Staff, anyway, given that most enforcement matters involving regulatory matters settle rather than go to court. But a settlement provides a degree of finality. It is not clear at all from the Advisory whether Division Staff will have any guidelines for assessing whether a firm has achieved compliance or sufficiently remediated noncompliance. In government, things without end dates usually don't end quickly.

The Advisory removes the "enforcement backstop" in discussions with Division Staff. If Enforcement Staff only become involved in matters involving the most serious offenses, firms may lose the ability to call Division Staff's figurative bluff on a given case theory. In our experience, Division Staff will at times relent in their compliance inquests when firms present their arguments and make the point—however subtly—that the likely assessment of Enforcement Staff—and the better view considering questionable legal theories, thin evidence, or other litigation risk—is to drop the matter. Now, Division Staff will have no such practical limit, and in precisely those kinds of matters that do not involve fraud or investor harm and thus may fall within "gray areas" more susceptible to creative legal theories on the part of Division Staff. This dynamic may result in some Commissioners becoming more involved in overseeing such deliberations, although the interests and practical ability of any Commissioner to redirect Division Staff are uncertain.

Penalties are not going away. They will just take the form of remedial costs. Firms should be relieved that regulatory compliance issues are much less likely to result in monetary penalties, equitable relief, and related collateral consequences. Enforcement sanctions for regulatory violations have been on a notable upswing for years; firms will appreciate the CFTC's shift in approach here. But the costs of noncompliance are not going anywhere, and those costs could be substantial if Division Staff have more occasion and considerable latitude to review compliance matters themselves.

In the absence of Commission action, it is uncertain whether Division Staff reviews of compliance matters will be susceptible to regulatory challenge. Over the past several years, firms have increasingly decided to take their disagreements with financial regulators like the CFTC to court. When an agency and a registered firm could not reach resolution, they would look to the judiciary to resolve the matter for them. In many cases, this has required firms to identify a form of final agency action that could be put to judicial review. It is less clear that Division Staff reviews will be susceptible to such challenges. And while it's possible the need to do so will prove vanishingly slim, the potential reduction in market participants' ability to access the courts in the face of questionable legal theories and mounting compliance costs may be regrettable.

The Advisory does not address the examination and referral practices of the National Futures Association (NFA). While this is an obvious point, firms that are both CFTC-registered and NFA members (e.g., swap dealers and futures commission merchants) remain subject to NFA existing protocols for examination and disciplinary action. The NFA runs its own self-regulatory process separately from the industry oversight conducted by staff in the CFTC Market Participants Division, although there is close coordination on some examinations and overall exam priorities. It seems unlikely that the NFA will change it practices—including with respect to referring matters to Division Staff rather than Enforcement Staff. NFA member firms therefore should continue to assume that, until informed otherwise, any follow-on referral from an NFA disciplinary action will likely go to Enforcement Staff.

Conclusion

The Advisory makes plain that the CFTC is operating under new orders. Only material compliance matters may now be referred to Enforcement Staff, and even within Enforcement the guidelines are increasingly clear for penalty reductions and declinations. This is a marked course correction for an agency that began appointing monitors and requiring admissions in non-fraud cases just a few years ago. Whether this reflects a wider swing of the regulatory pendulum in the opposite direction or a fundamental reordering of administrative practice remains to be seen. That is ultimately a policy question, not a legal one.

Meantime, firms will be well-served to consider whether they should best approach Division Staff as if they are facing an enforcement inquiry. This may entail proper attention to document retention, preparation of key personnel before meetings with Division Staff, the use of white papers and other persuasive presentations to forestall further proceedings, and so on. While the potential stakes and consequences of

Division Staff proceedings will differ from those in typical enforcement actions, great care and skill in resolving such matters will remain paramount.

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