

CFTC ISSUES ENFORCEMENT GUIDANCE ON EVALUATING CORPORATE COMPLIANCE PROGRAMS

On September 10, 2020, the Division of Enforcement of the U.S. Commodity Futures Trading Commission ("CFTC") issued guidance for evaluating corporate compliance programs in connection with enforcement charging and penalty matters (the "Compliance Program Guidance").¹ Along with certain penalty guidance published by the Division of Enforcement in May 2020,² it provides useful direction for companies operating in CFTC-regulated markets.

The Compliance Program Guidance underscores the importance of routine and proactive assessments of a company's control environment. Indeed, recent CFTC resolutions demonstrate the significant consequences of failing to prepare for or adequately respond to apparent violations or to investigations (see our [August 2020](#) client briefing). In addition to the Compliance Program Guidance, CFTC market participants should familiarize themselves with CFTC enforcement advisories issued since 2017 concerning cooperation and self-reporting (see our [January 2017](#), [September 2017](#), and [March 2019](#) client briefings). Entities seeking a comprehensive overview of the regulatory and enforcement apparatus in this area would be well-served by our [Guide to United States and United Kingdom Derivative and Commodity Market Enforcement Regimes](#), and those facing the prospect of a government inquiry may also wish to review our Futures Industry Association webinar [Don't make it worse: responding properly to US/UK investigations](#).

¹ See Memorandum from James M. McDonald, Director, Division of Enforcement, to Division of Enforcement Staff (Sept. 10, 2020), <https://www.cftc.gov/media/4626/EnfGuidanceEvaluatingCompliancePrograms091020/download> ("Sept. 10, 2020 Memorandum").

² See Memorandum from James M. McDonald, Director, Division of Enforcement, to Division of Enforcement Staff (May 20, 2020), <https://www.cftc.gov/media/3896/EnfPenaltyGuidance052020/download> ("May 20, 2020 Memorandum").

The Compliance Program Guidance shows that the CFTC will consider whether a company's compliance program "was reasonably designed and implemented to achieve three goals: (1) prevent the underlying misconduct at issue; (2) detect the misconduct; and (3) remediate the misconduct."³ This includes consideration of what the company did to review and modify its compliance program after discovering any malfeasance, including mitigation where harm occurs and discipline for culpable individuals.⁴ Although the Compliance Program Guidance is principles-based and not strictly prescriptive, it may serve as a checklist for proactively assessing the adequacy of compliance frameworks prior to any CFTC action, during the initial phase of any investigation or response, as well as during the pendency of any matter before the Enforcement Division.

When considering whether a compliance program effectively prevents potential misconduct, relevant stakeholders within a company should assess policies and procedures, training, remediation of known deficiencies, adequacy of resources, and independence from the organization's business functions.⁵

A checkup of a company's ability to detect malfeasance should include an analysis of internal surveillance and monitoring systems, internal reporting, and procedures for evaluating unusual or suspicious activity.⁶

Finally, in the context of remediating any misconduct identified, an organization should mitigate and otherwise address harmful impacts, discipline responsible individuals, and remediate deficiencies that contributed to the misconduct or failure to detect it.⁷

For further information and insight regarding the Compliance Program Guidance and the CFTC's enforcement program, please refer to the Clifford Chance contacts listed below.

³ Sept. 10, 2020 Memorandum

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

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