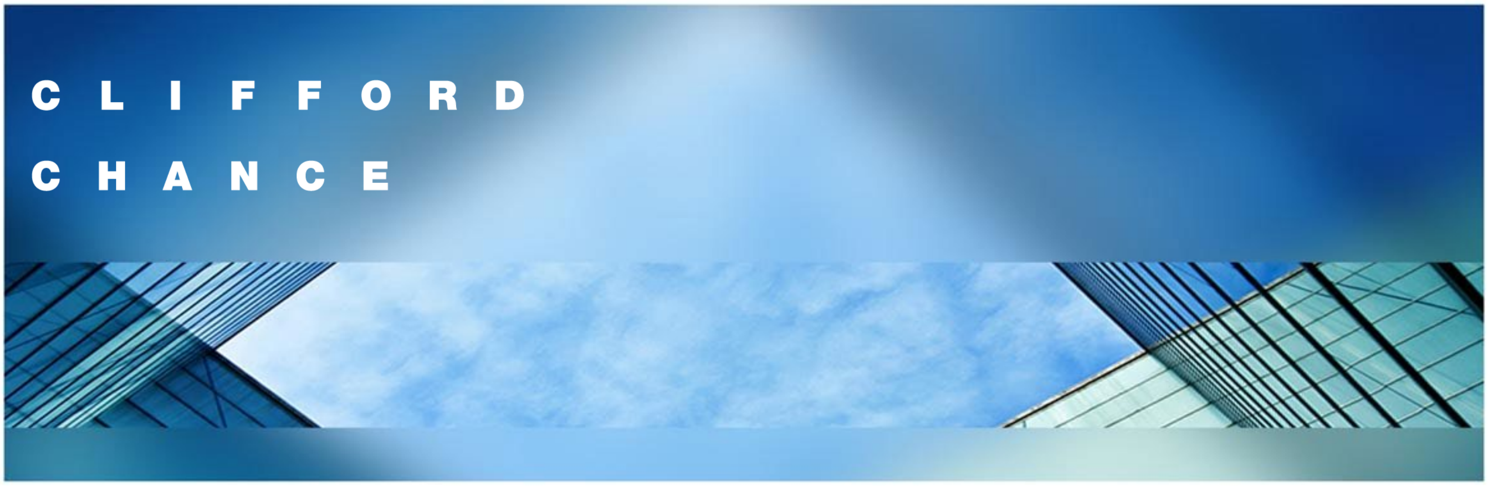

CFTC ISSUES NEW ENFORCEMENT ADVISORY ON SELF-REPORTING, COOPERATION, AND REMEDIATION

On February 25, 2025, the Division of Enforcement of the U.S. Commodity Futures Trading Commission ("**CFTC**") released a new Enforcement Advisory ("**Advisory**") that provides comprehensive guidance on self-reporting, cooperation, and remediation. This Advisory replaces various self-reporting and cooperation advisories previously released by the CFTC. Unlike those prior releases, the Advisory for the first time assigns concrete percentages by which penalties will be reduced for various levels of cooperation and self-reporting.

Unfortunately, however, this will be of limited use to targets of investigations seeking to predict their potential exposure and thereby assess the value of self-reporting or cooperating. This is because the CFTC has not defined with precision what constitutes a "violation," either in the Advisory or elsewhere, leaving open the possibility for creative definitions that vastly increase potential penalties. For example, the CFTC has at times taken suggested that each order placed in connection with a manipulative scheme constitutes its own violation, and could potentially even take the position that each individual futures contract that is part of a manipulative scheme constitutes its own violation, even if placed as part of a single, multi-lot order. Without more transparency from the CFTC on exactly how to predict the "numerator" that stands to be reduced by the self-reporting / cooperation "denominator," market participants will still find it hard to determine the actual value of self-reporting or cooperation.

Market participants would also need to consider the criminal implications of any self-report to the CFTC. The Commodity Exchange Act provides that intentional fraudulent or price-manipulative conduct is a criminal felony, which can be prosecuted by the U.S. Department of Justice ("**DOJ**"). A market participant considering self-reporting potentially intentional misconduct to the CFTC should therefore also consider whether to make a similar self-report to the DOJ.

KEY ASPECTS OF THE ADVISORY:

1. Self-Reporting:

The Advisory lists several key factors by which the CFTC will evaluate a self-report:

- **Voluntariness**: The self-report must be a voluntary disclosure made before any imminent threat of exposure. The CFTC will consider whether the potential violation was already publicly known or known to another government entity, and whether it was reasonable to assume that the Division of Enforcement could learn of the potential violations from another source.
- **Reporting to the Commission**: The CFTC previously only considered a self-report effective if it was made directly to the Division of Enforcement. The Advisory changes this policy, allowing a self-report to be made to any operating division of the CFTC. Disclosure to the Division of Enforcement is still considered sufficient, and a report to any one operating division is adequate even if the violation implicates the roles of multiple divisions.
- **Timeliness**: To be eligible for mitigation credit, a self-report must be prompt. The Advisory suggests that the CFTC will evaluate timeliness based on various facts and circumstances, including whether the self-reporter undertook a prompt investigation to determine whether there was a potential violation.
- **Completeness**: Full credit for self-reporting requires the disclosure of all material information known at the time of the report. The Advisory acknowledges that not all facts may be known initially and encourages early disclosure with ongoing updates as more information becomes available.

Safe Harbor for Good-Faith Self-Reporting: The Advisory provides a safe harbor for good-faith self-reports that may later be found inaccurate, provided corrections are promptly made after discovery of inaccuracies. This provision aims to encourage early and honest reporting without fear of penalty for initial inaccuracies.

Self-Reporting Tiers: The Advisory introduces a three-tier scale for evaluating self-reporting:

- **Tier 1: No Self-Report**:
  - No timely self-report;
  - Self-report was information already known from other sources; or
  - Self-report was not reasonably related to the potential violation or not reasonably designed to notify the Commission.
- **Tier 2: Satisfactory Self-Report**:
  - Self-report to an appropriate CFTC division;
  - Effective to notify the CFTC of the potential violation; but

    - Did not include all material information reasonably related to the potential violation that the reporting party knew at the time of the self-report.

- **Tier 3: Exemplary Self-Report**:
    - Self-report to an appropriate CFTC division;
    - Effective to notify the CFTC of the potential violation;
    - Included all material information reasonably related to the potential violation that the reporting party knew at the time of the self-report; and
    - Included additional information that assisted the Division of Enforcement with conserving resources its investigation.

2. Cooperation:

Cooperation is assessed on a four-tier scale, in which the CFTC will consider the nature and timeliness of assistance provided, voluntary engagement, and the use of resources to aid the Division of Enforcement's investigation. All cooperation evaluations will be based on the facts and circumstances of the matter at hand. The tiers are:

- **Tier 1: No Cooperation**: The target complies with legal obligations but does not provide substantial assistance beyond that.
- **Tier 2: Satisfactory Cooperation**: The target provides substantial assistance, such as voluntary document production and arranging witness interviews.
- **Tier 3: Excellent Cooperation**: The target provides consistent, substantial assistance, including by sharing with the Division of Enforcement the results of internal investigations, providing thorough analysis of violations, and taking prompt remedial actions.
- **Tier 4: Exemplary Cooperation**: This highest tier requires the target to proactively engage with the Division of Enforcement throughout its investigation, to devote substantial resources to aiding the investigation, and to make significant progress toward implementing remedial measures before the conclusion of the matter.

Factors for Cooperation Tier Determination: In determining the appropriate tier of the target's cooperation, the CFTC will consider factors such as the material assistance provided, timeliness of cooperation, nature and voluntariness of the cooperation, adequacy of resources used, and the extent of cooperation, including document preservation and witness availability.

Uncooperative Conduct: Actions that impede the Division of Enforcement's investigation, such as untimely subpoena compliance or failure to preserve material information, may offset any credit for cooperation. Uncooperative conduct can also include willful blindness to violations or failure to take corrective action. Such conduct may result in reduced Mitigation Credit.

Remediation: The Advisory suggests that remediation efforts are integral to evaluating cooperation. The CFTC will consider whether a company has taken substantial steps to prevent future violations, such as immediate corrective actions, gap analyses, and implementation of comprehensive remediation plans. The effectiveness of these efforts will be assessed by the relevant operating division of the CFTC, which may recommend the use of compliance monitors or consultants.

MITIGATION CREDIT MATRIX

The Advisory incorporates the tiers of self-reporting and cooperation described above into a "Mitigation Credit Matrix," which outlines presumptive percentage discounts on civil penalties based on the tiers of self-reporting and cooperation. While the matrix serves as a guideline, the Division of Enforcement retains discretion to adjust recommendations based on the unique facts and circumstances of each case.

	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%

RECOMMENDATIONS FOR CLIENTS

The Advisory's attempt to give greater certainty to market participants regarding the value of self-reporting and cooperation is somewhat undermined by the lack of clarity regarding what constitutes an instance of a "violation." Nevertheless, market participants would be well-advised to assess whether their compliance frameworks are adequate to detect—or ideally prevent—violations. Whatever value self-reporting and cooperation might have, market participants will be best placed to limit or avoid penalties by having systems in place to quickly detect and escalate any "red flags" suggesting that a violation may have occurred.

For further guidance on navigating the new Advisory and optimizing compliance practices, please contact our team members listed below.

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