

Alert | Financial Regulatory & Compliance

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Details on the CFTC's New Self-Reporting Policy

On Sept. 25, 2017, the Program on Corporate Compliance and Enforcement and the Institute for Corporate Governance and Finance at New York University School of Law hosted a policy speech by James McDonald, Director of the Division of Enforcement, United States Commodity Futures Trading Commission (CFTC). Mr. McDonald presented the CFTC's new self-reporting and cooperation policy. The new policy was originally announced in January 2017 and is the first update to the CFTC's cooperation guidelines since 2007. The new policy is a by-product of CFTC's recognition of its limited enforcement resources and the belief that self-reporting incentives will strengthen CFTC's ability to efficiently investigate misconduct and combat fraud.

Under the new policy, companies that voluntarily and promptly report their wrongdoing, cooperate with the CFTC throughout the investigation, and take swift action to remediate the problem can expect speedier settlements, substantially reduced penalties and, in rare cases, no prosecution at all. In evaluating the cooperation, the Division of Enforcement will focus on the value of the cooperation in relation to the specific investigation, the Division's overall enforcement objectives, and evidence of any history of misconduct and mitigation or remediation efforts. It is unclear whether the National Futures Association (NFA) will revise its own disciplinary approach to incorporate CFTC's new self-reporting and cooperation policy.

With respect to reporting, self-disclosure must occur in a "reasonably prompt period" after discovery and must include "all known facts" at the time of reporting. Voluntary disclosure, according to CFTC's enforcement advisory regarding the new policy, "must be made prior to an imminent threat of exposure of the misconduct." Mr. McDonald acknowledged that all the facts may not be known at the time of reporting. He said that full credit would be given to companies and individuals who make a good faith partial disclosure followed by further reporting.

According to Mr. McDonald, if a self-reporter has met the CFTC's expectations, that company or individual can expect that the CFTC will timely communicate its expectations, work with the self-reporter on remediation, and provide "concrete benefits" for self-reporting. The greatest reductions in penalties will go to self-reporters who report early, make an active effort to find all wrongdoing, and fully cooperate with the CFTC investigators.

Mr. McDonald said that his objective was not to dictate or demand any outcome from companies and individuals regulated by the agency, but to incentivize self-reporting and bring the CFTC's policies further in line with other agencies, including the Department of Justice.

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