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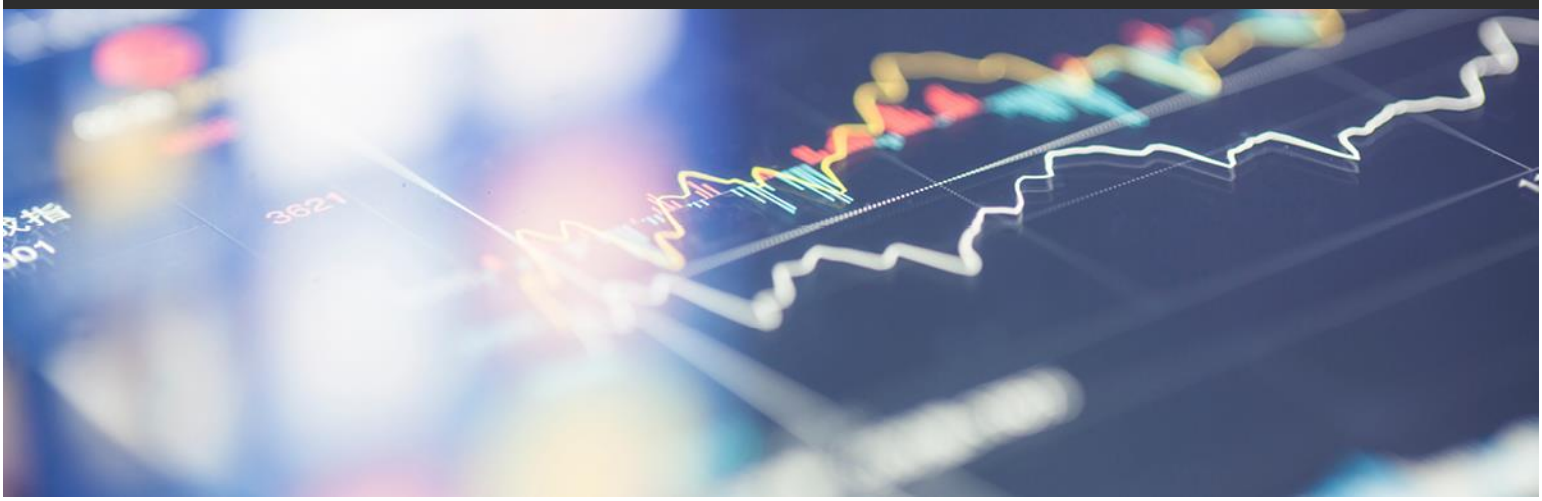

May 2020

CFTC's Division of Enforcement Issues Guidance Regarding Civil Monetary Penalties

The Division of Enforcement (Division) of the Commodity Futures Trading Commission (CFTC or the Commission) issued a memorandum on May 20, 2020 (2020 Memo), providing guidance regarding the factors the Division considers when recommending civil monetary penalties to the Commission for violations of the Commodity Exchange Act, as amended (the CEA), or CFTC's rules and regulations. The 2020 Memo represents CFTC's first independent statement addressing monetary penalties in nearly a quarter of a century and was accompanied by CFTC Chairman Heath Tarbert and Division Director James McDonald's statements emphasizing their view concerning the importance of transparency in the Division's enforcement efforts. Factors referenced in the 2020 Memo were incorporated into the Division's updated Enforcement Manual issued on the same date. The 2020 Memo is instructive both for what it contains and for what it omits.

The 2020 Memo divides factors considered by the Division into three categories: gravity of the violation, mitigating and aggravating circumstances, and other considerations. Because gravity of the violation is the only consideration specifically referenced in Section 9a of the CEA when assessing civil monetary penalties, it is perhaps not surprising that this category receives the most attention in the 2020 Memo. Factors considered within the "gravity of the violation" include: (i) the number, type and degree of the violations; (ii) respondent's role in the violations; (iii) any effort to conceal ongoing violations; (iv) the respondent's state of mind, including whether the conduct was intentional or willful; and (v) the nature and scope of any consequences flowing from the violations.

In the "mitigating and aggravating circumstances" category, the mitigation factors the Division may consider include: (i) the respondent's conduct, such as self-reporting the violation; (ii) the extent of cooperation and remediation, such as respondent's attempt to return funds to persons who lost money or by improving respondent's compliance program; and (iii) timeliness of the remediation. Conversely, the aggravating factors the Division may consider include: (i) acts of concealment, (ii) obstruction; or (iii) prior misconduct.

In the category of "other considerations," the Division may consider: (i) penalties assessed in comparable cases; (ii) the extent to which a settlement would conserve Division resources; and (iii) remedies and sanctions "to be imposed" in parallel cases by other civil or criminal authorities or self-regulatory agencies. The 2020 Memo does not address how the Division is expected to determine the existence and amount of remedies and sanctions in parallel cases that may be in process but have not been completed or possibly even initiated. In contrast to administrative actions brought by regulators with whom the Division could engage in discussions, it may be difficult if not impossible for the Division to factor into its recommendation the amount of any penalty imposed in civil or criminal cases until a final decision in such actions is rendered.

CFTC's press release accompanying the 2020 Memo states that in applying the guidelines, the Division "will be guided by the overarching consideration of ensuring that any proposed penalty achieves the dual goals of specific and general deterrence."

How do the factors referenced in the 2020 Memo differ from those set forth in the Division's first pronouncement regarding civil monetary penalties issued Nov. 1, 1994 (1994 Guidance)? Some of the factors referenced in the 2020 Memo were included in the 1994 Guidance. One set of factors that arguably received less attention in the 1994 Guidance than in the 2020 Memo is the extent to which self-reporting, cooperation, and remedial steps taken by the respondent bear on the amount of any monetary penalty recommended by the Division. In several enforcement cases brought by the Division in the past few years, the Division has cited self-reporting and cooperation by a respondent as relevant factors in recommending the penalty amount, along with any steps undertaken by the respondent to correct any error or deficiency in the policies or procedures that may have contributed to the violation.

These same factors were cited in the Division's January 2017 enforcement advisory. At that time, the Division noted that voluntary disclosure must include all relevant facts and be made to the Division within "a reasonably prompt time after the company or individual becomes aware of the misconduct." In this regard, *see* GT Alert dated Sept. 28, 2017, regarding the benefit of early reporting. In light of CFTC's continuing attention in this area, firms subject to the Commission's jurisdiction may want to consider both reviewing their compliance policies and procedures regarding internal investigations and self-reporting deficiencies or violations, if advisable and appropriate.

Unlike the 1994 Guidance, which devoted nearly half of its discussion to civil monetary penalties and other sanctions imposed by self-regulatory organizations (SRO) subject to CFTC's oversight, the 2020 Memo is silent on SRO sanctions. However, SROs remain actively involved in conducting surveillance, initiating disciplinary actions, and imposing penalties. Further, the Division's January 2017 enforcement advisory on self-reporting provided no recommendations regarding whether or how SROs should evaluate self-reporting and cooperation when considering sanctions.

Omitting guidance addressing SRO monetary penalties in the 2020 Memo may be attributable to one (or more) explanations. First, it may indicate the Division and the Commission's general concurrence and agreement with penalties imposed by NFA and the designated contract markets that are the exchanges

regulated by CFTC. Second, it may reflect a policy decision by the Division and the Commission to allow SROs greater latitude in establishing their own enforcement protocols.

Alternatively, the omission of SRO guidance may be attributable to the fact that the 1994 Guidance was issued as a consequence of an amendment to the CEA, requiring the Commission to study penalties imposed by the CFTC and SROs. Without a corresponding mandate to assess SRO penalties underlying the 2020 Memo, the 2020 Memo may have simply been intended to address factors to be considered by the Division when recommending monetary penalties. Whatever the explanation, it would behoove commodity futures and derivatives firms subject to CFTC jurisdiction to monitor closely future developments in this area. Given the pace of activity by the Division in the past few years, firms may not have to wait another quarter of a century for the next update.

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