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Insights

THE CFTC IS NOT YOUR FRIEND

MORE PENALTIES, MORE MONITORS AND MORE ADMISSIONS

Nov 01, 2023

New guidance from the Commodity Futures Trading Commission[i] may significantly change the calculus for firms considering whether to settle an enforcement action. Requiring admission of wrongdoing in a greater number of cases, as the CFTC claims it will do, could make some cases impossible to resolve via settlement. It remains to be seen whether the CFTC will stick to its guns and implement this new guidance in significant cases.

This guidance was announced earlier this month, when Ian McGinley, CFTC Director of Enforcement, spoke at New York University School of Law's Program on Corporate Compliance and Enforcement. McGinley used the occasion to unveil the new Enforcement Division guidance which focuses on penalties, monitors and admissions. He opened his remarks by saying that he has "been surprised to hear that some still believe the CFTC to be 'friendly' when it comes to enforcement."[ii]

MARKET PARTICIPANTS SHOULD EXPECT HIGHER PENALTIES FROM THE CFTC

According to McGinley, the new guidance is designed to better achieve deterrence by setting penalties at levels that "exceed the costs of compliance."[iii] By increasing penalties, the Division intends "to avoid the risk of institutions viewing penalties as an acceptable cost of doing business." McGinley noted that higher penalties "may also empower compliance professionals to make the business case to senior management for the resources they need"[iv] for the institution to comply. As examples of this approach in meting out increased penalties, he pointed to recent settlements against three swap dealers imposing civil monetary penalties of $8 million, $15 million and $30 million.[v] McGinley stated that these penalties are significantly higher than those imposed in prior similar matters and come in the context of "multiple swap dealers across the industry [which] are continuing to fail to report accurately (or at all) millions of swaps."[vi]

McGinley explained that existing Division policy considered recidivist conduct an aggravating factor in determining the appropriate level of penalties. The Division's new guidance provides factors for

what constitutes recidivist conduct in the context of the highly complex and regulated markets overseen by the CFTC. Those factors are:

- The overlapping nature of the current and prior violations – did they stem from the same root cause or involve the same general subject matter;
- The time between offenses – the more recent the prior violation the more likely it is to be considered recidivist conduct;
- Overlapping management – were the same personnel involved;
- The pervasiveness of the conduct – the more *de minimis* the new conduct is and the faster it was identified and remediated the less likely the CFTC will find of recidivism is involved; and
- The robustness and effectiveness of remediation of the prior issue – did the institution change personnel responsible and improve its compliance culture.[vii]

In addition to higher civil monetary penalties, McGinley explained that recidivism "will be a significant factor" in determining whether a corporate compliance monitor or consultant should be imposed on an institution.

MONITORS AND CONSULTANTS

McGinley shared that the Division needs to have confidence that unlawful conduct that is the subject of a CFTC enforcement action will not be repeated. In situations where an institution has taken substantial steps to fix the problems, the CFTC's order will reflect the institution's representations regarding its remediation. But in cases where the Division lacks confidence in an entity's ability to remediate the misconduct on its own, the Division will require "the entity to engage a third party, approved by the Division, to oversee and test the sufficiency of the remediation."[viii]

Going forward under the new guidance, third parties retained by an institution on its own volition to assist in the firm's remediation that have made significant progress so that the Division is confident that full remediation will be achieved will be called "consultants." In contrast, a third party retained by an institution that is approved by the Division and is tasked with testing an institution's compliance and reporting its findings and recommendations to the Division, will be called a "monitor."

If you are interested in resolving your enforcement matter, proactively engaging your own third-party consultant may help you better position your firm for settlement.

THE CFTC WILL DEMAND MORE ADMISSIONS IN SETTLEMENTS

Under the new guidance, McGinley warned that future respondents should no longer assume that they will be able to resolve enforcement actions against them on a no-admit, no-deny basis. He pointed to several recent CFTC orders in which large corporate respondents admitted violating provisions of law and regulation. Admissions are particularly appropriate, he suggested, in situations where:

- The respondent is entering into a parallel criminal resolution admitting to the same underlying facts;
- The respondent admitted to the misconduct in investigative testimony; or
- The matter involves one or more strict liability offenses so the conduct either did or did not occur.

McGinley did concede that there were situations where admissions may not be appropriate, such as where there was a realistic risk of criminal exposure "uniquely tied to the act of admitting [to] the misconduct," and where there are legitimate factual disputes that pose significant litigation risk to the Division.[ix]

PROTECTING YOUR FIRM IN THE NEW CFTC ENFORCEMENT LANDSCAPE

McGinley noted that this new guidance needs to "work[] alongside prior Division advisories, including those describing the importance of self-reporting and cooperation."[x]He said that the Division strives to strike the right balance between incentivizing settlements and deterring misconduct. It will be interesting to see going forward how easy achieving that balance will be for the Division which relies so heavily on settlements as opposed to litigated outcomes to its enforcement actions. More penalties, more monitors, and more admissions will certainly impact the analysis institutions must conduct when deciding how to approach a Division investigation.

Firms facing an enforcement action should consider whether admitting liability will have collateral consequences in other contexts that would make it impossible to agree to a settlement that includes an admission of liability. If an admission would be highly problematic, determining as early as possible whether the CFTC will require an admission is important, because the matter may need to be positioned for a courtroom battle.

FOOTNOTES

[i]*Advisory Regarding Penalties, monitors and Consultants, and Admissions in CFTC Enforcement Actions* (CFTC Enf. Div. Oct. 17, 2023)

[ii] *Remarks of Enforcement Director Ian McGinley at the New York University School of Law Program on Corporate Compliance and Enforcement: "The Right Touch: Updated Guidance on penalties, Monitors, and Admissions"* (CFTC Oct. 17, 2023) ("NYU Speech").

[iii] *Id.* at 3.

[iv] *Id.* at 3.

[v] *In re Bank of America, N.A., et al.*, CFTC Dkt. No. 23-58 (Sept. 29, 2023); *In re Goldman Sachs & Co. LLC*, CFTC Dkt. No. 23-59 (Sept. 29, 2023); *In re JPMorgan Chase Bank, N.A., et al.*, CFTC Dkt. No. 23-61 (Sept. 29, 2023).

[vi] *Id.* at 3.

[vii] *Id.* at 4.

[viii] *Id.* at 5.

[ix] *Id.* at 7.

[x] *Id.*

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MEET THE TEAM

Katherine Cooper

New York

katherine.cooper@bclplaw.com
+1 212 541 1141

Renato Mariotti

Chicago

renato.mariotti@bclplaw.com
+1 312 602 5037

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