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CFTC ENFORCEMENT: BEST PRACTICES AND RECENT DEVELOPMENTS

The CFTC's new chair, J. Christopher Giancarlo, and its new Director of Enforcement, James McDonald, have vowed to continue the Commission's robust enforcement program. In this article, the authors identify eight essential steps firms should take when contacted by the Enforcement Division. They then discuss strategies for engaging with the Division during the investigative process and the difficult decisions whether to self-report and cooperate in the investigation. They close with the CFTC's first use of a non-prosecution agreement.

By Mary P. Hansen, James G. Lundy, Antoinette M. Snodgrass *

For the past several years, the Division of Enforcement for the Commodity Futures Trading Commission has steadily increased its aggressiveness. While the CFTC's annual budget is significantly smaller than the Securities and Exchange Commission's, the "Annual Enforcement Results for Fiscal Year 2017" evidences the CFTC's ongoing zealous enforcement efforts.[1] Specifically, the data indicate that the CFTC collected total monetary sanctions amounting to more than $413 million from cases involving six different categories, as shown in Appendix A.

For the CFTC's Fiscal Year 2017, and going forward, CFTC Chairman J. Christopher Giancarlo has made clear that there will be "no pause, let up or reduction in [the CFTC's] duty to enforce the law and punish wrongdoing" in the markets under the CFTC's jurisdiction.[2] Consistent with his commitment to maintaining a robust enforcement program, Chair Giancarlo appointed veteran federal prosecutor James McDonald as Director of the CFTC's Enforcement Division. Enforcement Director McDonald has

[1] Rel. No. pr7650-17, *CFTC Releases Annual Enforcement Results for Fiscal Year 2017* (Nov. 22, 2017), *available at* http://www.cftc.gov/PressRoom/PressReleases/pr7650-17.

[2] Remarks of Acting Chairman J. Christopher Giancarlo before the 42nd Annual International Futures Industry Conference in Boca Raton, FL, *CFTC: A New Direction Forward* (Mar. 15, 2017), *available at* http://www.cftc.gov/PressRoom/SpeechesTestimony/opagiancarlo-20#P17_3230.

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INSIDE THIS ISSUE

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reiterated Chairman Giancarlo's commitment to enforcement and further stated that the primary way of meeting that goal is to bring "enforcement actions — often carrying substantial penalties."[3]

Accordingly, firms and market participants need to be prepared when the Enforcement Division comes "knocking at their doors." To this end, we discuss below important steps firms should take when they are contacted by the CFTC's Enforcement Division. We also discuss strategies for engaging with the Enforcement staff throughout their investigative process, including the complex and strategic decisions regarding cooperating and self-reporting. Towards that end, we also discuss the CFTC's first use of non-prosecution agreements.

WHEN CFTC ENFORCEMENT "KNOCKS"

While the CFTC has broad investigative powers, including the authority to subpoena documents and testimony, most CFTC investigations start with a "4g request" for documents.[4] Such requests are not welcome events; however, they must be taken very seriously from the start. In fact, the term "request" is misleading because recipients of 4g requests must comply with them; they are not truly "voluntary." By failing to respond — the CFTC will instead obtain a formal order of investigation and issue subpoenas. At that point, the recipient will lose goodwill with the CFTC and more importantly eligibility for the cooperation credit discussed below. Accordingly, ignoring a 4g request or refusing to respond to a 4g request because it is not a subpoena is not an effective tactic to employ with the Enforcement staff.

The following eight essential steps should be taken upon the receipt of any correspondence from the CFTC's Enforcement Division.

1. Determine Who Should Handle the Response to the Request or Subpoena.

Firms may be inclined to rely on their inside counsel or existing outside litigation counsel when faced with a CFTC request or subpoena. This decision is typically driven by cost management or comfort, but the decision on how to proceed should be deliberate and not reflexive. There may be instances where it is clear that the CFTC is not focused on the recipient. Handling such requests in-house or using an existing outside law firm might be appropriate in those situations. However, when the request or subpoena raises issues about the firm's policies, procedures, or processes, and/or focuses on the conduct of high-level employees and/or management, it is almost always preferable to retain counsel with significant experience handling Enforcement Division investigations. Regulatory enforcement defense is a unique practice area that requires not only an advanced understanding of the futures rules and regulations, but an in-depth understanding of the Enforcement Division and its processes. Retaining counsel familiar with the CFTC and the staff can help immediately establish the firm's credibility, and combat any preconceived negative notions that the Enforcement staff may have toward the firm or its representatives at the outset of an investigation. Experienced counsel will also be able to interpret and draw inferences about the underlying investigation from the staff's request.

2. Contact the Enforcement Staff Promptly.

Contacting the Enforcement staff in a timely fashion is of utmost importance. The initial conversation affords an invaluable opportunity to learn details about the investigation that may not be evident based solely on a meticulous review of the letter request or subpoena. Responding promptly to the staff and assuring the staff that the request is being given the utmost priority and attention will also serve to quell any concerns the staff may have about the need to seek a formal order of investigation.

The information sought initially by the Enforcement staff may be exceptionally broad with production deadlines that are largely unachievable given the request's scope. However, unlike in traditional civil

[3] Speech of James McDonald, Director of the Division of Enforcement, Regarding Perspectives on Enforcement: Self-Reporting and Cooperation at the CFTC (Sept. 25, 2017), *available at* http://www.cftc.gov/PressRoom/SpeechesTestimony/opamcdonald092517.

[4] Section 4g of the Commodity Exchange Act, 7 U.S.C. § 6g.

litigation, firms are poorly served in nearly all instances by challenging CFTC requests on grounds that they are either irrelevant or unduly burdensome. Rather, a request for production or subpoena offers the firm a valuable opportunity to gain early credibility with the Enforcement staff. As discussed below in further detail, a positive, professional relationship with the staff from the outset is crucial to, among other reasons, preserving the opportunity to claim cooperation credit.

Through these initial communications, a firm can often begin negotiating the breadth and timing of its production by demonstrating to the Enforcement staff the inherent difficulties in producing the volume of information sought within the requested time period. In doing so, a firm can propose a more manageable schedule with production installments that prioritize information most readily available or of particular interest to the staff. This process can also provide a good-faith basis for seeking to trim, or even eliminate, particular requests that are redundant or less likely to elicit relevant material.

3. Preserve Potentially Relevant Documents.

Once notified of an investigation through the receipt of a request or subpoena, a firm ordinarily needs to take immediate steps to secure any materials that could be considered relevant or responsive to the CFTC's request or subpoena. Senior personnel should issue a document preservation notice to all individuals who may have been involved in the actions at issue that instructs them to identify and safeguard any applicable hard copy and electronic documents. These notices should contain a returnable acknowledgment form that confirms each recipient has fulfilled his or her responsibilities. A firm should also take immediate possession of any potentially responsive materials held by persons who may have engaged in wrongful conduct.

When preserving documents, record-keeping and information technology staff needs to be contacted concerning data storage and retention practices. They should be authorized to suspend deletion capabilities for any potentially relevant hard copy or electronic files, whether centrally maintained or warehoused by a custodian. The firm also should seek to preserve less obvious "documents" that the CFTC typically requests, including data stored on local drives or portable media, such as CDs, DVDs, and flash drives. The firm must also consider how to extract and preserve information from firm-issued smartphones, tablets, and other personal electronic devices. Additionally, it is important to determine whether employees use personal cellphones or other devices for work-related activity. If so, the firm must consider how to collect and preserve evidence from those devices. Finally, the firm must determine whether its employees use third-party messages applications such as What's Up, Snapchat, or Facebook to communicate with each other, clients, or investors about firm business.

Firms should review the request letter or subpoena carefully to determine whether the staff has indicated that the firm keep the existence of the request and the Enforcement Division's investigation confidential. Notably, unlike certain other regulators, almost all Enforcement Division requests or subpoenas include this demand. While the enforceability of such requests is questionable, in almost all circumstances, it is advisable for the firm to comply. The CFTC may have several reasons for requesting confidentiality. As an example, the CFTC may be investigating a specific employee's conduct that occurred outside the scope of employment or in violation of firm policies and procedures. The staff may believe that the firm may have evidence, such as e-mails evidencing the misconduct. The staff may not, however, want the employee to know that it is investigating him or her. In these circumstances, counsel will work with the staff to determine what preservation and collection activities may be undertaken without generally revealing the investigation's existence. It is important to remember that such confidentiality requests may impact the firm's preservation notices.

4. Assess Internal and External Disclosure Obligations and Limitations.

Upon learning of an Enforcement Division investigation, firm leadership and inside counsel customarily devote considerable thought to deciding which individuals within the firm need to be made aware of the investigation. Initially, this group may consist mainly of the persons responsible for its management and governance, such as senior officers and the board of directors, and then expand quickly to include those required to preserve the potentially responsive information.

A concurrent assessment should also be performed to determine whether the CFTC investigation needs to be disclosed externally. That said, any disclosure considerations need to be balanced against the CFTC's requirement of confidentiality. Consideration must be given to placing the firm's outside auditor on notice, particularly when the firm's financial statements may be affected. Further, firms must determine whether contracts with third parties, such as strategic business partners and creditors, impose other contractual disclosure obligations. Also, firms affiliated with public companies will need to advise and confer with disclosure

counsel regarding any public company reporting requirements that may be triggered.

5. Conduct an Appropriately Tailored Internal Inquiry.

Firms regularly find themselves at a significant informational disadvantage when they learn of an Enforcement Division investigation. There is simply no way to know with any reasonable certainty what documents the Enforcement staff has reviewed, with whom they have spoken, or what preliminary theories are being developed. It is critical for a firm that is confronted with these circumstances to attempt to close this informational gap as quickly as possible by acquiring a strong understanding of the potentially relevant facts and legal claims. This process promotes not only the development of a sound defense strategy, but also the ability to uncover any wrongful conduct, which could extend beyond the CFTC's areas of focus.

An internal fact-finding inquiry can be conducted through a less formal internal assessment by defense counsel or, when appropriate, an independent internal investigation may need to be conducted. The latter is typically necessary when the alleged conduct may be regarded as pervasive or egregious, and especially when it could involve members of senior management. In those instances, the firm should designate quickly those persons within the organization who are best suited to oversee the independent investigation. Candidates include inside counsel, the board, or a special board committee typically comprised of independent directors (if available). Those tasked with the investigation regularly retain outside counsel and, if necessary, subject-matter experts to assist them in ensuring the investigation's thoroughness.

6. Identify Possible Conflicts of Interest.

Whether the firm's CFTC counsel can also represent the firm's current or former representatives during the CFTC investigation is another subject that demands early consideration. While some conflicts of interests are easily discernible, others may be more latent and emerge only as the investigation or an internal inquiry unfolds. The Enforcement Division generally stays out of conflict issues, unless obvious. In fact, as a general rule, the burden to decide whether to retain separate counsel for directors, officers, and other employees rests squarely with the firm and its counsel.

Frequently, these individuals will appeal to the firm to pay their legal costs when separate counsel is warranted. Employment contracts and indemnification provisions under the firm's bylaws or state law may provide the controlling language. When no obligation exists, a firm still should consider whether there are practical reasons to do so voluntarily. This can present a delicate balancing test. The preference to forge a cooperative working relationship with the individual and his or her counsel during the investigation is often a factor favoring payment. Conversely, the firm may prefer to avoid any appearance that it is assisting someone whom the Enforcement staff might view negatively.

7. Weigh the Pros and Cons of Cooperation.

We discuss cooperation in detail below. However, the issue of cooperation is important to consider at the outset of an investigation. Starting out on the "wrong foot" can doom a firm's ability to cooperate before it fully understands the parameters of the CFTC's investigation. Firms who choose to cooperate with the Enforcement Division during an investigation may receive cooperation credit through reduced charges and penalties, along with an opportunity to review a draft settlement order and the ability to negotiate some of its language.

8. Examine Pertinent Insurance Policies.

Errors and omissions liability policies, and directors and officers liability policies may provide coverage for investigative and defense costs involving firms and senior management. Such coverage can differ greatly depending on the insurance carrier and policy involved. For instance, certain policies cover costs for the individuals, but not the firm. Some policies delay coverage until a formal investigation is commenced, or until at least one employee has been subpoenaed to testify. Still others trigger coverage only when the CFTC investigation results in a charging decision against an insured.

Given the significant costs a firm and its indemnified representatives may incur collectively during a CFTC investigation, it is advisable that a firm seek prompt assistance from its insurance counsel to review its standard policy along with any special endorsements that may apply. It is also critically important for the firm to provide its insurance carrier with timely notice of any potential claims under an applicable professional liability policy in order to preserve any available coverage rights.

AN OVERVIEW OF THE CFTC ENFORCEMENT PROCESS

After counsel has been retained and the firm has at least an initial understanding of the relevant conduct

under investigation, it is important to start strategizing for how to best respond to the Enforcement Division's request and effectively communicate the underlying facts to the Enforcement staff in the best possible light for the firm.

At the outset, counsel should attempt to determine the status of the Enforcement Division's investigation. Is it still in an initial inquiry stage? If so, the firm may be able to provide specific information and documents necessary to convince the staff that there have been no violations and, therefore, no reason to transition to a formal investigation with the accompanying issuance of subpoenas. Counsel should be able to determine from conversations and the nature of the staff's requests how familiar the staff is with the underlying facts. If the staff seems well-versed with the underlying facts, it may indicate that they have been working on the matter for some time before issuing requests or subpoenas. If the staff had obtained formal order authority, then they would have had to prepare a memorandum setting forth, in very general terms, the basis for its belief that firms and/or individuals have engaged in violations of the Commodity Exchange Act ("CEA") and the rules thereunder. If the staff has formal order authority, recipients of subpoenas for documents and testimony have the right to see a copy of the Formal Order of Investigation. Regardless of whether the staff is in the informal inquiry stage or conducting a formal investigation, counsel should actively seek to engage the staff early and often in an attempt to resolve issues quickly. Due to the CFTC's limited resources, it is generally more amenable to resolve cases earlier in the process — if such resolution is appropriate — than other regulators, such as the SEC and FINRA.

Next, and as discussed above, counsel should work with the Enforcement Division to determine the staff's priorities with respect to document production. The staff is routinely willing to work with the firm on a document production schedule that gets them the documents they believe are most relevant while, to some extent, easing the burden on the firm. The firm may be able to glean significant information about the staff's interest by the way they prioritize the document production.

As the firm completes its document production, the firm should be prepared for the CFTC to request voluntary interviews to gather information from witnesses. The staff's willingness to conduct off-the-record voluntary interviews offers counsel an opportunity to be more involved in the interview than the more formal on-the-record testimony. In some instances, agreeing to produce witnesses voluntarily, without subpoenas, for either on-the-record or off-the-record testimony will contribute to claiming "cooperation" credit since this relieves the staff of the burden of obtaining a formal order of investigation (i.e., the authority to issue subpoenas).

The firm and any individuals who communicate in writing or orally with the Enforcement staff need to be especially mindful of the CFTC's expanded authority, pursuant to the Dodd-Frank Act, that prohibits false or misleading statements of a material fact to the CFTC.[5] Prior to the expanded authority, the Enforcement staff had to rely on their criminal counterparts at the Department of Justice to file criminal charges for perjury or false statements. Now, the CFTC can impose civil penalties for false statements without involving their criminal counterparts. And the CFTC started to do that in 2013 when, *In the Matter of Susan Butterfield*, it entered a $50,000 civil monetary penalty against an individual for making false statements of material fact in testimony to Enforcement staff.[6] In another action, the CFTC levied $250,000 in civil penalties against an individual defendant for both making affirmative false statements to the CFTC and for omitting certain disclosures during the Enforcement Division's investigation.[7] Since *Butterfield*, the CFTC has cited violations of Section 6(c)(2) in several cases — resulting in civil penalties.[8]

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[5] The provision states, "It shall be unlawful for any person to make any false or misleading statement of a material fact to the Commission, including in any registration application or any report filed with the Commission under this chapter." Section 6(c)(2) of the Commodity Exchange Act, 7 U.S.C. §9(2) (Supp. V 2011).

[6] *In the Matter of Susan Butterfield*, Docket No. 13-33 (Sept. 16, 2013), *available at* http://www.cftc.gov/idc/groups/public/@lrenforcementactions/documents/legalpleading/enfbutterfieldorder091613.pdf.

[7] *In the Matter of: Sean R. Stropp, Respondent*, 2014 WL 1117260, at *3 (Mar. 18, 2014) (finding Stropp made "misstatements and omissions [that] were material to the Division's investigation").

[8] *See, e.g., In re Cohen and Pure Reason LLC*, Docket No. 15-39 (Sept. 29, 2015), *available at* http://www.cftc.gov/idc/groups/public/@lrenforcementactions/documents/legalpleading/enfpureorder092915.pdf (finding violations for falsely testifying during the investigation and enforcing a civil penalty of $140,000); *In the Matter of: Scott A. Beatty, individually and d/b/a Peak Capital Group, Inc., and Peak Capital Management Group, Inc., Respondents*, 2014 WL 4965119, at *2 (Sept. 30, 2014) (finding that the Beatty made false and misleading statements "sent to Commission staff in response to subpoenas" and other

At the conclusion of an investigation, the Enforcement staff will come to a point where it decides either that the evidence does or does not support it in recommending to the Commission that it charge the company and/or individuals with violations of the CEA. If the staff believes it has sufficient evidence to recommend that the Commission charge the company and/or individuals it may issue a "Wells Notice."[9] The Wells Notice officially informs potential defendants or respondents of the specific charges that the Enforcement staff intends to recommend that the Commission bring, as well as the nature of the relief to be sought. In recent years, the practice of issuing Wells Notices has declined; whether Enforcement Director McDonald will end or continue this trend remains to be seen.

For strategic reasons, making a "Wells Submission" or submitting a "White Paper" at earlier points in the investigation addressing specific legal and factual issues can be strategically beneficial to a party.[10] The Enforcement staff will typically be receptive to White Paper submissions at certain points during the investigation. After the investigation concludes, however, at that point a Wells Submission is the appropriate and more formal method to communicate factual and legal arguments. As stated in the guidance, if a party makes a Wells Submission and "the Division recommends the commencement of an enforcement proceeding to the Commission, any written statement will be forwarded to the Commission if so requested."[11] Thus, a Wells Submission allows parties to make written arguments to the CFTC Commissioners.

Throughout the above, the firm should be considering the advantages and disadvantages of settlement in each phase of the investigation. Indeed, when appropriate, early settlement discussions can be advantageous, especially because the CFTC's settlement parameters typically increase during the course of the investigation and any litigation that follows.

Whether a party seeks settlement or advocates with a Wells Submission, at the conclusion of the investigation, the Enforcement Division will make a recommendation to the Commission — unless the matter will be closed without action. For settlement, the staff will make a recommendation to the Commission for acceptance of the settlement offer. If no settlement has been reached, the staff will seek authority to file a litigated action in an administrative proceeding or in federal district court. The remedies are similar: injunctive relief, monetary sanctions, and limitations such as undertakings, suspensions, or bars related to industry activities. In terms of the forum, the CFTC has been decreasing its use of administrative proceedings for litigated actions for several years; these actions now tend to be limited to registration revocation actions. Accordingly, most CFTC litigated actions are filed in federal court. Once the CFTC files its complaint, the Federal Rules of Civil Procedure and Federal Rules of Evidence govern the litigation and the CFTC is treated as any other civil litigant. Both parties are entitled to discovery, summary judgment, etc. Thus, parties can serve discovery on the CFTC to gain access to the non-privileged contents of the Enforcement staff's files.

CFTC COOPERATION AND SELF-REPORTING GUIDANCE, AND THE FIRST NON-PROSECUTION AGREEMENTS

Determining whether to cooperate with the CFTC is a complex, high-stakes decision that involves serious strategic implications based on the facts and circumstances of each particular investigation. The CFTC also encourages self-reporting. Similar to considering a cooperation strategy, the decision regarding whether to self-report also is complex and involves significant risks. For these reasons, this article neither encourages nor discourages cooperation and self-reporting, but rather seeks to analyze the CFTC's recent efforts to tout the purported advantages of cooperation and self-reporting.

To start, and by way of comparison, the history of cooperating and self-reporting with other regulators is revealing in that the rewards all too often appear to be

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violations resulting in a $1 million civil penalty); *In the Matter of Artem Obolensky*, Docket No. 14-05 (Jan. 2, 2014), *available at* http://www.cftc.gov/ idc/groups/public/@lrenforcement actions/documents/legalpleading/enfobolenskyorder010214.pdf (enforcing penalties of $250,000 for making false statements during the investigation); *U.S. Commodity Futures Trading Comm'n v. Arista LLC*, No. 12 CV 9043 PAE, 2013 WL 6978529, at *18 (S.D.N.Y. Dec. 3, 2013) (finding multiple instances of false or misleading statement in violation of the CEA, as well as other violations and levying millions of dollars against each defendant in civil penalties).

[9] 17 C.F.R. § 11, Appendix A.

[10] It is important to note that Wells Submissions are not considered settlement negotiations and are not protected from disclosure under Rule 408 of the Federal Rules of Evidence. Accordingly, the Enforcement staff may use statements in Wells Submissions as admissions in any subsequent litigation against firms and individuals.

[11] *Id.*

only a brief acknowledgement in a release or a simple paragraph in an action claiming that cooperation and self-reporting were recognized by the regulator — after an action is brought that resulted in financial and reputational damage to that party. Thus, the decision to cooperate must be thoughtfully evaluated in light of all the facts and a determination of how cooperation will affect the company during the investigation and beyond. Even assuming that the appropriate decision is made to be cooperative at the start of an investigation, that decision needs to be periodically re-assessed.

The CFTC's renewed efforts to encourage cooperation started earlier this year when the CFTC's Enforcement Division issued new advisories on cooperation.[12] For companies, this advisory amended the August 2004 and March 2007 advisories. The "individual" cooperation advisory is new and appears to be complementary to the CFTC's Whistleblower Program.[13] In addition to creating the individual program, these 2017 advisories contain certain other differences from prior advisories, including an emphasis on the CFTC's broader law enforcement interests to pursue other parties and to have culpable individuals identified.[14] The company advisory states that although the CFTC is looking for "more than ordinary cooperation or mere compliance with the requirements of law," cooperation that meets this standard could have significant impact on the company's result in the investigation, including "the Division recommending no enforcement action to recommending reduced charges or sanctions in connection with enforcement actions."[15]

Both the company and individual advisories focus on four issues: 1) the value of the cooperation to the investigation at issue; 2) the value of the cooperation to the CFTC's broader law enforcement interests; 3) balancing the cooperator's culpability and disciplinary history with mitigation, remediation, and acceptance of responsibility; and 4) any uncooperative conduct.[16]

Both advisories also discuss the CFTC's recognition of the attorney-client privilege and work product doctrine.[17] Importantly, the CFTC does not require companies or individuals to waive attorney-client privilege or work product protection as a prerequisite for cooperation credit. In practice, over the last several years, following the lead of the Department of Justice, the CFTC has been reluctant to ask companies and individuals to waive any privilege in the context of an investigation. In closing, both advise that the assessment of cooperation is discretionary.[18] This final point — that cooperation is discretionary — needs to be heeded as a veiled warning that cooperation can — and sometimes will — lead to negative consequences. Thus, deciding whether to cooperate and to continue to cooperate are very serious strategic decisions a firm or individual must work through with experienced counsel.

In recent months, the CFTC has continued to encourage full cooperation and self-reporting. On August 25, 2017, Enforcement Director McDonald, discussed incentivizing self-reporting on a CFTC podcast.[19] During that interview, he stated that although cooperation and self-reporting do not amount to "a get-out-of-jail-free card," they are strategies that will show that the Enforcement Division, under his leadership, is going to "take the substantial benefit seriously."[20] One month later, on September 25, 2017, he gave a speech announcing the CFTC's updated advisory on Self

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[12] *See* Rel. No. pr7518-17, CFTC's Enforcement Division Issues New Advisories on Cooperation (Jan. 19, 2017), *available at* http://www.cftc.gov/PressRoom/PressReleases/pr7518-17.

[13] CFTC Whistleblower Program, *available at* https://www.whistleblower.gov/.

[14] Parties need to also bear in mind that the CFTC possesses the authority to provide its investigatory files to other government or regulatory agencies, including state and federal criminal authorities, on a confidential basis to conduct their own investigations. Importantly, the staff will not advise that they have provided such information and documents.

[15] Enforcement Advisory, Cooperation Factors in Enforcement Division Sanction Recommendations for Companies, Sec. V. at 7 (Jan. 19, 2017), *available at* http://www.cftc.gov/idc/groups/public/@lrenforcementactions/documents/legalpleading/enfadvisorycompanies011917.pdf.

[16] *See id.*; Enforcement Advisory, Cooperation Factors in Enforcement Division Sanction Recommendations for Individuals (Jan. 19, 2017), *available at* http://www.cftc.gov/idc/groups/public/@lrenforcementactions/documents/legalpleading/enfadvisoryindividuals011917.pdf.

[17] Consistent with the 2007 advisory, the company advisory states, "With these cooperation factors in mind, the Division recognizes that the attorney-client privilege and the work product doctrine are fundamental to the American legal system and the administration of justice." Enforcement Advisory for Companies, *supra* note 16, Sec. V. at 7.

[18] Rel. No. pr7518-17, *supra* note 12.

[19] CFTC Talks Episode 005, Interview with James McDonald Director of Enforcement (Aug. 25, 2017), *available at* http://www.cftc.gov/Media/Podcast/index.htm.

[20] *Id.* at 15–16.

Reporting and Full Cooperation.[21] In his speech, he focused on the CFTC's initiative to "shift [a firm's] analysis in favor of self-reporting."[22] He provided several factors that must be present to obtain the "substantial benefits" of self-reporting: 1) the CFTC expects truly voluntary self-reporting before the threat of disclosure and expects it in a prompt timeframe; 2) full cooperation must continue throughout the investigation; and 3) timely and appropriate remediation must occur to ensure the misconduct does not occur again.

McDonald stated that if a self-reporter complies with the factors as he outlined them, the Enforcement Division will commit to certain actions to benefit the self-reporter. First, Enforcement will clearly communicate with the self-reporter, at the outset, its expectations regarding self-reporting, cooperation, and remediation. Second, Enforcement will work with the self-reporter on remediation. In exchange, the self-reporter can expect concrete benefits in return for the self-reporting, cooperation, and remediation. Specifically, the Director outlined that, "If a company does these three things, the Division of Enforcement will recommend a substantial reduction in the penalty. . . . In truly extraordinary circumstances, the Division may recommend declining to prosecute a case."[23] Unfortunately, the Enforcement Director's September speech and the accompanying advisory failed to articulate the "truly extraordinary circumstances" leading to the Enforcement Division declining to bring an action. Unlike the CFTC's non-prosecution agreements discussed below, there was no accompanying release discussing a matter where these "truly extraordinary circumstances" were present. As mentioned above, the history of how other regulators and the CFTC have handled self-reporting in the past requires that a healthy dose of skepticism be part of the complex and risky decision-making process regarding whether to self-report. Thus, when considering the purported benefits of self-reporting, a firm must be very mindful of and balance the serious risks and collateral consequences at issue as well.

As mentioned, on June 29, 2017, the CFTC announced that it had entered into its first non-prosecution agreements with three individuals based on "substantial cooperation."[24] The action involved traders in a CFTC case against a global futures firm for manipulative trading. The non-prosecution agreements emphasized: 1) the individuals' timely and substantial cooperation; 2) immediate willingness to accept responsibility for their misconduct; 3) material assistance provided to the CFTC's investigation of the company; and 4) the absence of prior misconduct.[25] Enforcement Director McDonald advised the industry that he expects non-prosecution agreements to "be an important part of the Division's cooperation program going forward."[26] Thus, "non-prosecution" provides another important strategy for consideration. If a firm decides to self-report and fully cooperate, but is unable to achieve declination of the Enforcement Division bringing an action, obtaining non-prosecution agreements serves as a secondary goal to pursue to avoid charges.

CONCLUSION

It is highly likely that the Enforcement Division will continue to aggressively investigate potential violations of the CEA and bring actions where they develop evidence that demonstrates that firms and/or individuals engaged in violations. Any request from the CFTC, or any regulator, must be taken very seriously and addressed without delay. Moreover, firms should seriously consider engaging counsel with experience handling matters before the CFTC, and firms should be cognizant of opportunities to advocate their positions with the Enforcement staff when appropriate. More specifically:

* Prior to an investigation, firms may be confronted with a need to decide whether to self-report upon the internal discovery of potential violative conduct.

* During an investigation, strategic advocacy, including submitting White Papers when appropriate, provides firms the opportunity to play an active role in the CFTC's investigation and, where appropriate, to engage in settlement negotiations sooner rather than later.

* Also, during an investigation, firms will be faced with decisions, including but not limited to, whether to

[21] McDonald Speech, *supra* note 3.

[22] *Id.*

[23] *Id.*

[24] Rel. No. pr7581-17, CFTC Enters into Non-Prosecution Agreements with Former Citigroup Global Markets Inc. Traders Jeremy Lao, Daniel Liao, and Shlomo Salant (June 29, 2017), *available at* http://www.cftc.gov/PressRoom/PressReleases/pr7581-17.

[25] *Id.*

[26] *Id.*

cooperate, submit a Wells Response, and settle or litigate.

All of these decisions are very risky and complex. Finally, if settlement is not appropriate, firms and individuals should be prepared to zealously litigate against the CFTC. Unlike during investigations, during litigation the CFTC becomes just another civil opponent subject to the Federal Rules of Civil Procedure and Federal Rules of Evidence and answerable to a federal judge who will rule on disputes during the preliminary phases and through trial. Notably, either the CFTC or the named defendants can request a jury trial. ■

APPENDIX A

FY 2017 Enforcement Actions by Category	
Manipulation, Attempted Manipulation, False Reporting, Disruptive Trading	12
Protection of Customer Funds, Supervision and Financial Integrity	6
Retail Fraud	20
Illegal Off-Exchange Contracts, Failure to Register	1
Other Trade Practice: Wash Trades, Fictitious Trades, Position Limits, Trading Ahead	3
Reporting, Recordkeeping	7
Total Number of Enforcement Actions Brought	49

Notes: CFTC enforcement actions include 29 administrative cases, 17 civil injunctive cases, and three non-prosecution agreements. The manipulation, attempted manipulation, false reporting, and disruptive trading actions included eight actions involving spoofing (including three non-prosecution agreements), two actions involving attempted manipulation, one action involving both spoofing and attempted manipulation, and one action involving a manipulative or deceptive device. Some of the other enforcement actions involve multiple types of charges, but are listed above by the primary charges. For example: three retail fraud actions also involved illegal, off-exchange transactions; and four actions against registrants included a failure to supervise violation.

CLE QUESTIONS on Hansen, et al., *CFTC Enforcement: Best Practices and Recent Developments.* Circle the correct answer to each of the questions below. If at least four questions are answered correctly, there is one credit for New York lawyers (nontransitional) for this article. Complete the affirmation, evaluation, and type of credit, and return it by e-mail attachment to rscrpubs@yahoo.com. The cost is $40, which will be billed to your firm. To request financial aid, contact us by e-mail or fax, as provided above.

1. The authors recommend that firms receiving a 4g request for documents from the CFTC wait until they receive a subpoena before complying. **True** **False**

2. Almost all Enforcement Division requests and subpoenas demand that the firm keep the existence of the request or subpoena confidential. **True** **False**

3. The Dodd-Frank Act gave the CFTC new authority to impose civil penalties for false statements made to it without involving the Department of Justice. **True** **False**

4. In recent years the CFTC has been decreasing its use of administrative proceedings for litigated actions, electing instead to file in federal courts. **True** **False**

5. The CFTC requires firms and individuals to waive the protection of the work product doctrine in order to claim credit for cooperation in an enforcement proceeding. **True** **False**

A F F I R M A T I O N

_____, Esq., an attorney at law, affirms pursuant to CPLR
[Please Print]
2106 and under penalty of perjury that I have read the above article and have answered the above questions without the assistance of any person.

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