



Division of
Enforcement

U.S. COMMODITY FUTURES TRADING COMMISSION

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ENFORCEMENT ADVISORY

Cooperation Factors in Enforcement Division Sanction Recommendations

The U.S. Commodity Futures Trading Commission ("CFTC") has long given credit for cooperative conduct by respondents and defendants when determining the appropriate level of sanctions to impose or approve in enforcement actions.¹ To provide further, detailed information about cooperation, the Commission's Division of Enforcement ("Division"), sets forth in this Advisory three broad categories of cooperation, identifies several factors within each category by which cooperation may be measured, and notes several additional issues that lend weight or perspective to the cooperation factors. The purpose of this Advisory is to assist prospective respondents and defendants and their counsel in assessing possible settlement positions and litigation risks.

It is important to note that certain combinations of factors, or the presence or absence of particular factors, may offer more persuasive evidence of cooperation than others. Nevertheless, the Division's consideration of the presence or absence, and relative weighting, of the cooperation factors discussed in the Advisory is a discretionary function of the Division's Director and staff, and nothing in this Advisory should be deemed to oblige the Division or the Commission to consider one or more cooperation factors in any given instance. Further, the failure to identify a particular factor in one matter does not preclude the Commission from relying on that factor in another matter.

The Advisory should not be read as requiring the Division staff to recommend, or the Commission to impose or authorize, a reduction of sanctions for a respondent or defendant based on the presence or absence of particular cooperation factors. The Division, in appropriate cases, may recommend enforcement action even where all or most of the factors identified below are present. Further, nothing in the Advisory is intended to waive any pre-decisional or other privileges that may apply to the Commission's or Division's deliberations or decision-making regarding cooperation or otherwise.

¹ See CFTC Policy Statement Relating to the Commission's Authority to Impose Civil Money Penalties., [1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶26,265 (November 1, 1994).

Broadly speaking, the Division looks to cooperative factors in three general areas of the company's conduct, together with certain additional factors, in evaluating whether a company cooperated with Division staff to a degree that would prompt the Division staff to recommend reduced sanctions to the Commission. The three areas of corporate conduct involve the company's (i) good faith in uncovering and investigating misconduct; (ii) cooperation with the Division's staff in reporting the misconduct and the company's actions with respect to it; and (iii) efforts to prevent future violations. Actions by an entity recognizing the legal rights of its employees are not inconsistent with these factors.

The additional factors include details about the corporate structure, nature of the misconduct, harm caused, among other factors that may enhance or mitigate sanctions, as discussed below. The three areas of a company's conduct that bear on the Division's decision-making about sanctions recommendations include the following:

I. Nature of the Company's Efforts to Uncover and Investigate Violations

Did the company:

1. uncover the misconduct, and by what means?
2. take immediate steps to address the misconduct and implement an effective response to it?
3. quickly make appropriate disclosure of the misconduct?
4. use an independent entity to investigate and report on the misconduct?

II. Quality of the Company's Efforts in Cooperating with the Division and Managing the Aftermath of the Misconduct

1. Following the discovery of the misconduct, did the company promptly notify the Division?
2. Did a corporate officer or company attorney promptly meet with Division staff to review and explain the known facts about the misconduct?
3. Did the company willingly utilize all available means to:
 - a. make employee testimony or other relevant corporate documents available in a timely manner?
 - b. avoid entering into joint defense agreements with counsel for employees or other entities?
 - c. provide a financial analysis of its gain from the unlawful activities?

4. Did the company outline the findings and relevant evidence regarding the misconduct, and produce a full and complete report of the internal investigation to the Division, including full disclosure of the:
 - a. scope of the wrongdoing?
 - b. identity of the wrongdoers within the organization, including culpable senior executives, where applicable?
 - c. steps taken upon learning of the misconduct?
 - d. processes followed to ferret out necessary information?
 - e. relevant communications between officers, directors and employees?
 - f. documents evidencing the misconduct?
 - g. measures taken to address and ameliorate the misconduct?

III. Corporate Efforts to Prevent Future Wrongdoing

Did the company:

1. provide sufficient, credible assurances to the Division that the conduct is unlikely to recur?
2. implement additional internal controls, procedures and oversight, or take other reasonable steps, to reduce the likelihood of recurrence of the misconduct?
3. reassign supervisors overseeing areas in which misconduct occurred?
4. adequately address the employment of the persons responsible for the misconduct, to the extent they were employed by the company when the conduct was discovered?

IV. Additional Factors

The additional factors the Division may take into account in making decisions about sanctions recommendations include the following:

1. At what level of the organization did the misconduct occur?
2. Did the misconduct arise because of pressure from superiors?
3. How long did the misconduct last after supervisors learned of it?

4. Did the company hire or designate adequate staff and resources to enable it to respond quickly to subpoenas?
5. Did the company take available actions to mitigate any losses caused by the misconduct?

V. Not All Cooperation Is Equal

Even when a company can demonstrate that it has met various factors identified above, certain actions by the company or its counsel may limit or offset the cooperation credit a company might otherwise receive. For example, if a company, while purporting to cooperate or taking certain cooperative steps, engages in other conduct that actually impedes the Division's investigation and consumes government resources unnecessarily, the Division may conclude that the company's conduct does not warrant credit for cooperation. Uncooperative conduct includes, among others, such things as:

- failure to respond to subpoenas in a timely manner, or to produce documents and witnesses within a reasonable period;
- misrepresenting the nature or extent of the company's misconduct;
- claiming that records are unavailable when they are;
- directing company counsel to limit Division staff access to employees;
- inappropriately directing employees or their counsel not to cooperate fully or openly with the investigation;
- engaging in obstructive conduct during investigative testimony or interviews;
- providing specious explanations for instances of misconduct that are uncovered;
- issuing questionnaires to employees that offer suggestive responses;
- failing to properly search computer hard drives for documents and electronic images; and
- failing to provide documents organized in the way they are maintained in the normal course of business.

A company's conduct in response to a Commission investigation can also be deemed uncooperative even when government resources are not consumed. For example, if a company turned a blind eye to warnings or indications that its employees had acted in violation of the law and failed to report such warnings to the Commission, the conduct can reduce the credit the Division would be willing to recommend. Similarly, if a company has seen or received indications of wrongdoing, but waited for a governmental inquiry to take action to uncover

ongoing misconduct, such inaction may suggest to the Division that the company has little interest in recognizing and taking responsibility for its misconduct.

VI. Attorney-Client Privilege and Work Product Protections

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. These rights are no less important for an organizational entity than for an individual. The Division further recognizes that these protections can promote a client's communications with counsel and thereby serve to promote the client's compliance with the law. These rights are not intended to be eroded or heightened by this advisory.

In sum, the Division will consider a variety of factors in determining whether to recommend to the Commission that a respondent or defendant receive recognition of its efforts to cooperate when the Commission accepts offers of settlement or determines the level of sanctions to be imposed. Such recognition is most likely to be given for conduct that is sincere, aggressively cooperative and indicative of a willingness to accept responsibility for the wrongdoing. The Division is least likely to recommend reduced sanctions when a company hides or misrepresents information about the misconduct, impedes Division efforts to obtain information, and creates a drain on government resources by prolonging the Division's investigation unnecessarily.