

May 21, 2020

New Guidance on How Civil Monetary Penalties Are Determined in CFTC Enforcement Matters

The CFTC Division of Enforcement Issued New Guidance Requiring Staff to Consider the Gravity of the Violation, Mitigating and Aggravating Circumstances, and Other Considerations in Recommending Civil Monetary Penalties.

SUMMARY

On May 20, 2020, the Commodity Futures Trading Commission's (the "CFTC" or the "Commission") Division of Enforcement (the "Division") issued new guidance outlining the factors to be considered by the Staff when making recommendations for civil monetary penalties ("CMPs"). The guidance—a step toward increased transparency in CFTC enforcement matters—is the Division's first publicly issued CMP-related guidance since the Commission published its penalty guidelines in 1994 and is binding on all Staff in the Division of Enforcement. The guidance provides a three-pronged approach to evaluating an appropriate penalty to recommend to the Commission: (i) the gravity of the violation, (ii) specified mitigating and aggravating circumstances and (iii) other considerations. In applying these factors, the Staff must be guided "by the overarching consideration of ensuring that any proposed penalty achieves the dual goals of specific and general deterrence."

BACKGROUND

The Commodity Exchange Act (the "Act") regulates commodity futures trading in the United States and establishes the statutory framework under which the CFTC operates.¹ The Act authorizes the CFTC to impose CMPs in enforcement proceedings.² CMPs may be determined either on a per violation basis or

up to triple the monetary gain of the respondent.³ Separately, U.S. criminal authorities may seek and impose criminal penalties for violations of the Act.

In 1994, the CFTC published guidelines that listed factors in its CMP assessments.⁴ The 1994 guidelines “identified certain factors that have influenced [the CFTC’s] assessment of [civil money] penalties”: gravity of the offense, financial condition, and other considerations.⁵

THE GUIDANCE

On May 20, 2020, the Division issued binding guidance, which has been incorporated into the CFTC Enforcement Manual,⁶ outlining the factors the Staff must consider when making civil monetary penalty (“CMP”) recommendations to the Commission (the “CMP Guidance”).⁷ The CMP Guidance is intended to promote transparency for market participants and ensure fair and consistent outcomes, and provides a three-pronged approach for the Staff’s decision-making regarding appropriate penalty recommendations. As described in the CMP Guidance, the Staff must consider (i) the gravity of the violation, (ii) specified mitigating and aggravating circumstances, and (iii) other considerations. The CMP Guidance notes that, in applying each of these factors, the Division “will be guided by the overarching consideration of ensuring the proposed penalty achieves the dual goals of specific and general deterrence.”⁸

Gravity of the Violation. Consistent with the Act and prior CFTC guidelines and precedent, the CMP Guidance makes clear that the “primary consideration” for the Staff in determining an appropriate CMP recommendation to the Commission is the gravity of the violation. The CMP Guidance provides the following “illustrative” list of factors for the Staff to consider:

- A. Nature and scope of the violations, including:
 - 1. the number, duration, type and degree of the violations;
 - 2. the Respondent’s role in the violations;
 - 3. whether the Respondent acted in concert with others;
 - 4. any efforts to conceal the ongoing violations; and
 - 5. whether the violations resulted in harm to victims and, if so, the number and type of victims;
- B. The Respondent’s state of mind, including whether the conduct was intentional or willful; and
- C. Nature and scope of any consequences flowing from the violations, including any:
 - 1. harm (or risk of harm) to victims and market participants;
 - 2. benefit or potential benefit to the Respondent; and
 - 3. impact on market integrity, customer protection, or the mission and priorities of the Commission in implementing the purposes of the Act.

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The CMP Guidance cautions that none of these factors is dispositive and notes that additional factors may be relevant based on the particular circumstances of a case.

Mitigating and Aggravating Circumstances. The Division will continue to consider relevant mitigating and aggravating circumstances, including:

- A. Post-violation conduct, including:
 - 1. mitigating conduct, such as attempts to cure, return of victim funds, or efforts to improve a compliance program; and
 - 2. aggravating conduct, such as concealment or obstruction of an ongoing investigation;
- B. Whether the Respondent self-reported the misconduct, as well as the extent of cooperation and remediation, as detailed in the Division's Enforcement Advisories;
- C. Timeliness of remediation;
- D. Existence and effectiveness of the company's pre-existing compliance program;
- E. Prior misconduct, such as whether the Respondent is a recidivist;
- F. Pervasiveness of misconduct within the company, including responsibility of management; and
- G. Nature of any disciplinary action taken by the company with respect to the individuals engaged in misconduct.

The CMP Guidance further advises the Staff that all relevant mitigating and aggravating circumstances should be considered in making a CMP recommendation.

Other Considerations. The Division will also consider other considerations such as:

- A. The total mix of remedies and monetary relief to be imposed on the Respondent in the recommended Commission enforcement action, in addition to the remedies and relief to be imposed in parallel cases involving criminal authorities (including incarceration), other regulatory entities, or self-regulatory organizations;
- B. Monetary and non-monetary relief in analogous cases; and
- C. Conservation of Commission resources, including timely settlement.

IMPLICATIONS

The CMP Guidance is one of several recent initiatives in the Division toward formalizing and establishing greater transparency around its enforcement program. The CMP Guidance comes one year after the Division published its first Enforcement Manual,⁹ eighteen months after issuance of the Division's first Annual Report,¹⁰ and during a time of great market volatility (e.g., oil futures) and the COVID-19 pandemic. In statements accompanying the announcement of the CMP Guidance, CFTC Chairman, Heath Tarbert, and Director of the Division of Enforcement, James McDonald, each emphasized the importance of clarity and transparency regarding the Division's decision-making processes in promoting the Commission's

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mission. In the aftermath of the pandemic, the CFTC and market participants will have continued interest in enforcing violations of the Act by parties who have caused or contributed to market disruptions or otherwise traded in a disorderly manner. The Enforcement Manual and CMP Guidance serve as a framework for these enforcement actions.

Many of the factors enumerated in the CMP Guidance are not new. Indeed, “gravity of the violation” and “other considerations” were listed in the CFTC’s 1994 guidance, which remains in effect.¹¹ “Mitigating and aggravating factors”—factors that may incorporate self-reporting, cooperation, and remediation advisories already published in or incorporated by the Enforcement Manual¹²—likely will gain new importance under the CMP Guidance. Another consideration promises to come into greater focus: the role of deterrence in determining an appropriate CMP. The CMP Guidance specifically notes that deterrence, both specific and general, is an “overarching consideration” in evaluating CMPs. This leaves some uncertainty as to the role of CMPs beyond deterrence. The CMP Guidance may suggest that the punitive purpose of CMPs can be served through actions by other law enforcement agencies in certain circumstances, such as the Department of Justice or Securities Exchange Commission, particularly given that the Division appears to be articulating the same concerns about “piling on” that other federal agencies have addressed in recent years.

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ENDNOTES

- 1 See Commodity Exchange Act & Regulations, Commodity Futures Trading Commission, <https://www.cftc.gov/LawRegulation/CommodityExchangeAct/index.htm> (last visited May 20, 2020).
- 2 See 7 U.S.C. §§ 9(10), 13a, 13a-1(d).
- 3 *Id.* §§ 9(10), 13a, 13a-1(d); see also Commodity Futures Trading Commission, *Inflation Adjusted Civil Monetary Penalties* (Jan. 13, 2020), <https://www.cftc.gov/LawRegulation/Enforcement/InflationAdjustedCivilMonetaryPenalties/index.htm> (providing inflation-adjusted CMP issued by the CFTC).
- 4 CFTC Policy Statement Relating to the Commission's Authority To Impose Civil Money Penalties, [1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,265 (Nov. 1, 1994).
- 5 *Id.*
- 6 Commodity Futures Trading Commission Division of Enforcement, *Enforcement Manual* (May 20, 2020), available at <https://www.cftc.gov/LawRegulation/Enforcement/EnforcementManual.pdf> [hereinafter, "CFTC Enforcement Manual"].
- 7 "CFTC Division of Enforcement Issues Civil Monetary Penalty Guidance," Commodity Futures Trading Commission press release (Washington, D.C., May 20, 2020), <https://www.cftc.gov/PressRoom/PressReleases/8165-20>; Memorandum from James M. McDonald, Director, Division of Enforcement, to Division of Enforcement Staff, *Civil Monetary Penalty Guidance* (May 20, 2020), available at <https://www.cftc.gov/media/3896/EnfPenaltyGuidance052020/download> [hereinafter, the "CMP Guidance"].
- 8 CMP Guidance at 2.
- 9 "CFTC Division of Enforcement Issues First Public Enforcement Manual," Commodity Futures Trading Commission press release (Washington, D.C., May 8, 2019), available at <https://www.cftc.gov/PressRoom/PressReleases/7925-19>.
- 10 "CFTC Division of Enforcement Issues Report on FY 2018 Results," Commodity Futures Trading Commission press release (Washington, D.C., Nov. 15, 2018), available at <https://www.cftc.gov/PressRoom/PressReleases/7841-18>; see also "CFTC Division of Enforcement Issues Report on FY 2019," Commodity Futures Trading Commission press release (Washington, D.C., Nov. 25, 2019), available at <https://www.cftc.gov/PressRoom/PressReleases/8085-19>.
- 11 See CFTC Enforcement Manual § 6.8.1 ("The Commission Guidelines [published in 1994] remain in place today.").
- 12 See *id.* § 7 ("The Division has issued a series of advisories and updates setting out the various factors the Division considered in evaluating self-reporting, cooperation, and remediation.").

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