



COMMODITY FUTURES TRADING COMMISSION

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Division of Enforcement

ENFORCEMENT ADVISORY

ADVISORY REGARDING PENALTIES, MONITORS AND CONSULTANTS, AND ADMISSIONS IN CFTC ENFORCEMENT ACTIONS

This enforcement advisory (“Advisory”) provides guidance to Division of Enforcement (“Division”) staff relating to the assessment of whether, in a proposed resolution of an enforcement action: (1) the proposed civil monetary penalty (“CMP”) is sufficient to achieve general and specific deterrence, particularly for a recidivist respondent;¹ (2) imposition of a corporate compliance monitor or consultant is appropriate, and if so, what the duties and responsibilities of monitors and consultants should be; and (3) admissions are appropriate based on the facts and circumstances of the particular enforcement action.² These considerations reflect the Division’s focus on achieving accountability and minimizing future misconduct when negotiating a proposed resolution that it may recommend to the Commission. These considerations apply to proposed resolutions of federal court and administrative enforcement actions.³

¹ General deterrence refers to the effect of potential punishment on the general public, while specific deterrence refers to the effect on a specific offender.

For ease of reference, the term “respondent” also includes a defendant in a federal court action.

² This Advisory supplements earlier advisories and guidance, including in the Division’s Enforcement Manual, addressing the manner in which the Division would assess whether respondents in Division investigations self-reported their misconduct, fully cooperated with the Division’s investigation, and sufficiently remediated the misconduct, and further examining when respondents should receive a reduction in their CMPs resulting from their self-reporting, cooperation and remediation. See Self-Reporting, Cooperation, and Remediation, *available at* <https://www.cftc.gov/About/CFTCOrganization/SelfReportingCooperationandRemediation> (listing advisories and guidance); Enforcement Manual, *available at* <https://www.cftc.gov/media/1966>. These previously announced policies remain in effect and continue to constitute essential components of the Division’s enforcement efforts. See, e.g., *In re Tanius Technology, LLC*, CFTC No. 22-34 (Sept. 26, 2022), *available at* <https://www.cftc.gov/PressRoom/PressReleases/8595-22> (recognizing self-reporting, cooperation, and appropriate remediation in the form of a substantially reduced penalty).

³ This Advisory is a statement of Division policy and direction to Division staff. The Advisory is not a statement of Commission policy.



I. Penalties: Achieving Deterrence

Per current Division policies, when assessing the appropriate CMP to recommend to the Commission in a particular matter, the Division accounts for numerous factors, including the need to achieve general and specific deterrence.⁴ If penalties are not sufficiently high, entities may choose to continue to behave unlawfully, viewing penalties as a cost of doing business; and individuals may view the potential rewards of misconduct as outweighing the potential risks. Higher penalties may, in particular, empower compliance professionals at entities to make the business case to senior management for the resources they need to do their jobs effectively. Further, without sufficient penalties, entities may be less inclined to cooperate with the Division, believing that any penalty ultimately imposed will be acceptable and bearable.

Going forward, the Division is recalibrating how it is assessing proposed CMPs to ensure that the CMPs are at the level necessary to achieve general and specific deterrence, which may result in the Division recommending higher penalties in resolutions than may have been imposed in similar cases previously. Particularly where the Division observes multiple similarly situated respondents violating similar laws in similar ways over time, the Division will assess whether penalties higher than those imposed previously are necessary to achieve sufficient general deterrence.

These considerations are especially salient in cases involving recidivism—i.e., repeated violations of law by the same person, for example where the proposed respondent has been the subject of previous Commission actions.⁵ In determining whether a person is a recidivist, the Division will consider various factors, including:

- The overlapping nature of the prior and current Commission actions (for example, do they involve the same or similar kinds or categories of violations). The Division will look to whether the violations resulted from the same root cause or involved the same general subject matter.
- The time between offenses. More recent conduct is likely to be given more weight in determining whether an entity is a recidivist.
- Whether overlapping management was involved.

⁴ See, e.g., Enforcement Manual, *supra* n.2, at 30 (when assessing penalties, “staff will be guided by the overarching consideration of ensuring the proposed penalty achieves the dual goals of specific and general deterrence”).

⁵ Herein, “person” refers to natural persons or entities.



- The pervasiveness of the new misconduct. De minimis new misconduct that is quickly identified and remediated is less likely to result in a recidivism finding than pervasive new misconduct that persists over time.
- The robustness and effectiveness of remediation, if any, taken and maintained since the prior resolution. Inadequate remediation reflects an insufficient commitment to addressing prior misconduct and minimizing the risk of recurrence.

Per current Division policies, the Division considers recidivism as an aggravating factor that can increase the amount of a CMP imposed in a resolution.⁶ Those policies also make recidivism relevant to assessing a resolving respondent's entitlement to cooperation credit.⁷ In recent years, the Division has observed recidivism by numerous categories of respondents, from individual offenders to large institutions which have had a number of significant legal violations in a limited period of time, reflecting an insufficient institutional commitment to taking steps necessary to ensure compliance with the law. In connection with the Division's focus on ensuring that proposed settlements will obtain appropriate and effective deterrence, the Division will heavily factor recidivism when determining appropriate penalties to recommend to the Commission.

For recidivist entities, in addition to escalating penalties, the Division will be inclined to recommend that a Monitor or Consultant be imposed as part of any resolution, applying the criteria set forth below in Section II of this Advisory.

II. Monitors and Consultants

The Division has long included undertakings involving both Monitors and Consultants to achieve an important goal—ensuring the actual and effective remediation of a respondent's conduct.⁸

⁶ See Enforcement Manual, *supra* n.2, at 31; Enforcement Advisory: Cooperation Factors in Enforcement Division Sanction Recommendations for Companies ("Cooperation Factors for Companies") and Enforcement Advisory: Cooperation Factors in Enforcement Division Sanction Recommendations for Individuals ("Cooperation Factors for Individuals"), available at <https://www.cftc.gov/About/CFTCOrganization/SelfReportingCooperationandRemediation>.

⁷ *Id.*

⁸ See, e.g., *In re Goldman Sachs & Co. LLC*, CFTC No. 23-59 (Sept. 29, 2023), available at [CFTC Orders Three Financial Institutions to Pay Over \\$50 Million for Swap Reporting Failures and Other Violations](#); *In re The Bank of Nova Scotia*, CFTC No. 20-26 (Aug. 19, 2020), available at [CFTC Orders The Bank of Nova Scotia to Pay \\$127.4 Million for Spoofing, False Statements, Compliance and Supervision Violations](#).



The Division intends to continue to recommend the use of Monitors and Consultants as appropriate. To provide guidance to staff, the Division outlines below the roles and responsibilities of Monitors and Consultants, among others:⁹

The selection of the specific Monitor will need to be approved by the Division. Responsibilities of the Monitor will include:

- (1) testing the sufficiency of the entity's policies, procedures, and controls to identify, address, and prevent future misconduct like that described in the order;
- (2) drafting specific recommendations to address issues identified during testing; and
- (3) testing the sufficiency of the entity's enhancements to its policies, procedures, and controls to implement the Monitor's recommendations and the effectiveness of those enhancements over time.

The Monitor will submit reports to the Division (or another operating division within the CFTC, as appropriate) describing the remediation plan and the entity's progress in implementing the recommendations. If the entity chooses not to adopt one or more of the Monitor's recommendations, the entity will be required to report that fact to the Division (or the relevant operating division) along with its stated reasons for non-adoption, to inform the Division's (or other operating division's) assessment of the entity's compliance with the order. Finally, the Monitor and the entity (for example, a Chief Compliance Officer and relevant senior business executive) will need to certify the entity's completion of the remediation plan.

For a Consultant, no Division approval of the specific Consultant will typically be required. The Consultant's responsibility will be to advise the entity regarding the implementation of remediation-related undertakings. The entity will need to periodically report to the Division on the progress of such implementation. Finally, each entity will need to have appropriate personnel (for example, a Chief Compliance Officer and relevant business executive) certify its completion of the remediation-related undertakings at the conclusion of the Consultant's engagement.

Going forward, the Division anticipates recommending to the Commission that a Monitor be imposed in cases involving the most significant and/or pervasive compliance and control

⁹ While going forward the Division will use the terms "Monitor" and "Consultant" as defined herein, in prior resolutions the Division may have used those terms in ways that differ from how they are defined herein (for example, using "Consultant" to apply to each of the roles separately defined herein). In addition, the Division notes that in many Commission orders involving restitution, the National Futures Association is appointed as "Monitor" to collect restitution funds and oversee distributions to victims. In any future order appointing NFA as "Monitor" in such capacity as well as requiring a compliance Monitor as described herein, the Division's recommended order will clearly distinguish the two roles.



failures reflecting a lack of sufficient commitment to effective compliance, and that a Consultant will be recommended in less severe cases. Specifically:

- A Monitor is appropriate where the pervasiveness and/or severity of the misconduct and/or the absence of effective controls is such that the Division lacks confidence that the entity will remediate its misconduct without the assistance of a neutral third party and oversight.
- A Consultant is appropriate where the evidence persuades the Division that the entity requires the assistance of a neutral third party to advise regarding remediation, but can otherwise remediate its misconduct without oversight.

III. Admissions

Per current Division policy, whether a resolving respondent admits to the underlying wrongdoing is a factor the Division may consider when assessing the extent of a respondent's cooperation.¹⁰ Certain recent resolutions have included admissions, reflecting the Division's perspective that they are important components of orders in appropriate cases.¹¹ Admissions in resolutions achieve numerous goals:

- the acceptance of responsibility promotes accountability and justice;
- admissions can function as a form of deterrence; and
- they facilitate comprehensive post-resolution cooperation where resolutions so require.

In light of these considerations, the Division will take the following approach to admissions in the resolutions it recommends to the Commission. In negotiations, respondents should no longer assume that no-admit, no-deny resolutions are the default. Rather, in each case, the Division will discuss with respondents whether admissions are appropriate. In evaluating whether admissions should be required as part of the proposed resolution, Division staff will consider the facts and circumstances presented by each matter as well as the non-exhaustive list

¹⁰ See Cooperation Factors for Companies *and* Cooperation Factors for Individuals, *supra* n.6.

¹¹ See, e.g., *In re: JP Morgan Chase Bank, N.A.*, CFTC No. 23-61 (Sept. 29, 2023), and *In re: Bank of America, N.A. and Merrill Lynch International*, CFTC No. 23-58 (Sept. 29, 2023), available at [CFTC Orders Three Financial Institutions to Pay Over \\$50 Million for Swap Reporting Failures and Other Violations](#); CFTC Orders Four Financial Institutions to Pay Total of \$260 Million for Recordkeeping and Supervision Failures for Widespread Use of Unapproved Communication Methods (Aug. 8, 2023), available at [CFTC Orders Four Financial Institutions to Pay Total of \\$260 Million for Recordkeeping and Supervision Failures for Widespread Use of Unapproved Communication Methods](#).



of factors set forth below. Each of these factors may be more or less relevant to the facts and circumstances of a particular matter and the type of violation at issue. No factor listed below is dispositive, and a case may present additional factors that are relevant to the inquiry. Examples of factors the Division will consider when assessing whether admissions are appropriate include:

Factors counseling in favor of admissions

- Whether the respondent is entering into a parallel criminal resolution where the respondent admits—through a guilty plea or otherwise—the underlying misconduct (such cases typically involve egregious conduct and significant harm or risks of harm to investors and markets).
- Whether the evidence uncovered during the investigation conclusively establishes the misconduct (for example, the respondent admitted to the misconduct in testimony or documentary evidence compels the admissions). This weighs in favor of admitting the misconduct in the order as well.
- Whether and to what extent a respondent seeks cooperation credit. As noted above, per current Division policy, whether a resolving respondent admits to the underlying wrongdoing is a factor the Division may consider when assessing the extent of a respondent's cooperation.
- Whether the offense is a strict liability offense in clear violation of the law. In such cases, the key underlying factual question is whether activities that violated the law occurred; there is no need in such cases to assess a respondent's state of mind.

Factors counseling against admissions

- Whether there is a realistic risk of criminal exposure uniquely arising from the act of admitting the misconduct. Where the respondent faces the realistic prospect of potential criminal liability relating to the misconduct, in certain cases it may be possible that admitting the misconduct could jeopardize the respondent's ability to legitimately defend against the criminal case.
- Whether there is a legitimate factual dispute where the Division is persuaded it faces significant litigation risk establishing the fact at trial (counsels against admissions only as to that disputed fact).

Ultimately, whether to require admissions remains a fact-intensive determination accounting for the unique facts and circumstances of a matter. However, the Division intends to



generally apply the criteria above when considering this issue when assessing what resolutions to recommend to the Commission.

The Division's assessment of the proposed settlement to recommend to the Commission to resolve any matter is a discretionary function of the Division's Director and staff and requires a case-by-case analysis of the specific facts and circumstances of each matter. Nothing in this Advisory should be deemed to oblige the Division or the Commission to consider one or more factors, or to give certain factors more weight than others in evaluating the appropriate penalty, the use of Monitors and Consultants, or requiring admissions. 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 any proposed enforcement or resolution.¹²

¹² This staff guidance does not create any private rights and is not enforceable in court. The Commission will continue to exercise its independent judgment and discretion as to the appropriate resolution in each case.