

Key Takeaways from CFTC Enforcement Director's Speech and Q&A on Self-Reporting

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There has been significant attention to the first major policy [speech](#) by the CFTC's newly-minted Enforcement Division Director, James McDonald on September 25, 2017. Mr. McDonald's speech outlined the Enforcement Division's updated approach to self-reporting and cooperation, as described in an [enforcement advisory](#) update issued to coincide with his speech (the "September Advisory"). We highlight below a few noteworthy points from the speech and the Q&A that followed and provide our initial thoughts on key takeaways for market participants regulated by the CFTC:

- ***Self-reporting will be treated as a distinct element in penalty reduction recommendations.*** As stated in [two enforcement advisories](#) on cooperation factors issued by the Enforcement Division in January 2017 (the "January Advisories"), the CFTC has historically considered self-reporting as one of several factors in evaluating the timeliness of a company's or individual's cooperation with CFTC investigations and enforcement actions. According to the September Advisory, self-reporting will now be treated as its own independent element in substantial credit calculations. Those who do not self-report may be eligible for cooperation credit, but the Enforcement Division will "reserve its recommendations for the most substantial reductions in civil monetary penalty" for those who self-reported and fully cooperated in an investigation and remediated the violation.
- ***A self-report must be designed to notify the Enforcement Division to get credit.*** During a Q&A that followed his speech, Mr. McDonald stated that for a company or individual to receive self-reporting credit, he would expect the Enforcement Division to be one of the first, if not the first, calls made by the reporting company or individual. By way of example, he commented that a vague disclosure buried in a compliance report submitted to another division of the CFTC is unlikely to be treated as "designed to notify" the Enforcement Division of a misconduct.
- ***A company may need to self-report before the nature or extent of the problem has been fully assessed.*** Self-reporting must be "reasonably prompt," even if at the time of the first voluntary disclosure, all of the relevant facts are not yet known. Moreover, during the Q&A, Mr. McDonald stated that if a whistleblower or some other interested party reports misconduct within a company to the Enforcement Division first, the company may be ineligible to receive credit for timely self-reporting. As a result, where the nature or extent of the misconduct is not easy to assess quickly because the regulatory issues are nuanced, unclear, or highly technical, for example, companies will face difficult decisions regarding whether and when to self-report.
- ***Use as enforcement tool against individuals.*** Mr. McDonald said that the Enforcement Division will use the self-reporting regime to prosecute individuals who commit illegal acts. The Enforcement Division will seek to move up the chain to the supervisors who make a decision behind the act and that, "just like in a racketeering case, when we talk cooperation, we're talking cooperating up, not down."

The Enforcement Division will state explicitly in future settlement orders whether or not self-reporting credit was granted. Mr. McDonald recognized that firms commonly engage in a cost-benefit analysis in deciding whether to self-report. He acknowledged that to shift the cost-benefit balance in favor of self-reporting, the Enforcement Division will need, and is committed, to demonstrate—in a transparent and concrete manner—that substantial benefits can be expected from self-reporting. Until the CFTC has developed a record that demonstrates the costs and benefits of self-reporting, a decision to do so will likely involve – as Mr. McDonald put it – "a bit of a leap of faith" on the part of the company.

If you have any questions regarding the matters covered in this publication, please reach out to any of the lawyers listed below or your usual Davis Polk contact.

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