

New CFTC Enforcement Director Emphasizes Benefits of Self-Reporting

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In the August 25th episode of the CFTC podcast, [CFTC Talks](#), the new Director of the CFTC's Enforcement Division, James McDonald, discussed his priorities for the Division ([transcript here](#)), including providing incentives for entities to self-report non-compliance issues to the CFTC.

McDonald stressed that as part of the CFTC's effort to increase compliance, the Enforcement Division will strive to "figure out ways where our enforcement actions can be designed to have the broadest impact or our enforcement policies can give the right incentives to companies so that they'll comply with the law." In particular, the Enforcement Division under McDonald's leadership will provide the public with what McDonald called the "data points" necessary to convince entities that the benefits from self-reporting non-compliance issues to the CFTC would be appreciable. According to McDonald, providing a clear benefit for self-reporting is the only way to "affect the company's calculation on the front end" of whether or not to self-report.

Although McDonald did not mention specific cases, the CFTC has recently made public statements that entities have received credit for self-reporting non-compliance issues. For example, in the [press release](#) that accompanied the CFTC's recent enforcement action against The Bank of Tokyo-Mitsubishi ("BTMU"), McDonald stated that BTMU "benefited from its self-reporting and cooperation in the form of a substantially reduced penalty... . [W]hen market participants discover wrongdoing, we want to incentivize them to voluntarily report it and to cooperate with our investigation, as [BTMU] did here."

McDonald made several specific points regarding the Commission's stance towards self-reporting:

- When determining whether to reward a specific instance of self-reporting, the CFTC considers whether the self-reporting entity made disclosure to all relevant agencies.
- An entity will not get credit for self-reporting if it was required to report the non-compliance issue under law or due to a public disclosure requirement.
 - It appears that, for example, merely including a material non-compliance issue in a CCO annual report would not generate self-reporting credit without further action.
- Entities should self-report non-compliance issues to the CFTC even if they are still in the process of determining the extent of the issues. Self-reporting is not going to be "a game of gotcha."
- Self-reporting credit may still be available if the CFTC later discovers additional violations that were not self-reported.
- Self-reporting is "not a get-out-of-jail-free card" for companies. The CFTC will still "investigat[e] the case[,] ... the individuals that were involved ... [and any] other companies that were also involved" even if a company is given self-reporting credit.

Law Clerk Greg Swanson contributed to this post.

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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