

## The CFTC's New Advisory on Self-Reporting, Cooperation and Remediation

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In an advisory announced February 25, 2025, the Division of Enforcement of the Commodity Futures Trading Commission (CFTC or Commission) announced a new regime for assessing cooperation credit in determining fines in the settlement of enforcement cases. The advisory expressly revokes and replaces all six prior enforcement advisories on cooperation, as well as the advice in the Enforcement Manual on cooperation. The advisory now formally titles cooperation credit as "Mitigation Credit." The advisory splits the scoring of Mitigation Credit between a score for a particular quality of self-reporting and a score for a particular level of cooperation during an investigation and remediation. A settling party can be eligible for Mitigation Credit based on either self-reporting or cooperation, or both.

The advisory provides a "Matrix" that assigns specific percentage penalty discounts for each combination of the credit scores. The scoring is structured to encourage both exemplary cooperation and exemplary self-reporting. For example, exemplary cooperation even with "satisfactory" self-reporting results in only a 35 percent reduction; exemplary self-reporting followed by no cooperation results in a 20 percent discount; and both an exemplary self-report and exemplary cooperation results in a 55 percent reduction in penalty.

The advisory might be a harbinger for better clarity and more predictable outcomes, but only time will tell what its future effectiveness will be. It can be hard to measure the extent to which credit is awarded in the current absence of quantified penalty levels for particular types of violations. If the CFTC Enforcement Division's initial settlement demand seems excessive, it will be difficult to discern the dollar or percentage value of any credit. However, by delineating specific percentage credits for particular Mitigation Credit, the advisory signals a quantitative approach that over time might provide more predictable rewards for self-reporting and cooperation. There will undoubtedly

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be disagreements over the Division's assessments but having the advisory's specific framework could help focus the debates.

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## Self-Reporting Process Changes

**Voluntariness:** A self-report must be made voluntarily, meaning that it must be made prior to an imminent threat of exposure of the potential violation.

Importantly, a self-report will be eligible for Mitigation Credit even if it may have been required to be disclosed by a futures commission merchant, swap dealer, major swap participant, swap execution facility or swap data repository in its annual chief compliance officer report, if the self-report was made in a timely manner "notwithstanding the timing of the annual report."

**Disclosure to the "Appropriate Division":** The advisory provides that an investigated party can be credited for self-reporting as long as it self-reported to the "Appropriate Division" of the CFTC. Previously, self-reporting would have been credited only if the report was made directly to the Division of Enforcement. The Appropriate Division is defined to be the primary division that is responsible for the interpretation and application of each regulation that is the subject of the potential violation. Disclosure to the Division of Enforcement, however, will be treated as disclosure to the Appropriate Division, so disclosure to the Division of Enforcement will always qualify.

**Timing of Self-Reporting:** Self-reporting must be "prompt" but promptness will be measured against the reporting person's efforts to determine whether there was a potential violation and its materiality in a timely manner, including discovery of the potential violation and escalation, investigation, management review and governance requirements.

**Qualifying for "Full Credit":** To receive "full credit" for a self-report, the report must be complete including all material information regarding the potential violation known to the person at the time of the self-report, including description of the issue, date and method of discovery, available root cause analysis and remediation, if any.

**Rolling Disclosure can Still Qualify for Full Credit:** To encourage voluntary disclosure at the earliest possible time, the Division will recommend full credit for the Person where the Person made best efforts to determine the relevant facts at the time of the self-report, fully disclosed the facts known at that time, continued to investigate and disclosed additional relevant facts as they were identified; and demonstrates adherence to the other requirements in this advisory.

**Safe Harbor for Good Faith Mistakes in Self-Reporting:** Importantly, the advisory makes the commitment that the Division will not recommend charges for fraud or false statements if errors and inaccuracies occur in self-reports if the self-report or voluntary disclosure was made in good faith and if any

inaccurate information in the self-report or voluntary disclosure is supplemented and corrected promptly after discovery of the inaccurate information. This might seem to be simply fair government behavior, but it is welcome to have it in writing.

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## The Matrix for Mitigation Credit

The advisory's Matrix assigns particular penalty percentage discounts based on the combination of separate scores for: (1) self-reporting; and (2) cooperation and remediation. The Division will evaluate self-reporting on a three-tier scale: No Self-Report; Satisfactory Self-Report; and Exemplary Self-Report. It will evaluate cooperation and remediation on a four-tier scale: No Cooperation; Satisfactory Cooperation; Excellent Cooperation; and Exemplary Cooperation. Mitigation Credit for self-reporting and cooperation are evaluated separately. This is the Matrix:

**Scoring Self-Reporting:** The Division of Enforcement will evaluate self-reporting primarily on four factors: (1) the voluntariness of the self-report; (2) whether the self-report was made to the Commission; (3) whether the self-report was made in a timely manner; and (4) whether the self-report was complete.

**Scoring Cooperation and Remediation:** In evaluating a company's or individual's cooperation, the Division of Enforcement will study a wide variety of factors, including remediation measures.

- **Cooperation:** The Division of Enforcement will consider such factors as whether the company or individual provided assistance beyond subpoenas and compulsory processes, voluntarily provided documents and information, made presentations, made witnesses available, performed internal investigations or reviews, provided an analysis and identified the root cause of the violation, took corrective action for remediation, significantly completed remediation and proactively engaged and used significant resources to provide material assistance.
- **Remediation:** The Division of Enforcement will also evaluate remediation as part of cooperation and will primarily consider whether a company or individual engaged in substantial efforts to prevent a future violation. The relevant Operating Division will determine whether the remediation plan is appropriate.
- **Monitors and Consultants:** The advisory introduces an important new role for Operating Divisions in fashioning remedial relief. The advisory states that *the appropriate Operating Division* will determine whether to recommend the use of a compliance monitor or consultant to ensure completion of remedial undertakings. This means that settlements can involve advocacy with Operating Divisions in addition to the Division of Enforcement. The Division

of Enforcement will then have to approve the selection of a monitor, who will have to periodically submit progress reports to the Division of Enforcement. Additionally, the monitor, in conjunction with the individual or company's senior management, must submit a certification of completion to the undertakings of the company or individual.

The Division's advisory opens the door to more predictable credit for self-reporting and cooperation going forward. Time will tell its contribution to fair outcomes.