

CFTC Memos Clarify When 'Sorry' Still Gets You Subpoenaed

By **Jeffrey Alberts** and **Aaron Wiltse** (May 12, 2025)

The U.S. Commodity Futures Trading Commission has clarified that it will refer only "material" cases for formal prosecution under a new staff advisory issued April 17.[1] The message of that advisory is clear: Minor lapses can be fixed in-house, but serious breaches still warrant a trip to the penalty box.

The materiality advisory comes on the heels of an advisory issued in February in which the CFTC added a new path for self-reporting.[2] Registrants no longer must go straight to the CFTC's Division of Enforcement: Potential violations may be routed through the CFTC's three operating divisions.

The materiality advisory explains that nonmaterial violations reported to the operating divisions will be addressed by those divisions, while material violations will be referred to the Enforcement Division.

In addition to allowing self-reporting to the CFTC operating divisions, the enforcement advisory also unveiled a first-ever "discount matrix" that can shave significant dollars off civil penalties when firms act quickly to self-report, cooperate and remediate.

For compliance officers, it's a rare glimpse at how the CFTC will calculate discounts to a penalty — and a fresh incentive to come forward before investigators come knocking.

Market participants subject to CFTC regulation should pay close attention to these two advisories in considering whether — and how — to self-report potential violations in the future.

The Enforcement Advisory

The enforcement advisory swept away all previously issued advisories — including some issued during President Donald Trump's first administration — as well as parts of the Enforcement Division's enforcement manual, and replaced it with detailed guidance on the criteria that the Enforcement Division will use to evaluate CFTC registrants' self-reporting and cooperation, as well as a quantitative formula for what discount to an eventual penalty the Enforcement Division will presumptively propose in light of the registrant's self-reporting and/or its cooperation.

Self-Reporting and Cooperation

With respect to self-reporting, the Enforcement Division will "evaluate whether the disclosure was voluntary, made to the Commission, made in a timely manner, and complete." A self-report is voluntary if it is "made prior to an imminent threat of exposure of the potential violation."

A timely self-report is one that is made "prompt[ly,] taking into account a [registrant's] efforts to determine whether there was a potential violation and its materiality in a timely



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manner, including discovery of the potential violation and escalation, investigation, management review, and governance requirements."

And a self-report is complete if the registrant "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."

Finally, as discussed further below, a self-report is made "to the Commission" if it is made to the relevant operating division or to the Enforcement Division.

With respect to cooperation, mere compliance with compulsory process alone warrants no cooperation credit. The baseline level of cooperation required for credit is instead providing "substantial assistance" to the Enforcement Division, including, for example, "voluntarily providing documents[,] making presentations[,] and making witnesses available for interviews or testimony."

Even better cooperation entails "consistently provid[ing] substantial assistance" by "performing internal investigations[;] providing ... thorough analysis of the potential violation, root cause, and corrective action for remediation[;] and consistently providing documents and information on a voluntary basis."

And the best cooperation entails providing "material assistance" that is "an exceptionally high degree of value," such as "proactive engagement and use of significant resources to provide material assistance to the [Enforcement] Division's investigation, significant completion of remediation, and use of accountability measures."

The Enforcement Division will also consider remediation as part of cooperation, including whether the violator "took immediate steps to address the potential violation, including corrective action; performed a gap analysis to identify and remediate similar potential violations[;] implemented an appropriate remediation plan[; and] provided an explanation of how the remediation plan is reasonably designed to prevent a future violation."

Mitigation Credit

A violator who self-reports or cooperates may be eligible for a mitigation credit, should an enforcement action be taken and a penalty imposed.

The Enforcement Division will determine what mitigation credit to propose on a case-by-case basis, but the enforcement advisory offers quantified guidance about what credit the Enforcement Division will presumptively propose.

The Enforcement Division will assign a violator's self-reporting and cooperation efforts into newly defined tiers, using the rubrics described above, and then will "presumptively recommend a percentage discount from the initial civil monetary penalty" based on a matrix of those self-reporting and cooperation tiers.

A violator can be eligible for mitigation credit for self-reporting, for cooperation, for both or for neither, depending on the facts of the case, as follows:

	Tier 1: No Cooperation	Tier 2: Satisfactory Cooperation	Tier 3: Excellent Cooperation	Tier 4: Exemplary Cooperation
Tier 1: No Self-Report	0%	10%	20%	35%
Tier 2: Satisfactory Self-Report	10%	20%	30%	45%
Tier 3: Exemplary Self Report	20%	30%	40%	55%

This detailed explanation of percentages, and treating self-reporting credit and cooperation as distinct elements of the calculation, is a new approach for the Enforcement Division, which previously explained the factors it would consider but did not assign specific percentages to particular levels of self-reporting or cooperation.

This new transparency concerning potential credit for self-reporting and cooperation only gives registrants some insight, however, into the ultimate penalty they may pay, as the enforcement advisory explains that "an analysis of the facts, the statute and regulation, past Commission precedent as appropriate, and other applicable law" will be the starting point for determining a penalty amount before discounting this amount by any mitigation credit.

The Materiality Advisory

As noted above, one significant departure from prior practice set forth in the enforcement advisory is that self-reports no longer must be made to the Enforcement Division to qualify for mitigation credit.

Registrants may also now self-report to one of the CFTC's operating divisions depending on the particular provision of the Commodity Exchange Act or CFTC regulations that govern the potential violation: the Division of Clearing and Risk, the Division of Market Oversight, or the Market Participants Division.

The CFTC has explained that the goal of this change is to "facilitate open and transparent engagement" between registrants and the operating divisions, which are the CFTC's substantive regulatory components, so that the operating divisions can "identify emerging issues, risks, or trends earlier."

Surely anticipating an uptick in self-reports to the operating divisions that would previously have gone to the Enforcement Division, the CFTC issued the materiality advisory to "provide guidance on the materiality or other criteria that the Divisions will use to determine whether to make a referral to [the Enforcement Division] for self-reported violations, or supervision or non-compliance issues."

Under the materiality advisory, the touchstone of referral to the Enforcement Division is whether the violation is a material violation of the Commodity Exchange Act or CFTC regulations.

The extent of the materiality advisory's guidance as to whether a violation may be material

is that material violations may "involve harm to clients, counterparties or customers, or members or participants, as applicable; harm to market integrity; or significant financial losses," or "fraud, manipulation, or abuse."

The materiality advisory goes on to explain that, so long as they are not material violations, "supervision or non-compliance issues" in particular will be addressed by an operating division without referral to the Enforcement Division.

It offers as examples of such supervision or noncompliance issues those that involve a registrant's "supervisory system or controls, risk management program, compliance program, or other system or program to achieve compliance with" the Commodity Exchange Act or CFTC regulations, and also notes that they "may involve" violations of Title 17 of the Code of Federal Regulations, Section 166.3; Title 7 of the U.S. Code, Section 6s(h)(1)(B); or Title 17 of the Code of Federal Regulations, Section 23.602.

In determining whether such supervision or noncompliance issues are material, and thus warrant referral to the Enforcement Division, the operating divisions will consider whether the violation reflects: "(1) especially egregious or prolonged systematic deficiencies or material weakness[;] (2) knowing and willful misconduct by management[;] or (3) a lack of substantial progress towards completion of a remediation plan for an unreasonably lengthy period of time."

These factors are to be under a "reasonableness standard" that takes into account a registrant's "size, activity, and complexity."

Whether Registrants Should Self-Report to an Operating or Enforcement Division

One likely result of the advisories is that registrants who decide to self-report generally will do so to the relevant operating division, rather than to the Enforcement Division.

The enforcement advisory specifically permits that option and indicates that the CFTC's aim is to resolve nonmaterial violations without involving the Enforcement Division at all.

This creates an incentive for registrants to self-report any potential violation (especially if it is even arguably a "supervision or non-compliance issue") to an operating division in the hopes that it will deem the violation nonmaterial and leave the Enforcement Division out of the matter entirely.

While registrants appear to have an incentive to report to the relevant operating division, the materiality advisory says that registrants "should use their own judgment to determine whether it is appropriate to self-report a material violation — particularly involving fraud, manipulation, or abuse — directly to [the Enforcement Division] in the first instance, rather than to the Operating Divisions."

This suggests that under at least some circumstances, a registrant aware of an obviously material violation may choose to go straight to the Enforcement Division to avoid the delay of a referral.

What remains murky is exactly where the line is drawn. Until the CFTC publishes more examples, firms must weigh the risks of silence against the tangible rewards of disclosure.

But in an era when transparency now carries a measurable markdown, betting on openness may prove the safest hedge of all.

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[1] <https://www.cftc.gov/csl/25-13/download>.

[2] https://www.cftc.gov/media/11821/EnfAdv_Resolutions022525/download.