

## CFTC Issues Guidance on Enforcement Penalties

June 2020

On May 20, 2020, the CFTC Division of Enforcement recently issued a memorandum<sup>1</sup> from James McDonald, its Director, that outlined various factors that the Division of Enforcement staff “will consider in recommending an appropriate civil monetary penalty to the Commission in an enforcement action, whether administrative or injunctive.” This memo represents the first published guidance of this kind since penalty guidelines were first published in 1994, and comes in the context of active and muscular CFTC enforcement activity. The CFTC Chairman, Heath Tarbert, stated that the “new guidance reflects [his] strong commitment to transparency and to the CFTC’s enforcement mission.” In addition James McDonald, emphasized that “[t]ransparency in our procedures, and in particular how we think about penalties, promotes fairness and enhances respect for the rule of law.”

The memorandum identifies three primary considerations that the CFTC enforcement staff will consider in determining whether a penalty achieves the dual goals of specific and general deterrence:

- *Gravity of the Violation.* The nature and scope of the conduct, including the number of violations, harm to victims (including the number and type of victims), efforts to conceal the conduct and whether the conduct caused harm (or risked causing harm) to the market and market participants.
- *Mitigating and Aggravating Circumstances.* Mitigating factors include efforts to cure, return victim funds and enhance compliance programs. Aggravating conduct includes efforts to conceal the activity or obstruct an investigation. The CFTC will also consider whether the conduct was self-reported as well as the extent of cooperation with the CFTC’s investigation.
- *Other Considerations.* The CFTC will also consider the total mix of remedies and monetary relief imposed in an enforcement action in the context of potential parallel cases involving criminal authorities, other regulatory entities or self-regulatory organizations, as well as the conservation of CFTC resources, including timely settlement.

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<sup>1</sup> See “Civil Monetary Penalty Guidance,” available [here](#).

## SchulteRoth&Zabel Private Funds Regulatory UPDATE

As recent enforcement actions show, the CFTC continues to seek more significant sanctions for violations of the Commodity Exchange Act and the rules thereunder, and continues to actively encourage and to act upon self-reported activity, tips and referrals from whistleblowers, commodities exchanges and other self-regulatory organizations.

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