

Public Statements & Remarks

Remarks of CFTC Director of Enforcement James McDonald at Futures Industry Association Fireside Chat

May 28, 2020

Thank you for that introduction and thanks to all the folks at FIA for hosting me. And thank you all for being with us today, if only virtually. We at the CFTC are wishing everyone the best, and hoping all of you stay safe and healthy during this difficult time. We look forward to being back together in person, hopefully before too long.

We're together today to talk about penalties at the CFTC, and the penalty guidance we recently issued in the Division of Enforcement. But before we dig into the details, I want to take a step back, and offer our view about how we got here, and what we're hoping to accomplish with this penalty guidance.^[1]

The Path Starts with Dodd-Frank

The path here, in my view, traces back to July 2010 and the passage of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"). Dodd-Frank sought, among other things, to improve transparency, mitigate systemic risk, and protect against market-related abuse in the U.S. derivatives markets. Congress largely placed responsibility for implementing these derivatives-market reforms with the CFTC.

This of course, had significant implications for the Commission, and for the Division of Enforcement. Among other things, Dodd-Frank significantly expanded the Commission's enforcement jurisdiction, and it granted the Commission new enforcement tools to wield in policing this broader jurisdiction. Over the balance of the next decade, the Commission and its dedicated staff of career civil servants have shown themselves to be up to the task Congress laid out in Dodd-Frank.

Consider just a few data points. Since Dodd-Frank, the Commission's enforcement program has focused on the most pernicious forms of wrongdoing, bringing more cases involving misconduct that undermines market integrity, like manipulation and spoofing, than ever before. To increase the deterrent effect of our enforcement actions, we've imposed substantial penalties, enhanced our evaluation of compliance programs, strengthened remediation requirements, and ramped up our parallel activity with the Department of Justice. To keep pace with our rapidly evolving digital markets, we've revolutionized the way we collect, analyze, and use data. And to increase transparency and fairness, we've taken significant steps to make public the policies, procedures, and practices that guide our actions, and to explain why we take the actions we do. The penalty guidance we'll talk about today flows from this final point.

The CFTC Is Committed to Transparency, Fairness, and Advancing the Rule of Law

Recently, the Commission for the first time articulated a set of core values: Commitment, Forward-thinking, Teamwork, and Clarity.^[2] Our penalty guidance advances the core value of clarity, providing market participants with greater transparency as to Division staff's decision-making processes in this critical area. As Chairman Tarbert has stated, "[W]e must be transparent in how we enforce the law. One goal of our enforcement program is to change behavior in a positive way by deterring misconduct before it happens. Deterrence requires clarity about how our laws work."^[3]

In this vein, the Division of Enforcement has taken a number of significant steps to promote transparency and increase clarity. We published an Enforcement Manual, laying out publicly for the first time the Division's practices and procedures.^[4] We began issuing Annual Reports at the conclusion of the Fiscal Year, laying out the Division's priorities, and explaining how the Division's enforcement efforts were designed to advance them.^[5] And we explained in publicly available staff guidances how the Division would handle a variety of issues—ranging from cooperation and self-reporting, to new areas of enforcement activity, to today's topic, penalties.^[6] This push toward ever greater transparency is something that, under Chairman Tarbert's leadership, I know will continue.

Penalty Guidance—What We're Hoping To Achieve

Last week, the Division of Enforcement issued penalty guidance to all staff, which we made publicly available and published in an updated version of our Enforcement Manual.^[7] This marks the first formal public statement on penalties at the CFTC in 25 years. The memorandum to staff with the guidance is available on the CFTC website, as is the Enforcement Manual. I encourage you to read the guidance carefully.

So why issue this penalty guidance at all, and why now? This is where we turn back to Dodd-Frank. In the nine Fiscal Years since Dodd-Frank, the CFTC has obtained more than \$13.6 billion in monetary relief. That's an average of more than \$1.5 billion per year. As you might expect, given the dramatic expansion of jurisdiction and authority that came with Dodd-Frank, these numbers mark a sharp increase over the pre-Dodd-Frank averages.

Just as the size of the penalties have grown, so too has the breadth of cases that have produced these penalties. We've pursued misconduct in every corner of our markets, from cattle futures traded by feedyards to financial instruments traded by Wall Street banks. We've obtained significant penalties in traditional markets like precious metals, and new-age markets like digital assets. And we've kept pace as our markets transformed from analogue to digital, from order tickets trading hands in the pits to algorithms trading at high frequency on the screen.

So over the past several years, we have regularly brought cases commanding eight—and sometimes nine—figures in monetary relief, stretching across an ever-growing range of market activity, often involving new rules, new conduct, and new CFTC market participants. Yet we had not made a clear public statement as to how we arrived at particular penalties, or what we hoped to accomplish by imposing them. That's where our penalty guidance comes in.

On a big picture level, this penalty guidance reflects our view that the ultimate goal of our enforcement program is to deter misconduct. Indeed, the guidance explains that, in considering the appropriate penalty, staff will “be guided by the overarching consideration of ensuring the proposed penalty achieves the dual goals of specific and general deterrence.”^[8]

But for enforcement actions to deter, the potential wrongdoer must have some sense of how certain types of misconduct will be punished. For companies to build effective compliance programs, they must understand how enforcement authorities would view certain categories of conduct. For business executives to cultivate a true culture of compliance, they must be able to explain to their employees how enforcement bodies would separate right from wrong, and the expected consequences for any wrongdoing. All of this requires clear statements about how and why enforcement authorities punish.

Moving from the big picture to the more pragmatic, we also issued the penalty guidance in the hopes it would be informative and useful on a practical level. Consistent with the CFTC’s history as a principles-based regulator, the penalty guidance sets out the principles and factors that will guide staff action. This has the added benefit of yielding a document that is short enough that the people affected—business leaders, compliance professionals and market participants—should be able to easily read it, understand it, and implement any lessons learned. In addition, the guidance binds Division staff, ensuring consistency across teams. And by making clear to the outside world the factors we consider, the guidance should streamline any discussions we have with defense counsel and market participants about penalties. To the extent you are preparing for discussions with staff about penalties, your preparations should focus on the factors laid out in the guidance.

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In the end, it seems to us that Justice Oliver Wendell Holmes got it right when he wrote about penalties. We all wish, as Holmes explained, to deal only with what he called the “good men.”^[9] But at times, particularly when it comes to enforcement, we must confront the “bad man” as well.^[10] It is for them we must design systems that offer the bad man “as much reason as a good one for wishing to avoid an encounter with the public force.”^[11] For even “[a] man who cares nothing for an ethical rule which is believed and practiced by his neighbors is likely nevertheless to care a good deal to avoid being made to pay money, and will want to keep out of jail if he can.”^[12]

If we in the Division of Enforcement can use penalties to make the bad man, just as much as the good, follow the law, we will have achieved our ultimate goal: to use the law, and the rule of law, “to make good citizens, and good men.”^[13] That is what we are hoping to achieve.

^[1] As I begin, please keep in mind that the views I express today are my own and do not necessarily represent the views of the Commission, its staff, or the Commissioners.

^[2] CFTC, Mission, Vision, and Values, <https://www.cftc.gov/About/Mission/index.htm>.

^[3] Chairman Heath P. Tarbert, CFTC, Statement: “Tripling Down on Transparency” (Dec. 10, 2019), <https://www.cftc.gov/PressRoom/SpeechesTestimony/tarbertstatement121019>.

[4] See <https://www.cftc.gov/LawRegulation/Enforcement/EnforcementManual.pdf>.

[5] See <https://www.cftc.gov/media/3081/ENFAnnualReport112519/download>.

[6] Each of these guidances is published in the Division's Enforcement Manual.

[7] See Memorandum from James M. McDonald, Director, Division of Enforcement, to Division of Enforcement Staff (May 20, 2020), <https://www.cftc.gov/media/3896/EnfPenaltyGuidance052020/download> ("May 20, 2020 Memorandum").

[8] May 20, 2020 Memorandum at 2.

[9] Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 Harv. L. Rev. 457, 458-59 (1897).

[10] *Id.* at 457.

[11] *Id.*

[12] *Id.*

[13] *Id.* at 457-58.

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