

CFTC Issues Division of Enforcement Annual Report

The US Commodity Futures Trading Commission (“CFTC” or the “Commission”) recently released its Division of Enforcement Annual Report for the Fiscal Year 2020 (“annual report”). The annual report highlights a record-breaking year for the CFTC’s Division of Enforcement (“DOE”) across many metrics:

- **Enforcement Filings:** The CFTC through the DOE filed 113 enforcement actions, which established a new high. The previous high was 102 and the average number annually over the prior thirty fiscal years was 58.
- **Total Monetary Relief:** The CFTC obtained more than \$1.3 billion in total monetary relief, the fourth highest in history.
- **Monetary Relief in a Single Action:** The CFTC imposed the highest monetary relief in its history (\$920 million) in its largest ever spoofing and manipulation case.
- **Retail Enforcement Filings:** The CFTC filed its largest ever number of retail fraud cases (56).
- **Digital Asset Enforcement Filings:** The CFTC filed its largest ever number of cases involving digital assets (7), including a case in which the defendants allegedly targeted churchgoers, a case involving the misappropriation of funds in connection with purported Bitcoin investments, and a case involving offering illegal leveraged transactions in cryptocurrencies.
- **Cross-Agency Actions:** The CFTC filed 16 actions in coordination with federal criminal authorities, for a three-year total of 46, exceeding the 27 that had been filed over the prior seven fiscal years collectively.
- **State Coordination:** The CFTC filed an action jointly with 30 state regulators, which is the largest ever number of partner agencies with the CFTC on a single case.
- **Litigation:** The CFTC’s DOE litigated over 140 matters, including against corporate entities and individuals arising from manipulation, spoofing, fraud, misappropriation, illegal offerings, and violations relating to digital assets.

DOE also issued two critical guidance documents – (1) *Civil Monetary Penalty Guidance*, which publicly outlines factors considered in recommending civil monetary penalties for the first time since 1994;

and (2) *Guidance on Evaluating Compliance Programs in Connection with Enforcement Matters*, which for the first time publicly outlines factors relevant when evaluating compliance programs in connection with enforcement matters.

In addition to issuing guidance regarding corporate compliance, the report notes that the Commission often considers the adequacy of compliance programs in the context of their cases, and expects that the compliance function will serve as a “meaningful check” to detect and prevent misconduct.

The report then outlined the Commission’s enforcement priorities going forward, and how the DOE will support those priorities:

- **Preserving market integrity.** To support what the report describes as the “heart of the real economy” that impacts “the livelihood of every American,” the DOE is focused on detecting, investigating, and prosecuting misconduct that undermines market integrity, including fraud, manipulation, spoofing and disruptive trading.
- **Protecting customers.** The Commission views customer protection as a focus since its inception, including pursuing fraud in traditional markets and in new asset classes, like digital assets. The DOE noted its focus on staying abreast of new technologies, spotting market trends, and educating the public.
- **Promoting individual accountability.** The Commission highlighted efforts to hold responsible the individuals that engaged in wrongdoing, whether front line employees, supervisors and others in control positions. The Commission emphasized that individuals must be held responsible to deter wrongful conduct and support companies in developing a culture of compliance. The DOE pointed out that it does not stop at front line employees but works to hold accountable the supervisors and others in control who may be culpable as well.
- **Coordinating with criminal authorities and other regulators.** The Commission noted the importance of coordinating with regulators across the United States and internationally, as well as across the criminal and regulatory spectrum. This coordination increases exposure for bad actors and “is critical to deterring violators, punishing misconduct, preserving market integrity, and protecting customers.”
- **Transparency.** The Commission highlighted the need to “provide market participants with greater transparency” about DOE’s procedures and decision-making criteria.

Despite the far-reaching effects of the global pandemic, the Commission had a record-breaking year in enforcement. As the new administration implements its priorities, it is worth watching whether the

focus or the resource allocations change, but it is important to proceed on the assumption that the CFTC will remain vigilant in its enforcement activities. As a best practice, market participants should regularly consider the following questions:

1. Does the firm have a culture of compliance, from the top of the organization, and how can the firm further enhance and implement that culture;
2. Has the firm empowered the compliance department;
3. Does firm staff receive regular and robust compliance training;
4. Does the firm properly implement its supervisory procedures, including internal trading surveillance;
5. Has the firm regularly reviewed its compliance program, including to ensure it meets or exceeds current standards and fits the realities of the current business;
6. When has the firm last audited its compliance with internal policies and procedures; and
7. Are there opportunities for the firm to work proactively with regulators, including by educating the Commission on market trends and issues and assisting with investigation or enforcement activities.

FisherBroyles attorneys are knowledgeable on CFTC compliance and enforcement and are able to advise and assist you with both proactive efforts to build and maintain a compliance program, as well as responding to regulatory inquiries and enforcement matters.

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