



A CFTC Enforcement Refresher and Overview of Cooperation Credit

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Agenda

- Steps to take when Enforcement “knocks”
- The CFTC 2017 Cooperation Advisories
- CFTC Self-Reporting Guidance
- CFTC Enforcement Overview & Strategies Discussion
- Review of NFA, CME, and ICE Enforcement Processes
- Takeaways
- Questions & Answers



When Enforcement Comes “Knocking”

- Preserve Potentially Relevant Documents
- Retain Experienced Enforcement Counsel
- Contact the Staff Promptly
- Assess Internal and External Disclosure Obligations & Limitations
- Conduct an Appropriately Tailored Internal Inquiry
- Identify Possible Conflicts of Interest
- Weigh the Pros and Cons of Cooperation
- Examine Insurance Coverage



CFTC's Jan. 2017 Advisories On Cooperation

- On January 19, 2017, the CFTC's Enforcement Division Issued New Advisories on Cooperation. (See <http://www.cftc.gov/PressRoom/PressReleases/pr7518-17>).
- Certain differences from the prior Advisories –
 - The individual cooperation factors are new and complement the CFTC's Whistleblower Program.
 - The policy factor emphasizing the CFTC's broader law enforcement interests appears to elicit efforts to pursue other parties.
 - The identification of culpable individuals is conspicuously discussed.

Advisories on Cooperation Cont.

- For both advisories, the CFTC considers these 4 issues:
 - The value of the cooperation to the investigation.
 - The value to the CFTC's broader law enforcement interests.
 - The balancing of the culpability & disciplinary history with mitigation, remediation, & acceptance of responsibility.
 - Any uncooperative conduct.
- Both recognize the attorney-client privilege and work product doctrine.
- Both also close by advising that the assessment of cooperation is discretionary.



First CFTC Non-Pros Agreement

- On June 29, 2017, the CFTC entered into its 1st non-prosecution agreements with 3 individuals - based on “substantial” cooperation (See CFTC Release pr7581-17).
- On Aug. 25, 2017, the CFTC’s Enforcement Director discussed incentivizing self-reporting on a podcast - (<http://www.cftc.gov/Media/Podcast/index.htm>).



Self-Reporting Guidance

- On Sept. 25, 2017, the CFTC’s Enforcement Director gave a speech outlining the CFTC’s new guidance on self-reporting.
- That day, the CFTC also issued updates to the Enforcement Advisories on Cooperation and an “Updated Advisory On Self Reporting and Full Cooperation.”
- The Director advised that to obtain the substantial benefits of self-reporting:
 - First, the CFTC expects truly voluntary self-reporting before the threat of disclosure and expects it in a prompt timeframe.
 - Second, full cooperation must continue throughout the investigation.
 - Third, timely and appropriate remediation must occur to ensure the misconduct does not occur again.

Self-Reporting Guidance

- The Director continued that if the above factors are complied with, that the Division will commit to:
 - Clearly communicating with the self-reporter – at the outset – the CFTC’s expectations regarding self-reporting, cooperation, and remediation.
 - The CFTC will work with the self-reporter on remediation.
 - Finally – and most importantly – the self-reporter can expect concrete benefits in return for self-reporting, cooperation, & remediation.
- The Director then stated, “If a company does these three things, the Division of Enforcement will recommend a substantial reduction in the penalty . . . In truly extraordinary circumstances, the Division may recommend declining to prosecute a case.”
- When considering self-reporting – be mindful of the risks and collateral consequences.

CFTC: Overview of the Enforcement Process

- The CFTC typically seeks information informally or “voluntarily”
- For registrants, the CFTC issues 4g requests, which are not truly voluntary.
- These requests are usually very broad, but the Staff will tailor – and at times narrow – the document requests.
- The CFTC will also request interviews with individuals and entertain requests by parties to submit additional information or to make presentations.

CFTC: Overview of the Enforcement Process



- Parties need to be mindful of the CFTC's expanded authority, pursuant to the Dodd-Frank Act to prohibit false statements made to the CFTC.
- If necessary the Enforcement Division will seek formal authority to issue subpoenas for documents and on the record testimonies of witnesses.
- At the conclusion of an investigation, the Enforcement Division may issue a Wells Notice. (See 17 CFR 11, Appendix A).



CFTC: Overview of the Enforcement Process

- In recent years, due to apparent increased aggressiveness the practice of issuing Wells Notices has declined.
- Even if not offered – for strategic reasons making a Wells Submission or submitting a “white paper” – may be beneficial to a party.
- The Wells Submission is submitted to the Enforcement Division.
- As part of the normal internal process, Enforcement would attach the Wells Submission to the request for enforcement action submitted to the CFTC’s Commissioners. It’s Enforcement’s prerogative to also submit its response to the Wells Submission.



CFTC: Overview of the Enforcement Process

- Regarding Settlement:
 - When appropriate, early settlement discussions can be advantageous, especially because CFTC's settlement parameters regularly increase through the course of the investigation and any litigation that follows.
- Administrative Proceedings v. U.S. Dist. Court:
 - The CFTC has been decreasing its use of administrative proceedings for litigated actions over the past few years.
- Once the complaint has been filed, the rules of litigation and the rule of evidence apply, to the CFTC as to any party to a civil lawsuit, and opposing parties are entitled to discovery, to seek summary judgment, etc. (See the CFTC Rules of Practice, the Federal Rules of Civil Procedure, and the Federal Rules of Evidence).



NFA: Overview of the Enforcement Process

- Common Triggers

- Targeted examinations of problematic firms and individuals
- Complaints from customers, analysis of financial statements, etc.

1) The Enforcement Department investigates violations of NFA Rules and makes recommendations to the Business Conduct Committee (“BCC”)

The BCC rarely refuses to follow a recommendation to issue a complaint

2) The BCC either closes the matter and/or issues a warning letter, or issues a complaint.

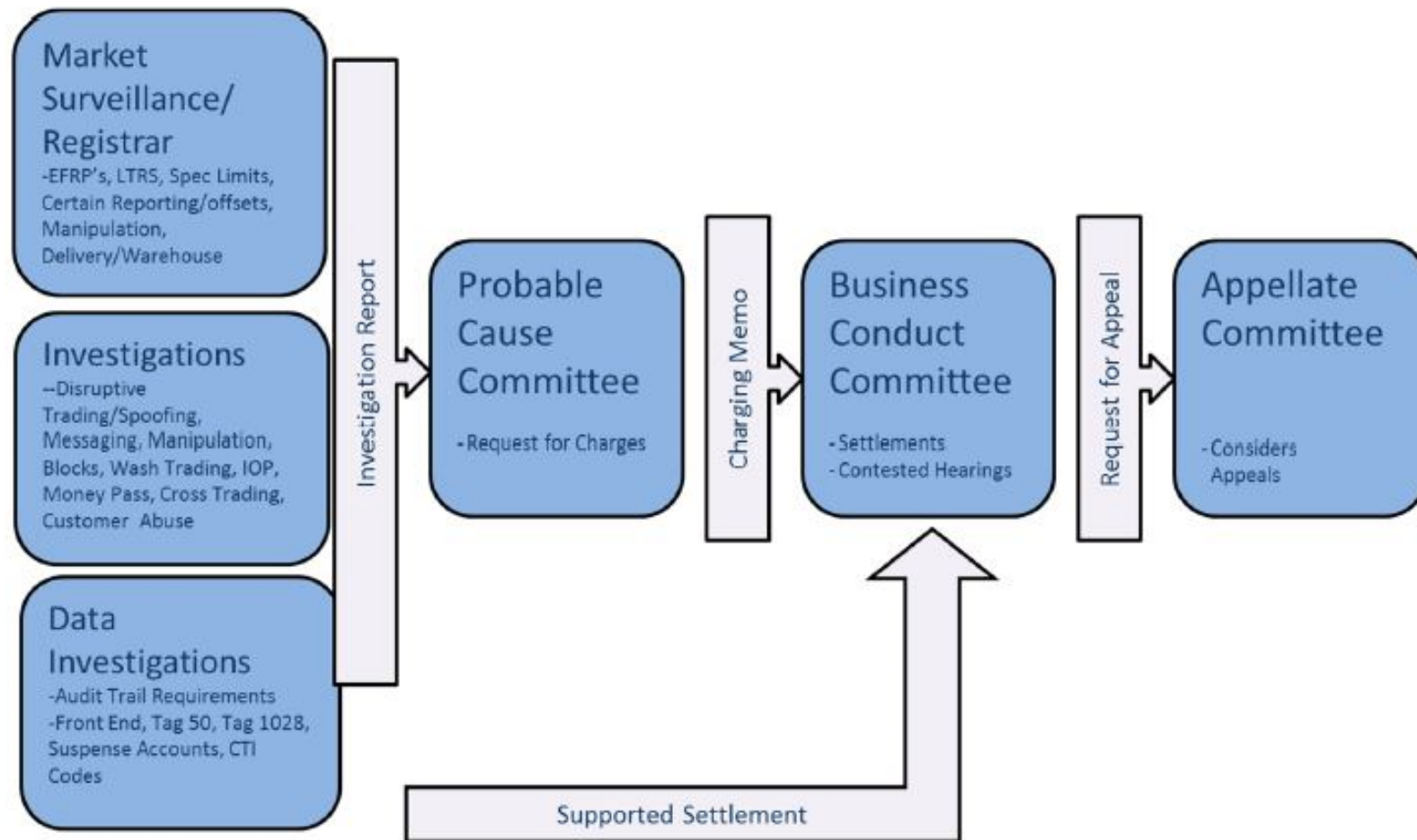
3) Settlement (NFA Rule 3-11)

Any proposed offer of settlement is submitted to the BCC or the Hearing Panel (once a chairperson is appointed)

4) If the settlement is not accepted, the respondent is entitled to a hearing.



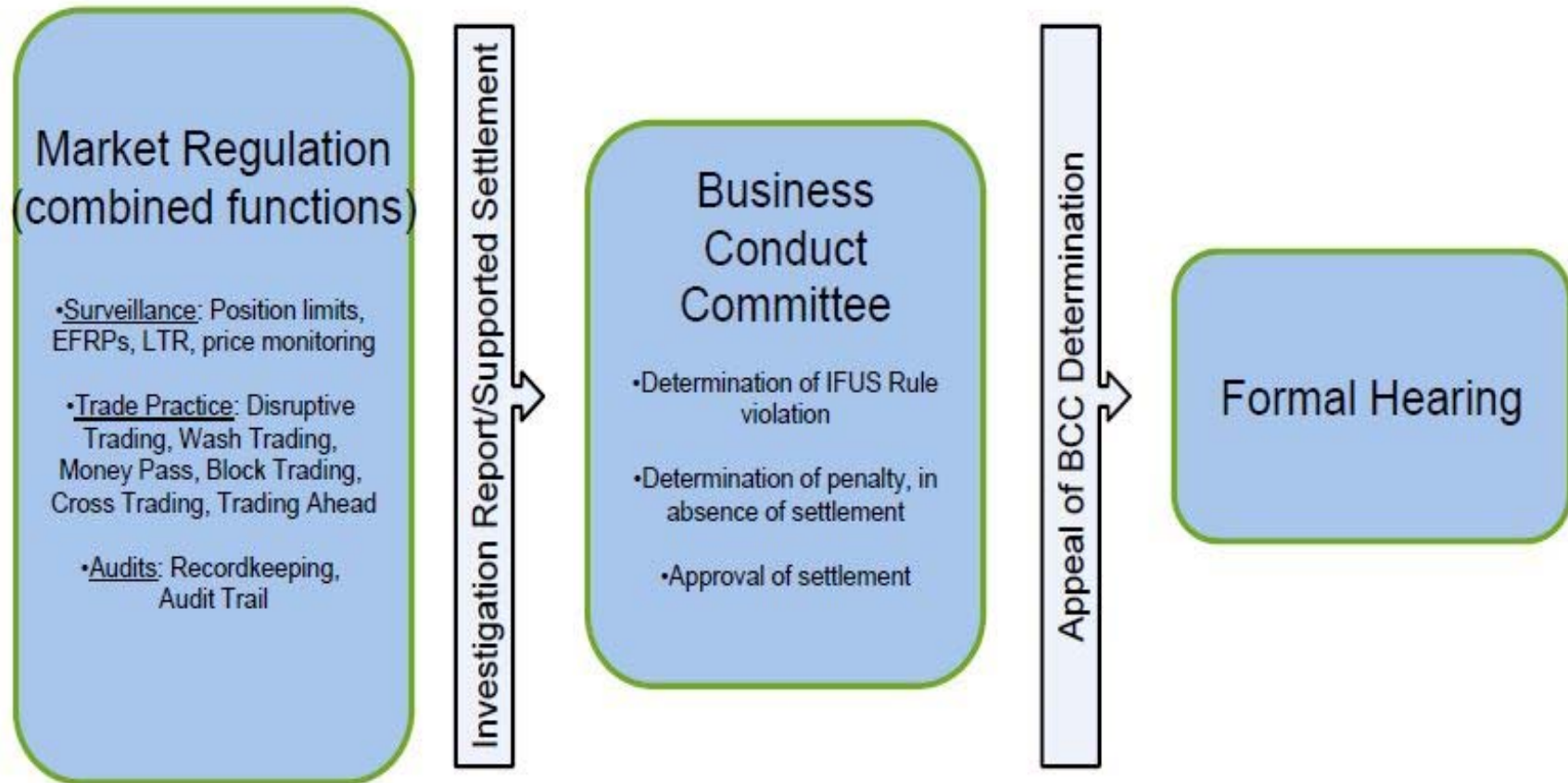
CME: Overview of the Enforcement Process



* See the CME Rulebook –

<http://www.cmegroup.com/rulebook/CME/I/4/4.pdf>.

ICE: Overview of the Enforcement Process



* See the ICE Rulebooks - <https://www.theice.com/rulebooks>.

Takeaways

- Remember to follow the recommended steps.
- Cooperation and Self-Reporting – when strategically appropriate – can contribute to a more successful resolution.
- The CFTC will entertain presentations and the production of additional information – do so when strategically appropriate.



Takeaways

- If not offered a Wells Notice – still pursue making a Wells Submission or submitting a White Paper.
- If settlement is appropriate – do it early.
- Know the different regulators and forums as well as possible – CFTC, NFA, CME, ICE – and the rules of practice that apply to each.



Conclusion

Questions

About the Presenters



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21



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