



# Trust But Verify

*New expectations in regulatory enforcement cases  
and the evolving role of post-settlement obligations*



# Presenters

## Host:

**Natalie Tynan**, Associate General Counsel, Head of Technology,  
Documentation Strategy, FIA

## Panelists:

**Jon Flynn**, Senior Counsel, Allen & Overy

**Anthony Mansfield**, Partner, Allen & Overy

**Tom Balogh**, Executive Director, Allen & Overy Consulting

Presentation prepared by **ALLEN & OVERY**

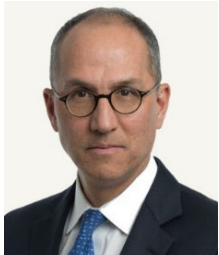
# Biographies



**Jon Flynn**

Senior Counsel

Jon focuses his practice on commodities, securities, derivatives and related regulatory and litigation matters. He represents a wide range of participants in the physical commodity and financial markets. Jon also represents companies and individuals in investigations by the U.S. Department of Justice, the CFTC, SEC and other government regulators in the U.S. and abroad related to manipulation, fraud, price reporting, supervisory controls, position limits, and other prohibited trade practices.



**Anthony Mansfield**

Partner

Tony is a member of the investigations and litigation practice. He focuses his practice on commodities, securities and related derivatives litigation, complex commercial litigation and regulatory/enforcement matters. Prior to returning to private practice in 2007, Tony served as a Chief Trial Attorney and Counsel to the Director in the Division of Enforcement of the CFTC. While there, he managed a team of lawyers and investigators focused primarily on manipulation in the commodities markets.



**Tom Balogh**

Executive Director – A&O Consulting

Tom leads the non-financial risk practice at A&O Consulting. He is highly experienced in the areas of risk, compliance and financial crime and has worked in regulation for 20 years. Prior to joining A&O, Tom was a director in EY's risk advisory business, where he worked for eight years both in London and New York.

# Three long-term trends in regulatory enforcement

Large market abuse cases

Types of cases brought by enforcement authorities

Supervision failures / systems and controls

Encourage cooperation / self-reporting

Enforcement guidelines and priorities

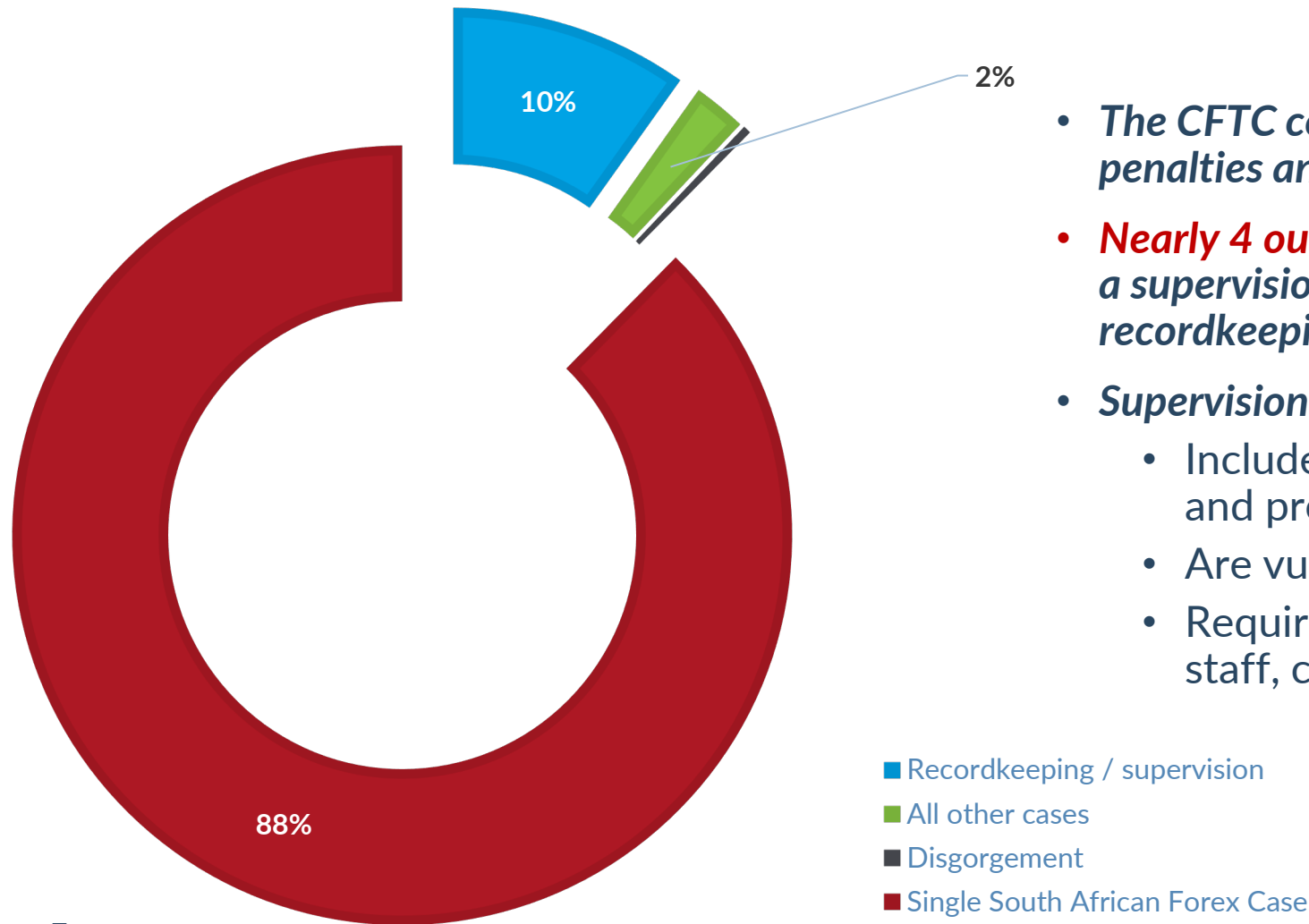
Encourage whistleblowers / punish recidivism

Deterrence through penalties

Settlement strategies and expectations

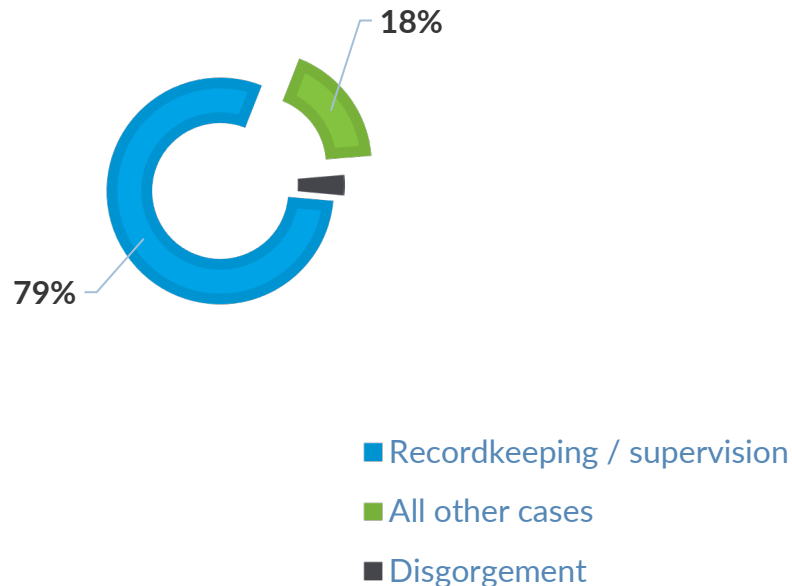
Ongoing obligations / monitors and consultants

# CFTC 2023 Enforcement Results – As Reported



- The CFTC collected approximately \$500 million in penalties and disgorgement during the 2023 FY
- **Nearly 4 out of every 5 dollars** collected came from a supervision-related claim (often based on recordkeeping failures)
- **Supervision-related claims often:**
  - Include systemic issues / inadequate policies and procedures
  - Are vulnerable to recidivism
  - Require long-term remediation (i.e., audit staff, consultants)

# CFTC 2023 Enforcement Results – Realized



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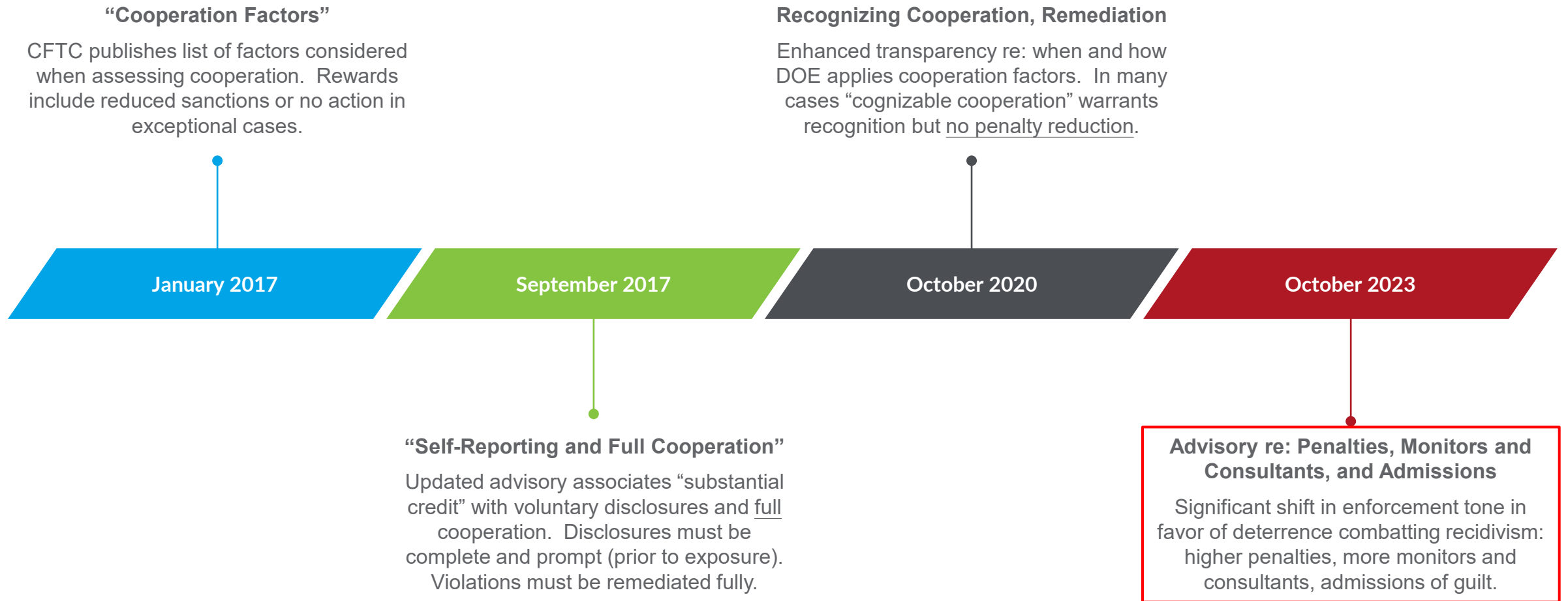
# Roadmap for today

## How new regulatory expectations will impact regulatory investigations?

- How the CFTC's enforcement guidelines have evolved over time
- Why is the CFTC's October 2023 Enforcement Advisory important?
  - Key provisions
  - Case study from recent enforcement actions
- *Monitor vs. Consultant*
  - Practical implications for investigations
- What does a successful compliance consultant engagement look like?



# Evolution of the CFTC Enforcement Guidelines





# Case study: Goldman Sachs (No. 23-59)

*CFTC alleged that Goldman failed to diligently supervise a wide range of its swap dealer activities and had “unprecedented failures” of its swap reporting and disclosure systems*

- \$30 million penalty
- Reduced penalty for “substantial cooperation”
- Written remediation plan required
- Consultant for 3 years to advise and assess plan

## CFTC Order:

The Division of Enforcement’s (“Division”) investigation revealed that, since becoming a swap dealer, Goldman has failed to properly resource and prioritize CFTC compliance. This failure resulted in violations that permeated numerous aspects of Goldman’s swap dealer activities. As a result, Goldman failed to diligently supervise a wide range of its swap dealer activities in violation of Section 4s(h)(1) of the Act and Regulation 23.602(a). The Division’s investigation revealed supervisory deficiencies in a number of areas: swap data reporting, pre-trade mid-market mark disclosures, a personnel reporting line, clearing member risk management policy, notices regarding its initial margin model and segregation, and disclosure of static material economic terms. These deficiencies were pervasive, and in some instances, have persisted since 2013. The Commission has not brought a swap data reporting case or a pre-trade mid-market marks (“PTMMs”) case with this volume of failures, and thus those failures are also the basis for standalone violations of the Act and Regulations.<sup>3</sup>

September 29, 2023

# Case study: Goldman Sachs (No. 23-59)

*CFTC alleged that Goldman failed to diligently supervise a wide range of its swap dealer activities and had “unprecedented failures” of its swap reporting and disclosure systems*

- \$50 million penalty
- Reduced penalty for “substantial cooperation”
- Written remediation plan required
- Consultant for 3 years to advise and assess plan

Commissioner Goldsmith Romero’s Concurrence:

“The violations of law found by the CFTC in this case are serious, pervasive, and persistent, evidencing widespread problems with Goldman’s culture as a swap dealer.”

“The illegal action evidences very serious corporate governance failures that are not adequately addressed in the undertakings in the settlement.”

“This is not the first time that the Commission has charged Goldman with failure to supervise its swaps business, which means that Goldman is a recidivist in violating that specific law. Here the violations occurred for more than a decade, even as the defendant settled other CFTC enforcement actions.”

“The requirement for a compliance monitor should ring a very loud alarm for Goldman about the lack of confidence that the CFTC has in the defendant’s ability to implement the systems, controls, and supervision needed to come into, and stay in, compliance with the law.”



# CFTC's October 2023 Enforcement Advisory

*The new Enforcement Advisory codifies a substantive shift in enforcement priorities and tactics*

- **Higher penalties**
  - “[T]he proposed civil monetary penalty [must be] sufficient to achieve general and specific deterrence, **particularly for a recidivist respondent.**”
  - “[T]he Division is recalibrating how it is assessing proposed CMPs... which may result in the Division recommending **higher penalties** in resolutions that have been imposed in similar cases previously.”
- **Monitors and consultants**
  - Greater reliance on post-settlement undertakings; especially the use of monitors and consultants (possibly a new “lighter touch” category of monitors)
- **Admissions of wrongdoing**
  - More pressure for admissions by Division staff (and in exchange for enhanced cooperation credit)

# DOE Director McGinley Explains New Policy

"I've been surprised to hear that some still believe the CFTC to be 'friendly' when it comes to enforcement."

"At the end of the day, the penalties need to exceed the costs of compliance, to avoid the risk of institutions viewing penalties as an acceptable cost of doing business."

"[W]hat today's Advisory means is that where conduct is occurring repeatedly over time, wrongdoers should expect a reassessment of the penalty size needed to deter the misconduct."

"Today, we are announcing that the Division intends to prioritize recidivism as a significant aggravating factor under our existing penalty guidance. This means that recidivists can expect the Division to recommend increased penalties, so that we do not keep seeing the same entities with the same problems."

"Recidivism will be a significant factor that will influence whether the Division will recommend a corporate compliance Monitor or Consultant."



Ian McGinley and Commissioner Goldsmith Romero at NYU on October 17, 2023



# New Reliance on Compliance Consultants?

## Monitors

- Staff approval required
- Responsibilities:
  - Testing the sufficiency of policies, procedures, and controls to identify, address, and prevent future misconduct
  - Drafting specific recommendations to address issues
  - Testing the sufficiency of the entity's enhancements to implement recommendations and the effectiveness of those enhancements over time
  - Periodic reporting on the progress of implementation

## Consultants

- Staff approval “typically” not required
- Responsibilities:
  - Advising the entity regarding the implementation of remediation-related undertakings
  - Periodic reporting on the progress of implementation



# New Reliance on Compliance Consultants?

## Monitors

- Certification:
  - The monitor and the entity must certify the entity's completion of the remediation plan
- When appropriate:
  - Cases involving the most significant / pervasive compliance and control failures reflecting a lack of sufficient commitment to effective compliance
  - Where the pervasiveness / severity of the misconduct and/or the absence of effective controls is such that **the Division lacks confidence that the entity will remediate** its misconduct without the assistance of a neutral third party and oversight

## Consultants

- Certification:
  - The entity must certify its completion of the remediation-related undertakings at the conclusion of the Consultant's engagement
- When appropriate:
  - Less severe cases
  - Recommended where the evidence persuades the Division that **the entity requires the assistance of a neutral third party to advise** regarding remediation, but can otherwise remediate its misconduct without oversight



# Case study: Off-Channel Communications Cases

*Recent settlements provide a template for post-settlement consultant engagements*

- **“Comprehensive Reviews”** of policies / procedures, surveillance programs, and internal frameworks for detecting and addressing non-compliance events
- **“Assessments”** of the effectiveness of surveillance programs, internal compliance controls, and available technological solutions (whether currently in use or available but not implemented)
- **“Detailed written reports”** of the reviews performed including the individuals involved, conclusions reached, and plans for implementing recommended changes
  - Entities will be required to implement recommended changes under the terms of their settlements
- **“Annual evaluation”** after 1-year to assess the entity’s progress and continued compliance
- **“Reporting discipline imposed”** against individuals involved for a period of time following settlement
- **“Enhanced recordkeeping”** for records associated with compliance with required undertakings

# DOE Director McGinley Explains New Policy

Given my remarks today, you may wonder why a firm would self-report and cooperate if it could result in higher penalties, a Monitor, and admissions? . . . | If you self-report, fully cooperate, and remediate, it is likely you will receive a substantial reduction in the penalty that would otherwise be appropriate. It is also less likely the Division will recommend the imposition of a Monitor.



Ian McGinley and Commissioner Goldsmith Romero at NYU on October 17, 2023





# Proactive Companies May Have Better Results

## Post-settlement strategy

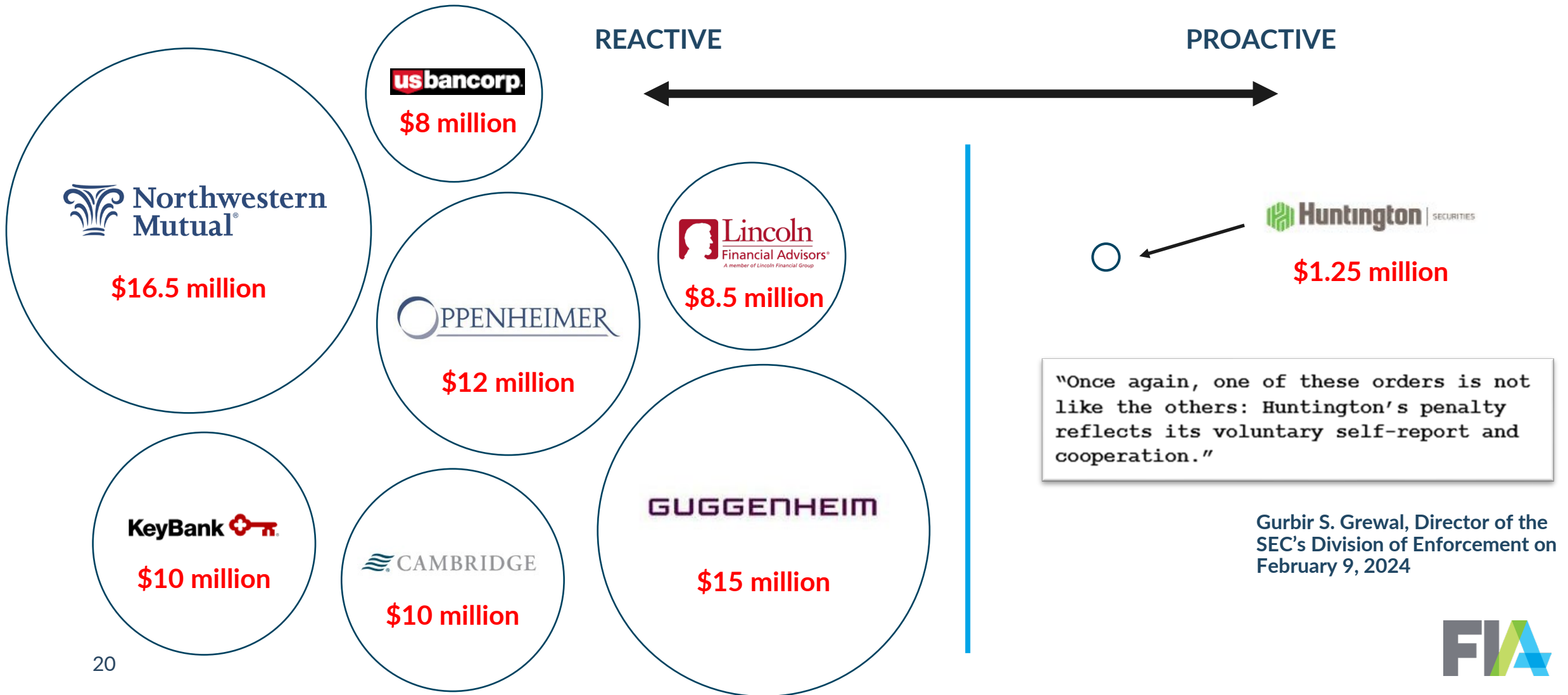
- Recognize that more cases will include post-settlement obligations, particularly cases involving supervision failures / systems and controls
- Where a “monitor” of some form is likely to be imposed, advocacy should focus on the sufficiency of a “consultant” instead of a monitor:
  - Less invasive
  - More choice
  - Not adversarial
  - Likely less expensive
- Understanding the current enforcement context will be critical

## Pre-settlement strategy

- The better option is to begin positioning the company for a favorable settlement well before settlement negotiations begin
- Establish relationship of trust between enforcement staff and respondent during the investigation
- Cooperation factors favor timely and effective remediation
  - This means identifying and resolving issues early, then reporting out on the scope of any remediation done and the results
  - This requires a compliance consultant with particular expertise and objectivity to lend credibility when reporting

*Expectations will be similar for both pre- and post-settlement (i.e., you'll need to do the work anyway) but if you do it before a penalty is imposed, you may receive credit in the form of a reduced fine*

# Actual Results





# Practical Lessons Learned from Global Practices

*A reliance on independent consultants may be new to the US, but it is an approach already taken by many regulators around the world. Insights from our international engagements include:*

- **Resources**
  - Firms can underestimate the intensity of the review process and fail to allocate appropriate resources to manage and respond to requests from the independent consultant.
- **Milestones**
  - Firms can agree to overly optimistic milestones that are unachievable due to insufficient project planning.
- **Importance of a clear narrative**
  - Firms can fail to provide sufficient evidence or narrative to build a credible and accurate picture of remediation action that the independent consultant can easily understand.
- **Significance of poor findings**
  - Firms can underestimate the significance that poor findings in a report can have on their business e.g., additional remedial costs, enforcement, reputational damage with the regulator and external reputation, if made public.

# Responding to Investigation Challenges

*Investing in getting it right from the beginning makes for a more successful independent consultant engagement*

## Before

- **Get prepared and involved early** – proactive work with an independent consultant can help the firm to position itself for a favorable settlement
- **Agree the scope of review and the terms of reference**
- Allocate appropriate and sufficient **resources**
- Establish **key points of contact** and consider **preparing employees** attending meetings and interviews with the independent consultant

## During

- **Assist** the independent consultant to **build an accurate and credible narrative**
- Keep a lookout for **'scope creep'**
- Set up **regular meetings** with the independent consultant and **keep a written record** of information shared
- Ensure privileged information is not provided to the independent consultant (unless a decision has been taken to waive privilege)

## After

- **Clarify any misunderstanding** (factual circumstances; understanding of systems and controls)
- **Commenting** on findings is possible – but only when it comes to **facts rather than opinions**
- Ensure there is a **management response with clear next steps**



# Engaging an Independent Consultant has Tangible Benefits

*The report produced by an independent consultant can provide a valuable tool for your advocacy to the regulator:*

- 1 Clearly articulated **narrative** – more control over the scope of the review
- 2 Building **trust and credibility with the regulator** through proactive engagement
- 3 **Practical roadmap** for remediating issues



# Thank you for joining us today!

## Upcoming Webinar:



**MNPI and Physical Commodities Markets**  
10:00 – 11:00 AM ET

# Sources

## Slide 7:

- CFTC January 2017 Enforcement Advisory
  - <https://www.cftc.gov/PressRoom/PressReleases/7518-17>
- CFTC September 2017 Enforcement Advisory
  - <https://www.cftc.gov/sites/default/files/idc/groups/public/@lrenforcementactions/documents/legalpleading/enfadvisoryselfreporting0917.pdf>
- CFTC October 2020 Enforcement Advisory
  - <https://www.cftc.gov/PressRoom/PressReleases/8296-20>
- CFTC October 2023 Enforcement Advisory
  - <https://www.cftc.gov/PressRoom/PressReleases/8808-23>

## Slide 8:

- Goldman Sachs settlement
  - <https://www.cftc.gov/media/9411/enfgoldmansachsorder092923/download>

## Slide 9:

- Concurrence of Commissioner Goldsmith Romero in Goldman Sachs settlement
  - <https://www.cftc.gov/PressRoom/SpeechesTestimony/romerostatement092923c>

## Slide 11:

- Remarks of Enforcement Director Ian McGinley at the New York University School of Law
  - <https://www.cftc.gov/PressRoom/SpeechesTestimony/opamcginley2>

## Slide 14:

- Examples of off-channel communications cases:
  - <https://www.cftc.gov/PressRoom/PressReleases/8599-22>

## Slide 17:

- Recent SEC enforcement actions involving supervision and off-channel communications:
  - <https://www.sec.gov/news/press-release/2024-18#.ZcY2RWOPnn0.mailto>

