

## Cabinet News and Views

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### InDepth: CFTC's Regulatory Priorities for 2023



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Much like taxes and mortality, it is certain that during 2023 the U.S. Commodity Futures Trading Commission (“CFTC”) will promulgate new rules, issue interpretation and guidance, issue no-action letters, engage in investigations and pursue enforcement cases to police its markets and participants. The direction, however, does change from year to year and depending on the Administration. It is likely that the CFTC will pursue the following agenda based on CFTC commissioners’ public statements and based on the rule list [filed](#) by the CFTC in the Fall of 2022 with the U.S. General Services Administration (the Unified Agenda of Federal Regulatory and Deregulatory Actions).

#### Trading Facilities

One of the key traditional priorities for the CFTC is regulation of trading facilities, such as commodity exchanges (designated contract markets – “DCMs”) and swap execution facilities (“SEFs”). In response to a dramatic growth in prediction and event contract markets, the CFTC is likely to promulgate a rulemaking on event contract markets (such as binary options for political events or sports outcomes). Recent enforcement and regulatory actions are indicative of a critical mass of enquiries that will need to be addressed by a federal agency ruling.

Even though rules for SEFs were implemented 10 years ago, the CFTC continues to finetune its regulations, such as revisions to rules on “made available to trade,” conflicts of interest and governance of SEFs, as well as Part 40 regulations applicable to all registered entities. It is likely that the CFTC will address in a rulemaking its no-action positions on § 37.6(b) for confirmation of swaps executed on a SEF and maintaining the swaps documentation, package transactions, and reporting of SEF-executed swaps.

It is also expected that there will be further guidance (including by enforcement) relating to DeFi and decentralized autonomous organization (“DAO”) facilities.

There is hope that the CFTC will also provide further guidance relating to its controversial SEF advisory from September 29, 2021.

### **Swap Dealers and FCMs**

Even though swap dealers (“SDs”) have been subject to CFTC regulation and registration for over 10 years now, they are still “provisionally” registered. Now that the CFTC has completed its position limits rules, and specifically with respect to swaps, it is expected that this “provisional” category will go away in 2023. As with SEFs, the CFTC will continue adjusting its rules – e.g., with respect to capital and risk management over SDs.

It is also expected that the National Futures Association (“NFA”) will continue with its enhanced supervisions of SDs and other registered members. The CFTC is also proposing additional rules on system safeguards and testing for CFTC registrants.

### **Reporting**

Even though the CFTC has recently overhauled its reporting rule in Parts 43 and 45, it will continue work on many more detailed aspects of these rules, such as appendices for supplemental reporting fields as well as the large trade reporting under Part 17. The CFTC is also working on reporting and information requirements amendments and rules for DCOs.

### **Crypto Regulation**

The collapse of FTX in the Fall of 2022 has upended Congressional efforts at proposing the regulatory framework for the digital assets industry. The CFTC is making an argument that none of the CFTC-regulated FTX entities (the DCM, the DCO and a SEF) became insolvent and are not a part of the bankruptcy filing. There is a concern, however, that neither the CFTC nor the SEC needed any additional jurisdiction to prevent the fraud that eventually took down both Alameda and FTX.

Nevertheless, the CFTC continues to advocate for an expanded jurisdictional reach over spot and forward commodity markets to have the jurisdiction to regulate and police crypto and other digital assets markets. It is likely that there will be a lot of regulatory activity in 2023 in response to FTX’s collapse.

### **Carbon and Climate Change**

CFTC’s commissioners have noted on several occasions that the CFTC has a role to play in policing and regulating voluntary and even compliance carbon and other environmental commodity markets. In 2022, the CFTC had conducted its first voluntary carbon markets convening and sought comments on the impact of climate change on U.S. financial markets.

### **Customer Protection**

There are a number of regulatory proposals aimed at the strengthening of customer protection rules applicable to futures, options on futures and swaps customer accounts. The CFTC is intending to propose rules on investment of customer funds, cleared swap customer funds, and foreign futures and foreign options accounts (the § 30.7 accounts), as well as a separate rulemaking on separate and segregated accounts of futures commission merchants (“FCMs”).

## **Clearing**

The CFTC is required under the Dodd Frank Act of 2010 to periodically review the markets and determine if additional swap contracts should be designated as required to be cleared. It is likely that the CFTC will review the list of cleared swaps in addition to the currently cleared interest rate swaps (“IRS”) and credit default swaps (“CDS”). The CFTC had started that work in 2022 with the LIBOR transition and will be further addressing governance standards of designated clearing organizations (“DCOs”).

The CFTC has been working on governance requirements for DCOs and will likely complete its amendment revisions in 2023. Following CFTC’s revisions to its Part 190 rules in 2021, the CFTC will address recovery and wind-down plans for systemically important DCOs and other clearing organizations.

It appears at this time that the CFTC chose not to further address several issues in implementation of initial margin requirements for non-cleared swaps (financial end users, margin affiliates, eligible initial margin collateral, etc.), as [noted](#) by CFTC Commissioner Summer Mersinger.

## **Investment Management**

There is a large body of no-action letters, advisories and interpretations relating to commodity trading advisers (“CTAs”) and commodity pool operators (“CPOs”). Many of these entities are also dually registered with the Securities and Exchange Commission (“SEC”). The CFTC intends to amend reporting requirements under Form PF for filers and large hedge fund advisers as well as several regulations in its Part 4 for CTAs and CPOs.

## **Cross-Border Guidance**

It is expected that the CFTC will continue work on finalizing its swaps cross-border regulations with respect to reporting as well as arrange, negotiate and execute provisions and other provisions left unaddressed in its 2022 cross-border rule. Further, it likely that the CFTC will address its no-action letters relating to Brexit and mutual recognition of entities located in the UK but transacting with U.S. persons (e.g., exempted SEFs).

## **Enforcement**

The CFTC will continue to vigorously police its markets, and it is likely that, as discussed in connection with CFTC’s jurisdiction over digital assets, enforcement will focus increasingly on fraud and manipulation in commodities traded in interstate commerce even if there is no derivative (such as futures or swaps or options). It is also likely that the CFTC will address greenwashing and fraud in connection with trading environmental commodities, such as carbon.

As in the past, the CFTC will continue policing reporting and recordkeeping violations, compliance with SD business conduct requirements, its new position limits rules, generally fraud and manipulation, FCPA-type of commodity fraud and manipulation, misappropriation of material non-public information (a.k.a. insider trading), acting as unregistered entities (e.g., crypto exchanges or intermediaries), spoofing, wash trading and other trading violations.

## **Administrative**

There are a number of proposals aimed at streamlining CFTC's operations as well as "cleaning up" its duplicative or incorrect language in the regulations. As part of this effort, the CFTC will clarify the definition of "small entity," update guidance on ethical standards for CFTC employees and will further implement the Privacy Act of 1974.

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