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CFTC and SEC Issue Guidance on Security-Based Swaps and Fraud in OTC Swap Disclosures



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On October 21, Commodity Futures Trading Commission (“CFTC”) Commissioner Caroline D. Pham issued a [concurring statement](#) to the CFTC’s amended complaint originally filed on April 27, 2022 in the U.S. District Court for the Southern District of New York against Archegos Capital Management, LP (“Archegos”) and certain related individuals. A [parallel enforcement action](#) was filed on the same day by the Securities and Exchange Commission (“SEC”).

Both the CFTC and the SEC allege that Archegos, through its key representatives, engaged in a fraudulent and manipulative scheme to drive up the valuations of Archegos through swaps and security-based swaps (“SBS”), including total return swaps. The Dodd-Frank Wall Street Reform and Consumer Protection Act assigned oversight of swaps to the CFTC and SBS to the SEC. Archegos’ use of these derivatives with numerous counterparties effectively concealed from these counterparties Archegos’ true exposure and its available cash position. The market unfavorably turned against Archegos’ positions in March 2021, and these counterparties cumulatively lost over \$10 billion.

First, this action illustrates that further clarification is necessary to the definitions of a commodity-based swap, or a “swap” (that is subject to CFTC’s exclusive jurisdiction), and “SBS” (that, in turn, is subject to SEC’s exclusive jurisdiction). Subsequent to the adoption of Dodd-Frank, the agencies issued [joint guidance](#) in 2012 (Products Definitions) further delineating the differences between swaps and SBS. However, in the 10 years since the adoption of Products Definitions, further refinement was necessary, and following the Archegos action, the SEC on July 11, 2022 issued [FAQs](#) clarifying that: “In the staff’s view, the swap based on the shares of an exchange traded fund (ETF) that tracks a broad-based securities index, such as the S&P 500, is a security-based swap.” Because the majority of swaps utilized by Archegos were indeed SBS, Commissioner Pham stated that the SEC had

primary enforcement responsibility. Nevertheless, some transactions qualified as “swaps” and therefore the CFTC proceeded as well.

Second, the SEC’s and the CFTC’s joint enforcement actions, as well as the [filing](#) of criminal charges by the U.S. Attorney’s Office for the Southern District of New York, illustrate the government’s willingness to pursue civil and criminal remedies for alleged intentional fraud, particularly where the magnitude of losses caused by the alleged wrongdoing is as large as in the case of Archegos.

Third, this complaint is further significant because this is the first time the CFTC took a broader interpretation of its authorities under §6(c)(1) of the Commodity Exchange Act (“CEA”) and §180.1(a)(1)-(3) promulgated thereunder to assert that a swap counterparty, Archegos, is liable for misleading statements with respect to OTC swaps where no disclosures were required by the CEA. One thing is certain: this is unlikely to be the last instance where the CFTC adapts SEC’s traditional enforcement priorities to commodity derivatives markets.
