

Cabinet News and Views

Informed analysis for the financial services industry



Live from FIA L&C: Redefining the Scope of a “Trading Facility”



By **Peter Y. Malyshev**
Partner | Financial Services

This week, attendees at the FIA L&C conference are gathered in Washington, D.C., for the first time in three years to discuss several issues with significant potential impact on the markets. One such issue is redefining the concept of the trading facility for securities and derivatives. In 2021 and 2022 the U.S. Commodity Futures Trading Commission (“CFTC”) and the U.S. Securities and Exchange Commission (“SEC”) have taken several regulatory actions that will have significant implications for commodity traders as well as for the fintech sector.

First, on September 29, 2021, the CFTC issued an advisory where it significantly expanded the contours of what was established as a swap execution facility (“SEF”) since 2013. Specifically, the CFTC’s advisory stated that an entity may need to register as a SEF when: (1) facilitating trading or execution of swaps through one-to-many or bilateral communications; (2) facilitating trading or execution of swaps not subject to the trade execution requirement under CFTC rules; (3) providing non-electronic means for the execution of swaps; or (4) currently registered with the CFTC in some other capacity, such as a commodity trading advisor or an introducing broker, if its facility falls within the SEF definition.

Importantly, the advisory implies that platforms that provide purely chat functionalities without the multi-to-multi execution, may nevertheless qualify as SEFs. As a result, many platforms, such as emerging defi facilities or traditional communication platforms may become subject to registration and regulation.

Second, in similar actions, the SEC has proposed Regulation ATS on January 26, 2022, where it proposed that platforms that qualify as communication protocol systems register as exchanges or as broker dealers subject to Regulation ATS requirements. If this regulation becomes law, this rulemaking will significantly expand the definition of “exchange”. Further, on April 6, 2022, the SEC proposed its regulations on Security-Based Swap Execution Facilities (“SB SEFs”) where it closely followed the provisions articulated by the CFTC in relation to SEFs in its rules and the advisory.

Further, the European Securities and Markets Authority ("ESMA"), the EU's securities markets regulator, on January 28 published a consultation paper (CP) on what constitutes a multilateral system also seeking to broaden the scope of regulated trading venues.

These regulatory actions from the CFTC, the SEC and the ESMA indicate that U.S. and global regulators are seeking to bring a larger number of unregulated trading, communication and execution venues that trade derivatives and securities into the regulatory fold. Establishing such broad and flexible parameters for what constitutes a regulated trading platform will particularly affect the fintech sector and the defi platforms and those who trade on them.
