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Research and commentary on regulatory and other financial services topics

Regulation in Flux

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Trump's War on Consumer Protection, Humph(rey)

March 20, 2025

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We have been following closely developments with the Consumer Financial Protection Bureau ("CFPB") and the Trump/Musk administration (see **here** and **here**), and while we have a few updates on the CFPB, Trump and Musk have taken another swing at making consumers more vulnerable to the excesses of our economy by attempting to "fire" two Democratic Federal Trade Commission ("FTC") commissioners.

The FTC has a hybrid mission to regulate the marketplace – its Bureau of Competition addresses antitrust and anti-competitive concerns, and its Bureau of Consumer Protection works to ensure that consumers are not subject to unfair or deceptive acts or practices. The FTC is a commission and it is intended to have five commissioners, no more than three of which may belong to the party of the President. While the President appoints the commissioners, whether Democratic or Republican, but the FTC is an independent agency and is not under the Executive Branch. In fact, the Supreme Court decision that established the unique status of an independent agency (as compared to an executive agency) was **Humphrey's Executor**, which was decided in 1935 and was focused upon the removal of an FTC commissioner by President Franklin D. Roosevelt because Roosevelt did not agree with that commissioner's politics.

As reported by several news organizations, the letter received by FTC Commissioners Alvaro Bedoya and Rebecca Slaughter from President Trump stated that their "continued service is inconsistent with my Administration's priorities." And yet, every single Commission vote since the inauguration (and there have been several votes) was unanimous, meaning that all commissioners – the Republicans and the Democrats voted exactly the same way. The similarity between this action by Trump and the actions taken by Roosevelt is too strong to ignore, so this means that Trump is directly asking the Supreme Court to strengthen the Executive Branch by overruling Humphrey's Executor and doing away with independent agencies altogether. Because Humphrey's Executor is still valid precedent, the legal validity of the firings of the FTC Commissioners is questionable, which is why many characterize the firings as "attempted" firings.

If this all sounds familiar to folks who are more focused on the CFPB, **this letter sent yesterday to Trump** challenging the firing of the FTC Commissioners from twenty-six Senators explains the connection between the FTC and the CFPB: "Ninety years ago, the Supreme Court held that Congress's authority to create bipartisan, multimember, expert commissions—and specifically the FTC—"cannot well be doubted" because "it is quite evident that one who holds his office only during the pleasure of another cannot be depended upon to maintain an attitude of independence. . . ." In a 2020 decision involving whether Congress could insulate the single director of the Consumer Financial Protection Bureau from at-will removal by the President, the Supreme Court declined to revisit this precedent, finding important differences between the CFPB and the FTC, including that the FTC has multiple expert members to ensure the Commission retains relevant expertise at all times, that each President can influence the makeup of the Commission by nominating new members and appointing the Chair (as you have already done), and that the Commission is funded through the traditional appropriations process that the President may influence."

The CFPB and the FTC are the only Federal agencies that have primary missions to protect consumers in the marketplace, and Trump and Musk have effectively rendered each organization powerless at this point. With only two remaining commissioners at the FTC, the agency does not have the ability to establish a "quorum" of commissioners and therefore cannot take action in the marketplace. Of particular concern, beyond the importance of the FTC's work in ensuring that everyday transactions made by American consumers are free from unfair or deceptive practices, hobbling the FTC's antitrust capabilities as well makes it that much easier for the biggest corporations to control markets and engage in anti-competitive behavior, which always drives up costs and can even impact the freedoms and rights of Americans.

On the CFPB front, things have not improved much, although there are scattered reports that more CFPB staff have been called in to work on "statutorily-required" activities. In the lawsuit brought by the union that includes CFPB employees against the administration, Judge Amy Berman Jackson heard arguments last week regarding whether a preliminary injunction should be granted to stop the firing of CFPB staff. While she has not yet rendered her decision, she did extend the temporary restraining order that was already in place. Meanwhile, Trump's nomination of Jonathan McKernan to become the actual Director of the CFPB is proceeding through the Senate approval process.

OCC Gives Green Light to National Bank Fintech Business Model

March 20, 2025

By Daniel Meade
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On March 17th, the Office of the Comptroller of the Currency ("OCC") **conditionally approved** the application for the newly renamed SmartBiz Bank N.A. ("SmartBiz Bank") to change its business model in support of its fintech parent and a substantial change in assets under 12 C.F.R. 5.53. The OCC application was part of a larger transaction in which Billfloat, Inc (d/b/a SmartBiz Loans) became a bank holding company through its acquisition of United Community Bancshares, Inc and thereby indirectly acquired Centrust Bank, N.A., which it then renamed as SmartBiz Bank. The Federal Reserve Bank of Chicago approved the Bank Holding Company Act application from Billfloat under delegated authority on **February 25, 2025**.

In conjunction with the approval, Acting Comptroller of the Currency Rodney Hood stated in the accompanying **press release** that "[a]safe, sound and fair fintech business model has a place in today's federal banking system . . . this conditional approval demonstrates the OCC's commitment to a regulatory framework that supports innovations in banking that expand access to financial services for consumers and communities across the country."

This approval of a fintech business model for a national bank follows the OCC's actions on March 7th, where it issued **Interpretive letter 1183**, rescinding **Interpretive Letter 1179**, which had been issued in 2021. The OCC also **announced** on March 7th that it withdrew from two interagency statements issued in 2023 on crypto assets. In rescinding IL 1179, the OCC is no longer requiring supervisory non-objection for a national bank to engage in the crypto and stablecoin related activities it found permissible in Interpretive Letters **1170**, **1172**, and **1174** that were issued in 2020 and January 2021.

Taken together, Acting Comptroller Hood's actions this month show a less restrictive approach to fintech and crypto-related activities on the part of national banks by the OCC under the Trump administration in comparison to the Biden administration. However, as Acting Comptroller Hood noted, the less restrictive approach should not be read as the OCC deviating from its mission to promote a "safe, sound and fair" federal banking system.

UK Government Proposes Action Plan on a “New Approach To Ensure Regulators and Regulation Support Growth”

March 20, 2025

By Alix Prentice
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The UK’s Treasury ("HMT") has set out an **Action Plan** to ensure that regulation promotes growth and investment. Noting that while regulation has many benefits, the UK’s current stance is hindering its international competitiveness through unnecessary and disproportionate regulatory requirements. The Government has committed to ensuring that administrative costs for business of 25%, and sees this as happening through understanding the actual costs of the regulatory burden and targeting reforms that streamline processes.

The Plan covers a number of sectors including financial services. These largely focus on regulatory barriers to entry for global firms looking at the UK as a destination, and for early-stage innovative firms to fundraise and include:

- more resources to support early and high-growth firms to grow;
- extend pre-application support to all wholesale payments and crypto firms;
- introduce a ‘minded to approve’ notice system for early-stage innovative firms to enable fundraising;
- consider allowing relevant firms to conduct limited activities before full authorisation;
- reduce regulatory reporting obligations; and
- speed up the review of capital requirements for specialised trading firms.

Next steps will include the introduction of any necessary legislation.

Key Takeaways From CFTC Acting Chairman Caroline Pham's FIA Boca 50 Keynote

March 20, 2025

By Peter Y. Malyshev
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On March 11, 2025 at the 50th Annual International Futures Industry ("FIA") Conference, Commodity Futures Trading Commission ("CFTC") Acting Chairman Caroline Pham delivered a ground-breaking keynote covering administrative matters, enforcement priorities and regulatory clarity in the wake of President Trump's Executive Orders and the CFTC's plans for modernizing market surveillance. There are several key takeaways:

1. Administrative Priorities

At the outset, Acting Chairman C. Pham stated that she and her staff undertook an exercise of identifying each open matter before the CFTC and actioned each of these matters to dismiss, complete, or identify as requiring further work. In a matter of six weeks the staff of the CFTC was able to "complete or address" 20% of these matters and "dispositioned" 30% of open investigations. For example, on March 13, 2025, the CFTC withdrew a much-criticized "guidance" on swap execution facilities issued on September 29, 2021, and it is expected that many additional CFTC controversial actions will be either undone, significantly revised, or the long-awaited relief will be granted.

Next, to modernize surveillance over the markets, the market surveillance function will be moved back to the Division of Market Oversight ("DMO") from the Division of Enforcement ("DOE") and the CFTC will procure new modern surveillance systems. Demonstrating Pham's belief that futures commission merchants ("FCMs") not only serve a vital intermediary function, but are at the core of the futures and swaps clearing mandate, the oversight over FCMs will also be moved back to the Division of Clearing that overseas derivatives clearing organizations ("DCOs").

2. Focus on Lawful Enforcement

Most of Acting Chairman's address focused on the CFTC's enforcement matters describing as the first step towards enforcement clarity the CFTC's self-reporting advisory issued on February 25, 2025 on enforcement mitigation credit. In tandem with this advisory the CFTC will soon issue another advisory addressing how the CFTC's operating divisions will be referring material non-compliance and material violation matters to DOE. This is to address whether and under what circumstances the CFTC's operating divisions that conduct routine examinations and surveillance of market participants can refer non-compliance to DOE.

C. Pham has acknowledged that the self-reporting February 25, 2025 advisory did not address how the initial amount of civil monetary penalties will be established. To expedite the settlement of outstanding enforcement matters that do not involve market abuse and fraud (e.g., recordkeeping and reporting violations), during 30 days market participants are encouraged to come forward to DOE with a reasonable settlement offer and outline what remediation measure have been taken. This "compliance and remediation initiative" is a new approach to enforcement that is intended to free up the CFTC's resources to focus on fraudsters and scammers – i.e., a pivot toward customer protection.

3. Regulatory Clarity

C. Pham pledged to prioritize **Executive Order 14219** and implement changes conducive to regulatory clarity, namely enforcing clear, simple rules with common standards. The CFTC plans to achieve this with public engagement through roundtables, gathering input on various regulated products, substituted compliance for non-U.S. swap dealers, registration definitions and requirements, and potential structural reforms to derivatives market oversight. The conversations would revisit unresolved 2017 public comments on simplifying swap rules and cross-border treatment.

Finally, C. Pham stated that the CFTC will continue focusing on regulatory matters relating to digital assets and will commence a pilot program on the use of tokenized non-cash collateral. The CFTC will further address the development of event contracts markets by holding a public round table in March/early April; however, C. Pham did not state whether the CFTC's 2024 proposed rulemaking on event contracts will be withdrawn or amended, but requested public comments on how the CFTC should regulate event contracts.

What This Means for Market Participants

There may be a correlating increase in CFTC enforcement activity targeting fraud and market abuse and technological advances in their market screening surveillance. Market participants currently under investigation or enforcement review may benefit from self-reporting or participating in the 30-day remediation initiative to potentially mitigate penalties. Further, with the CFTC's prioritization of regulatory clarity, market participants should prepare for potential shifts in oversight frameworks and compliance requirements that could reshape market operations. Lastly, with the enhanced focus on digital assets, event contracts regulation as well as all other open matters, the CFTC welcomes public input via comments or by participation at the roundtables.

UK Financial Conduct Authority Abandons "Name and Shame" Proposals

March 20, 2025

By Tom Grodecki
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The UK Financial Conduct Authority is **no longer pursuing** its high-profile proposal to announce the start of enforcement investigations into regulated firms. However, we may see a more robust interpretation of existing rules in this area.

The FCA had **previously justified** its proposal on the basis that earlier publicity would reduce harm to consumers, and signal to other firms that similar conduct should be corrected. It also pointed to the ability of other agencies (such as the UK Financial Reporting Council) to announce their investigations. Whilst there was support from some consumer groups, there was overwhelming opposition from the financial sector, advisors and the House of Lords. In November 2024, the FCA announced watered down proposals, but has now pulled the proposal entirely, citing a "*lack of consensus*".

The FCA does not appear to have been persuaded at the substance of opposition to its proposal, and we will be watching its interpretation of existing rules with interest. At present, the FCA is permitted to announce investigations in "exceptional circumstances." So far, this has been rare, but we expect a more purposive interpretation, noting the following **comments** made last year by Therese Chambers, co-head of the FCA's enforcement division:

At the moment, bar 'exceptional circumstances', we are silent during the period between looking into a potential issue and reaching an outcome. What that has meant in practice, is that 'exceptional circumstances' has usually translated into 'computer says no' in response to requests for further information. [emphasis added]

Going forwards, a more refined approach is likely.

The UK’s FCA Publishes Bulletin on Leaks of Market Sensitive Information

March 20, 2025

By Alix Prentice
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In **Primary Market Bulletin 54**, the Financial Conduct Authority ("FCA") addresses concerns about deliberate, unintentional and unlawful disclosure of market sensitive information during ongoing M&A transactions. Leaks to the press have been identified as well as inadvertent “hints,” which cause the price of shares to move significantly.

“Unlawful disclosure” is the offence of disclosure of inside information (non-public information about a listed security that could have a significant effect on its price) other than in the normal exercise of an employment, profession or duties. Note that it does not matter if the individual making the disclosure is employed by the issuer or a regulated firm.

The FCA has identified gaps in actions taken by issuers and their advisers to make sure inside information is handled appropriately and measures are in place to prevent leaks. It has also identified a growing practice of deliberate and strategic leaking of this information to the media while the transaction is ongoing.

The FCA’s expectation is that relevant holders of inside information underpin policies and procedures with a culture and practices that actively discourage leaks.

CFTC Staff Withdraws Advisory on Swap Execution Facility Registration Requirement

March 20, 2025

By Peter Y. Malyshev
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On March 13, 2025, the Commodities Futures Trading Commission ("CFTC") issued Letter 25-05, withdrawing controversial and much-criticized Staff Letter 21-19 ("SEF Registration Advisory"), which was issued September 29, 2021 by the CFTC's Division of Market Oversight ("DMO"). The original staff letter reminded market participants of the swap execution facility ("SEF") registration requirements under the Commodity Exchange Act ("CEA") and the CFTC regulations.

The letter's broad SEF registration requirements caused uncertainty, introducing a fact-specific approach to SEF registration and proposing far-reaching scenarios in which registration might be required beyond what market participants had understood since the enactment of CFTC's SEF rules almost a decade prior, in 2013.

Furthermore, the CFTC was criticized for violating the Administrative Procedure Act ("APA") because the SEF Registration Advisory essentially changed the law without the proper procedure outlined in the APA. Similar concepts to the SEF Registration Advisory were introduced in the 2018 CFTC proposed rulemaking on SEFs, which was subsequently withdrawn to comply with the APA.

Importantly, the SEF Registration Advisory was the basis for, and cited concurrent and, subsequent CFTC enforcement actions where market participants were found operating SEFs without proper registration. It is unclear to what extent these enforcement actions will remain as precedent in the absence of the SEF Registration Advisory.

In Letter 25-05, the CFTC's DMO acknowledged that the SEF Registration Advisory caused confusion among market participants:

"DMO understands that the SEF Registration Advisory has created regulatory uncertainty regarding whether certain entities that operate in the swaps market are required to register as SEFs with respect to their particular functions within the swaps market, as well as the specific attributes of their business models. Therefore, DMO has determined to withdraw the SEF Registration Advisory in its entirety, effective immediately."

Letter 25-05 alleviates the amassed regulatory uncertainty regarding the swaps market and reinforces the Trump Administration's broader initiatives to descale financial regulation and prioritize business-oriented rollbacks of Biden-era mandates. As a result, the swaps market should be less nebulously regulated, with more predictable and efficient enforcement, aligning with the administration's free-market principles.