

KEY AREAS OF FOCUS FOR THE CFTC UNDER THE SECOND TRUMP ADMINISTRATION

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A party change in the White House triggers cascading changes at the level of federal agencies, including within the Commodity Futures Trading Commission (the “CFTC” or the “Commission”). This article addresses what policy priorities the CFTC should and likely will focus on for the next four years.

I. Summary

- The CFTC should consolidate, codify or cancel as obsolete its no-action letters guidance to the extent possible (*e.g.*, relating to “commodity pools” and Commodity Pool Operator (“CPO”) registration. Numerous letters are of temporary nature and are issued to specific market participants, which creates dubious guidance and uncertain legal status for many of market structures (*e.g.*, a multibillion-dollar securitization market);
- The CFTC should revisit its proposed, identified and unfinished rules and either complete them or withdraw;
- Re-establish a cooperative relationship with the Securities and Exchange Commission (“SEC”) and the U.S. prudential regulators (“USPRs”) to participate in

joint working groups with fellow regulators toward regulatory goals consistent with public interest and in the interest of promotion of U.S. businesses’ global competitiveness;

- The new chairman of the CFTC should articulate CFTC’s priorities and strategy in the short term and the long term;
- Several previously enacted regulatory actions should be rescinded, such as the proposed event contacts rule and the voluntary carbon credit (“VCC”) guidance;
- The CFTC will assess whether the term “commodity” can be either further defined, or whether a formal process for designating certain goods and articles as commodities (or conversely removing them from such designation) should be implemented to minimize uncertainty;
- In the event that the new crypto/digital assets legislation is enacted in the near term to amend the Commodity Exchange Act of 1936 (the “CEA”),² the CFTC should commence implementation of the provisions of this new law and either amend its existing rules or promulgate new rules; however, if it is unlikely that the new legislation will pass in the near term, the CFTC should implement a number of exemptions for new digital products and new forms of business (*e.g.*, decentralized autonomous organizations “DAOs”);
- The CFTC will need to implement a se-

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ries of rules to improve the customer and retail participant protection regime with respect to crypto and digital assets to remain on par with the SEC;

- There will be greater emphasis on ensuring that CFTC's division of enforcement is enforcing existing law, not making new law (*i.e.*, no regulation by enforcement);
- For example, in a series of enforcement actions CFTC's division of enforcement has created new and expansive disclosure requirements for swap dealers under § 23.431 relating to pre-trade market marks and other pre-trade disclosures (*e.g.*, hedging). Instead of regulation by enforcement, the CFTC should either amend its rules or provide clear guidance on what would constitute an acceptable market practice for disclosures under § 23.431;
- CFTC should finalize existing regulations, such as relating to: cross-border, position limits (economically equivalent swaps, or the aggregation rules focusing on actual control and not merely passive ownership), Future Commission Merchant ("FCM")s' accounts and investment of customer assets, collateral management and the use of U.S. Treasuries, conflicts of interest and vertical integration, *e.g.*, FCMs and Designated Contract Markets ("DCM"s), Swap Execution Facilities ("SEF"s) etc.;
- Most importantly, the CFTC should review and significantly revise its reporting regime to provide clarity, avoid duplication and ensure efficiency and certainty of compliance;
- Update its 2012 products and entities definitions and guidance consistently with existing market practices and provide clear guidance on product classification (*e.g.*, spots, forwards, trade-options) and regulated activities and participant categories and respect for registered entities (to

avoid confusion between SEFs, Commodity Trading Advisors ("CTA"s), Introducing Broker ("IB"s), FCMs);

- The National Futures Association ("NFA") should be encouraged to revise its enforcement program to make it more independent of its regulatory and supervisory function (*e.g.*, regulatory filings should not be used as a tool for discovery for an enforcement action) and to provide the ability for market participants to challenge NFA's rulemaking process to ensure that such rulemaking stays within the boundaries of NFA's jurisdictional grant and does not "gold plate" existing CFTC regulations; and
- Through roundtables and by sponsoring working groups encourage the industry to design global or industry codes (similar to the global FX code) in areas where the CFTC may not have exclusive regulatory jurisdiction (*e.g.*, in spot commodity markets).

II. Administrative Priorities

A. The New Commission Agenda

Generally, the new Chairman would lay out the agenda for the new Commission for the next four years. Given that under the Administrative Procedure Act (the "APA"),³ any change or amendment to any enacted federal rule published in the Federal Register must also be made under the APA, *i.e.*, by a rule proposal, the opportunity for the public to comment and then the enactment of a new rule usually takes one or two years. Likewise, if any new rules were introduced, the Commission would need to start work immediately.

Acting Commission Chairman Caroline Pham has outlined her new agenda in a series of presentations, and most recently in a keynote address at the Futures Industry Association ("FIA") Boca 2025 conference on March 11, 2025 (the "Boca 2025 Address").⁴ This paper responds to the policies and the feedback requested in the Boca 2025 Address.

B. Completion of the KISS Project

The CFTC should complete the administrative and regulatory efficiency project that was started under Chairman C. Giancarlo.⁵ The purpose of this project was to assess comprehensively all of the rules that the CFTC has implemented and determine if there is any redundancy, any overlap or if the rules have become outdated. There were hundreds of rules implemented after the enactment of the Dodd-Frank Act in 2010 (the “Dodd Frank Act” or “DFA”);⁶ with 15-year hindsight, many of the rules will need to be streamlined (as further discussed below).

For example, at the time of the enactment of the Dodd Frank Act, there were no cryptocurrencies commonly traded and there were no decentralized finance (“DeFi”) platforms, or digital commodities transferred via the distributed ledger technology (“DLT”). The CFTC must update their rules and regulations towards this new reality (see below regarding competitive pressures on DCMs and SEFs from the DeFi platforms).⁷

C. Staff No-Action Letters and Guidance

Under CFTC Chairman H. Tarbert, the Commission implemented a policy to limit staff no-action letters (“NAL”) and focus on making the rules more transparent and comprehensive so there will be less need to issue NALs or other forms of staff guidance.⁸ The CFTC should further implement this policy and where practical, codify the NALs into federal rules and update its website to give clear notice to the industry regarding which NALs and guidance is no longer effective.⁹

D. Commission Committees

CFTC commissioners sponsor several subject matter committees (*e.g.*, the market risk advisory committee, the global markets advisory committee, the technology and agriculture committees, or the energy and environmental markets advisory committee).¹⁰ The committees should be more involved with the industry and have greater accountability and report the results

of their work (*e.g.*, written recommendations on a subject matter).

E. Coordination between the CFTC, SEC and USPRs

1. The Merger of the CFTC and the SEC

During the change in administration, it has become almost a tradition to discuss a potential merger of the CFTC and the SEC into one regulatory entity. Administratively, this can certainly be done, provided that U.S. Congress consents and enacts appropriate legislation and Congressional supervisory committees reach a compromise on the oversight. Given that there are different congressional committees overseeing the CFTC and the SEC, a merger will likely prove to be a very contentious process and thus is very unlikely. Even if this were to happen, the savings will only be at the level of support staff (*e.g.*, the human resources department and computer systems). While the federal acts that each agency has been created to enforce (*i.e.*, the securities laws and the CEA) will still remain separate. The federal rules enacted under these acts will also be enforced separately. This being the case, a merger is less likely to happen with no efficiencies realized, and CFTC’s budget being infinitesimal compared to other federal expenditures.

Having said this, if instead of subsuming the CFTC into the SEC, a separate federal agency were created (*e.g.*, similar to U.K.’s Financial Conduct Authority), while preserving the independence of and separateness between commodities and securities regulatory regimes, such combined regulator may foster greater coordination and contribute to the increased clarity in U.S. financial markets. Maintaining the separateness of the SEC and the CFTC ensures that market participants have a choice between SEC’s and CFTC’s regulatory and jurisdictional regimes when they design novel products. This ensures robustness of the U.S. regulatory regime and a greater possibility for innovation.

2. Coordination between CFTC, SEC and USPRs

As a separate matter, even without the merger, the CFTC and the SEC should be encouraged (if not outright mandated) to work more cooperatively and collaboratively on solving common problems (*e.g.*, a potentially overlapping crypto regulation), and joint working and coordinating committees will be reinstated (as was required in the Dodd Frank Act of 2010).

Further, in addition to reconciliation of all CFTC rules, the CFTC and the SEC should form a working group to reconcile and where necessary to foster substituted compliance between their rulebooks.

Likewise, the CFTC, the SEC and USPRs (collectively, the “Agencies”) should undertake a thorough review of their rules relating to derivatives, *e.g.*, capital, margin and cross-border. While there are substituted compliance orders issued for non-U.S. regulators, the agencies should coordinate substituted compliance at their national level as well.

F. Implementing the *Chevron* Doctrine

In the wake of the repeal of the *Chevron* doctrine under the *Loper Bright Enterprises v. Raimondo* decision,¹¹ both the SEC and the CFTC should be more judicious with their rulemaking to remain within the boundaries of their jurisdictional grant. For example, SEC’s rulemaking on ESG disclosures¹² and CFTC’s proposed rulemaking on event contracts and the VCC guidance for commodity exchanges¹³ should be further scrutinized and possibly withdrawn.

G. Mutual Recognition with Foreign Regulators and Substituted Compliance

The CFTC should review and assess its mutual recognition, substituted compliance and other agreements with foreign regulators and determine whether, and to what extent, the interests of U.S. businesses and U.S. participants in futures and swaps markets are protected. It is likely that many of these matters will be revisited

to ensure that U.S. market participants are not unfairly disadvantaged and are operating at the level playing field.

As discussed further below, this review comes in tandem with the assessment of the definition of “U.S. person” and the circumstances when a transaction is overseas, or not in the United States.

III. Commodity Definition and Event Contracts

A. The Statutory Definition—CEA

It is an oddity of law that under the CEA, a “commodity,” similar to “security,” is defined in the CEA¹⁴ only by listing examples of goods and articles that would qualify as “commodities” and providing very little guidance on what actually would constitute a “commodity.” Also, unlike with respect to “securities,” there is not even a well-established judicial (however flawed and outdated) *Howey* test¹⁵ to determine if a particular asset is a “commodity,” and the closest the courts came was in the *McDonnell Cabbageteck* and *My Big Coin* decisions in 2018.¹⁶ At the time of the enactment of CEA’s predecessor, the Grain Futures Act in 1922,¹⁷ only certain grains were listed as a “commodity” and the CEA held no expectation of the thousands of commodities traded a century later. Accordingly, unlike with respect to “investment contracts,” there was no need to interpret what a “commodity” was; however, with the advent of retail crypto markets, this has changed because now most of the crypto market is driven by retail participants, as discussed below.

Defining “commodity” is a critical component of CFTC’s jurisdictional boundaries—*i.e.*, if something is not a “commodity,” the CFTC would not have the jurisdiction to prosecute for fraud or manipulation (note the recently sponsored legislation by Sen. Elizabeth Warren to carve out physically deliverable water from the definition of “commodity”).¹⁸

For example, there was no formal process to designate Bitcoin or Ether as a “commodity” for some time.

Until the CFTC's then-chairman Tim Massad had stated publicly that Bitcoin is a commodity and subsequently several exchanges had self-certified Bitcoin futures contract and several courts stated that these assets were indeed "commodities,"¹⁹ there was no authority to the contrary, triggering the turf war between the SEC and the CFTC and leaving market participants in the dark. There remain numerous other assets to this day that straddle the SEC's and CFTC's jurisdictional reach (*e.g.*, as discussed in the recent *Ripple* decision).²⁰ There needs to be a more formalized but at the same time expedient approach to clarifying what is and what is not a commodity short of amending the CEA.

B. Possible Approaches to Defining Commodity

In the absence of CFTC's analogy to even a flawed *Howey* test, the CFTC may take two approaches:

1. CFTC Rulemaking

First, it may promulgate a rulemaking, where similar to self-certification or the approval of listing of new and novel futures contracts on commodity exchanges,²¹ *i.e.*, DCMs, the CFTC will propose a formal process for self-certification or designation and approval of certain products as "commodities" (or conversely carving out from such designation) and this designation will go to the public for a period of time for comment, and then based on the comments and the process in the APA, the CFTC will issue an order designating a given product as a "commodity" (or carving one out of the category of "commodities" similar to the onions and the box office receivables). Given that it is the CFTC that ultimately approves all futures contracts, it will have the authority to also clarify what is and what is not a "commodity" "in which contracts for future delivery are presently or in the future dealt in" in addition to what is specifically included or excluded in § 1a (9) of the CEA.

2. Amendment of Products Definitions—Guidance

The second approach the CFTC may take is by

amending, together with the SEC, its 2012 Products Definitions²² to provide for some form of *Howey* test for a "commodity" so that the public at large (as well as the courts) will have a better understating of what products do and do not qualify as "commodities."²³ This process will significantly simplify the CFTC's (and SEC's) regulatory scheme for new products (since it is a certainty that there will be new products that at present can't even be imagined) and provide greater certainty to the markets and businesses that are engaged in financial innovation.

3. Congressional Action

There is a school of thought that the CFTC does not have the jurisdiction to define what is a commodity (even though the CFTC has the jurisdiction to allow or not to allow which contracts "in the future" are dealt in commodities), and therefore only the U.S. Congress can expand or limit the scope of "commodity" definition. However, if this was the case, by analogy, the *Howey* test would not have possible with respect to "securities" because it is a court-created construct.

C. Event Contracts and Gaming

On June 10, 2024 the CFTC published their notice of proposed rulemaking ("NOPR") relating to event contracts on certain excluded commodities.²⁴ For a number of reasons discussed below, this NOPR should be withdrawn and the CFTC should consider two potential approaches to event contract markets.

1. Establishing Specific Criteria for "Legitimate" Event Contracts

First, a better approach would be clarify the criteria under which a specific event contract would be protected by CEA's federal preemption. Specifically, if the market consensus is that trading in political and sports and other similar event futures contracts is in public interest and therefore should be protected from state regulation under CFTC's federal preemption,²⁵ the CFTC should issue clear guidance (after public notice and comment period) that would provide objective criteria

and conditions on the characteristics of these event contracts that would set them apart from traditional gaming or gambling contracts that have been regulated by States for centuries instead of outright banning an entire class of commodity contracts.

For example, certain sports event contracts may clearly fall in the category of gaming or gambling contracts, while others may serve a very clear objective and an economic purpose, hedging and price discovery and therefore should not be lumped in the same category with gaming and gambling simply because the underlying commodity is an outcome of a sports event. In the absence of this guidance, this new class of commodity futures contracts will always be subject to State challenge (*e.g.*, the State of Nevada cease and desist order) and potentially Federal challenge under the federal Wire Act that prohibits transmission across State lines of wagering information relating to sports events.²⁶

Clearly there are two separate markets that can exist in parallel with each other—the futures market where contracts on certain event outcomes trade under CEA’s federal preemption (and that may be used to hedge billions of dollars associated with professional sports industry), and State-regulated markets involving traditional gaming and wagering. In other words, not all event contracts are created equal and serve the same purpose and thus should be treated differently and it is inappropriate to presume that all event contracts (*e.g.*, sports-related) would constitute gaming or gambling.

2. Carving out from “Commodity” Definitions

Second, a less preferable approach would be instead of promulgating a new proposed rule on “event contracts” and defining “gambling,”²⁷ is for the CFTC to merely promulgate guidance or an order (with notice and available for comment as discussed above) providing that certain clearly defined political events or sports events outcomes are not “commodities,” and therefore futures contracts (and swaps) on a non-commodity cannot exist under the CEA, and therefore they cannot be

traded on a DCM; however, the States are free to allow the trading in these contracts on a State level. Further, by doing so, it will be unnecessary to ban the entire class of political event contracts and to define “gaming,” which is already defined by virtually every State in the Union for over 200 years. This approach is less preferable given the possibility of overbreadth.

IV. Swaps/Products Definitions

A. Update 2012 Products Definitions

As a part of the administrative efficiency project, or separately, the CFTC should update its 2012 Further Product Definitions that were issued together with the SEC shortly after the enactment of the DFA. As noted above, many market practices have significantly changed, and the CFTC has issued new rules and interpretations relating to many products discussed in the Product Definitions. It is time to make an update.

For example, there needs to be more comprehensive guidance on what are VCCs and other environmental commodities such as RECs, RINs, CCAs, etc. Further, the guidance needs to better focus on clearer commercial transactions so that energy traders have more precise guidance regarding what is a derivative (*i.e.*, a swap) and what is not (*e.g.*, virtual power purchase agreements (“VPPAs”) and merchandising transactions, commodity trade options, forwards and spots).

B. Further Definition of Foreign Exchange Forwards and Foreign Exchange Swaps

Foreign Exchange Forwards (“FXF”) and Foreign Exchange Swaps (“FXS”), as defined in §§ 1 a(24) and (25) have been narrowly exempted from the definition of “swap” since 2012 under the Treasury Determination.²⁸ This exemption needs to be revisited with the view that some non-deliverable products (*i.e.*, cash-settled in one currency) should also qualify for a similar exemption. The CFTC is overdue in clarifying how these products are treated given the prevailing market practices.

C. Characterization of Products as Not “Commodity Interests”

For the novel products, the updated Product Definitions rule should address products that are not “commodity interests”—*e.g.*, non-fungible tokens (“NFTs”), smart contracts and provide a formalized process for characterizing these new products as “commodity interests” (*i.e.*, derivatives) or not.

V. Crypto/Digital Assets

A. The Legislation on Digital Assets

It is clear that this Commission will have to devote a lot of its attention to all matters relating to “digital assets” generally, and specifically to crypto assets. It is also possible that in 2025 or 2026 U.S. Congress, after many false starts, will eventually enact legislation that will amend the CEA and the securities laws to provide greater certainty to markets on all matters relating to digital assets and specifically delineation between “commodities” and “securities.” If this legislation were to be enacted, the CFTC and the SEC will promulgate a set of rules implementing provisions of this new legislation, similar to the rulemaking effort they undertook after the enactment of the DFA. Given the high likelihood that the “digital assets” legislation may pass in the upcoming term, the CFTC (or the SEC) may be disinclined in engaging in any significant rulemakings addressing digital assets markets—subject to below.

B. Exercise of Existing Exemptive Authority

Nevertheless, given the uncertainty of enactment of this legislation, the CFTC (and the SEC), should revisit their already existing regulatory actions and either reverse or revise them or promulgate new rules and guidance to provide greater certainty to crypto markets in the immediate short-term (also, these agency actions will further help shape the statutory text). For example, the CFTC should significantly revise its guidance on “actual delivery” issued in 2020²⁹ with respect to retail commodity transactions under § 2(c)(2)(D) of the CEA

recognizing how digital wallets are custodied and cryptocurrencies are transferred.

The CFTC should also revisit its treatment of DAOs³⁰ and issue enforcement guidance to market participants on when DAOs may become regulated entities and how to comply with registration requirements (if necessary). At a minimum, the CFTC may exercise its exemptive authority under § 4(c) of the CEA while it evaluates all relevant aspects of these new business models. For example, in 1993, before Congress had enacted exemptions in the CEA relating to swaps, the CFTC had exempted certain energy agreements³¹—conditions and principles articulated in these exemptions were further codified in subsequent legislation.

C. Rulemaking After the Enactment of the Legislation on Digital Assets

After the enactment of the digital assets and crypto legislation (that will amend the CEA) virtually every existing CFTC rule and regulation will need to be amended and tens if not hundreds of new rules will need to be enacted to create a parallel regime for the digital assets’ markets. The same exercise will be taking place at the SEC similar to the rulemaking efforts after the enactment of the Dodd Frank Act in 2010.

D. Enforcement and Digital Assets

Given that currently the CFTC only has enforcement jurisdiction over spot commodity markets (*i.e.*, enabling the CFTC to prosecute only for fraud and manipulation involving commodities, but not regulate spot markets), if the CFTC were to receive a jurisdictional grant over regulation of spot commodity markets involving digital assets (*i.e.*, exclusive regulatory jurisdiction), this will be a paradigm shift in the federal financial regulation.

The CFTC would have to bifurcate its regulatory and enforcement approach to spot markets—where it will have enforcement and regulatory jurisdiction (with respect to cryptos, such as specified digital asset com-

modities) as well as spot markets where the CFTC will only have the enforcement jurisdiction (all other markets, *e.g.*, energy and other exempt or excluded commodities as is the case now).

E. SROs and Digital Assets

Unless a new market self-regulatory organization (“SRO”) is established, the CFTC will likely delegate registration and examination authority to the NFA which will be responsible for registering numerous digital assets intermediaries, advisors, exchanges, dealers, and more. This will be a massive regulatory undertaking.

The success of this effort will largely determine the U.S.’s position as a leader in global digital assets markets, and the CFTC will have to tackle numerous issues, such as regulation of DeFi and DAOs, new registrants, various tokens, collateral management, treasury clearing, and the new types of participants.

VI. Retail Participation in Derivatives Markets

A. Retailification of Commodity Markets

The explosive growth of “digital assets” markets is not driven by institutional money alone, but mainly by retail participation of millions of individual non-professional traders—“retail” participants. This massive influx of retail participants has put a significant strain on the FCMs and other intermediaries and at the same time has spurred a dramatic growth in the number of futures contracts traded on exchanges (as well as the number of new exchanges—DCMs).

B. Increased Retail Participant/Investor Protections in Crypto Markets

Because the “retailification” of commodities trend is likely to continue, especially after a greater certainty for the digital commodities markets either due to CFTC’s own regulatory action or thanks to Congressional action, the CFTC should conduct a study on increased retail participation (*e.g.*, via Robinhood) and

how this trend is likely to change the risks in commodity markets (*e.g.* influencers on digital media).

Customer protection is one of the areas where the CFTC can read from the SEC’s rulebook given that the SEC has traditionally been more focused on the retail markets and has mainly the customer protection approach. This study should focus on how retail participants can have better access to DCMs and other platforms while being protected. This study will be highly useful for market participants regardless of whether the crypto legislation passes.

One of the tools proposed was the self-clearing and self-liquidating model that ensures full collateralization of a retail participant’s position at all times.³² Even though technically this approach may increase access of retail participants to DCMs and DCOs, it will be imperative that the CFTC implement all the necessary protections that currently are carried out by the FCMs and DCOs’ clearing members given that the current financial markets infrastructure under the CEA is built around intermediation and FCMs acting as agents for customers.

C. The Global Crypto Code

One of the better approaches to customer protection discussed previously is drafting a form of digital assets and crypto global code to voluntarily create a set of general guiding principles for market participants even in the absence of CFTC’s ability to regulate spot crypto markets. These codes already exist for FX and precious metals markets and are very widely used.³³ No legislative action is necessary to implement such codes.

D. DeFi Trading Facilities

Rapid proliferation of DeFi, DAOs and other trading facilities is creating a separate pool of liquidity that is supplemental to, or increasingly competing with, traditional exchanges (*i.e.*, DCMs and SEFs). This trend will continue. Even before the enactment of comprehensive legislation on digital assets, the CFTC

must assess how a traditional IB-FCM-DCM-DCO model is likely to change and how best to protect retail investors.

E. New Forms of Intermediaries

Retailification is a trend that is forcing traditional categories of market participants to change and adapt to new market realities. One of the emerging models is a simulated portfolio platform (*e.g.*, “mirror trade”) where retail participants have an opportunity to learn trading skills while not risking their own capital before the necessary trading skills are acquired. Given fast proliferation of similar models, the CFTC should encourage the industry to create a voluntary code governing participants in this fledgling industry.

F. Fractionalization and Tokenization of Commodities

In tandem with the “retailification,” commodity markets are experiencing increased demand for fractionalization and tokenization of commodities and commodity interests. This trend is evident equally with the traditional products as well as with novel products. The CFTC has commenced this work, and this analysis should continue. For example, it will be critical to assess such threshold issues, such as what type of products these will be, whether these will be commodities or securities or commodity interests, or whether these instruments will be classified as property and what kind of property.

There is already increased interest in fractionalized and tokenized products for purposes of collateral management, *e.g.*, if the DCM exchange trading regime becomes 24/7 and collateral transfer needs proportionally increase each day of the week. Several European countries are significantly ahead of the U.S. on this (*e.g.*, Luxembourg, France, Switzerland creating regulatory regimes around tokenized assets). The CFTC solidifying a legal framework could help U.S. industry take-up in this area and ensure that the U.S. remains the world leader in fintech.

In addition, retail participants will be demanding not

only a greater variety of commodity contracts, but also greater variety in terms, including both micro (*i.e.*, shorter or even same-day settlement) as well as perpetuals (*i.e.*, longer or even forever contracts).

VII. AI

Acceptance of AI as a significant factor in the financial industry will drive many of the CFTC’s initiatives in the new term. The key should be the focus on *conduct*, not on the new technology—similar to how the CFTC’s existing bricks and mortar regime applied to the internet in the late 1990s.

It is a given that new technologies will develop in the future after AI becomes an “old hat” and it will be impractical to rewrite the CFTC’s rulebook every time a new asset or financial technology emerges. The CFTC’s experience with high-frequency traders (“HFT”) illustrates this when the proposed rule became outdated one year before it was even finalized.³⁴ No need to regulate technology; the CFTC should focus on conduct.

Markets need clear guidance on the future of financial engineering and the CFTC has taken several important steps (including on Dec. 5, 2024 by issuing the AI guidance).³⁵

VIII. Enforcement

A. No Regulation by Enforcement

The CFTC is required to and certainly should continue its enforcement program to ensure that commodity and commodity derivatives markets perform a reliable price discovery function as well as allow for reliable hedging and remain free of fraud and manipulation. However, the CFTC’s enforcement should remain enforcement—and not make new law. Based on the CFTC’s then Republican Commissioners Caroline Pham and Summer Mersinger’s dissenting statements to the CFTC’s enforcement orders, there will likely be less regulation by enforcement.³⁶ For example, Commissioner Mersinger has expressly noted that even the CFTC’s settlement orders are not new law.

The February 25, 2025 CFTC Enforcement Advisory on Self-Reporting, Cooperation, and Remediation is helpful, although there are still several gaps remaining, such as for example, the determination process of the starting point of the amount of a penalty before any reductions are applied.³⁷ Thus, even though there is greater certainty in how the penalty may be reduced, there may still be a significant degree of arbitrariness in how the initial penalty is set (before any discounts or reductions).

B. Make Regulations Less Ambiguous

Next, the division of enforcement should work collaboratively with other divisions within the CFTC to ensure that enforcement is not compensating for ambiguity in the substantive regulations. For example, there are numerous recordkeeping and reporting violations settlement orders and litigated cases. Evidently, even most sophisticated market participants cannot get reporting and recordkeeping rules right despite millions of dollars spent on compliance. Obviously, the rules need to be amended to make them more clear. As a corollary to this, the CFTC's enforcement orders should provide more details and guidance to other participants to serve as a more useful tool and guide for future compliance by other participants.

C. Self-Reporting

Although it is imperative that market participants conduct internal compliance and monitor their regulated activity consistently with the rules and the established law, compliance departments are not expected to carry out the CFTC's division of enforcement duties. For example, self-reporting is an important factor in enforcement, but it should be deemed fulfilled when reported to any office in the Commission, not only to a specific person within the division of enforcement. It is commendable that the CFTC has promulgated its February 25, 2025 guidance on self-reporting.

D. Enforcement By the SROs—A Revisit

The CFTC should also better coordinate its enforce-

ment efforts with the SROs, and whenever possible have joint enforcement actions so that market participants would not have to address the same conduct twice. Further, SROs, just like the CFTC, should provide better guidance as to what conduct is illegal and make it easier for market participants to assess their counterparties.

In addition, the CFTC should assess NFA's overall approach to enforcement when NFA's regulatory and compliance function is used as a discovery tool for enforcement actions. These functions must be separate, similarly to how the FINRA conducts its enforcement program. Thus, an NFA exam should not be a substitute to an enforcement action by either the NFA (or an SRO) itself or the CFTC.

Given that the new digital assets regulatory regime will be implemented (*e.g.*, via registration) by the NFA, it is imperative that any inefficiencies should be resolved.

E. Traditional Enforcement Priorities

As before, the CFTC's division of enforcement will continue to pursue instances of misappropriation of material non-public information, fraud and manipulation, reporting and recordkeeping failures, failure to register in an appropriate category, position limits, disclosure violations (*e.g.*, involving pre-trade mid-market marks ("PTMMM")), FCPA-type violations, and more. However, the focus of these investigations and enforcement actions is likely to change.

IX. Coordination with the NFA and other SROs

A. NFA Regulation—BASIC

On a number of occasions, the NFA takes action or promulgates rules that are inconsistent or even directly contradict CFTC's authority.

For example, during the summer of 2024, the NFA made its BASIC system less transparent by no longer publicly displaying exempted filings by entities that are

exempted from registration, such as CPOs and CTAs. It is a part of the conditions to claim the exemption from registration as a CPO under § 4.13(a)(3) that a CPO make a filing to the BASIC and annually renew this filing of eligibility for an exemption. The purpose of the filing is to give public notice that even though it is not a registered CPO, the CPO nevertheless has met certain conditions that allow an exemption. BASIC listings were useful for counterparty due diligence, especially in the funds space. The NFA justified this (*i.e.*, making the filing of exemption no longer public) by stating that there were too many instances of fraud when exempted entities were claiming that they were “registered” with the NFA. This means that instead of going after these fraudsters, although many of these are located overseas, the NFA (and the CFTC) chose to make BASIC less transparent by hiding this information entirely instead of prosecuting those who violate CFTC Regulations and NFA rules. NFA’s action by hiding this exemption information from the public directly frustrates the purpose of the filing as it is required under Part 4.13 of CFTC Regulations.

B. Inconsistence with CFTC’s Rules

In another example, the NFA chose to “gold-plate” CFTC’s regulations relating to swap entity margin disputes. The CFTC gave relief to non-U.S. foreign participants from a requirement to provide a notice of margin dispute under substituted compliance, while the NFA does not provide such relief.³⁸

X. Unfinished Business

The CFTC has a lot of unfinished business, even some of the rulemakings remaining after the enactment of the Dodd-Frank Act (such as reporting in the cross-border context, position limits, ownership and control of regulated entities, as further discussed below).³⁹

A. Re-redraft Reporting Rules

As noted above, for example, reporting continues to be an area of little clarity, and the CFTC needs to revisit and assess whether what is reported is useful and how

to make reporting more user-friendly and revise the rules since they are unclear. Is it really necessary to have reporting under Part 17, 18, 20, 43, 45, and Form 40, in addition to the reporting required under the NFA’s rules? Recognizing that reporting rules are almost unworkable, the CFTC has promulgated the technical specifications and additional voluminous guidance for ownership and control of accounts and Large Trade Reporting (“LTR”). Again, if it is necessary to promulgate so much guidance, either the rules are not clear, or the provisions in these rules are redundant and repeated revisions and amendments to the rules also require commitment of significant resources by the reporting entities.

1. Execution

There are many substantive provisions in reporting rules that require reporting entities making determinations that are otherwise without guidance. For example, when is a transaction “executed?” There are certain types of transactions, *e.g.*, deal-contingent trades, or swaps with certain conditionality when it is not entirely clear whether a reportable transactions has occurred—this needs to be clarified.

As a separate matter, the CFTC should make it easier for first-time reporting entities (*e.g.*, de minimis swap dealers trading with other unregistered entities) to sign on with the Swap Data Repository (“SDR”) and be able to file a report. It takes weeks to sign with the SDR and it is extremely complicated to determine which fields should be included in the report.

2. Necessary Provisions/Error Reports

Relatedly, the CFTC should assess which fields are necessary for CFTC’s staff to efficiently conduct their surveillance and reconcile these required fields with other regulatory regimes, *e.g.*, in Europe under EMIR. Some information may not serve any valuable purpose, for example with respect to error reports, there should be no requirement to go beyond five years to report

swaps that had been terminated 5 years ago (the document retention requirement under CFTC § 1.31).

3. Cross-Border Reporting

As discussed in the context of cross-border regulations, it is imperative to clarify how reporting should work, and, for example, mandating that U.S. reporting rule apply solely because there is a U.S. parent guaranty to an affiliate of a U.S. entity entirely located overseas and transacting with non-U.S. persons is very burdensome and puts U.S. entities at a competitive disadvantage, while other entities may rely on substituted compliance.

4. Life-cycle Events

Certain events, such as an amendment to an ISDA Credit Support Annex (“CSA”), may qualify as a “life-cycle event” triggering a number of regulatory requirements (reporting, clearing, *etc.*). The CFTC had issued relief for LIBOR-related CSA amendments, but this relief has expired. In addition, often counterparties recalibrate eligible collateral that may also qualify as a “life-cycle event,” which again should not count as such. The CFTC needs to revisit this definition to provide greater flexibility and clarify which events may not qualify as “life-cycle events.”

5. Blocks and Caps

CFTC’s revised rules on blocks and caps became effective in October 2024⁴⁰ without the economic evidence or support as to whether the thresholds are justified. These thresholds need to be evaluated.

Finally, given that many swaps are executed by the same desk along with security based swaps, the CFTC and the SEC should promulgate together a revised reporting rule.

6. Part 20 Swap Reporting

LTR for physical commodity swaps was appropriate when Part 43, 45 were not yet fully operational. After implementation of reporting rules, establishment of

SDRs and implementation of CFTC’s 2020 position limits rules, LTR regulations under Part 20 should be sunset under § 20.9.

7. Ownership and Control Reports

CFTC should codify as appropriate its ownership and control reports (“OCR”) no action letter⁴¹ into the Federal Register as part of the OCR rules.⁴² Again, these rules are extremely burdensome and should be significantly simplified.

A. FCM-Related Regulations

1. FCM Accounts and Custody

The CFTC should continue work on matters relating to FCM operations and client account management as well as collateral management. The number of FCMs is dramatically decreasing while the demand for their services is increasing with newer futures contracts coming into the market and more swap products being cleared. The CFTC should commission a study on the health and viability of FCMs, how their operational resilience could be improved, and how new FCMs can be attracted into the markets (both clearing and non-clearing FCMs).

For example, the CFTC had alluded to,⁴³ but never finalized its, regulations and guidance relating to FCM, customer (or custodian) and DCO tri-party custodial agreement with respect to futures after curtailing its guidance under Interpretation 10.⁴⁴

2. FCM Affiliations

The CFTC should finalize its Operational Resilience⁴⁵ framework and further address vertical integration issues (including lateral integration as well to include affiliations between financial infrastructure providers and regulated intermediaries)—*e.g.*, FCMs and DCOs and DCMs.

C. Finalizing Cross-Border for Swap Dealers

1. Arrange, Negotiate and Execute

Critically, the CFTC should focus on finalizing (and revising where necessary) its cross-border rules and specifically arrange, negotiate and execute transactions (“ANE”) and ensuring that U.S. entities are not disadvantaged vis-à-vis non-U.S. market participants operating in similar circumstances. Also, revisions to these provisions will need to be coordinated with the SEC.

2. U.S. Parent Guarantees

For example, an affiliate of a U.S. entity located overseas may become required to register as a non-U.S. swap dealer merely because it may have a U.S. parent guarantee, or its counterparty has a U.S. parent guarantee and as a result a “de minimis” exemption threshold may be breached and such entity located entirely overseas and transacting solely with non-U.S. entities may be required to register as a swap dealer which would put such entity at a competitive disadvantage because non-U.S. entities can rely on CFTC’s substituted compliance. If the CFTC had recognized substituted compliance for a given jurisdiction, there is no need to double up U.S. regulatory requirements merely because there is a U.S. parent guaranty so long as the entity is located in a jurisdiction with substituted compliance and is fully compliant with local regulations and is in good standing.

Provisions for U.S. parent guarantees were relevant at the time when CFTC’s rules were the first ones in the world implemented after the 2008 financial crisis, while by now all of G-20 countries have implemented their own compliance regime comparable with that of the CFTC.

3. U.S. Person Definition and Execution Not in the U.S.

Further, it is necessary, as part of the KISS project, to reconcile all applicable definitions—for example, the definitions of “U.S. person” under the 2013 Guid-

ance (effective until 2027) and the 2020 rule do not correlate. The CFTC needs to take the time to reconcile all duplicative definitions in its rules, and to the extent possible with the SEC (*e.g.*, Reg. S also defining a “U.S. person”) and USPR rules.

D. Uncleared Margin Regulations

1. Coordination with USPRs

There remain several outstanding issues, some of these can only be resolved in coordination with the SEC and USPRs). For example, while CFTC and most non-U.S. jurisdictions with substituted compliance regime allow for an exemption from inter-affiliate margin (where only variation margin (“VM”) needs to be exchanged, but not the initial margin (“IM”)), USPRs require that IM should be exchanged as well (subject to the 15% threshold of Tier 1 Capital which puts at a disadvantage smaller banks because this is less of a burden for larger banks). Further, there are different 3-month calculation periods and methodologies used for material swaps exposure calculation under CFTC and USPR’s rules—which needs to be reconciled.

Also, to the extent that a swap dealer may be a USPR-regulated swap dealer, this restriction becomes a concern and a “foreign swap” exemption will also not be applicable. All this puts U.S. entities at a very significant disadvantage vis-à-vis non U.S. bank regulated swap dealers.

2. Revisit the Definition of Uncleared Margin

The CFTC should revisit what types of swaps would constitute “uncleared” for margin purposes⁴⁶ given that the definition refers to “registered” or “exempted” DCOs. This strict condition becomes often impractical in non-U.S. markets (particularly emerging markets) and U.S. swap dealers are significantly constrained in entering these new markets because swaps cleared on local DCOs that are not registered with or exempted by the CFTC would qualify as “uncleared swaps” while from a local counterparty’s perspective they are cleared.

3. Margin Affiliate Provisions

In addition, the CFTC should finalize its regulations on seeded funds and mutual funds for uncleared margin purposes (“margin affiliates”).⁴⁷ For example, the CFTC should consider what additional types of entity’s affiliates should be called out from the definition of “margin affiliate” (*e.g.*, operating affiliates).

4. Financial Entity and Financial End-User Definition

These definitions are at the core of clearing SEF-trading and margining provisions for swaps under the Dodd Frank Act amendments. However, CFTC catch-all definitions of a “financial entity” in reference to Reg K (similar reference is found in CFTC’s swap dealer capital rules) are ill-suited to commodity derivatives business since these were drafted for unregistered banking institutions. Instead of punting to USPR regulations, the CFTC should take the time to update its own regulations to address this catch-all definition.

E. Position Limits

The CFTC should revisit its position limits rules relating to economically equivalent swaps (“EES”) given that to this day it is not clear what types of swaps will qualify as EES. In addition, CFTC’s rules on the cross-border application of position limits (especially considering substituted compliance requirements) as well as its aggregation rules should be also updated.

The CFTC should regularly update its position limits workbook on its website. There are other numerous technical concerns with the 2020 position limits rules that should be revisited in a comprehensive manner.

F. Commodity pools

1. Codification of NALs

Numerous NALs relating to “commodity pools” show that the rules in Part 4 are also not very clear, requiring amendment or the addition of some form of “Further Definitions” for commodity pools is in order to address many issues that were addressed in NALs

and guidance. For example, many market participants are still struggling to comply with the requirements of § 4.13(a)(3) exemptions, which remain unclear or ambiguous. For example, it is not clear whether “liquidation value” of the portfolio is synonymous with the funds’ net asset value (“NAV”), or what types of pools would be created for the purpose of trading or marketing commodity interests. It is commendable that the CFTC had updated its § 4.7 rules.⁴⁸

2. Securitization Vehicles

There is a large number of letters of guidance and NALs relating to securitization vehicles (*e.g.*, Letters 12-14, 12-45, 14-111) where various fact patterns and scenarios are addressed. It is overdue for the CFTC to consolidate all these letters and address all issues applicable to securitization and capital relief trade industry in one rulemaking. Note that the SEC has promulgated several rulemakings relating to asset backed securities and securitization vehicles over 20 years ago.

Further, these securitization vehicles should be excluded from the definition of “financial entities” and “financial end users” because they are already collateralized and there is no need to also subject them to IM and VM requirements.

Likewise, reporting swaps entered into with these securitization vehicles serves no regulatory purpose and should be treated similar to reporting FXF and FXS.

G. SEF Rulemakings

The CFTC should revisit the SEF rulemaking originally promulgated in 2013. There were several attempts to amend and revise the SEF rule during the past 11 years,⁴⁹ and it is likely that a comprehensive regulatory overhaul of SEF’s rule will happen under the new administration.

1. The CLOB Requirement

For example, as 12 years of SEF operation have demonstrated there is no need to mandate the central

limit order book (“CLOB”) requirement when the request for quote (“RFQ”) methodology is commonly used. Further, there needs to be greater flexibility for the forms of trading facilities (similar to what was the state of the law before the Dodd Frank Act), and for example, SEFs should be able to choose to merely operate as lesser regulated trade processing facilities or some form of a transaction negotiation facility. There is enough flexibility in the CEA to allow this interpretation.

2. RFQ to 3

Furthermore, even RFQ to 3 is an arbitrary requirement—there is no compelling reason why this number must be 3 and not 2, for example. Many of swap dealer’s clients do not want RFQ to 3 because it creates information leakage. As noted above, there should be greater flexibility in how trades are executed on SEFs and the dealers and their counterparties should have greater ability to engage in pre-trade communications.

For example, on March 13, 2025 the CFTC acknowledged that its CFTC Letter No. 21-19 (issued September 29, 2021) was issued in error and therefore should be withdrawn in its entirety because it created greater confusion in interpretation of what is a SEF.⁵⁰

3. DCM/SEF Governance

The CFTC should finalize its SEF and DCM governance rules and fitness requirements and revisit its made available to trade (“MAT”) requirements as well as assess their suitability and necessity.

H. Disclosures by Swap Dealers and Pre-Hedging

Next, it appears that the CFTC is reading from the SEC’s rule on disclosures as evidenced by a series of enforcement orders involving SD’s disclosure requirements under § 23.431.⁵¹ Many market participants were caught by surprise as to the scope and depth of these disclosure requirements as was addressed in the CFTC’s settlement orders. It is clear that some form of disclosure guidance is necessary.

Note that IOSCO in November 2024 issued a guidance on pre-hedging as disclosures related to this practice.⁵² The CFTC should promulgate guidance on various disclosures under the CEA and CFTC’s regulations, including on PTMMs, daily markets, pre-hedging, conflicts as well as pre trade disclosure generally; in fact PTMMM should be abolished entirely because this disclosure is not specifically required by the CEA.

There are many other areas of regulation that likely will be addressed by the CFTC in the new term (such as cross-border regulations applicable not only to swaps but also futures under § 3.10, Part 30, *etc.*) some of these areas are addressed further below.

XI. Respect for Registered Entities

A. Revisit Registered Categories

Another major area of concern that should be addressed by the new Commission involves registered entities. In 2012, the CFTC, jointly with the SEC, promulgated Entities Further Definitions.⁵³ In the past 12 years since, there have been numerous enforcement actions and market developments that warrant a revision of these definitions and inclusion of additional categories.

For example, in the definition of “swap dealer” there is room for formally creating a category of “commercial” swap dealers. There are several such swap dealers (*e.g.*, Cargill, Shell or BP swap dealer) and the CFTC should formalize this category.

In addition, the definition of “swap dealer” was finalized in 2010 and subsequently the CFTC agreed on the \$8 billion threshold for “de minimis” swap dealers instead of dropping this threshold to \$3 billion. It is time to revisit this threshold and to determine if even \$8 billion is too low given the inflation and changes in the market, capitalization of market participants and generally systemic risks. For example, a U.S. entity located overseas would be competitively disadvantaged vis-à-vis non-U.S. swap dealer that would not have to

register if its \$8 billion “de minimis” threshold is exceeded.

B. No Blurring the Lines for Registered Categories

One troubling trend that has emerged with CFTC enforcement is the blurring of the lines between regulated entities that appears in a series of enforcement actions where already registered entities are also required to additionally register in yet another category (*e.g.*, IBs and CTAs required to register as CTAs or SEFs respectively).

The CFTC should revisit the definition of FCM, which has been significantly expanded in enforcement actions (including the instances where the FCM is acting not as an agent but rather as a counterparty); the definition of IB, *e.g.*, addressing an exemption for IBs providing CTA services but not *vice versa*, in a way creating a de minimis IB; or the definition of CTA in the context of IBs, FCMs, SDs, and SEFs. Market participants should have clear guidance on where definitional boundaries end and where they begin.

Conversely, the CFTC should remain open-minded to new business forms and establish a sand-box and working groups to address new emerging organizational forms—*e.g.*, DAOs or other DeFi entities.

C. Level the Playing Field

As a corollary to respecting the regulatory categories, the CFTC should also ensure the level playing field and that new entrants into the market do not act as, *e.g.*, look-alike FCMs, swap dealers, or IB without the registration and compliance. The same concern was expressed with respect to the shadow banking institutions that act as banks without being regulated as banks.

After the enactment of the digital assets legislation, the CFTC should also promulgate Financial Market Utilities (“FMU”) Further Definitions where it can address the grey areas involving DCMs, SEFs, DCOs, SDRs, and other FMUs such as DAOs and DeFi platforms.

For example, the CEA definition of a SEF provides a lot more flexibility than what was ultimately codified in 2013, *e.g.*, SEFs can be of three-tiered varieties, where the CFTC can register a full SEF that serves as a platform for MAT swaps, as a permissive platform where all swaps can trade and a transaction execution facility.

Further, the CFTC should promulgate rules on exempted SEFs, *i.e.*, entities that operate overseas but are mutually recognized as exempted in the U.S. to allow U.S. participants to trade directly on these entities. Currently, these exempted SEFs operate under an *ad hoc* NAL and there is no formal process to exempt and regulate them.

Importantly, registered entities, such as DCMs are increasingly feeling the pressure to accommodate retail market demand while competing with the DeFi platforms that offer similar products without the need to register as a DCM. The CFTC should clearly assess these dynamics and either continue its enforcement efforts at policing unregistered entities or allow DCMs to offer contract execution on more flexible terms.

D. Clarifying the DCOs

There have been many developments with DCOs, including, as discussed above, direct clearing and margining models for retail participants, SD acting as DCOs on SEFs, other forms of compression, netting, and settlement facilities, including with the use of digital assets. In the environment of increasingly 24/7 trading regime, proper collateral management will be also critical, which will likely be addressed by the CFTC.

Similarly, any insolvency and bankruptcy issues involving new models will need to be addressed as well.

XII. Coordination with the SROs

As noted above, the CFTC should coordinate more closely its enforcement and regulatory functions with the NFA; for example, the CFTC should mandate that

the NFA reinstate their BASIC functionality for exempted entities.⁵⁴ The CFTC should establish a clear process to provide the ability for market participants to challenge NFA's rulemakings to ensure that such rulemaking stays within the boundaries of NFA's jurisdictional grant.

SROs should offer greater coordination with industry participants and specifically in the fintech area. For example, the NFA should be able to provide its for-hire regulatory compliance services not only to DCMs and SEFs but also to all other participants if necessary.

The CFTC should consider sponsoring the creation of additional industry codes (in addition to the Global FX Code and Metals Code), *e.g.*, crypto industry, carbon industry, energy and agricultural commodities industries as well as simulated portfolio traders—a form of non-binding best practices.

In sum, there will be many areas for the CFTC and the NFA to focus on during the new administration.

XIII. Environmental Commodities

A. Guidance on VCCs to be Revisited

Not counting agricultural commodity markets,⁵⁵ environmental commodity markets are small; however, they have been attracting a lot of the CFTC's attention under former CFTC Chairman R. Behnam. For example, the CFTC has published guidance for DCMs on VCCs traded in spot markets that are outside of the CFTC's regulatory jurisdiction, and imposed onerous (non-binding) obligations on DCMs to police the markets that they have no control over.⁵⁶ The new Commission should withdraw this guidance because it is likely to stifle these markets before they have even had a chance to mature.

Having said this, it is clear that environmental commodity markets (either compliance, voluntary, or under the Paris Agreement) will continue to function and grow and it will be imperative that the CFTC remains committed to providing guidance as well as focus its

enforcement efforts in instances where there is fraud involving environmental commodity markets.

B. The Global Carbon Code

Because most fraud in environmental commodity markets occurs on the spot market level (similar to the digital assets currently traded in spot markets), the CFTC would not have regulatory jurisdiction over environmental markets (such as VCC); the recent joint CFTC/SEC/DOJ enforcement action regarding *CQC* focused on fraud.⁵⁷ Nevertheless, the CFTC can conduct a comprehensive study on these markets and become a sponsor of a global carbon code (similar to the Global FX Code or the Metal Code).

Short of promulgating regulations, such a guide will serve a valuable purpose and cement the CFTC's position as a leader in world environmental commodity markets. The guide can address whether these are commodities (see section above on the definition of commodity), whether these are property and what type of property, how these commodities can be created, and how intermediaries and other market participants can trade these commodities. This study and the code will overlap with the CFTC's work involving digital assets—since all environmental commodities only trade digitally and some are traded via the DLT.

There will be a lot of engineering and innovation involving environmental commodities and the CFTC should remain at the forefront of these markets.

ENDNOTES:

²See 7 U.S.C.A. §§ 1a *et. seq.*, as amended.

³5 U.S.C.A. §§ 500 *et seq.*

⁴ <https://www.cftc.gov/PressRoom/SpeechesTestimony/opapham13>.

⁵ <https://www.cftc.gov/PressRoom/PressReleases/7555-17>.

⁶The Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. Law 111-203 (2010).

⁷See paragraph XI.C *below*.

⁸ <https://www.cftc.gov/PressRoom/SpeechesTestimony/tarbetsstatement102720>.

⁹ See e.g., paragraph X.F below.

¹⁰ See, e.g., § 2(a)(15) of the CEA.

¹¹ See *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369, 144 S. Ct. 2244, 219 L. Ed. 2d 832, Fed. Sec. L. Rep. (CCH) P 101887 (2024).

¹² See The Enhancement and Standardization of Climate-Related Disclosures for Investors, 89 F.R. 21668 (Mar. 28, 2024).

¹³ <https://www.cftc.gov/PressRoom/PressReleases/8969-24>.

¹⁴ See § 1a(9) of the CEA.

¹⁵ See *S.E.C. v. W.J. Howey Co.*, 328 U.S. 293, 66 S. Ct. 1100, 90 L. Ed. 1244, 163 A.L.R. 1043 (1946).

¹⁶ See *CFTC v. Patrick K. McDonnell, and Cabbagepatch, Corp. d/b/a COIN DROP MARKETS*, USDC for the EDNY, Case No. 18-CV-0361 (Aug. 23, 2018), see also *CFTC v. My Big Coin Pay Inc.*, USDC of MA, Case 1:18-cv-10077-RWZ (Sept. 26, 2018).

¹⁷ The Grain Futures Act, ch. 369, 42 Stat. 998, 7 U.S.C.A. § 1 (Sept. 21, 1922).

¹⁸ <https://www.congress.gov/bill/117th-congress/senate-bill/3886/titles>.

¹⁹ See *In re Derivabit/Coinflip*, <https://www.cftc.gov/PressRoom/PressReleases/7231-15> and see also *In re TeraExchange LLC*, <https://www.cftc.gov/PressRoom/PressReleases/7240-15>.

²⁰ See *SEC v. Ripple Labs, Inc., Bradley Garlinghouse, and Christian A. Larsen*, 20-cv-10832, USDC for the SDNY (Aug. 7, 2024).

²¹ See Part 40 of CFTC Regulations.

²² Further Definition of “Swap,” “Security-Based Swap,” and “Security-Based Swap Agreement”; “Mixed Swaps”; “Security-Based Swap Agreement” Recordkeeping. 77 F.R. 48208 (Aug. 13, 2012).

²³ A CFTC driven process will likely more market-based as compared to a more partisan legislation; see e.g., the proposed Future of Water Act of 2024, available at <https://khanna.house.gov/media/press-releases/rep-khanna-and-senator-warren-reintroduce-bill-stop-wall-street-profiting>.

²⁴ See Event Contracts, 89 FR 48968, June 10, 2024, <https://www.cftc.gov/sites/default/files/2024/06/2024-12125a.pdf>.

²⁵ See § 2(a)(1)(A) of the CEA.

²⁶ See 18 U.S.C.A. § 1084, <https://www.law.cornell.edu/uscode/text/18/1084>.

<https://www.cftc.gov/PressRoom/PressReleases/8907-24>.

²⁷ See <https://www.cftc.gov/PressRoom/PressReleases/8907-24>.

²⁸ <https://www.federalregister.gov/documents/2012/11/20/2012-28319/determination-of-foreign-exchange-swaps-and-foreign-exchange-forwards-under-the-commodity-exchange>.

²⁹ <https://www.cftc.gov/PressRoom/PressReleases/8139-20>.

³⁰ See, e.g., *In re Ooki DAO*, <https://www.cftc.gov/PressRoom/PressReleases/8590-22>.

³¹ See, e.g., <https://www.cftc.gov/sites/default/files/files/opa/oparegulatoryframework.pdf>.

³² See, e.g., <https://www.cftc.gov/LawRegulation/FederalRegister/proposedrules/2023-28767.html>.

³³ See, e.g., <https://www.globalfxc.org/fx-global-co-del/>.

³⁴ <https://www.cftc.gov/PressRoom/PressReleases/7283-15>.

³⁵ <https://www.cftc.gov/csl/24-17/download>.

³⁶ <https://www.cftc.gov/PressRoom/SpeechesTestimony/phamstatement100124b>.

³⁷ <https://www.cftc.gov/PressRoom/PressReleases/9054-25>.

³⁸ See NFA Interpretative Notice 9072, NFA COMPLIANCE RULE 2-49: SWAP VALUATION DISPUTE FILING REQUIREMENTS (May 18, 2017), <https://www.nfa.futures.org/rulebooksql/rules.aspx?Section=9&RuleID=9072>.

³⁹ <https://www.cftc.gov/LawRegulation/DoddFrankAct/index.htm>.

⁴⁰ [https://www.cftc.gov/PressRoom/PressReleases/8913-24#:~:text=May%2023%2C%202024&text=The%20updated%20post%2Dinitial%20appropriate,and%2043.4\(h\)%20respectively](https://www.cftc.gov/PressRoom/PressReleases/8913-24#:~:text=May%2023%2C%202024&text=The%20updated%20post%2Dinitial%20appropriate,and%2043.4(h)%20respectively).

⁴¹ <https://www.cftc.gov/PressRoom/PressReleases/8980-24>.

⁴² <https://www.federalregister.gov/documents/2013/11/18/2013-26789/ownership-and-control-reports-forms-102102s-4040s-and-71>.

⁴³ See Part 22 adopting release.

⁴⁴ https://www.cftc.gov/sites/default/files/tm/finseointerp_10.htm.

⁴⁵ https://www.cftc.gov/media/9951/votingdraft121323_OperationalResilienceNPRM/download.

⁴⁶ See § 23.151 “Uncleared Swap.”

⁴⁷ <https://www.federalregister.gov/documents/2023/08/08/2023-16572/margin-requirements-for-uncleared-swaps-for-swap-dealers-and-major-swap-participants>.

⁴⁸ <https://www.cftc.gov/PressRoom/PressReleases/8965-24>.

⁴⁹ See, e.g., the proposed 2018 SEF rule.

⁵⁰ <https://www.cftc.gov/PressRoom/PressReleases/9055-25>.

⁵¹ <https://www.law.cornell.edu/cfr/text/17/23.431>.

⁵² <https://www.iosco.org/library/pubdocs/pdf/IOSCOPD778.pdf>.

⁵³ <https://www.sec.gov/files/rules/final/2012/33-9338.pdf>.

⁵⁴ As of July of 2024, the NFA no longer makes publicly available exemptive filings (e.g., under

§ 4.13(a)(3) of CFTC Regulations) which frustrates due diligence and compliance for market participants and their counterparties and impedes market transparency. This change was made without any notice to the public and is arguably in violation of the APA given that CFTC's rules, e.g., in Part 4 specifically reference and rely on public disclosure of exempted filings.

⁵⁵ An argument can be made that all agricultural commodities are environmental commodities because they are directly impacted by any changes in climate. See, e.g., <https://optiver.com/insights/two-types-of-liquidity-the-mississippi-river-and-market-makers-in-agricultural-derivatives/>.

⁵⁶ <https://www.cftc.gov/PressRoom/PressReleases/8969-24>.

⁵⁷ <https://www.cftc.gov/PressRoom/PressReleases/8994-24>.

