REPORT

Futures & Derivatives Law

The Journal on the Law of Investment & Risk Management Products

September 2025 ▪ Volume 45 ▪ Issue 8

STRATEGIC CONSIDERATIONS FOR TRANSACTIONS INVOLVING CFTC-REGISTERED ENTITIES

By Matthew Kulkin, Megan O'Flynn, and Joshua Nathanson Wilmer Cutler Pickering Hale & Dorr LLP[*]

The Commodity Futures Trading Commission (CFTC) plays a central role in regulating markets for futures, swaps, and options. It is the primary regulator for registered trading platforms, exchanges, clearinghouses, brokerage firms, asset managers, and investment advisory firms. Companies must navigate stringent agency rules and regulations, particularly when considering the purchase or sale of a CFTC registrant. Businesses evaluating investments in, or buying or selling, these types of entities should carefully consider how important regulatory components could affect transaction timing, pricing, and compliance requirements.

Careful attention to regulatory issues could prove to be especially important for successful M&A execution. Indeed, there are many similarities between regulatory examinations and regulatory due diligence in that both reward proactive issue spotting, effective recordkeeping, and clear communication.

This article provides three strategic considerations for companies contemplating such transactions: engaging in comprehensive due diligence, updating regulatory records and forms, and communicating changes in control to the CFTC or the National Futures Association (NFA), as required by the Commodity Exchange Act (CEA), CFTC regulation, and NFA rules.

Strategic Consideration 1: Conduct Comprehensive Regulatory Due Diligence

In any transaction involving a CFTC-registered company, conducting thorough due diligence is a critical step. While this process generally involves scrutinizing the target company's financial health, operational integrity, and issues such as intellectual property, employee benefits, and tax structuring, prospective purchasers should pay close attention to evidence of the target company's compliance with CFTC and NFA requirements.

Key diligence activities include:

- **Compliance Audits**: Conducting detailed audits of the target's compliance with CFTC and NFA regulations, including recordkeeping, reporting, and trade practices.
- **Financial Analysis**: Evaluating the target's financial statements, accounting practices, and any past financial irregularities (from a regulatory perspective, as discussed below).
- **Operational Reviews**: Assessing the target's internal controls, risk management frameworks, and operational procedures.
- **Legal Reviews**: Scrutinizing past litigation, enforcement actions, and any ongoing legal issues that may impact the transaction.

To support a robust due diligence process, there are several materials a buyer should request and review:

- **A potential acquirer of a CFTC registrant should request financial records sufficient to evaluate compliance with applicable financial responsibility rules.**

  For example, for a target registered as a

[*]A version of this article was presented at the 2025 ABA Derivatives & Futures Law Committee Meeting.

futures commission merchant (FCM) or an introducing broker (IB), the acquirer should evaluate compliance with CFTC Regulation 1.17, which sets a minimum required level of adjusted net capital. To do so, an acquirer should ask for copies of Form 1-FR-FCM (for FCMs) and Form 1-FR-IB (for non-guaranteed IBs), which include important financial information and are filed with the CFTC on a monthly basis.

Similarly, if the target is registered as a swap dealer, the acquirer will need to evaluate compliance with the minimum capital requirements established by CFTC Regulation 23.101. The acquirer should ask for records maintained pursuant to CFTC Regulation 23.201(b)(2).

For designated contract markets (DCMs), the acquirer will need to consult Section 5(d)(21) of the CEA (DCM Core Principle 21) and CFTC Regulation 38.1101(a), which require a DCM to maintain sufficient financial resources. There are analogous requirements for swap execution facilities (SEFs) in Section 5h(f)(13) of the CEA (SEF Core Principle 13) and CFTC Regulation 37.1301(a). DCMs are required to report the amount and value of their financial resources to the Commission every quarter along with a balance sheet, income statement and cash flow statement under Regulation 38.1101(f). SEFs have similar quarterly reporting obligations under Regulation 37.1306.

- **The acquirer should request the target company's recent CFTC and NFA communications and exam materials, including finding letters and the target company's response.**

  Exam findings or other communications with the CFTC or NFA may indicate a pattern of noncompliance or suggest inadequate compliance resources. They may also form the basis for additional diligence requests.

- **Many CFTC registrants are also required to prepare documents themselves that may indicate compliance weaknesses.**

  For example, under CFTC Regulation 37.1501(d), the Chief Compliance Officer of a SEF is required to prepare an annual compliance report. The report must include, among other things, any material noncompliance matters and material changes made to compliance policies and procedures during the coverage period for the report.

  Similarly, under CFTC Regulation 3.3, the Chief Compliance Officer of an FCM or swap dealer must prepare an annual compliance report, which an acquirer should request and review—particularly the "Areas for Improvement" and "Material Noncompliance Issues" sections. NFA members are also required to file annual compliance questionnaires with the NFA.

In addition to assessing compliance with CFTC and NFA requirements, the acquirer should determine whether the target is potentially required to register with FINRA, the SEC or other federal or state regulators.

For example, if the target is registered as a commodity trading advisor but also provides advice with respect to securities, the acquirer should determine whether an exception to the requirement to register under the Investment Advisers Act of 1940 applies, such as Section 203(b)(6), which exempts certain registered commodity trading advisors from investment adviser registration.

If the target is registered as an FCM or an IB, the acquirer should determine whether the target is also engaged in securities trading activities that would require registration as a broker-dealer.

Many firms have both a securities affiliate and a derivatives affiliate. In these cases, the acquirer should determine whether there are adequate controls in place to ensure that referrals to the securities affiliate and the activities of dually registered individuals do not trigger registration requirements for the target.

At the same time, targets should prepare for diligence requests by maintaining complete books and records and, if necessary, obtaining a legal opinion from counsel where there are potentially material compliance issues. Key legal and compliance personnel should also be prepared to field questions from counsel to the acquirer. In some respects, regulatory due diligence can be like a CFTC inquiry or NFA examination, and it can be helpful to approach regulatory due diligence with the same mindset.

Throughout the diligence process, the acquirer should craft deal terms that may properly allocate regulatory risk. Among other things, the acquirer may ask the former owners of the target to indemnify the acquirer against pre-existing regulatory issues. The acquirer may also ask for representations and warranties related to CFTC and NFA regulatory issues.

Strategic Consideration 2: Diligently Update Records and Forms

Another crucial aspect of transactions involving CFTC-registered companies is ensuring records and forms are appropriately updated. The CFTC and NFA require registrants to maintain comprehensive and up-to-date records and forms as part of their compliance obligations, and a merger or acquisition may require amendments to existing records and forms.

First, the NFA Bylaws and CFTC Regulation 3.12 require associated persons to be registered, and under NFA registration rules, members must file a Form 8-R for their associated persons and principals. The NFA routinely brings enforcement actions against registrants that permit unregistered individuals to act as associated persons or fail to timely report individuals as principals. The acquirer should determine whether, upon closing, additional NFA filings will be required. In particular, the acquirer should determine whether any new entity owners of the target or any newly installed executives fall within the definition of "principal" under NFA rules.

Second, an entity registered as a derivatives clearing organization (DCO), a DCM or a SEF may be required to update certain information provided to the CFTC. For example, CFTC regulations require SEFs to make amendments if there are changes to the information included in their Form SEF,[1] and DCOs and DCMs may be required to request an amendment to their order of designation. Accordingly, an amendment to the registered entity's filed materials with the CFTC may be required upon closing. In the instructions for Exhibit A to Form DCO, for example, the Commission instructs DCOs to list any person (i) who owns 5% or more of the DCO's stock or other ownership or equity interests; or (ii) who, either directly or indirectly, through agreement or otherwise, may control or direct the management or policies of the DCO.[2]

Third, the target may need to update its business continuity and disaster recovery plans to reflect any changes in its operations and any changes in its key management employees. FCMs, IBs, CPOs, CTAs and Foreign Dealer Members should consult NFA Compliance Rule 2-38, which sets minimum requirements for business continuity and disaster recovery plans. Swap dealers should consider CFTC Regulation 23.603. Form DCO, Form DCM and Form SEF all have questions related to business continuity and disaster recovery plans that may require amendment upon closing of a transaction.[3]

In each case, the potential acquirer of a CFTC registrant should review the applicable rule and any relevant guidance and consider potential revisions as part of the workflow between signing and closing.

Strategic Consideration 3: Timely Inform Regulators About Planned Transactions

Another strategic consideration for companies involved in transactions with CFTC-registered entities is the importance of informing applicable regulators about the transactions. It is typically preferable to notify the regulator early in the negotiation process, so that the regulator is prepared for the transaction to close.

Regulation 40.6 requires DCMs, SEFs, and DCOs to submit rule amendments to the CFTC for review and approval. This includes amendments related to changes in ownership or control. The regulation outlines the procedures for submitting rule amendments, including the required documentation and timelines for review.

In some cases, CFTC rules may require the registrant to notify the Commission. Under CFTC Regulation 1.12(l), an FCM must "provide prompt notice, but in no event later than 24 hours . . . whenever the [FCM] experiences a material change in its operations or risk profile."

Under CFTC Regulation 39.19(c)(4), a DCO is required to report certain "events" to the Commission. In particular, under Regulation 39.19(c)(4)(ix), a change in ownership or corporate or organizational structure of the DCO or its parent must be reported. Regulation 39.19(c)(4)(ix) further provides that an initial report with certain information related to the transaction must be filed by the DCO "no later

than three months prior to the anticipated change" (unless the DCO does not know and reasonably could not have known of the anticipated change three months prior to the change) and a second report must be filed "no later than two business days following the effective date of the change."

For DCMs, Regulation 38.5 requires notice to the Commission if the DCM enters into a transaction involving the transfer of ten percent or more of the equity interest in the DCM. There is a similar requirement in Regulation 37.5 for SEFs that transfer 50% or more of the equity interest in the SEF. For both DCMs and SEFs, notification is required "at the earliest possible time but in no event later than the open of business ten business days following the date upon which the [DCM or SEF] enters into a firm obligation to transfer the equity interest."

NFA also has rules regarding notification of material changes. NFA Rule 2-52(b) provides that, where there has been a material change to an NFA Member firm's business operations that would make previously submitted NFA Member Questionnaire responses inaccurate or incomplete, such Member must "promptly update" the applicable Member Questionnaire responses.

NFA Interpretive Notice 9082 states that NFA does "not intend to prescribe all of the events that may qualify as material" in this respect. Rather, NFA "recognizes each Member is in the best position to determine what constitutes a material change in its operations based on the type, size and complexity of the Member's business."

Finally, regulated entities may also be required to notify state regulators. The acquirer will need to understand whether the target is registered with any state regulatory agencies and any applicable filing requirements.[4]

Conclusion

These are just three strategic considerations for companies considering an investment in or the acquisition or sale of a CFTC registrant. An investor or acquirer will need to be attentive to the full range of CFTC and NFA regulatory issues throughout the diligence process to support a rigorous review and successful investment or acquisition.

Similarly, CFTC registered companies with an eye towards becoming a target for acquisition should consider the areas described above carefully before engaging in discussions with potential purchasers. Deficiencies in regulatory compliance and operational controls can materially impact transaction value and timelines, and shortcomings identified by potential purchasers may lead to purchase price reductions, extended closing periods, or heightened post-closing obligations. A proactive review of these areas can enable sellers to address issues preemptively, enhance their market position, and maximize valuation outcomes while minimizing transaction execution risk.

ENDNOTES:

[1]Core Principles and Other Requirements for Swap Execution Facilities, 78 Fed. Reg. 33476, 33485 (Jun. 4, 2013) ("As stated in the SEF NPRM, the Commission clarifies that if any information contained in Form SEF is or becomes inaccurate for any reason, even after a SEF is registered, the SEF must promptly make the appropriate corrections with the Commission.")

[2]As noted in the instructions to Form DCO, "17 CFR 39.3(a)(4) requires an Applicant to promptly amend its application if it discovers a material omission or error in the application, or if there is a material change in the information contained in the application, including any supplement or amendment thereto." Instructions to Form DCO, available at https://www.cftc.gov/sites/default/files/2020-01/Form%20DCO.pdf.

[3]See Exhibit V to Form DCM and Form SEF and Exhibit I of Form DCO.

[4]While this article does not endeavor to address considerations relevant to non-U.S. regulators, we note that U.S.-regulated entities may also be required to notify regulators in non-U.S. jurisdictions where they are otherwise registered or operate of such transactions.