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CFTC 2020 Enforcement and Regulatory Developments and a Look Forward

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I. Introduction

2020 saw continuity in CFTC leadership, programs, and direction from 2019. Overall, the Commission enjoyed an unusually heavy rulemaking calendar and continued the direction of its enforcement program from 2019.

On the enforcement side, the Commission brought a record number of cases, broadly representative of the full breadth and scope of the markets and activities within the Commission's jurisdictions. Spoofing remained a priority, with the Commission and the Department of Justice (DOJ) jointly resolving several significant spoofing matters in 2020, including the single largest settlement in Commission history. The Commission also brought its first action arising out of its foreign corruption initiative. In addition, the Commission brought a record number of retail fraud cases as well as meaningful actions regarding swap dealer compliance and digital asset intermediaries. Beyond these individual actions, the Commission also took several noteworthy steps to publicize and document the Division of Enforcement's internal processes, including how it determines civil penalties and assesses corporate compliance programs.

On the regulatory side, the Commission engaged in a very high number of final rulemakings, especially notable in light of the challenges presented by the COVID-19 pandemic. The Commission addressed the pandemic with a series of targeted no-action letters and then resumed its pre-pandemic regulatory agenda. Most significantly, with the adoption of the speculative position limit rules, the CFTC completed the last significant remaining open issue in its implementation of the Dodd-Frank Act.[1] Much of the rest of the Commission's rulemaking activity was to codify relief from various Dodd-Frank implementing rules that were previously granted through the no-action process. Although not breaking new ground, this effort will be helpful to market participants and the practitioners who advise them in the future. Finally, the Market Risk Advisory Committee, in a groundbreaking meeting, examined the issue of climate change and its relationship to the futures industry.

II. Enforcement

The Commission's Division of Enforcement remained active in 2020, bringing a record number of actions and expanding its program in several noteworthy ways. Overall, the Commission brought a record 113 actions in fiscal year 2020, nearly doubling the number of cases it brought in fiscal year 2019. Monetary recoveries, including penalties, disgorgement and restitution, remained flat at approximately $1.3 billion. Despite the monetary penalties remaining flat during 2020, that amount nevertheless represented the fourth-largest total levied by the Commission. Approximately 70% of this recovery—approximately $920 million—was attributable to a single spoofing matter, the single largest penalty in Commission history; the remaining 30% was attributable to the other 112 actions.

In addition to the sheer volume of activity, there were several noteworthy trends and developments in CFTC enforcement over the past year. First, the Division of Enforcement continued to work closely with its counterparts at the DOJ on parallel criminal investigations, as well as with state regulators. Second, after announcing a program to address foreign corrupt practices involving a violation of the Commodity Exchange Act (CEA or Act)[2] in 2019, the Division began bringing such actions. The Division in 2020 stepped up enforcement efforts against firms in the virtual currency sector. Finally, a private litigation case decided by the US Court of Appeals for the Second Circuit involving the Brent oil market may have far-reaching significance for future cases that raise issues of cross-border jurisdiction.

Beyond these new developments, the remainder of the Commission's docket reflected its ongoing commitment to market integrity and customer protection. Consistent with the Division's recent

[1] Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Public Law 111–203, title VII, 124 Stat. 1376 (2010) (Dodd-Frank Act).

[2] 7 U.S.C. §1 *et seq*.

focus, the Commission brought 16 cases involving manipulative conduct and spoofing, 56 cases involving commodity fraud, and 24 matters involving various customer protection issues.

A. Increased Operational Transparency

The Commission continued its effort to provide additional transparency in the operation and decision making of the Division of Enforcement. These efforts provide welcome guidance to market participants on what to expect during the enforcement process. However, as noted below, the Division's existing guidance leaves a number of important questions unresolved.

First, in May 2020, the Division of Enforcement issued guidance on determining civil monetary penalties in enforcement actions (Penalty Guidance).[3] Although the Penalty Guidance does not provide quantitative guidance on assessing the appropriate penalty in Commission enforcement actions, the memorandum articulates a number of mitigating and aggravating factors to be considered when comparing individual resolutions with relevant precedent. Consistent with the Division's recent focus on encouraging self-reporting and cooperation, the memorandum provides that the Division typically will recommend reduced fines for entities that self-report and remediate misconduct and cooperate in the resulting investigation; conversely, the memorandum notes that it will consider attempts to conceal misconduct or to obstruct an investigation to be aggravating factors warranting greater penalties. The memorandum also notes that the Division will consider the "existence and effectiveness of the company's pre-existing compliance program" when determining an appropriate sanction.

Second, in September 2020, the Division of Enforcement director issued a memorandum to Division staff setting forth a framework for evaluating the effectiveness of a company's compliance program in the context of an enforcement matter (Compliance Guidance).[4] The Compliance Guidance followed the DOJ's June 2020 revisions to its guidance "Evaluation of Corporate Compliance Programs," originally published in 2017 (DOJ Guidance).[5] While the memorandum largely consolidated and formalized existing CFTC guidance and was consistent with the more detailed DOJ Guidance,[6] it provided some additional insight into the emphasis the Division places on the scope and speed of remediation in the enforcement process. These insights continued the Commission's ongoing commitment to provide more transparency in its deliberative process,[7] and

[3] Memorandum from James M. McDonald, Dir., Div. of Enforcement, Commodity Futures Trading Comm'n, to Division of Enforcement Staff, Civil Monetary Penalty Guidance (May 20, 2020).

[4] Memorandum from James M. McDonald, Dir., Div. of Enforcement, Commodity Futures Trading Comm'n, to Division of Enforcement Staff, Guidance on Evaluating Compliance Programs in Connection with Enforcement Matters (Sept. 10, 2020).

[5] US Department of Justice Criminal Division, *Evaluation of Corporate Compliance Programs* (June 2020).

[6] *See*, e.g., Enforcement Advisory, Updated Advisory on Self-Reporting and Full Cooperation (March 6, 2019) (noting that the Division considers appropriate remedial measures in assessing corporate cooperation and self-reporting credit).

[7] *See* Statement of Heath P. Tarbert, Chair, Commodity Futures Trading Comm'n, Before Open Meeting of Commodity Futures Trading Comm'n (Dec. 10, 2019) (noting that "the CFTC will triple down on transparency

they serve as helpful guideposts to market participants as they structure and enhance their existing compliance programs.[8]

Third, in October 2020, the Division of Enforcement issued a memorandum providing guidance on how it recognizes self-reporting, cooperation and remediation in Commission enforcement orders.[9] As the memorandum reflects, this guidance does not change the Division's approach to providing credit for cooperation, self-reporting and remediation; instead, it is intended to "provide transparency and clarity regarding when and how" that assistance will be credited and reflected in public enforcement actions. This guidance provides a useful benchmark for assessing a respondent's actions during a Commission investigation, which should give market participants comfort that they are being treated consistently during the enforcement process. However, the guidance does not provide any counsel on the Division's increasingly common practice of citing perceived uncooperative conduct in consent orders, and it remains unclear when difficulties in responding to Division requests will result in a public reprimand.

Beyond these Division of Enforcement memoranda, the Commission also negotiated a protocol with the Securities and Exchange Commission (SEC) to memorialize how the Commission handles enforcement orders that implicate "bad actor" disqualification provisions under Regulations A and D of the Securities Act of 1933 and, specifically, when the Commission will advise the SEC "that a disqualification should not arise as a consequence of the CFTC order."[10] While this protocol does not provide market participants any substantive or procedural rights in the waiver process, it does provide some clarity about how waiver requests will be handled between the agencies.

B. Spoofing

Spoofing continues to be one of the highest priorities for the Commission's enforcement program, resulting in significant monetary recoveries and a number of parallel criminal proceedings. In total, the Commission brought 16 manipulative conduct or spoofing cases in 2020, which matched the number it brought in the prior year. All 16 of these actions had parallel criminal components against the responsible traders, the associated entity or both.

This trend reflects an ongoing partnership between the Commission and the DOJ to prioritize and prosecute spoofing, a partnership that successfully combines the Commission's sophisticated

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by taking action in the following three areas: (1) how we make regulations; (2) how we apply them; and (3) how we enforce them").

[8] For a more detailed summary of this guidance and key takeaways, *see* Elizabeth L. Mitchell, Daniel F. Schubert, Anjan Sahni, Paul M. Architzel, Petal P. Walker, Matthew Beville and Robert Greffenius, *Client Alerts: CFTC Enforcement Division Issues Compliance Program Guidance*, WilmerHale (Nov. 11, 2020).

[9] Memorandum from Vincent A. McGonagle, Acting Dir., Div. of Enforcement, Commodity Futures Trading Comm'n, to Division of Enforcement Staff, Recognizing Cooperation, Self-Reporting, and Remediation in Commission Enforcement Orders (Oct. 29, 2020).

[10] Joint Letter from Jay Clayton, Chair, Secs. & Exch. Comm'n, & Heath P. Tarbert, Chair, Commodity Futures Trading Comm'n, Notification Protocol for CFTC Orders Implicating SEC Regulation A and D (Oct. 23, 2020).

automated surveillance program with the leverage and resources of the DOJ's Criminal Division. Most notably, in fiscal year 2020, the Commission brought the three largest spoofing matters in its history, including the single largest resolution in the history of the CFTC.[11] In all three matters, the underlying conduct was identified by the Commission's market surveillance program.[12] And in all three matters, the DOJ brought criminal charges against the responsible traders and entered DPAs with the associated firms.[13]

However, there is some reason to believe that these matters may reflect a high-water mark in spoofing enforcement. The most recent conduct charged in any of the three matters occurred in 2016. While other violative conduct certainly has occurred over the past five years, it is clear that the Commission's surveillance program is more than capable of identifying suspicious trading patterns and that the penalties for spoofing are severe for both individuals and firms. In addition to the significant deterrent effects of this approach, market participants and self-regulatory organizations have responded by significantly increasing their own surveillance efforts to identify spoofing, allowing issues to be addressed immediately and before they can give rise to significant liability. As a result, we would not be surprised to see the number and severity of spoofing actions decrease in the coming years as the Commission's docket catches up with past violations and market participants become increasingly able to proactively self-police this disruptive practice.

C. Manipulation

Over the past year, the Commission continued to assert its authority to challenge manipulative practices under Regulation 180.1, following several years of litigation and uncertainty.[14] Specifically, in its July 2019 decision in *CFTC v. Monex Credit Company*, the Ninth Circuit broadly interpreted Regulation 180.1 to authorize standalone fraud claims, reversing an earlier district court decision that found that the rule applied only to fraud-based manipulations.[15] The decision also

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[11] Order Instituting Proceedings, *In the Matter of JPMorgan Chase & Co., JPMorgan Chase Bank, N.A., and J.P. Morgan Securities LLC,* CFTC No. 20-69 (Sept. 29, 2020); *see also* Deferred Prosecution Agreement (DPA), *United States v. JPMorgan Chase & Co.*, No.: 3:20-cr-00175 (D. Conn. Sept. 29, 2020); In re J.P. Morgan Securities LLC, Exchange Act Release No. 90,035 (Sept. 29, 2020); Order Instituting Proceedings, The Bank of Nova Scotia, CFTC Docket No. (Aug. 15, 2020); Order Instituting Proceedings, Tower Research Capital LLC, CFTC Docket No. 20-06 (Nov. 9, 2019).

[12] Div. of Enforcement, Commodity Futures Trading Comm'n, FY2020 Division of Enforcement Annual Report, at 10 (2020).

[13] DPA, *United States v. JPMorgan Chase & Co.*, No.: 3:20-cr-00175 (D. Conn. Sept. 29, 2020); DPA, *United States v. The Bank of Nova Scotia,* No. 20-707 (D.N.J. Aug. 19, 2020); DPA, Tower Research Capital LLC, No.: 19-cr-819 (S.D. Tex. Oct. 24, 2019).

[14] 17 CFR § 180.1 - Prohibition on the employment, or attempted employment, of manipulative and deceptive devices.

[15] *CFTC v. Monex Credit Co.*, 931 F.3d 966 (9th Cir. 2019); CFTC Release No. 7984-19, Ninth Circuit Rules in Favor of CFTC in Fraud Case Against Monex Deposit Company and Its Principals (Jul. 26, 2019); *see also* CFTC Release No. 8192-20, Supreme Court Denies Defendants' Challenge to CFTC's Enforcement Authority (Jun. 30, 2020) (noting Supreme Court's denial of a writ of certiorari filed by Monex in the CFTC's anti-fraud enforcement action against the company and its affiliates and principals).

endorsed the Commission's larger position that Regulation 180.1 may be used to bring standalone fraud *or* manipulation cases.

Following *Monex*, the Commission has begun to rely more aggressively on Regulation 180.1 to bring standalone manipulation cases rather than on its traditional anti-manipulation authority under Section 9(1) of the CEA.[16] In the most noteworthy example, the Commission relied on Regulation 180.1 to bring a settled action against a US-based energy and commodity trading firm for, among other things, attempting to manipulate certain crude oil benchmarks by submitting orders during a pricing window that were intended to influence related derivatives positions.[17] This development is noteworthy, as Regulation 180.1 only requires the Commission to establish that the respondent "(1) attempted to engage or engaged in prohibited fraudulent or manipulative conduct (i.e., employed a manipulative device, scheme, or artifice to defraud; made a material misrepresentation, misleading statement or deceptive omission; or engaged in a business practice that would operate as a fraud); (2) with scienter; and (3) in connection with any swap, or contract of sale of any commodity in interstate commerce, or contract for future delivery on or subject to the rules of any registered entity."[18] This is a significantly lower burden than the burden of claims under Section 9(1), which requires proof of the existence of an artificial price, that the respondent had the ability to and did cause that artificial price, and that the defendant had a specific intent to create an artificial price.

If accepted by the courts, this approach could significantly enhance the Commission's ability to litigate manipulation claims successfully, a long-standing weakness of the Commission's enforcement program. For example, the Commission is still attempting to resolve its 2015 action against Kraft Foods Group, Inc. (Kraft) and Mondelez Global LLC (Mondelez) regarding allegations that they manipulated the price of wheat futures in violation of Regulation 180.1 and Section 9(1).[19] Although the case survived a motion to dismiss, the district court adopted a narrow interpretation of Regulation 180.1, finding that the rule "prohibits only fraudulent manipulations, that is, those involving deception, misrepresentation, or other form[s] of fraud."[20] Then, in 2018, the Southern District of New York rejected the Commission's expansive interpretation of liability in the Donald R. Wilson matter, holding that claims under Section 9(1) require proof that a defendant intended to

[16] The Commission has also continued to bring standalone fraud claims under Regulation 180.1. *See* Order Instituting Proceedings, In the Matter of Marcus Schultz, CFTC No. 20-76 (Sep. 30, 2020).

[17] Order Instituting Proceedings, *In the Matter of Vitol Inc.,* CFTC No. 21-01 (Dec. 3, 2020); *see also* CFTC Release No. 8326-20, CFTC Orders Vitol Inc. to Pay $95.7 Million for Corruption-Based Fraud and Attempted Manipulation (Dec. 3, 2020).

[18] Order Instituting Proceedings, *In the Matter of Vitol Inc., supra* note 16.

[19] Complaint, *CFTC v. Kraft Foods Grp., Inc.*, 153 F. Supp. 3d 996 (N.D. Ill. Apr. 1, 2015) (No. 1:15-cv-02881), ECF No. 1; *see also* CFTC Release No. 7150-15, CFTC Charges Kraft Foods Group, Inc. and Mondelez Global LLC with Manipulation of Wheat Futures and Cash Wheat Prices (Apr. 1, 2015).

[20] Order, *CFTC v. Kraft Foods Grp., Inc.,* 153 F. Supp. 3d 996 (N.D. Ill. Dec. 18, 2015) (No. 1:15-cv-02881), ECF No. 87.

create an artificial price by trading uneconomically or otherwise attempting to displace the natural forces of supply and demand and not merely that the defendant intended to affect prices.[21]

Faced with another potentially significant setback to its anti-manipulation theories, the Commission opted to settle the matter through a consent decree with Kraft and Mondelez in August 2019, through which the parties agreed to pay $16 million in penalties. This consent decree included a highly unusual provision prohibiting either party from "mak[ing] public statement[s] about this case other than to refer to the terms of this settlement agreement or public documents filed in this case."[22] However, Kraft and Mondelez accused the Commission and several commissioners of violating this provision, which led the district court to vacate the settlement and institute contempt proceedings against the Commission.[23] In February 2020, the Commission and Kraft submitted a second proposed settlement; however, the district court has not accepted the agreement, pending its decision on the defendant's motion for sanctions, leaving the matter unresolved.

While obviously somewhat unique, the Commission's ongoing dispute with Kraft and Mondelez is, in significant part, attributable to its historic difficulties in litigating manipulation claims. If the Commission prevails in its interpretation of Regulation 180.1, it will potentially increase its likelihood of establishing manipulation in contested matters but also significantly increase its leverage in settlement, which may avoid any perceived need to agree to such unusually restrictive settlement terms in the future.

D. Foreign Corrupt Practices and Extraterritoriality

In March 2019, the CFTC announced that it would pursue violations of the CEA that involved foreign corrupt practices, including the payment of bribes to secure business in connection with regulated activities or attempts to corruptly manipulate benchmarks or commodity prices that impact derivative contracts within the Commission's jurisdiction. In December 2020, the Commission brought its first action in this program, when it settled an action with a Houston-based energy and commodity trading firm for allegedly making corrupt payments to agents and employees of certain state-owned entities (SOEs) in Brazil, Ecuador and Mexico to obtain preferential treatment and access to trades with SOEs.[24] In partnership with the DOJ, the Commission enacted a settlement with the firm for $163 million for charges of fraud, manipulation

[21] Order at 21, *CFTC v. Wilson*, No. 13 Civ. 7884 (RJS), 2018 WL 6322024 (S.D.N.Y. Nov. 30, 2018), ECF No. 207.

[22] Consent Order at 3, *CFTC v. Kraft Foods Grp., Inc.,* 153 F. Supp. 3d 996 (N.D. Ill. Aug. 14, 2019) (No. 1:15-cv-02881), ECF No. 310.

[23] Motion for Contempt, Sanctions, and Other Relief, *CFTC v. Kraft Foods Grp., Inc.*, 153 F. Supp. 3d 996 (N.D. Ill. Aug. 16, 2019) (No. 1:15-cv-02881), ECF Nos. 315, 316 (withdrawn at ECF No. 382); Dean Seal, *Kraft Pulls Bid to Sanction CFTC Over Press Release Feud*, LAW360 (Mar. 9, 2020).

[24] Order Instituting Proceedings, *In the Matter of Vitol Inc., supra* note 16.

and foreign corruption. The settlement demonstrates that the agency is prepared and willing to investigate foreign corrupt practices that involve or impact a commodity interest contract.

Although we expect this to remain an area of focus for the Commission, its reach will be somewhat constrained by the limited extraterritorial application of the Act. This limitation is highlighted by a recent Second Circuit decision in a putative class action alleging violations of CEA Sections 6 and 9.[25] There, the plaintiffs alleged the defendants manipulated the price of physical Brent crude oil, which in turn influenced the prices of NYMEX Brent futures.[26] However, the Second Circuit upheld the district court's dismissal of the case, as the plaintiffs had pleaded "no allegation of manipulative conduct or statements made in the United States."[27] This decision potentially undermines the Commission's long-standing position that it has authority to bring actions based on foreign misconduct that influences domestic commodity or futures prices. For example, the facts in this case are similar to the Commission's 1998 action against the Sumitomo Corporation of Japan for allegedly manipulating the price of copper on the London Metals Exchange, which caused artificially high prices in cash and future markets in copper in the United States.[28] While it is not clear if the Second Circuit would have reached a different conclusion in a Commission enforcement action, this holding potentially may limit the Commission's ability to challenge foreign corrupt practices that do not have a clear nexus to the United States.

E. Anti-Money Laundering and Bank Secrecy Act Compliance

In 2020, the Commission brought several significant actions for violations of the Bank Secrecy Act (BSA) and anti-money laundering (AML) regulations.

First, on August 10, 2020, the Commission brought its first action under Regulation 42.2, which requires registrants to comply with the BSA, when it charged a futures commission merchant (FCM) for allegedly failing to diligently supervise its officers', employees' and agents' handling of several commodity trading accounts and for allegedly failing to adequately implement procedures to detect and report suspicious transactions as required under federal AML laws and regulations. As a result of these allegations, the FCM agreed to pay an $11.5 million penalty, disgorge $706,214 earned from a customer that had engaged in misconduct previously charged by the Commission

[25] *Prime Int'l Trading, Ltd. v. BP P.L.C.,* 937 F.3d 94 (2d Cir. 2019), *reh'g and reh'g en banc denied*, No. 17-2233, ECF No. 272 (2d Cir. Oct. 16, 2019).

[26] *Prime Int'l Trading,* 937 F.3d at 100.

[27] *Id.* at 107-08.

[28] CFTC Release No. 4144-98, CFTC Files and Settles Action Against Sumitomo Corporation for Manipulating the Copper Market in 1995-96 (May 11, 1998).

and comply with certain undertakings, including the continued retention of a third-party compliance consultant that the FCM had already hired to review the FCM's AML and supervisory program.[29]

Second, on October 1, 2020, the Commission brought a contested action against five entities and three individuals that owned and operated what was touted to be the world's largest cryptocurrency derivatives platform, for operating as an unregistered trading platform and for failing to implement required AML procedures.[30] The platform, which was registered in the Seychelles, allegedly received more than $11 billion in bitcoin deposits and made more than $1 billion in fees while conducting significant aspects of its business from the US and accepting orders and funds from US customers, without registering as a domestic contract market, swap execution facility, or futures commission merchant.[31] Further, the CFTC's complaint alleges that the defendants failed to implement adequate AML or know-your-customer policies. In addition to highlighting the Commission's ongoing interest in policing digital asset markets that provide services to U.S persons, the matter reflets the Commission's interest in ensuring that intermediaries and exchanges are taking appropriate steps to identify and prevent money laundering and other misconduct on their platforms. This matter is ongoing, and the Commission is seeking disgorgement, recission, restitution and the payment of a civil monetary penalty. There is a related criminal action also underway by the US attorney for the Southern District of New York alleging federal charges of violation of the BSA and conspiracy to violate the BSA.[32]

III. Regulatory

The following discussion highlights or summarizes noteworthy rulemakings during 2020.

A. COVID-19-Related Relief

Shortly after the outbreak of COVID-19 in the US, the Commission Staff issued nine no-action letters to facilitate the functioning of the derivatives markets during the pandemic.[33] These actions assisted registered entities and derivatives intermediary firms in implementing their business continuity/pandemic plans and in operating on a dispersed basis. In a complementary notice, the

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[29] Order Instituting Proceedings, *In the Matter of Interactive Brokers, LLC*, CFTC No. 20-25 (Aug. 10, 2020); *see also* CFTC Release No. 8218-20, CFTC Orders Interactive Brokers LLC to Pay More Than $12 Million for Anti-Money Laundering and Supervision Violations (Aug. 10, 2020).

[30] Complaint, *CFTC v. HDR Global Trading Ltd.*, No. 20-cv-8132 (S.D.N.Y. Oct. 1, 2020), ECF No. 1; *see also* CFTC Release No. 8270-20, CFTC Charges BitMEX Owners with Illegally Operating a Cryptocurrency Derivatives Trading Platform and Anti-Money Laundering Violations (Oct. 1, 2020).

[31] *Id.*

[32] Indictment, *United States v. Hayes*, No. 20-cr-500 (S.D.N.Y. Sept. 21, 2020), ECF No. 2.

[33] CFTC Letter No. 20-02 (Mar. 17, 2020); CFTC Letter No. 20-03 (Mar. 17, 2020); CFTC Letter No. 20-04 (Mar. 17, 2020); CFTC Letter No. 20-05 (Mar. 17, 2020); CFTC Letter No. 20-06 (Mar. 17, 2020); CFTC Letter No. 20-07 (Mar. 17, 2020); CFTC Letter No. 20-08 (Mar. 17, 2020); CFTC Letter No. 20-09 (Mar. 17, 2020).

National Futures Association (NFA) issued a member notification to facilitate member firms' implementing social distancing practices for their employees.

The series of staff no-action letters addressed compliance with various aspects of the regulatory framework made difficult or impossible when social distancing practices are in effect, addressing rules that are location-specific, including rules relating to floor brokering and rules requiring location-specific compliance systems, such as audit trail requirements that apply to recording of oral communications and time stamps. In addition, the NFA provided relief with respect to supervision requirements tied to the location of a firm's associated persons (APs). In addition, the staff temporarily delayed various specified reporting obligations in order to permit affected persons to redirect staff resources during the crisis.

The COVID-19-related relief remained in effect through the remainder of 2020.[34] It is unclear to what extent the industry will continue to operate remotely during 2021. However, the Commission may have to consider how to account for some of these practices in its rules if some of the ways of doing business that began as a reaction to the COVID-19 pandemic become generally accepted and routine.

B. Speculative Position Limits

On October 15, 2020, the Commission adopted final rules imposing speculative position limits in derivative contracts referencing 25 agricultural, metals and energy commodities.[35] These limits are the culmination of almost a decade of work by the Commission and its staff, including revising the rules after a federal court vacated its last attempt to expand speculative position limits in 2012.

The final rules amend the overall framework for speculative position limits by building on the current structure that applies to the agricultural contracts currently subject to federal limits. These nine agricultural commodities will continue to be subject to spot-month and combined single-month and all-month limits. The final rules expand the application of federal speculative position limits to derivative contracts referencing 16 additional agricultural, metals and energy commodities, but only in the spot month. For all covered contracts, these limits apply separately to positions in physically and cash-settled products and to cash-settled futures and options contracts that are either "directly or indirectly" linked to the price of a "core referenced futures contract" or the same commodity. In addition, these limits apply to "economically equivalent swaps." The final rules also amend the regulations governing exchange-set position limit levels. Finally, they expand the definition of "bona fide hedging transaction or position" to incorporate a larger list of enumerated bona fide hedge

[34] For a more detailed summary of these actions, *see* Paul M. Architzel, *Client Alerts: Coronavirus (COVID-19): CFTC and NFA Issue Relief and Guidance*, WilmerHale (Mar. 19, 2020).

[35] Position Limits for Derivatives, 86 Fed. Reg. 32363,236 (Jan. 14, 2021).

transactions and creates an entirely new process for the approval and recognition of non-enumerated bona fide hedging transactions.

The speculative position limit rule package is a major milestone in the Commission's regulatory agenda and one of the final steps in fully implementing the Dodd-Frank Act. Although the rules' more flexible approach to granting hedge exemption requests will likely be received better by the industry than the Commission's prior proposals, it delegates significant decision-making authority to the designated contract markets (DCM). Although the Commission retains veto power over DCM decisions, it remains to be seen how the Commission will use its veto authority and whether this decentralized approach will lead to inconsistent treatment of hedge requests by different exchanges, complicating compliance by market participants.

The final rules become effective upon publication in the Federal Register but with a relatively distant compliance date. Market participants must comply with applicable position limits for futures and options contracts not currently subject to federal limits by January 1, 2022, and for economically equivalent swaps by January 1, 2023.[36]

C. Cross-Border

In July, the Commission adopted a new rule regarding the cross-border application of the Dodd-Frank Act, replacing existing no-action guidance from 2013.[37] The cross-border final rule is considerably different from the guidance that it replaces. For the most part, it reduces the regulatory burden on market participants by streamlining various requirements, simplifying defined categories of persons to which it applies and, in some instances, harmonizing those definitions with the rules of other regulators.

1. US Person Definition

The final rule both limits and simplifies the definition of a US person. For example, while the cross-border guidance had defined as a "US person" to include funds that had majority ownership by US persons, that look-through provision has been removed in the final rule. The rule simplifies the determination of who or what is a US person, defining it as including (1) a natural person resident in the United States; (2) a partnership, corporation, trust, investment vehicle, or other legal person organized, incorporated, or established under the laws of the United States or having its principal place of business in the United States; (3) an account (whether discretionary or nondiscretionary) of a US person; or (4) an estate of a decedent who was a resident of the United States at the time of death. The Commission notes that the second category would include (1) collective investment

[36] For a more detailed summary of this rule, *see* Paul M. Architzel, Petal P. Walker, Matthew Beville and Nikki Austin, *Client Alerts: CFTC Adopts Final Rule Regarding Speculative Position Limits*, WilmerHale (Dec. 22, 2020).

[37] Cross-Border Application of the Registration Thresholds and Certain Requirements Applicable to Swap Dealers and Major Swap Participants.

vehicles, (2) pension plans for the employees of a US person and (3) trusts in which a court within the US is able to exercise primary supervision over its administration. “Principal place of business” can be interpreted broadly, including a location from which the officers, partners or managers of the legal person primarily direct, control and coordinate the activities of the legal person. With respect to an externally managed investment vehicle, this location is the office from which the manager of the vehicle primarily directs, controls and coordinates the investment activities of the vehicle. Finally, in contrast to the guidance that included a “catchall” phrase that indicated that the enumerated list of US persons was not exhaustive, the final rule makes clear that the list of four US person categories is exclusive.

2. *Significant Risk Subsidiary*

In determining whether a person engages in a de minimis quantity of swap dealing, the final rule states that a US person must count toward their de minimis threshold swaps by significant risk subsidiaries. The SRS definition has two main components. First, the ultimate US parent entity must have at the end of its most recent fiscal year more than $50 billion in global consolidated assets calculated under US generally accepted accounting practices (GAAP). And second, the non-US significant subsidiary must have (1) a three-year rolling average of the subsidiary’s equity capital ≥ 5% of the three-year rolling average of the US parent’s consolidated equity capital, (2) a three-year rolling average of the subsidiary’s total revenue ≥10% of the three-year rolling average of the US parent’s total consolidated revenue or (3) a three-year rolling average of the subsidiary’s total assets ≥ 10% of the three-year rolling average of the US parent’s total consolidated assets. This definition does not apply to non-US subsidiaries of a US parent that are subject to supervision by the Federal Reserve as a subsidiary of a US bank holding company or an intermediate holding company, or that are subject to capital standards and oversight by the subsidiary’s home country supervisor consistent with the Basel Committee on Banking Supervision’s International Regulatory Framework for Banks and subject to margin requirements for uncleared swaps in a jurisdiction that the Commission has found comparable pursuant to a published comparability determination with respect to uncleared swap margin requirements.

3. *Counting Swaps Toward the De Minimis Threshold*

The final rule provides that the swaps transacted by a US person or an SRS or that are guaranteed by a US person engaged in dealing activity count toward the de minimis threshold. The de minimis threshold is the minimum aggregate gross notional amount of swap dealing activities that trigger registration as a swap dealer. Swaps transacted through dealing activity by a non-US, non-SRS or non-guaranteed entity with any of the foregoing US or US guaranteed entities count toward that entity’s de minimis threshold, except for a foreign branch of a swap dealer or where the guaranteed non-US counterparty is itself a swap dealer, the guarantor is a nonfinancial entity, or the counterparty is below the de minimis threshold and affiliated with a swap dealer.

Importantly, the Commission refrained from adopting its proposal to exclude from the de minimis count swaps entered into by non-US, non-SRS, non-guaranteed entities anonymously on a DCM, a swap execution facility (SEF), an exempt SEF or a foreign board of trade and cleared on a derivatives clearing organization (DCO) or an exempt DCO. Thus, these non-US entities continue to be required to include their swaps toward the de minimis threshold even if the swaps are transacted anonymously and cleared.

4. Arranged, Negotiated and Executed (ANE) Trades

One CFTC rule that has not been harmonized with a rule of the SEC is the treatment of foreign-based swaps entered into between a non-US swap entity and a non-US person that have been "arranged, negotiated, or executed" by US-based personnel or agents. The CFTC's "comity" approach with respect to transactions between two non-US persons that are booked to entities outside the United States but arranged, negotiated or executed by US-located personnel (ANE transactions) continues to diverge from the "territorial" approach of the SEC. The SEC's rule 3a71-3(b)(1)(c)(ii) provides that persons must count against the applicable de minimis threshold, their security-based swap dealing transactions with non-U.S. counterparties that were arranged, ANEd by personnel within the US. Although the CFTC swap rules generally do not apply to ANE transactions, such transactions remain subject to the CEA's anti-manipulation and anti-fraud provisions and the rules thereunder.

5. Transaction-Level Requirements

The final rule recategorizes the transaction-level requirements into three groups: Group A—risk-related requirements such as risk management programs, chief compliance officer (CCO), etc.; Group B—record keeping and documentation; and Group C—business conduct rules. For the most part, the Commission lessens the regulatory burden in all categories. For instance, under the final rule, non-US swap dealers are allowed to use substituted compliance to meet the Group A requirements. Group B requirements have a number of exceptions as well, including that for most of the non-US counterparties of non-US and US dealers, there is an exception for swaps that are traded anonymously and cleared on CFTC-registered entities. And Group C requirements do not apply to, inter alia, swaps that are booked in a US branch with a foreign counterparty that is not a foreign branch of a US person or guaranteed by a US person.

D. Market Regulation

1. *Swap Execution Facilities*

In 2013, the Commission adopted rules to implement the Dodd-Frank framework with respect to the registration, operations and compliance requirements for SEFs. Since then, the CFTC typically has responded to issues arising in the implementation of these rules informally, by issuing no-action or

interpretative relief or guidance, much of which was time-limited. In 2020, the Commission made permanent and codified a number of these previously informal fixes.

a) Name give-up

Although the 2020 rulemakings are largely technical or administrative in nature, one rulemaking affected the structure of SEF trading. During 2020, the Commission addressed the issue of post-trade name give-up, bringing closure to one of the more contentious and heretofore unresolved issues relating to SEF market structure.[38] The final rule amends Regulation 37.9, which relates to permitted methods of trade execution on a SEF, by prohibiting a SEF from disclosing directly or indirectly the identity of a counterparty to a swap that is executed anonymously and intended to be cleared. The prohibition also applies to third-party trade processing services used to route transaction information from a SEF to a DCO. The rule would not apply to name-disclosed methods of execution on a SEF, such as requests for quotes, or to uncleared transactions. The rule includes an exception for a package trade, where only one component is not intended to be cleared.[39] The Commission's rationale for adopting this rule is that prohibiting post-trade name give-up "is reasonably likely to improve liquidity on SEFs," as additional market participants will choose to participate.[40] If the Commission's analysis is correct, its action in adopting this rule should result in a significant positive change in the market structure for SEFs. Time will tell.

b) Audit trail, financial resource and CCO requirements

On December 8, 2020, the CFTC approved a final rule to resolve operational issues faced by SEFs and their market participants in relation to audit trail data, financial resource and CCO requirements.[41] Specifically, the rule updates the following elements of the SEF regulatory regime:

- *Audit Trail Data*: The final rule removes the requirement for a SEF to record and maintain post-execution allocation information in its audit trail data.
- *Financial Resources*: The final rule applies the existing Core Principle 13 financial resources requirements to SEF operations in a less-burdensome manner, including through amendments to the existing six-month liquidity requirement and the addition of new acceptable practices providing further guidelines to SEFs for making a reasonable calculation of their projected operating costs.

[38] Post-Trade Name Give-Up on Swap Execution Facilities, 85 Fed. Reg. 44,693 (July 24, 2020).

[39] The staff published a helpful FAQ addressing the issue of a package trade consisting of mixed components, some of which are not intended to be cleared, CFTC, *Frequently Asked Questions Regarding the Post-Trade Name Give-Up Rule in Commission Regulation 37.9(d)*, (last visited Feb. 18, 2021).

[40] Post-Trade Name Give-Up on Swap Execution Facilities, 85 Fed. Reg. 44,693 at 44,705 (July 24, 2020).

[41] Swap Execution Facilities, 86 Fed. Reg. 9224 (Feb. 11, 2021).

- *CCO*: The final rule streamlines requirements for the CCO position, allows SEF management to exercise greater discretion in CCO oversight, and simplifies the preparation and submission of the required annual compliance report.

c) Exemptions for package trades and error trades

The SEF rules created two categories of swap transactions: required transactions (transactions subject to the trade execution requirement) and permitted transactions (any transaction not involving a swap that is subject to the trade execution requirement). Regulation 37.9 also requires a SEF to offer, as required methods of execution, either (a) an order book or (b) a request-for-quote (RFQ) system that sends an RFQ to no fewer than three unaffiliated market participants and operates in conjunction with an order book for the execution of these transactions. For permitted transactions, any method of execution is permitted but SEFs must also make available an order book for all swaps, including illiquid bespoke swaps.

As written, these rules require each swap to be executed separately, which created a number of difficulties for "package transactions," or complex swaps with two or more legs that are intended to be executed simultaneously. To address this issue, the Commission staff issued a series of no-action letters.[42] On November 18, 2020, the CFTC unanimously approved a final rule to allow the swap components of certain categories of package transactions to be executed on SEFs but through flexible means of execution rather than through the required methods of execution for required transactions.[43] In addition, the final rule amends part 36 of CFTC regulations to include an exemption from the trade execution requirement for swap transactions that are executed as a component of a package transaction that also includes a component that is a new issuance bond. The final rule codifies the majority of relief currently provided in CFTC No-Action Letter No. 20-31.

Further, the final rule enables SEFs to permit market participants to execute swaps transactions to correct operational or clerical errors using execution methods other than those required by CFTC regulations for required transactions, codifying the intent of CFTC No-Action Letter Nos. 17-27 and 20-01.

d) Exemption from required trade execution

On December 8, 2020, the CFTC approved a final rule establishing two exemptions from the statutory requirement to execute certain types of swaps on a SEF or a DCM.[44] The first exemption applies to any swap that qualifies for and meets the associated requirements of any exception or exemption under Part 50 of the Commission's regulations. Part 50 exempts from the clearing requirement swaps that have at least one counterparty that is a certain type of entity, including

[42] CFTC No-Action Letter No. 20-31 (Oct. 9, 2020); CFTC No-Action Letter No. 17-55 (Oct. 31, 2017).

[43] Swap Execution Facility Requirements, 85 Fed. Reg. 82,313 (Dec. 18, 2020).

[44] Exemptions from Swap Trade Execution Requirement, 86 Fed. Reg. 8993-01 (Feb. 11, 2021).

"exempt cooperatives,"[45] entities that qualify for the statutory end-user exception and eligible affiliate counterparties. In addition, the CFTC recently adopted amendments to Part 50 codifying additional clearing exemptions for swaps entered into with certain central banks, sovereign entities, international financial institutions (IFIs), depository institutions, bank holding companies, and community development financial institutions.

The Commission also codified relief provided under CFTC Staff Letter No. 17-67 and prior staff letters applicable to swaps entered into by eligible affiliate counterparties and cleared, regardless of the affiliates' ability to claim the inter-affiliate clearing exemption under CFTC Regulation Part 50.52.

e) Withdrawal of prior proposed rules

Finally, the CFTC voted to withdraw[46] the unadopted portions of its November 2018 Swap Execution Facilities and Trade Execution Requirement proposal (2018 proposal).[47] In the withdrawal, the CFTC stated that it determined the withdrawal of the unadopted portions of the 2018 proposal to be necessary as a result of the concern expressed by commenters regarding the operational challenges and compliance costs the unadopted portions would impose on market participants.

2. Digital Assets

The Commission during 2020 updated its interpretative guidance on the meaning of "actual delivery" as it applies to digital assets, specifically virtual currencies. [48] This, along with the recent line of enforcement cases against digital asset platforms discussed above, will significantly impact the direction of future growth of the markets for digital assets.

Section 2(c)(2)(D) provides that leveraged or margined commodity transactions offered to retail counterparties are subject to regulation under the Act, including registration of the platform on which they are traded as a DCM, except for a contract of sale that "results in actual delivery within 28 days . . . ."[49] The meaning of "actual delivery" therefore is critical in in determining whether the Act applies to the transaction.

The Commission in this release clarified and updated its 2013 Guidance, noting that as provided in the earlier guidance, the Commission will "employ a functional approach and examine how the agreement, contract, or transaction is marketed, managed, and performed" and will assess its

[45] *Id*. at 8999.

[46]Swap Execution Facilities and Trade Execution Requirement, RIN 3038-AE25 (Dec. 8, 2020).

[47]Swap Execution Facilities and Trade Execution Requirement, 83 Fed. Reg. 61,946-01 (Nov. 30, 2018).

[48] Retail Commodity Transactions Involving Certain Digital Assets, 85 Fed. Reg. 37,734-01 (June 24, 2020).

[49] *Id*. at 37,735.

relevant factors in determining whether actual delivery occurs in a particular circumstance.[50] The guidance reiterates that actual delivery occurs if within 28 days a customer secures possession and control of the entire quantity of the commodity; the seller and its affiliates do not retain any interest, legal right or control over the commodity; and the purchaser has the ability to use the entire quantity of the commodity away from any particular execution venue. The guidance updates the guidance with four examples, in which the Commission makes clear that when an execution venue or third-party offeror acts as an intermediary, the virtual currency's public distributed ledger should reflect the transfer from the seller's blockchain address to the purchaser's wallet or other relevant storage system (other than one owned or operated by an affiliate of the seller) and that book entry of a transaction by the seller is not sufficient.

In addition, in April 2020, the Commission approved Bitnomial Exchange, LLC, located in Chicago, Illinois, as a DCM, effective April 20, 2020. This follows the earlier approval by the CFTC of a number of other trading platforms permitted to list bitcoin derivatives, including CME, CX Futures Exchange, Bakkt, Erisx and Ledgerx.

3. Electronic Trading

The Commission in December 2020 adopted three risk principles applicable to DCMs relating to "electronic trading," which is defined to include any trading activity submitted to a domestic contract market via electronic message, including from fully automated trading systems, manual orders submitted electronically, and electronically submitted block trades and exchanges-for-related-positions.[51] These three risk principles supplement Commission Rule 38.2521 which provides general requirements to meet the requirement of Core Principle 4 that a DCM have surveillance mechanisms and other controls reasonably designed to prevent market disruption. The three risk principles provide that DCMs must adopt and implement rules to prevent, detect and mitigate market disruptions or system anomalies associated with electronic trading; subject all electronic orders to exchange-based pre-trade risk controls; and notify Commission staff of any significant market disruptions of the electronic trading platform(s). As the Commission noted, it believes that "DCMs are addressing most, if not all, of the electronic trading risks currently presented to their trading platforms."[52]

E. Clearing and Derivatives Clearing Organization Operations

In a unanimous vote, the Commission approved final rules that clarify or codify existing interpretation, guidance or no-action letters with respect to the operation of DCOs. The rule amendments are largely administrative in nature.

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[50] *Id*.

[51] Electronic Trading Risk Principles, 86 Fed. Reg. 2048-01 (Jan. 11, 2021).

[52] *Id*. at 2048.

Key aspects amend the requirements relating to DCO governance, the role of the CCO, and risk management and enterprise risk oversight processes. In a change to the requirements relating to governance, DCOs are now required to include market participants and individuals who are not executives, officers, or employees or affiliates of the DCO on the DCO's governing board or board-level committees.

CCOs have been granted flexibility in the submission and the content of their annual reports by describing the process by which the reports are furnished to the board of directors and permitting reports to incorporate by reference portions of the most recent report, particularly those sections relating to the DCO's written policies and procedures. Under the amended rules, CCOs are permitted to report to the senior officer responsible for the DCO's clearing activities regardless of whether the DCO also engages in activities unrelated to clearing.

The rule amendments also require that DCOs have an enterprise risk management program and that they identify an enterprise risk officer, who must have access to the board of directors. The enterprise risk officer may also be the DCO's chief risk officer. In a change to required reporting, the following additional events are now reportable: a significant decrease in liquidity resources from the prior day or changes in (1) liquidity funding arrangements; (2) depositories for customer funds; (3) independent accounting firm; or (4) other significant events such as settlement bank issues, major decisions of the board of directors, margin model issues, recovery and wind-down plans, new products accepted for clearing, and decreases in liquidity resources.

Although the rule amendments are mainly administrative and technical in nature, the requirement with respect to the composition of the boards of directors of DCOs is more fundamental. This change may have a significant effect on DCOs in the longer term, leading to a more open and inclusive governance structure.

Additional rulemakings during 2020 relating to clearing include:

- Codification of the exemption from the clearing mandate under Section 2(h) of the Act for central banks, sovereign entities, IFIs, bank holding companies, savings and loan holding companies, and community development financial institutions.[53] This rulemaking amends the definition of "financial entity" under Commission Regulation 50.50 to include a number of specified entities. These amendments codify relief previously granted in a series of no-action letters. The amendments are found in Commission Regulations 50.51(a)(3)(ii) (cooperatives); 50.53 (banks, savings associations, farm credit system institutions and credit unions); 50.75 (central banks or sovereign entities); 50.76 (IFIs); 50.77 (community development financial institutions); 50.78 (bank holding companies); and 50.79 (savings and loan holding companies).

[53] Swap Clearing Requirement Exemptions, 85 Fed. Reg. 76,428 (Nov. 30, 2020).

- Codification of conditions to the inter-affiliate clearing exception relating to transactions with a non-US affiliate.[54] The amended rule reinstated an alternative compliance framework applicable to counterparties entering swaps with non-US affiliates under Rule 50.52(b). The relief in the rule expired on March 11, 2014, and had been extended through no-action relief. In making the alternate framework permanent, the Commission also expanded the list of jurisdictions eligible for this relief. Under the amended rule, affiliates located in Australia, Canada, Hong Kong, Mexico, Switzerland or the United Kingdom join those located in the European Union, Japan or Singapore as eligible for the alternative.

F. Intermediaries

1. Commodity Pool Operator/Commodity Trading Advisor Disqualification

On June 4, 2020, the CFTC approved a new rule that will affect CPOs with a statutory disqualification under the CEA that claim an exemption from registration under CFTC Rule 4.13. The new rule requires a person claiming an exemption from registration as a CPO under Regulation 4.13 to represent that, subject to certain exceptions, neither the claimant nor any of its principals has a CEA Section 8a(2) disqualification ("CEA Statutory Disqualification") that would require disclosure if the claimant sought registration with the CFTC. The CEA Statutory Disqualifications subject to the new rule include, among other things, serious types of financial crimes (e.g., theft, fraud, bribery, embezzlement, and misappropriation) and findings or settlements consenting to findings that a person committed primary or secondary violations of the CEA, the federal securities laws, MSRB rules, or similar state or foreign statutes "where such violation involves embezzlement, theft, extortion, fraud, fraudulent conversion, misappropriation of funds, securities or property, forgery, counterfeiting, false pretenses, bribery, or gambling."

The final rule's prohibition on CEA Statutory Disqualifications, does not include offenses listed in CEA Section 8a(3), which are generally less serious than those covered by 8a(2) and include other types of criminal convictions, violations of the CEA and federal securities laws more generally, failure to supervise findings, and government debarment orders. The new rule will not affect the registration of registered CPOs who already disclosed CEA Statutory Disqualifications on Forms 7-R and 8-R as part of the registration process. Disclosures of CEA Statutory Disqualifications enumerated in 8a(2) generally result in the NFA refusing to register such person as a CPO

Persons with a statutory disqualification may seek exemptive letter relief individually or on a firm-by-firm basis by demonstrating that such relief is consistent with the public interest and customer protection. The CFTC has stated that it expects to grant the relief infrequently and only when such relief is strongly supported by the facts and the law. Alternatively, an applicant may apply for registration. Family offices, relying on the new exemption in Regulation 4.13(a)(6) (published

[54] Exemption From the Swap Clearing Requirement for Certain Affiliated Entities–Alternative Compliance Frameworks for Anti-Evasionary Measures, 85 Fed. Reg. 44,170 (July 22, 2020).

December 2019), are not subject to the new requirement.[55] This rule, although seeming to close an unintended loophole in the registration framework, may nevertheless have a far-reaching effect on investment managers and others having a de minimis relationship with the Commission. This rule imposes a new consideration relating to the possible collateral consequences of entering into a settlement with an investment manager's primary regulator, and may constitute a trap for the unwary.[56]

2. Margin

In April, the Commission amended the 2016 rules governing the phase-in of initial margin requirements for uncleared swaps. These revisions reduced the margin requirement threshold and lengthened the phased compliance schedule by bifurcating the final phase.[57]

When the Commission in 2016 first adopted margin requirements for uncleared swaps for swap dealers and major swap participants, it set a five-phase implementation schedule.[58] Covered swap entities (CSEs) and covered counterparties were scheduled to comply with the Margin Rule as the phased threshold of their average daily aggregate notional amount (AANA) of uncleared swaps and other financial products progressively lowered.[59] Phase 4, which was completed in September 2019, covered counterparties with more than $750 billion in AANA.

The April 2020 Revised CFTC Margin Rule bifurcated what had previously been the final phase, Phase 5, which would have applied to swaps counterparties with more than $8 billion in AANA of uncleared swaps. The bifurcation resulted in Phase 5, applying only to swaps counterparties with more than $50 billion in AANA by the original deadline of September 1, 2020, and a new Phase 6, applicable to the remainder of those covered by the rule by September 1, 2021.[60] This amendment to the phased compliance schedule aligned with the 2019 recommendation of the Basel Committee on Banking Supervision and the Board of the International Organization of Securities Commissions (BCBS and IOSCO).

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[55] The CFTC declined to exclude investment advisers registered under the Investment Advisers Act of 1940 from the final rule's scope.

[56] The rule does not include offenses listed in Section 8(a)(3) of the Act. That section of the Act requires a hearing prior to disqualification.

[57] Margin Rule, 85 Fed. Reg. 19,878 (Apr. 9, 2020).

[58] The CFTC Margin Rule requires initial margin to be posted and collected only by "covered swap entities" (swap dealers and major swap participants) and other entities with "material swaps exposure," which is defined as an average daily aggregate notional amount of uncleared swaps, uncleared security-based swaps, foreign exchange forwards and foreign exchange swaps with all counterparties above $8 billion. Final Rule, Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants, 81 Fed. Reg. 636 (Jan. 6, 2016).

[59] Margin Rule.

[60] *Id*. at 19,880.

A little more than a month after the amendment became effective, on May 28, 2020, the Commission approved an interim final rule that deferred the compliance date of September 1, 2020, for Phase 5 by a year, until September 1, 2021, in response to the dislocations resulting from the COVID-19 outbreak.[61] This extension did not mirror the delayed timelines implemented by BCBS and IOSCO, which delayed both Phase 5 and Phase 6 by one year. The Commission has not provided any further insight into whether it will amend its Revised Margin Rule to align with this further extension.

In a further action related to margin, on November 24, 2020, the CFTC and the SEC approved a final rule to harmonize the minimum margin level for security futures held in a futures account with the minimum margin level for security futures held in a securities portfolio margin account.[62] The amendment lowers the margin requirement for an unhedged security futures position from 20% to 15%.[63] The final rule went into effect on December 24, 2020.

3. Capital

In July 2020, the Commission adopted final rules establishing capital requirements for swap dealers and major swap participants.[64] The final capital rules applicable to swap dealers (1) outline the minimum capital requirements, (2) define how swap dealers must calculate their actual capital amount and (3) establish other requirements (e.g., use of internal models, notice requirements, etc.). Under the final rules, there are four possible approaches to defining the minimum capital requirements for swap dealers: (1) FCM-based, (2) bank-based, (3) broker-dealer-based (net liquid assets) and (4) the tangible net worth (TNW) approach.

FCMs must follow the FCM-based minimum capital requirements of CFTC Rule 1.17. Non-FCM swap dealers have the choice of using the bank-based or the net liquid assets approach. Under the bank-based approach, swap dealers calculate their minimum capital requirement by determining the greatest of, inter alia, (1) $20 million of common equity tier 1 capital; (2) common equity capital equal to or greater than 8% of risk-weighted assets; (3) common equity capital equal to or greater than 8% of uncleared swap margin; or (4) the capital requirement of the registered futures association, the National Futures Association (NFA). Under the net liquid assets approach, the minimum level of adjusted net capital must be the greatest of (1) $20 million, (2) 2% of uncleared margin or (3) the NFA's capital requirement. All of these approaches also have funding and liquidity requirements.

[61] *Id.* at 19,881.

[62] Customer Margin Rules Relating to Security Futures, 85 Fed. Reg. 75,112 (Nov. 24, 2020).

[63] *Id.*

[64] Capital Requirements of Swap Dealers and Major Swap Participants, 85 Fed. Reg. 57,462 (Sept. 15, 2020).

Non-financial commercial entities are also able to use the TNW approach.[65] With this approach, TNW is defined as basically assets minus liabilities. Accordingly, this approach does not require that the commercial entity maintain a separate pool of capital but simply requires that it have sufficient net worth based on net equity as determined under US GAAP, excluding certain intangible assets such as goodwill. Under the TNW approach, minimum TNW must be the greatest of (1) $20 million (plus market and credit risk exposure), (2) 8% of uncleared swap margin or (3) the NFA capital requirement. Under this approach, there are no liquidity or funding requirements.

Non-US swap dealers can use substituted compliance of their home country where there has been a capital comparability determination. The final capital rules are the essential last rulemaking necessary to enable provisionally registered swap dealers, which include all swap dealers not subject to a prudential regulator, to become permanently registered.[66] As such, they mark an important milestone for the Commission, in addition to the adoption of speculative position limits, in finalizing a decade-long process of implementing fully the Dodd-Frank Act.

4. Amendments Relating to Form CPO-PQR

During 2020, the Commission revisited Form CPO-PQR, easing certain of the burdens or simplifying the requirements associated with that report.[67] In addition, the Commission is requiring that the revised form be filed quarterly by all reportable CPOs, regardless of the amount of assets under management. Finally, to reduce duplication, the Commission is permitting the filing of NFA Form PQR to substitute for compliance with the CFTC Form CPO-PQR, but the Commission at the same time eliminated the possibility for a dually registered CPO-investment advisor to complete Joint Form PF in lieu of the CFTC's form, as revised. All reporting CPOs must file a revised form by May 30, 2021, for the first calendar quarter of 2021.

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[65] In order to be defined as a nonfinancial entity, the swap dealer must be predominantly engaged in nonfinancial activities, which means that its

> (1) consolidated annual gross financial revenue in either of its two most recently completed fiscal years (or if the swap dealer is wholly owned subsidiary, the consolidated total financial assets of the swap dealer's parent) represents less than 15% of the swap dealer's consolidated gross revenue in that fiscal year (15% revenue test),Revenue Test); and (2) consolidated total financial assets at the end of its two most recently completed fiscal years (or if the swap dealer is a wholly owned subsidiary, the consolidated total financial assets of the swap dealer's parent) represent less than 15% of the consolidated total assets as of the end of the fiscal year (15% asset test). Asset Test).

Id. at 57,499.

[66] Currently, CFTC provisionally registered swap dealers are a diverse group including: (1) FCMs, (2) SEC-registered broker-dealers, (3) nonbank affiliates of banks, (4) nonbank financial services entities, (5) swap dealer affiliates of commercial entities and (6) commercial entities that engage in swap dealing. Banks that are swap dealers that are prudentially regulated are not registered with CFTC and are not subject to the final rules.

[67] Compliance Requirements for Commodity Pool Operators on Form CPO-PQR, 85 Fed. Reg. 71,772 (Nov. 10, 2020).

5. Reporting

The Commission during 2020 revisited its reporting rules, significantly amending reporting requirements relating to swap data repositories (SDRs) (Part 49), real-time reporting (Part 43), and reporting of creation and continuation data (Part 45). The key aspects of the rules (1) replace the rules' previous set of data elements with data elements that are harmonized internationally; (2) provide the means to ensure that the data reported to the SDR is accurate; and (3) establish appropriate time delays for large, market-moving swaps.

The key changes to the SDR reporting rules aim largely at providing the SDR, and thus ultimately the Commission, with the means and authority to ensure that accurate data is reported. Under the final rules, SDRs are responsible for providing their swap data to reporting parties (or their designated third-party agents) to engage in the regular verification process. SDRs are also responsible for reporting corrections of errors, as appropriate, to the public and the Commission. Finally, the SDRs are also obligated to take on a surveillance role on behalf of the Commission periodically and episodically and to notify the Commission of any untimely reporting of Part 43 data.[68]

The most significant change to the real-time reporting rules is to the amendment of the appendix listing the data elements to be reported. These were agreed on through a multiyear, multinational effort across multiple working groups. Despite the cost of coming into compliance with the amended data elements, because the new list of elements will be common to multiple jurisdictions, it should make it considerably easier in the long run for global firms to comply and for various jurisdictions to share swaps data.

Also, under the final rules, the DCMs, SEFs and reporting counterparties are now responsible for correcting any errors as soon as technologically practicable, but no later than seven days from discovery, and to report the failure to do so to the director of the Division of Market Oversight. Non-reporting parties also have obligations to report errors, but to the reporting party (or to the DCM or the SEF if the reporting party is not known to the non-reporting party).

The time delay for reporting block trades has also been amended. The final rules define block trades and large notional off-facility swaps and provide for delays for dissemination of real-time information for these large, potentially market-moving trades.[69] For block trades executed on or

[68] In furtherance of this surveillance obligation, the SDR must "routinely monitor, screen, and analyze SDR data for the purpose of any standing swap surveillance objectives that the Commission may establish as well as perform specific monitoring, screening, and analysis tasks based on ad hoc requests by the Commission." Regulation 49.3(a), 17 C.F.R. § 49.3(a).

[69] A block trade is defined as a publicly reportable swap that (1) is listed on a SEF/DCM; (2) onSEF, or pursuant to the rules of the SEF or DCM; (3) has a notional or principal amount at or above the minimum block sizes; and (4) is reported by a SEF or DCM pursuant to the CFTC's rules. Large notional off-facility swaps are of an amount at or above the appropriate minimum block size but are not block trades (i.e., not executed on SEF, or subject to the rules of a SEF or DCM).

subject to the rules of a SEF or a DCM, the time delay is 15 minutes from execution. Generally, large notional off-facility swaps subject to the mandatory clearing requirement that are cleared and for which one party is a swap dealer also have a 15-minute delayed publication. If neither party is a swap dealer, the delay is one hour from execution. For rate, credit, foreign exchange or equity asset swaps that are not required to be cleared and for which at least one counterparty is a swap dealer, there is a 30-minute delay. For other commodity swaps (not subject to a clearing requirement) with a swap dealer counterparty, the delay is two hours. And other large notional off-facility swaps that are not subject to clearing or have swap dealer counterparties are subject to a 24-hour delay.

There are several key changes to the Part 45 rules as well. As with the real-time reporting rules, the Part 45 required data elements were also amended, and DCMs, SEFs and reporting parties are required to correct errors as soon as technically practicable, but within seven days; non-reporting parties must correct errors in no longer than three days; and DCMs, SEFs and reporting parties are now required to engage regularly in a verification process (monthly for swap dealers and DCOs, otherwise quarterly) in the form and manner required by the SDR. Reporting parties must also maintain a verification log that records all their verifications.

DCMs, SEFs, DCOs and reporting parties are also required to report this data in accordance with the validation standards established by the SDR. If they are successful in doing so, they will receive a validation notification from the SDR indicating that their swap data is consistent with the requirements. Importantly, if the DCMs, SEFs, DCOs and RPs do not receive this validation confirmation, they have not met their regulatory obligation to report and must resubmit until the SDR indicates that they have met the requirements. This change is a significant one, since it means that the failure to meet the SDR's obligations amounts to a regulatory failure.

G. Security-Based Swap Rules

Although security-based swaps are under the jurisdiction of the SEC and not the CFTC, futures and derivatives practitioners should be aware of the major development during 2020 relating to these instruments. The SEC's security-based swap dealer (SBSD) rules have finally been issued, and a large amount of work will be required in order to comply. The rules represent the culmination of many years of work by the SEC implementing its Dodd-Frank mandate, and they begin the clock for participants that meet the definition of an SBSD or a major security-based swap participant to register with the SEC.

Implementation of the SEC swap dealer rules will require a detailed impact assessment at the rule provision level. While the security-based swap dealer regulatory framework is different in certain key respects, firms can use their current CFTC swap dealer program as a reference point and drive actions based on the differences. Some of the SEC rules will set a higher bar (e.g., record retention for recorded conversations), a similar standard (e.g., cross-border application) or a lower bar (e.g.,

offering scenario analysis and mid-market marks to clients) than the CFTC rules, which may be a useful way of articulating the program of work to senior stakeholders.

The SEC's SBSD and major security-based swap participant registration compliance date is October 6, 2021. For more information regarding preparing for security-based swap registration, see, "Preparing for Security-based Swap Dealer Registration: Comparing SEC & CFTC Regulatory Requirements."[70]

IV. Looking Ahead to 2021

After an extended period of continuity, Commission leadership and direction will experience a change with the election of President Biden. Unified government, with both houses of Congress under control of the same political party, potentially will have a great or a greater impact on the future direction of the Commission. Foremost, we can expect to see movement on reauthorizing the Commission once the more pressing issues facing the nation have been addressed.

While there has been speculation as to who will be nominated as the Commission's new chair, no formal nomination has been made as of the publication of this article. However, this pending change in leadership is likely to lead to new directions and new emphasis in the Commission's regulatory program. As the Commission largely has completed its implementation of the Dodd-Frank Act, we expect that the incoming chair will be free to set new goals and a new agenda for the Commission. We expect that climate issues will be on the Commission's agenda going forward. Commissioner Behnam, now Acting Chairman Behnam, hosted a meeting of the Market Risk Advisory Committee on July 21, 2020, which included a status update from the subcommittee on climate-related market risk.[71] The February 21 meeting is slated to discuss this issue again. We expect that this issue will continue to be a focus of Commission attention in the coming year, in alignment with the priorities of the new administration.

We also expect issues of diversity and inclusion to be a Commission focus in the coming year. This may take a number of forms, including a renewed look at the governance of registered entities.

With regard to structural issues facing the industry, the increasing concentration of FCMs has been an issue of growing unease. We expect that this issue will continue to be of concern to the Commission, with increased attention paid to it in the coming year. We expect that the evolving area of crypto assets will continue to be a focus both for the development of further regulatory responses and for the Commission's enforcement program. As the effects of Brexit become more

[70] Bruce H. Newman, Aaron Friedman, Allen Meyer and Tammi Ling, *Client Alerts: Preparing for Security-based Swap Dealer Registration: Comparing SEC & CFTC Regulatory Requirements*, WilmerHale (Sept. 8, 2020).

[71] Transcript of Market Research Advisory Committee CFTC Teleconference (July 21, 2020).

apparent and settled, we are likely to see renewed consideration of how the Commission's rules impact or are impacted by regulators in other jurisdictions, and we expect that international regulators will have renewed energy to address cross-border issues unrelated to Brexit.

It is likely that the enforcement program will continue on its current trajectory. The Division of Enforcement remained active throughout the Trump Administration, and we expect that the program will continue that approach under President Biden. We expect the Commission will continue to aggressively pursue potentially manipulative or disruptive trading practices, including through expanding the use of its authority under Regulation 180.1, and to expand its foreign corrupt practices initiative. Beyond these high-level priorities, any changes in focus are likely to be within the domain of the director of enforcement, who has yet to be named. The recent trend has been to nominate enforcement directors with prosecutorial experience from outside the Commission. The ultimate director's biography and experience may provide some insights into his or her priorities, though the long-standing tenure of leadership below the deputy level suggests that the program's focus will not change significantly under new leadership.

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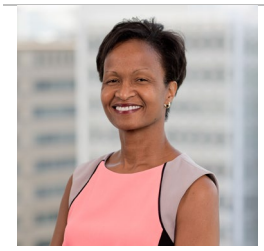

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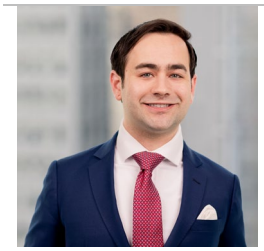

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