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Climate Regs Expected To Lead CFTC Policy Agenda In 2021

By **Tom Zanki**

Law360 (January 3, 2021, 12:02 PM EST) -- The U.S. Commodity Futures Trading Commission is expected to focus on mitigating climate risks under Democratic leadership in 2021, an agenda consistent with Biden administration priorities that will likely require collaboration with other regulators.

The CFTC, which will have a Democratic chair this year for the first time since the Obama administration, could also delve deeper into digital currency regulation or revisit recent rulemaking, attorneys say. Wholesale change appears unlikely as Republicans, at least for the time being, still have a 3-2 edge on the commission.

Current chairman Heath Tarbert plans to step down from his role as chairman in early 2021, which will enable President-elect Joe Biden to pick a new leader. But Tarbert is reportedly planning to continue serving on the commission until he decides his next move. That could leave the agency in Republican hands until 2022 or sooner, depending on when vacancies arise. The president's party can fill up to three CFTC seats.

Yet the chairperson is influential in shaping the agency's agenda. The CFTC has already signaled that climate policy should take greater priority, as evidenced by a September subcommittee report outlining threats posed by climate change on U.S. financial markets.

Such efforts would align with the goals of Biden, who has pledged that the U.S. will rejoin the Paris Agreement, an international pact that aims to restrain rising global temperatures. President Trump pulled the U.S. out of the pact in 2017, citing sovereignty concerns.

"Climate change and everything around it is going to be a huge focus of the Biden administration," said Gabe Rosenberg, a partner in Davis Polk & Wardwell LLP's financial institutions and regulations group. "So it would not be surprising to see the CFTC follow in those footsteps."

What route the CFTC will take is not clear, though the report, sponsored by Democratic commissioner Rostin Behnam, offers clues. The 196-page treatise recommends the CFTC and other regulators require market participants include climate risks in their stress testing.

The report presumes that cooperation among agencies will be needed given the jurisdictions involved in U.S. financial regulation. It also calls on the Financial Stability Oversight Council, which was created by the Dodd-Frank Act to monitor threats to U.S. financial markets, to increase oversight of climate risks and provide reports to Congress.

"A lot of it requires action outside of the CFTC, but I think the agency is ready to join in on discussion and provide regulations for their registered entities as necessary," said Covington & Burling LLP counsel Anne Termine, a former chief trial attorney in the CFTC's enforcement division.

Rosenberg added that the CFTC could increase oversight of carbon derivatives trading, an area within its jurisdiction. The report also urges the CFTC to review whether its capital and margin requirements on futures merchants and swap dealers should be bolstered to factor climate risks.

Discussion will likely unfold as the year progresses. Steptoe & Johnson LLP partner Matthew Kulkin said he expects the CFTC's climate-related market risk subcommittee that generated the report to be more active, issuing more white papers and advising regulators what steps to take.

"I would expect they will take their September 2020 report and start to drill down into some of the recommendations," said Kulkin, a former director of the CFTC's Division of Swap Dealer and Intermediary Oversight.

In terms of other policy priorities, the CFTC is likely to focus on digital assets trading. Kulkin said many issues regarding market structure remain unresolved, plus the CFTC will have to implement its 2020 guidance explaining what constitutes actual delivery of virtual currencies.

The guidance affects trading platforms, custodians and other market participants that enter into transactions involving digital assets like bitcoin. The CFTC since 2015 has maintained that bitcoin and other virtual currencies are commodities and therefore come under its purview.

"As virtual currency derivatives in particular continue to grow in popularity, I think the CFTC will face more and more questions from market operators and market participants about how to conduct their business in a compliant manner," Kulkin said.

The CFTC's enforcement division, coming off a busy 2020, is likely to keep heat on the cryptocurrency sector and investigate illegal trading. Kobre & Kim LLP defense litigator David McGill said he expects the CFTC to continue collaborating with the U.S. Department of Justice, which is cracking down on fraudulent cryptocurrency activity.

Attorneys also note that the CFTC may revisit a recent flurry of rulemaking in 2020 under Tarbert, some of which was enacted on party-line votes as Democrats argued the rules weren't tough enough on large banks and institutions. Tarbert made it his goal to finalize rulemaking mandates stemming from the landmark Dodd-Frank Act, which has occupied CFTC efforts since 2010.

For now at least, any action to toughen regulations will require at least one Republican vote. Democrats can take a 3-2 edge on the agency when the next vacancy arises, possibly soon. Republican Commissioner Brian Quintenz's term officially ended in April, though he can stay until Jan. 3, 2022. Tarbert's five-year term ends in 2024, but he is expected to depart before then.

Rosenberg said CFTC actions in 2020 governing cross-border swaps and its enactment of position limits on commodity derivatives, which are intended to deter harmful speculation, could be reexamined at some point. Both measures passed narrowly, with Democrats dissenting.

But attorneys say any changes are likely to be incremental. The CFTC is not expected to take up an ambitious agenda like it did a decade ago, when Obama appointee Gary Gensler implemented massive rules required by Dodd-Frank after the financial crisis.

With that work mostly in the rearview mirror, attorneys expect that rulemaking will be less sweeping and the CFTC will return to its traditional role of monitoring and regulating markets.

"There are not going to be an enormous number of entirely new rules being passed," Rosenberg said.

--Editing by Adam LoBelia.