

CFTC ENFORCEMENT AND REGULATORY REPORT: 2020 IN REVIEW AND 2021 OUTLOOK¹

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I. INTRODUCTION

The U.S. Commodity Futures Trading Commission (the “CFTC” or the “Commission”) has had a very active year in 2020. Throughout 2020, the agency worked diligently to implement the regulatory and enforcement priorities of Republican Chairman Heath P. Tarbert. In particular, the Division of Enforcement (“CFTC Enforcement” or the “Division”) saw the highest volume of enforcement actions in the Commission’s history, demonstrating the commitment to enforcement of both Chairman Tarbert and outgoing CFTC Enforcement Director James McDonald. The Commission also finalized a number of major regulatory developments in 2020, including its long-awaited rule imposing position limits for derivatives. This report describes recent activity by CFTC Enforcement, focusing on its activities during the CFTC’s Fiscal Year 2020 running from October 1, 2019 through September 30, 2020. The report also provides highlights on significant regulatory developments during the year, and looks ahead at possible priorities for

¹ The information contained in this article is not intended as legal advice. Readers should seek specific legal advice before acting with regard to the subjects mentioned herein.

the Commission under the Biden Administration.

II. THEMES IN ENFORCEMENT

A. ENFORCEMENT OVERVIEW

In 2020, CFTC Enforcement filed 113 separate actions during the Fiscal Year, which was the most in its history.² Its activities resulted in orders directing total monetary relief of over \$1.3 billion. This represents the fourth-highest total in any year in the Commission's history, and the highest total since Fiscal Year 2015.³ The Division described its enforcement efforts throughout the year as "further[ing] the agency's broader mission to promote the integrity, resilience, and vibrancy of the U.S. derivatives markets through sound regulation and the strategic goal of being tough on those who break the rules."⁴

This active enforcement year ended with the Division entering a period of transition. In October, Enforcement Director James McDonald announced his plans to depart the agency; he is being replaced by Principal Deputy Director Vincent McGonagle, who will manage the Division in an acting capacity.⁵ Mr. McGonagle is a long-time senior agency official and has served as Acting Director of Enforcement on a few occasions in his decades-long career at the CFTC.⁶ And, this robust activity had as its backdrop an election year, ultimately resulting in a change in administration taking place in early 2021. With the new Biden Administration will come adjustments in CFTC leadership and potentially new enforcement priorities.

Consistent with historical trends, the closing weeks of the Fiscal Year were particularly busy for CFTC Enforcement, with the Division bringing a disproportionate number of its actions dur-

ing this time. It filed 57 actions in September 2020 alone, as compared with 24 across all of June, July, and August. While such a flurry of enforcement actions to close the Fiscal Year is not a historical anomaly, it may also have reflected work by Enforcement staff in advance of the anticipated departure of Director McDonald at the close of the Fiscal Year.

Notably, CFTC Enforcement appears to have brought actions without settlement at a higher-than-normal rate. The Division brought 33 actions as civil complaints in federal court, rather than through administrative proceedings. Of its 86 administrative enforcement actions, 20 were complaints, rather than consent orders settling proceedings against the respondent. As a result, Enforcement staff in 2021 will be left with a large volume of ongoing litigation. This could ultimately lead to resource and personnel constraints on the Division and its fewer than 150 staffers in at least the first half of 2021.

B. ENFORCEMENT GUIDANCE

In keeping with the Commission's commitment to transparency, as Commissioner Tarbert has emphasized,⁷ the CFTC released two significant guidance documents in 2020 describing decision-making processes within the Division of Enforcement.

1. Civil Monetary Penalty Guidance

In May, the Commission published formal guidance for staff to consider when recommending civil monetary penalties in enforcement actions ("CMP Guidance").⁸ This written guidance—the first guidance from the CFTC on civil monetary penalties since 1994⁹—describes qualitative factors that formulate into CMP recom-

mendations but does not provide any specific guidance on how penalty amounts are actually calculated. The CMP Guidance is emblematic of the Division's recent efforts to provide greater transparency around its enforcement program, including the Division publishing its Enforcement Manual for the first time in 2019.¹⁰ In remarks shortly after the release of the guidance, Director McDonald explained its dual purposes of deterring misconduct and providing "clear statements about how and why enforcement authorities punish."¹¹

The CMP Guidance instructs Division of Enforcement staff to consider three categories of factors. First, staff must consider the gravity of the violation, including the nature and scope of violations, willful or intentional conduct, and attendant consequences.¹² Second, staff must consider mitigating or aggravating circumstances, including post-violation conduct, self-reporting, remediation efforts and timeliness, and pervasiveness of misconduct within an organization.¹³ Third, staff should take into account a catchall category of other considerations, which may include considerations from parallel actions against the enforcement target, precedent from monetary and non-monetary relief imposed in analogous cases, and the conservation of Commission resources, including timely settlement.¹⁴

This guidance does not reflect new policies by the Division but instead communicates practices that the Division regularly employs in its investigations and settlements when evaluating potential mitigating or aggravating factors in a proposed settlement. The CMP Guidance does emphasize, however, the Division's *expectation* that cooperation will be given, a self-report of violations will be made, and remediation will occur in an en-

forcement investigation. This guidance, along with prior published Division advisories, offer the promise of a "substantial reduction" in the penalties assessed, in return for significant cooperation, early self-reporting, and full remediation.¹⁵ Further, by publishing the CMP Guidance and including it in the Enforcement Manual, the Division has codified the CMP Guidance as an official part of the Enforcement Program, underscoring the expectation that current and future staffers will employ these factors in determining an appropriate penalty. The factors discussed in this document are not revolutionary, but they do commit the CFTC to a process for reaching settlement decisions.

2. Corporate Compliance Program Guidance

In September, CFTC Enforcement published guidance for evaluating compliance programs in connection with enforcement inquiries.¹⁶ The guidance, promulgated as part of the CFTC's enforcement manual, is the first of its kind. It builds off of a provision of the CMP Guidance that directs Enforcement staff to consider as possible mitigating or aggravating factor the "[e]xistence and effectiveness of [a] company's pre-existing compliance program," as well as a company's "efforts to improve a compliance program" after the occurrence of a violation.¹⁷

The compliance program guidance directs Enforcement staff to consider a number of factors in evaluating the performance of a corporate compliance program. Specifically, under the guidance, the Division of Enforcement will consider whether a program was reasonably designed and implemented to prevent the underlying misconduct, monitor for and detect misconduct, and remediate misconduct.¹⁸ To evaluate

each of these, the Division must conduct a risk-based analysis that takes into account various factors including the entity involved, its role in the market, and the potential impact of the underlying misconduct on markets or customers.¹⁹

Under the guidance, compliance programs must be iterative, rather than static, in nature.²⁰ The guidance will place a focus on how a compliance program evolves alongside changes in business. This approach aligns with that of the Department of Justice (DOJ) in its own framework for evaluating corporate compliance programs.²¹ Corporations can use this guidance, along with the more specific and detailed version provided by DOJ as a roadmap to test and review their current systems and controls. Such a review, if documented and memorialized, will assist in addressing CFTC Enforcement questions about the sufficiency and effectiveness of a compliance program in an enforcement action.

C. DATA ANALYTICS PROGRAM

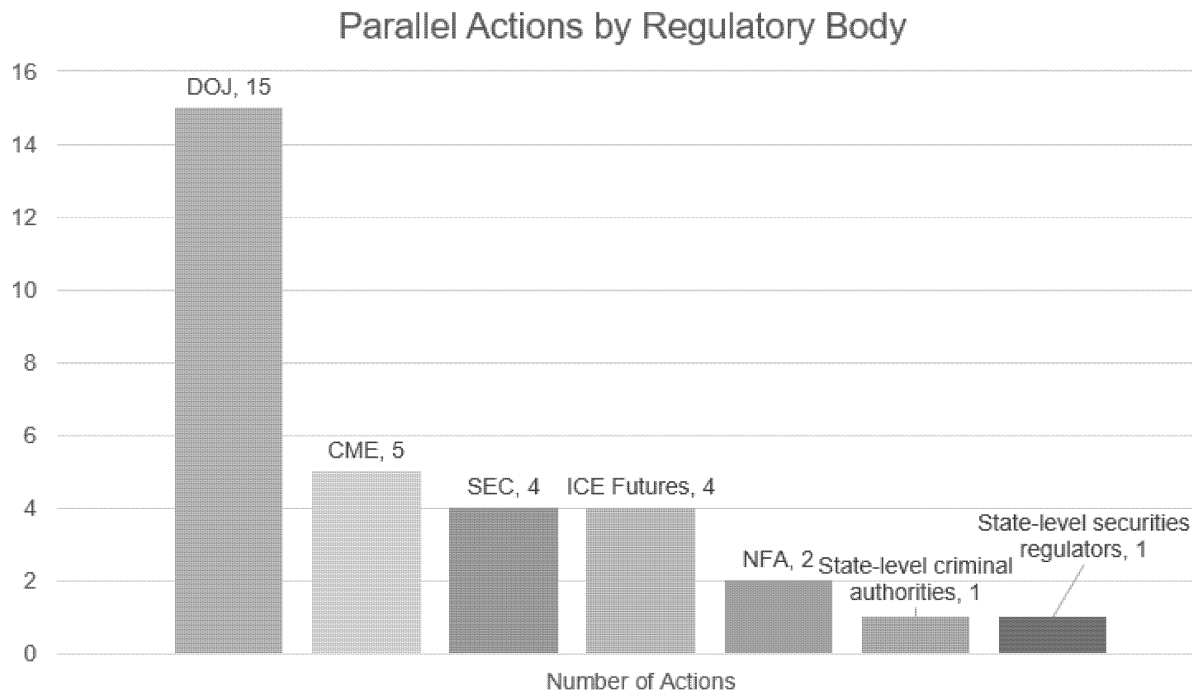
A long-term priority of the Division emphasized during Director McDonald's tenure is the use of data analytics in enforcement to ensure market integrity. The CFTC receives troves of data from market participants and from the exchanges it oversees, and much of this data is made available to CFTC Enforcement's surveillance staff, a group of experienced economic investigators. In the years since the financial crisis of 2008 to 2010, the CFTC has expended significant resources to expand its capabilities to identify market disruptive behavior, such as manipulative trading schemes or spoofing, in the data it receives by investing in experienced personnel and developing proprietary software. The Division publicized the use of its improved

surveillance programs a number of times in enforcement actions in 2020, as it has in the past.²² It cited its ability to obtain and review trading data, its use of investigative personnel with legitimate market experience, and its proprietary surveillance programs, which all allow it to examine data in a near-real time manner. In at least one instance, the Division indicated that its data analytics improvements allowed it to bring an enforcement action that it could not have brought using previous analytics technology: the Division had previously examined the relevant conduct with older analytics technology and concluded that it lacked sufficient evidence to commence enforcement proceedings, but the Division's modernized analytics capabilities enabled it to collect enough evidence of misconduct to bring a successful enforcement action. The ability to begin investigations and bring cases off of its in-house data analytics will be an ongoing trend for CFTC Enforcement.

D. COOPERATION WITH OTHER AGENCIES

The Division continued its trend in recent years of increased levels of cooperation with other agencies in investigating and bringing enforcement actions. Throughout the Fiscal Year, 16 enforcement actions came with parallel criminal actions, which tied the previous year's volume and slightly exceeded the 14 instances in Fiscal Year 2018.²³ In addition to cooperation with criminal authorities, the Division also brought actions in tandem with the Securities and Exchange Commission (SEC), the National Futures Association (NFA), the Chicago Mercantile Exchange, Intercontinental Exchange Futures US, and a number of state regulators. These parallel actions account for nearly one-third of

all the cases brought by CFTC Enforcement in 2020.



CFTC Enforcement also has ongoing information-sharing agreements with many domestic²⁴ and foreign authorities,²⁵ regularly receives assistance from foreign authorities in obtaining investigative material from foreign enforcement targets, and has even detailed Enforcement attorneys to DOJ to assist in investigating and bringing criminal cases involving spoofing. The Division is certain to continue this trend of cooperation with other government agencies in future investigations and enforcement proceedings in 2021 and years to come.

E. WHISTLEBLOWER OFFICE

The CFTC’s whistleblower program has maintained an active role since its creation in 2014. The program permits monetary awards to individuals who provide the CFTC with information that leads to successful enforcement by the CFTC

or other regulators.²⁶ Whistleblower awards range from 10–30% of monetary sanctions collected through enforcement proceedings.²⁷ The CFTC provides whistleblowers with anonymity protection and therefore divulges only the fact that an award was made (and in many cases, the amount of the award), rather than connecting the award to a particular enforcement action. The CFTC’s Whistleblower Office has been a significant source of investigative leads for the Enforcement program. Whistleblower complaints are submitted daily to the agency and have proven fruitful to the Division in bringing new cases and assisting in cases already underway.

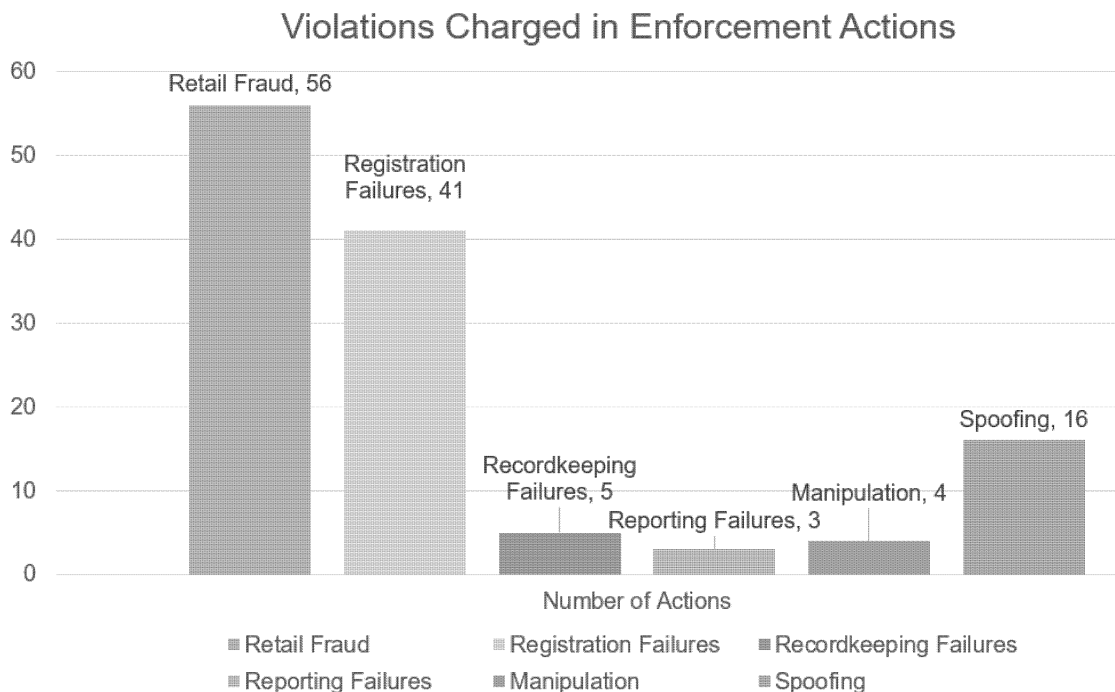
The whistleblower program continued to grow in 2020. Throughout the Fiscal Year, the CFTC made nine announcements of whistleblower awards, providing 14 total awards of more than \$25 million in the aggregate (although the CFTC

did not specify the amount of three of the 14 awards). By the end of the Fiscal Year, the whistleblower program had cumulatively awarded approximately \$120 million in awards since its creation in 2014.²⁸ During that time, CFTC enforcement actions associated with the awards resulted in monetary relief of nearly \$950 million. Just as whistleblower programs in other agencies, including the SEC and IRS, have enjoyed success,²⁹ CFTC Enforcement expects whistleblower complaints to continue to flow into the CFTC and the Division will be proactive in investigating these complaints and bringing enforcement cases stemming from them.

F. KEY CATEGORIES OF VIOLATIONS CHARGED

Enforcement actions throughout the year tar-

geted a number of areas that have traditionally formed the basis for CFTC enforcement actions. Key areas of focus include market manipulation (four cases brought), spoofing (16 cases brought), regulatory violations (41 cases brought), and retail fraud (56 cases brought).³⁰ What is striking from the cases brought in 2020 is the number of matters the Division filed in federal court, rather than settled administratively. With 33 federal civil complaints and 20 administrative complaints filed, the scant resources of CFTC Enforcement will be spread thin as they litigate these pending matters. This will not prevent the Division from bringing new investigations, but it may slow down the intensive pace for some period of time.



1. Market Manipulation

The CFTC brought four cases involving market manipulation, which generally aligns with historical levels. Cases involving manipulation are less frequently filed than other violations for a number of reasons. For instance, building a manipulation case may require months or years of information-gathering, whereas proving regulatory violations is less resource-intensive. While manipulation cases are less common than other types of enforcement actions, they are often quite significant and involve the highest penalties possible for the Division.³¹

The Division continued to be aggressive in charging this behavior, bringing charges under both its traditional price manipulation statute Section 9(a)(2)³² as well as its Dodd-Frank-expanded manipulation authority under Section 6(c)(1) and (3),³³ and related Regulations 180.1(a)(1) and (3), and 180.2.³⁴ Three of the four cases were also charged concurrently with spoofing violations under Section 4c(a)(5)(C) (also discussed below). In the two manipulation cases in which the Division brought charges under Section 9(a)(2), it did so to ensure the alleged conduct that occurred prior to 2011, when Section 6(c) took effect, was properly covered. In contrast, the CFTC used its enhanced authority under Section 6(c)(1) and Regulation 180.1(a) to police manipulation in every manipulation case that it brought. Whether this means that the CFTC will only use its traditional price manipulation statute in cases where the conduct extends back before the passage of Dodd-Frank remains to be seen. However, if the Division's data analytics are clear that an artificial price was or could have been created from the alleged manipulative conduct, CFTC Enforcement will at least consider bring-

ing a Section 9(a)(2) charge concurrently with Section 6(c)(1).

In addition to the above types of manipulation cases, CFTC Enforcement also interprets Section 6(c)(1) and Regulation 180.1 to include prohibitions against certain forms of insider trading.³⁵ While these cases are not as common as other enforcement actions and the Division did not bring a new case under this theory in 2020, the Commission has typically used these provisions in the past to charge insider trading on a misappropriation theory. In the future, the Division also may opt to bring actions under Section 6(c)(1) and Regulation 180.1 on a tipper-tippee theory of liability, which is closer to the common approach to insider trading cases in the securities context.

In 2021, the Division will continue to aggressively explore the outer bounds of the Commission's authority in bringing manipulation charges under the varied aspects of Section 6(c)(1) and Regulation 180.1. Thus far, these cases have been litigated very rarely, and the resultant lack of case law interpreting Section 6(c)(1) and Regulation 180.1 has contributed to the foggy contours of these authorities. Should the Division take an increasingly expansive view of these anti-manipulation powers, however, it could prompt market participants to take the rare step of challenging these powers through litigation.

2. Spoofing

CFTC Enforcement brought 16 actions citing spoofing under Section 4c(a)(5)(C), 7 U.S.C.A. § 6(a)(5)(C), including the three that, as noted above, were also charged as manipulative conduct. This is the same number of actions that the Division brought in 2019³⁶ and represents a downturn from the 26 spoofing cases brought in

2018.³⁷ Although the number of cases the Division has initiated has not increased, it has still been quite active in this area: the CFTC recouped record levels of relief in one spoofing and manipulation case.

Because of the importance of market evidence in proving spoofing violations, this area is one in which the Division's advances in data analytics have taken and will continue to take on significant importance. Spoofing charges generally require strong evidence of intent, such as emails or other communications, to show that the related murky market data is suggestive of a spoofing scheme. However, as data analytics improve, so too will the quality of trading-based evidence that the CFTC is able to glean, which may increase the ability of the CFTC to investigate and potentially bring matters based on the circumstantial evidence of the trading data. This clarity of trading evidence may gradually obviate the need for clear communications to prove intent in charging spoofing.

3. Regulatory Violations

Prosecuting regulatory violations continues to occupy a significant share of the Division of Enforcement's case load. Common violations include failure to register as an appropriate category of market participant (such as Futures Commission Merchant (FCM),³⁸ Commodity Pool Operator,³⁹ or a Commodity Trading Advisor (CTA))⁴⁰, failures to maintain adequate records,⁴¹ and failures to maintain adequate reporting systems.⁴² During Fiscal Year 2020, the Commission brought 41 actions alleging registration failures (nine of which involved illegal off-exchange transactions), five cases alleging recordkeeping failures, and three cases alleging reporting failures. Each of these figures repre-

sents an increase from the previous year. Registration failures in particular were high. These numbers came in part from a Division sweep, charging in a single day ten CTAs with standalone registration failures.⁴³

These violations are a mainstay for the Commission's enforcement efforts. This is perhaps in part due to the relative ease in proving these violations compared to other, more complex ones: these cases are *per se* violations and do not demand proof of intent. More importantly from the Division's perspective, they underscore the crucial role of proper systems and controls and emphasize the importance of both maintaining a strong compliance department and keeping up with regulatory requirements. These seemingly routine enforcement actions often carry significant penalties and compliance mandates that require ongoing improvements to systems and controls that must be reported back the Division, thereby extending the Division's close review of internal operations.

The ongoing emphasis on these type of cases suggests that market participants may consider conducting a review of current policies and procedures to ensure that they are in full compliance with applicable regulations, based on current business models and personnel. Such reviews are particularly relevant in light of recent regulatory developments, such as changes to rules governing swap trading and the imposition of new position limits on derivatives. As discussed below, the CFTC's output of rulemaking and other regulatory actions has matched its active enforcement pace this year. While there will be some grace period from enforcement after regulations take effect, this period is likely to be brief, and investigations and enforcement actions

will follow closely behind. With regulatory changes come the risk of penalties for companies that do not appropriately adapt their compliance infrastructure. The CFTC's active regulatory agenda is likely to continue in the future, meaning that in-house compliance reviews should be frequent and comprehensive.

4. Retail Fraud

The Division of Enforcement brought 56 actions involved allegations of retail fraud.⁴⁴ This volume was the highest in the Commission's history.⁴⁵ Fraudulent schemes at the heart of these actions involved a variety of commodities, including digital assets,⁴⁶ binary options,⁴⁷ foreign exchange transactions,⁴⁸ and precious metals.⁴⁹ The Commission also brought an enforcement sweep charging 14 entities with falsely claiming to be registered with the CFTC or members of the NFA, the self-regulatory body with designated registration authority from the CFTC.⁵⁰ These cases have long been a mainstay of CFTC enforcement and underscores the Commission's longstanding focus on investor protection and maintenance of market integrity.

G. SPECIAL TOPICS IN ENFORCEMENT

1. Digital Assets and Cryptocurrency

The CFTC continued its focus on developments in the world of digital assets and cryptocurrency in 2020. CFTC Enforcement was active here as well, bringing seven actions that involved substantive issues in digital assets. These included actions targeting illegal off-exchange transactions in digital assets and actions targeting registration failures by entities offering transactions in digital assets.⁵¹ The Division also brought

a landmark lawsuit in the digital assets space in October, charging a large cryptocurrency and derivatives exchange and its owners with a variety of regulatory failures and anti-money laundering violations.⁵² Its complaint alleged the exchange operated for years as an unregistered trading platform, illegally offering leveraged retail commodity transactions, futures, options, and swaps, and failed to observe attendant CFTC regulations, including implementation of procedures to detect and prevent manipulative trading activities and requirements to supervise commodity interest account handlings. The Commission also alleged that the exchange's failure to implement any policies or procedures, such as know-your-customer procedures, to comply with anti-money laundering requirements violated CFTC regulations mandating compliance with the Bank Secrecy Act. In developing the case, the CFTC worked in parallel with the U.S. Attorney's Office for the Southern District of New York, which brought simultaneous criminal indictments against the owners for Bank Secrecy Act violations.

The Commission will continue to be focused on digital assets for the foreseeable future. It has taken a strong position that many cryptocurrencies are commodities and therefore subject at least to the agency's enforcement authority over manipulation in commodity markets. Further, the development of the cryptocurrency derivatives markets, which are directly subject to the CFTC's jurisdiction, is still in the nascent stages. As these assets gain further market penetration and recognition from other regulators,⁵³ their importance in the financial sector will increase. With that increased prominence will come the possibility of more aggressive enforcement against misconduct in the digital assets markets. And, as dis-

cussed below, the Commission has taken steps this year to clarify the rules that apply to retail commodity transactions in digital assets, which is all but certain to provide the basis of future enforcement actions.

2. Foreign Corrupt Practices Enforcement

In March 2019, Director McDonald announced the Commission's plans to expand its enforcement focus on foreign corrupt practices for the first time.⁵⁴ Director McDonald acknowledged the Commission's cooperation in ongoing investigations with DOJ and the SEC, the agencies that have traditionally enforced the Foreign Corrupt Practices Act (FCPA).⁵⁵ At the same time, the Commission issued an Enforcement Advisory outlining the importance of self-reporting and cooperation in investigations of violations of the Commodity Exchange Act (CEA) involving foreign corrupt practices.⁵⁶ Since then, the CFTC had largely maintained silence on the issue. It did not bring enforcement actions centered on foreign corrupt practices in Fiscal Year 2019 or Fiscal Year 2020. Nor did agency leadership provide detailed public comment on enforcement developments in this area.

However, in December 2020, near the end of the first quarter of the CFTC's Fiscal Year 2021, the Commission brought its first-ever enforcement action on the basis of foreign corrupt practices. Working in parallel with DOJ and the United States Attorney's Office for the Eastern District of New York, the Commission filed and settled charges against a commodities trading firm, alleging the firm's involvement in a market manipulation scheme that involved foreign bribery and kickback payments. While the CFTC did not charge violations of the FCPA itself, it pointed

to the bribery and kickback payments as facts key to establishing violations of a broad span of charges under its manipulation authority in Section 6(c)(1), 7 U.S.C.A. § 9(c)(1), and Regulation 180.1(a), 17 C.F.R. § 180.1(a). Specifically, it charged the firm with violations of the prohibition on the use of manipulative or deceptive devices or contrivances under a number of theories, including engaging in manipulative trading activity, the use of misappropriated, nonpublic information, and obtaining improper preferential treatment through a corrupt payment scheme.⁵⁷

This case presents a roadmap of how CFTC Enforcement may bring similar cases involving facts that also violate the FCPA. It is also a clear demonstration of the power and flexibility of Section 6(c)(1) and Regulation 180.1 for the Division. This expansive manipulation authority allows the CFTC to bring cases in areas it would not reach previously, and provides a complement to DOJ FCPA actions where other agencies could not address related market behavior. While this enforcement action was the first of its kind, the Division is likely to bring additional cases in the near future and will continue to coordinate and cooperate with fellow law enforcement agencies on other foreign corrupt practices cases in the future.

3. Bank Secrecy Act and Anti-Money Laundering

The CFTC is one of many federal regulators tasked with enforcement of the Bank Secrecy Act (BSA) and related anti-money laundering (AML) regulations. While the Commission has not historically devoted major enforcement focus to this area, it nonetheless has policed BSA/AML compliance by commodity market participants in recent years. During Fiscal Year 2020, the Com-

mission brought three actions in this area, generally concerning intermediaries' failure to file Suspicious Activity Reports (SARs) and to conduct proper BSA oversight. In particular, one case during 2020 provided the first instance of the Commission charging violations of CFTC Regulation 42.2, 17 C.F.R. § 42.2, which imposes BSA/AML requirements on FCMs and Introducing Brokers.⁵⁸ The order settling the charges stated that the respondent had reason to suspect that certain transactions "had no business or lawful purpose, were not the sort in which the particular customers would normally be expected to engage, and/or involved the use of [the respondent] to facilitate criminal activity," triggering a duty to file SARs.⁵⁹ These cases reflect another emphasis on systems and controls, and companies should review and test current BSA policies and procedures for effectiveness, as this will be part of the review conducted by CFTC Enforcement in an investigation for like violations.

III. REGULATORY UPDATE

A. POSITION LIMITS FOR DERIVATIVES

In October, the Commission finalized a long-awaited rule imposing new federal position limits for derivatives, fulfilling one of the last remaining regulatory mandates under the Dodd-Frank Act.⁶⁰ The CFTC first adopted limits through a final rule promulgated in 2011.⁶¹ However, subsequent litigation challenging the rule prompted a federal district court to vacate most of the position limits rule in 2012 on administrative law grounds.⁶² The Commission attempted to restart the rulemaking process on position limits through proposals in 2013 and June 2016, and a re-

proposal in December 2016.⁶³ None of the three coalesced into a final rule.

Chairman Tarbert consistently maintained during his tenure that the Commission would achieve a final rule under his leadership.⁶⁴ In January 2020, the Commission unveiled a sweeping position limits proposed rule, which passed over sharp dissents from Commissioners Rostin Behnam and Dan M. Berkovitz.⁶⁵ In an October 15 open meeting, the Commission passed the final rule, once again over dissents from Commissioners Behnam and Berkovitz.⁶⁶ Unlike the 2011 final rule, the new rule stated in its preamble that the Commission made a series of formal findings of necessity as a prerequisite to the rule.⁶⁷ The absence of a necessity finding was a central aspect of the 2012 court ruling vacating the 2011 final rule,⁶⁸ and the presence of the necessity findings preceding the 2020 final rule could play a key role in prospective litigation challenging the rule.

The final rule imposes position limits on 25 physically delivered "core referenced futures contracts," along with associated contracts referenced in the rule and economically equivalent swaps.⁶⁹ The final rule enumerates exemptions from position limits, including through revisions to the regulations defining bona fide hedging positions.⁷⁰ Furthermore, the rule sets parameters that exchanges listing contracts subject to position limits must use in imposing their own position limits rules, and prescribes an expedited process for market participants seeking an exemption permitting hedging of futures contracts in a manner not enumerated under the rule.⁷¹

The final rule on position limits is set to take effect on March 15, 2021. Compliance with its

operative provisions will be required in two parts, first in January 2022 and then in January 2023. After these compliance dates have passed, market participants can expect the Commission to consider enforcement of the new position limits rules as an area of focus for the Division, as recent statements by Commissioners seem to suggest. During Fiscal Year 2020, the Commission brought only one enforcement action on the basis of the existing position limits rules, assessing a relatively small penalty based on alleged violations of position limits on live cattle futures.⁷² In a concurring statement, Commissioner Berkovitz described enforcement of position limits as “critical to prevent unwarranted price volatility and market manipulation.”⁷³ He went on to criticize the penalty levied in the action as too small, pointing to the recently published CMP guidance stating that penalties should aim to “deter misconduct before it happens” and that the Division of Enforcement should be “tough on those who break the rules while striving for fair and consistent outcomes in doing so.”⁷⁴ Commissioner Berkovitz described the penalty as “neither sufficient to meaningfully deter future position limit violations, nor . . . consistent with recent Commission precedent involving similar facts.”⁷⁵ Given the changeover to a Democratic-led Commission, as discussed below in Section IV, these statements potentially signal that more aggressive enforcement of position limits violations is to come in the future.

B. “ACTUAL DELIVERY” FOR DIGITAL ASSETS

In March 2020, the CFTC announced the finalization of interpretive guidance concerning certain retail transactions in digital assets, including cryptocurrencies.⁷⁶ The guidance describes the

Commission’s interpretation of provisions of the CEA that govern retail commodity transactions, as these provisions apply to transactions in digital assets. Under Section 2(c)(2)(D)(ii)(III)(aa) of the CEA,⁷⁷ an exemption from regulation as a futures contract is available for any contract “that results in *actual delivery* within 28 days or such longer period as the Commission may determine by rule or regulation”⁷⁸

The 2020 final guidance sought to clarify this application by expanding upon the 2017 proposed guidance, with a few changes. Under the final guidance, the Commission will use a two-part analysis to evaluate whether “actual delivery” has occurred. First, it will look to the degree of control and use that a customer has over the commodity, inquiring whether the customer has secured “(i) possession and control of the entire quantity of the commodity, whether it was purchased on margin, or using leverage, or any other financing arrangement, and (ii) the ability to use the entire quantity of the commodity freely in commerce (away from any particular execution venue) no later than 28 days from the date of the transaction and at all times thereafter”⁷⁹ Second, it will evaluate the degree of control or influence that an offeror, counterparty seller, affiliate, or other persons acting in concert maintain over the commodity, requiring that they “do not retain any interest in, legal right, or control over any of the commodity purchased on margin, leverage, or other financing arrangement at the expiration of 28 days from the date of the transaction.”⁸⁰ If both requirements are met, the Commission will take the view that “actual delivery” of the transaction has occurred. The final guidance also provides a series of five illustrative examples that describe specific transaction circumstances in which the Commission

would (or would not) take the position that “actual delivery” has occurred.⁸¹

While the guidance provided long-sought clarity surrounding the parameters of actual delivery, the Commission coupled it with a warning that enforcement efforts may follow. In a statement praising the passage of the final guidance, Chairman Tarbert stated that he “anticipate[s] that for a period of *90 days* the CFTC will forbear from initiating enforcement actions addressing aspects of this guidance that were not plainly evident from prior CFTC guidance, enforcement actions, and case law.”⁸² This statement contained an implicit expectation of the Commission that actors in the digital assets space would use the 90-day window to review their business models and ensure that their compliance operations adhered to the guidance. This window has since elapsed, CFTC Enforcement’s review of market participants for compliance is likely underway, and the Division will ultimately pursue enforcement actions if market participants’ efforts are insufficient or insincere.

C. SWAP TRADING UPDATES

In September, the CFTC unanimously passed a trio of final rules overhauling various swap trading requirements.⁸³ These rules imposed amendments to real-time public reporting requirements (contained in Part 43 of the CFTC’s regulations), swap data recordkeeping and reporting requirements (Part 45), and requirements for swap data repositories (SDRs) (Part 49).

The first rule amended CFTC regulations concerning real-time public reporting of swap pricing and transaction data to SDRs. The rule imposed increased thresholds for block trades, revised Appendix A in Part 43 to standardize the

list of swap terms that must be reported, created delay requirements for post-priced swaps, and added definitions to clarify aspects of prime brokerage swaps.⁸⁴

The second rule created a series of revisions to CFTC regulations for swap data reporting and recordkeeping requirements. In particular, the rule expanded reportable field requirements to encompass margin and collateral elements, which will thereby provide the Commission with access to uncleared margin data for the first time.⁸⁵ It also established 128 reporting fields, providing standardized practices to replace the individualized fields previously used across various SDRs.⁸⁶ Furthermore, the rule requires swap execution facilities (SEFs), designated contract markets (DCMs), and their counterparties to tender a unified swap creation data report, rather than providing data across multiple reports.⁸⁷

The third rule altered regulations applicable to the reporting of data to SDRs and applicable to SDRs themselves. Key provisions include the requirements that SDRs validate all swap transaction and pricing data they receive and that market participants verify the accuracy of their swap data regularly, as well as mandates on logging of verification and correction records relating to swap trades.⁸⁸

While the CFTC did not explicitly provide an enforcement grace period, as it did in issuing the actual delivery guidance, it will undoubtedly expect firms to update their compliance procedures to comport with these new rules. Any future violations may be met with less tolerance from the Division, as these updated rules were intended to ease reporting burdens. These three rules each take effect January 25, 2021. Compliance with

most of these provisions is required by May 25, 2022, although certain provisions of the real-time reporting requirements do not require compliance until May 25, 2023.

IV. OUTLOOK FOR THE CFTC UNDER A BIDEN ADMINISTRATION

With the election of Joseph R. Biden, Jr. to the presidency, the Commission will undergo significant change in its makeup and key personnel. These changes will affect the Commission's approach to both enforcement and rulemaking.

The Commission's most visible change will be to its membership. The Chairman's seat is expected to be filled by a Democrat, thereby flipping the Commission to a 3-2 Democratic majority. The day after the inauguration of President Biden, Republican Chairman Tarbert stepped down from his position and back into a Commissioner role, consistent with his announcement in December; it is expected that he will leave the agency in short order.⁸⁹ The same day, the CFTC Commissioners unanimously elected Commissioner Rostin Behnam, the longest serving Democratic commissioner, as Acting Chairman of the CFTC.⁹⁰ The eventual nomination for a permanent Chairman could fall upon either of the current Democratic Commissioners, (Commissioner Behnam and Commissioner Berkovitz),⁹¹ or someone from the outside the agency.⁹² In April 2020, Commissioner Brian D. Quintenz announced plans to leave his position in late 2020, but the CEA permits him to continue to serve until January 2023, (and does not preclude him from requesting to serve a second term).⁹³ The Biden Administration will nominate a Democrat to either fill the Chairman seat or the

Commissioner seat created by Tarbert's departure because no more than three members of the Commission may be members of the same political party.⁹⁴

This partisan shift will affect all of the Commission's activities. A Democratic-majority Commission could take aim at politically controversial rules that passed on narrow margins, such as the position limits final rule, swap dealer capital rules, and certain cross-border regulations. The newly constituted Commission could vote to roll back or rewrite these rules. A Democratic Congress could use the Congressional Review Act to block recent rulemakings from taking effect and prevent the CFTC from passing substantially similar rules in the future.⁹⁵

Leadership positions in many of the agency's operating Divisions and Offices will also change. The positions of Director of the Division of Enforcement, Director of the Office of Legislative and Intergovernmental Affairs, and the General Counsel are already vacant. It is likely that some or all of Directors of the Division of Market Participants, the Division of Market Oversight and the Office of International Affairs will depart. Regardless, turnover in any of these roles would be significant.

Under a Democratic-majority commission, the Division of Enforcement is likely to maintain or increase its intensive pace. Gary Gensler, who served as Chairman of the CFTC from mid-2009 through early 2014 and has recently been nominated for Chairman of the SEC, leads President-Elect Biden's transition team for financial services agencies, including the CFTC.⁹⁶ As CFTC Chairman, Gensler attracted a reputation for aggressive enforcement efforts, and he may play a

significant role in shaping the CFTC by recommending personnel in key positions with a similar appetite for enforcement.

Statements from the Democratic members of the Commission dissenting from enforcement actions may indicate policy preferences that will enjoy majority support under the Biden Administration. For instance, as discussed above, Commissioner Berkovitz has voiced support for more aggressive enforcement against position limits violations.⁹⁷ Additionally, throughout his tenure, Commissioner Berkovitz has lodged a number of dissents from decisions to grant waivers from the “bad actor” securities law disqualification.⁹⁸ While the Commission has granted these waivers in the past, this could change under the new administration. As a result of these Commission-wide changes, CFTC Enforcement is likely to continue or increase its recent trend of using an aggressive, DOJ-like model of enforcement, with a dogged focus on policing regulatory violations as well as market-wide conduct like manipulation.

V. CONCLUSION

The past year saw the CFTC set new records in bringing enforcement actions. The Commission also promulgated a number of major regulatory changes that will affect the commodities and derivatives markets for years to come. As the year came to a close, the results of the presidential election and the departures of key leadership at the Commission signaled significant changes to come. In 2021 and beyond, the Commission can be expected to adopt an even more active approach to both enforcement and rulemaking.

ENDNOTES:

²CFTC, *CFTC Division of Enforcement Issues Annual Report* (Dec. 1, 2020), <https://www.cftc.gov/PressRoom/PressReleases/8323-20> [hereinafter Annual Enforcement Report].

³*Id.* at 1, 9.

⁴*Id.* at 1.

⁵CFTC, *Enforcement Director James McDonald to Depart CFTC* (Oct. 6, 2020), <https://www.cftc.gov/PressRoom/PressReleases/8275-20>.

⁶Mr. McGonagle has also served as the appointed Director of the Division of Market Oversight. CFTC, *CFTC Announces Vincent A. McGonagle as Director of the Division of Market Oversight* (Sept. 16, 2013), <https://cftc.gov/PressRoom/PressReleases/6694-13>.

⁷CFTC, *Statement of Chairman Heath P. Tarbert Before the December 10, 2019 Open Meeting* (Dec. 10, 2019), <https://www.cftc.gov/PressRoom/SpeechesTestimony/tarbertstatement121019>.

⁸CFTC, *CFTC Division of Enforcement Issues Civil Monetary Penalty Guidance* (May 20, 2020), <https://www.cftc.gov/PressRoom/PressReleases/8165-20> [hereinafter CMP Guidance].

⁹CFTC Policy Statement Relating to the Commission’s Authority To Impose Civil Money Penalties, (1994 Transfer Binder) Comm. Fut. L. Rep. (CCH) ¶ 26,265 (Nov. 1, 1994).

¹⁰See CFTC, *CFTC Division of Enforcement Issues First Public Enforcement Manual* (May 8, 2019), <https://www.cftc.gov/PressRoom/PressReleases/7925-19>. In a statement connected to the publication of the Enforcement Manual, Director McDonald noted, “The decision to create and publish the Enforcement Manual was rooted in the common sense notion that our policies and procedures should be readily accessible to those affected by them.” CFTC, *Remarks of CFTC Director of Enforcement James M. McDonald at the 41st Annual Conference of the Future Industry Association’s Law & Compliance Division Conference* (May 8, 2019), <http://cftc.gov/PressRoom/SpeechesTestimony/opamcdonald3>. The CFTC’s publication of its Enforcement Manual

came years after the publication of similar documents by the SEC, which published its Enforcement Manual on October 6, 2008, and the DOJ Justice Manual, formerly called the United States Attorneys' Manual, has been published and regularly updated since 1953.

¹¹CFTC, *Remarks of CFTC Director of Enforcement James McDonald at Futures Industry Association Fireside Chat* (May 28, 2020), <https://www.cftc.gov/PressRoom/SpeechesTestimony/opamcdonald6>.

¹²CMP Guidance at 3.

¹³*Id.* at 3-4.

¹⁴*Id.* at 4.

¹⁵See September 2017 Self-Reporting Advisory at 2 (“Specifically, if a company or individual self-reports, fully cooperates, and remediates, the Division will recommend that the Commission consider a substantial reduction from the otherwise applicable civil monetary penalty.”).

¹⁶CFTC, *CFTC Issues Guidance on Factors Used in Evaluating Corporate Compliance Programs in Connection with Enforcement Matters* (Sept. 10, 2020), <https://www.cftc.gov/PressRoom/PressReleases/8235-20> [hereinafter *Corporate Compliance Guidance*].

¹⁷CMP Guidance at 3-4.

¹⁸Corporate Compliance Guidance at 2-3.

¹⁹*Id.* at 2.

²⁰See Dylan Tokar, *CFTC to Issue Guidance on Corporate Compliance Programs*, Wall Street Journal (Sept. 10, 2020), <https://www.wsj.com/articles/cftc-to-issue-guidance-on-corporate-compliance-programs-11599730200> (comments of Anne Termine).

²¹See Dep't of Justice, *Evaluation of Corporate Compliance Programs*, <https://www.justice.gov/criminal-fraud/page/file/937501/download> (last updated June 2020).

²²See, e.g., CFTC, *Speech of Enforcement Director James M. McDonald Regarding Enforcement trends at the CFTC, NYU School of Law: Program on Corporate Compliance & Enforcement* (Nov. 14, 2018), <https://www.cftc.gov/>

[PressRoom/SpeechesTestimony/opamcdonald1](https://www.cftc.gov/PressRoom/SpeechesTestimony/opamcdonald1).

²³Annual Enforcement Report at 9.

²⁴See, e.g., North American Securities Administrators Association, *CFTC NASAA Sign Agreement for Greater Information Sharing Between Federal Commodities and State Securities Regulators* (May 21, 2018), <https://www.nasaa.org/45123/cftc-nasaa-sign-agreement-for-greater-information-sharing-between-federal-commodities-and-state-securities-regulators/>.

²⁵CFTC, *CFTC and SEC Participant in the Signing Ceremony for the IOSCO Enhanced Multilateral MOU Concerning Cross-Border Enforcement* (May 20, 2019), <https://www.cftc.gov/PressRoom/PressReleases/7929-19> (describing signing of memorandum of understanding under which signatories “agree to new forms of assistance critical to effective enforcement, such as obtaining compelled testimony and obtaining asset freezes to protect customer funds, among other powers); see also Int'l Org. of Securities Comm'ns, *Enhanced Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information (EMMoU)*, <https://www.iosco.org/about/?subsection=emmou>.

²⁶CFTC Regulation 165.5, 17 C.F.R. § 165.5.

²⁷CFTC Regulation 165.8, 17 C.F.R. § 165.8.

²⁸CFTC, *CFTC Awards Whistleblower \$250,000* (Sept. 29, 2020), <https://cftc.gov/PressRoom/PressReleases/8262-20>.

²⁹See generally SEC, *2020 Annual Report to Congress: Whistleblower Program* (2020), https://www.sec.gov/files/2020%20Annual%20Report_0.pdf; IRS, *Whistleblower Program, Fiscal Year 2019, Annual Report to Congress* (Feb. 3, 2020), <https://www.irs.gov/pub/irs-pdf/p5241.pdf>.

³⁰The CFTC brought multiple types of charges concurrently in many enforcement actions. This means that double-counting may occur in some instances as each section below discusses individual types of charges, and the sum of cases described exceeds the year-end total of 113 actions.

³¹See 7 U.S.C.A. §§ 9, 13a, & 13a-1. A single

manipulation violation can result in a penalty of up to \$1,212,866, based on inflation-adjusted numbers. As CFTC Enforcement typically determines penalties on a per violation basis, the possibility for multi-million dollar fines is very high.

³²⁷ U.S.C.A. § 13(a)(2).

³³⁷ U.S.C.A. § 9(c)(1) & (3).

³⁴ 17 C.F.R. §§ 180.1(a)(1), (3) & 180.2.

³⁵ Heath Tarbert, *What Is Insider Trading In The Derivatives Markets?*, Law360 (Jan. 12, 2021), <https://www.law360.com/articles/1343854>.

³⁶ CFTC, *CFTC Division of Enforcement Issues Annual Report for FY 2019* (Nov. 25, 2019), <https://cftc.gov/PressRoom/PressReleases/8085-19>.

³⁷ CFTC, *Annual Report on the Division of Enforcement* at 11 (Nov. 2018), https://www.cftc.gov/sites/default/files/2018-11/ENFAnnualReport111418_0.pdf.

³⁸ CEA § 4d(a)(1), 7 U.S.C.A. § 6d(a)(1). For enforcement actions in this area, see, e.g., CFTC, *CFTC Charges Foreign Trading Platform with Offering Illegal Leveraged Transactions in Ether, Litecoin, and Bitcoin* (Sept. 28, 2020), <https://cftc.gov/PressRoom/PressReleases/8256-20>.

³⁹ CEA §§ 2(c)(2)(C)(iii)(I)(cc) & 4m(1), 7 U.S.C.A. §§ 2(c)(2)(C)(iii)(I)(cc) & 6m(1); CFTC Regulation 5.3(a)(2), 17 C.F.R. § 5.3(a)(2). For enforcement actions in this area, see, e.g., CFTC, *CFTC Charges 4 Florida Men, 1 New Jersey Man, and Their Companies in \$4.75 Million Forex Ponzi Scheme* (Sept. 16, 2020), <https://cftc.gov/PressRoom/PressReleases/8246-20>.

⁴⁰ CEA § 4m(1), 7 U.S.C.A. § 6m(1). The Commission brought a ten-case enforcement sweep targeting CTA failure registrations. Annual Enforcement Report at 4 n.7.

⁴¹ CEA § 4g, 7 U.S.C.A. § 6g.

⁴² See, e.g., CFTC Regulations 43 and 45, 17 C.F.R. pts. 43 & 45.

⁴³ CFTC, *CFTC Charges 10 Commodity Trading Advisors for Failing to Maintain NFA Mem-*

berships (Sept. 3, 2020), <https://cftc.gov/PressRoom/PressReleases/8232-20>.

⁴⁴ Many of these were brought concurrently with other charges, such as retail fraud.

⁴⁵ Annual Enforcement Report at 1.

⁴⁶ See, e.g., CFTC, *CFTC Charges 3 Texas Men and 1 Florida Man in Fraudulent Digital Asset Scheme* (Sept. 14, 2020), <https://cftc.gov/PressRoom/PressReleases/8241-20>.

⁴⁷ See, e.g., CFTC, *CFTC Charges 5 Canadians, 1 American, and 4 Companies in \$165 Million Global Binary Options Fraud Scheme* (Sept. 2, 2020), <https://cftc.gov/PressRoom/PressReleases/8231-20>.

⁴⁸ See, e.g., CFTC, *CFTC Charges 4 Florida Men, 1 New Jersey Man, and Their Companies in \$4.75 Million Forex Ponzi Scheme* (Sept. 16, 2020), <https://cftc.gov/PressRoom/PressReleases/8246-20>.

⁴⁹ See, e.g., CFTC, *CFTC Charges Georgia Company and Florida Residents with Precious Metals Fraud and Misappropriation of Nearly \$900,000* (July 16, 2020), <https://cftc.gov/PressRoom/PressReleases/8204-20>.

⁵⁰ CFTC, *CFTC Charges 20 Entities for Making False Registration Claims* (Sept. 1, 2020), <https://www.cftc.gov/PressRoom/PressReleases/8229-20>.

⁵¹ See, e.g., CFTC, *CFTC Sanctions Two Firms Offering Digital Asset-Based Swaps for Illegal Off-Exchange Trading and Registration Violations* (July 13, 2020), <https://cftc.gov/PressRoom/PressReleases/8201-20>.

⁵² CFTC, *CFTC Charges BitMEX Owners with Illegally Operating a Cryptocurrency Derivatives Trading Platform and Anti-Money Laundering Violations* (Oct. 1, 2020), <https://www.cftc.gov/PressRoom/PressReleases/8270-20>.

⁵³ See, e.g., Office of the Comptroller of the Currency, *Federally Chartered Banks and Thrifts May Provide Custody Services for Crypto Assets* (July 22, 2020), <https://www.occ.gov/news-issuances/news-releases/2020/nr-occ-2020-98.html>.

⁵⁴ CFTC, *Remarks of CFTC Director of Enforcement James M. McDonald at the American*

Bar Association's National Institute on White Collar Crime (Mar. 6, 2019), <https://www.cftc.gov/PressRoom/SpeechesTestimony/opamcdona1d2>.

⁵⁵*Id.*

⁵⁶CFTC, *Advisory on Self Reporting and Cooperation for CEA Violations Involving Foreign Corrupt Practices* (Mar. 6, 2019), <https://www.cftc.gov/sites/default/files/2019-03/enfadvisoryselfreporting030619.pdf>.

⁵⁷CFTC, *CFTC Orders Vitol Inc. to Pay \$95.7 Million for Corruption-Based Fraud and Attempted Manipulation* (Dec. 3, 2020), <https://www.cftc.gov/PressRoom/PressReleases/8326-20>. Section III of the CFTC's order, available for download at the right side of the press release webpage, sets forth the numerous ways in which the CFTC interpreted the firm's conduct to violate Section 6(c)(1) and Regulation 180.1.

⁵⁸CFTC, *CFTC Orders Interactive Brokers LLC to Pay More than \$12 Million for Anti-Money Laundering and Supervision Violations* (Aug. 10, 2020), <https://cftc.gov/PressRoom/PressReleases/8218-20>.

⁵⁹*Id.*

⁶⁰CFTC, *CFTC Finalizes Position Limits Rule at October 15 Open Meeting* (Oct. 15, 2020), <https://www.cftc.gov/PressRoom/PressReleases/8287-20>. Section 737 of Dodd-Frank amended Section 4a of the CEA to direct the CFTC to establish limits on speculative positions. Pub. L. No. 111-203, § 737, 124 Stat. 1377, 1722 (2010).

⁶¹CFTC, *Position Limits for Futures and Swaps*, 76 Fed. Reg. 71,626 (Nov. 18, 2011).

⁶²*International Swaps and Derivatives Ass'n v. U.S. Commodity Futures Trading Com'n*, 887 F. Supp. 2d 259, Comm. Fut. L. Rep. (CCH) ¶ 32313 (D.D.C. 2012).

⁶³CFTC, *Position Limits for Derivatives*, 78 Fed. Reg. 75,680 (Dec. 12, 2013); CFTC, *Position Limits for Derivatives: Certain Exemptions and Guidance*, 81 Fed. Reg. 38,458 (June 13, 2016); CFTC, *Position Limits for Derivatives*, 81 Fed. Reg. 96704 (Dec. 30, 2016).

⁶⁴*See, e.g.,* CFTC, *Statement of Chairman*

Heath P. Tarbert in Support of Proposed Rule on Speculative Position Limits (Jan. 30, 2020), <https://www.cftc.gov/PressRoom/SpeechesTestimony/tarbertstatement013020>.

⁶⁵CFTC, *CFTC Approves Two Proposed Rules at January 30 Open Meeting* (Jan. 30, 2020), <https://www.cftc.gov/PressRoom/PressReleases/8112-20>; CFTC, *Statement of Dissent by Commissioner Rostin Behnam Regarding Position Limits for Derivatives; Proposed Rule* (Jan. 30, 2020), <https://www.cftc.gov/PressRoom/SpeechesTestimony/behnamstatement013020>; CFTC, *Dissenting Statement of Commissioner Dan M. Berkovitz Regarding Proposed Rule on Position Limits for Derivatives* (Jan. 30, 2020), <https://www.cftc.gov/PressRoom/SpeechesTestimony/berkovitzstatement013020b>.

⁶⁶CFTC, *CFTC Finalizes Position Limits Rule at October 15 Open Meeting* (Oct. 15, 2020), <https://www.cftc.gov/PressRoom/PressReleases/8287-20>; CFTC, *Statement of Dissent of Commissioner Rostin Behnam Regarding Position Limits for Derivatives* (Oct. 15, 2020), <https://www.cftc.gov/PressRoom/SpeechesTestimony/behnamstatement101520c>; CFTC, *Dissenting Statement of Commissioner Dan M. Berkovitz Regarding Final Rule on Position Limits for Derivatives* (Oct. 15, 2020), <https://www.cftc.gov/PressRoom/SpeechesTestimony/berkovitzstatement101520b>.

⁶⁷*See generally* 2020 Final Rule Voting Draft at §§ III.(c)-(E).

⁶⁸887 F. Supp. 2d at 268.

⁶⁹2020 Final Rule Voting Draft at 37.

⁷⁰*Id.* at 11.

⁷¹The expedited process permits participants to apply directly to exchanges or to the Commission itself to obtain exemptions from the rule, although the Commission would retain authority to review and overturn an exchange's decision to grant an exemption. *See id.* at 22.

⁷²CFTC, *Mexican Meat Processor to Pay Fine for Violating Cattle Futures Speculative Position Limits* (Sept. 18, 2020), <https://www.cftc.gov/PressRoom/PressReleases/8248-20>.

⁷³CFTC, *Concurring Statement of Commis-*

sioner Dan M. Berkovitz Regarding *In re Sukarne SA de CV*, CFTC No. 20-60 (Sept. 18, 2020), <https://www.cftc.gov/PressRoom/SpeechesTestimony/berkovitzstatement091820>.

⁷⁴*Id.*

⁷⁵*Id.*

⁷⁶CFTC, *CFTC Issues Final Interpretive Guidance on Actual Delivery for Digital Assets* (Mar. 24, 2020), <https://www.cftc.gov/PressRoom/PressReleases/8139-20>.

⁷⁷ U.S.C.A. § 2(c)(2)(D)(ii)(III)(aa).

⁷⁸CEA § 2(c)(2)(D)(ii)(III)(aa), 7 U.S.C.A. § 2(c)(2)(D)(ii)(III)(aa) (emphasis added). While the Commission had previously provided guidance on the application of the “actual delivery” provisions to retail transactions in traditional commodities, it also acknowledged the ambiguity surrounding the law’s application to retail transactions in digital assets, including by seeking feedback from market participants on proposed guidance in late 2017. CFTC, *Retail Commodity Transactions Under Commodity Exchange Act*, 78 Fed. Reg. 52,426 (Aug. 23, 2013); CFTC, *Retail Commodity Transactions Involving Virtual Currency*, 82 Fed. Reg. 60,335 (Dec. 20, 2017).

⁷⁹CFTC, *Retail Commodity Transactions Involving Certain Digital Assets*, 85 Fed. Reg. 37,734, 37,742 (June 24, 2020).

⁸⁰*Id.* at 37,743.

⁸¹These examples generally exhibit a more flexible approach than that contained in the 2017 proposed guidance. For example, the final guidance rejects formalistic requirements in the proposed guidance that a customer must obtain a particular key or blockchain address in order to “possess or control” to the commodity. *See id.* at 37,738.

⁸²CFTC, *Statement of Chairman Heath P. Tarbert in Support of Interpretive Guidance on Actual Delivery for Digital Assets* (Mar. 24, 2020), <https://www.cftc.gov/PressRoom/SpeechesTestimony/tarbertstatement032420a> (emphasis added).

⁸³CFTC, *CFTC Finalizes Rules to Improve*

Swap Data Reporting, Approves Other Measures at September 17 Open Meeting (Sept. 17, 2020), <https://www.cftc.gov/PressRoom/PressReleases/8247-20>.

⁸⁴CFTC, *Real-Time Reporting Requirements*, 85 Fed. Reg. 75,422 (Nov. 25, 2020).

⁸⁵CFTC, *Swap Data Recordkeeping and Reporting Requirements*, 85 Fed. Reg. 75,503, 75,512 (Nov. 25, 2020).

⁸⁶*Id.* at 75,596.

⁸⁷*Id.* at 75,508.

⁸⁸CFTC, *Certain Swap Data Repository and Data Reporting Requirements*, 85 Fed. Reg. 75,601 (Nov. 25, 2020).

⁸⁹CFTC, *Heath P. Tarbert Concludes Historic Tenure as CFTC Chairman* (Jan. 21, 2021), <https://cftc.gov/PressRoom/PressReleases/8354-21>; *Statement of Chairman Heath P. Tarbert Announcing His Future Plans* (Dec. 10, 2020), <https://www.cftc.gov/PressRoom/SpeechesTestimony/tarbertstatement121020>.

⁹⁰In the event of a party change in the White House, the serving Chairman typically steps down or steps back to make room for a member of the President’s party. The Commissioners vote among themselves to determine who will be acting Chairman, and comity usually dictates that oldest serving member of the party in power will be voted Chairman. Commissioner Behnam has served as a Commissioner since September 2017. His term is set to expire in June 2021, although he may stay in the position for several years, until the end of the next Congress in January 2025. *See* 7 U.S.C.A. § 2(a)(2)(A)(ii).

⁹¹Commissioner Behnam likely has Congressional support, as he was formerly senior counsel to the soon-to-be chair of the Senate Agriculture Committee, Senator Debbie Stabenow (D-MI). Commissioner Berkovitz served as the CFTC’s General Counsel under former CFTC Chairman Gary Gensler during the passage and implementation of the Dodd-Frank Act. Gensler may advocate for his former General Counsel’s nomination to the CFTC Chairman position.

⁹²On January 21, 2021, multiple media re-

ports suggested that Christopher Brummer, Professor and Faculty Director of Georgetown University's Institute of International Economic Law, will be nominated by the Biden Administration to serve as Chairman of the CFTC. *See e.g.*, Jarrett Renshaw, Karen Brettell, Michelle Price, *Exclusive: CFTC chair steps down, academic Chris Brummer in lead to replace him—sources*, Reuters (Jan. 21, 2021), <https://www.reuters.com/article/us-usa-biden-cftc-exclusive/exclusive-cftc-chair-steps-down-academic-chris-brummer-in-lead-to-replace-him-sources-idUSKBN29Q2MT>. Brummer, who serves as a member of Biden's transition team for the Treasury Department, was previously nominated under the Obama administration to be a CFTC Commissioner, although that nomination was rescinded by the Trump administration. Brummer is an expert on financial technology, including digital assets, and, accordingly, a CFTC under his leadership is likely to focus on these issues if he becomes its Chairman.

⁹³CFTC, *Statement of Commissioner Brian D. Quintenz on the End of His Term and Future Plans* (Apr. 28, 2020), <https://www.cftc.gov/PressRoom/SpeechesTestimony/quintenzstatement042820>.

⁹⁴CEA § 2(a)(2)(A)(ii), 7 U.S.C.A. § 2(a)(2)(A)(ii).

⁹⁵*See* 5 U.S.C.A. § 801(b).

⁹⁶Alan Rappeport & Jeanna Smialek, *Biden's Transition Teams Suggest Tougher Wall Street Oversight*, N.Y. Times (Nov. 13, 2020), <https://www.nytimes.com/2020/11/13/us/politics/bidens-financial-transition-teams.html>; Biden-Harris Transition, Gary Gensler (Jan. 18, 2021), <https://buildbackbetter.gov/nominees-and-appointees/gary-gensler/>.

⁹⁷CFTC, *Concurring Statement of Commissioner Dan M. Berkovitz Regarding In re Sukarne SA de CV, CFTC No. 20-60* (Sept. 18, 2020), <https://www.cftc.gov/PressRoom/SpeechesTestimony/berkovitzstatement091820>.

⁹⁸*See, e.g.*, CFTC, *Dissenting Statement of Commissioner Dan. M. Berkovitz In re Tower Research Capital LLC: Waiver of SEC "Bad Actor" Disqualifications* (Nov. 7, 2019), <https://www.cftc.gov/PressRoom/SpeechesTestimony/berkovitzstatement110719>.