

CFTC: 2022 IN REVIEW AND A LOOK AHEAD

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I. OVERVIEW

The year 2022 was a historic year for the Commodity Futures Trading Commission (“CFTC” or the “Commission”). Just four days into the new year, on January 4, 2022, Rostin Behnam was sworn in as the CFTC’s 15th Chairman. Three months later, on March 28, 2022, the U.S. Senate approved four new Commissioners—Christy Goldsmith Romero, Kristin Johnson, Summer Mersinger, and Caroline Pham—by unanimous consent, and each Commissioner was sworn into her new role within a few weeks. In addition, following the confirmation of Chairman Behnam, the CFTC’s executive leadership team was reconstituted, largely from experienced CFTC career staff, providing for continuity in leadership and preservation of institutional memory, but perhaps at the expense of fresh perspective.¹

As a result of this transition period, much of the activity at the CFTC in 2022 focused on the integration and establishment of the new leadership of the agency. Once in office, Commissioners made staff appointments, took up sponsorship of Advisory Committees, and went on “listening tours” to meet with constituents and

registrants in the United States and around the world.

Chairman Behnam, just weeks after taking office, gave a preview of his agenda at an industry conference.² He identified, among other issues, cash market oversight, the rise of retail market participants, global regulatory coordination, climate-related financial risk, and the collection, use, analysis, and protection of data as priority topics. Perhaps recognizing that market events could impose on his plans, he presented his agenda as “subject to change.”

The past year saw new developments in digital asset markets, efforts to expand the types of derivatives products regulated by the CFTC, including developments in both the event contract space and the retail commodity/precious metals space. Record-breaking penalties and fines were issued from an aggressive enforcement effort, with novel theories established in new cases that covered a broader set of cases than seen before. At the same time, international regulatory bodies deliberated on how to prevent or mitigate the next financial crisis and ensure global coordination on new laws and regulations, as well as cross-border oversight of global financial firms. The CFTC explored intermediation and the role of brokers, as well as potential changes to global market structures. As Chairman Behnam described the CFTC’s agenda during a March 2022 speech, the agency would

move deliberately and “reassess, reevaluate, and reprice”³ its priorities and positions.

II. CRYPTO-ASSET AND DEFI DEVELOPMENTS

A completely new asset class is introduced into the financial ecosystem perhaps once in a generation. Equally rare is the introduction of a completely new technology that results in a fundamental change in the manner of doing business. The CFTC successfully addressed both during its formative years, bringing under its regulation a new asset class—financial futures—and successfully navigating the introduction of a then revolutionary technology—computerized trading. The CFTC met the introduction of both creatively, stretching its regulatory framework to incorporate both developments and in doing so, fostering their acceptance and growth. This foundational experience of successfully finding regulatory solutions to market innovation has entered the DNA of the agency, resulting in its flexibility and creativity in applying its regulatory framework to ground-breaking market developments.⁴

The CFTC’s openness to applying the regulatory framework which it administers to innovative developments may not be sufficient, however, to meet all challenges, particularly those that test the boundaries of jurisdiction among federal regulators. For example, the introduction of financial futures resulted in Congress amending the Commodity Exchange Act, 7 U.S.C.A §§ 1 et seq. (the “CEA” or “Act”) to formalize the role of the Department of Treasury in reviewing new Treasury-related products and passage of the Shad-Johnson Accord to settle the jurisdictional boundary between the CFTC and SEC relating to stock index futures.⁵

Much of the CFTC’s attention during 2022 has been to respond to the challenges presented by the growth of crypto asset trading, a new asset class that often is coupled with new trading technologies. In light of the Commission’s limited jurisdiction over spot markets,⁶ its response to trading of crypto commodities has been mainly through enforcement. Notably, according to the CFTC’s annual enforcement report, approximately 20% of the enforcement actions filed in fiscal year 2022 were against crypto-related entities, evidencing the significant number of resources the Commission is devoting to this topic, a trend that we expect will continue.

A. CRYPTO-RELATED ENFORCEMENT DEVELOPMENTS

Although the CFTC does not have regulatory authority over spot markets, it can bring actions challenging allegedly fraudulent or manipulative activities regarding spot commodities in interstate commerce. In 2015, the CFTC determined that Bitcoin and other digital assets are within the definition of “commodity” under Section 1a(9) of the Act.⁷ It has since found that Ethereum, Litecoin, and at least several stablecoins are also commodities. Relying on this, and other authorities, the CFTC has brought a significant number of enforcement actions regarding alleged misconduct in digital asset markets.⁸

Although quite active, the Commission’s crypto docket has largely matured and its enforcement actions now largely fall into two main categories.

First, the CFTC has brought a number of cases against entities that have allegedly failed to register as designated contract markets (“DCMs”)⁹ or futures commission merchants (“FCMs”),¹⁰

including entities that offered leveraged retail commodity contracts in violation of the prohibition of section 2(c)(2)(D) of the Act. In these matters, the CFTC also often finds that the defendant or respondent failed to comply with other regulations, such as applicable Know-Your-Customer or Bank Secrecy Act requirements.

Second, the CFTC has brought a number of actions involving alleged fraud¹¹ or manipulation involving crypto assets.¹² This included allegations of one of the largest Bitcoin fraudulent schemes to date, involving over \$1.7 billion in allegedly misappropriated assets.¹³

In many cases, these categories overlap, but most cases involve familiar fact patterns that are well-within fact patterns consistent with the Commission's established enforcement precedent. However, there were several noteworthy developments in 2022 that signal the CFTC's continued interest in expanding its role in regulating crypto asset markets:

In September 2022, the Commission brought its first-ever enforcement action against a decentralized autonomous organization ("DAO"). In September 2022, the CFTC announced a settled action against bZeroX and two of its founders for developing a digital asset protocol that offered leveraged retail commodity transactions without registering as a DCM or FCM.¹⁴ The protocol used smart contracts to allow participants to establish disintermediated leveraged positions across digital asset pairs.¹⁵ This decentralized protocol included automated collateral requirements and mechanisms to liquidate positions in the event losses exceeded the value of the posted collateral. Around August 2021, one of the founders announced plans to "future proof" the bZeroX

protocol by transferring control from bZeroX to a DAO, which would continue to offer leveraged commodity transactions to retail customers.¹⁶ The CFTC found that this plan was intended to evade regulatory requirements by transferring ownership of the protocol from a distinct legal entity to a distributed "community."¹⁷

In the settled order, the CFTC found that the virtual currencies traded on the bZx Protocol, which included ETH and DAI, are "commodities" under the CEA, a requisite finding for liability. The CFTC found that the virtual currencies were "retail commodity transactions," which are regulated like derivatives, because they were offered to retail customers on a leveraged basis but were not "actual[ly] deliver[ed]" within 28 days.¹⁸ The CFTC found that bZeroX and the individual founders offered illegal leveraged retail commodity transactions without registering as a DCM in violation of Section 4(a) of the CEA and failed to register bZeroX as an FCM in violation of CEA Section 4d(a)(1). The CFTC also found that bZeroX and the founders violated CFTC regulation 42.2 by failing to adopt a Customer Identification Program to implement Know-Your-Customer requirements for bZeroX's FCM activities. This component of the action was straightforward and consistent with the CFTC's prior actions in this space.

However, the CFTC order went further and found that the bZeroX founders were personally liable for the Ooki DAO's ongoing violations through their roles in proposing and voting on DAO governance proposals. Specifically, the order found that the Ooki DAO is an unincorporated association because it is a (1) voluntary group of people, (2) without a charter, (3) formed by mutual consent, (4) promoting a common

objective.¹⁹ “Once an Ooki Token holder votes his or her Ooki Tokens to affect the outcome of an Ooki DAO governance vote, that person has voluntarily participated in the group formed to promote the common objective of governing the Ooki Protocol and is thus a member of the Ooki DAO unincorporated association.”²⁰ The order found that, under principles of partnership law, the bZeroX founders were members of an unincorporated association organized for profit and thus are personally liable for Ooki DAO’s violations of the CEA.²¹

The CFTC also filed an enforcement action against Ooki DAO, claiming that it continues to engage in the same violative conduct as bZeroX.²² Specifically, the CFTC alleges that bZeroX transferred control of the bZx Protocol to the bZx DAO, which then renamed itself to Ooki DAO, in an “attempt to render the bZx DAO, by its decentralized nature, enforcement-proof.”²³ Similar to the settlement order, the CFTC complaint alleges that Ooki DAO is an unincorporated association, thus it, and its members, are liable for violations of Sections 4(a) and 4d(a)(1) of the CEA. Given the unincorporated nature of the organization, which lacks office space, a mailing address or even defined officers, the CFTC was initially permitted to serve the DAO by posting notice on its message board.²⁴ However, the court later required the CFTC to formally serve at least one identifiable DAO token holder, which was accomplished by serving the U.S.-based founders.²⁵ Nonetheless it is unclear whether the DAO will actually appear and contest the CFTC’s charges. Although several trade groups are seeking to intervene on the DAO’s behalf, the CFTC is seeking a default judgment against the DAO.

The CFTC brought two actions against large

crypto asset firms for allegedly failing to accurately describe aspects of their operations. In the first, the CFTC charged a crypto trading platform that was seeking registration as a DCM for allegedly making false statements to the CFTC in connection with the self-certification of a Bitcoin futures contract in violation of Section 9(c) of the CEA, which prohibits any person from providing information to the CFTC that it knew or should have known was false.²⁶ The CFTC alleged that the trading platform falsely stated that its contract was not readily susceptible to manipulation—a requirement for listing—because it required customers to completely pre-fund positions, without disclosing that the firm had allegedly given certain customers loans or advances to help increase trading volumes. The trading platform also allegedly overstated the effectiveness of its self-trading prevention controls and allegedly failed to disclose that a significant portion of the volume during the auction process involved a single participant trading with itself. This approach is consistent with the CFTC’s recent push to leverage its authority under Section 9 to police statements made to the Commission during investigations or in regulatory filings.

In the second matter, the CFTC brought a settled action against a large stablecoin sponsor for allegedly making false statements regarding the sufficiency and composition of its reserves, and the frequency in which its reserves were audited.²⁷ In bringing the action, the CFTC expressly found that the stablecoin is a “commodity,” along with “Bitcoin, Ether, and Litecoin.” This position creates significant tension with Securities and Exchange Commission (“SEC”) Chair Gensler, who has indicated that he believes many stablecoins are securities or investment companies subject to SEC jurisdiction. This

direct competition between the CFTC and SEC introduces additional layers of complexity as firms try to determine how to participate in crypto markets in a compliant way.

B. CRYPTO-RELATED LEGISLATIVE DEVELOPMENTS

Despite its vigorous enforcement response to violative activity in crypto-asset related markets, the extent of the Commission's future role in regulating the spot market for crypto assets largely will depend on statutory changes.²⁸ As Chairman Behnam has stated, enforcement "cannot be viewed as a viable substitute for a functional regulatory oversight regime for the cash digital asset market."²⁹ He further observed that this will only come about legislatively by granting enhanced authority to regulate spot digital asset markets to a federal financial regulator.³⁰

Although there have been a number of legislative proposals, the Digital Commodities Consumer Protection Act ("DCCPA"), cosponsored by the Senate Agriculture Committee Chairwoman Debbie Stabenow (D-MI) and Ranking Member John Boozman (R-AR), attracted the most attention.³¹ Among other things, the DCCPA would have required all digital commodity platforms, digital commodity brokers, dealers, and custodians to register with the Commission.³² On September 15, 2022, Chairman Behnam testified before the Senate Agriculture Committee (where he once served as staff), welcoming the proposed DCCPA, stating that,

The DCCPA leverages the historical strength of the CFTC as a market regulator by requiring registration and supervision of digital commodity platforms and digital commodity intermediaries as is required in CFTC-regulated derivatives

markets. . . . Critically, all digital commodity platforms must maintain adequate financial, operational, and managerial resources, segregate customer funds, and comply with Commission requirements for the treatment of customer assets. These tools have proven effective in preserving customer funds and market operations in times of instability, uncertainty, or market misconduct.³³

In the wake of FTX's collapse and ensuing bankruptcy filing, Chairman Behnam returned to testify before the Senate Agriculture Committee to reiterate that the "CFTC does not have direct statutory authority to comprehensively regulate cash digital commodity markets"; and that lack of authority will leave consumers of digital assets largely unprotected.³⁴ During his testimony, Chairman Behnam noted that the CFTC-regulated affiliate of FTX (LedgerX, LLC) did not share in the customer losses suffered by FTX, demonstrating the value and strength of the CFTC regulatory framework.³⁵

Legislative change to address these issues is unlikely in the short run. The consensus that was building in favor of the DCCPA evaporated in reaction to the collapse of FTX and sent Congress back to the drawing board conceptualizing digital-asset regulation. For example, Senators Elizabeth Warren (D-MA) and Roger Marshall (R-KS) introduced the Digital Asset Anti-Money Laundering Act³⁶ and Senator Cynthia Lummis (R-WY) stated that she plans to reintroduce the Responsible Financial Innovation Act.³⁷ In the House of Representatives, House Agriculture Committee Ranking Member (now Chairman) Glenn "GT" Thompson (R-PA) will likely seek to build on his bill, the Digital Commodity Exchange Act of 2022.³⁸

With split chambers in Congress, however, it

is unclear whether any piece of legislation to address enhanced digital asset regulation will come to fruition this year.

III. ENFORCEMENT DEVELOPMENTS OF 2022

Enforcement in general continued to be robust in 2022, with the Commission filing 82 enforcement actions and obtaining over \$2.5 billion in restitution, disgorgement, and civil monetary penalties.³⁹ This was the third-highest yearly total in CFTC history for both the number of actions filed and total monetary recovery. These numbers demonstrate that the Commission continues to police the futures and derivatives industry aggressively, with both the number of actions and amount of recovery representing a significant increase in activity compared to 2021.

The recent trends in enforcement include a relative decrease in the number of spoofing cases, which is likely explained by market participants being increasingly able to prevent such activity through their own surveillance and compliance programs. Despite this downward trend, the Commission nonetheless brought five spoofing actions this year.⁴⁰ We expect that spoofing will continue to be a priority for the Commission, though we believe that most of the largest such matters have been resolved.

A second trend is the continued use of enforcement cases in overseeing the operation of registered entities.⁴¹ This year, two such cases were brought, one against a DCM and the second against a swap execution facility (“SEF”). In the first, the Commission ordered a DCM to pay a \$6.5 million civil monetary penalty for alleged violations of requirements relating to system safeguards, swap reporting and options report-

ing, as well as allegedly giving a false statement to the CFTC.⁴² In the second, the Commission brought an action against a SEF for permitting the execution of 301 swap transactions that did not comply with the requirement of a 15-second delay between the entry of each side of the transaction, which the CFTC found was a failure to enforce compliance with both CFTC regulations and the SEF’s own rulebook.⁴³ The SEF was ordered to pay a \$850,000 civil monetary penalty and to comply with other undertakings.⁴⁴ These matters were in addition to the action against the crypto asset trading platform that was seeking registration as a DCM, which was described above.⁴⁵ This continuing trend is a troubling development, substituting enforcement tools and mechanisms, including hefty civil money penalties, for long-established supervisory tools, such as rule enforcement reviews, traditionally relied upon by the Commission in overseeing industry self-regulatory organizations.

Enforcement actions against insider trader violations in futures markets is still somewhat rare, but this year the Commission brought two such cases, both involving the alleged misuse of confidential information relating to energy block trade orders and both involving the cooperation of an energy broker.⁴⁶ Although two cases do not constitute a trend, it does suggest that market participants should review their internal compliance programs relating to block trading.

The Commission continued its focus on enforcing its data reporting requirements, bringing 18 actions against market participants for record-keeping and reporting violations, 15 of which also involved a charge of failure to supervise.⁴⁷ Notable this year was the investigative sweep against the swap dealer and FCM affiliates of 11

financial institutions for recordkeeping and supervision failures related to employee communications, both internal and external, via unapproved communication methods such as personal text or widely used messaging applications.⁴⁸ The civil monetary penalties in the sweep ranged from \$6 million at the low end to \$100 million at the high end, with the most common penalty being \$75 million.⁴⁹ In total, the firms paid over \$710 million in civil monetary penalties.⁵⁰ These actions, along with past cases regarding swap data reporting, are a warning to everyone in the regulated futures and swap space that compliance with reporting and recordkeeping requirements remains a chief area of exposure for their compliance programs, which requires on-going vigilance, particularly in light of the recent changes to the swap data reporting regulations.⁵¹

Anti-manipulation has been a bedrock enforcement area for the Commission, albeit difficult to enforce. During 2022, the Commission brought one such case. That case alleged manipulation of four widely distributed physical oil benchmarks, as well as allegedly corrupt payments to persons associated with state-owned entities in exchange for confidential information regarding traders or potential contracts. The settlement in this case resulted in the highest civil monetary penalty and disgorgement amount ordered in the history of the Commission, a total combined amount of \$1.186 billion.⁵²

Enforcing the registration requirements against unregistered trading platforms or intermediaries has been, and remains, an important customer protection element of the Commission's enforcement program. This remains a concern for CFTC because of the possibility that unregistered entities might fail to provide their customers with

protections that follow from adherence to the requirements for proper registration, or even operate in a fraudulent manner. The Commission brought 12 actions for illegal off-exchange contracts or failure to register.⁵³ Although several of these actions involved cryptocurrency platforms, as discussed above, others involved the trading of traditional commodities.⁵⁴

Several other of these matters have involved precious-metals trading platforms. As a spot commodity, the CFTC generally lacks regulatory jurisdiction over trades involving physical metals. However, under Section 4(a) of the Act, any contract for future delivery of a spot commodity—a futures contract—must be conducted pursuant to the rules of a DCM. Further, Section 4d(a)(1) of the Act requires that leveraged retail commodity transactions may only be executed by registered FCMs (unless actual delivery is accomplished with 28 days), as leveraged spot transactions are economically similar to futures contracts. Thus, in one matter, the CFTC entered a settled administrative proceeding against two precious metals firms, finding that they offered illegal off-exchange futures contracts without registering as a DCM and offered leveraged retail commodity transactions without registering as an FCM; the entities were also alleged to have engaged in fraud in connection with a retail commodity transaction.⁵⁵ In addition, the CFTC resolved its long running litigation with Monex Deposit Company and several affiliated entities and individuals for allegedly offering off-exchange leveraged retail commodity transactions.⁵⁶ Following over five years of litigation, including a precedent-setting decision from the Ninth Circuit,⁵⁷ the defendants agreed to a settlement in which they paid \$33 million in restitution and a \$5 million penalty.

Finally, the Commission brought 31 cases against various allegedly fraudulent operators, including one against a hedge fund and its Chief Financial Officer (CFO) for allegedly misrepresenting or omitting material facts relevant to assessing the risks of its portfolio and further aided and abetted the fraud by allegedly directing fund employees to misrepresent or omit certain material facts.⁵⁸ In a second notable action, the Commission charged a former trader at a global bank with allegedly engaging in a fraudulent scheme to mismark positions on the bank's U.S. dollar interest rate derivatives desk that at its peak, allegedly overstated the unrealized profit & loss of the desk by approximately \$25 billion.⁵⁹

IV. REGULATORY DEVELOPMENTS OF 2022

A. MARKETS DEVELOPMENTS

In 2022, the CFTC's Division of Market Oversight ("DMO") did not propose or adopt any new regulations; however, the Commission took a number of noteworthy actions during the year, including effectively withdrawing a platform's ability to operate in the United States. In an unprecedented action, on August 4, 2022, DMO withdrew the no-action letter issued to Victoria University of Wellington, New Zealand (the "University") under which it had operated an online market for political-event contracts called PredictIt since 2014.⁶⁰ The no-action letter permitted the University to operate PredictIt as a not-for-profit market for the trading of event contracts, to offer such event contracts to U.S. persons, and to collect the results derived from trading in these contracts for academic and educational use, without formally registering as a DCM or SEF.⁶¹ DMO determined that the "Uni-

versity has not operated its market in compliance with the terms of Letter 14-130."⁶² The withdrawal letter did not explain how PredictIt violated the terms of the no-action letter, or why the DMO determined to withdraw the no-action letter at this time. This is the first such example of the withdrawal of a no-action relief having the effect of shutting down the operation of an existing trading platform.

PredictIt maintains that it operated within the scope of the no-action letter and has filed suit seeking review of the withdrawal under the Administrative Procedure Act as arbitrary and capricious.⁶³ The Commission argues that no-action letters, and withdrawals thereof, are not "final agency action" under the APA and are unreviewable as a matter of law.⁶⁴ The case is currently pending in the Western District of Texas.

In a separate development also relating to political event contracts, on August 26, 2022, the CFTC announced the review and public comment period for KalshiEX, LLC's ("Kalshi") proposed contracts on which political party will be in control of each chamber of the U.S. Congress under CFTC Regulation 40.11.⁶⁵ Kalshi voluntarily submitted the political event contracts for approval pursuant to CFTC Rule 40.3. The contracts are cash-settled, binary contracts based on the question: "Will <party> be in control of the <chamber of Congress>?" Commissioner Pham dissented from the Commission's decision to initiate review under Rule 40.11, arguing that the appropriate process is to review the contracts under Rule 40.3, and noting that Kalshi is not prevented from withdrawing the request for approval and self-certifying the contracts pursuant to Rule 40.2.⁶⁶ In her statement, Commissioner Pham noted that Kalshi extensively discussed the

political event contracts with the Commission and staff over the course of approximately 36 meetings for nearly a year, and that if the Commission had a concern that the contracts violated the Act or Rule 40.11, or did not ever intend to allow the contracts to be traded, then the Commission should have said so.⁶⁷

In another noteworthy development, the Commission contributed substantially to the public discourse on the ways in which markets can be used to further the goals of mitigating climate change. Executive Order 14030, issued by President Biden on May 20, 2021, directed the federal government and its agencies to identify and mitigate risks posed to financial markets as a result of climate change.⁶⁸ In June 2022, the CFTC hosted the first-ever Voluntary Carbon Markets Convening to discuss issues related to the carbon offsets markets,⁶⁹ and sought public comment to “inform its understanding and oversight of climate-related financial risk as pertinent to the derivatives markets and underlying commodities markets.”⁷⁰ It remains to be seen how active the Commission will be in respect of voluntary carbon markets. As noted above, although the Commission does not have regulatory authority over cash markets, its guidance on “actual delivery” for crypto asset markets did provide some regulatory guardrails to those markets. Likewise, there may be room for the Commission to explore whether through safe harbors, voluntary guidance, or rules relating to delivery of carbon credits underlying futures contracts traded on DCMs, it might be able to facilitate the operation of these important, developing markets, as well.

B. CLEARING DEVELOPMENTS

In 2022, the Commission undertook a review

of a proposal from LedgerX LLC, which currently operates a non-intermediated model and clears futures and options on futures contracts on a fully collateralized basis, to amend its order of registration as a DCO to allow it to clear margined products for retail participants while continuing with a non-intermediated model.⁷¹

This proposal resulted in a congressional hearing, a CFTC roundtable and a significant number of comments.⁷² In light of the collapse of FTX and the subsequent withdrawal by LedgerX of its application to amend its order of registration as a DCO, it is unlikely that these issues will be decided in the near future. However, the continued advancement in DeFi technology may cause the Commission to continue considering the potential impacts of these market structure changes.

In addition to its consideration of this new clearing model, the Commission adopted rules to facilitate the transition to LIBOR,⁷³ and proposed rules relating to DCO governance⁷⁴ and to amend certain reporting and information regulations applicable to DCOs.⁷⁵

C. INTERMEDIARIES DEVELOPMENTS

In a rare demonstration of cooperation and coordination, on August 10, 2022, the SEC and CFTC proposed to amend Form PF, the confidential reporting form for certain SEC-registered investment advisers to private funds, including those that are also registered with the CFTC as a CPO or CTA.⁷⁶ These enhanced disclosures would give the Financial Stability Oversight Council more detailed data with which it can better assess systemic risk and would provide the regulatory agencies more detailed information to carry out its oversight functions.

D. INTERNATIONAL DEVELOPMENTS

From its inception, the Commission has recognized that futures trading, like the cash commodity markets, are global in nature. Based on this insight, the Commission has sought to accommodate global trading while maintaining the market and customer protections provided in the Act. Often the Commission has achieved this balance through recognition or exemptive regimes finding that a foreign jurisdiction's regulatory regime is comprehensive and comparable to the Commission's. During 2022, the Commission took the following actions relating to global trading:

- **No-Action Letters to Non-U.S. Clearing Organizations.** In 2022, the Division of Clearing and Risk ("DCR") granted temporary no-action relief to two non-U.S. clearing organizations from the Act's DCO registration requirements while their applications for exemption under Commission Rule 39.6 to clear U.S. member proprietary swaps remain pending.⁷⁷
- **Capital Comparability Determinations.** In 2022, the Commission sought public comment on applications submitted, respectively, by the Financial Services Agency of Japan⁷⁸ and the Mexican Banking and Securities Commission,⁷⁹ seeking capital comparability determinations. These were submitted under the Commission's final swap dealer "Capital Rule"⁸⁰ that permits a non-U.S. domiciled nonbank SD, trade association, or foreign-country regulator to submit an application to the Commission for a determination that compliance with applicable home country capital and financial reporting requirements will satisfy all or parts of

the Commission's capital and financial reporting rules. Both applications remain pending. Depending upon the final outcome, which is likely in 2023, additional future applications can be expected.

- **Foreign Board of Trade.** On March 30, 2022, the Commission granted an Order of Registration to FEX Global Pty Ltd ("FGL"), an Australian-based foreign board of trade ("FBOT").⁸¹ Supervised by the Australian Securities and Investments Commission, FGL is licensed to offer markets in environmental, energy, and commodity products. The Order of Registration allows FGL to identify U.S. participants and permit the participants to enter trades directly into its exchange system.
- **No-action relief in respect of transitioning stock index.** Foreign boards of trade may request under Rule 30.13 that the Commission certify that a stock index is not-narrow and as a result, a futures contract overlying the index may be offered or sold to persons in the U.S. On October 17, 2022, the Division of Market Oversight granted no-action relief to Korea Exchange, Inc. ("KRX") for the offer or sale of Korea Composite Stock Price Index (KOSPI) 200 Futures Contracts and Mini KOSPI 200 Futures Contracts to persons located within the U.S. while the Commission's review of KRX's request for certification of the contracts under Rule 30.13 is pending.⁸² This index has a history of transitioning between narrow and not-narrow, resulting in its periodic availability to trade in the U.S. This feature of the jurisdictional boundary between the applicability of the Act and the

U.S. securities laws to these instruments remains a trap for the unwary, and requires vigilance by foreign boards of trade to remain in compliance with these provisions.

V. LOOKING FORWARD

With a full complement of Commissioners in place, the CFTC could achieve significant accomplishments in 2023.

Certainly, enforcement will not slow in pace or contract in scope. In his keynote address at the 2022 International Futures Industry Conference in Boca Raton, Florida, Chairman Behnam called for a “culture of compliance” and said that “surveillance staff are surgically focused on their analysis of trading for any manipulative, inappropriate or disruptive conduct.”⁸³ As previously discussed, in light of the Commission’s enforcement results for Fiscal Year 2022,⁸⁴ we expect the agency to continue to have an aggressive enforcement agenda and collaborate with other regulators.

On the policymaking front, while the Commission’s Fall 2022 agenda⁸⁵ does not deviate substantially from the Spring 2022 agenda,⁸⁶ it shows a wide range of issues and regulatory actions are all on the table. There is not complete agreement among the Commissioners on the policy agenda priorities,⁸⁷ perhaps indicative of the difficulties that may prevent unanimous, bipartisan support on future Commission matters. The prospect of competing interests amongst the remaining four Commissioners will undoubtedly add a complex layer moving forward.

While much of the previous year was spent examining the Commission’s jurisdiction over digital assets, Chairman Behnam will likely focus

on progressing through his regulatory agenda. In his March 2022 testimony before the House Committee on Agriculture, Chairman Behnam stated that his top priority would be the review of the Commission’s Dodd-Frank rulemakings.⁸⁸ He further highlighted emerging risks that the CFTC would focus on, including digital assets and climate-related risk, among other developments. Commissioners Goldsmith Romero, Johnson, Mersinger and Pham have all expressed their views on a range of topics, in part overlapping and in part differing from the Chairman’s agenda.

The Chairman will need to build consensus on each of these topics. Certainly, the digital asset policy debate will continue, with efforts focused on improving the frameworks set forth in the DCCPA and the Digital Commodity Exchange Act of 2022. But significant questions remain—both large and small—given events in crypto markets over the last few months. These include gating issues like registration and product development, to more granular issues including self-certification of new contracts, audit and oversight of entities, and relationships between affiliated entities.

Climate-related risk also looms large, where the Chairman will need to work with his fellow Commissioners. For example, Commissioner Goldsmith Romero has expressed support for focusing on climate-related financial risk, noting that “as a market regulator, it is no longer a choice, but an imperative, for the CFTC to enhance its ability to identify and monitor climate-related risk that impacts our markets and market participants.”⁸⁹ The CFTC likely will build on the progress made by Chairman Behnam’s recent day-long event to explore the issue⁹⁰ and the request for public input on climate-related financial risk.⁹¹

Regardless of the twists and turns we may experience in 2023, the CFTC's mission remains rooted in promoting the integrity, resilience, and vibrancy of the U.S. derivatives markets through sound regulation. This fundamental principle will certainly guide the CFTC through a busy year of rulemaking, interpretation, advisory committee meetings, legislative debate, and enforcement actions.

ENDNOTES:

¹The executive leadership team includes: Tanisha Cole Edmonds Clark, Chief Diversity Officer; Clark Hutchison, Director, Division of Clearing and Risk; Gretchen Lowe, Acting Director, Division of Enforcement; Vincent McGonagle, Director, Division of Market Oversight; Amanda Olear, Director, Market Participants Division; Suyash Paliwal, Director, Office of International Affairs; Tamara Roust, Director, Division of Data, and Robert Schwartz, General Counsel.

²Rostin Behnam, Chairman, Comm. Fut. Trading Comm'n, Keynote Address at the ABA Business Law Section Derivatives & Futures Law Committee Virtual Winter Meeting (Mar. 16, 2022), <https://www.cftc.gov/PressRoom/SpeechesTestimony/opabehnam19>.

³Rostin Behnam, Chairman, Comm. Fut. Trading Comm'n, Keynote at the FIA Boca 2022 International Futures Industry Conference, Boca Raton, Florida (Mar. 16, 2022), <https://www.cftc.gov/PressRoom/SpeechesTestimony/opabehnam21>.

⁴For example, the Commission was one of the first agencies to address digital assets. Starting in 2015, the CFTC began filing cases involving Bitcoin (*In re Coinflip, Inc.*, CFTC No. 15-29, 2015 WL 5535736 (Sept. 17, 2015) and *In re TeraExchange LLC*, CFTC No. 15-33, 2015 WL 5658082 (Sept. 24, 2015)).

⁵See 7 U.S.C.A. § 2(c)(1) (the statutory exclusion of certain Treasury-related products was

first enacted in 1974); *see also* Futures Trading Act of 1982, Pub. L. No. 97-444, 96 Stat. 2294 (1983); Act of Oct. 13, 1982, Pub. L. No. 97-303, 96 Stat. 1409.

⁶The CFTC has limited jurisdiction over cash (spot) markets by maintaining enforcement authority over interstate commerce involving commodities through general anti-fraud and manipulation provisions.

⁷*See In re Coinflip, Inc.*, CFTC No. 15-29, 2015 WL 5535736, at *2 (Sept. 17, 2015), <http://www.cftc.gov/idc/groups/public/@lrenforcementactions/documents/legalpleading/enfcoinfliporder09172015.pdf>.

⁸*Examining Digital Assets: Risks, Regulation, and Innovation: Full Committee Hearing Before S. Comm. on Agric., Nutrition, & Forestry* (Feb. 9, 2022), https://www.agriculture.senate.gov/imo/media/doc/Testimony_Behnam_020920225.pdf (testimony of Rostin Behnam, Chairman, CFTC).

⁹On October 3, 2022, the CFTC filed a complaint against Adam Todd and four companies he controlled—Digitex LLC, Digitex Limited, Digitex Software Limited, and Blockster Holdings Limited Corporation (together “Digitex Futures”)—alleging that he and Digitex Futures operated an unregistered commodity exchange, <https://www.cftc.gov/media/7826/enfdigitexcomplaint093022/download>.

¹⁰The CFTC also charged that because Digitex Futures met the statutory definition of an FCM, it was required to comply with the applicable provisions of the Bank Secrecy Act, including requirements to implement effective KYC procedures and a customer information program (“CIP”). The CFTC alleged that Digitex Futures did not have effective KYC procedures and did not implement an effective CIP, thus violating 17 C.F.R. § 42.2. CFTC, *Statement of Commissioner Kristin N. Johnson Regarding Unregistered Crypto Futures Platform, Price Manipulation, and Failure to Comply with AML/KYC/CIP Obligations* (Oct. 3, 2022), <https://www.cftc.gov/PressRoom/SpeechesTestimony/johnsonstatement100322>.

¹¹On May 19, 2022 the CFTC filed a civil

enforcement action against Sam Ikkurty, Ravisankar Avadhanam, and Jafia LLC for fraudulently soliciting participation interest in an income fund that invested in digital assets and other instruments. Compl., *CFTC v. Ikkurty*, No. 1:22-cv-02465 (N.D. Ill. May 10, 2022), ECF No. 1, <https://www.cftc.gov/media/7266/enfsenecacomplaint051022/download>. According to the complaint, the defendants solicited more than \$44 million from at least 170 individuals to purchase, hold, and trade digital assets, commodities, derivatives, swaps, and commodity futures contracts. However, the defendants allegedly did not invest the pooled funds as represented, instead the funds were transferred to other accounts under defendants' control for their sole benefit. The CFTC seeks restitution for defrauded investors, disgorgement of ill-gotten gains, civil monetary penalties, permanent trading and registration bans, and a permanent injunction.

¹²The CFTC's first enforcement action involving a digital asset manipulation scheme was brought on March 5, 2021, when it filed a complaint in the Southern District of New York against John McAfee and his former employee, Jimmy Gale Watson for allegedly engaging in a pump-and-dump scheme in a variety of digital currencies. Compl., *CFTC v. McAfee*, No. 1:21-cv-01919 (S.D.N.Y. Mar. 5, 2021), ECF No. 1, <https://www.cftc.gov/media/5741/enfjohndavidmcafeecomplaint030521%20/download>. On July 18, 2022, after McAfee's death, the court entered a Consent Order against Watson that found Watson engaged in price manipulation in violation of Sections 6(c)(3) and 9(a)(2) of the Act and Regulation 180.1, requiring Watson to disgorge \$144,736 in ill-gotten gains, and pay a civil monetary penalty of the same amount. Consent Order, *CFTC v. McAfee*, No. 1:21-cv-01919 (S.D.N.Y. July 14, 2022), ECF No. 38, <https://www.cftc.gov/media/7481/enfjimmywatsonconsentorder071422/download>.

In addition, the Commission in the Digitex case alleged that the respondent attempted to manipulate the price of the Digitex exchange's native currency, DGTX, by engaging in non-economic trading activity on third-party digital asset trading platforms with the intent to artificially inflate

the price of DGTX and increase the value of the DGTX. Specifically, the CFTC alleged Todd pumped the price of DGTX by developing a "bot" that purchased and sold DGTX on third-party exchanges but was designed to always buy more than it sold, and by filling large over-the-counter orders to purchase DGTX from third-party exchanges rather than Digitex's reserves, which owned hundreds of millions of DGTX tokens. CFTC Press Release No. 8605-22 (Oct. 3, 2022), <https://www.cftc.gov/PressRoom/PressReleases/8605-22>.

¹³Compl., *CFTC v. Mirror Trading Int'l Proprietary Ltd.*, No. 1:22-cv-00635 (W.D. Tex. June 30, 2022), ECF No. 1, <https://www.cftc.gov/media/7426/enfmirrortradingcomplaint063022/download>.

¹⁴*In re bZeroX, LLC*, CFTC No. 22-31, 2022 WL 4597664 (Sept. 22, 2022), <https://www.cftc.gov/media/7676/enfbzerosexorder092222/download>.

¹⁵2022 WL 4597664, at *2-3.

¹⁶Compl. ¶ 3, *CFTC v. Ooki DAO*, No. 3:22-cv-5416 (N. D. Cal. Sept. 22, 2022), ECF No. 1, <https://www.cftc.gov/media/7681/enfookicomplaint092222/download>.

¹⁷*In re bZeroX*, 2022 WL 4597664, at *4.

¹⁸*Id.* at *1, *6.

¹⁹*Id.* at *9-10.

²⁰*Id.* at *8.

²¹Although this case is novel, it is not completely without antecedents. The Act, prior to passage of the Commodity Futures Modernization Act of 2000, defined a "board of trade" as meaning "any exchange or association, whether incorporated or unincorporated, of persons who shall be engaged in the business of buying or selling any commodity."

²²*See* Compl. ¶ 3, *CFTC v. Ooki DAO*, No. 3:22-cv-5416 (N. D. Cal. Sept. 22, 2022), ECF No. 1, <https://www.cftc.gov/media/7681/enfookicomplaint092222/download>.

²³*Id.* ¶ 3.

²⁴Order Granting Pls.' Mot. for Alternative

Service, *CFTC v. Ooki DAO*, No. 3:22-cv-05416 (N. D. Cal. Oct. 3, 2022), ECF No. 17.

²⁵Order to Serve Individuals or Show Cause, *CFTC v. Ooki DAO*, No. 3:22-cv-05416 (N. D. Cal. Dec. 12, 2022), ECF No. 59.

²⁶Compl., *CFTC v. Gemini Tr. Co.*, 1:22-cv-04563 (S.D.N.Y. June 2, 2022), <https://www.cftc.gov/media/7316/enfgeminicomplaint060222/download>.

²⁷*In re Tether Holdings Ltd.*, CFTC No. 22-04, 2021 WL 8322874, at *1, *7 (Oct. 15, 2021), <https://www.cftc.gov/media/6646/enftetherholdingsorder101521/download>.

²⁸The Commission did issue guidance to those trading crypto commodities on what constitutes “actual delivery” for purposes of the application of the prohibition of leveraged retail commodity trading. Retail Commodity Transactions Involving Certain Digital Assets, 85 *Fed. Reg.* 37734 (June 24, 2020). The Commission has not sought comment or otherwise publicly explored whether it might be able to offer further regulatory guidance in respect of trading in crypto commodities by way of a safe harbor.

²⁹*Supra* note 8.

³⁰Chairman Behnam stated: “This is not to diminish the fact that many cash commodity markets benefit from federal oversight. However, the digital asset market, which at present is most directly supervised through state money transmitter licenses, is unique and presents many novel issues for the CFTC, given our limited authority to police these volatile markets. In fact, there is no one regulator, either state or federal, with sufficient visibility into digital asset commodity trading activity to fully police conflicts of interest and deceptive trading practices impacting retail customers.” *Id.*

³¹Digital Commodities Consumer Protection Act of 2022, S.4760, 117th Cong., introduced to the Senate in August 2022.

³²*Id.* § 4.

³³*Legislative Hearing to Review S.4760, the Digital Commodities Consumer Protection Act: Full Committee Hearing Before S. Comm. on Ag-*

ric., Nutrition, & Forestry (Sept. 15, 2022), <https://www.agriculture.senate.gov/download/farm-bill/testimony-of-rostin-behnam> (testimony of Rostin Behnam, Chairman, CFTC).

³⁴*Why Congress Needs to Act: Lessons Learned From the FTX Collapse: Full Committee Hearing Before S. Comm. on Agric., Nutrition, & Forestry* (Dec. 1, 2022), <https://www.agriculture.senate.gov/imo/media/doc/The%20Honorable%20Rostin%20Behnam%20Testimony.pdf> (testimony of Rostin Behnam, Chairman, CFTC).

³⁵Chairman Behnam stated: “LedgerX is required by CFTC regulations to ensure segregation and security of customer property (including digital assets), maintain capital to cover up to a year’s worth of projected operating costs on a rolling basis, and maintain accurate books and records, in addition to numerous other important requirements. Among other things unique to LedgerX’s DCO registration order as required by the Commission, LedgerX must engage an independent certified public accountant to audit its digital asset balances and issue an opinion on accounting treatment of digital assets held by LedgerX annually. Many public reports indicate that segregation and customer security failures at the bankrupt FTX entities resulted in huge amounts of FTX customer funds being misappropriated by Alameda for its proprietary trading. But the customer property at LedgerX—the CFTC regulated entity—has remained exactly where it should be, segregated and secure. This is regulation working.” *Id.*

³⁶Press Release, Elizabeth Warren, Senator, Warren, Marshall Introduce Bipartisan Legislation to Crack Down on Cryptocurrency Money Laundering, Financing of Terrorists and Rogue Nations (Dec. 14, 2022); <https://www.warren.senate.gov/newsroom/press-releases/warren-marshall-introduce-bipartisan-legislation-to-crack-down-on-cryptocurrency-money-laundering-financing-of-terrorists-and-rogue-nations>.

³⁷*Crypto Crash: Why the FTX Bubble Burst and the Harm to Consumers: Full Committee Hearing Before S. Comm. on Banking, Hous., & Urban Affairs* (Dec. 14, 2022), <https://www.banking.senate.gov/hearings/crypto-crash-why-the-ft>

x-bubble-burst-and-the-harm-to-consumers.

³⁸Digital Commodity Exchange Act of 2022, H.R.761, 117th Cong., introduced to the House in April 2022.

³⁹*CFTC Releases Annual Enforcement Results*, CFTC Press Release No. 8613-22 (Oct. 20, 2022), <https://www.cftc.gov/PressRoom/PressReleases/8613-22>.

⁴⁰Compl., *CFTC v Skudder*, No. 1:22-cv-01925 (N.D. Ill. Apr. 14, 2022), ECF No. 1; Compl., *CFTC v Shak*, No. 2:22-cv-01258 (D. Nev. Aug. 5, 2022), ECF No. 1; *In re Schwartz*, CFTC No. 22-22, 2022 WL 3656396 (Aug. 24, 2022); *In re Tanius Tech., LLC*, CFTC No. 22-34, 2022 WL 4597775 (Sept. 26, 2022); *In re Chen*, CFTC No. 22-35, 2022 WL 4597774 (Sept. 26, 2022).

⁴¹As defined in section 1a(40) of the Act, registered entities include DCMs, SEFs, and DCOs.

⁴²*In re CX Futures Exch., L.P.*, CFTC No. 22-51, 2022 WL 6063663 (Sept. 29, 2022), <https://www.cftc.gov/media/7801/enfcxfuturesorder092922/download>.

⁴³*In re tpSEF, Inc.*, CFTC No. 22-49, 2022 WL 5002747 (Sept. 29, 2022), <https://www.cftc.gov/media/7786/enftpseforder092922/download>. The Order's undertaking included requiring the review of tpSEF, Inc's policies and procedures as well as all transactions on the SEF from August 2020 through September 2022 for compliance with the 15-second delay requirement.

⁴⁴*Id.*

⁴⁵Compl., *CFTC v. Gemini Tr. Co.*, 1:22-cv-04563 (S.D.N.Y. June 2, 2022), ECF No. 1.

⁴⁶Compl., *CFTC v. Clark*, No. 4:22-cv-00365 (S.D. Tex. Feb. 3, 2022), ECF No. 1. This case involved illegal tipping of confidential block trade order information. In one, the Commission filed charges against an employee of a national gas company for allegedly misappropriating confidential natural gas block trade order information from his employer and allegedly disclosing that information to an introducing broker who would then disclose the information to an indi-

vidual energy trader. The energy trader would then purportedly execute non-competitive, fictitious block trades with the natural gas company as the counterparty on the basis of the misappropriated information. The CFTC alleges that a share of the trading profits gained from the material, non-public information was provided to the tippers. In the second, the Commission filed charges against a proprietary trading company and its owner, who received and traded on the basis of material non-public information regarding block trade order information belonging to an energy company and disclosed via a trader at that company. *See* Compl., *CFTC v. Miller*, No. 4:21-cv-04023 (S.D. Tex. Dec. 10, 2021), ECF No. 1.

⁴⁷CFTC, *Addendum A: FY 2022 Enforcement Actions* (Oct. 20, 2022), https://www.cftc.gov/media/7861/DOE_ResultsFY22_AddendumA100722/download.

⁴⁸*CFTC Orders 11 Financial Institutions to Pay Over \$710 Million for Recordkeeping and Supervision Failures for Widespread Use of Unapproved Communication Methods*, CFTC Press Release No. 8599-22 (Sept. 27, 2022), <https://www.cftc.gov/PressRoom/PressReleases/8599-22>.

⁴⁹*Id.*

⁵⁰*Id.*

⁵¹CFTC Finalizes Rules to Improve Swap Data Reporting, Approves Other Measures at September 17 Open Meeting, CFTC Press Release No. 8247-20 (Sept. 17, 2020), <https://www.cftc.gov/PressRoom/PressReleases/8247-20>.

⁵²The Commission brought an action against an energy and commodities trading firm for manipulative and deceptive conduct involving manipulation or attempted manipulation of four widely distributed physical oil benchmarks and related futures and swaps from 2007 to 2018. *In re Glencore Int'l AG*, CFTC No. 22-16, 2022 WL 1963727 (May 24, 2022).

⁵³CFTC, *Addendum A: FY 2022 Enforcement Actions* (Oct. 20, 2022), https://www.cftc.gov/media/7861/DOE_ResultsFY22_AddendumA100722/download.

⁵⁴Among these, the Commission filed charges

against a registered commodity trading advisor (CTA) for failure to register as a SEF, finding that the CTA operated an unregistered SEF that provided clients the ability to execute swaps by accepting bids and offers made by multiple participants on a trading system, and often recommended that clients execute swap transactions in which the underlying commodity was natural gas, natural gas liquids or crude oil. The CTA was ordered to pay a \$200,000 civil monetary penalty and cease and desist from further violations. *In re Asset Risk Mgmt., LLC*, CFTC No. 22-36, 2022 WL 4597772, at *4 (Sept. 26, 2022), <https://www.cftc.gov/media/7706/enfasse-triskorder092622/download>. The Commission also filed charges against a company for acting as a futures commission merchant (FCM) without registration, finding that the company accepted and placed orders and accepted money in connection with those orders from a foreign customer for crude oil futures contracts. The company agreed to cease and desist from further violations, to disgorge \$1,376,206.81 in unlawful commission and fees, and to pay a \$1,376,206.81 civil monetary penalty. *In re Starberry Ltd.*, CFTC No. 22-17, 2022 WL 2390566, at *3 (Jun 24, 2022), <https://www.cftc.gov/media/7411/enfstarberryorder062422/download>. Finally, the Commission brought an action against a company for failure to register as an introducing broker as well as the company's controlling person for failure to register as an associated person of a CTA. *In re Gospodarek*, CFTC No. 22-37, 2022 WL 4597773 (Sept. 26, 2022), <https://www.cftc.gov/media/7711/enfgospodarekorder092622/download>.

⁵⁵*In re Goldline, Inc.*, CFTC No. 22-30, 2022 WL 4482007 (Sept. 22, 2022), <https://www.cftc.gov/media/7651/enfgoldlineorder092222/download>.

⁵⁶Consent Order, *CFTC v. Monex Deposit Co.*, No. 8:17-cv-01868 (C.D. Cal. Dec. 19, 2022), ECF No. 416, <https://www.cftc.gov/media/8016/enfmonexconsentorder121922/download>.

⁵⁷*U.S. Commodity Futures Trading Commission v. Monex Credit Company*, 931 F.3d 966, Comm. Fut. L. Rep. (CCH) P 34538 (9th Cir. 2019). The Ninth Circuit found that the CFTC's authority under Regulation 180.1 extended to

both fraud and manipulation, as opposed to fraud-based manipulations, as the district court had found. The opinion also provided significant clarity regarding the "actual delivery" exception for certain leveraged transactions.

⁵⁸Compl., *CFTC v. Archegos Cap. Mgmt., LP*, No. 22-CV-3401 (S.D.N.Y. Apr. 27, 2022), ECF No. 1, <https://www.cftc.gov/media/7191/enfarchegoscomplaint042722/download>. The complaint alleges that the fund entered into short swaps with a total notional value of tens of billions of dollars referencing broad-based exchange-traded funds and broad-based custom baskets of securities in order to hedge the risk associated with its long portfolio, and that the fund and its employees repeatedly misrepresented to swap counterparties the size of its largest position, which in March 2021 was approximately 70% of the fund's net asset value.

⁵⁹Consent Order at 24-25, 30, *CFTC v. Castilla*, No. 1:22-cv-21520 (S.D. Fla. Dec. 6, 2022), ECF No. 20. The CFTC found that the trader was required to pay a \$3,000,000 civil monetary penalty and receive a lifetime ban on trading commodity interests for or on behalf of other persons or entities.

⁶⁰Professor Margaret Hyland, Ph.D., *Withdrawal of CFTC Letter No. 14-130*, CFTCLTR No. 22-08, 2022 WL 3914154 (Aug. 4, 2022), <https://www.cftc.gov/csl/22-08/download>. See also *CFTC Staff Withdraws No-Action Letter to Victoria University of Wellington, New Zealand Regarding a Not-For-Profit Market for Certain Event Contracts*, CFTC Press Release No. 8567-22 (Aug. 4, 2022), <https://www.cftc.gov/PressRoom/PressReleases/8567-22>.

⁶¹Neil Quigley, CFTC No-Action Letter, CFTCLTR No. 14-130, 2014 WL 5499971 (Oct. 29, 2014), <https://www.cftc.gov/sites/default/files/idc/groups/public/@lrllettergeneral/documents/letter/14-130.pdf>.

⁶²CFTCLTR No. 22-08, 2022 WL 3914154, at *1.

⁶³Compl., *Clarke v. CFTC*, No. 22-cv-00909 (W.D. Tex. Sept. 9, 2022), ECF No. 1; First Am. Compl. *Clarke v. CFTC*, No. 22-cv-00909 (W.D. Tex. Oct. 6, 2022), ECF No. 15.

⁶⁴Def. CFTC's Mot. to Dismiss at 9-15, *Clarke v. CFTC*, No. 22-cv-00909 (W.D. Tex. Oct. 28, 2022), ECF No. 19.

⁶⁵CFTC Announces Review and Public Comment Period of KalshiEx Proposed Congressional Control Contracts Under CFTC Regulation 40.11, CFTC Press Release No. 8578-22 (Aug. 26, 2022), <https://www.cftc.gov/PressRoom/PressReleases/8578-22>.

⁶⁶CFTC, Dissenting Statement of Commissioner Caroline D. Pham Regarding the Review and Stay of KalshiEX LLC's Political Event Contracts (Aug. 26, 2022), <https://www.cftc.gov/PressRoom/SpeechesTestimony/phamstatement082622>.

⁶⁷*Id.*

⁶⁸Exec. Order No. 14030, Climate-Related Financial Risk, 86 Fed. Reg. 27967 (May 20, 2021).

⁶⁹CFTC Announces Voluntary Carbon Markets Convening, CFTC Press Release No. 8525-22 (May 11, 2022), <https://www.cftc.gov/PressRoom/PressReleases/8525-22>.

⁷⁰Request for Information on Climate-Related Financial Risk, 87 Fed. Reg. 34856, 34,856 (June 8, 2022), <https://www.cftc.gov/site/default/files/2022/06/2022-12302a.pdf>.

⁷¹CFTC, Office of Public Affairs, Request for Comment on FTX Request for Amended DCO Registration Order (Mar. 10, 2022), <https://www.cftc.gov/media/7031/CommentFTXAmendedOrder/download>.

⁷²See Changing Market Roles: The FTX Proposal and Trends in New Clearinghouse Models: Full Committee Hearing Before H. Comm. on Agric. (May 12, 2022), <https://agriculture.house.gov/calendar/eventsingle.aspx?EventID=7287>; See also Tr. of CFTC Staff Roundtable on Non-Intermediation (May 25, 2022), <https://www.cftc.gov/sites/default/files/2022/07/1658159363/transcript052522.pdf>.

⁷³Clearing Requirement Determination Under Section 2(h) of the Commodity Exchange Act for Interest Rate Swaps To Account for the Transition From LIBOR and Other IBORs to Alterna-

tive Reference Rates, 87 Fed. Reg. 52182 (Aug. 24, 2022). The final rule removes the requirement to clear interest rate swaps referencing certain IBORs (e.g., LIBOR) and replaces them with requirements to clear interest rate swaps referencing overnight, nearly risk-free reference rates.

⁷⁴Governance Requirements for Derivatives Clearing Organizations, 87 Fed. Reg. 49559 (Aug. 11, 2022). The proposed amendments would require DCOs to establish and consult with one or more risk management committees ("RMCs") on matters that could materially affect the risk profile of the DCO. Finally, the proposed amendments would require DCOs to establish at least one market participant risk advisory working group ("RWGs") that must convene at least quarterly, and adopt written policies and procedures related to the formation and role of RWGs.

⁷⁵CFTC Approves a Proposed Rule and a Proposed Order and Request for Comment, CFTC Press Release No. 8624-22 (Nov. 10, 2022) <https://www.cftc.gov/PressRoom/PressReleases/8624-22>.

⁷⁶Form PF; Reporting Requirements for All Filers and Large Hedge Fund Advisers, 87 Fed. Reg. 53832 (Sept. 1, 2022).

⁷⁷On July 25, 2022, DCR extended previously granted no action relief to the Shanghai Clearing House ("SHCH"), allowing it to clear certain swaps for the proprietary accounts of SHCH U.S. clearing members while its exemption application is pending. Hongbo Wang, CFTC No-Action Letter, CFTCLTR No. 22-07, 2022 WL 3914152 (July 25, 2022). On September 15, 2022, DCR granted a no-action request from the Taiwan Futures Exchange Corporation ("TAIFEX"), while TAIFEX's application under Commission Rule 39.6 for an exemption from DCO registration remains pending. Tzu-Hsin Wu, CFTC No-Action Letter, CFTCLTR No. 22-12, 2022 WL 4463420 (Sept. 15, 2022).

See 7 U.S.C.A. § 7a-1(a) (providing DCO registration requirements).

⁷⁸Notice of Proposed Order and Request for Comment on an Application for a Capital Comparability Determination From the Financial Services Agency of Japan, 87 Fed. Reg. 48,092

(Aug. 8, 2022), <https://www.govinfo.gov/content/pkg/FR-2022-08-08/pdf/2022-16684.pdf>. The comment period closed on Oct. 7, 2022, and the comments are currently under review.

⁷⁹Notice of Proposed Order and Request for Comment on an Application for a Capital Comparability Determination Submitted on Behalf of Nonbank Swap Dealers Subject to Regulation by the Mexican Comisión Nacional Bancaria y de Valores, 87 Fed. Reg. 76,374 (Dec. 13, 2022), <https://www.govinfo.gov/content/pkg/FR-2022-12-13/pdf/2022-26758.pdf>. The comment period will close on Feb. 13, 2023.

⁸⁰Capital Requirements of Swap Dealers and Major Swap Participants, 85 Fed. Reg. 57,562 (Sept. 15, 2020), <https://www.cftc.gov/sites/default/files/2020/09/2020-16492a.pdf>.

⁸¹CFTC Issues Order of Registration to FEX Global Pty Ltd to Permit Trading by Direct Access from the U.S., CFTC Press Release No. 8509-22 (Mar. 30, 2022), <https://www.cftc.gov/PressRoom/PressReleases/8509-22>.

⁸²Hyojae Cho, CFTC Request for No-Action Letter, CFTCLTR No. 22-13, 2022 WL 16507746 (Oct. 17, 2022), <https://www.cftc.gov/csl/22-13/download>.

⁸³CFTC, *Keynote of Chairman Rostin Behnam at the FIA Boca 2022 International Futures Industry Conference, Boca Raton, Florida* (Mar. 16, 2022), <https://www.cftc.gov/PressRoom/SpeechesTestimony/opabehtnam21>.

⁸⁴CFTC, *Addendum A: FY 2022 Enforcement Actions* (Oct. 20, 2022), https://www.cftc.gov/media/7861/DOE_ResultsFY22_AddendumA100722/download.

⁸⁵Office of Information & Regulatory Affairs, *CFTC Agency Rule List—Fall 2022*, https://www.reginfo.gov/public/do/eAgendaMain?operation=OPERATION_GET_AGENCY_RULE_LIST¤tPub=true&agencyCode=&showStage=active&agencyCD=3038&csrf_token=EAB9EF7E5B174902D056470B5A95CE732250303E55EC3A573B194660385BCB2EF899200DBB7EC52E068E6201B803201B76DB.

⁸⁶Office of Information & Regulatory Affairs, *CFTC Agency Rule List—Spring 2022*, https://www.reginfo.gov/public/do/eAgendaMain?operation=OPERATION_GET_AGENCY_RULE_LIST¤tPubid=202204&showStage=active&agencyCd=3038&csrf_token=E54C33EAA3EE6B2588D84B6F286078C983AC659F8CB743EA29E7EB12B721EA4F612EB5130D77E7CC52521C0B593B8DF72FCF.

⁸⁷CFTC, *Dissenting Statement of Commissioner Summer K. Mersinger Regarding CFTC's Regulatory Agenda* (Jan. 9, 2022), <https://www.cftc.gov/PressRoom/SpeechesTestimony/mersingerstatement010923>.

⁸⁸*State of the CFTC: Full Committee Hearing Before the H. Comm. on Agric.*, 117th Cong. (Mar. 31, 2022) (testimony of Rostin Behnam, Chairman, CFTC), https://agriculture.house.gov/uploadedfiles/behnam_testimony_house_ag_3-31-2022.pdf.

⁸⁹CFTC, *Statement of Commissioner Christy Goldsmith Romero before the Market Risk Advisory Committee* (Sept. 28, 2022), <https://www.cftc.gov/PressRoom/SpeechesTestimony/romerostatement092822>.

⁹⁰Tr. of Voluntary Carbon Markets Convening (June 2, 2022), https://www.cftc.gov/sites/default/files/2022/10/1664914920/transcript_VCM_C060222.pdf.

⁹¹Request for Information on Climate-Related Financial Risk, 87 Fed. Reg. 34856 (June 8, 2022), <https://www.govinfo.gov/content/pkg/FR-2022-06-08/pdf/2022-12302.pdf>.