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CFTC Regulatory and Enforcement Report: 2020 Activity and Outlook

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The past year has been very active for the CFTC, despite the historic COVID-19 pandemic. Chairman Heath Tarbert's agenda has been largely accomplished because the CFTC has been able to finish and further refine multiple rules required by the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank), spanning a wide range of topics, such as swap dealer (SD) rules, margin for uncleared swaps, cross-border regulation, and position limits. Moreover, the CFTC has actively addressed pressing market issues. For example, the CFTC issued highly anticipated guidance and rules for digital assets, as well as electronic trading risk principles for exchanges, and has provided much-needed amendments to the regulatory reporting regime. Notably, the CFTC set a number of enforcement records, such as filing the highest number of enforcement actions in a year (113) and achieving the largest monetary relief for a single case in CFTC history ($920 million).

As the 2020 presidential election loomed, there were several significant departures from the CFTC, including the departure of CFTC Division of Enforcement (DOE) Director, James McDonald. As of this writing, former Chairman Tarbert has left his post as Chairman but continues to serve as a Commissioner. Commissioner Rostin Benham serves as Acting Chairman, and we will see a new Chairperson and new leadership in the operating divisions of the CFTC. In short, the new regulatory and enforcement agenda of the CFTC will begin to reveal itself as we enter the administration of President Joe Biden.

New Requirements for Commodity Pool Operators, Commodity Trading Advisors, and Registered Investment Companies

On November 25, 2019, the CFTC approved a series of amendments (the Amendments) to commodity pool operator (CPO) and commodity trading adviser (CTA) regulations. The Amendments, among other things, (1) clarified an existing exclusion from the definition of CPO for operators managing registered investment companies (RICs); (2) eliminated certain regulatory filings for particular classes of CPOs and CTAs; and (3) exempted CPOs meeting the definition of "family office" from certain registration requirements. The Amendments became effective over the course of 2020 and will continue to apply into 2021.

The CFTC clarified Regulation 4.5 by affirming that a registered investment adviser (RIA) is the appropriate person to claim the exclusion on behalf of a RIC. Thus, the Amendments eliminate some confusion among market participants as to who should claim the exclusion. For those RIAs already claiming the Regulation 4.5 exclusion with respect to the RICs they operate, the RIA simply needs to continue to affirm the notice filing in the same manner it did prior to the amendments. Additionally, the CFTC extended the exclusionary relief of Regulation 4.5 to cover RIAs of business development companies.

The CFTC adopted a revision to the definition of "Reporting Person" by codifying CFTC Letter No. 14-115 and CFTC Letter No. 15-47.[1] CPOs operating pools for which the CPO claims either a Regulation 4.5 exclusion or a Regulation 4.13 exemption are exempted from filing Form CPO–PQR. Likewise, registered CTAs who do not direct client accounts are exempt from the reporting requirements. The CFTC acknowledged that certain categories of CPOs and CTAs filing Form CPO–PQR and Form CTA–PR provided it with limited utility.[2] Compliance by RIAs with respect to RICs affected by the Amendments is not required until March 1, 2021.

The Amendments establish CPO and CTA registration exemptions for persons meeting the definition of "family office."[3] The Amendments are consistent with the regulatory exclusion from the definition of "investment adviser" for family offices adopted by the US Securities and Exchange Commission (SEC) in 2012.[4] The CFTC contends that familial relationships inherent in family offices need less regulatory oversight than the typical, arms-length transactions between a CPO and a pool participant.[5] The CFTC noted the Amendments are intended to codify existing no-action relief for CPOs and CTAs provided through CFTC Letter Nos. 12–37 and 14–143 and improve harmonization for market participants subject to dual CFTC and SEC jurisdiction.[6] The family office registration exemptions went into effect on January 9, 2020.

On June 4, 2020, the CFTC amended Regulation 4.13(b) requiring persons claiming or affirming an exemption from registration as a CPO to certify that neither it, nor any of its principals, have a "statutory disqualification" requiring disclosure under Section 8a(2) of the Commodity Exchange Act (CEA).[7] Statutory disqualifications include serious violations of a number of laws and regulations governing financial markets, including felony convictions for embezzlement, theft, extortion, fraud and other legal and ethical violations. The revision closed a loophole, whereby financial wrongdoers can no longer rely on Regulation 4.13(b) to avoid disclosing past bad acts while still servicing pool participants.[8] Prior to this modification, CPOs generally could not register with the CFTC or the National Futures Association (NFA) if it, or its principals, previously committed acts resulting in statutory disqualifications. However, the statutory disqualification requirements did not extend to exempt CPOs. Importantly, the revision excludes any act previously revealed to the CFTC in connection with an application for registration granted by the CFTC. As a result of this revision, any CPO claiming an exemption in accordance with Rule 4.13(a)(1), (2), (3) or (5) must affirmatively certify that neither it nor its principals have any statutory disqualifications in their backgrounds. Importantly, the statutory disqualifications of Section 8a(2) of the CEA already disqualify most asset managers subject to SEC regulations and oversight, but managers must be mindful of this revision when claiming or reaffirming an exemption with the NFA. A CPO relying on Rule 4.13(a)(1), (2), (3) or (5) must certify that it is in compliance with this revision by March 1, 2021.

On October 6, 2020, the CFTC approved changes to Form CPO-PQR for CPOs. Specifically, the revisions:

1. Eliminate existing Schedules B and C of the form, except for the Pool Schedule of Investments;

2. Retain the 5 percent threshold for reportable assets with respect to the Pool Schedule of investments;
3. Amend the information requirements and instructions to request Legal Entity Identifiers for CPOs and their operated pools that have them, and to delete questions regarding pool auditors and marketers;
4. Enable substituted compliance by allowing CPOs to file NFA Form PQR in lieu of filing the revised Form CPO-PQR with the CFTC; and
5. Rescind substituted compliance with respect to Joint SEC-CFTC Form PF.

The initial compliance date is May 30, 2021. Additionally, the CFTC will evaluate the ongoing utility of these changes within 18 to 24 months after the compliance date.

Market participants, including registered CPOs and CTAs, should be aware that, on October 10, 2020, the CFTC[9] rolled back certain Volcker Rule restrictions in 2020.[10] The Volcker Rule limits banking entities and certain nonbank financial companies from engaging in proprietary trading activities and from holding certain interests in hedge funds and private equity funds (for example, covered funds). Among other things, these changes are intended to loosen certain regulations by allowing banks to lend more freely to covered entities and by clarifying which types of entities are "covered funds."[11]

Lastly, while not a CFTC action, on October 28, 2020, the SEC finalized regulations related to the use of derivatives transactions by registered funds (Derivatives Rule).[12] In conjunction with the Derivatives Rule, the SEC will rescind Investment Company Act Release No. 10666 and replace the SEC's decades-old patchwork of guidance with a comprehensive framework for the use of derivatives transactions. The Derivatives Rule retains the key elements of the 2019 proposal, with certain modifications in consideration of industry feedback and market disruptions surrounding the COVID-19 pandemic. Specifically, the Derivatives Rule mandates a registered fund adopt and/or implement: (1) value at risk limitations in lieu of asset segregation requirements; (2) a written derivatives risk management program; (3) new board oversight responsibilities; and (4) new reporting and recordkeeping requirements. The Derivatives Rule provides an exception for funds limiting their derivative exposure to 10 percent of net assets, excluding certain currency and interest rate hedging transactions. In addition, the Derivatives Rule provides special treatment for reverse repurchase agreements, and similar financing transactions and unfunded commitment agreements.

Swap Dealers: Capital Requirements and Cross-Border Rules

At open meetings held on July 22 and July 23, 2020, the CFTC issued final rules on (1) new capital requirements on SDs and major swap participants (MSPs) that are not subject to supervision by a banking regulator, as well as financial reporting requirements for SDs and MSPs generally (Final Capital Requirements Rule); and (2) the cross-border application of the registration thresholds (Final Cross-Border Rule) for SDs and MSPs.[13] The Final Cross-Border Rule is of significant note because it largely replaces the cross-border guidance that the CFTC issued in 2013. The 2013 cross-border guidance was subject to controversy, both with regard to its reach and its application. The Final Cross-Border Rule seeks to remedy this controversy.

The Final Capital Requirements Rule allows SDs to choose from among three alternative methods, each subject to a $20 million capital floor, to establish and meet minimum capital requirements:

1. Net liquid assets method, based primarily on existing capital requirements for futures commission merchants (FCMs), and on the capital requirements adopted by the SEC for security-based SDs and major security-based swap participants;
2. Bank-based method, based primarily on existing capital requirements for bank holding companies

under the supervision of the Federal Reserve Board; and
3. Tangible net worth method, designed specifically for SDs that are part of a larger commercial enterprise. (This method is the approach adopted for MSPs.)

The Final Capital Requirements Rule amends existing capital requirements for FCMs to impose specific requirements for swaps and security-based swaps. In addition, the Final Capital Requirements Rule includes: (1) a comprehensive model approval process; (2) accompanying financial reporting, recordkeeping, and notification requirements; and (3) a substituted compliance determination process for those SDs that already may be required to maintain capital in accordance with a foreign regulator. The Final Capital Requirements Rule became effective on November 16, 2020, and the date of compliance is October 6, 2021.[14]

The CEA requires registration of an SD,[15] but exempts entities engaged in a *de minimis* quantity of swap dealing transactions, currently set at $8 billion (over the course of the immediately preceding 12 months), except for endowments and other "special entities."[16] The Final Cross-Border Rule describes how the *de minimis* threshold applies to the cross-border swap dealing transactions of US Persons and Non-US Persons and, specifically, identifies an entity's cross-border dealing activities that should be included in its *de minimis* threshold:

1. A US Person is required to include all of its swap dealing transactions, including those of its foreign branches, in its *de minimis* threshold calculation without exception;
2. A Non-US Person that is guaranteed by a US Person (a Guaranteed Entity) or a Significant Risk Subsidiary (SRS) is required to include all of its swap dealing transactions in its *de minimis* threshold calculation; and
3. A Non-US Person that is neither a Guaranteed Entity nor an SRS (collectively referred with its US branches as an Other Non-US Person) is subject to special provisions:

   a. An Other Non-US Person is required to include swap dealing transactions with a US Person or a Guaranteed Entity in its *de minimis* threshold calculation, except for swaps conducted through a foreign branch of a registered SD.
   b. However, an Other Non-US Person may exclude swap dealing transactions with a Guaranteed Entity where the Guaranteed Entity is guaranteed by a nonfinancial entity or the Guaranteed Entity is itself below the *de minimis* threshold and is affiliated with a registered SD.[17]

MSP thresholds are required to be calculated in largely the same manner, except with regard to swap positions with guarantees. MSP calculations for swap positions with guarantees require that all swap positions subject to recourse must be attributed to the guarantor unless the guarantor, the Guaranteed Entity and its counterparty are Other Non-US Persons.

The Final Cross-Border Rule includes a series of new definitions. Most notably, the definition of "US Person"[18] is now consistent with the definition adopted by the SEC, and "SRS"[19] replaces the concept of a "conduit affiliate" from prior CFTC guidance. The Final Cross-Border Rule also re-categorizes certain CFTC regulatory requirements as Group A (entity-wide requirements for SDs), Group B (transaction level requirements for SD to counterparty transactions) and Group C (business conduct standards for SD to counterparty transactions), and provides exceptions from, and substitute compliance rules for, such regulatory requirements.

The Final Cross-Border Rule became effective on November 13, 2020, and the date of compliance is September 14, 2021. Swaps entered into prior to September 14, 2021 are not subject to the Final Cross-Border Rule and may continue to rely on prior CFTC guidance.[20]

Cross-Border Clearing

The clearing of derivatives globally and the permission of mutual recognition to avoid market fragmentation have been important themes for the CFTC, which continued in 2020. There are 15 derivatives clearing organizations (DCOs) currently registered with the CFTC. Five of these DCOs are organized outside of the United States (non-US DCOs). These five DCOs are also registered in their respective home countries, and thus are subject to oversight by both the CFTC and their home country regulators. Effective November 20, 2020, the CFTC adopted an alternative compliance framework which permits non-US DCOs to avoid this dual registration and to be registered with the CFTC through compliance with their home country regulatory regimes only, in lieu of, and as an alternative means of, compliance with the CFTC's DCO Core Principles. Now, under Part 39 and Part 140 as amended, a non-US DCO that wants to clear only swaps for US Persons has two registration options: (1) the non-US DCO may apply for regular DCO registration under existing procedures in Section 39.3(a)(2) and be subject to all CFTC regulations applicable to DCOs in general, or (2) if the non-US DCO does not pose substantial risk to the US financial system and meets the requirements of Section 39.51, it may register and maintain registration as a DCO by relying largely on its home country regulatory regime, in lieu of compliance with CFTC regulations. This alternative compliance framework is not available to US DCOs, which must comply with all CEA and CFTC regulations applicable to DCOs.

A non-US DCO applying for registration as a DCO under this alternative compliance framework also must satisfy a few additional requirements: (1) the CFTC must determine that the non-US DCO's compliance with its home country regulatory regime would satisfy the CFTC's DCO Core Principles; (2) the non-US DCO must be in good regulatory standing in its home country; and (3) a memorandum of understanding or similar arrangement satisfactory to the CFTC must be in effect between the CFTC and the non-US DCO's home country regulator. Also, the non-US DCO must not pose substantial risk to the US financial system. The CFTC has defined "substantial risk" as (1) the non-US DCO holding 20 percent or more of the required initial margin (IM) of US clearing members for swaps across all registered and exempt DCOs and (2) when 20 percent or more of the IM requirements for swaps at that DCO is attributable to US clearing members. If one or both of these thresholds are close to 20 percent, the CFTC may exercise discretion in its determination of whether the DCO poses a substantial risk.

Swap Execution Facilities: No More Name Give-Up

Effective September 22, 2020, the CFTC finalized a revision of Section 37.9(d) to prohibit a swap execution facility (SEF) from directly or indirectly disclosing the identity of a counterparty to any swaps that are both (1) anonymously executed (including swaps that are anonymously pre-arranged or anonymously pre-negotiated), and (2) intended to be cleared. During 2020, SEFs implemented new rules that prohibit any person from violating this new requirement. There is one narrow exception: The requirement will not apply to package transactions that include a component transaction that is not a swap intended to be cleared. There are no exceptions in regards to workup protocols, error trades and permitted swaps.

There is an earlier compliance date for required swaps and a later compliance date for voluntarily-cleared/permitted swaps. For swaps subject to the trade execution requirement under CEA Section 2(h)(8), SEFs must commence compliance no later than November 1, 2020. For swaps not subject to the trade execution requirement under CEA Section 2(h)(8), SEFs must commence compliance no later than July 5, 2021.

The CFTC believes that this revision was reasonably necessary to promote trading of swaps on SEFs, fair competition among market participants and impartial access to SEFs. The CFTC stated that it encourages SEFs and market participants to generally work to eliminate the technological or operational need for post-trade name give-up.

Refining the Phasing of Margin Requirements

On April 3, 2020, the Basel Committee on Banking Supervision (BCBS) and the International Organization of Securities Commissions (IOSCO) announced a one-year deferral of the final implementation phases of the margin requirements for non-centrally cleared derivatives.[21] Due to this extension, entities with an aggregate average notional amount (AANA) of non-centrally cleared derivatives greater than €50 billion will now be subject to the requirements on September 1, 2021. Entities with an AANA of non-centrally cleared derivatives greater than €8 billion will be subject to the requirements on September 1, 2022.

SDs are required to post and collect IM for uncleared swaps with other SDs and counterparties that are financial end users[22] with "material swap exposure" in accordance with a compliance schedule that has been phasing in for the last four years.[23] The final phase of that implementation, "Phase V," was scheduled to take effect in September 2020 and to result in a substantial number of investment funds and other financial end users coming into the scope of the IM requirements. However, on July 23, 2019, BCBS and IOSCO issued a statement advising that they have agreed to extend the implementation of the IM requirements by one year, until September 1, 2021.[24] The announcement in April extends the implementation deadline by another year, until 2022.[25] BCBS and IOSCO provided a summary table to note the changes,[26] which is reproduced in Exhibit 1 with the additional changes from the one-year delay announced on April 3, 2020[27] in bold.

The extension is a welcome development given the possible displacement of employees and the need for firms to focus resources on managing risks associated with current market volatility. This extension will provide additional operational capacity for firms to respond to the immediate impact of the COVID-19 pandemic while still facilitating covered entities to act diligently to comply with the requirements.[28]

Additionally, on August 14, 2020, the CFTC unanimously approved a proposal to align the CFTC's uncleared swap margin requirements with the above BCBS/IOSCO framework for non-cleared derivatives.[29] On November 9, 2020, the CFTC extended the implementation phase such that compliance would be required for most market participants starting on September 1, 2022, which is consistent with the BCBS/IOSCO framework as described above.[30]

Lastly, the CFTC amended the margin requirements for uncleared swaps for SDs and MSPs for which there is no prudential regulator to add the European Stability Mechanism (ESM) to the list of entities that are expressly excluded from the definition of financial end user under CFTC regulations and to correct an erroneous cross-reference in CFTC regulations.[31] The CFTC approved a final rule so that no enforcement actions will be taken against a registered SD that does not follow the uncleared margin rules with respect to swaps entered into with the ESM. The final rule codifies relief from CFTC No-Action Letter 19-22[32] and exempts registered SDs that do not follow the uncleared margin rules with respect to swaps entered into with the ESM.

Clarification of the Rules for Non-US Futures and Options Transactions

On March 18, 2020, the CFTC issued a final rule amending its regulations governing the offer and sale of non-US or foreign futures and options to customers located in the United States (the Foreign Transactions Rule). The Foreign Transactions Rule codifies the process by which the CFTC may terminate exemptive relief issued pursuant to its regulations.[33]

The CFTC's Part 30 regulations govern the offer and sale of futures and option contracts traded on or

Exhibit 1—Summary of Changes to the Implementation of the Margin Requirements for Non-Centrally Cleared Derivatives

	March 2015 Framework	**July 2019 Revisions**	**April 2020 Revisions**
Initial Margin			
Covered entities belonging to a group whose aggregate month-end average notional amount of non-centrally cleared derivatives exceeds:			
€3.0 trillion	September 1, 2016 to August 31, 2017 (based on average notional amounts for March, April and May 2016)	September 1, 2016 to August 31, 2017 (based on average notional amounts for March, April and May 2016)	September 1, 2016 to August 31, 2017 (based on average notional amounts for March, April and May 2016)
€2.25 trillion	September 1, 2017 to August 31, 2018 (based on average notional amounts for March, April and May 2017)	September 1, 2017 to August 31, 2018 (based on average notional amounts for March, April and May 2017)	September 1, 2017 to August 31, 2018 (based on average notional amounts for March, April and May 2017)
€1.5 trillion	September 1, 2018 to August 31, 2019 (based on average notional amounts for March, April and May 2018)	September 1, 2018 to August 31, 2019 (based on average notional amounts for March, April and May 2018)	September 1, 2018 to August 31, 2019 (based on average notional amounts for March, April and May 2018)
€0.75 trillion	September 1, 2019 to August 31, 2020 (based on average notional amounts for March, April and May 2019)	September 1, 2019 to August 31, 2020 (based on average notional amounts for March, April and May 2019)	September 1, 2019 to **August 31, 2021** (based on average notional amounts for March, April and May 2019)
€50.0 billion	Not applicable	September 1, 2020 to August 31, 2021 (based on average notional amounts for March, April and May 2020)	**September 1, 2021 to August 31, 2022 (based on average notional amounts for March, April and May 2021)**
Covered entities belonging to a group whose aggregate month-end average notional amount of non-centrally cleared derivatives exceeds €8.0 billion	From September 1, 2020 onwards (based on average notional amounts for March, April and May that year)	From September 1, 2021 onwards (based on average notional amounts for March, April and May that year)	**From September 1, 2022 onwards (based on average notional amounts for March, April and May that year)**

subject to the regulations of a foreign board of trade (foreign futures and options) to customers located in the United States. These regulations set forth requirements for foreign firms acting in the capacity of an FCM, introducing broker, CPO and CTA with respect to the offer and sale of foreign futures and options to US customers, and are designed to ensure that such products offered and sold in the United States are subject to regulatory safeguards comparable to those applicable to transactions entered into on designated contract markets (DCM).

While the Part 30 regulations allow the CFTC to grant an exemption subject to any terms or conditions it may find appropriate, they did not provide a specific course of action if the CFTC should determine that exemptive relief is no longer warranted. Accordingly, the Foreign Transactions Rule amended the Part 30 regulations to codify a process by which it may terminate exemptive relief after notice and an opportunity to respond.

Electronic Trading Risk Principles and Market Disruptions

On December 8, 2020, the CFTC approved amendments to its regulations to address the potential risk of a DCM's trading platform experiencing a market disruption or system anomaly due to electronic trading.[34] The CFTC set forth three risk principles:

1. The implementation of exchange rules applicable to market participants to prevent, detect, and mitigate market disruptions and system anomalies associated with electronic trading;
2. The implementation of exchange-based pre-trade risk controls for all electronic orders; and
3. Prompt notification to the CFTC of any significant market disruptions on their electronic trading platforms.

A DCM can comply with these principles by implementing rules and risk controls that are reasonably designed to prevent, detect and mitigate market disruptions and system anomalies associated with electronic trading.[35]

These changes will be effective upon publication in the Federal Register.[36] DCMs must be in full compliance with the new requirements within 180 calendar days after the effective date.

On June 25, 2020, the CFTC withdrew its controversial Regulation Automated Trading Proposed Rule (Regulation AT) and Supplemental Proposed Rule and rejected certain policy approaches relating to the regulation of automated trading. Regulation AT sought to impose risk controls to mitigate potential risks and volatility associated with automated and algorithmic trading systems, in part, by requiring registration of certain persons as "Floor Traders" and increasing transparency of DCMs' electronic trading platforms and incentive programs.

Retail Commodity Transactions Involving Certain Digital Assets: Actual Delivery Required

On March 24, 2020, the CFTC approved its final interpretive guidance regarding retail commodity transactions involving certain digital assets (RCT Guidance).[37] The RCT Guidance clarifies the CFTC's interpretation of the actual delivery exception to Section 2(c)(2)(D) of the CEA in the context of virtual currencies.[38]

Under CEA Section 2(c)(2)(D), certain retail commodity transactions are subject to various CEA requirements, such as on-exchange trading and broker registration requirements. The actual delivery exception in CEA Section 2(c)(2)(D)(ii)(III)(aa), however, excepts a contract of sale that results in actual delivery within 28 days or such other longer period as the CFTC may determine by rule or regulation from such requirements. The RCT Guidance provides two central tenets of "actual delivery" in regards to virtual currency:

1. When a customer secures: (1) both 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 (2) 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; and

2. When the offeror and counterparty seller (including any of their respective affiliates or other persons acting in concert with the offeror or counterparty seller on a similar basis) do not retain any interest in, legal right to, 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.[39]

Consequently, actual delivery occurs if, within 28 days after entering into the transaction, the virtual currency is transferred to the buyer's blockchain address, over which the buyer maintains possession and control. Actual delivery also occurs if the virtual currency is transferred to a depository (that is, a wallet or other relevant storage system) other than one owned, controlled, operated by, or affiliated with, the counterparty seller (including any parent companies, subsidiaries, partners, agents, affiliates or others acting in concert with the counterparty seller) that has agreed to hold the virtual currency on behalf of the buyer, so long as certain other conditions are met.[40]

In contrast, actual delivery will not have occurred if (1) the retail commodity transaction was settled in cash, (2) only a book-entry was used to indicate a transfer to the buyer's account, or (3) there were any liens, interests or legal rights of the offeror or counterparty seller (including any of their respective affiliates or other persons acting in concert with the offeror or counterparty seller on a similar basis) on the virtual currency after 28 days from the date of the transaction. The RCT Guidance became effective on June 24, 2020 and has had multiple impacts on the use of margin for trading in the United States and abroad (see discussion of BitMEX enforcement matter below).

Position Limits for Derivatives Finalized After a Decade of Rulemaking

On October 15, 2020, the CFTC approved a final rule amending regulations of speculative position limits (Position Limits Rule), ending a decade-long saga and finally achieving compliance with certain amendments to the CEA passed by Dodd-Frank.[41]

The Position Limits Rule establishes a maximum position size for certain "referenced contracts."[42] Specifically, the CFTC set limits for 25 core referenced futures contracts, which consist of nine "legacy" agricultural contracts[43] that are currently subject to federal position limits and 16 additional non-legacy contracts.[44] The Position Limits Rule also applies to cash-settled futures and options on futures that are directly or indirectly linked to physically settled contracts, in order to prevent market manipulation.[45] Lastly, to prevent evasion through the creation of economically equivalent futures contracts that do not directly reference the price of the core referenced futures contracts, the Position Limits Rule further applies to "economically equivalent swaps."[46] Previously, there have not been required position limits on swaps.

The nine legacy contracts are subject to two types of federal position limits: (1) a position limit that applies in the spot month only; and (2) a position limit that applies in any single non-spot month as well as all months combined. In contrast, the 16 new non-legacy contracts have federal position limits that only apply in the spot month. However, it should be noted that all 25 of these futures contracts are, currently, already subject to exchange-set limits. While the Position Limits Rule allows exchanges to set position limits at the exchange level at any level that does not exceed the federal position limits, exchange-set limits typically are set at a lower threshold. We anticipate that this trend will continue when the exchanges update their limits in response to the Position Limits Rule.

In addition to broadening the scope of federal position limits, the Position Limits Rule also clarifies the applicable standard for bona fide hedging exemptions. A bona fide hedging transaction may exceed the federal position limits only if the transaction satisfies each of the following:

1. The position represents a substitute for transactions or positions made or to be made at a later time in a physical marketing channel (temporary substitute test);
2. The position is economically appropriate to the reduction of price risks in the conduct and management of a commercial enterprise (economically appropriate test); and
3. The position arises from the potential change in value of actual or anticipated assets, liabilities, or services (change in value requirement).[47]

Furthermore, the Position Limits Rule expands the list of enumerated bona fide hedges by adding five new types of hedges: (1) hedges of anticipated merchandising, (2) hedges by agents, (3) hedges of anticipated royalties, (4) hedges of services, and (5) offsets of commodity trade options. However, the Position Limits Rule also eliminates the risk management hedge as of January 1, 2023. The enumerated bona fide hedges are self-effectuating, meaning market participants utilizing such hedges do not need to notify the CFTC of the hedge. However, market participants will still need to apply to an exchange for a bona fide hedge exemption, even for enumerated bona fide hedges.

The Position Limits Rule eases the administrative burden on market participants by allowing a participant to file a single application to an exchange requesting a non-enumerated bona fide hedge exemption. If the CFTC does not object within the review period of 10 business days (or two business days in the case of sudden or unforeseen bona fide hedging needs) and the exchange approves of the bona fide hedge, the applicant will receive approval from both the CFTC and the exchange's requirements. Market participants are permitted to enter into hedging transactions while the application is pending, but risk having to unwind the position if the application is rejected by the CFTC. If the CFTC denies an application, a market participant will not be subject to a federal position limits enforcement action, so long as the applicant files the request in good faith and brings the position back into compliance with federal position limits requirements within a commercially reasonable period of time.

The Position Limits Rule elaborates on how and when a market participant may measure risk on a gross basis rather than on a net basis. Currently, market participants generally may only hedge positions on a net basis. However, the Final Rule permits hedge positions on a gross basis so long as the risk calculations are done consistently over time and not with the intent of evading federal position limits. Exchange rules may differ. The Position Limits Rule also eliminates the monthly reporting requirements related to reports of physical commodity holdings and fixed-price commodity contracts.

The Position Limits Rule will become effective on March 15, 2021. The new federal position limits for the nine legacy agricultural contracts and the new enumerated bona fide hedges will become effective at that time. The 16 new non-legacy contracts will be subject to the federal position limits on January 1, 2022. Additionally, exchanges must establish their new position limits rules and exemption application processes, as well as data sharing processes with the CFTC, by January 1, 2022. The Position Limits Rule becomes applicable to economically equivalent swaps on January 1, 2023.

The Enforcement Agenda Objectives and New Guidance

As noted above, James McDonald, director of the CFTC's DOE, left the agency in October 2020 after serving in that role since April 2017. With the election of President Joe Biden, the CFTC will have a new Chair in the coming months. While these leadership changes create the possibility of revised DOE enforcement priorities, we anticipate that the primary priorities will remain essentially as they have been since 2018. DOE published its first annual report in November 2018, and there reported on enforcement activity for the CFTC's fiscal year (FY) 2018 (October 1, 2017 to September 30, 2018). In that report, published during former CFTC Chairman Christopher Giancarlo's tenure, DOE identified its four priorities: (1) preserving market integrity; (2) protecting customers; (3) promoting individual accountability; and (4) coordinating with other regulators and criminal authorities on parallel matters.[48] Those four priorities remained constant in 2019 and 2020 under Chairman Tarbert's leadership.[49] Though DOE may alter its execution in 2021, we expect these high-level priorities to remain in effect.

New Enforcement Guidance in 2020

In 2020, DOE issued three primary sources of guidance to market participants, though all three were updates and revisions to existing guidance. First, in May 2020, DOE issued a memorandum to DOE Staff called "Civil Monetary Penalty Guidance" that summarized various factors that Staff will consider in recommending an appropriate civil monetary penalty to the CFTC in administrative or injunctive enforcement actions.[50] Among the factors Staff will consider is the existence and effectiveness of the company's pre-existing compliance program. Second, also in May 2020, DOE published a revised version of its Enforcement Manual, which was first published in May 2019. The revisions to the Manual primarily consisted of incorporating the new guidance on civil monetary penalties.

Third, in September 2020, DOE issued a memorandum to DOE Staff called "Guidance on Evaluating Compliance Programs in Connection with Enforcement Matters."[51] The memorandum begins by noting the civil monetary penalty guidance issued in May 2020, which directs Staff, when considering an appropriate penalty, to consider any relevant mitigating or aggravating circumstances, including the existence and effectiveness of the company's pre-existing compliance program. The September 2020 memorandum directs Staff, when evaluating a corporate compliance program, to consider whether the compliance program was reasonably designed and implemented to achieve three goals: (1) prevent the underlying misconduct at issue, (2) detect the misconduct, and (3) remediate the misconduct. The memorandum instructs Staff to further consider whether, upon discovery of any misconduct, the compliance program itself has been reviewed and modified to address any deficiencies.

CFTC Enforcement Results in 2020

According to the CFTC, FY 2020 was a "record-breaking" year in terms of the number of enforcement actions filed and the financial penalties assessed.[52] DOE brought 16 "manipulative conduct/spoofing" cases in FY 2020, which is equal to the number that it brought in FY 2019. The greater number of cases brought in FY 2020 resulted from a much larger number of "retail fraud/protection of customer funds" cases. While the number of spoofing and manipulation cases remained constant, several of the spoofing cases were very noteworthy.

Spoofing and Manipulation

During 2020, there was continued coordination between the CFTC and US Department of Justice (DOJ) on spoofing and manipulation cases. Of particular note was the CFTC's enforcement action against JPMorgan Chase & Company (JPMC) for spoofing.[53] Under the settlement order, JPMC is required to pay a total of $920.2 million—the largest amount of monetary relief ever imposed by the CFTC in a single case—including the highest restitution ($311,737,008), disgorgement ($172,034,790) and civil monetary penalty ($436,431,811) amounts in any spoofing case.[54] The spoofing activity in this case took place in precious metals futures, US treasury futures and cash treasury markets. As a result of this conduct, JPMC also entered into a deferred prosecution agreement with the DOJ and a civil settlement with the SEC. Of particular interest to trading managers is the fact that the JPMC settlement also involved a charge that it failed to diligently supervise its traders in violation of CFTC Regulation 166.3. According to the settlement, JPMC failed to maintain an adequate supervisory system or to engage in diligent supervision sufficient to detect the spoofing and manipulative conduct on its trading desks.[55] When entering into the settlement the CFTC took into account JPMC's level of cooperation with the CFTC during its investigation. According to the CFTC, the company's cooperation was lacking in the early stages of the investigation but improved in later stages.[56] Finally, the CFTC has entered into cooperation agreements with two former JPMC traders and is engaged in civil litigation against two others.[57] Those two traders, Michael Nowak and Gregg Smith, along with two other co-defendants, are currently facing federal criminal spoofing-related charges in Chicago and currently are scheduled to go to trial in October 2021.[58]

Also noteworthy were the CFTC's three enforcement actions against the Bank of Nova Scotia (BNS). On August 19, 2020, the CFTC announced that it had filed and settled three separate actions against BNS for spoofing, making false statements to the CFTC and for compliance and supervision failures related to its SD business.[59] DOJ also entered into a deferred prosecution agreement with BNS concerning the spoofing-related conduct. According to the CFTC orders, the spoofing and false statement charges arose from the futures trading activity of several traders on BNS's precious metals desk. As background, BNS had entered into a previous spoofing-related settlement with the CFTC in 2018.[60] According to the CFTC's 2020 false statement order, after the 2018 case was settled, the CFTC learned that BNS had made false and misleading statements during the investigation, and had omitted material facts, including omissions regarding the universe of BNS's precious metals futures accounts, the identities of the traders who traded precious metals futures and the order entry operator identifiers (Tag50s) of certain traders (including the trader terminated for spoofing) used to trade precious metals futures. BNS also allegedly made false statements to Commodity Exchange, Inc., via CME Group, Inc.'s Market Regulation Department, regarding BNS's failure to maintain a central repository of the Tag50s its traders used, and to the National Futures Association concerning its purported use of software to monitor manipulative or deceptive trading practices, including spoofing.[61]

The CFTC's 2020 spoofing case against BNS resulted from the widened scope of the investigation that allegedly was limited in the 2018 case by BNS's false statements and omissions. The 2020 spoofing order took BNS's compliance program to task for failing to detect and prevent the spoofing activity, despite having actual notice of it.[62] Finally, according to the CFTC's 2020 SD order, for tens of thousands of swaps, and over a seven-year period of time, BNS: (1) failed to provide timely and accurate pre-trade mid-market marks, which had the effect of concealing BNS's full markup from counterparties; (2) violated various requirements relating to BNS's counterparty onboarding process, recordkeeping, chief compliance officer reporting and supervision; and (3) made false or misleading statements to CFTC staff concerning its audio retention and supervision.[63] As a result of the three separate 2020 orders, the CFTC ordered BNS to pay a total of $127.4 million in fines, restitution and disgorgement.

Enforcement Concerning Digital Assets

In FY 2020, DOE continued to prioritize enforcement actions involving digital assets, filing a "record setting" seven such cases. The majority of cases involved retail fraud but one matter, *CFTC v. Laino Group Limited d/b/a Paxforex*, involves a foreign trading platform that allegedly offered illegal leveraged transactions in Ether, Litecoin, and Bitcoin.[64] In that case which is pending in federal court in Texas, the CFTC has charged the defendant with engaging in illegal off-exchange transactions and with failure to register as an FCM.

Not included in the seven cases mentioned above, because it was filed on October 1, 2020, one day after the end of the CFTC's fiscal year, is *CFTC v. HDR Global Trading Limited et al.*—entities and individuals doing business as BitMEX.[65] In that case pending in federal court in New York, the CFTC has charged the defendants with engaging in off-exchange transactions, offering illegal off-exchange commodity options, failure to register as an FCM, failure to register as a DCM or swap execution facility, failure to supervise and failure to implement a customer identification program and know your customer rules/anti-money laundering procedures. As of the date of this writing, BitMEX must answer or otherwise respond to the complaint by March 29, 2021. DOJ also charged the individual defendants with violating and conspiring to violate the Bank Secrecy Act by failing to have in place appropriate know your customer and anti-money laundering procedures. DOJ has informed the court in the CFTC case that it intends to file a motion to intervene in that case in order to seek a stay of discovery while the criminal case proceeds.[66] The CFTC has informed the court that it does not oppose the stay sought by DOJ, and defendants Arthur Hayes and Samuel Reed have informed the court that they do oppose the stay.[67]

The above cases build upon the CFTC's statements and guidance regarding its jurisdiction over Bitcoin because it is a commodity, which has been reinforced by various court decisions over the past years. Market participants should continue to monitor CFTC and court developments in 2021, as the oversight role of the CFTC and other regulators continues to develop.

Enforcement Takeaway—Focus on Compliance

The message is unmistakable. DOE continues to emphasize and press for corporate compliance. Both the civil monetary penalty guidance and the corporate compliance guidance were designed to put market participants on notice that DOE will evaluate a company's compliance program when deciding on the dollar amount of financial penalties to impose and when considering the need for other remedial measures, such as imposition of a corporate monitor. As stated in the FY 2020 Enforcement Report, "Because companies stand as the first line of defense to prevent misconduct, the Commission expects a compliance function to serve as a meaningful check: to ensure proper systems are in place to detect misconduct when it occurs, and to make sure it does not happen again."[68] In the JPMC and BNS cases discussed above, the robustness of those companies' compliance programs were front and center both in terms of how the CFTC arrived at settlement terms and how it communicated the settlement actions to the public. A common thread running through each case discussed above is that market participants simply must have robust compliance policies and procedures. Market participants must train on those policies and procedures, and not leave them on the shelf. These developments related to compliance programs are further underscored by a recent line of exchange enforcement actions that have found failure-to-supervise violations where there is a failure to train personnel on exchange rules and related regulatory guidance.[69] Market participants must monitor for compliance, and test whether the compliance program actually works. Finally, when they discover non-compliance, they must review and modify the program to address any deficiencies. Put simply, remediation is mandatory.

Conclusion

During 2021, the CFTC will not only have a new Chair, but will likely adopt a new regulatory philosophy. A significant portion of the new Chair's agenda may be to "re-finish" any Dodd-Frank work, such as expanding regulation to additional products and implementing the prior administration's rules.

However, there also is the potential that the new CFTC chair will seek to revise some of the finalized regulations discussed above, given that many were voted for along party lines.

The global futures and derivatives team at K&L Gates continues to follow the regulatory and enforcement developments at the CFTC. This article was prepared at the end of 2020 and there may be many other developments in the weeks prior to its publication. Our futures and derivatives team stands ready to assist market participants in navigating these developments and the new CFTC and global derivatives regulatory agenda.

Mr. Humenik and **Mr. Histed** are partners, and **Mr. Rogers**, **Mrs. Herr**, **Ms. Pham**, and **Mr. Lee** are associates, at K&L Gates, LLP. This article is not intended to be an offer to represent any person. Use of this article does not give rise to a lawyer-client relationship. Please do not consider there to be any lawyer-client relationship between you and K&L Gates or any of its lawyers unless or until: (1) you have sought to retain us; (2) we have had an opportunity to check and clear any conflicts; and (3) you have received a letter from us confirming the retention and its scope.

NOTES

1 *See* CFTC Letter Nos. 14–115 and 15–47. The amendments exclude certain registered CPOs and CTAs from the "Reporting Person" definition, consistent with exemptive relief provided by the CFTC's Division of Swap Dealer and Intermediary Oversight.

2 *See* Compliance Requirements for Commodity Pool Operators on Form CPO–PQR, 85 FR 71787 (Nov. 10, 2020).

3 *See* Registration and Compliance Requirements for Commodity Pool Operators and Commodity Trading Advisors: Registered Investment Companies, Business Development Companies, and Definition of Reporting Person, 84 FR 67343 (Dec. 10, 2019).

4 *See* Rule 202(a)(11)(G)-1 of the Investment Advisers Act of 1940, as amended.

5 *See id.* at 52909.

6 *See id.* at 52908.

7 *See* Registration and Compliance Requirements for Commodity Pool Operators and Commodity Trading Advisors: Prohibiting Exemptions on Behalf of Persons Subject to Certain Statutory Disqualifications, 85 FR 40877 (July 8, 2020).

8 *See* Supporting Statement of Chairman Heath P. Tarbert.

9 The Office of the Comptroller of the Currency, Board of Governors of the Federal Reserve System, Federal Deposit Insurance Corporation and SEC each adopted similar amendments to their regulatory requirements.

10 *See* Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships With, Hedge Funds and Private Equity Funds, 85 FR 46422 (Oct. 10, 2020).

11 *See id.*

12 *See* Use of Derivatives by Registered Investment Companies and Business Development Companies, 85 FR 83162 (Dec. 21, 2020).

13 *See* Press Release, CFTC, Release No. 8211-20, CFTC Approves Final Cross-Border Swaps Rule and an Exempt SEF Amendment Order at July 23 Open Meeting, (July 23, 2020), *https://www.cftc.gov/PressRoom/PressReleases/8211-20*.

14 *See* Capital Requirements of Swap Dealers and Major Swap Participants, 85 FR 57462 (Sept. 15, 2020).

15 *See* 7 U.S.C. § 6s(a). The CEA defines the term "swap dealer" as any person who (1) holds itself out as a dealer in swaps, (2) makes a market in swaps, (3) regularly enters into swaps with counterparties as an ordinary course of business for its own account, or (4) engages in any activity causing the person to be commonly known in the trade as a dealer or market maker in swaps; provided, however, in no event shall an insured depository institution be considered to be a SD to the extent it offers to enter into a swap with a customer in connection with originating a loan with that customer. The term "swap dealer" does not

include a person that enters into swaps for such person's own account, either individually or in a fiduciary capacity, but not as a part of a regular business.

16 The *de minimis* threshold with regard to swaps with special entities is set at $25 million. 17 C.F.R. § 1.3, Swap dealer, paragraph (4)(i)(A). A special entity is: (1) a Federal agency; (2) a State, State agency, city, county, municipality, or other political subdivision of a State, or any instrumentality, department, or a corporation of or established by a State or political subdivision of a State; (3) any employee benefit plan subject to Title I of the Employee Retirement Income Security Act of 1974 (ERISA); (4) any governmental plan, as defined in Section 3 of ERISA; (5) any endowment, including an endowment that is an organization described in Section 501(c)(3) of the Internal Revenue Code; or (6) any employee benefit plan defined in Section 3 of ERISA, not otherwise defined as a Special Entity, that elects to be a Special Entity by notifying an SD of its election prior to entering into a swap with the particular SD. *See* CFTC, Q & A–Business Conduct Standards for Swap Dealers and Major Swap Participants with Counterparties Final Rulemaking, *https://www.cftc.gov/sites/default/files/idc/groups/public/@newsroom/documents/file/bcs_qa_final.pdf*.

17 *See* Cross-Border Application of the Registration Thresholds and Certain Requirements Applicable to Swap Dealers and Major Swap Participants, 85 FR 56924 (Sept. 14, 2020).

18 "US Person" is defined as (1) natural person resident in the United States; (2) a partnership, corporation, trust, investment vehicle, or other legal person organized, incorporated, or established under the laws of the United States or having its principal place of business in the United States; (3) an account (whether discretionary or nondiscretionary) of a US Person; or (4) an estate of a decedent who was a resident of the United States at the time of death. *See id.* at 56998.

19 An SRS is generally defined as any non-US significant subsidiary of a US parent entity where the ultimate US parent entity has more than US$50 billion in global consolidated assets, as determined in accordance with US GAAP at the end of the most recently completed fiscal year. *See id.*

20 *See* Interpretive Guidance and Policy Statement Regarding Compliance with Certain Swap Regulations, 78 FR 45291 (July 26, 2013).

21 *See* Press Release, Basel Committee on Banking Supervision and the International Organization of Securities Commissions, Basel Committee and IOSCO announce deferral of final implementation phases of the margin requirements for non-centrally cleared derivatives (Apr. 3, 2020), *https://www.bis.org/press/p200403a.htm*.

22 Financial end users are defined broadly in CFTC Regulation 23.151 as counterparties who are not SDs and are a: bank holding company, depository institution, credit or lending entity, money services business, securities holding company, broker or dealer, investment adviser, registered investment company, private fund, commodity pool, commodity pool operator, commodity trading advisor, floor broker, floor trader, introducing broker, futures commission merchant, employee benefit plan, insurance company, or other enumerated financial firms.

23 CFTC Regulation 23.161. CFTC regulations referred to in this document may be found in Title 17 of the Code of Federal Regulations.

24 *See* Stephen M. Humenik, Michael W. McGrath, Kenneth Holston, Edgar Mkrtchian, Lawrence B. Patent, "Final Phase of Initial Margin Requirements for Uncleared Swaps to Be Delayed Until September 2021 for Most Market Participants–How to Manage Timelines and Expectations in Light of Recent Actions by Global Regulators," *K&L Gates HUB* (Aug. 13, 2019), *http://www.klgates.com/final-phase-of-initial-margin-requirements-for-uncleared-swaps-to-be-delayed-until-september-2021-for-most-market-participantshow-to-manage-timelines-and-expectations-in-light-of-recent-actions-by-global-regulators-08-12-2019/*.

25 Phases I–IV have been implemented on an annual basis beginning in 2016. Please see the table below for the full implementation schedule. The delay implementing Phase V does not otherwise impact

the parties who are required to post and collect IM to comply with Phases I–IV.

26 *See* Press Release, Basel Committee on Banking Supervision and International Organization of Securities Commissions, BCBS/IOSCO statement on the final implementation phases of the Margin requirements for non-centrally cleared derivatives (Mar. 5, 2019), *https://www.bis.org/press/p190305a.htm*. The table is available at: *https://www.bis.org/bcbs/publ/d475_summarytable.pdf*.

27 *See* Basel Committee on Banking Supervision and International Organization of Securities Commissions, Margin requirements for non-centrally cleared derivatives (Apr. 2020), *https://www.bis.org/bcbs/publ/d499.pdf*. The table is created from the information on page 24 of the document.

28 *See* Press Release, Basel Committee on Banking Supervision and the International Organization of Securities Commissions, Basel Committee and IOSCO announce deferral of final implementation phases of the margin requirements for non-centrally cleared derivatives (Apr. 3, 2020), *https://www.bis.org/press/p200403a.htm*.

29 *See* CFTC Release No. 8219-20, CFTC Unanimously Approves Proposals Amending Margin Requirements for Swap Dealers and Major Swap Participants (Aug. 14, 2020).

30 *See* Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants, 85 FR 71246 (Nov. 9, 2020).

31 *See* Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants, 85 FR 27674 (May 11, 2020).

32 *See* CFTC Letter No. 19-22 (Oct. 16, 2019).

33 *See* Foreign Futures and Options Transactions, 85 FR 15359 (Mar. 18, 2020).

34 *See* Final Rule (voting draft), CFTC, Electronic Trading Risk Principles (Dec. 8, 2020).

35 *See id.* at 35-37.

36 At the time of this writing, the Electronic Trading Risk Principles have not yet been published.

37 *See* Retail Commodity Transactions Involving Certain Digital Assets, 85 FR 37734 (June 24, 2020).

38 Virtual currencies refer to digital assets that serve as a medium of exchange.

39 *See* Retail Commodity Transactions Involving Certain Digital Assets at 37743-44.

40 The buyer must have the ability to remove the virtual currency as soon as technologically practicable and use freely, up to the full amount of the virtual currency purchased from the depository, at any time. The buyer must be able to transfer the virtual currency to another depository of the buyer's choosing. Further, no portion of the purchased commodity must be subject to a forced sale or be otherwise removable from the customer's control. *See id.* at 37739.

Additionally, the depository should be (1) a "financial institution" as defined by CEA Section 1a(21); (2) a separate line of business from the offeror not subject to the offeror's control; (3) a separate legal entity from the offeror and any offeror execution venue; (4) predominantly operated for the purpose of providing custodial services for virtual currency and other digital assets; (5) appropriately licensed to conduct such custodial activity in the jurisdiction of the customer; (6) offering the ability for the customer to utilize and engage in cold storage of the virtual currency; and (7) contractually authorized by the customer to act as its agent. *See id.* at 37743, n. 170.

41 *See* Press Release, CFTC, Release No. 8287-20, CFTC Finalizes Position Limits Rule at October 15 Open Meeting (Oct. 15, 2020).

42 *See* Final Rule (voting draft), CFTC, Position Limits for Derivatives (Oct. 15, 2020).

43 The nine legacy agricultural contracts refer to the list of commodities contained in the definition of "commodity" in CEA Section 1a; 7 U.S.C. 1a. These agricultural products consist of the following nine currently traded contracts: CBOT Corn (and Mini-Corn) (C), CBOT Oats (O), CBOT Soybeans (and Mini-Soybeans) (S), CBOT Wheat (and Mini-Wheat) (W), CBOT Soybean Oil (SO), CBOT Soybean Meal (SM), MGEX HRS Wheat (MWE), CBOT KC HRW Wheat (KW) and ICE Cotton No. 2 (CT). *See* 17 CFR 150.2.

44 The 16 additional non-legacy contracts include seven additional agricultural contracts, four energy contracts and five metals contracts. The seven additional agricultural contracts are: CME Live Cattle (LC), CBOT Rough Rice (RR), ICE Cocoa (CC), ICE Coffee C (KC), ICE FCOJ-A (OJ), ICE U.S. Sugar No. 11 (SB) and ICE U.S. Sugar No. 16 (SF). The four energy contracts are: NYMEX Light Sweet Crude Oil (CL), NYMEX New York Harbor ULSD Heating Oil (HO), NYMEX New York Harbor RBOB Gasoline (RB) and NYMEX Henry Hub Natural Gas (NG). The five metals contracts are: COMEX Gold (GC), COMEX Silver (SI), COMEX Copper (HG), NYMEX Palladium (PA) and NYMEX Platinum (PL).

45 The CFTC stated that, in the absence of position limits, an entity with positions in both the physically delivered and cash-settled contracts may have an increased ability and an increased incentive to manipulate one of these contracts to benefit positions in the other contract.

46 Futures that settle to the price of a referenced contract but not to the price of a core referenced futures contract would be indirectly linked to the core referenced futures contract as economically equivalent swaps.

47 *See* Position Limits for Derivatives at 24.

48 *See* CFTC Press Release, CFTC Division of Enforcement Issues Report on FY 2018 Results, Release Number 7841-18 (Nov. 15, 2018), *https://www.cftc.gov/PressRoom/PressReleases/7841-18*.

49 *See* CFTC Press Release, CFTC Division of Enforcement Issues Annual Report for FY 2019, Release Number 8085-19 (Nov. 25, 2019), *https://cftc.gov/PressRoom/PressReleases/8085-19*, and CFTC Press Release, CFTC Division of Enforcement Issues Annual Report, Release Number 8323-20 (Dec. 1, 2020), *https://www.cftc.gov/PressRoom/PressReleases/8323-20*.

50 *See* CFTC Press Release, CFTC Division of Enforcement Issues Civil Monetary Penalty Guidance, Release Number 8165-20 (May 20, 2020), *https://www.cftc.gov/PressRoom/PressReleases/8165-20*.

51 *See* CFTC Press Release, CFTC Issues Guidance on Factors Used in Evaluating Corporate Compliance Programs in Connection with Enforcement Matters, Release Number 8235 (Sept. 10, 2020), *https://www.cftc.gov/PressRoom/PressReleases/8235-20*.

52 *See* CFTC Press Release, CFTC Division of Enforcement Issues Annual Report, Release Number 8323-20 (Dec. 1, 2020), *https://www.cftc.gov/PressRoom/PressReleases/8323-20*.

53 *See* CFTC Press Release, CFTC Orders JPMorgan to Pay Record $920 Million for Spoofing and Manipulation, Release Number 8260 (Sept. 29, 2020), *https://www.cftc.gov/PressRoom/PressReleases/8260-20*.

54 *See id*.

55 *See id*.

56 *See id*.

57 *See id*.

58 In September 2020, a federal jury in Chicago convicted two former precious metals traders for Deutsche Bank, James Vorley and Cedic Chanu, of wire fraud for spoofing-related conduct. They have not been sentenced and currently are engaged in post-trial litigation attacking their convictions. The case is *United States v. James Vorley and Cedric Chanu*, Case No. 1:18-cr-00035, pending in the Northern District of Illinois.

59 *See* CFTC Press Release, CFTC Orders the Bank of Nova Scotia to pay $127.4 Million for Spoofing, False Statements, Compliance and Supervision Violations, Release Number 8220-20 (Aug. 19, 2020), *https://www.cftc.gov/PressRoom/PressReleases/8220-20*.

60 *See* CFTC Press Release, CFTC Orders the Bank of Nova Scotia to pay $800,000 Penalty for Spoofing in the Precious Metals Futures Markets, Release Number 7818-18 (Oct. 1, 2018), *https://www.cftc.gov/PressRoom/PressReleases/7818-18*.

61 *See* CFTC Press Release, CFTC Orders the Bank of Nova Scotia to pay record $77.4 Million for Spoofing and Making False Statements, Release Number 8221-20 (Aug. 19, 2020), *https://www.cftc.gov/PressRoom/PressReleases/8221-20*.

62 *See id*.

[63] *See* CFTC Press Release, CFTC Orders the Bank of Nova Scotia to pay $50 Million for Swap Dealer Compliance and Supervision Failures and False Statements (Aug. 19, 2020), *https://www.cftc.gov/PressRoom/PressReleases/8222-20*.

[64] *See* CFTC Press Release, CFTC Charges Foreign Trading Platform with Offering Illegal Leveraged Transactions in Ether, Litecoin, and Bitcoin, Release Number 8256-20 (Sept. 28, 2020), *https://www.cftc.gov/PressRoom/PressReleases/8256-20*.

[65] *See* CFTC Press Release, CFTC Charges BitMEX Owners with Illegally Operating a Cryptocurrency Derivatives Trading Platform and Anti-Money Laundering Violations, Release Number 8270-20 (Oct. 1, 2020), *https://www.cftc.gov/PressRoom/PressReleases/8270-20*.

[66] Commodity Futures Trading Commission v. HDR Global Trading, *et al.*, Case No. 20 Civ. 8132 (Southern District of New York), Dkt. No. 40, February 10, 2021.

[67] *Id*. at Dkt. No. 44, and 42, respectively.

[68] CFTC, *FY 2020 Division of Enforcement Annual Report*, p. 6.

[69] Since at least September 2019, the CME Group futures exchanges have brought a series of disciplinary actions against trading firms that allegedly failed to train their traders and staff about CME rules and CME Market Regulation Advisory Notices (MRANs). For example, on December 14, 2020, COMEX (a CME exchange) published a Notice of Disciplinary Action against Levmet Holdings Ltd. for a allegedly engaging in wash sales in copper futures markets and for failing to supervise its employees, a violation of CME Rule 432.W. The "failure to supervise" charge was based on Levmet's alleged failure to train its employees about CME rules and MRANs.