

7 Ways CFTC Should Nix Unnecessary Regulatory Burdens

By **Cheryl Isaac and Sarah Riddell** (March 31, 2025)

President Donald Trump's Jan. 31 Executive Order No. 14,192 on unleashing prosperity through deregulation aims to "alleviate unnecessary regulatory burdens placed on the American people." [1]

To achieve this goal, Trump has directed the heads of all federal agencies to ensure that the total incremental cost of all new regulations finalized in 2025 "be significantly less than zero." The executive order requires that any new costs associated with new regulations be offset by the elimination of existing costs of "at least 10 prior regulations." [2]

In this article, we identify a sampling of U.S. Commodity Futures Trading Commission regulations that we believe do not work efficiently in practice, and make specific recommendations for their elimination and other improvements to the CFTC's regulatory framework to achieve the goals of the executive order.

Recommendations

1. Eliminate the order book requirement applicable to swap execution facilities for permissible swap transactions.

One candidate for potential elimination is the swap execution facility order book requirement as it relates to swaps that are permitted transactions.

Under CFTC Regulation 37.3(a)(2), registered SEFs are required, at a minimum, to offer an order book for all swaps transacted on their platforms, other than a limited subset of swaps that are executed as a component of a package transaction. The CFTC's requirement includes both required transactions — i.e., those involving a swap subject to the trade execution requirement, including certain interest rate and credit default swaps — and permitted transactions, i.e., those not involving a swap subject to the trade execution requirement.

The Commodity Exchange Act, which authorizes the CFTC to promulgate rules related to SEFs, explicitly states that swaps that are not required to be executed on an SEF "may be executed through any other available means of interstate commerce." [3]

Thus, the CEA allows permitted transactions to be executed by any methodology offered by the SEF in its discretion. [4] Despite this permissibility, the CFTC requires every SEF to have an order book as an optional execution method.

The inefficient end result of the SEF order book requirement is that an SEF that solely lists permitted transactions for trading — which, again, do not have any requisite execution methods — must still allocate substantial capital to the creation and surveillance of an order book that may never be used, and is not required to be used.

Accordingly, the CFTC should revise Part 37 of its regulations to eliminate the SEF order book requirement, so long as the SEF only lists swaps that are permitted transactions.



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2. Codify ownership and control reporting no-action relief.

Another area for the CFTC to address — the codification of no-action relief — would reduce an unnecessary regulatory burden.

Over the 11 years since the CFTC adopted amendments to its ownership and control reporting, or OCR, regime, CFTC staff has issued and extended no-action relief from certain of the OCR requirements on eight occasions.[5]

The relief provides reporting parties extended timelines for the reporting of certain data and the ability to omit reporting in fields otherwise required under the rules across Forms 102 and 40.[6] The relief also increases the designated contract market volume threshold account reporting trigger from 50 to 250 or more contracts per day, and relieves parties from reporting SEF volume threshold accounts.[7]

Following these repeated extensions, CFTC Commissioner Summer Mersinger has urged the CFTC to promulgate an updated OCR rule, rather than needlessly extending its no-action relief and "kicking the can down the road." [8] Likewise, the Futures Industry Association Inc. and Commodity Markets Council have petitioned the CFTC for codification of the OCR relief.[9]

We agree: The CFTC should codify the OCR relief. Instead of using staff resources to issue extension after extension of relief related to decade-old issues, the CFTC should adopt amendments codifying the relief. Industry participants are otherwise currently expending unnecessary time and effort — and potentially legal fees — to scour the CFTC's website for relevant no-action relief to comprehensively comply with the CFTC's requirements.

Updating the OCR rules in a proper rulemaking process will provide notice to derivatives market participants, streamline compliance obligations, and provide clarity and consistency as to the actual scope of the OCR rules.

3. Eliminate the duplicative dual regulatory regime for mixed swaps.

The CFTC could also eliminate duplicative regulations in an effort to comply with the executive order.

Under the Dodd-Frank Act, Congress modified both the CEA and Securities Exchange Act to include a new definition of "mixed swaps," which are essentially a subset of security-based swaps that are also based on the value of one or more interest rates, currencies, commodities, instruments of indebtedness, indices or other financial interests (other than a single security or a narrow-based security index).[10]

One example provided by both the CFTC and U.S. Securities and Exchange Commission is a swap based on a custom basket of an oil company's stock as well as the price of oil.[11]

Mixed swaps are regulated equally by the CFTC and SEC, with the entire swap and security-based swap regulatory regimes applicable to these types of transactions, but with limited regulatory relief available to (1) dually registered swap dealers and security-based swap dealers, and (2) market participants that petition the CFTC and SEC for a joint order allowing only one set of specified parallel provisions from one of the regulators to apply.[12]

The CFTC and SEC intended the scope of what constitutes a mixed swap to be narrow. While

the definition is itself quite limited, the number of mixed swaps transacted in U.S. derivatives markets is likely significantly smaller than what it would otherwise be because the dual regulatory regime is so burdensome on market participants.

For example, intermediaries and exchanges offering mixed swaps would need to be dually registered with both the CFTC and SEC, and counterparties to these transactions would need to report to both swap data repositories and security-based swap data repositories.

At a minimum, we recommend that the CFTC amend CFTC Regulation 1.9 — in tandem with the SEC amending Rule 3a68-4 of the Exchange Act — allowing for only one regulatory regime to apply where there are parallel provisions, without the need for a counterparty to petition both regulators for clarity. The CFTC and SEC should work together to eliminate the need for compliance with dual, identical regulations wherever possible.

4. Issue a sunset order for large-trader reporting for physical commodity swaps.

Another excellent candidate for elimination is Part 20 of the CFTC's regulations.

The CFTC should issue an order to sunset Part 20 governing large-trader reporting of physical commodity swaps. Part 20 is redundant with other reporting requirements and increases regulatory obligations of swap counterparties — primarily swap dealers — with no significant benefits to the CFTC or the swaps markets.

When the CFTC adopted these regulations in 2011, it did so as a temporary measure, prior to the adoption of swap data reporting requirements. In fact, the regulations contain a specific sunset provision, allowing the CFTC to issue an order making Part 20 ineffective and unenforceable once swap data repositories are operational and processing swap data.[13]

The Futures Industry Association and the International Swaps and Derivatives Association Inc. have petitioned the CFTC to sunset these rules.[14] The CFTC should do so.

5. Issue new clarifying guidance related to the CFTC's expansive definition of "SEF."

It was welcome news to many that on March 13, the CFTC's Division of Market Oversight withdrew[15] its controversial staff advisory on swap execution facility registration requirements.[16]

Under that advisory, the Division of Market Oversight created an expansive — and confusing — interpretation of the types of activities that might require registration as a SEF, including offering one-to-many communications (e.g., request for quote platforms) and one-to-one bids and offers (e.g., chat functions). The SEF staff advisory bolstered the CFTC's September 2022 enforcement action against Asset Risk Management LLC[17] and subjected AEGIS, a platform offering bilateral trade communications, to SEF registration.[18]

The withdrawal of the SEF staff advisory has the effect of eliminating, but not replacing, the Division of Market Oversight's overly broad interpretation of the definition of "SEF." What remains is the existing regulatory framework for SEFs, including a requisite analysis of the particular facts and circumstances of the swap-related activities and types of communications offered on a given platform. The SEF staff advisory suggests, but does not guarantee, that the traditional interpretation of the CFTC's "multiple-to-multiple" prong of the SEF definition will reign supreme.

In order to provide clarity and avoid a return to the overly burdensome guidance in the SEF staff advisory in a future administration, we recommend that the CFTC promulgate a clear and concise amendment to the definition of "SEF" in Part 37 of its regulations — or do the same in the form of new guidance — ensuring that registered introducing brokers, commodity trading advisers and other derivatives market participants will not be unnecessarily swept into this onerous registration requirement.

6. Streamline conflict of interest obligations.

The CFTC should introduce streamlined, principles-based conflicts of interest rules and eliminate existing rules where they are redundant.

For more than a decade, the CFTC has attempted to introduce conflict of interest requirements applicable to derivatives clearing organizations, designated contract markets and SEFs.

After proposing conflict of interest rules in 2010, the CFTC withdrew the proposal the following year.[19] More recently, in 2023, the CFTC issued a request for comment on conflicts of interest related to the affiliations between certain CFTC-regulated entities,[20] and, in 2024, the CFTC proposed — but did not finalize — governance and conflict of interest rules applicable only to SEFs and designated contract markets.[21]

These rule proposals addressed the composition of the board of directors of a designated contract market, SEF and derivatives clearing organization, as well as certain types of committees and limitations on ownership.

Following these proposals, the CFTC now has a treasure trove of comments from industry participants on the topic of conflicts of interest. The regulator also has a precedent for addressing common types of conflicts of interest in CFTC Regulations 1.59 and 1.69 in connection with self-regulatory organizations' employees, boards of directors and committees.

The time is ripe for the CFTC to promulgate a conflict of interest rule that eliminates redundancies and inconsistent requirements for derivatives clearing organizations, designated contract markets and SEFs.

The CFTC should holistically review existing conflict of interest rules and determine how it can achieve the executive order's goals.

Currently, an entity registered in multiple capacities is subject to a patchwork of requirements. Because affiliation across registrants is increasingly commonplace, it would behoove the CFTC to address the myriad conflicts of interest that could arise in this environment in a single rulemaking, potentially consolidating the rule in Part 40 of the CFTC's regulations so that it applies equally to derivatives clearing organizations, designated contract markets and SEFs.

Any such rulemaking should be consistent with the CFTC's existing principles-based regime, rather than creating overly prescriptive requirements related to conflicts, and should create efficiencies and clarity for market participants that are registered in multiple capacities with the CFTC.

7. Streamline Subpart C of Part 39 of the CFTC's regulations.

In 2013, the CFTC adopted regulations applicable to certain derivatives clearing organizations, consistent with international standards, i.e., the Principles for Financial Market Infrastructures. These regulations apply to derivatives clearing organizations that are designated as systemically important, and to derivatives clearing organizations that elect to comply with these requirements — qualified central counterparties — to benefit from preferential capital charges available to banks that clear derivatives through a qualified central counterparty.[22]

The rationale for these regulations is the directive in Section 805 of the Dodd-Frank Act, which instructs the CFTC to consider international standards as they relate to risk management standards governing operations related to a systemically important derivatives clearing organization's payment, clearing and settlement activities.

The CFTC created an entirely new subpart in its regulations when adopting the Principles for Financial Market Infrastructures, incorporating not only the international principles but also, in most cases, additional obligations related to the principles' key considerations. The CFTC's requirements could be more narrowly tailored to address the principle itself without the detailed and prescriptive key considerations, similar to the approach the SEC took when adopting international standards for certain clearing agencies.

In keeping these requirements more principles-based, the CFTC could provide systemically important derivatives clearing organizations and qualified central counterparties more flexibility in complying with the relevant Principles for Financial Market Infrastructures and avoid redundancy with existing regulations.

Conclusion

The executive order's directive to keep the net costs of any new regulations below zero may sound daunting, but there are numerous areas the CFTC can examine for rescission or streamlining to reduce unnecessary regulatory burdens, consistent with the executive order's objectives.

The recommendations we have proposed are a starting point for the CFTC to consider when moving forward with regulatory initiatives, and should not be considered a comprehensive list. What did we miss?

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[1] Exec. Order No. 14,192, "Unleashing Prosperity Through Deregulation" (Jan. 31, 2025), <https://www.whitehouse.gov/presidential-actions/2025/01/unleashing-prosperity-through-deregulation/>.

[2] Id.

[3] 7 U.S.C. § 7b-3(d)(2).

[4] In accordance with CFTC Regulation 37.9, Required Transactions that are not block trades must be executed through (i) an Order Book; or (ii) a Request for Quote (RFQ) System with at least three bids.

[5] Ownership and Control Reports, Forms 102/102S, 40/40S, and 71; Final Rule, 78 Fed. Reg. 69,178 (Nov. 18, 2013).

[6] Staff of the Division of Market Oversight issued the most recent no-action relief on September 25, 2024. CFTC Letter No. 24-14 (Sept. 25, 2024). This relief remains effective until the effective date or compliance date (whichever is later) of a CFTC action addressing the obligations covered by the no-action relief. Id. at 3.

[7] CFTC Letter No. 24-14.

[8] Statement of Commissioner Summer K. Mersinger Regarding Extension of Staff No-Action Position from Certain Reporting Obligations (Sept. 25, 2024), <https://www.cftc.gov/PressRoom/SpeechesTestimony/mersingerstatement092524>; Statement of Commissioner Summer K. Mersinger Regarding Extension of Staff No-Action Position Regarding Ownership and Control Reports (Sept. 22, 2023), <https://www.cftc.gov/PressRoom/SpeechesTestimony/mersingerstatement092223b>.

[9] FIA and Commodity Markets Council, Petition for Amendment of the [OCR] Rule (Jun. 14, 2018), <https://www.fia.org/sites/default/files/2019-05/FIA-CMC-OCR-Petition-June-2018.pdf>.

[10] 7 U.S.C. § 1a(47) and 15 U.S.C. § 3(a)(68)(D).

[11] Further Definition of "Swap," "Security-Based Swap," and "Security-Based Swap Agreement"; Mixed Swaps; Security-Based Swap Agreement Recordkeeping, 77 Fed. Reg. 48,208, (Aug. 13, 2012).

[12] 17 C.F.R. §§ 1.9(b), (c); 240.3a68-4(b), (c).

[13] 17 C.F.R. § 20.9(a).

[14] Letter from FIA and International Swaps and Derivatives Association, Inc. to CFTC Secretary Christopher Kirkpatrick, Response to Notice of Intent to Renew Collection 3038-0095; Large Trader Reporting for Physical Commodity Swaps (May 13, 2024).

[15] CFTC Letter No. 25-05, Division of Market Oversight, Commodity Futures Trading Commission (March 13, 2025), available at <https://www.cftc.gov/csl/25-05/download>.

[16] CFTC Letter No. 21-19, Division of Market Oversight, Commodity Futures Trading Commission (Sept. 29, 2021), available at <https://www.cftc.gov/csl/21-19/download>.

[17] In the Matter of Asset Risk Management, LLC, CFTC No. 22-36 (Sept. 26, 2022), available at <https://www.cftc.gov/media/7706/enfassetriskorder092622/download>.

[18] See "AEGIS Hedging Solutions Update on SEF Registration for Certain CTAs," available

at <https://aegis-hedging.com/news/aegis-hedging-solutions-update-on-sef-registration-for-certain-ctas>.

[19] See Requirements for Derivatives Clearing Organizations, Designated Contract Markets, and Swap Execution Facilities Regarding the Mitigation of Conflicts of Interest, 75 Fed. Reg. 63732 (Oct. 18, 2010); withdrawn on February 9, 2011, <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201104&RIN=3038-AD01>.

[20] Request for Comment on the Impact of Affiliations on Certain CFTC-Regulated Entities (Jun.27, 2023), <https://www.cftc.gov/media/8826/rfcimpactaffiliations062823/download>.

[21] Requirements for Designated Contract Markets and Swap Execution Facilities Regarding Governance and the Mitigation of Conflicts of Interest Impacting Market Regulation Functions, 89 Fed. Reg. 19646 (Mar. 19, 2024).

[22] Enhanced Risk Management Standards for Systemically Important Derivatives Clearing Organizations, 78 Fed. Reg. 49663 (Aug. 15, 2013); Derivatives Clearing Organizations and International Standards, 78 Fed. Reg. 72476 (Dec. 2, 2013). The CFTC determined that the international standards most pertinent to SIDCO risk management were the PFMIs, developed by the Bank for International Settlements' Committee on Payment and Settlement Systems and the Technical Committee of the International Organization of Securities Commissions. 78 Fed. Reg. at 49666.