

The State of Futures: Emerging Trends and Enforcement Priorities

November 11, 2021

The CFTC and the exchanges have plenty of activity in the futures space. During a Futures session at Katten's annual [Financial Markets Litigation and Enforcement Symposium Series](#), Katten attorneys and guests discussed swap dealer developments and priorities, exchange enforcement priorities and CFTC enforcement priorities.

Current Status at the CFTC

The five-member Commodities Futures Trading Commission (CFTC) is currently down to two members — Acting Chair Rostin Behnam and Commissioner Dawn Stump. Chairman Tarbert and Commissioners Quintenz and Berkovitz left earlier this year. Thus, both Acting Chair Behnam and Commissioner Stump must agree to proceed with any Commission business.

President Biden has nominated Acting Chair Behnam to be the permanent Chair of the CFTC as well as two other Democrats — Kristin Johnson and Christy Goldsmith Romero — to the Commission. He has not yet nominated a Republican to the fifth open CFTC seat. The Senate Agriculture Committee has held a nomination hearing for Acting Chair Behnam and voting him out of Committee favorable, so his nomination awaits a vote on the Senate floor. Until the Republican nominee is announced, it is unlikely that the two nominated Democrats will proceed further in the Senate.

Three Takeaways to Note

1. Enforcement Is 'Business as Usual'

In the wake of Covid-19, enforcement actions across the financial markets were surprisingly "business as usual." The focus continues to be on preserving market integrity. Despite some ebb and flow, 2021 saw the usual numbers and types of cases, including actions involving: swaps market manipulation; spoofing; wash trades; insider trades; and swap reporting failures. With respect to swaps reporting failures in particular, the CFTC brought and settled five swaps manipulation

enforcement cases in 2021. Supervisory practices and digital currencies continued to garner attention from regulators in 2021.

Rounding out the state of enforcement activity in 2021, efforts to coordinate investigations across agencies and exchanges continue. Although each regulator and exchange has a different mission, communicating on joint investigations and resolutions benefits all. Similarly, the CFTC and others continue to enhance regulatory outreach and education, and as well as improving internal capabilities to flag suspicious activities for further investigation.

2. Swap Reporting Failures Continue to Be a Top Enforcement Priority for the CFTC

While the CFTC understands that no reporting party will accurately and timely report swap data to a swap data repository 100 percent of the time, the CFTC's recent swap reporting enforcement actions against several swap dealers and — for the first time — a swap execution facility, highlight the fact that the CFTC continues to view swap reporting failures as a top enforcement priority. The CFTC has repeatedly noted that swap reporting is essential to its swap market oversight function. For that reason, swap reporting parties need to continue to assess and improve their swap data reporting systems, compliance framework and governance.

Not all swap reporting failures tend to become the subject of enforcement actions. Analyzing the facts of the CFTC's various swap reporting cases over the last eight years reveals that certain failures may likely result in an enforcement action. These failures include: the same or substantially similar root cause failure being repeated over a multiple-year period; substantially late reporting; missing data fields that the CFTC considers critical (i.e., creation data); the lack of (or a deficient) supervisory and governance framework focused on swap data reporting; and high volumes of reporting failures overall (i.e., in terms of a gross number) or as a percentage of the reporting party's total number of swaps reported.

To avoid a reporting failure turning into a potential CFTC enforcement action, reporting parties should: promptly identify and remediate any reporting failures through reconciliation and review of swap data at each SDR to which the reporting party reports; after any remediation, follow-up to ensure that any past failures do not resurface; and maintain a comprehensive swap data reporting compliance framework that includes active governance. Where significant reporting failures are identified, a reporting party should consider whether self-reporting to the CFTC would be appropriate.

3. Who Oversees Virtual Currencies, Digital Assets and Decentralized Finance (DeFi)

Jurisdiction and enforcement cases regarding virtual currency markets continues as a hot topic among regulators and participants. The Commission, which brought its first crypto-related

enforcement action in 2015, handled several important crypto-related enforcement cases in 2021, including the first manipulation case — a pump and dump scheme — that used Twitter to tout a certain cryptocurrency. The CFTC also brought or settled various actions alleging the entities offered margined retail commodity transactions or binary options in digital assets without properly registering with the CFTC.

Regulator jurisdiction with respect to decentralized finance, or DeFi, a blockchain-based form of finance is being examined by regulators such as the CFTC and Securities and Exchange Commission. CFTC efforts to become more knowledgeable in the digital asset space continue. The agencies can be expected to proceed if one of them concludes that an appropriate enforcement case has arisen.

In November 2021, the President's Working Group on Financial Markets issued an interagency report urging Congress to pass legislation to make stablecoins, a class of cryptocurrencies that attempt to offer price stability and are backed by a reserve asset, to be subject to federal banking laws. The regulators also asserted that they would use their current jurisdictional authorities to monitor the stablecoin market. The report also described the growing market for stablecoins and also discussed DeFi-related issues.

We expect the CFTC and exchanges to continue to be active in all of these areas in the future. We also expect 2022 to deliver more collaboration to foster responsible innovation, promote consistent regulatory approaches, and identify and address potential risks that arise from digital trading and financial assets.

Read more coverage from the [2021 Annual Financial Markets Litigation and Enforcement Symposium Series](#):

[Market Trading Trends: Expect Regulatory Guidance to Accelerate](#)

[Securities Regulatory and Enforcement: Four Asset Management Trends](#)

[Global Financial Institutions Legal Departments Share D&I Successes and Lessons Learned](#)

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