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CFTC Alert

2017 CFTC Year-in-Review and a Look Forward

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I. INTRODUCTION

In 2017, under the leadership of new Chairman J. Christopher Giancarlo, the Commodity Futures Trading Commission (CFTC or Commission) adopted a notable shift in its enforcement priorities and regulatory agenda. In March, shortly following his nomination by President Donald Trump as chairman, Chairman Giancarlo signaled that it was time for the CFTC to “reinterpret its regulatory mission” by focusing on fostering economic growth, enhancing U.S. financial markets, and “right-sizing” its regulatory footprint.¹ In particular, he announced Project KISS (“Keep It Simple, Stupid”)—an agency-wide review of rules, regulations, and practices to make them “simpler, less burdensome and less costly.”² With respect to enforcement, he emphasized that, under his leadership, “[t]here will be no pause, let up or reduction in our duty to enforce the law and punish wrongdoing in our derivatives markets,” and promised that those who cheat or manipulate markets “will face aggressive and assertive enforcement action by the CFTC under the Trump Administration.”³

Chairman Giancarlo’s comments presage a significant shift in the priorities and goals of the Commission during the Trump Administration. Nevertheless, looking forward to 2018, we expect no diminished enforcement where fraud, manipulation, and consumer protection are concerned. Several recent settlements and the introduction of a new cooperation and self-reporting program indicate that firms and individuals that self-report and cooperate in investigations will get better treatment. On the regulatory front, we expect the Commission to continue its Project KISS regulatory reform initiative. Although several important Dodd-Frank Act rulemakings remain pending, we expect that certain Dodd-Frank Act rules, such as the rules governing trading on swap execution facilities (SEFs), will be revisited. In addition, the cryptocurrency markets, including the newly-listed futures contracts on bitcoin, will be an area of particular concern for the Commission. We expect the Commission to continue to assess and closely monitor the development of the cryptocurrency market.

¹ J. Christopher Giancarlo, Chairman, CFTC, Remarks Before the 42nd Annual International Futures Industry Conference in Boca Raton, FL, “CFTC: A New Direction Forward” (Mar. 15, 2017), <http://www.cftc.gov/PressRoom/SpeechesTestimony/opagiancarlo-20>.

² *Id.*

³ *Id.*

II. ENFORCEMENT DEVELOPMENTS

The CFTC filed 49 enforcement actions in Fiscal Year 2017 (ended in September), obtaining \$413 million in restitution, disgorgement and penalties.⁴ This represents a sharp decrease in enforcement actions, which were down 28% from 68 in the prior fiscal year. With respect to monetary penalties, the Commission collected less than one-third of the \$1.29 billion it collected in 2016. Monetary penalties have fallen significantly from the \$3.27 billion collected in 2014 and the \$3.14 billion collected in 2015, when the Commission obtained record-setting fines relating to the manipulation of benchmark interest rates and other high-profile misconduct following the financial crisis. The Commission announced that it settled or obtained judgment in an additional 11 actions from October 1 through December 31, 2017.

The following discussion highlights the noteworthy enforcement developments in 2017.

A. Market Intelligence Unit and Enforcement

In March, Chairman Giancarlo realigned the Surveillance Branch, previously housed in the Division of Market Oversight, into the new Market Intelligence Unit in the Division of Enforcement. The new Market Intelligence Unit will continue to monitor markets for suspected fraud and manipulation and is designed “to understand, analyze and communicate current and emerging derivatives market dynamics, developments and trends – such as the impact of new technologies and trading methodologies.”⁵ Chairman Giancarlo subsequently named Andrew B. Busch, the former CEO of an economic research company, as the Commission’s first Chief Market Intelligence Officer.⁶

Also in March, Chairman Giancarlo appointed James McDonald, a former prosecutor in the Southern District of New York, as director of the Agency’s Enforcement Division.⁷

B. Cooperation and Self-Reporting

As described below, the CFTC took several steps in 2017 to further encourage cooperation with and self-reporting to the Commission’s Division of Enforcement. In addition, Director McDonald made a number of public statements signaling that the Division was changing its approach to cooperation and self-reporting.⁸

⁴ Press Release, CFTC, CFTC Releases Annual Enforcement Results for Fiscal Year 2017, PR7650-17 (Nov. 22, 2017), <http://www.cftc.gov/PressRoom/PressReleases/pr7650-17>.

⁵ J. Christopher Giancarlo, Chairman, CFTC, Remarks Before the 42nd Annual International Futures Industry Conference in Boca Raton, FL, “CFTC: A New Direction Forward” (Mar. 15, 2017), <http://www.cftc.gov/PressRoom/SpeechesTestimony/opagiancarlo-20>.

⁶ Press Release, CFTC, CFTC Acting Chairman Giancarlo Announced Andrew B. Busch as the Commission’s first Chief Market Intelligence Officer, PR7543-17 (Apr. 3, 2017), <http://www.cftc.gov/PressRoom/PressReleases/pr7543-17>.

⁷ Press Release, CFTC, CFTC Acting Chairman Giancarlo Appoints James McDonald as Enforcement Director, PR7541-17 (Mar. 30, 2017), <http://www.cftc.gov/PressRoom/PressReleases/pr7541-17>.

⁸ See, e.g., James McDonald, Director of Enforcement, CFTC, Speech at the NYU Program on Corp. Compliance & Enforcement / Inst. for Corp. Governance & Fin., “Perspectives on Enforcement: Self-Reporting and Cooperation at the CFTC” (Sept. 25, 2017), <http://www.cftc.gov/PressRoom/SpeechesTestimony/opamcdonald092517> [hereinafter “Speech on Self-Reporting and Cooperation”]. See also, Interview by CFTC Talks with James McDonald, Director of Enforcement, CFTC, Ep. 0005 (July 2017), https://secure-hwcdn.libsyn.com/p/2/2/1/221a3c555a7ecbd9/CFTC_Talks_Ep_5_Transcript.pdf?c_id=16566154&expiration=1512685327&hwt=6e79c84976d336cd14e88f92b3ea3d6a. Director McDonald stated that the Commission wants to “[g]iv[e] companies and individuals the incentive, the right incentives to comply with the law while holding the people who violated the law accountable.” *Id.* at 15.

1. Enforcement Advisories on Cooperation

On January 19, 2017, the Commission issued revised cooperation credit guidelines for companies and its first cooperation credit guidelines for individuals (together, the January 2017 Advisories).⁹ The January 2017 Advisories list four factors that the Division will consider in determining whether to extend cooperation credit: (i) the value of the company/individual's cooperation to the CFTC's investigation(s) or enforcement action(s); (ii) the value of the company/individual's cooperation to the CFTC's broader law enforcement interests; (iii) the company/individual's culpability and other relevant factors; and (iv) any uncooperative conduct.

There are several key differences between the January 2017 Advisories and the Commission's earlier enforcement advisories, published in 2004 and 2007. In particular, the January 2017 Advisories include a specific discussion relating to the CFTC's interest in a company's efforts to identify culpable individuals, as well as a qualitative assessment of whether and how the company's cooperation assisted the CFTC in identifying other wrongdoers. Additionally, in contrast to the prior enforcement advisory, the January 2017 Advisories do not include any discussion discouraging joint defense agreements.

2. Updated Advisory on Self-Reporting and Full Cooperation

On September 25, 2017, the Commission published an *Updated Advisory on Self-Reporting and Full Cooperation* (Updated Advisory).¹⁰ The Updated Advisory is a continuation of recent changes in the Commission's policies on cooperation and broadly harmonizes the CFTC's approach to cooperation with that of the Securities and Exchange Commission (SEC), which is of particular note for many dual CFTC/SEC registrants. Under the new guidelines, voluntary self-disclosure is now the single most significant driver in the Division's cooperation assessment. In this regard, Director McDonald announced that the Division would provide "substantial credit" for a self-reported violation, but less so for cooperation during an investigation already underway. Director McDonald explained that the Division is hopeful that by "spelling out the substantial benefit, in the form of a significantly reduced penalty," companies and individuals will be more motivated to self-report misconduct.¹¹ Further, the Updated Advisory states that the Division will provide "substantial reduction[s]" in civil penalties for companies that self-report wrongdoing, cooperate with the Division's investigation, and remediate flaws in their controls and compliance programs. No less significant, the Division outlined heightened expectations for "full cooperation," including identification of potentially culpable individuals.

The Updated Advisory outlines three requirements for full self-reporting and cooperation credit: (i) voluntary disclosure of misconduct to the Division; (ii) full cooperation during an investigation; and (iii) timely and appropriate remediation of flaws in compliance and control programs.¹²

If companies follow these requirements, Director McDonald stated that the Division would commit to clearly communicate with self-reporters and coordinate with companies on their remediation efforts. Director McDonald stressed that self-reporting will not short-circuit the

⁹ CFTC Enforcement Advisory, Cooperation Factors in Enforcement Division Sanction Recommendations for Companies (Jan. 19, 2017), <http://www.cftc.gov/idc/groups/public/@lrenforcementactions/documents/legalpleading/enfadvistorycompanies011917.pdf>; CFTC Enforcement Advisory, Cooperation Factors in Enforcement Division Sanction Recommendations (Jan. 19, 2017), <http://www.cftc.gov/files/enf/enfcooperation-advisory.pdf>.

¹⁰ CFTC Enforcement Advisory, Updated Advisory on Self-Reporting and Full Cooperation (Sept. 25, 2017), <http://www.cftc.gov/idc/groups/public/@lrenforcementactions/documents/legalpleading/enfadvistoryselfreporting0917.pdf> [hereinafter the "Updated Advisory"].

¹¹ Speech on Self-Reporting and Cooperation, *supra* n.8.

¹² Updated Advisory, *supra* n.10, at 2-3.

Division's process and that an investigation will still be initiated to confirm the scope of the wrongdoing and its remediation. However, Director McDonald promised that such investigations will be conducted expeditiously. Further, substantial cooperation during an investigation, absent self-reporting, will also be credited, at a reduced level. Lastly, Director McDonald emphasized that the Division has no "plans of slowing down" and that enforcement will continue to "aggressively prosecut[e] not just the company ultimately responsible for the misconduct, but also the individuals involved."¹³

The Division's announcement underscores the importance that the Commission places on proactive, robust, and timely self-reporting and cooperation. Nevertheless, it remains to be seen how the Commission will interpret and apply the new guidelines in practice, particularly with respect to timeliness, completeness, and materiality. The decision whether to self-report and to cooperate is difficult, and, until the Commission's practice can be observed over time, it will remain difficult to evaluate the potential risks of self-reporting against the possible benefits.¹⁴

3. First Non-Prosecution Agreements

On June 29, 2017, the Commission issued its first non-prosecution agreement (NPA) with three former traders of a large futures commission merchant (FCM) and provisionally registered swap dealer (SD).¹⁵ The Commission entered into the NPAs based, in part, on each trader's timely and substantial cooperation in the investigation, their immediate willingness to accept responsibility for their misconduct, the material assistance they provided to the Division, including implicating others, and their lack of prior misconduct. Director McDonald said that "[t]hese traders readily admitted their own wrongdoing, identified misconduct of others, and provided other valuable information, all of which expedited our investigation and strengthened our cases against the other wrongdoers."¹⁶ Director McDonald explained that NPAs "give the Division a powerful tool to reward extraordinary cooperation in the right cases, while providing individuals and organizations strong incentives to promptly accept responsibility for their wrongdoing and cooperate with the Division's investigation," and noted that they "will be an important part of the Division's cooperation program going forward."¹⁷

III. NOTABLE ENFORCEMENT CASES

A. Manipulation and Attempted Manipulation

Since January 2017, when Chairman Giancarlo first assumed the role of Acting Chairman, the Commission has continued to aggressively enforce and prosecute manipulation under its Dodd-Frank Act authority.

1. Spoofing

The Dodd-Frank Act makes it unlawful for any person to engage in "spoofing," broadly defined as "bidding or offering with the intent to cancel the bid or offer before execution."¹⁸ Over the

¹³ Speech on Self-Reporting and Cooperation, *supra* n.8.

¹⁴ For a more detailed discussion regarding developments in the CFTC's cooperation program, see Paul M. Architzel, Matthew Beville, Yeve Chitiga, and Daniel J. Martin, *Developments in CFTC Cooperation Program*, 38 FUTURES & DERIVATIVES L. REP. 1 (Jan. 2018).

¹⁵ See Press Release, CFTC, PR7581-17 (June 29, 2017), <http://www.cftc.gov/PressRoom/PressReleases/pr7581-17>.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ 7 U.S.C. § 6c(a)(5)(C).

past several years, the Division of Enforcement has aggressively enforced its new anti-spoofing authority, and we expect the Division to continue to prioritize spoofing as a key focus of the enforcement program in the future. In January 2018, Director McDonald announced the Division's new Spoofing Task Force, which he described as "a coordinated effort across the Division—with members from our offices in Chicago, Kansas City, New York, and Washington, DC—to root out spoofing from our markets," and explained that, over the past year, the CFTC has developed new, sophisticated data analysis tools to identify spoofing and other unlawful trading activity.¹⁹

Notably, spoofing is a criminal violation if the trader "knowingly" intended to engage in spoofing conduct.²⁰ In August 2017, the U.S. Court of Appeals for the Seventh Circuit unanimously upheld the conviction of Michael Coscia, the first person to be criminally prosecuted under the anti-spoofing provision implemented as a result of the Dodd-Frank Act.²¹ In July 2016, Coscia was sentenced to three years in prison after a federal jury found him guilty of spoofing and commodities fraud.²² Coscia appealed, arguing, in part, that the anti-spoofing statute is unconstitutionally vague. The Seventh Circuit rejected Coscia's argument and further denied his contention that the evidence of record did not support his spoofing conviction, affirming the judgment of the District Court.²³ The Seventh Circuit's rejection of Coscia's constitutional challenge will empower federal prosecutors and is likely to pave the way to future criminal prosecutions of spoofing activity.

The Commission has continued to investigate and impose significant penalties for spoofing against both firms and individual traders, with fines against firms ranging from \$600,000 to \$25 million. These cases represent a continuation of the Commission's on-going programmatic focus on aggressive enforcement in this area.

In August 2017, the CFTC ordered the Bank of Tokyo-Mitsubishi UFJ to pay a \$600,000 penalty for spoofing in a variety of CME and CBOT futures products, including futures contracts based on U.S. Treasury notes and Eurodollars.²⁴ The Order found that from July 2009 through December 2014, a trader placed multiple orders for futures contracts with an intent to cancel the orders before their execution. Notably, the Order recognized the firm's self-reporting and cooperation, noting that the firm "promptly self-reported the misconduct and proactively implemented large-scale remedial measures and process improvements to deter and detect similar misconduct."²⁵

In June 2017, the CFTC permanently banned David Liew, a junior trader on a precious metals desk at a large financial institution, for engaging in numerous acts of spoofing and manipulation of the gold and silver futures markets.²⁶ Notably, the Order recognized Liew's cooperation: "[T]he Commission recognizes Liew's cooperation . . . including his entry into a formal Cooperation Agreement . . . with the Division, his provision of substantial assistance to the

¹⁹ James McDonald, Director of Enforcement, CFTC, Statement (Jan. 29, 2018), <http://www.cftc.gov/PressRoom/SpeechesTestimony/mcdonaldstatement012918>.

²⁰ 7 U.S.C. § 13(a)(2).

²¹ Opinion, *U.S. v. Coscia*, No. 16-3017 (7th Cir., Aug. 7, 2017).

²² In 2013, Coscia and his trading firm had entered into a settlement order with the CFTC, providing for a \$1.4 million civil penalty and the disgorgement of \$1.4 million in profits for spoofing violations. See *In re Panther Energy Trading LLC and Michael J. Coscia*, CFTC Docket No. 13-26 (July 22, 2013).

²³ *Id.* at 27.

²⁴ *In re The Bank of Tokyo-Mitsubishi UFJ Ltd.*, CFTC Docket No. 17-21 (Aug. 7, 2017).

²⁵ *Id.* at 2.

²⁶ *In re David Liew*, CFTC Docket No. 17-14 (June 2, 2017).

investigation and his undertaking to continue to cooperate.”²⁷ In addition, Liew pleaded guilty in federal court to one count of conspiracy to commit wire fraud and spoofing.²⁸

In July 2017, the CFTC ordered New York-based trader Simon Posen to pay a \$635,000 penalty and permanently banned him from trading in CFTC-regulated markets for spoofing in gold, silver, and copper futures contracts traded on the Commodity Exchange, Inc., and crude oil futures contracts traded on the New York Mercantile Exchange from at least December 2011 through March 2015.²⁹ Posen traded from home for his own account.

2. Benchmark Manipulation

Last year the Commission continued its pursuit of misconduct relating to the manipulation of global benchmark rates. In February 2017, the Commission reached a settlement relating to allegations that a firm’s traders attempted to manipulate the U.S. Dollar International Swaps and Derivatives Association Fix (ISDAFIX) benchmark over a period of five years in order to benefit certain derivatives positions that were priced off of the benchmark.³⁰ According to the CFTC’s order, in which the firm neither admitted nor denied wrongdoing, the firm’s traders bid, offered, and executed transactions in certain interest rate products at the 11:00 a.m. “print” time with the intent to affect reference rates and spreads, and thereby to affect the published ISDAFIX benchmark in whichever direction benefitted their positions. The Order alleged that the firm engaged in multiple acts of attempted manipulation in violation of Sections 6(c), 6(d), and 9(a)(2) of the CEA and Regulations 180.1(a) and 180.2, and ordered the firm to pay a \$85 million civil monetary penalty. The Order acknowledged that the firm had undertaken remedial steps to improve its internal controls to ensure the integrity and reliability of its benchmarks. The CFTC’s announcement of the settlement noted that, to date, the Commission has imposed penalties of \$5.29 billion in 19 actions for misconduct relating to the manipulation of ISDAFIX, LIBOR, Euribor, and other global benchmarks.³¹

B. Fraud

In September 2017, the CFTC brought its first anti-fraud enforcement action involving bitcoin, which foreshadows further scrutiny of the virtual currency market.³² The CFTC alleged that GBI and Nicolas Gelfman operated a bitcoin Ponzi scheme that misappropriated more than \$600,000 from at least 80 customers, in violation of Section 6(c)(1) and Regulation 180.1(a). The affected customers invested amounts ranging from a few hundred dollars to tens of thousands of dollars. The defendants claimed that their “Jigsaw” high-frequency, algorithmic trading strategy generated monthly profits of 7-9%; in reality, trading account records revealed only infrequent trading that resulted in losses. Additionally, the defendants provided false performance reports to pool participants and staged a fake computer “hack” designed to conceal trading losses and misappropriation.

We expect enforcement activity in this area to continue apace. Indeed, in January 2018, the CFTC announced charges in three separate cases involving fraudulent schemes relating to

²⁷ *Id.* at 2.

²⁸ Plea Agreement, *U.S. v. Liew*, No. 17-CR-001 (N.D. Ill., June 1, 2017).

²⁹ *In re Simon Posen*, CFTC Docket No. 17-20 (July 26, 2017).

³⁰ CFTC Docket No. 17-08 (Feb. 3, 2017).

³¹ Press Release, CFTC, PR7527-17 (Feb. 3, 2017), <http://www.cftc.gov/PressRoom/PressReleases/pr7527-17>.

³² Complaint, *U.S. Commodity Futures Trading Commission v. Gelfman Blueprint, Inc., and Nicolas Gelfman*, No. 17-7181 (S.D.N.Y. Sept. 21, 2017).

virtual currencies, and, in a joint statement with the SEC, warned that “[w]hen market participants engage in fraud under the guise of offering digital instruments – whether characterized as virtual currencies, coins, tokens, or the like – the SEC and the CFTC will look beyond form, examine the substance of the activity and prosecute violations of the federal securities and commodities laws.”³³ The CFTC’s active and aggressive pursuit of fraud in cryptocurrency-related cases is being carried out against the backdrop of its permitting designated contract markets to list futures contracts or swaps on bitcoin.

Also in September 2017, the CFTC filed a complaint in the U.S. District Court for the Northern District of Illinois, alleging that Monex Deposit Company defrauded thousands of retail customers out of hundreds of millions of dollars while executing tens of thousands of illegal, off-exchange retail commodity transactions, in violation of Sections 4(a), 4(b)(a)(2)(A) and (C), and 6(c)(1) and Regulation 180.1(a).³⁴ In addition, the CFTC alleged that Monex and its affiliates failed to register as futures commission merchants (FCMs). Monex has denied the allegations, stating that it delivers metals in accordance with the “actual delivery” exception under Section 2(c)(2)(D), and that it did not commit fraud in its customer solicitations.

C. Trade Practice Violations—Wash Trades, Fictitious Trades, Position Limits, Trading Ahead

Last year, the CFTC targeted a number of firms involved in various trade practice violations. In June 2017, the Commission ordered Rosenthal Collins Capital Markets, a proprietary trading firm, to pay a \$5 million penalty for engaging in three different wash trading strategies designed to generate rebates through an exchange’s market maker program, in violation of Section 4c(a) of the CEA and Regulation 1.38(a).³⁵ The Order alleged that, in total, RCCM earned rebates on approximately 300,000 Eurodollar contracts through more than 8,000 wash trades.

In August 2017, the Commission ordered Copersucar Trading A.A.V., a subsidiary of the Copersucar sugar and ethanol company, to pay a \$300,000 penalty for executing wash trades involving Sugar No. 11 futures TAS contracts traded on ICE, between April 2013 and September 2014.³⁶ According to the Commission’s Order, the firm maintained that it had sought to consolidate its positions in separate trading accounts at different brokers into one account in order to better manage delivery obligations and risk.

D. Failures to Register, Illegal Off-Exchange Contracts

The Commission has long pursued violations involving the trading of illegal, off-exchange contracts. In 2017 the Commission obtained judgment in several actions in the U.S. District Court for the Southern District of Florida relating to illegal, off-exchange precious metal transactions. For example, in June, the Court entered a Consent Order against North American Asset Management and its owners Alexi Bethel and Steven Labadie, for engaging in illegal, off-exchange precious metal transactions with retail customers on a leveraged, margined, or financed basis, in violation of Sections 4(a) and 4d(a).³⁷ The Order required Defendants to pay

³³ Press Release, CFTC, Joint Statement from CFTC and SEC Enforcement Directors Regarding Virtual Currency Enforcement Actions (Jan. 19, 2018), <http://www.cftc.gov/PressRoom/PressReleases/mcdonaldstatement011918>.

³⁴ Complaint, *U.S. Commodity Futures Trading Commission v. Monex Deposit Company, et al.*, No. 1:17-cv-06416 (N.D. Ill. Sept. 6, 2017).

³⁵ *In re Rosenthal Collins Capital Markets LLC*, CFTC Docket No. 17-17 (June 29, 2017).

³⁶ *In re Copersucar Trading A.V.V.*, CFTC Docket No. 17-22 (Aug. 15, 2017).

³⁷ *U.S. Commodity Futures Trading Commission v. North American Asset Management, LLC, et al.*, No. 0:16-cv-60093-JEM (S.D. Fla., June 1, 2017), ECF No. 25.

restitution of \$648,759.60 and a civil monetary penalty of \$977,430.47, and imposed permanent trading and registration bans. In August, the Court entered a Consent Order against Jeffrey Slemmer, Christian Dorrian, Adam Roth, and their former Florida-based companies, finding that the defendants defrauded customers in connection with precious metals and diamonds transactions from at least June 2012 through May 2015.³⁸ The Order required defendants to pay \$2.74 million in restitution and a \$2.74 million civil monetary penalty.

E. Reporting and Recordkeeping Violations

Reporting and recordkeeping also continue to be a focus of the enforcement program, with a number of cases involving failures to preserve required records and associated supervisory failures. In one case, the Commission coupled a penalty of \$200,000 with withdrawal from FCM registration. This remedy was ordered for failure to make complete production of records in response to a Commission subpoena.³⁹ Specifically, the CFTC's Order alleged that, over the course of two years and following the issuance of two subpoenas, the firm failed to make a complete production of all documents requested by Division staff.

The Commission also ordered payment of a penalty of \$2.5 million for a large FCM's failing to supervise its employees' response to a CME investigation into the firm's recordkeeping and execution practices with respect to block trades, and for failing to prepare and maintain necessary records of futures block trades under Regulations 1.31 and 1.35.⁴⁰ According to the CFTC's Order, the firm's compliance and legal staff relied on a business operations support group to gather certain information to respond to the CME's inquiries. That operations group withheld key information and certain traders subsequently made misleading statements to CME Market Regulation Staff. The Order alleged that compliance and legal staff failed to stay adequately informed, thereby contributing to the firm's failures.

IV. REGULATORY DEVELOPMENTS

Below is an overview of the key regulatory developments at the CFTC in 2017.

A. New Commission Leadership

1. New Commissioners

Former Chairman Timothy Massad announced his resignation in January 2017, and Commissioner Sharon Bowen subsequently announced in June that she would step down before the expiration of her term.⁴¹

In August 2017, the U.S. Senate confirmed then-Acting Chairman Giancarlo as Chairman of the Commission, and Brian D. Quintenz and Rostin Behnam as Commissioners.

³⁸ *U.S. Commodity Futures Trading Commission v. Jeffrey Slemmer et al.*, No. 9:16-cv-80867 (S.D. Fla., Aug. 16, 2017), ECF No. 31.

³⁹ *In re Ikon Global Markets, Inc.*, CFTC Docket No. 17-23 (Aug. 31, 2017).

⁴⁰ CFTC Docket No. 17-25 (Sept. 22, 2017).

⁴¹ In doing so, she stated her hope that this would hasten the process for filling Commission vacancies. She warned that "[w]ithout a full complement of commissioners to consider the far-reaching implications of our decisions, we are frozen in place while the markets we regulate are moving faster every day." Sharon Bowen, Commissioner, CFTC, Closing Statement before the Market Risk Advisory Committee (June 20, 2017), <http://www.cftc.gov/PressRoom/SpeechesTestimony/bowenstatement062017>.

Commissioner Quintenz was sworn into office on August 15, 2017 for a term expiring in April 2020. Prior to his appointment to the CFTC, Commissioner Quintenz founded Saeculum Capital Management, a registered Commodity Pool Operator. Earlier in his career he served in the office of U.S. Representative Deborah Pryce (R) (OH-15), ultimately becoming a senior policy adviser. In his testimony before the Senate Agriculture Committee, Commissioner Quintenz indicated that he was in favor of restrained regulation, noting that “regulations meant to address [flaws in our markets] should not spill over to harm the normal activity of ordinary businesses and end-users” and promising “to ensure that regulations and their burdens are tied to the risks being mitigated.”⁴²

Commissioner Behnam was sworn into office on September 6, 2017 for a term expiring in June 2021. Previously he served as senior counsel to U.S. Senator Debbie Stabenow (D-MI), the ranking member of the Senate Agriculture Committee. In his testimony, Commissioner Behnam stated that “the Commission must aim to finalize outstanding Title VII work in a thoughtful and expeditious manner” and that there is a “constant need for strong enforcement of Commission rules and regulations.”⁴³

2. New Division Directors and Senior Staff

In 2017, Chairman Giancarlo appointed the following division directors and senior staff:

- **Brian A. Bussey**, Director of the Division of Clearing and Risk
- **Matthew B. Kulkin**, Director of the Division of Swap Dealer and Intermediary Oversight
- **James McDonald**, Director of the Division of Enforcement
- **Amir Zaidi**, Director of the Division of Market Oversight
- **Daniel Gorfine**, Director of LabCFTC
- **Bruce Tuckman**, Chief Economist

B. **Project KISS**

On February 24, 2017, President Trump signed Executive Order 13777—Enforcing the Regulatory Reform Agenda, which directed federal agencies to designate a Regulatory Reform Officer, establish a Regulatory Reform Task Force, and take other measures to reduce regulatory burden. Although the CFTC, an independent federal agency, is not formally bound by the President’s executive order, Chairman Giancarlo announced on March 15, 2017 an agency-wide review of CFTC rules, regulations, and practices called Project KISS.⁴⁴ In announcing the initiative, Chairman Giancarlo cautioned that “this exercise is not about identifying existing rules for repeal or even rewrite”; rather, “[i]t is about taking our existing rules as they are and applying them in ways that are simpler, less burdensome, and less of a drag on the American economy.”⁴⁵

⁴² Brian D. Quintenz, Nominee to the Commodity Futures Trading Commission, Opening Statement Before the U.S. Senate Committee on Agriculture, Nutrition & Forestry (July 27, 2017), https://www.agriculture.senate.gov/imo/media/doc/Testimony_Quintenz1.pdf.

⁴³ Rostin Behnam, Nominee to the Commodity Futures Trading Commission, Opening Statement Before the U.S. Senate Committee on Agriculture, Nutrition & Forestry (July 27, 2017), https://www.agriculture.senate.gov/imo/media/doc/Testimony_Behnam.pdf.

⁴⁴ J. Christopher Giancarlo, Chairman, CFTC, Remarks Before the 42nd Annual International Futures Industry Conference in Boca Raton, FL, “CFTC: A New Direction Forward” (Mar. 15, 2017), <http://www.cftc.gov/PressRoom/SpeechesTestimony/opagiancarlo-20>.

⁴⁵ *Id.*

In support of these efforts, on May 3, 2017, the Commission voted to seek suggestions from the public regarding “how the Commission’s existing rules, regulations, or practices could be applied in a simpler, less burdensome, and less costly manner,” and set up a Public Comment Form on its website, <http://www.cftc.gov/projectkiss>.⁴⁶ The Commission’s website sought input on five broad rule categories:

- **Registration**—relating to the initiation and continuation of becoming regulated by the CFTC as registered clearing, trading, data repository, and intermediary entities;
- **Reporting**—relating to all reporting requirements, including swap data and recordkeeping;
- **Clearing**—relating to clearing services with respect to futures contracts, options on futures contracts, or swaps;
- **Executing**—relating to marketplace transaction of futures and swaps; and
- **Miscellaneous**—anything not relating to the four topics described above.

The public comment solicitation period for Project KISS closed on September 30, 2017. In November, CFTC Chief of Staff Michael Gill, whom Chairman Giancarlo designated as Regulatory Reform Officer, announced that the Commission had received more than 40 comments and that it was “actively reviewing the submissions.”⁴⁷

C. Virtual Currencies

Last year the Commission grappled with responding to the rapidly growing interest and surging prices in bitcoin and other virtual currencies.

In October 2017, the Commission’s LabCFTC released the well-received *A CFTC Primer on Virtual Currencies* (Primer), which is designed to provide an overview of virtual currencies, the role of the CFTC, and potential risks.⁴⁸ The Primer reiterated the Commission’s view, first articulated in 2015, that bitcoin and other virtual currencies are properly defined as “commodities,” and explained that the CFTC has jurisdiction if a virtual currency is used in a derivatives contract or if there is fraud or manipulation involving a virtual currency traded in interstate commerce.

Also in October, it was reported that the Commission had requested information from Coinbase regarding a June 21, 2017 flash crash on its GDAX trading platform.⁴⁹ The flash crash saw the price of the Ether digital token fall from \$317.81 to just 10 cents in milliseconds, before quickly recovering. News reports suggested that the CFTC is focused on the role of margin trading in the crash. The Commission has not publicly commented on its review.

In the most significant development of the year related to cryptocurrencies, on December 1, 2017, the Chicago Mercantile Exchange (CME) and the CBOE Futures Exchange (CFE) self-certified new bitcoin futures contracts, and the Cantor Exchange self-certified a new contract for bitcoin swaps. At the request of CFTC staff, CME, CFE, and Cantor agreed to endeavor to enter into information sharing agreements with the underlying cash bitcoin markets. In a press

⁴⁶ Project KISS, 82 Fed. Reg. 23765 (May 24, 2017).

⁴⁷ Michael Gill, Chief of Staff, CFTC, Remarks to the Futures Industry Association Japan (Nov. 10, 2017), <http://www.cftc.gov/PressRoom/PressReleases/opagill1>.

⁴⁸ CFTC, *A CFTC Primer on Virtual Currencies* (Oct. 17, 2017), http://www.cftc.gov/idc/groups/public/documents/file/labcftc_primercurrencies100417.pdf.

⁴⁹ See Lily Katz and Matt Robinson, *Cryptocurrency Flash Crash Draws Scrutiny from Watchdog*, BLOOMBERG (Oct. 2, 2017), <https://www.bloomberg.com/news/articles/2017-10-02/cryptocurrency-flash-crash-is-said-to-draw-scrutiny-from-cftc>.

statement, the CFTC emphasized that the self-certification process “is not a Commission approval” and “does not constitute a Commission endorsement of the use or value of virtual currency products or derivatives.”⁵⁰ Nonetheless, the Futures Industry Association subsequently published an open letter sharply criticizing the self-certification process, stating that its members “remain apprehensive with the lack of transparency and regulation of the underlying reference products on which these futures contracts are based and whether exchanges have the proper oversight to ensure the reference products are not susceptible to manipulation, fraud, and operational risk.”⁵¹ The CME and CFE contracts launched on December 18 and December 10, respectively.

D. Rulemaking

Last year the Commission experienced a slowdown in rulemaking and related actions relative to prior years, due in part to the fact that, for much of 2017, the CFTC operated with only two commissioners—Chairman Giancarlo and Commissioner Bowen.

1. Final Rule—Recordkeeping

In May 2017, in response to petitions for rulemaking from various industry groups, the Commission unanimously approved amendments designed to modernize and streamline its recordkeeping requirements under Regulation 1.31 (Regulatory Records; Retention and Production).⁵² The amendments are the most significant changes to the Commission’s recordkeeping rules since the electronic reporting provisions were added in 1999.

The amended Regulation 1.31 eliminates the requirements that records entities store regulatory records in their “native file format” (*i.e.*, the format in which they were originally created) and in a non-rewritable, non-erasable format (*i.e.*, the “write once, read many” or “WORM” requirement). In this regard, the Commission noted that the amended rule “will allow records entities to utilize a wider range of currently available technology than previously allowed.”⁵³ Similarly, the Commission eliminated the requirement that records entities engage a third-party technical consultant and for the consultant to file certain representations with the Commission regarding access to the records entity’s electronic regulatory records. In addition, the final rule reduces the retention periods for pre-trade communications for swaps and forwards to five years from the date the record was created (rather than the duration of the swap plus five years). The effective date for the final rule was August 28, 2017.

2. Final Rule—Whistleblower Awards Process and Anti-Retaliation

In May 2017, the Commission approved certain amendments to its Whistleblower Rules relating to anti-retaliation and eligibility.⁵⁴ The amendments harmonize the CFTC’s rules with those of

⁵⁰ Press Release, CFTC, CFTC Statement on Self-Certification of Bitcoin Products by CME, CFE and Cantor Exchange, Release 7654-17 (Dec. 1, 2017), <http://www.cftc.gov/PressRoom/PressReleases/pr7654-17>.

⁵¹ Letter from Walt Lukken, CEO, Futures Industry Association to J. Christopher Giancarlo, Chairman, CFTC, “Open letter regarding the listing of cryptocurrency derivatives” (Dec. 6, 2017), <https://fia.org/file/6869/download?token=8zpZKbUj>.

⁵² Recordkeeping, 82 Fed. Reg. 24479 (May 30, 2017), <http://www.cftc.gov/idc/groups/public/@lrfederalregister/documents/file/2017-11014a.pdf>.

⁵³ *Id.* at 24485.

⁵⁴ Whistleblower Awards Process, 82 Fed. Reg. 24487 (May 30, 2017), <http://www.cftc.gov/idc/groups/public/@lrfederalregister/documents/file/2017-10801a.pdf>.

the SEC's whistleblower program.⁵⁵ Revised Rule 165.19 prohibits a person from taking "any action to impede an individual from communicating directly with the Commission's staff about a possible violation of the Commodity Exchange Act, including by enforcing, or threatening to enforce, a confidentiality agreement or pre-dispute arbitration agreement with respect to such communications." New Rule 165.20 clarifies that the Commission may bring an enforcement action against an employer that retaliated against a whistleblower. Revised Rule 165.5 clarifies that a whistleblower may be eligible for an award by voluntarily providing the Commission with original information without being the original source of information. In addition, the Commission replaced its Whistleblower Award Determination Panel with a Claims Review Staff.

The Commission did not announce any final orders issued under the Whistleblower Program in 2017.

3. Proposed Rule—Regulation Automated Trading

In November 2016, the Commission approved by a 2-1 vote revisions to proposed Regulation Automated Trading (Reg AT).⁵⁶ Reg AT, which initially was proposed in December 2015,⁵⁷ would impose a series of risk controls and other safeguards designed to minimize the risk of disruption caused by automated trading. Among its most controversial provisions, Reg AT proposed that algorithmic trading code be preserved and made available to the Commission. Chairman Giancarlo strongly opposed the revised proposal, expressing concerns regarding due process and the ability of the Commission to maintain the confidentiality of the information.⁵⁸

In January 2017, in light of "the broad range of topics addressed" and "the number of questions posed," the Commission extended the comment period for its supplemental Reg AT proposal through May 1, 2017.⁵⁹ Notably, in his first public remarks since joining the Commission, Commissioner Quintenz described Reg AT as "poorly-crafted and flawed public policy" and said that the Commission "needs to reset its posture on this issue."⁶⁰ He further emphasized that "the prior administration's massively over-reaching and highly concerning 'source code repository' proposal is D-E-A-D."⁶¹

To date, the CFTC has taken no further action on the proposed rule.

⁵⁵ Beginning in 2015, the SEC has actively enforced Rule 21F-17(a) under the Securities Exchange Act, which provides that "[n]o person may take any action to impede an individual from communicating directly with the Commission staff about a possible securities law violation, including enforcing, or threatening to enforce, a confidentiality agreement . . . with respect to such communications." For a discussion of SEC enforcement actions under Rule 21F-17(a), see Thomas W. White, *SEC enforcement actions under exchange act rule 21F-17*, JOURNAL OF INVESTMENT COMPLIANCE, Vol. 18, Issue 3 (2017), at 1, https://www.wilmerhale.com/uploadedFiles/Shared_Content/Editorial/Publications/Documents/2017-09-29-SEC-Enforcement-Actions-Under-Exchange-Act-Rule-21F-17.pdf.

⁵⁶ Regulation Automated Trading, Supplemental Notice of Proposed Rulemaking, 81 Fed. Reg. 85334 (Nov. 25, 2016). For a detailed description of the proposal and discussion of the issues therein, see WilmerHale's client alert, "CFTC Revises Proposed Reg AT" (Nov. 9, 2016), <https://www.wilmerhale.com/pages/publicationsandnewsdetail.aspx?NewsPubId=17179883173>.

⁵⁷ Regulation Automated Trading, Proposed Rule, 80 Fed. Reg. 78824 (Dec. 17, 2015).

⁵⁸ J. Christopher Giancarlo, Commissioner, CFTC, Statement of Dissent Regarding Supplemental Notice of Proposed Rulemaking on Regulation Automated Trading (Nov. 4, 2016), <http://www.cftc.gov/PressRoom/SpeechesTestimony/giancarlostatement110416>.

⁵⁹ Regulation Automated Trading, 82 Fed. Reg. 8502 (Jan. 26, 2017).

⁶⁰ Brian Quintenz, Commissioner, CFTC, Keynote Remarks before the Symphony Innovate 2017 Conference (Oct. 4, 2017), <http://www.cftc.gov/PressRoom/SpeechesTestimony/opaquintenz1>.

⁶¹ *Id.*

4. Proposed Rule—Capital Requirements for Swap Dealers and MSPs

On December 16, 2016, the Commission approved proposed rules establishing minimum capital requirements for swap dealers and major swap participants not subject to the capital rules of a prudential regulator, among other requirements.⁶² Although he voted to approve the proposal, Chairman Giancarlo expressed a number of concerns, including its broad scope, its effect on smaller swap dealers and how much additional capital they may have to raise to comply with the proposal, and its proposed capital model review and approval process.⁶³

In March 2017, in response to industry concerns regarding the complexity and potential impact of the proposal, the Commission extended the comment period through May 15, 2017. The Commission has not yet addressed the proposed rules.

5. DMO Review of Swap Data Reporting Requirements

In July 2017, the Division of Market Oversight (DMO) announced a comprehensive review of the swap data reporting regulations issued under Dodd-Frank, with two goals in mind: “(a) to ensure that the CFTC receives accurate, complete, and high quality data on swaps transactions for its regulatory oversight role; and (b) to streamline reporting, reduce messages that must be reported, and right-size the number of data elements that are reported to meet the agency’s priority use-cases for swaps data.”⁶⁴ In connection with this review, DMO published a *Roadmap to Achieve High Quality Swaps Data*, which describes the categories of proposed rulemaking workstreams that DMO plans to pursue in the coming months.⁶⁵ DMO plans to complete its review, including the adoption and implementation of any final rules, by the end of 2019.

V. **Expectations for 2018**

Currently, there are only three CFTC commissioners—Chairman Giancarlo, Commissioner Behnam, and Commissioner Quintenz. Operating with only three out of five Commissioners creates certain challenges for the CFTC. The Government in the Sunshine Act requires that, any time a quorum is present, it constitutes a formal meeting that must be open to the public and noticed in the Federal Register several days in advance. This prevents two Commissioners from meeting informally to discuss CFTC business without the meeting being considered a quorum and thus subject to the Sunshine Act requirements.

In 2018, we expect the Trump Administration to fill the two remaining vacancies on the Commission, which would create a full Commission for the first time since 2014. In December 2017, the *Wall Street Journal* reported that President Trump is expected to nominate Republican Dawn Stump and Democrat Dan Berkovitz to fill the remaining two vacancies on the Commission.⁶⁶

⁶² Capital Requirements of Swap Dealers and Major Swap Participants, 81 Fed. Reg. 91252 (Dec. 16, 2016).

⁶³ See J. Christopher Giancarlo, Commissioner, CFTC, Statement on Proposed Rule for Capital Requirements of Swap Dealers and Major Swap Participants (Dec. 2, 2016), <http://www.cftc.gov/PressRoom/SpeechesTestimony/giancarlostatement120216>.

⁶⁴ CFTC, Division of Market Oversight Announces Review of Swap Reporting Rules in Parts 43, 45, and 49 of Commission Regulations, CFTC Letter 17-33 (July 10, 2017), <http://www.cftc.gov/idc/groups/public/@llettergeneral/documents/letter/17-33.pdf>.

⁶⁵ CFTC, *Roadmap to Achieve High Quality Swaps Data* (July 10, 2017), http://www.cftc.gov/idc/groups/public/@newsroom/documents/file/dmo_swapdataplan071017.pdf.

⁶⁶ Gabriel T. Rubin, *White House Weighs Former CFTC General Counsel for CFTC Democratic Slot*, WALL ST. J. (Dec. 15, 2017), <https://www.wsj.com/articles/white-house-weighs-cftc-general-counsel-for-cftc-democratic-slot-1513370482>.

We expect a full Commission will endeavor to resolve a number of key outstanding regulatory issues before the CFTC, including the *de minimis* exception and a final position limits rulemaking. In addition, we expect that there will be a reconsideration of some Dodd-Frank Act rulemakings, particularly relating to SEFs. However, we do not expect wholesale revisions to the current regulatory framework for swaps. In addition, cross-border issues will remain a focus for the Commission, particularly as the ramifications of Brexit become clearer. Although it remains to be seen how the CFTC will implement its new self-reporting program, we expect the Commission to continue its aggressive enforcement with respect to fraud, manipulation, and other trading abuses such as spoofing, and for reporting and recordkeeping to remain an enforcement focus.⁶⁷

Finally, we expect Chairman Giancarlo to further develop his vision of the CFTC as a “21st Century regulator,” including through the LabCFTC initiative. In particular, we expect the Commission to continue to advance its oversight of and approach to virtual currency futures markets. In this regard, Chairman Giancarlo has urged that “[t]he responsible regulatory response to virtual currencies is consumer education, asserting CFTC authority, surveilling trading in derivative and spot markets, prosecuting fraud, abuse, manipulation and false solicitation and active coordination with fellow regulators,” and we expect that the CFTC will continue to follow this course of action.⁶⁸

⁶⁷ Indeed, on January 29, 2018, the CFTC announced anti-spoofing enforcement actions against three firms and six individuals. The settlements required the firms to pay a total of more than \$46 million in civil monetary penalties. See Press Release PR7681-18 (Jan. 29, 2018), <http://www.cftc.gov/PressRoom/PressReleases/pr7681-18>. At the same time, the Department of Justice brought related actions against eight individuals, the “largest futures market criminal enforcement action in Department history.” See Press Release, U.S. Department of Justice, Acting Assistant Attorney General John P. Cronan Announces Futures Markets Spoofing Takedown (Jan. 29, 2018), <https://www.justice.gov/opa/speech/acting-assistant-attorney-general-john-p-cronan-announces-futures-markets-spoofing>.

⁶⁸ See J. Christopher Giancarlo, Chairman, CFTC, Statement on Virtual Currencies (Jan. 4, 2018), <http://www.cftc.gov/PressRoom/SpeechesTestimony/giancarlostatement010418>.

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