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CFTC Regulatory and Enforcement Report: 2019 Activity and Outlook

By Stephen M. Humenik, Clifford C. Histed, and Edgar Mkrtchian

The Commodity Futures Trading Commission (CFTC) focused on the possibility of a no-deal Brexit, cross-border issues and comparability, and a continued, aggressive enforcement program reinforced with several task forces. Heath Tarbert was sworn in as CFTC Chairman, and it is likely that the agenda of Chairman Tarbert will build on some of the primary objectives of former Chairman J. Christopher Giancarlo, which include reviewing the cross-border approach of the CFTC, risk management and central counterparties, position limits, swap dealer (SD) oversight, swaps trading reform, and the continued use of the CFTC's post-Dodd-Frank enforcement tools.

This article examines the regulatory and enforcement activity of the CFTC during 2019. It is detailed and is meant to serve as a reference guide on many areas.¹

Introduction

2019 began with the continued government shutdown, which started on December 22, 2018, and ended on January 25, 2019. The shutdown caused the CFTC rulemaking agenda to come to a halt. All agency work “not essential to preservation of life and property has ceased... It means suspension of ongoing agency examinations of clearinghouses... [and] a halt to routine enforcement actions.”² The shutdown slowed down the momentum of the

regulatory rulemaking agenda of the CFTC, but as the end of Chairman Giancarlo's term approached, there was a noticeable uptick in activity.

Chairman Heath Tarbert was sworn in on July 15, 2019, and announced that he eagerly looked forward “to ensur[ing] our derivatives markets remain vibrant and the wrongdoers are held accountable” and that he “intend[ed] to hit the ground running.”³

Cross-Border Issues: Brexit, LIBOR, Deference, EMIR, and the Securities and Exchange Commission

As an initial matter, the CFTC has not finalized any rules in the past six years that have substantially altered the cross-border approach to “U.S. Persons” set forth in the CFTC's Cross-Border Guidance published in 2013.⁴ This approach relates to the rules for SD registration, as well as the clearing, trading, and reporting of swaps. However, during 2016, the CFTC (and the Prudential Regulators⁵) finalized rules related to margin for uncleared swaps that took a slightly different approach to the definition of “U.S. Person.” Importantly, this definition does not take into account majority ownership by U.S. investors of a commodity pool for purposes of defining a “U.S. Person” in the context of the margin for uncleared swaps rules only.

Other than this change in approach for margin for uncleared swaps rules in 2016, former Chairman Giancarlo had proposed several changes to the cross-border framework both during and at the end of his tenure; however, to date, those changes have not been finalized.

During his tenure, former Chairman Giancarlo emphasized deference to other comparable regulations and, notably, the CFTC provided exemptions for certain European trading platforms in 2017 and 2018. However, because exemptions for clearing and reporting are not in place, the overall impact of these cross-border actions has not been dramatic. In addition, the CFTC recently made comparability determinations for the margin requirements of several non-European jurisdictions, which reflected a new, holistic approach to such determinations.⁶ These determinations employed a different methodology than the line-by-line approach used by former Chairman Gary Gensler and former Chairman Timothy Massad to examine other regulatory frameworks, and those determinations with respect to other subject matter areas remain in effect.

Market participants continue to see fragmentation of markets and regulatory approaches on a cross-border basis. Brexit and “EMIR 2.2” have been the principal cross-border focus of the CFTC and have added delay and tension to overall cross-border developments, including comprehensive mutual recognition and substituted compliance.

Chairman Tarbert is poised to take cross-border actions that further the approach of deference to comparable regulations. Specifically, during his confirmation hearing, Mr. Tarbert stated: “...because our markets are global, coordination with our international counterparts to reduce systemic risk, avoid market fragmentation, protect customers, and promote basic international standards will be vital as we move forward.”⁷

Brexit

Brexit has been a significant driver of CFTC cross-border activity over the course of 2019. To

address industry concerns, the CFTC and the Prudential Regulators have actively addressed the possibility of a “No-Deal Brexit” by putting measures in place to preserve the stability of trade execution and clearing relationships.⁸ Specifically, in April, the CFTC announced two measures to provide greater certainty in the global marketplace.⁹ The CFTC Staff positions and time-limited relief in each of the letters will become effective if and when the United Kingdom withdraws from the European Union.

The end result of the CFTC’s Brexit relief is to preserve the status quo of the CFTC’s cross-border approach. Below, we discuss the CFTC’s Brexit-related actions, as well as other cross-border actions by the CFTC.

CFTC Provides No-Action Relief for EU Comparability Determinations for Entity-Level and Transaction-Level and Trade Execution-Related Relief

In CFTC No-Action Letter No. 19-08 (April 5, 2019) (NAL 19-08), CFTC Staff provided time-limited no-action relief to ensure the continued availability following Brexit of substituted compliance and regulatory relief under certain existing CFTC comparability determinations and exemption orders.¹⁰ Specifically, NAL 19-08 related to several comparability determinations that the CFTC took in recent years related to entity-level requirements for SDs, transaction-level requirements for transactions with SDs, and margin requirements for uncleared swaps (referred to in NAL 19-08 as the EU Comparability Determinations).¹¹ NAL 19-08 provides certain regulatory relief whether there is a No-Deal Brexit (also referred to as a Hard Brexit),¹² or a Soft Brexit.¹³

NAL 19-08 also applies to the Exemptive Order related to the registration of swap execution facilities (each, a SEF).¹⁴ Specifically, in the Exemptive Order, the CFTC determined that the EU’s regulatory frameworks for multilateral trading facilities (each, an MTF) and organized trading facilities (each, an OTF) satisfy the standard for granting an exemption

from the requirement to register with the CFTC as a SEF. As a result, NAL 19-08 provides that, upon the occurrence of either a No-Deal Brexit or a Soft Brexit, the Division of Market Oversight (DMO) will not recommend that the CFTC take an enforcement action against:

1. An MTF or OTF that is authorized within the United Kingdom and subject the Exemptive Order (referred to as an Eligible UK Facility) for failure to register as a SEF; or
2. A counterparty that is subject to the CFTC's trade execution requirement, if such counterparty executes a swap that is subject to such trade execution requirement on an Eligible UK Facility.¹⁵

Importantly, NAL 19-08 notes that the no-action relief does not affect other provisions of the Commodity Exchange Act (CEA) or CFTC regulations when cross-border trades are executed on a European facility. In other words, NAL 19-08 provides a summary of how the CFTC cross-border approach continues to provide an incomplete substituted compliance framework with respect to reporting and clearing. Specifically, with respect to swap transactions executed on a European facility, including Eligible UK Facilities:

1. The reporting requirements of Parts 43 and 45 of the CFTC's regulations apply, meaning that a European market participant executing on a UK Facility must report to a CFTC-registered swap data repository and a European trade repository;¹⁶
2. The swap trading eligibility requirement of CEA section 2(e) applies (that is, the eligible contract participant requirement); and
3. The following clearing-related requirements apply:
 - a. When a swap transaction executed by a U.S. Person on an Eligible UK Facility is a "customer" position subject to CEA section 4d,

the transaction, if intended to be cleared, must be cleared through a futures commission merchant (FCM) registered under the CEA at a derivatives clearing organization (DCO) registered under the CEA;¹⁷

- b. When a swap transaction executed by a U.S. Person on an Eligible UK Facility is a "proprietary" position under CFTC Regulation 1.3, the transaction, if intended to be cleared, must be cleared either through a DCO registered under the CEA or a clearing organization that has been exempted from DCO registration by the CFTC pursuant to CEA section 5b(h) (an Exempt DCO); and
- c. When a swap transaction is subject to the CFTC's clearing requirement under Part 50 of the CFTC's regulations and is entered into by a person that is subject to such clearing requirement, the transaction must be cleared either through a DCO registered under the CEA or an Exempt DCO; provided that, consistent with the first bullet point above, if the transaction is a "customer" position subject to CEA section 4d, it must be cleared through an FCM registered under the CEA at a DCO registered under the CEA, and it cannot be cleared through an Exempt DCO.

Finally, as to clearing, NAL 19-08 notes that if, as a result of the clearing arrangements that an Eligible UK Facility has in place, some swap transactions executed on the Eligible UK Facility are cleared by a clearing organization that is not a DCO registered under the CEA, the Eligible UK Facility must, as a condition of receiving the above relief from the SEF registration requirement, have a rule in its rulebook that requires the types of swap transactions described in clauses (1), (2), and (3) above, if intended to be cleared, to be cleared in a manner consistent with the requirements described in clauses (1), (2), and (3), respectively.¹⁸

In CFTC No-Action Letter No. 19-09 (April 5, 2019) (NAL 19-09), the CFTC clarified that

the existing regulatory no-action relief affecting EU entities will continue to be available for UK entities following Brexit.¹⁹ The existing no-action relief relates to introducing broker registration requirements for SDs, uncleared swaps subject to risk mitigation techniques under the European Market Infrastructure Regulation (EMIR), reporting requirements for certain SDs, outward-facing swaps condition in the Inter-Affiliate Exemption from the clearing requirement, and swaps executed between certain affiliated entities that are not exempt from clearing.²⁰

London Inter-Bank Offered Rate

With London Inter-Bank Offered Rate's (LIBOR) discontinuation in 2021 as a representative interest rate benchmark, the CFTC has been reviewing alternatives. Commissioner Rostin Behnam noted that in the second quarter of 2019: "We have persisted towards resolving LIBOR."²¹

Market participants organized a group called the Alternative Reference Rates Committee, that identified the Secured Overnight Financing Rate (SOFR) as an alternative to LIBOR. SOFR futures began trading at the Chicago Mercantile Exchange (CME) and ICE Futures Europe. Since it began trading at the CME in May 2018, through March 2019, SOFR futures have traded the equivalent of nearly US\$4 trillion in notional value with cumulative volume exceeding two million contracts.²²

Neither U.S. regulators nor the Federal Reserve are likely to mandate an alternative to LIBOR. However, Commissioner Behnam established the Interest Rate Benchmark Reform Subcommittee of the Market Risk Advisory Committee, which he sponsors, to provide reports and recommendations regarding efforts to transition the United States to SOFR. Chairman Giancarlo noted: "There is broad consensus that development of SOFR swaps markets will follow SOFR futures.... in the next 12 months, both...SOFR futures and swaps, [and] related debt markets—will hit critical levels where liquidity

begets liquidity."²³ The CFTC will continue to work with market participants to facilitate a shift away from LIBOR to SOFR.²⁴

Some have noted that SOFR may be more volatile than LIBOR. In response to these concerns, the Federal Reserve Bank of New York has indicated in a user's guide to SOFR that:

On a daily basis, SOFR can exhibit some amount of idiosyncratic volatility, reflecting market conditions on any given day, and a number of news articles pointed to the jump in SOFR over the end of the year. However, although people often focus on the type of day-to-day movements in overnight rates shown by the black line in the figure, it is important to keep in mind that the type of averages of SOFR that are referenced in financial contracts are much smoother than the movements in overnight SOFR.²⁵

The Federal Reserve Bank of New York has indicated that it will solicit public feedback on its plans to begin publishing averages of SOFR by the first half of 2020, which may further help market participants understand and use SOFR.

Cross-Border—Putting Deference and a Principles-Based Approach into Practice

Chairman Giancarlo's Final Actions on Cross-Border

In his last open Commission meeting, former Chairman Giancarlo referenced his October 2018 white paper on cross-border swaps regulations, noting that in it, he "proposed updating the agency's...approach with an objective and risk-focused framework based on regulatory deference to third-country jurisdictions with comparable regulation and supervision."²⁶ In response, CFTC Staff drafted four proposals on the cross-border reach of CFTC regulations:

1. Amendments to Part 30 of the CFTC regulations governing the offer and sale of foreign futures and options to customers located in the United States, which was published for comment on July 5, 2019, but recently extended to November 22, 2019.²⁷
2. A framework under which non-U.S. DCOs that do not pose a substantial risk to the U.S. financial system would have the option of being fully registered with the CFTC as a DCO or meeting their registration requirements through compliance with their home country requirements.²⁸ The comment period for this proposal was recently extended to November 18, 2019, as discussed below.
3. Provide a non-U.S. DCO that does not pose a substantial risk to the United States and that is subject to comparable regulation by appropriate regulators in the DCO's home jurisdiction, the option to be an Exempt DCO allowing them to offer customer clearing to U.S. eligible contract participants through foreign clearing members that are not registered as FCMs.²⁹
4. Amendments to the registration and regulation of SDs and major swap participants. Former Chairman Giancarlo noted that this proposal continues to be the subject of constructive dialogue with the Commissioners and their staffs.³⁰

Former Chairman Giancarlo also stated:

As a result, **the CFTC now has more than five years of experience with its current regulatory framework, including the approach to its cross-border application.** This puts us in a position to appreciate that application's different strengths and deficiencies. Based on a careful analysis of that data and experience, it is possible to recognize successes, address flaws, recalibrate imprecision, and optimize measures. **This is particularly important with respect to**

the CFTC's approach to regulating cross-border activities.³¹

With Chairman Giancarlo's departure, market participants are awaiting Chairman Tarbert's agenda on cross-border issues; as to date, he has only taken limited action as discussed below.

Cross-Border Developments under Chairman Tarbert

On September 13, 2019, Chairman Tarbert and John Berrigan, the Deputy Director General for Financial Stability, Financial Services, and Capital Markets at the European Commission (EC), issued a joint statement following a meeting.³² At the meeting, the delegations from the CFTC, the EC, and the European Securities and Markets Authority (ESMA) discussed financial supervisory and regulatory developments, as well as current and future priorities. The discussions provided an opportunity to exchange views on regulatory and supervisory responses to foreign/third-country central counterparties (CCPs) that clear for domestic market participants, possible qualitative and quantitative factors to determine systemic relevance, efficient and effective supervisory cooperation, and the need to avoid inconsistent or conflicting requirements. The discussion also covered the importance of home and host regulators and supervisors in fostering the robustness of the local and broader derivatives markets and the utility of deference in this regard. The CFTC and the EC reaffirmed their mutual commitment to transatlantic cooperation among regulators.³³

On September 13, 2019, the CFTC also announced that it has extended to November 18, 2019, the comment period for the proposal for an alternative compliance framework for DCOs organized outside of the United States that do not pose a substantial risk to the U.S. financial system.³⁴ As noted above, under the proposal, these DCOs would be able to register with the CFTC and comply with the core principles applicable to DCOs in the CEA

by compliance with their home-country regulatory regime.

On September 24, 2019, at the Global Markets Advisory Committee Meeting, Chairman Tarbert commented on EMIR 2.2 as follows:

As currently envisioned, EMIR 2.2 could result in one or more U.S. CCPs being designated systemically important to the EU financial system. **Such a “tier 2” designation seemingly would, at a minimum, subject any such U.S. CCPs to direct supervision by ESMA and, at the extreme, require the relocation of any EU-derived business to an EU-based entity. Direct supervision of U.S. CCPs by European regulators has the potential to introduce fragmentation into the U.S. financial markets through inconsistent and contradictory risk management requirements.** It also has the potential to increase systemic risk within the U.S. financial system.

Regulators undoubtedly have an interest in the potential for third-country CCPs to pose a systemic risk to their local jurisdiction. However, **I believe international regulators should create a regulatory structure that relies on cooperation and deference, without asserting extraordinary, extraterritorial jurisdiction over third-country markets.**

I strongly encourage EU authorities to finalize EMIR 2.2 in a manner that strengthens financial stability *while advancing home regulator deference* so that CCPs and their members are not subject to conflicting and inconsistent regimes.³⁵

Most recently, on October 16, 2019, the CFTC proposed two rules: (1) a proposed rule to extend the compliance date for phase five of the CFTC’s

margin rule for uncleared swaps (Margin Rule), and (2) a proposed rule regarding the application of the Margin Rule to the European Stability Mechanism (ESM). This second proposal excludes sovereign entities, multilateral development banks, the bank for international settlements, and similar entities from the CFTC Margin Rule’s definition of “financial end user.”

Given that this proposal had a cross-border impact, Chairman Tarbert took the opportunity to share his thoughts on deference, the 2016 Equivalence Conditions, EMIR 2.2, and next steps:

The global nature of today’s derivatives markets requires that regulators work cooperatively to ensure the success of the G20 reforms, foster economic growth, and promote financial stability. In 2016, for example, the CFTC and...EC entered into an agreement regarding requirements for dually registered central counterparties, and in doing so, took an important step in achieving cross-border harmonization of derivatives regulation...

The CFTC aims to lead by example, and the proposed rule before the Commission today is an opportunity to demonstrate our commitment to regulatory deference and support for efficient market activity...**As we go forward, it is important to recognize that deference is a two-way street: the only way to make it work is if it is mutual.**

Deference not only facilitates greater cooperation between regulators, but also promotes stability, resiliency, and growth in our global derivatives markets. I will continue to encourage our foreign counterparts to act in a manner that relies on cooperation and deference, so that duplicative or conflicting regulatory regimes do not stifle our markets or raise the prospect of financial stability

risks. By working together, we can promote sound and effective regulation without unduly constraining our financial markets.³⁶

Market participants can anticipate further cross-border announcements from the CFTC on pending proposals and possibly new cross-border proposals.

The CFTC 2019 Comparability Determinations

The CFTC also addressed other cross-border issues in 2019. These actions underpinned the efforts to exercise deference where possible in order to have workable substituted compliance to avoid fragmentation. As a result, the CFTC announced several comparability determinations during early 2019.

1. *Japan*: On March 26, 2019, the CFTC found that Japanese margin transaction requirements are comparable to CFTC requirements.³⁷ On July 11, 2019, the CFTC also announced the issuance of an order exempting Electronic Trading Platforms regulated by the Japan Financial Services Agency from the requirement to register with the CFTC as SEFs.³⁸
2. *Australia*: On March 27, 2019, the CFTC concluded that Australian margin rules are comparable to CFTC rules, and as a result, Australian firms may rely on compliance with Australian margin rules to satisfy CFTC requirements.³⁹
3. *Singapore*: On March 13, 2019, the CFTC announced the mutual recognition of certain derivatives trading venues in the United States and Singapore. The CFTC issued an order exempting Approved Exchanges and Recognized Market Operators derivatives trading facilities regulated by the Monetary Authority of Singapore from the requirement to register with the CFTC as SEFs.⁴⁰

The final substituted compliance action builds upon past substituted compliance actions by the CFTC related to MTFs, OTFs in Europe, and an

exemption from the requirement to register with the CFTC as a SEF for certain European facilities.

EMIR 2.2: Clearing Deference Hangs in the Balance

In 2016, the EC made an equivalence determination for five U.S. DCOs, which requires those DCOs to have rules consistent with three EMIR risk management provisions in order to operate in the European Union: (1) financial resources, (2) procyclicality, and (3) margin (collectively, the Equivalence Conditions). Recognition status is premised on the fact that these five US DCOs have demonstrated to ESMA that they have rules consistent with the Equivalence Conditions. The EC determination was made shortly after the CFTC issued a comparability determination for EU-based DCOs registered with the CFTC under which such dually registered CCPs could comply with certain CFTC requirements by satisfying corresponding European laws set forth in EMIR.

However, in June 2017, the EC proposed legislative amendments to EMIR (EMIR 2.2) to expand the regulatory and supervisory authority of ESMA over both EU and third-country CCPs (including ongoing surveillance and on-site inspections) and to provide the European Central Bank (ECB) and other EU central banks with new oversight authority over both EU and third-country CCPs. Pursuant to this Proposal, ESMA would have the ability to require third-country CCPs to comply with *all* provisions of EMIR, not just for their European-facing clearing activities, but for their entire domestic operations as well. This effectively would mean that, if the Proposal were enacted, at least some recognized U.S. DCOs would be required to follow EU law even for the clearing of domestic U.S. contracts, including listed futures, and for the clearing of transactions of U.S. customers.

Former Chairman Giancarlo viewed the application of EU law to U.S. financial markets without deference to the CFTC as unacceptable and a dangerous precedent. Former Chairman Giancarlo stated that “we have made clear U.S. expectation that these

concerns will be afforded due consideration during the upcoming development of the EMIR 2.2 delegated acts and application of EMIR 2.2.”⁴¹ U.S. regulators are primarily concerned with the possibility that under this regulatory framework, the European Union would be regulating and reviewing DCOs in the United States. Former Chairman Giancarlo recommended that the EC honor the determinations made in 2016. Chairman Tarbert recently noted that the EU regulatory framework “could direct foreign regulators to rewrite the rules for American CCPs. Despite the hyper-partisanship in Washington, there is virtual bipartisan unanimity that such an outcome would be a non-starter.”⁴²

The CFTC will continue to engage with EU authorities on EMIR 2.2 through the next phase of the legislative process—the drafting of the implementation regulations (the Level 2 process)—and expects that the European Union will consider the CFTC’s concerns during this Level 2 process.⁴³ As noted below, there has been some recent activity on this topic.

Former Chairman Giancarlo recommended in his White Paper that the CFTC, in return for the EC maintaining its 2016 equivalence determinations for the five US DCOs, expand the use of authority granted by the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) to exempt non-US CCPs that do not pose substantial risk to the US financial system if the CFTC determines, using an outcomes-based approach, that the CCP is subject to “comparable, comprehensive supervision and regulation” by appropriate government authorities in the CCP’s home country. Such non-US CCPs also would be permitted to provide clearing services to US customers indirectly through non-US clearing members, without the non-U.S. CCP or its non-US clearing members’ having to register under the CEA as a DCO or FCM, respectively. This approach would be consistent with the CFTC’s longstanding treatment of foreign futures and options under Part 30 of its regulations. In these circumstances,

only local bankruptcy laws would apply. Previously, the CFTC has used this authority to exempt certain non-US CCPs from registration under the CEA, but only with respect to the clearing of proprietary swap positions of US clearing members and their affiliates.

SEC Cross-Border Activities

As noted above, a primary driver of the CFTC’s agenda has been the theme of preventing market fragmentation and implementing regulations to prevent further exacerbation of market fragmentation. Former Chairman Giancarlo’s white paper identified his concerns with fragmentation. Similarly, the Securities and Exchange Commission (SEC) recently has proposed a rule related to risk management for security-based swaps. The SEC stated: “[We] endeavor to take a holistic approach in determining the comparability of foreign requirements for substituted compliance purposes.”⁴⁴ These announcements by the CFTC and SEC represent a change in approach by US regulators to apply deference where possible.

Key Cross-Agency and CFTC Regulatory Actions

CFTC and SEC Cross-Agency Activities

While the section above is focused on cross-border activities, there have also been important developments with regard to cross-agency activities. Specifically, in order to harmonize the CFTC and SEC regulations, the CFTC and SEC put forward two joint proposals:

1. *Align Minimum Margin*: The CFTC and the SEC approved a joint proposal to align the minimum margin required on security futures with other similar financial products, which would set the minimum margin requirement for security futures at 15 percent of the current market value of each security future. The CFTC unanimously approved publication of the proposed

amendments to regulations for comment on July 11, 2019.⁴⁵

2. *Community Banks*: On July 9, 2019, both the CFTC and the SEC announced that they adopted a final rule to exclude community banks with US\$10 billion or less in total consolidated assets and total trading assets and liabilities of 5 percent or less of total consolidated assets from the Volcker Rule.⁴⁶

CFTC and the Fed: Leverage Ratio Advocacy

On February 19, 2019, the CFTC Commissioners (the Commissioners) submitted a comment to the notice of proposed rulemaking issued by the Board of Governors of the Federal Reserve System to implement a new approach for calculating the exposure amount of derivatives contracts under the agencies' regulatory capital rules. The Commissioners explained that the calculation of the supplementary leverage ratio in the proposed rulemaking fails to acknowledge the risk-reducing impact of client initial margin that the clearing member client banking organizations hold on behalf of clients.⁴⁷

Increased Surveillance of Trading Platforms

On February 12, 2019, the CFTC announced for the first time the "2019 Examination Priorities" of the Division of Market Oversight (DMO) and Division of Swap Dealer and Intermediary Oversight (DSIO) for entities subject to their oversight and regulation.⁴⁸ DMO's Examination Priorities include cryptocurrency surveillance practices, surveillance for disruptive trading, and block trade surveillance practices. In addition, DMO noted that while it would continue its rule enforcement review program for futures exchanges (designated contract markets or DCM), it would also begin to ramp-up its rule enforcement review program for SEFs, which have yet to be subject to such a review after five years of being

registered with the CFTC. DSIO's Examination Priorities include withdrawal of residual interest from customer accounts, accepted forms of noncash margin, and compliance with segregation requirements.⁴⁹

Swaps Trading Reform

One of the most highly anticipated regulatory developments during former Chairman Giancarlo's tenure was swaps trading reform. The rule was proposed in November 2018, and the comment period was extended to March 2019 due to the government shutdown. The swaps trading rule proposal was met with significant criticism from the industry. The Chairman himself noted that "the proposed Amendments were [not] without constructive criticism."⁵⁰ Former Chairman Giancarlo summarized the criticism as follows:

1. *New Products*: Market participants raised concerns about the process and timing of bringing new products under the trade execution requirement. Specifically, commenters are concerned that the proposal may inadvertently create the opportunity for a single SEF to force market-wide SEF execution by quickly listing cleared swap products. In response, the CFTC will have to consider comment letters that suggest minimum conditions with adequate time for SEF connectivity and onboarding.
2. *Pretrade Transparency*: Market participants expressed concerns that moving to a flexible execution method may reduce the benefits of pretrade price transparency. In response, the Chairman responded that the proposed rules seek to increase pretrade transparency by increasing the number and range of transactions traded and executed on SEFs.
3. *Scope of Pre-Execution Communications*: Some market participants expressed concerns with the proposed restriction on off-SEF, pretrade communications. In response, the Chairman noted the CFTC would consider comment letters that address whether the objective of encouraging the full process of liquidity formation, price

discovery, and trade execution to take place on SEF platforms is sufficiently furthered by the proposal's efforts to make the SEF environment more salutary without needing to prohibit off-platform, pretrade communications.

4. *Impartial Access*: Some market participants criticized that the proposal oversimplified revisions to the standards for "impartial access," suggesting that permissible SEF membership criteria should relate to a member's actual market activity in particular swap asset classes and not to the member's broader commercial activities. As a result, the Chairman noted he would receive public comments on whether the revisions to "impartial access" would benefit from minimum standards for SEF membership criteria.⁵¹

In addition, other Commissioners have weighed in on the industry response to and criticism of the swaps trading proposal. In particular, Commissioner Quintenz noted:

...there may be aspects of the Proposal... that should be implemented *or adjusted* to better promote price discovery and liquidity on SEFs and create a vibrant, competitive swaps trading marketplace that works for all market participants.⁵² Commissioner Berkovitz was harsher in his criticism of the proposal: The proposal issued by the Commission last November to overhaul the SEF rules... is inconsistent with the swap trading provisions of the Dodd-Frank legislation and our G20 commitments. The Proposal would abandon the methods of execution requirements that ensure that SEFs enable market participants to trade highly liquid standardized swaps with each other openly and competitively.⁵³

Given the criticism and call for change to the swaps trading proposal, market participants will continue to watch the next activity from CFTC in

this area, which is likely to contain modifications to the proposal.

Swap Data

On April 25, 2019, the CFTC issued proposed changes to update the requirements for Swap Data Repositories (SDRs) and swap counterparties to verify the accuracy and completeness of swap data reported to SDRs. Former Chairman Giancarlo noted that these changes "will result in more complete, more accurate, and higher-quality data available to the CFTC and to the public."⁵⁴ The changes would:

- Update requirements for SDRs to verify swap data with reporting counterparties;
- Update requirements to correct swap data errors and omissions for SDRs, reporting counterparties, and other market participants; and
- Update and clarify SDR operational requirements to ensure that data is available to the CFTC and the public as required by the CEA.⁵⁵

Swap data has been an ongoing challenge for the CFTC and the industry. There have been continued calls for improvements in data inputs and outputs, as well as better coordination with international standards. Therefore, we would expect that this will continue to be a key agenda item for the new Chairman as the first step in a multistep process.

Margin for Uncleared Swaps

There have been several major developments related to uncleared swaps. First, in June 2019, Chairman Giancarlo congratulated the SEC on its adoption of final rules that will allow dual registrants that predominantly deal in swaps and do not have a significant amount of security-based swap positions to elect to comply with the capital, margin, and segregation requirements of the CFTC in lieu of SEC requirements.⁵⁶

Second, on May 2, 2019, Chairman Giancarlo sent a letter to Federal Reserve Board Vice Chairman

Randal K. Quarles concerning “Phase Five” implementation requirements for initial margin on uncleared swaps, scheduled for September 2020. Chairman Giancarlo made the following recommendations to “significantly reduce the compliance burden of entities that would not, in any case, be required to post initial margin:”

- US regulators should issue guidance clarifying that an entity need not make any preparations to exchange initial margin on uncleared swaps so long as its calculated margin amount is less than the current initial margin threshold of US\$50 million; and
- Global regulators should further engage with the Basel Committee on Banking Supervision and International Organization of Securities Commissions (BCBS).⁵⁷

Related to this last point, on July 23, 2019, the BCBS and the International Organization of Securities Commissions (IOSCO) issued a statement advising that they have agreed to extend by one year the final implementation of the margin requirements, originally set for September 1, 2020.⁵⁸ The split of the Phase Five implementation over two years is a welcome development, given the compliance and documentation issues that have been of concern for market participants in recent months. To facilitate this extension, the BCBS and IOSCO introduced an additional implementation phase whereby, as of September 1, 2020, covered entities with an average aggregate notional amount of non-centrally cleared derivatives greater than €50 billion will be subject to the requirements. The CFTC and Prudential Regulators will need to take action in order to implement the phases noted above.

Third, on March 28, 2019, the CFTC unanimously approved amendments to permit counterparties of SDs to be notified of their right to require segregation at the beginning of the swap trading relationship, rather than prior to each swap transaction or no less than annually.⁵⁹

Finally, on July 9, 2019, the CFTC issued a Staff Advisory to make “clear to CFTC registrants that documentation requirements pertaining to uncleared swaps (also referred to as ‘non-centrally cleared derivatives’) will not apply until the firms exceed the US\$50 million initial margin threshold” (the Advisory).⁶⁰ SDs that are subject to the CFTC Margin Regulations for Uncleared Swaps⁶¹ are required to complete documentation governing the posting, collection, and custody of initial margin (IM). The Advisory aligns with the recent BCBS and IOSCO statement, which noted that “the framework does not specify documentation, custodial, or operational requirements if the bilateral IM amount does not exceed the framework’s €50 million IM threshold.”⁶²

Registrant Issues

DSIO⁶³ has primary oversight responsibility over derivatives market intermediaries. Significant initiatives during the past 14 months included:

1. *Streamlined Chief Compliance Officer (CCO) Duties and Annual Reports*: In August 2018, the CFTC adopted amendments to Regulation 3.3, which clarified and modified certain of a CCO’s reporting lines and CCO’s duties with respect to administering policies and procedures specific to the registrant’s business in their annual report.⁶⁴
2. *Proposal to Codify Certain Commodity Pool Operator and Commodity Trading Advisor Staff Letters*: In October 2018, the CFTC proposed amendments to regulations that would provide greater regulatory certainty to market participants by including relief set out in various Staff no-action letters directly to the CFTC’s regulations.⁶⁵
3. *Removing Barriers for Banks Entering into Customer Swaps in Connection with Loans*: In April 2019, the CFTC adopted an exception to the SD registration regime to encourage more insured depository institutions to participate in the swap market in order to increase the availability of loan-related

swaps and help end-user customers hedge loan-related exposure. The rule will also allow certain banks to engage in an ancillary amount of dealing without significant hurdles to market entry.⁶⁶

4. *Relieving Prime Brokers from Certain SD Business Conduct Standards*: In March 2019, the CFTC Division of Enforcement (the Division) issued a no-action letter⁶⁷ that allows prime brokers to act as a source of liquidity in swaps, particularly FX swaps, without the burden of certain pretrade disclosure obligations. The CFTC implemented this relief to attract more prime brokers to provide bids and offers in swaps markets, including trades executed on SEFs.⁶⁸
5. *No-Action Relief for Floor Traders*: On June 27, 2019, the CFTC issued no-action relief for floor traders. The No-Action Relief allows registered floor traders to exclude cleared swaps executed on, or subject to, the rules of a DCM or SEF from the *de minimis* threshold when determining whether they are a SD. Thus, a floor trader may trade cleared swaps executed on, or subject to, the rules of a DCM or SEF without being designated as an SD.⁶⁹ In a related matter, on July 8, 2019, DSIO issued a report that presents data and analysis regarding the SD *de minimis* exception, with a specific focus regarding on-venue and cleared swaps. Former DSIO Director Matthew Kulkin noted that “DSIO believes this staff report will assist the CFTC and market participants analyze the potential implications of certain policy proposals.”⁷⁰

Position Limits

With the arrival of Chairman Tarbert, the CFTC likely will propose new position limits related to certain physical commodities in the coming months. Chairman Tarbert testified at his nomination hearing regarding the importance of finalizing the position limits regulations.⁷¹ The upcoming proposals will likely include a revised definition of “bona fide hedging,” a broader list of enumerated bona fide hedging

exemptions, and an improved process for exchange-granted non-enumerated hedge exemptions.⁷²

On August 1, 2019, the CFTC’s DMO announced that it had issued a no-action letter extending, until August 12, 2022, the relief provided in CFTC Letter 17-37, which would have expired on August 12, 2019. This no-action letter continues to provide relief to market participants from certain position aggregation requirements in CFTC Regulation 150.4 by: revising the notice filing requirements; revising the definition condition for purposes of complying with the aggregation requirements; and limiting the aggregation requirements for the “substantially identical trading strategies” rule to circumstances where positions in more than one account or pool are held in order to willfully attempt to circumvent applicable position limits.⁷³

On September 16, 2019, the CFTC unanimously approved a final rule on position limits and position accountability for security futures products and a proposed rule on public rulemaking procedures.⁷⁴ The position limits final rule updates security futures products position limits that were adopted approximately 20 years ago.⁷⁵ It also helps to align equity-based security futures products position limits with the limits that national securities exchanges apply to equity options. Commissioner Berkovitz has stated that “these measures, together with the recent [security futures products] margin proposals issued jointly with the SEC, will help to level the regulatory playing field” between security futures products and equity options.⁷⁶ The proposed rule on public rulemaking eliminates provisions that overlap with the Administrative Procedure Act and are duplicative.⁷⁷

The Enforcement Agenda

Enforcement Policy Developments

IOSCO Memorandum of Understanding

On May 20, 2019, at the 44th Annual IOSCO meeting, the Chairmen of the CFTC and the

SEC participated in a signing ceremony for the IOSCO Enhanced Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information (EMMoU). Signatories of the EMMoU agree to new forms of assistance critical to effective enforcement, such as obtaining compelled testimony and obtaining asset freezes to protect customer funds, among other powers. Chairman Giancarlo noted: “The CFTC is proud to be part of the inaugural group of signatories to the EMMoU and to demonstrate its commitment to international enforcement cooperation.”⁷⁸

Enforcement Advisory on Foreign Corrupt Practices

On March 6, 2019, the Division announced its publication of an Enforcement Advisory on self-reporting and cooperation for violations of the CEA involving foreign corrupt practices. Enforcement Director James McDonald noted: “This new Enforcement Advisory provides further clarity surrounding the benefits of self-reporting misconduct, full cooperation, and remediation in this context...”⁷⁹ This advisory further incentivizes individuals and companies to self-report misconduct, cooperate fully in CFTC investigations and enforcement actions, and appropriately remediate to ensure the wrongdoing does not happen again. Some commentators have observed that the CEA may not permit the extraterritorial enforcement authority apparently contemplated by the CFTC. Legislation to give the CFTC such authority was pending in the House of Representatives as this article went to print.⁸⁰

The CFTC Division of Enforcement Manual

On May 8, 2019, for the first time, the Division published an Enforcement Manual (Manual) describing CFTC measures implemented to make regulations simpler, more accessible, and more transparent.⁸¹ Though the Manual creates no private rights and is not enforceable in court, the Division

published it to have clear policies to promote consistency in its operations and to communicate those policies to the public.

The Manual is divided into 11 different sections, each addressing a different subject ranging from how the Division generates and processes leads, to how it investigates and litigates cases, to how it evaluates applicable privileges and issues of confidentiality. It also sets forth how the Division works in parallel with other civil and criminal agencies; lays out the various aspects of its self-reporting and cooperation program, including the various tools it can use to recognize cooperation; and provides an overview of the CFTC’s whistleblower program. As it develops new policies and procedures, the Division will seek to incorporate them into the Manual.⁸²

Notable Enforcement Developments

On November 15, 2018, the Division issued a report outlining its major priorities and initiatives during Fiscal Year 2018.⁸³ The report outlined its four major priorities: (1) preserving market integrity, (2) protecting customers, (3) promoting individual accountability, and (4) enhancing coordination with other regulators and criminal authorities.

On November 25, 2019, the Division issued its Fiscal Year 2019 report and stated that the four major priorities established for Fiscal Year 2018 would remain its priorities in Fiscal Year 2019.⁸⁴

Both the 2018 and 2019 reports described the enforcement efforts being carried out by specialized task forces focusing on both virtual currency and on misappropriation of confidential information.

Consistent with Chairman Giancarlo’s priority to “closely monitor trading activity in our markets for all varieties of misconduct” and Chairman Tarbert’s statement, the Division has remained active. Some notable cases include:

- Allegations of failure to supervise the handling of commodity interest accounts, specifically with regard to the execution of bunched orders.⁸⁵

- Allegations of holding a net position of soft red winter wheat futures contract in excess of the spot month speculative position limit.⁸⁶
- Allegations of engaging in wash trading and noncompetitive transactions to offset original bids and offers.⁸⁷
- Allegations of spoofing and manipulating precious metals futures contracts traded on the Commodity Exchange Inc. to manipulate market prices.⁸⁸
- Allegations against an individual for defrauding the commodities trading company where he worked as president by scheming to inflate the reported market-to-market profit-and-loss value of the gas division's overall trading book in order to conceal losses.⁸⁹
- Allegations against an individual for engaging in manipulative and deceptive schemes, which involved thousands of acts of spoofing in many futures contracts.⁹⁰
- Allegations of spoofing in the CME soybeans futures market.⁹¹
- Allegations of spoofing and manipulations in the precious metals futures markets. The CFTC filed and settled charges against former precious metals traders who entered into cooperation agreements and admitted to spoofing and manipulative conduct in the futures markets.⁹²
- Allegations of spoofing in the CME financial futures markets.⁹³
- The SEC and the CFTC charged a DCO with failing to establish and maintain adequate risk management policies and required the company to undertake remedial efforts and pay US\$20 million in penalties.⁹⁴
- The CFTC filed and settled charges against a registrant, ordering him to pay US\$1.25 million for fraud, unauthorized trading, and violating speculative position limits in cattle futures. Chairman Tarbert stated: "This case shows the CFTC's unwavering commitment to protect America's farmers and ranchers from fraud and other misconduct in connection with the agricultural derivatives markets. The CFTC will continue to work to ensure all Americans who use these markets can have confidence in their integrity."⁹⁵
- The CFTC filed and settled charges against a Chief Compliance Officer, requiring him to pay US\$125,000 in restitution and a US\$25,000 civil penalty for engaging in acts that operated as a fraud on pool participants and making false statements to the National Futures Association.⁹⁶
- The CFTC filed and settled charges against a registered futures commission merchant for allowing cyber criminals to breach its email systems, access customer information, and successfully cause the withdrawal of US\$1 million in customer funds.⁹⁷
- The CFTC filed and settled charges against an interdealer broker and CFTC-registered introducing broker. The combined orders require the interdealer broker to pay a total of US\$13 million for failing to supervise employees and making false or misleading statements to CFTC Staff.⁹⁸
- The CFTC charged traders at a major U.S. bank with spoofing, engaging in a manipulative and deceptive scheme, and attempting to manipulate prices in the precious metals futures markets.⁹⁹
- A former precious metals trader at two financial institutions entered into a formal cooperation agreement with the Division and admitted to spoofing in the futures markets.¹⁰⁰
- The CFTC filed and settled charges against a trader for violating spot-month speculative position limits in soybean oil and soybean meal futures.¹⁰¹
- The CFTC filed and settled charges against a trading firm and its founder for spoofing and for engaging in a manipulative and deceptive trading scheme. The orders require the firm and its founder to pay civil monetary penalties of US\$2.5 million.¹⁰²

- The CFTC filed and settled charges against a former CFTC registrant for making false and misleading statements of material fact to CFTC staff during an investigation by the Division.¹⁰³
- The CFTC filed and settled charges against a global agribusiness for failing to file timely CFTC Form 204 reports. The order requires the company to pay a US\$175,000 civil monetary penalty and to cease and desist from violating CFTC Regulation 19.01.¹⁰⁴
- The CFTC filed and settled charges against a global agribusiness for failing to submit accurate monthly CFTC Form 204 reports regarding the composition of its fixed price cash corn and soybean purchases and sales. The order also charges the company for violating the cease and desist provision of a 2016 CFTC order, which involved a 13-year failure to file correct Form 204 reports with the CFTC, and imposes a US\$500,000 penalty.¹⁰⁵
- The CFTC filed and settled charges against an introducing broker and its owner for misusing material, nonpublic, order information in connection with block trades in natural gas futures on ICE Futures US, as well as related supervision and recordkeeping violations. The broker and its owner are subject to a civil monetary penalty of US\$1.5 million and must disgorge US\$413,065 in ill-gotten gains.¹⁰⁶
- The CFTC filed and settled civil enforcement actions against two trading firms and a bank for violating prohibitions on spoofing, requiring the firms to pay a total of US\$3 million. As to these matters, CFTC Enforcement Director James McDonald stated: “The CFTC is committed to preserving the integrity of our markets—like the financial and precious metals futures markets at issue here—and to rooting out unlawful practices like spoofing ... we will continue to vigilantly investigate and prosecute misconduct by entities that spoof in our markets.”¹⁰⁷
- The CFTC filed and settled charges against two interdealer brokers and imposed a civil monetary penalty of US\$25 million. The CFTC determined that brokers employed by the firms on their emerging markets foreign exchange options desks made false representations that certain bids and offers were executable and that certain trades had occurred. The CFTC mandated that the companies strengthen their internal controls and procedures, appoint a monitor, and cease and desist from violating the CEA and CFTC regulations.¹⁰⁸
- The CFTC entered into a settlement involving alleged wheat futures manipulation and other violations by two global food companies. As part of the agreement, the companies agreed to pay a US\$16 million civil penalty but both the companies and the CFTC agreed not to make public statements about the settlement other than to refer to pleadings previously filed in the case. However, following public statements made by the CFTC after the settlement, which the defendant companies claimed violated the settlement agreement, the Court stated that “all counsel of record, as well as Jamie McDonald, Chairman Heath Tarbert, Commissioners Rostin Behnam and Dan Berkovitz, are ordered to appear in person at the evidentiary hearing and provide live testimony as needed” in response to a motion for contempt.¹⁰⁹ The CFTC, Commissioner Behnam, and Commissioner Berkovitz provisionally asserted the protections of the Fifth Amendment pending further proceedings.¹¹⁰ Following a series of sealed motions, the CFTC appealed to the US Court of Appeals for the Seventh Circuit for a writ of mandamus, and the docket was unsealed on October 2, 2019.¹¹¹ The Seventh Circuit directed the District Court to “desist from any effort to hold the Chairman, Commissioners, and staff members personally in contempt of court or otherwise to look behind the Commission’s public statements and the administrative record” and remanded the case for further proceedings in the District Court.¹¹² The District Court then vacated the settlement

agreement and informed the parties that they should be prepared to set a trial date.¹¹³ These developments are highly unusual, and further proceedings in this case will be followed closely by those who interact with, or are regulated by, the CFTC.

In general, the CFTC enforcement program likely will have continuity from former Chairman Giancarlo's tenure, given that it appears James McDonald will stay on as the Enforcement Director under Chairman Tarbert.¹¹⁴ Therefore, market participants should anticipate continued enforcement investigations and activities in the areas of spoofing, manipulation, position limits, and a new area: swaps trading.

Upcoming Priorities for the CFTC

On July 29, 2019, Chairman Tarbert published an opinion column for Fox Business and articulated his priorities and vision for the CFTC.¹¹⁵ Because Dodd-Frank concentrated risk in the derivatives markets in CCPs, Chairman Tarbert believes that "one of the most critical responsibilities of the CFTC is supervising CCPs on a daily basis."¹¹⁶ As a result, the CFTC is closely monitoring the potential for Brexit, because it will likely impact the supervision of London-based CCPs. Chairman Tarbert also indicated that the CFTC "must issue long-awaited rules to limit derivatives positions that help unscrupulous traders corner commodity markets."¹¹⁷ He also advocated for the CFTC to develop a holistic framework for 21st century commodities, such as blockchain-based digital currencies, and stated that "reinvigorating our historical principles-based approach, where appropriate, will help our markets remain fair, innovative, and vibrant."¹¹⁸ Chairman Tarbert expanded on these priorities by articulating his strategic goals for the agency at the FIA Expo in Chicago on October 30, 2019.¹¹⁹ Chairman Tarbert stated that he plans to focus on: (1) a principles-based approach to digital assets, (2) a two-way street on deference with the EC, (3) a risk-based approach

to SD rules, (4) paying attention to agricultural concerns, and (5) data protection. As Chairman Tarbert begins his work, we expect to see regulatory guidance to be issued that furthers these policy priorities.

On September 25, 2019, Director James McDonald delivered the keynote address at the Practising Law Institute's White Collar Crime 2019 conference. He discussed Chairman Tarbert's goals for the enforcement program and how the institute can better fulfill its mission by working with other regulators through the parallel enforcement initiative, where the CFTC works in concert with other regulators and with law enforcement agencies.¹²⁰ Chairman Tarbert indicated that vigorous enforcement is essential to fulfilling the CFTC's broader goals and that the CFTC will be tough on those who break the law. Director McDonald noted that well-functioning commodities and derivatives markets can work for all Americans. In contrast, unlawful activity dampens economic growth and undermines democratic values, public accountability, and the rule of law. Director McDonald suggested that parallel enforcement and cooperation with the Department of Justice and other colleagues in the enforcement and regulatory community can most effectively protect the commodities and derivatives markets. He discussed specific instances where the CFTC has worked successfully with the Department of Justice and the SEC, including an enforcement action filed by the CFTC on September 16, 2019, in the Northern District of Illinois against two traders formerly employed by JP Morgan Chase. A federal grand jury in Chicago also returned a criminal indictment against the same two traders (plus a third defendant not charged by the CFTC) in a parallel criminal case. This case is particularly noteworthy because the government has brought—for the first time—racketeering, conspiracy, and bank fraud charges in a spoofing case. Indeed, the indictment characterizes the bank's trading desk as a criminal racketeering enterprise while at the same time characterizing the bank as a victim of the defendants' alleged fraud.¹²¹

The Director of DSIO, Joshua Sterling, articulated his goals at a speech before the District of Columbia Bar Association on September 25, 2019.¹²² Director Sterling discussed the purpose and implementation of Title VII of the Dodd-Frank Act and then laid out his vision for the future. He has developed a programmatic approach for DSIO consisting of five building blocks, including: (1) The Examination Program, (2) The Reporting Framework, (3) The Guidance Program, (4) The Relationship to Enforcement, and (5) The Rulemaking Function. He stated that he hopes that these five building blocks persist beyond his tenure and allow DSIO to be left in a better position than it was in when he started.

Director Sterling discussed DSIO's approach to bank-affiliated CFTC registrants on September 26, 2019, in remarks at the ABA Securities Association.¹²³ The CEA requires that the CFTC and the SEC, to the extent practicable, establish comparable capital and margin requirements. The CFTC originally issued a SD capital and financial reporting rule in 2011, followed by a reproposal in 2016. Director Sterling anticipates recommending that the CFTC reopen the comment period and adopt a final rule in 2020. Director Sterling discussed the Phase Five implementation of the initial margin requirements and noted the swaps industry has raised concerns about operational difficulties. In light of these concerns, he noted that the CFTC "has already undertaken certain measures to address possible 'congestion' when [Phase Five] begins in September 2020, and is contemplating further efforts as well."¹²⁴

Conclusion

The global futures and derivatives team at K&L Gates continues to follow the regulatory and enforcement developments at the CFTC, including changes to the swaps trading rules, cross-border guidance, and position limits given the arrival of new Chairman Tarbert, as well as the policy and regulatory goals that he has articulated. This article was prepared at the end of 2019 and the authors expect

many other developments in the coming 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. Mkrtchian** is an associate, at K&L Gates, LLP. **Christine Mikhael**, a 2019 summer associate, contributed to this article.

NOTES

- ¹ This article is not intended to be an offer to represent any person. Your 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: (i) you have sought to retain us; (ii) we have had an opportunity to check and clear any conflicts; and (iii) you have received a letter from us confirming the retention and its scope.
- ² Keynote Address of Chairman J. Christopher Giancarlo Before the ABA Business Law Section, Derivatives & Futures Law Committee Winter Meeting (Jan. 25, 2019), <https://www.cftc.gov/PressRoom/SpeechesTestimony/opagiancarlo63>.
- ³ Press Release, CFTC, Tarbert Begins Term as 14th CFTC Chairman (July 15, 2019), <https://www.cftc.gov/PressRoom/PressReleases/7976-19>.
- ⁴ Interpretive Guidance and Policy Statement Regarding Compliance With Certain Swap Regulations, 78 Fed. Reg. 45,292 (July 26, 2013), <https://www.cftc.gov/sites/default/files/idc/groups/public/@bfrfederalregister/documents/file/2013-17958a.pdf>.
- ⁵ This group of regulators includes the Federal Deposit Insurance Corporation, the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, the Farm Credit Administration and the Federal Housing Finance Agency.
- ⁶ See, e.g., CFTC, CFTC Approves Comparability Determination for Australia Uncleared Swap Margin Rules for Substituted Compliance Purposes

- (Mar. 27, 2019), <https://www.cftc.gov/PressRoom/PressReleases/7902-19>.
- ⁷ See United States Senate Committee on Agriculture, Nutrition, and Forestry, Nomination of Heath P. Tarbert (Mar. 13, 2019), <https://www.agriculture.senate.gov/hearings/nomination-of-heath-p-tarbert>.
- ⁸ CFTC Provides Further Brexit-Related Market Certainty (Mar. 25, 2019) <https://www.cftc.gov/PressRoom/PressReleases/7896-19>.
- ⁹ Press Release, CFTC, CFTC Staff Provides Further Brexit-Related Market Certainty (Apr. 5, 2019), <https://www.cftc.gov/PressRoom/PressReleases/7910-19>.
- ¹⁰ CFTC No-Action Letter No. 19-08, No-Action Relief in Connection With Certain Previously Granted Commission Determinations and Exemptions, in Order to Account for the Anticipated Withdrawal of the United Kingdom From the European Union (Apr. 5, 2019), <https://www.cftc.gov/system/files/file=cs/finallpdfs/19/19-08.pdf>.
- ¹¹ The comparability determinations are cited in NAL 19-08 and include: Comparability Determination for the European Union: Certain Entity-Level Requirements (Dec. 27, 2013), <https://www.cftc.gov/sites/default/files/idc/groups/public/@lrfederalregister/documents/file/2013-30980a.pdf>; Comparability Determination for the European Union: Certain Transaction-Level Requirements (Dec. 27, 2013), <https://www.cftc.gov/sites/default/files/idc/groups/public/@lrfederalregister/documents/file/2013-30981a.pdf>; and Comparability Determination for the European Union: Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants (Oct. 18, 2017), <https://www.cftc.gov/sites/default/files/idc/groups/public/@lrfederalregister/documents/file/2017-22616a.pdf>.
- ¹² NAL 19-08 notes that based on the understanding of the Division of Swap Dealer and Intermediary Oversight in the event of a No-Deal Brexit, the EU laws and regulations relevant for the EU Comparability Determinations will be transposed into UK laws and regulations pursuant to the European Union (Withdrawal) Act 2018 (EU(W) A). As to a No-Deal Brexit, the relief will expire upon the earlier of (i) the effective date of any comparability determination issued by the Commission for the United Kingdom to the extent such determination encompasses the subject matter of the EU Comparability Determinations; or (ii) the date that is six months from the date of the United Kingdom's withdrawal from the European Union.
- ¹³ NAL 19-08 notes that in the event of a Soft Brexit, the EU laws and regulations relevant for the EU Comparability Determinations will for some transition period continue to apply in the United Kingdom as if it were a member of the EU. As to a Soft Brexit, the relief will expire upon the earlier of (i) the effective date of any such technical amendments to the EU Comparability Determinations, or (ii) the expiration of the transition period during which the EU laws and regulations relevant to the EU Comparability Determinations continue to apply in the United Kingdom as if it were a member of the EU.
- ¹⁴ See In the Matter of the Exemption of Multilateral Trading Facilities and Organized Trading Facilities Authorized Within the European Union from the Requirement to Register with the Commodity Futures Trading Commission as Swap Execution Facilities (the Exemptive Order) (Dec. 8, 2017), https://www.cftc.gov/sites/default/files/idc/groups/public/@requestsandactions/documents/ifdocs/mtf_otforder12-08-17.pdf.
- ¹⁵ NAL 19-08 at 4–5.
- ¹⁶ In addition, a European market participant executing on a SEF must report to a European trade repository, the SEF would be expected to report the trading to a CFTC-registered swap data repository.
- ¹⁷ On May 1, 2019, the CFTC's Division of Clearing and Risk (DCR) and the Office of the Chief Economist (OCE) issued a two-part report with the results of a reverse stress test of CCPs and an analysis of stressed liquidation costs. The report found that CME Clearing and LCH Ltd. would have sufficient prefunded resources to cover losses even if all clearing members with losses defaulted under certain extreme historic one-day scenarios. In addition, the report

- found that prefunded resources at CME Clearing and LCH Ltd. would have been sufficient to cover extreme but plausible market losses plus liquidation expenses for two house accounts even if the actual liquidation costs were double the amount of the liquidation margin add-on. The report is available at <https://www.cftc.gov/system/files?file=2019/05/02/cftc-stresstest042019.pdf>.
- ¹⁸ *NAL 19-08 at 4–5.*
- ¹⁹ See CFTC No-Action Letter No. 19-09, Extension to UK Entities of Regulatory Relief Previously Granted to European Union Entities in CFTC No-Action Letters: 12-70, 13-45, 17-64, 17-66, and 17-67 (Apr. 5, 2019), <https://www.cftc.gov/system/files/csllpdfs/19/19-09.pdf>.
- ²⁰ The CFTC also unanimously adopted a provision to allow an uncleared swap to retain its legacy status under the CFTC Margin Rule or Prudential Margin Rule if affected swap dealers attempt to transfer uncleared swaps in the case of a No-Deal Brexit. See Press Release, CFTC, CFTC Provides Further Brexit-Related Market Certainty (Mar. 25, 2019), <https://www.cftc.gov/PressRoom/PressReleases/7896-19>. In addition, the outward-facing swaps condition “is intended to prevent swap market participants from using the Inter-Affiliate Exemption to transfer risks to US companies and financial markets by entering into uncleared swaps with non-US affiliates and, in turn, such non-US affiliates entering into swaps with unaffiliated counterparties, in jurisdictions that do not have mandatory clearing regimes comparable to the Commission’s clearing requirement regime.” See CFTC No-Action Letter No. 17-66, No-Action Relief from Certain Provisions of the Outward-Facing Swaps Condition in the Inter-Affiliate Exemption from the Clearing Requirement (Dec. 17, 2017), <https://www.cftc.gov/sites/default/files/csllpdfs/17/17-66.pdf>.
- ²¹ Remarks of CFTC Commissioner Rostin Behnam at the ISDA 34th Annual General Meeting, Grand Hyatt Hong Kong, Hong Kong (Apr. 9, 2019), <https://www.cftc.gov/PressRoom/SpeechesTestimony/opabehnam13>.
- ²² *Id.*
- ²³ Press Release, CFTC, CFTC Chairman Gives Remarks at FSB Meeting on LIBOR Reform (Apr. 11, 2019), <https://www.cftc.gov/PressRoom/PressReleases/7911-19>.
- ²⁴ Statement of CFTC Chairman J. Christopher Giancarlo Regarding the Financial Stability Board Industry Roundtable on Reforming Major Interest Rate Benchmarks, Washington, DC (Apr. 10, 2019), <https://www.cftc.gov/PressRoom/SpeechesTestimony/giancarlostatement041019>.
- ²⁵ Alternative Reference Rates Comm., Fed. Reserve Bank of N.Y., A User’s Guide to SOFR, (Apr. 2019), https://www.newyorkfed.org/medialibrary/Microsites/arrc/files/2019/Users_Guide_to_SOFR.pdf.
- ²⁶ Opening Statement of Chairman J. Christopher Giancarlo before the Open Commission Meeting (July 11, 2019), <https://www.cftc.gov/PressRoom/SpeechesTestimony/giancarlostatement071119>.
- ²⁷ Press Release, CFTC, CFTC to Clarify Cross-Border Regulatory Commitments (June 25, 2019) <https://www.cftc.gov/PressRoom/PressReleases/7944-19>. See also Press Release, CFTC, CFTC Extends Public Comment Period for Proposed Rules Pertaining to Cross-Border Clearing (Sept. 13, 2019), <https://www.cftc.gov/PressRoom/PressReleases/8010-19> (noting comment period extension).
- ²⁸ Press Release, CFTC, CFTC Voted on Open Meeting Agenda Items (July 11, 2019), <https://www.cftc.gov/PressRoom/PressReleases/7967-19>.
- ²⁹ *Id.* The definition of an eligible contract participant is set forth in Section 1a(18) of the CEA, as supplemented by CFTC Regulation 1.3. CFTC Regulations are found in Title 17 of the Code of Federal Regulations.
- ³⁰ Opening Statement of Chairman J. Christopher Giancarlo before the Open Commission Meeting (July 11, 2019), <https://www.cftc.gov/PressRoom/SpeechesTestimony/giancarlostatement071119>.
- ³¹ *Id.* (emphasis added).
- ³² Press Release, CFTC, Joint Statement of the CFTC and the European Commission Following Meeting

- on Cross-Border Derivatives Regulatory Issues (Sept. 13, 2019), <https://www.cftc.gov/PressRoom/PressReleases/8009-19>.
- ³³ *Id.*
- ³⁴ Press Release, CFTC, CFTC Extends Public Comment Period for Proposed Rules Pertaining to Cross-Border Clearing (Sept. 13, 2019), <https://www.cftc.gov/PressRoom/PressReleases/8010-19>.
- ³⁵ Opening Statement of Chairman Heath P. Tarbert Before the Global Markets Advisory Committee Meeting (Sept. 24, 2019), <https://www.cftc.gov/PressRoom/SpeechesTestimony/tarbertstatement092419> (emphasis added).
- ³⁶ Opening Statement of Chairman Heath P. Tarbert Before the Open Commission Meeting on October 16, 2019 (Oct. 16, 2019), <https://www.cftc.gov/PressRoom/SpeechesTestimony/heathstatement101619> (emphasis added).
- ³⁷ Statement of Chairman J. Christopher Giancarlo on Amendment to Japan Comparability Determination: Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants (Mar. 26, 2019), <https://www.cftc.gov/PressRoom/SpeechesTestimony/giancarlostatement032619>.
- ³⁸ Press Release, CFTC, The CFTC and the Japan Financial Services Agency Issued a Joint Statement Regarding the Comparability of Certain Derivatives Trading Venues in the US and Japan (July 11, 2019), <https://www.cftc.gov/PressRoom/PressReleases/7968-19>.
- ³⁹ Statement of Chairman J. Christopher Giancarlo on Australia Comparability Determination: Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants (Mar. 27, 2019), <https://www.cftc.gov/PressRoom/SpeechesTestimony/giancarlostatement032719>.
- ⁴⁰ Press Release, CFTC, Joint Statement of the CFTC and the Monetary Authority of Singapore Regarding the Mutual Recognition of Certain Derivatives Trading Venues in the United States and Singapore (Mar. 13, 2019), <https://www.cftc.gov/PressRoom/PressReleases/7887-19>.
- ⁴¹ Statement of Chairman J. Christopher Giancarlo on EMIR 2.2 (Mar. 13, 2019), <https://www.cftc.gov/PressRoom/SpeechesTestimony/giancarlostatement031319>.
- ⁴² Dr. Heath P. Tarbert, “Why the CFTC is the most important regulator you’ve never heard of,” *Fox Business* (July 29, 2019), <https://www.foxbusiness.com/financials/why-the-cftc-is-the-most-important-regulator-youve-never-heard-of>.
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