Strategic
Perspectives

Wolters Kluwer

January 7, 2020

The CFTC in 2019: A New Chairman, an Ambitious Agenda, and a Fierce Battle with Kraft Foods mark the year

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In 2019, Dr. Heath Tarbert took the reins of the Commodity Trading Futures Commission to become the 14th chairman in the agency's history with the stated intention of hitting the ground running. During his tenure, the CFTC has continued its aggressive enforcement agenda across the board, but especially in the areas of anti-spoofing and market manipulation where it has teamed up increasingly with the Department of Justice. However, these efforts have not been without complications and public criticism. Also, on the enforcement front, the Commission became embroiled in high-profile dispute when its settlement with Kraft Foods unraveled based on claims that agency deliberately violated the court's consent order resolving the matter. During the year, the agency also maintained a steady pace of rulemaking, which has included both proposed and final rules, but which from time to time, was also the subject of rancorous policy disputes among various commissioners.

Focusing on the numbers, spoofing, and tag teaming with the DOJ drove CFTC enforcement in 2019

In 2019, the CFTC continued its ambitious enforcement agenda from previous years as Dr. Heath Tarbert became the agency's fourteenth chairman on July 15, 2019. The new chairman promised to maintain vigorous derivatives markets while holding wrongdoers accountable. The majority of Division of Enforcement's accomplishments during the year were captured in its *FY 2019 Annual Report*, which covers October 1, 2018 through September 30, 2019. As the report notes, the CFTC filed 69 actions during FY 2019 marking a slight increase over the average of 67.5 cases filed for the five prior years. The DOE's concerted enforcement activity has continued through FY 2020 as the Commission has either filed complaints or obtained orders reflecting awards in 20 additional matters, including both federal court actions and administrative proceedings.

Chairman Tarbert's focus on aggressive enforcement, along with optimizing the associated metrics, is reflected in the DOE report which specifically notes that nearly 48 of 69 (or nearly 70 percent) of the actions filed for FY 2019 were initiated during the time Tarbert was serving as the agency's chairman (from July 15 through the end of September). Moreover, 27 enforcement actions were filed in a flurry of activity on September 30th, the final day of the fiscal year.

While the DOE annual report acknowledges that a discussion of enforcement metrics places a certain emphasis on the numbers themselves, it also notes the centrality of CFTC's enforcement program which includes preserving market integrity, protecting customers, and deterring misconduct from happening in the first place. Towards that end, in 2019 the CFTC saw greater coordination and collaboration with the U.S. Department of Justice than in any prior year.

The FY 2019 report. While the DOE FY 2019 report reflects a record of active enforcement, certain activities fall short in some respects in comparison with prior years. Note the following:

- While the Commission filed 69 enforcement actions, this number of actions is down from 83 cases filed in FY 2018, thereby representing a 17 percent decline in comparison with the prior year. The number of filed actions for FY 2019 also falls well short of the recent high-water mark of 102 actions in 2012. However, the trend in the number of actions should be considered in the context of the 35-day government shutdown that hampered the CFTC's efforts in the early part of 2019.
- The total monetary relief awarded in CFTC enforcement actions in FY 2019 exceeded $1.3 billion, marking a 39 percent increase over the prior fiscal year where monetary relief totaled $953 million. This stands as the fourth highest total in the Commission's history. The total monetary relief amount covers all monetary relief ordered in CFTC actions, which includes civil monetary penalties, disgorgement, and restitution.
- During the fiscal year, the CFTC filed more cases involving manipulative conduct and spoofing than any prior year except 2018. The agency brought 16 spoofing and manipulative conduct cases this year, compared to 26 in fiscal 2018. The most active area for enforcement cases in fiscal 2019 was commodities fraud with 25. Together, commodities fraud, manipulative conduct, and spoofing accounted for 65 percent of all cases filed during the fiscal year.
- The DOE maintained a docket of over 140 pending litigation actions against corporate entities and individuals that involved allegations of manipulation, spoofing, fraud, misappropriation of confidential information, illegally offering new products, including digital assets, and other violations.
- The CFTC continued its efforts to hold individuals accountable for wrongdoing during the fiscal year. Nearly 58 percent of the year's actions involved charges against one or more individuals. The report notes that 11 individuals were charged with spoofing-related misconduct during the year.

Tag teaming with the DOJ. The CFTC's enforcement program has also become increasingly intertwined with U.S. Department of Justice and FBI. The CFTC filed 16 actions in parallel with the Department of Justice in FY 2018, two more than in any FY 2018, and six more than for the prior 5 years combined. While the Commission asserts that its collaborative efforts with criminal authorities has led to greater overall law enforcement effectiveness, this combined approach has also resulted in complications and industry backlash.

The annual report provides the rationale for the CFTC-DOJ team approach noting "our parallel enforcement program starts with the premise we believe a robust combination of criminal prosecution and regulatory enforcement is critical to deterring violators, punishing misconduct, preserving market integrity, and protecting market participants." The report further observes that ultimate goal is to deter wrongdoers from committing misconduct in the first place, and there is no greater deterrent than the prospect of criminal prosecution—and the reality of time in jail.

From the DOJ's perspective, it has been able to avail itself to the CFTC's expertise and institutional knowledge of the commodities and derivatives markets in pursuit of its criminal prosecutions. Notwithstanding, in 2019 the DOJ encountered some setbacks and complications in connection with its joint efforts with the Commission.

One of those setbacks involved the government's unsuccessful prosecution of software developer Jitesh Thakkar, who was charged with aiding and abetting the spoofing activities of convicted felon and flash crash perpetrator Navinder Sarao. In April, after a federal jury voted 10-2 to acquit Thakkar, the DOJ dismissed the remaining charges rather than engage in another trial.

Despite the DOJ's unsuccessful prosecution, the dismissal of criminal charges, and the judge in the criminal proceeding describing government's case as "thin", in September, the CFTC decided to vigorously pursue Thakkar in the enforcement action which was stayed during the pendency of the criminal matter. Additionally, the CFTC is seeking extensive discovery in the civil matter even though the CFTC has access to a massive trove of documents from the criminal matter. The CFTC's aggressive pursuit of Thakkar has resulted in blowback from the public and futures industry as over 2300 individuals have signed on to a Justice for Jitesh supporting petition. The petition asserts the CFTC's continued pursuit of this matter is an injustice, as well as detrimental to the futures industry. While the CFTC claims in its annual report that its joint efforts with DOJ is being done the right way—meaning with the appropriate transparency, accountability, and fairness—many futures industry participants and observers would certainly beg to differ.

Meanwhile, the DOJ has hit some snags, as a result of its parallel efforts with the CFTC, in one of its highest profile spoofing prosecutions involving former J.P. Morgan precious metal traders, Michael Nowak and Gregg Smith. In the civil enforcement action, the defendants are seeking to obtain discovery from the CFTC which arguably will allow them to circumvent the limitations associated with the criminal discovery process. The defendants assert that granting a complete stay as argued by the government will result in prejudice. They suggest that the court should stay the action but allow for document discovery, including third party discovery, to proceed. In support of this approach, the defendants pointed to *CFTC v. Vorley*, a recent case in the Northern District of Illinois where the court considered a similar situation.

For their part, the DOJ and the CFTC contend that the partial stay advocated by the defendants will provide these alleged wrongdoers with an unfair tactical advantage in the parallel criminal proceeding. A ruling on this issue is pending with the court in the civil enforcement matter.

The increased role of data analytics. The annual report also underscores the increased role that data analytics will play in its to our day-to-day work as regulators, noting that the DOE has engaged in a multi-year project to enhance its ability to detect misconduct through data analytics. The division noted that it has developed an ability to identify in the trading data forms of misconduct that it might previously have been unable to detect. The report also pointed to the significant increase in the number of cases involving manipulative conduct, and the significant increase in the percentage of the overall docket involving charges of manipulative conduct and commodities fraud, which directly tied to these data analytical efforts. Many of these matters include the parallel enforcement undertakings with the DOJ.

Ensuring registrants adopt and implement proper risk management processes. Through its enforcement efforts, the DOE also stepped up its efforts overseeing and regulating systemic risk endemic to the derivatives markets, which was a core component of the Dodd-Frank market reforms.

CFTC regulations promulgated thereafter implemented measures requiring registrants to properly manage their risks. During FY 2019, the Commission filed a number of enforcement actions aimed at ensuring the responsible parties were meeting their obligations which included:

- In the clearing space, an action against a registered derivatives clearing organization (DCO) charging violations of core principles involving financial risk management, operational requirements, and information-systems security;
- An action against an exempt DCO for making a false statement to the CFTC in connection with the DCO's risk management program.
- In the swap dealer space, an action against a swap dealer for violating rules that require financial institutions to establish a governing body and internal policies to oversee data reporting for swap dealers.

According to the report the goal of these cases is to ensure that the Commission—and market participants—are fulfilling their duties under Dodd Frank to appropriately address systemic risk in the derivatives markets. Notably, some of those cases required substantial remediation, including the imposition of an independent compliance consultant and regular reporting to the Commission, to ensure the relevant risks were being properly managed going forward.

Whistleblower program. According the DOE annual report, during fiscal year 2019, the CFTC issued five whistleblowing awards amounting to $15.38 million. Prior to this time, nine awards had been issued. Additionally, the whistleblower program received 117 claims for award, which is about the same amount as received in FY 2018. In December, the Commission announced it will award more than $1 million to a whistleblower whose tip helped expose a scheme that violated CEA and eventually led to the CFTC filing charges. That individual first provided the information through their employer's internal compliance program to another regulator and then subsequently provided that information directly to the CFTC.

The CFTC has awarded over $100 million during the life of the whistleblower program, and agency actions associated with those awards have resulted in judgments totaling more than $800 million. According to the report, between 30 percent and 40 percent of the DOE's ongoing investigations involve some whistleblower component.

Looking ahead: early FY 2020 activities reflect CFTC priorities. The annual report outlines the four priorities around which the DOE has focused its enforcement efforts during fiscal years 2018 and 2019. Those are:

- preserving market integrity;
- protecting customers;
- promoting individual accountability; and,
- increasing coordination with other regulators and criminal authorities.

The actions the CFTC has brought thus far in FY 2020, the period following most recent report, indicated that the Commission is keeping true to its enforcement mission and stated priorities. Thus far, in the new fiscal year a wide range of actions have been brought involving binary options fraud binary options fraud, forex fraud, pool operator fraud, spoofing, failure to register, failure to supervise, reporting and recordkeeping, swap dealer business standards and conduct, manipulation and fraud in connection with swap dealing.

One could reasonably expect these trends to continue into the new year. Moreover, the chairman's recent pronouncements reflect a central concern for protecting America's farmers and families, having proclaimed "America is the breadbasket of the world. Market manipulation and similar wrongdoing inflicts real pain on farmers by denying them the fair value of their hard work and crops. It also hurts American families by raising the costs of putting food on the table. Protecting our agricultural markets from manipulation and abuse is a special focus for the CFTC."

The *CFTC V. Kraft* litigation in 2019—a long, winding and twisted road

It looked like the CFTC's high-profile and bitterly contested enforcement action against Kraft Foods Group, Inc. and Mondelez Global LLC, brought in 2015 under the Dodd-Frank Act's expanded anti-manipulation authority, had come to a peaceful conclusion when the parties told the court that they had reached a binding agreement in March 2019. That was not to be. Instead, immediately following the announcement of the final settlement in mid-August, an unprecedented series of events ensued leading the parties down a long, winding and twisted road of legal jostling and intrigue.

More than four years ago, the CFTC charged the defendants with manipulating the prices of red winter wheat, a key ingredient in Kraft's snack foods and thereby had violated sections 6(c)(1) and 9(a)(2) of the Commodity Exchange Act, as well as CFTC Regulations 180.1 and 180.2. Industry participants were eagerly awaiting the settlement in this matter and further clarification from the CFTC what the agency would (or would not) deem to be manipulation. This was especially so given the Commission's then recent defeat in its case with DRW and Don Wilson in late 2018, where its manipulation theory was squarely rejected by a federal court in the Southern District of New York.

As it turned out, the settlement reached by the parties did not provide the guidance many were seeking. Instead, the CFTC found itself in the crosshairs as it faced charges that it had engaged in a deliberate effort to violate the court's consent order within minutes of its entry. Ultimately, the district court judge would set the settlement aside, and at present, the contentious litigation has resumed in earnest. In 2019, *SRD* closely followed the controversies, developments, and the legal precedents that emerged in this case in the summer and fall of the year. A look back at some of the highlights in *CFTC v. Kraft* in 2019 follow:

- An "unusual" settlement. On August 14th, the parties entered into a settlement agreement that provided for the defendants to pay $16 million to resolve claims that they manipulated wheat futures markets. Notably, Kraft, Mondelez, and the CFTC (as a full Commission) also agreed to a "gag" provision in the consent order that limited their ability to speak publicly about the case. Moreover, the consent order did not contain any factual findings or conclusions of law thereby denying Congress and the public with the basis of the sanctions obtained as well as the rationale for entering into the settlement. Commissioners Rostin Behnam and Dan Berkovitz described these two provisions as "unusual" in their joint statement. The CFTC also issued a press release and separate statement in connection with the settlement.

- CFTC leaders ordered to testify in Chicago courtroom on contempt charges. In an emergency motion, Kraft and Mondelez, charged the CFTC with deliberately violating the consent order, contending that the statements of the CFTC and its commissioners following the settlement demonstrated that they never intended to comply with the agreement they had negotiated. In an August 19th hearing, Judge Robert Blakey ordered CFTC Chairman Heath Tarbert, Commissioners Dan Berkovitz and Rostin Behnam, and James McDonald, the agency's director of enforcement, to appear in his Chicago courtroom at a future hearing to testify in connection with the agency's potentially contemptuous conduct.
- Commission leadership lawyers up. In advance of the court hearing on contempt and sanctions, then scheduled for October 2nd, CFTC leadership retained legal heavy weight Zach Fardon, the former U.S. attorney for the Northern District of Illinois, to represent their personal interests. Fardon had recently launched the Chicago office for the law firm King and Spalding.
- 7th Circuit stays district court's contempt proceedings. The CFTC scored a significant victory as a three-judge panel from the Seventh Circuit Court of Appeals granted its motion for a stay of proceedings in a ruling dated September 26th. As a consequence, the district court struck its evidentiary hearing scheduled for October 2nd.
- Let the sunshine in—7th Circuit releases a trove of previously sealed documents. The appellate court issued an order on September 26th unsealing and releasing numerous documents in the case which were previously kept out of the public eye. At the center of the document release was the CFTC's Petition for Writ of Mandamus filed two weeks earlier whereby the Commission sought to vacate the district court's contempt proceeding which it characterized as "unlawful judicial inquest hearing."
- CFTC argues district court proceedings are premised on a pure mistake of law. In a reply memorandum urging the appellate court to grant its request for a writ of mandamus, the CFTC's Office of General Counsel argued that the lower court proceedings were premised on a pure mistake of law based on the judge's view that any finding of civil contempt required some showing of state of mind. The CFTC asserted that view was flat out wrong.
- 7th Circuit issues writ of mandamus giving CFTC a major victory. The Seventh Circuit issued a writ of mandamus on October 22nd granting the Commission a majority of its requested relief, and which notably eliminated the requirement for the CFTC's high-level leadership to appear at the controversial contempt hearing. The district court was permitted to keep its contempt inquiry open, but only with respect to the CFTC, and not with respect to any of the agency's personnel.
- District court vacates the settlement and reopens the underlying market manipulation case. Judge Blakey, on October 23rd, vacated the consent order previously agreed to by the CFTC, Kraft, and Mondelez, citing language in the Seventh Circuit's opinion that the consent order's gag rule was "ineffectual" at least regarding public statements made by individual CFTC commissioners. As a result, and in combination with his view that the gag rule was material to the prior settlement, the judge vacated the consent order and the associated settlement among the parties.
- CFTC asks judge to set aside the pending contempt motion asserting the issue is now moot. The CFTC urged the court to reject Kraft's continued bid for imposing sanctions for civil contempt premised upon the CFTC's alleged violations of the court's consent order. In a filing dated November 8th, the agency argued that the court's subsequent order vacating the disputed consent order rendered Kraft's motion for civil contempt sanctions moot.

- The underlying litigation resumes in earnest. Housekeeping matters dominated as the parties reconvened at a status hearing before Judge Blakey on December 18th. At issue were motions to compel the production of deposition transcripts, and the parameters surrounding Kraft's third time out deposing the Commission's expert witness. The judge also afforded the CFTC an opportunity to weigh in further regarding defendant's pending motion for contempt and sanctions.

Ironically, the *CFTC v. Kraft* litigants find themselves much in the same position they were in a year ago — squabbling over various discovery issues as they inextricably move towards the dispositive motion phase and trial. Assuming the parties decide not give settlement another go, the battle will likely turn to the interpretation of 6(c)(1) of the CEA.

The Commission has previously argued that the provision does not require it to prove that an artificial price existing when it pursues a defendant based on "fraud and fraud based manipulative schemes under Rule 180.1. In the DRW case, the Southern District of New York rejected this line of argument holding that the CFTC must prove that a defendant intended to create an artificial price, not merely to affect a price in order to prevail in claims for both attempted and completed manipulation. Nonetheless, it is conceivable that the CFTC will again pursue its earlier legal theory in the Northern District of Illinois against Kraft as allegations against DRW covered a time period before the Dodd-Frank amendments became effective.

In any event, 2019 was a remarkable year in the *Kraft* matter, one of the most important enforcement actions in the CFTC's history. Next up, the parties are scheduled to appear in Judge Blakey's court room on February 13, 2020, at which time they should be prepared to report on discovery and to set a trial date.

CFTC rulemaking rolls on despite rancorous policy dissents

The CFTC kept a steady pace of rulemaking throughout the year, including both proposed and final rules.

Swaps. Rulemaking involving swaps addressed a broad range of topics including swap dealer registration, capital, margin, and clearing issues.

In a vigorously debated move, the Commission proposed rules to address the cross-border application of registration thresholds and other requirements for swap dealers and major swap participants, and to establish a formal process for requesting comparability determinations. The proposal will be open for a 60-day comment period following publication in the Federal Register.

In Chairman Tarbert's view, the proposal provides finality and clarity that the Commodity Exchange Act does not apply to swaps activities outside the U.S. unless the activities (1) have a "direct and significant connection with activities in, or effect on, commerce of the United States" or (2) run afoul of the Commission's rules or regulations that prevent evasion of Title VII of the Dodd-Frank Act. However, Commissioners Berkovitz and Behnam expressed strong concern that the proposed rules would unduly limit CFTC jurisdiction and create multiple loopholes for U.S. banks to evade the CFTC's oversight of their cross-border activity, potentially posing risks to the U.S. financial system.

In another contentious move, the Commission reopened comment on its 2016 proposal to establish capital requirements for swap dealers (SDs) and major swap participants (MSPs). The 2016 proposal would set a minimum capital requirement based on 8 percent of margin, but Commissioner Quintenz warned that too high a cost of capital could make futures markets less liquid, less accessible to end users, more heavily concentrated, and less competitive.

In Commissioner Berkowitz's view, a lower threshold, such as 4 percent or 2 percent, should not be adopted merely to harmonize with the SEC. Commissioner Behnam added that CFTC staff was contemplating more than a mere re-opening of the comment period, so it should instead be handled as a re-proposal. Comments on the proposal are open until March 3, 2020.

Other swaps rulemaking included:

- A final rule providing an exclusion from the de minimis threshold for swap dealer registration for swap-dealing activity relating to loans by Insured Depository Institutions (IDIs). An IDI will not be considered a swap dealer to the extent it offers to enter into a swap with a customer in connection with originating a loan with that customer. The rule became effective April 1, 2019.
- An interim final rule providing relief from certain margin requirements for certain legacy swap transfers in case of a "no-deal Brexit." The rule became effective April 1, 2019.
- A final rule to streamline notification requirements relating to segregation of assets held as collateral for uncleared swaps. The rule became effective May 3, 2019.
- Proposed rules to improve swaps data quality by amending provisions relating to verification and correction of transactions as well as operational and governance requirements for swap data repositories. Comments on the proposal are open until January 27, 2020.
- Proposed rules to amend the swap clearing requirement exemption for inter-affiliate swaps. Comments on the proposal are open until February 21, 2020.
- Proposed amendments to extend by one year the compliance date for the final phase of the CFTC's margin rule for uncleared swaps, which is currently scheduled to impose initial margin (IM) documentation, custodial, and operational requirements on hundreds of small swaps entities for the first time as of September 1, 2020. Comments on the proposal closed on December 23, 2019.
- Proposed amendments to exclude a European crisis resolution agency from CFTC margin rules. Comments on the proposal closed on December 23, 2019.

Volcker Rule. Following the Dodd-Frank Act, the SEC, CFTC, Federal Reserve, OCC, and FDIC jointly issued rules in 2013 to implement the "Volcker Rule". The goal was to reduce systemic risk by preventing federally insured banks from engaging in proprietary trading or controlling hedge funds or private equity funds.

In 2019, responding to criticism that the 2013 rule was unclear and required overly complicated compliance processes, the agencies jointly issued two sets of amendments to Volcker Rule restrictions:

- In July, the agencies adopted amendments to exclude small banks from the Volcker Rule under the Economic Growth, Regulatory Relief, and Consumer Protection Act (EGRRCPA). The amendments exclude from the prohibitions and restrictions certain firms with total consolidated assets of $10 billion or less and total trading assets and liabilities of five percent or less of total consolidated assets. The amendments also allow an investment adviser that is a banking entity to share a name with the fund under certain circumstances. The amendments became effective on July 22, 2019.

- In October, the agencies adopted amendments that create a three-tiered framework in which compliance requirements scale with a bank's trading assets and liabilities. The amendments also exclude certain financial instruments in which trading is permitted under Section 13; simplify methodologies for calculating compliance thresholds for foreign banking organizations; modify the short-term intent prong in the definition of "proprietary trading;" modify the liquidity management exclusion to permit banking entities to use a broader range of financial instruments to manage liquidity; add a number of new exclusions; and add exemptions for underwriting and market making-related activities, risk-mitigating hedging, and trading by foreign banking entities solely outside the United States. Effective dates vary by provision beginning January 1, 2020, with a compliance date of January 1, 2021.

Fed Governor Lael Brainard voted against the second set of amendments, expressing strong concern that they could gut the Volcker Rule by significantly narrowing the scope of covered activities, relying excessively on firms' self-policing, not requiring firms to promptly report limit breaches and increases, and narrowing the scope of the CEO attestation requirement.

CPOs and CTAs. The Commission adopted two sets of final rule amendments relating to registration and compliance requirements for CPOs and CTAs. One set of amendments provided exemptions from CPO and CTA registration for entities that qualify as "family offices" under SEC rules, and also amended certain exemptions in Part 4 to permit general solicitation in these dually regulated offerings. Commissioner Berkowitz strongly dissented, concerned that the rules provide a blanket exemption without requiring even notice filing.

The second set of amendments related to Rules 4.5 and 4.27 exempting certain commodity trading advisors and pool operators from certain registration requirements. Many of the parties impacted by these amendments previously received exemptions through no-action letters on an ad hoc basis. These amendments also clarified an existing exclusion from the CPO definition for registered investment companies and expanded it to also exclude registered investment advisers operating or soliciting on behalf of business development companies. This rulemaking also eliminated certain duplicative and unnecessary regulatory filings by carving out particular classes of CPOs and CTAs from the filing requirements.

Both sets of amendments become effective January 9, 2020.

Position limits for security futures. The Commission adopted final rule amendments to Part 41 to increase default position limits for security futures products (SFP), in line with current minimum position limits in equity options. According to Commissioner Berkowitz, the amendments align equity-based SFP position limits with the limits that national securities exchanges apply to equity options, and together with SFP margin proposals issued jointly with the SEC, will help to level the regulatory playing field between SFPs and equity options.

Other rules. Other rulemakings included:

- Final amendments to Regulation 160.5 to eliminate the requirement for covered persons to provide annual privacy notices to customers when certain conditions are satisfied. The rule became effective May 28, 2019.
- Final amendments to Regulation 1.52 relating to routine examinations of futures commission merchants (FCMs) by self-regulatory organizations (SROs). The amendments became effective May 3, 2019.
- Final amendments to Part 13 to delete all provisions relating to rulemaking procedures except for petitions for rulemaking. Because the Administrative Procedure Act (APA) governs the CFTC's rulemaking process, the Commission believed it unnecessary to codify the rulemaking process in a CFTC regulation. The amendments will become effective January 16, 2020.
- Final amendments to rules governing Derivatives Clearing Organizations (DCOs), which address risk management and reporting obligations, clarify the meaning of certain provisions, simplify processes for registration and reporting, and codify existing staff relief and guidance. The amendments will become effective 30 days following publication in the Federal Register.
- A proposal to amend Part 30 of CFTC regulations to codify the process by which the Commission may terminate exemptive relief issued under rules governing the offer and sale of foreign futures and options to customers located in the U.S. The comment period closed August 5, 2019.
- A proposal to amend Part 37 of CFTC regulations to prohibit "post-trade name giveup" practices for swaps that are anonymously executed on a Swap Execution Facility (SEF) and are intended to be cleared. The comment period is open until March 22, 2020.

The year ahead at the CFTC—will 2020 be the time to act?

When Dr. Heath Tarbert assumed the CFTC chairmanship in July 2019, he proclaimed, "At its core, the CFTC is a guardian of the American free-enterprise system. Opportunities and threats await us, and we will be ready. Whether it be unfinished business or the unwritten future, now is the time to act…" Tarbert added that he intended to hit the ground running, and to a large extent he has as numerous proposed and final rules have already been approved during his relatively brief tenure.

As chairman, Tarbert will be the driving force with respect to the agency's future agenda and the course it will take in the coming year. Some insights regarding the chairman's priorities and specific contemplated actions can be gleaned from his prior public statements and pronouncements. In particular, the chairman's comments before the 35th annual Futures and Option Expo held in Chicago, in October of last year point to a number of undertakings central on the Chairman's radar. While some of the matters discussed have already been the subject of proposed rulemaking in the later part of 2019, a number of matters are ripe for consideration as the CFTC looks ahead to 2020.

Speculative position limits. The matter of speculative position limits remains high on the chairman's list. In Chicago, Tarbert stated, "We will propose a position limits rule in the next few months that addresses the concerns of end users, that ensures that bona fide hedging is not restricted, and that risk management is there." He also indicated that the commission would endeavor to provide some prophylactic, clear, and usable rules so that market participants will know what the limits are. In this regard, the chairman also underscored the underlying purpose of these markets was to provide end users with risk management and price discovery.

Digital assets and virtual currencies. Digital assets and virtual currencies are also a high priority for Chairman Tarbert. In Chicago, he addressed the topic of digital assets straight on, noting the central importance of coming up with an approach the U.S to lead in this area. lead. The chairman has forcefully stated his view on this topic, "I want the United States to lead because whoever leads in this technology is going to end up writing the rules of the game." So then we come to the question 'well what is the role of the CFTC?' And it's very interesting because I think the CFTC's role is to ensure that there's integrity in the markets and we want these markets to develop in way that has integrity."

Earlier in October at the Yahoo! Finance All Markets Summit, the Chairman proclaimed, "It is my view as Chairman of the CFTC that ether is a commodity, and therefore it will be regulated under the CEA. He went on to say that it was his guess that we will see, in the near future, ether-related futures contracts and other derivatives potentially traded. While neither Chairman Tarbert nor the CFTC have had further comment on the potential launch of ether-related futures or on a 2018 request for information regarding ether, further action on this front in 2020 can be expected. Moreover, blockchain-related topics promise to be front row and center for this chairman.

Building out the Division of Clearing and Risk (DCR). At the FIA expo, Chairman Tarbert also observed that his first big bucket of things was CCP supervision, given the importance of clearinghouses and central counterparties. This was especially the case in light of the Dodd-Frank market reforms which resulted in the majority of risks being centralized in the clearinghouses. Consequently, the chairman stated, "One of my key goals is to enhance and build out our Division of Clearing and Risk." Dr. Tarbert also underscored the importance of having the people and personnel in place so as to keep pace with the industry on issues like cybersecurity, margin, and capital.

Recently, the Commission approved final amendments applicable to registered derivatives clearing organizations (DCOs), which addressed certain risk management and reporting obligations, simplified processes for registration and reporting, and codified existing staff relief and guidance. Given potential overreach from foreign regulators, continued CFTC activity in this area is expected to remain a high priority as Chairman Tarbert has declared it is "critically important that the CFTC remains the primary regulator and supervisor of our clearinghouses."

Deference as a two-way street and challenges to international cooperation. Additionally, in Chicago, Chairman Tarbert expressed his concerns regarding EMIR 2.2 and how it potentially challenged the CFTC maintaining its primary oversight of U.S. clearinghouses. In particular, under EMIR 2.2, U.S. clearinghouses would be subject to EU oversight if they were deemed systematically important. On this score, Chairman Tarbert stated, "We want to get to a place where we have regulatory cooperation that retains the authority of the CFTC and America to regulate and supervise our own clearinghouses. He added, “Let me be very clear on this, deference is a two-way street. So we will grant deference if deference is granted in return. And so we are committed to doing that.” Certainly in 2020, issues surrounding EMIR 2.2 and two-way deference will be closely watched at the Commission.

Customer protection rules. In the area of customer protection, the chairman indicated that the Commission expects to release a proposal early in 2020 which will codify thirty years of important bankruptcy standards contained in the agency’s Part 190 rules “to ensure that customers are protected and so as to avoid another crisis similar to that involving MF Global.”

Principles-based regulation. Chairman Tarbert has regularly returned to the theme of principal based regulation whereby general principals are favored over detailed prescriptive rules. Tarbert observed that the CFTC has a long history of principles-based regulation. He noted that although the Dodd-Frank Act codified much of what this industry has been doing for close to a hundred years, that legislation did not actually codify the principles-based approach that has led to the sound regulation of a thriving futures and derivatives industry. In 2020, don’t be surprised if the CFTC looks to introduce principles-based regulation in certain areas. One area Dr. Tarbert has identified where this approach would be preferred is digital assets. In his view, a principles-based approach would provide the U.S. with a leg up and open the door to the America becoming a regulatory leader in this sphere.

Chairman Tarbert has certainly brought an ambitious agenda forward across the spectrum at the CFTC in 2020. Whether he will be successful in making this year a time to act, only time will tell.