

## [Securities Regulation Daily Wrap Up, COMMODITY FUTURES—House Agriculture Committee floats proposed CFTC reauthorization bill, \(Oct. 25, 2019\)](#)

Securities Regulation Daily Wrap Up

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The House Agriculture Committee published what has been cast as a "bipartisan discussion draft" of legislation to reauthorize the CFTC and to achieve other purposes, including addressing digital commodities and emerging technologies.

The House Agriculture Committee will try once again to move legislation to reauthorize the CFTC, this time, until 2025. The CFTC's last reauthorization was to expire in 2013. The bill is the first attempt at reauthorizing the CFTC under the new Democrat-controlled House and is [cast](#) as a "bipartisan discussion draft" that addresses a variety of topics, including digital commodities and diversity and inclusion. Overall, the bill cobbles together a few smaller bills previously introduced in the current Congress and includes some provisions addressing topics that were part of similar legislation that passed the Republican-led House in the last Congress. Still, it remains to be seen if this latest attempt to reauthorize the CFTC will have a life beyond the House given the recent tendency of such bills to falter in the Senate.

**Digital commodities and emerging technologies.** Section 109 of the [Discussion Draft](#) would amend the Commodity Exchange Act (CEA) to require the CFTC to adopt rules regarding the content and availability of trading and trader data that boards of trade and swap execution facilities (SEFs) must be able to access from cash markets for digital commodities with respect to contract markets and SEFs whose contracts or swaps reference digital commodities on cash markets.

The provision is similar to a bill ([H.R. 4234](#)) sponsored by Rep. Sean Maloney (D-NY) that uses the term "virtual currency" instead of "digital commodity." Specifically, the Maloney bill would require (1) unconstrained access to all trade and trader data regarding the virtual currency on the spot market platform; and (2) the capability to provide the data to the CFTC on request.

Section 118 of the discussion Draft also would direct the CFTC to establish a research and development plan to address emerging technologies. Subject to disclosure and other requirements, the CFTC would be able to accept a non-monetary gift of the provision of access, use of facilities, personal property, or services, related to the sharing of research, data, or other information, public presentations, or non-commercially available services or systems. Gifts would have to be returned within 90 days after acceptance and the CFTC's gift authority would expire on October 1, 2025.

**Dodd-Frank correction on diversity and inclusion.** Section 104 of the Discussion Draft would fix an oversight in the Dodd-Frank Act. Dodd-Frank Act Section 342 mandated that each federal financial agency establish an Office of Minority and Women Inclusion (OMWI) to further such agencies' workforce diversity. The term "agency," however, was defined to include Treasury departmental offices, banking regulators, the Consumer Financial Protection Bureau, and the SEC, but not the CFTC. Despite this omission, the CFTC has established an OMWI to oversee the agency's efforts regarding civil rights, equal employment opportunity, diversity, and inclusion programs.

The Discussion Draft provision tracks proposed legislation ([H.R. 4257](#)), sponsored by Rep. David Scott (D-Ga), that would give the CFTC one year from the date of enactment (the separate bill would allow for only six months) to comply with Dodd-Frank Act Section 342. The bill also would require the CFTC's OMWI to establish an annual internship program that would place students who attend qualified institutions in internships at the CFTC's offices. The CFTC would have to set aside funds to pay for students' living expenses in cities where

the OMWI director identifies internship opportunities. The Discussion Draft also would add a requirement that the CFTC, in formally establishing its OMWI, follow the Final Interagency Policy Statement Establishing Joint Standards for Assessing the Diversity Policies and Practices of Entities Regulated by the Agencies that was [adopted](#) by financial regulators in 2015.

**Chief economist.** Under Section 106 of the Discussion Draft, the CFTC would be required to establish the Office of the Chief Economist. The new office would be in keeping with the recent trend at financial regulators, such as the SEC, to place greater emphasis on economic analysis in developing proposed rules and providing research to Commissioners mulling rulemakings, as happened when SEC commissioners requested more data on post-Great Recession money market fund reforms in advance of proposing new rules. Specifically, the CFTC's chief economist would be charged with performing economic analysis, regulatory cost-benefit analysis, and other research.

The CFTC provision is similar to Section 204 in the CFTC reauthorization bill that passed the House in the last Congress (See, [H.R. 238](#)) except that one key difference is the Discussion Draft's lack of a provision expressing the sense of Congress that the CFTC should encourage applications for jobs within the Office of Chief Economist from members of minority groups, women, disabled persons, and veterans.

**Other provisions.** The Discussion Draft contains numerous additional substantive provisions plus a list of technical corrections that, with a few exceptions, mirrors the reauthorization bill from the last Congress. Key provisions in the Discussion Draft include:

- **Clearing requirement**—For purposes of the exception from the clearing requirement, Discussion Draft Section 107 would amend the definition of "financial entity" such that the CFTC could nullify whether to exempt from that definition bank holding companies and savings and loan holding companies with \$10 billion or less of aggregated assets.
- **Charitable organizations**—Section 108 of the Discussion Draft would create an exemption from the registration requirement for commodity trading advisors and commodity pool operators regarding charitable organizations.
- **Cybersecurity**—Discussion Draft Section 110 would strengthen cybersecurity by requiring contract markets, clearing houses, SEFs, and swap data repositories to have: (1) relevant controls and procedures; and (2) automated systems that are reliable, secure and resilient while also having adequate capacity and maintaining data confidentiality and integrity. These qualities would have to be verified.
- **Extraterritoriality**—Section 112 of the Discussion Draft would clarify that the CFTC's enforcement authority regarding fraud and manipulation applies extraterritorially if the targeted "activities, independently or in conjunction with activities in the United States, have or would have a reasonably foreseeable substantial effect within the United States."
- **Proprietary information**—Under Section 114 of the Discussion Draft, the CFTC may adopt rules to govern the agency's handling of proprietary information and sharing of that information with other regulators.
- **Aiding and abetting liability**—CEA Section 13(a) already contains language addressing "willfully" aiding or abetting commodities law violations. Section 117 of the Discussion Draft would add language to allow the CFTC to pursue charges against a person who "recklessly" provides substantial assistance to another.
- **Bankruptcy**—CEA Section 20(a) grants the CFTC authority to define by rule certain types of customer or member property with respect to proceedings under Chapters 7 and 11 of the U.S. Bankruptcy Code. Section 119 of the Discussion Draft would provide that cash, securities, or other property of the estate of a commodity broker be included in customer property to the extent that property that is otherwise customer property is insufficient to satisfy net equity claims of a commodity broker's public customers. The Discussion Draft provision mirrors a bill ([H.R. 4333](#)) sponsored by Rep. Abigail Spanberger (D-Va), who said via [press release](#) that the bill would help protect agribusinesses from commodity broker

bankruptcies by giving them advance notice of which assets might be used to cover the costs of equity claims.

- **Whistleblowers**—Section 121 of the Discussion Draft would clarify for purposes of the CEA that a whistleblower can invoke the Dodd-Frank Act whistleblower protections against retaliation if they report wrongdoing internally to their employer. Similar bills have been introduced to make the same change to the SEC's and CFTC's whistleblower programs ([S. 2529](#); [H.R. 2515](#)) and to create such a program at the Public Company Accounting Oversight Board ([H.R. 3625](#)). In each instance, the clarification was necessitated by the Supreme Court's [Somers](#) opinion in which the court held that the plain language of the Dodd-Frank Act provision applicable to the SEC's whistleblower program required a report directly to the SEC.

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