

## [Securities Regulation Daily Wrap Up, COMMODITY FUTURES—CFTC issues request for information on climate risk, \(Jun. 3, 2022\)](#)

Securities Regulation Daily Wrap Up

[Click to open document in a browser](#)

By [Mark S. Nelson, J.D.](#)

The RFI seeks public input on a variety of matters, including whether the CFTC should impose climate-related risk disclosure requirements on the firms it oversees.

The CFTC issued a Request for Information on climate-related issues as part of its recent Voluntary Carbon Markets Convening. The purpose of the RFI is to solicit public comment on a range of climate-related issues that impact markets and firms within the agency's jurisdiction. The vote to issue the [RFI](#) was essentially unanimous, although Republican Commissioners Summer K. Mersinger and Caroline D. Pham concurred in its issuance. Public comments on the RFI are due 60 days after it is published in the *Federal Register*.

**Is the CFTC seeking to expand its reach?** In a [press release](#), CFTC Chair Rostin Behnam broadly stated the purpose of the RFI. "My intention is to focus on ensuring that America's farmers, ranchers, manufacturers, commercial end-users, and investors are equipped to manage their risks from increasingly severe and frequent weather events as well as the transition to a net-zero, low-carbon economy," said Behnam. "The RFI seeks to ensure that we as regulators are informed, educated, and engaged."

For the four Commissioners who issued separate statements on the RFI, the principal divide was whether the RFI would, if eventually brought to bear on derivatives markets through new or amended regulations, take the CFTC beyond its statutory mandate. The answers to this question split on political lines.

"These inquiries are well within the ambit of the CFTC's statutory authority and continue a long-established tradition of engaging in thoughtful dialogue with our market participants and diverse stakeholders in order to understand their concerns related to emerging and evolving risk management oversight," said Democratic Commissioner Kristin N. Johnson.

With respect to the use of derivatives to hedge climate risk, Christy Goldsmith Romero, another Democratic commissioner, remarked that "the Commission's role extends to promoting responsible innovation, which includes the evolution of climate/sustainability products in our markets." She added: "[w]ith a growing number of companies making net zero pledges, there is notable interest in carbon offset or sustainability products. However, concerns about transparency, credibility, and greenwashing may hamper the integrity and growth of these markets."

The concurring Republican commissioners, however, emphasized that the RFI may suggest that the CFTC has powers far beyond its statutory jurisdiction. For example, Mersinger said "...I do not want my concurrence to be mistaken for support of the substance of this RFI or all the questions being asked." She added that "[a]sking these questions causes confusion as to the role that Congress has tasked the CFTC to perform in our governing statute, the Commodity Exchange Act []." Mersinger also expressed concern that the RFI omitted any reference to legacy agriculture contracts and futures markets.

Commissioner Pham sounded a similar note in her statement in which she distinguished the CFTC from other federal financial regulatory agencies. "We are not, for instance, a prudential banking regulator like the Fed, OCC, or FDIC, nor are we a primarily disclosures-based market regulator like the SEC," said Pham. "Keeping our focus on our markets, products, and purpose—keeping our eyes on the ball—will help us avoid the risk of diluting our limited resources and potentially straying from our core expertise and responsibilities into areas already tasked to others."

**Key topics in RFI.** The RFI contains an extensive list of questions for public comment regarding climate-related risk issues, including the following:

- What data would assist the CFTC and the market participants it oversees to understand climate risk?
- Should the CFTC consider scenario analysis and stress testing standards beyond those presented by the Network for Greening the Financial System and/or the Financial Stability Board?
- How may commodities market participants need to adapt their risk management frameworks to address climate change? The request suggested the following topics: margin models, scenario analysis, stress-testing, collateral haircuts, portfolio management strategies, counterparty, and third-party service provider risk assessments, and/or enterprise risk management programs.
- Should the CFTC establish climate-related risk disclosure requirements for the various types of entities it regulates that would focus on the Task Force on Climate-Related Financial Disclosures's four core elements of governance, strategy, risk management, and metrics and targets?
- What derivatives products are currently used to hedge climate risk and what customer protections are or may be needed to promote market integrity for such products?
- How can the CFTC promote transparency, fairness, and liquidity in voluntary carbon markets?
- How should the CFTC consider the impact of climate risk on financially vulnerable populations?
- How might the CFTC promote public-private partnerships to address climate-related financial risk within the derivatives markets?

**Digital assets.** The topic of digital assets received a single paragraph of attention in the RFI as compared to the many other topics that often posed several paragraphs-worth of questions. The blockchain community generally has been criticized for years because of what is perceived to be an excessive need for electricity to power server farms that mine for Bitcoin and other virtual currencies. Under the dominant mining method, proof of work, powerful computers solve complex math problems in order to discover the next Bitcoin or other virtual currency. An alternative method called proof of stake has yet to catch on within the blockchain industry, but it purports to use far less electricity than proof of work.

Digital assets also have been the subject to regulatory competition and, potentially regulatory arbitrage, with no singular U.S. federal government regulator governing the entirety of the digital asset marketplace, although the SEC has become one of the most active regulators for digital assets that are also securities. Among U.S. federal financial regulators, the CFTC is one of several regulators that are active, but still far behind the SEC in terms of the number of enforcement actions brought in the digital asset space.

According to the RFI, the CFTC believes the following three questions to be a starting point for discussing climate-related risk associated with digital assets:

- Are digital asset markets creating climate-related financial risk for CFTC registrants, registered entities, other derivatives market participants, or derivatives markets?
- Are there any aspects of climate-related financial risk related to digital assets that the Commission should address within its statutory authority?
- Do digital assets and/or distributed ledger technology offer climate-related financial risk mitigating benefits?

Commissioner Mersinger, who concurred in the issuance of the RFI, noted the limits of the CFTC's jurisdiction over digital assets: "[t]he CFTC does not have statutory authority under the CEA to regulate digital assets or distributed ledger technology except to the extent they involve derivatives."

Although legislation to clarify the roles of the CFTC and other federal regulators in the digital asset space has lately focused on central bank digital currencies and stablecoins, the CFTC could get new, broader authorities over digital assets if the Digital Commodity Exchange Act of 2022 ([H.R. 7614](#)) were to become law. Overall, the bill purports to offer a [federal regulatory alternative](#) to firms that would otherwise have to comply with multiple state money transmitter laws, but it would also expressly allow the CFTC to regulate more directly spot digital commodity exchanges. The bill is sponsored by House Agriculture Committee Ranking Member Glenn "GT"

Thompson (R-Pa), and co-sponsored by fellow Agriculture Committee member Rep. Ro Khanna (D-Calif), and non-committee members Rep. Tom Emmer (R-Minn), and Rep. Darren Soto (D-Fla).

RegulatoryActivity: CFTCNews CommodityFutures Derivatives FinancialIntermediaries InvestorEducation  
RiskManagement Swaps