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Commodities & Derivatives: The Biden Administration's first 100 days at the CFTC—the sound of one hand clapping

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As the Biden Administration reaches its 100-day mark, a vague sense of limbo hangs over the CFTC. Biden has not yet nominated his choice for permanent chairman and the agency has said little about where its policy agenda or future focus may be heading. Unlike at the SEC, a number of key leadership positions across the organization remain occupied by political appointments made under former President Trump. These include the directors at the agency's Division of Market Oversight, Division of Risk and Clearing and Office of Public Affairs. Career staffers are serving as acting directors at the Division of Enforcement and the Markets Participants Division.

CFTC leadership

While the nomination of a permanent chair, key leadership appointments, and agency's overall direction remain in a holding pattern, individual commissioners have spoken out forcefully about various policy matters during the Biden Administration's first 100 days. As a result, some clues about the issues and controversies the agency will likely be grappling with can be gleaned through the lens of these various commissioner statements and pronouncements as the new administration moves forward.

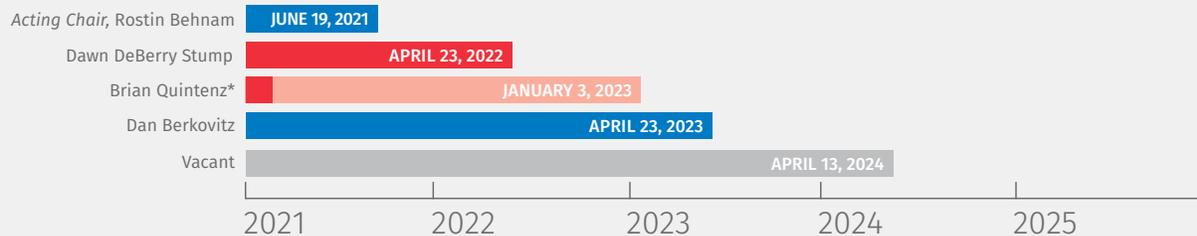
Acting Chairman Behnam on climate, precious metals

Rostin Behnam was [unanimously voted in](#) as acting chairman by his fellow commissioners on the day following President Biden's inauguration. Since then, however, the acting chairman has kept a low profile, making few public comments. With the departure of former Chairman Heath Tarbert in January, a vacancy now exists. There has been no indication regarding a replacement.

In the climate change realm, where Behnam has been a leading voice among regulators, the acting chairman described a change in the agency's future direction at a virtual version of the FIA's Boca conference. Behnam explained that the CFTC's recently created [Climate Risk Unit](#) would mark the agency's pivot away from the agency's broad financial market scope to one that focuses more on the role of derivatives in addressing climate-related risks and transitioning to a low-carbon economy. Additionally, during a volatile period in the precious metal markets, Behnam indicated the agency was [closely monitoring activity](#) in the silver markets and would remain vigilant in surveilling these venues for fraud and manipulation.

CFTC Composition

As terms expire, Biden can replace commissioners with a Democrat, Republican or Independent.
No more than three commissioners can be members of the same political party.



* Commissioner Quintenz was sworn in August 15, 2017, for the remainder of a five-year term that expired April 13, 2020. He may remain until the end of the 117th Congress, but is generally expected to depart sooner.

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Commissioner Stump on cryptocurrencies

The CFTC's role with respect to its regulatory oversight and enforcement authority for digital assets have been on Commissioner Dawn Stump's mind and she has not hesitated to make her strong views known. In remarks before the Texas A&M Bitcoin Conference, [Stump called for](#) the need for clarity regarding the CFTC's day-to-day oversight of cryptocurrency derivatives and swaps markets compared to its more limited enforcement role in connection with cash Bitcoin and digital asset markets.

The commissioner has also stated her worries that the CFTC's exercise of that enforcement authority might leave the public with the impression that the agency is the frontline regulator of cash digital asset markets. Stump declared, "This is simply not the case, nor in my opinion is this what the CFTC is best tasked to do." Stump expressed similar sentiments in a [sharply worded concurrence](#) involving Coinbase's settlement of an administrative action where the company agreed to a \$65 million penalty. Coinbase has never been registered with the Commission, nor did it ever deal in derivative instruments. Looking ahead, the Commission's role in the digital assets realm will likely garner further examination as these markets continue to expand and evolve.

Commissioner Berkovitz on market meltdowns, position limits

Commissioner Dan Berkovitz has been outspoken on several fronts since Biden's inauguration. Regarding the spectacular collapse of Archegos Capital Management, [Berkovitz urged](#) the CFTC to revisit regulatory requirements for family offices, warning that recent regulatory rollbacks hamper the agency's ability to protect the integrity of the commodity markets.

The commissioner also [spoke out](#) against the use of Trading at Settlement (TAS) contracts to manipulate the price of NYMEX's West Texas Intermediate crude oil futures. Berkovitz, who

opposed the CFTC's position limits final rules that recently took effect, declared that the agency failed to address the absence of numerical limits on the speculative use of TAS contracts during the spot month of the contract. He also noted that NYMEX itself missed the opportunity to close that vulnerability when it implemented the position limits rules.

The final position-limit rule was approved along partisan lines by a 3-2 vote under a Republican administration after many years of contentious debate. While the CFTC under the Biden Administration is not expected to discard the rule, some observers believe some modifications and refinements may be in the offing.

Berkovitz also weighed in on the Eris Exchange, LLC (ErisX) self-certification of RSBIX NFL futures contracts, which are based on various aspects of NFL games. Berkovitz believed that these instruments, as proposed, had fatal flaws and explained that the ErisX would have to show that these contracts had a legitimate economic purpose. It would also have to make the contracts available to the public, rather than limit them to institutional users.

Commissioner Quintenz on NFL futures

Commissioner Brian Quintenz also expressed his strong views surrounding the Eris X NFL contracts that were withdrawn by the exchange before the Commission made a final determination regarding their validity. Reacting to an unissued Commission order, Quintenz expressed his significant concerns around the constitutionality of a Commodity Exchange Act provision at issue, the validity of the applicable CFTC regulation, and the unissued order's arbitrariness. Quintenz's statement sets forth what his dissent would have stated in the event ErisX had not withdrawn its self-certification, and the CFTC had issued an order rejecting the certification. In any event, the CFTC may well revisit the issue surrounding the results of NFL games and other professional sporting events as the gaming industry continues to grow. Moreover, ErisX has indicated that it may again attempt to self-certify contracts in this area.

It's also worth noting that Quintenz's statutory term expired in April 2020. He had previously indicated that he would be leaving the CFTC no later than October 31, 2020. At a meeting of Market Risk Advisory Meeting on February 23, Quintenz indicated that his tenure at the CFTC was coming to an end in the very near future. Since that time, the commissioner has not made any further public statements regarding the timing of his departure from the agency. Under applicable "timing out" provisions, Quintenz could conceivably remain as a CFTC commissioner until the end of the 117th congressional session, which will occur in January 2023.

Enforcement priorities

The Division of Enforcement has continued to explore the boundaries of its remit with new crackdowns in areas the agency has recently entered, as well as areas in which it has decisively expanded its footprint.

Foreign corrupt practices

According to Cleary Gottlieb partner Colin Lloyd in a recent [FIA webinar](#), the CFTC's foray into foreign corrupt practices with [Vitol Inc.](#), its first settled action in this area, is important because the agency's scope may be broader than the FCPA. The agency's anti-fraud authority covers both CFTC registrants and non-registrants, and potentially some firms are in scope that are not in scope for the FCPA. Further, the agency's whistleblower statute has entered the mix, and the CFTC's civil standard may ensnare some conduct that does not rise to a criminal level or raise the interest of the DOJ, said Lloyd.

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Fellow Cleary partner Lisa Vicens highlighted best practices to avoid running afoul of the CFTC. Companies revamping their internal controls should look to benchmark measures to DOJ guidance on effective compliance programs. Also, companies should pay special attention to the activities of third parties and agents, said Vicens. Two-thirds of all FCPA resolutions involve payments of bribes by these actors.

A third Cleary partner, Jonathan Kolodny, said he "certainly expects" the CFTC to continue pursuing foreign corrupt practices cases. According to Kolodny, these cases are most likely to arise as the result of overlapping FCPA actions with the SEC and DOJ, self-reporting, and whistleblower tips. He added that with reports of investigations of Glencore Commodities Ltd. and Trafigura, there may be more cases in the pipeline, particularly involving natural resources and the energy sector.

Insider trading

The CFTC further expanded its footprint in the area of misuse of material nonpublic information with a settlement against [Ron Eibschutz](#), a former energy broker who obtained illegal disclosures of material nonpublic information from two former employees of the New York Mercantile Exchange (NYMEX). The CFTC's order imposed a permanent registration and trading ban and a \$75,000 penalty. The order concludes the NYMEX matter, which kicked off in August 2020 when the exchange itself was ordered to pay \$4 million, in the CFTC's first action against an exchange involving material nonpublic information.

Notably, the NYMEX action was only the CFTC's fourth enforcement action involving insider trading since its first settlement in this area in 2015 (Motazed). Given the slow but steady pace and a lack of recent guidance, commissioner statements, or increase in cases, it seems the CFTC remains interested in this area but there are no indications of a newly heightened focus for the immediate future.

Cryptocurrency and digital assets

CFTC enforcement in the digital asset space has spiked upward, with five actions involving cryptocurrency fraud announced just since Inauguration Day. The agency demonstrated its ability to pursue massive operations ([Benjamin Reynolds](#), \$571 million) while also keeping its eye on small schemes ([J Squared](#), \$397,000), as well as matters in between ([Circle Society](#), \$32 million and [Spence](#), \$5 million). In an action against tech tycoon [John McAfee](#), the CFTC showed a willingness to team up with the SEC and to go after well-known public figures in the pursuit of market manipulation in the digital asset realm.

For institutional entities, as noted above, the CFTC has shown that it will pursue misconduct by cryptocurrency spot exchanges ([Coinbase](#)). The issue of the regulator's authority over spot markets has arisen before in the context of forex markets and was addressed legislatively in the 2008 CFTC reauthorization act. With Commissioner Stump's dissent delineating sharp limitations in the agency's jurisdiction in the cryptocurrency spot markets, the boundaries of the agency's authority in this area will no doubt continue to be hashed out.

All in all, given the Biden Administration's emphasis on strong consumer protection, anti-corruption, and leveling the playing field, the CFTC will likely continue flexing its authority and looking to expand its influence in the areas of foreign corrupt practices, insider trading, and cryptocurrency and digital assets.