Public Statements & Remarks

Testimony of Chairman Rostin Behnam Before the U.S. Senate Committee on Agriculture, Nutrition, & Forestry

“Oversight of the Commodity Futures Trading Commission”

March 08, 2023

Introduction

Good morning Chairwoman Stabenow, Ranking Member Boozman, and members of the Committee. I appreciate the opportunity to discuss the state of the Commodity Futures Trading Commission (the “CFTC” or “Agency”).

In recognition of Women’s History Month, and specifically today, which is International Women’s Day, I first and foremost want to acknowledge all the women in attendance in person and virtually, and at the CFTC, and to commend my colleagues Commissioners Johnson, Goldsmith Romero, Mersinger and Pham, for their leadership and public service to this country. I’d also like to recognize and thank all CFTC staff for their continued dedication and commitment to the American public.

The CFTC’s focused, principles-based approach to customer protection, market integrity, price discovery, transparency, competition and enforcement has proven both steady and exceptionally calibrated throughout the evolution of our markets, even in times of market stress and record volatility. During the past three years, CFTC rules and regulations have ensured that the derivatives markets performed well for businesses who were able to hedge price risk under extreme pressures brought on by the pandemic, geo-political tension, and extreme weather.

I last appeared before this committee to address the clear absence of any regulatory standards for the digital asset commodity market. Today, I would like to share some of my thoughts on how the adoption of innovation and technology is more broadly changing the nature of our markets, and what statutory amendments should be considered to address observed changes.

Products and structures are evolving not only to meet demand from a growing customer base that is diverse in terms of geography, sophistication, and objectives, but also to attract participants from the broader population whose interest is piqued by the promise of financial inclusion and prosperity made possible by technological innovation.

The dislocation between regulation and innovation has expanded. As regulators, the Commission is bound by legislative mandates that in many circumstances never really contemplated current technology and its capabilities.

As the Commission is increasingly presented with proposals that envision new models, invite new participants, and incentivize new risks, we must balance our commitment and legal obligation to engage with our primary oversight mission, which is to protect customers and ensure market integrity.

Reauthorization

Commodity Exchange Act Modernization

It has been almost 13 years since Title 7 of the Dodd-Frank Wall Street Reform and Consumer Protection Act[1] expanded the CFTC's authority to resolutely address the weaknesses in the global regulatory system. And it has been roughly 10 years since the CFTC's authorization as part of the 2008 Food, Conservation, and Energy Act[2] lapsed.

In that time, derivatives markets have experienced massive growth: trading volumes in exchange-traded futures and options more than doubled between 2010 and 2022; the swaps market brought within our jurisdiction pursuant to the Dodd-Frank Act is now over $350 trillion.[3] This growth occurred in concert with significant market structure changes including shifts precipitated by algorithmic trading; the introduction of swap execution facilities (SEFs); growth in retail trading in both futures and options; and the emergence of several new or consolidated exchanges holding multiple designations as both central counterparties (CCPs) and/or futures commission merchants (FCMs) within the same consolidated group. Over this time period the CFTC has seen a significant number of new product filings—more than 4,000 filings by designated contract markets (DCMs) and more than 1,200 by SEFs.

Derivative markets have also seen the emergence and growth of new asset classes such as digital assets. The strides of this past decade, coupled with the events of last year—some of which we examined during my last three appearances before you[4], and others which I will expand upon here today—more than warrant a close look at the Commodity Exchange Act (CEA) to determine whether and which additional authorities, guidelines, and resources will guarantee the CFTC remains the global standard of derivatives regulation.

In addition, key programs and offices at the CFTC need to be supported and modernized, and these too would benefit from consideration of legislative amendments.

Current Priorities

Market Resilience

Punctuated by a perfect storm of externalities directly impacting commercial end-users, including America's farmers and ranchers, the market turmoil of 2020, 2021, and 2022 tested the resilience of the derivatives markets and the efficacy of post-financial crisis reforms.[5] The CFTC remained vigilant and responsive, ensuring appropriate risk tolerances and guardrails, analyzing data and trading activity, monitoring for compliance, and ensuring open and continuous conversations across the markets and with our fellow financial regulators both domestically and abroad. Our market structures, regulations, and thoughtful yet assertive approach served the American people and markets as intended, allowing end-users to hedge their risks in this volatile period. This has remained a consistent pattern dating back to the 2008 financial crisis.

The Regulatory Agenda

Strengthening our ruleset is a major priority for 2023 and beyond. At my direction, the CFTC's Divisions are fulfilling an aggressive agenda. My goal over the next two years is for the Commission to consider and vote on at least 30 to 35 of the anticipated proposals in addition to all of the rules and orders proposed last year[6].

Looking at the over 30 matters for consideration, certain themes emerge: (1) enhancing risk management and resilience across intermediaries, exchanges, and derivatives clearing organizations (DCOs); (2) fostering sound and responsive practices regarding cybersecurity and the use of third-party vendors across all registrants; (3) strengthening customer protections; (4) promoting efficiency and innovation; (5) improving reporting and data policy; and (6) addressing any duplicative regulatory requirements and amplifying international comity and domestic coordination with both federal and state regulators.[7]

Underlying all of these themes is the need for our ruleset to address the derivatives industry's current trajectory. Our regulations historically developed according to activities as they related to an individual registrant. However, we are continuing to observe a desire to shift to structures that combine unique activities into a single entity, raising important questions about conflicts of interest, the strength of capital, margin, and segregation requirements, the role and responsibilities of self-regulatory organizations, affiliate risk management, and of course, customer protections. Indeed, what we are seeing also raises questions as to whether certain service providers should fall within our traditional registration categories.

Recent Events

Last month, the Commission issued its first public statement on the cyber-related incident at ION Cleared Derivatives.[8] The directly impacted FCMs represented less than 10 percent of the cleared derivatives market overseen by the CFTC based on the total customer funds held collectively by FCMs for their clients trading futures, foreign futures, and cleared swaps transactions. The incident prevented certain FCMs from submitting timely and accurate positions data to the CFTC and, as a result, CFTC's release of Commitments of Traders (CoT) Reports was delayed. CFTC has started receiving corrected historical data and resumed publication of the CoT Reports sequentially; it is expected that publication of backlogged reports will be complete in the coming weeks.[9]

Current law could not have prevented the ION incident, as the direct regulation of third-party service providers is beyond CFTC jurisdiction. Recognizing the relevant risk, I have asked our Market Participants Division (MPD), which is currently developing rule proposals to address cybersecurity and related risk, to further identify potential weaknesses with respect to third-party service providers and vendor relationships and identify appropriate solutions for Commission consideration. However, even if the Commission supports a rulemaking in this area, with growing cybersecurity risk permeating all elements of our markets, I believe this Committee's reauthorization effort should consider what role and relationship the CFTC should have with third party service providers and vendors of registered entities.

Climate

Extreme weather events contributed to the confluence of factors that defined commodity volatility in 2022. The Commission both domestically and in international workstreams is continuing to engage through the Climate Risk Unit (CRU) on the role of derivatives in understanding, pricing, and mitigating climate-related risk, and to support the orderly transition to a low-carbon economy through market-based initiatives. One such effort involves the voluntary carbon markets, which are jurisdictional to the CFTC in light of listed futures contracts on registered designated contract markets. I am proud of the Commission's efforts toward increasing U.S. participation in international efforts. These markets require a new way of thinking, present questions requiring careful examination, and benefit from the public-private partnership that is the hallmark of the CFTC's approach to examining novel matters.

Digital Commodity Markets

As I discussed in December, the CFTC does not have direct statutory authority to comprehensively regulate cash digital commodity markets. Its jurisdiction is limited to its fraud and manipulation enforcement authority.[10] In the absence of direct regulatory and surveillance authority for digital commodities in an underlying cash market, our enforcement authority is by definition reactionary; we can only act after fraud or manipulation has occurred or been uncovered. Despite this limitation, to date the Commission has brought 70 enforcement actions involving digital assets commodities. Such cases comprised more than 20% of the 82 actions filed last fiscal year.[11]

I continue to believe that this limited enforcement authority is no substitute for comprehensive regulation in which trading platforms, dealers, custodians, and other critical market infrastructure participants must register and submit to direct oversight by a regulator such as the CFTC.[12] By the time the CFTC is able to exercise its enforcement authority, it is generally too late for defrauded customers and too late to isolate and contain the fallout from attendant bankruptcies, failures, and flights to liquidity. Comprehensive regulation would enable us to establish market structures and regulatory barriers, guardrails, and guidance that would prevent fraud before it happens, and fully deploy transparency and surveillance tools to see fraud when it does occur.

Enforcement

The CFTC's preeminent enforcement division continues to use every authority available to police commodity markets. In fiscal year 2022, the Commission imposed over $2.5 billion in restitution, disgorgement, and penalties—approximately eight times our current budget. This shows how effective and successful the CFTC is at using its resources efficiently to protect market participants.

Given the breadth of issues the enforcement division is covering, from preventing excessive speculation in commodity markets, to policing digital commodity asset markets, to ensuring registrants meet their compliance duties from communications and recordkeeping to data reporting and risk management, I believe it is important for this Committee to evaluate current law to ensure penalties are appropriately calibrated to both penalize bad actors and deter fraud and manipulation in commodity derivatives markets.

Proactive Possibilities

The aggressive regulatory agenda is an admittedly bold attempt to address the expanding dislocation between regulation and innovation. However, we are limited by the four corners of the CEA, which, though agile in some areas, sometimes cannot account for today's continually evolving challenges.

With the recent expansion of direct retail participation in the derivatives markets and in underlying commodity markets such as those for digital commodity assets, the CFTC must be able to ensure that the products offered are suitable, that the barriers to entry are meaningful, and that the disclosure information provided is material to their decision making. While there are clear differences and delineations between the futures products offered by CFTC designated contract markets and cash products offered by a variety of unregistered entities, the growing participation appears to be technology driven. Technology not only makes it easier for individual customers to access markets—both regulated and unregulated— but it allows for the increased development of nano, mini, micro, and event contracts, as well as the structuring of crypto and index futures and options. As individual customers gain greater familiarity and comfort with regulated products, there is an increasing risk that they will find their way into more opaque venues. This risk is amplified where access is achieved seamlessly through vertically integrated, application enabled software available via any Wi-Fi connection.

We are doing a lot. And the Commission will remain vigilant with respect to our registered entities, and use our existing tools and authorities to the fullest extent of the law and the authority we are given to propose stronger rules, monitor and surveil the markets, and root out misconduct wherever it lurks.

Office of Minority and Women and Inclusion

As Chairman, in January of 2022 I appointed the CFTC's first ever Chief Diversity Officer (CDO) who oversees the agency's Office of Minority and Women Inclusion (OMWI). The CDO's role is to provide leadership and executive direction regarding the CFTC's efforts to integrate and promote diversity, equity, and inclusion, and accessibility (DEIA) at all levels of the Agency's workforce, in our workplace, business operations, and mission critical work.

I am eager to see the CFTC's OMWI statutorily authorized, similar to other federal financial regulators.[13] This would expressly authorize us to: 1) assess the diversity policies and practices of entities regulated by the agency; 2) submit annual reports to Congress; and 3) allocate additional resources and staff towards outreach and engagement.

I am committed to building a bench of diverse top talent at the Agency. Current efforts through our OMWI include establishing partnerships and recruiting at minority serving institutions and rural colleges and universities, engaging urban and rural communities and related professional associations, and planning a robust mass media campaign to enhance our outreach efforts.

Whistleblower Incentives and Protection

The Dodd-Frank Act established the Customer Protection Fund,[14] which supports our Whistleblower Program[15] and the Office of Customer Education and Outreach. As this Committee knows, the overwhelming success of the Whistleblower Program has led to the potential for disruptions in these two vital offices. In addition to the importance of a long-term fix to avoid one-time depletions greater than the total balance of the fund, I believe amendments to the statutory provisions describing the permitted uses of the Customer Protection Fund by the Office of Customer Education and Outreach[16] would allow the Commission to implement a host of new investor protection programs and systems and information aimed at ensuring American families have the knowledge and tools to not only protect themselves from fraud and manipulation, but to more fully engage with the Commission and the markets we oversee.

Conclusion

The CFTC has consistently been at the forefront of identifying and addressing risks, and our approach has been balanced, thoughtful, and measured. As Chairman, I will continue to direct staff to engage with seriousness and objectivity; this is our most important responsibility as public officials. In my view, that includes a duty to protect the public interest and ensure that our markets serve their intended purpose as a means for risk management and price discovery.

More than five years ago, I testified before this Committee during my nomination hearing to be a CFTC Commissioner. In my opening statement, I remarked that "as this Committee shifts focus to the 2018 Farm Bill, I commit…to working with each member of this Committee…to ensure the CFTC…remains both a desirable and cost-effective risk management and price discovery tool for agricultural producers and the entire value chain."[17] This commitment remains my anchor. And as this Committee now considers the 2023 Farm Bill, I remain committed to this promise, and look forward to working with each member during the reauthorization process.

Thank you and I look forward to answering your questions.

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[1] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (the "Dodd-Frank Act").

[2] Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-246, 122 Stat. 165 (2008).

[3] CFTC, Weekly Swaps Report, Weekly Swaps Report | CFTC (https://www.cftc.gov/MarketReports/SwapsReports/index.htm).

[4] *See* Rostin Behnam, Chairman, CFTC, Testimony of Chairman Rostin Behnam Regarding "Examining Digital Assets: Risks, Regulation, and Innovation" before the U.S. Senate Committee on Agriculture, Nutrition, and Forestry (Feb. 9, 2022), Testimony of Chairman Rostin Behnam Regarding "Examining Digital Assets: Risks, Regulation, and Innovation" | CFTC (https://www.cftc.gov/PressRoom/SpeechesTestimony/opabehnam20); Rostin Behnam, Chairman, CFTC, Testimony of Chairman Rostin Behnam Regarding the Legislative Hearing to Review S.4760, the Digital Commodities Consumer Protection Act at the U.S. Senate Committee on Agriculture, Nutrition, and Forestry (Sept. 15, 2022); Testimony of Chairman Rostin Behnam Regarding the Legislative Hearing to Review S.4760, the Digital Commodities Consumer Protection Act at the U.S. Senate Committee on Agriculture, Nutrition, and Forestry | CFTC (https://www.cftc.gov/PressRoom/SpeechesTestimony/opabehnam26); Rostin Behnam, Chairman, CFTC, Testimony of Chairman Rostin Behnam Regarding "Why Congress Needs to Act: Lessons Learned from the FTX Collapse" at the U.S. Senate Committee on Agriculture, Nutrition, and Forestry (Dec. 1, 2022), Testimony of Chairman Rostin Behnam Before the U.S. Senate Committee on Agriculture, Nutrition, and Forestry | CFTC (https://www.cftc.gov/PressRoom/SpeechesTestimony/opabehnam29).

[5] At a high level, the key factors impacting commodity markets in 2022 were: (1) the post-pandemic economic recovery characterized by rising commodity prices across all asset classes, contributing to overall inflation; (2) Russia's invasion of Ukraine and related U.S. and E.U sanctions contributing to sharp price spikes in agricultural, energy, and certain metals markets; (3) monetary tightening and the policy response, with rate hikes by the FOMC totaling a 4.25% increase over the year and the U.S. dollar rising to multi-year highs before falling; (4) severe weather across the globe with heat, drought, and flooding impacting agricultural and energy markets; and (5) China's Covid-19 lockdowns, reducing demand and impacting global supply chains. *See* Rostin Behnam, Chairman, CFTC, Remarks of Chairman Rostin Behnam at the Commodity Markets Council 2023 State of the Industry Conference (Jan. 23, 2023), Remarks of Chairman Rostin Behnam at the Commodity Markets Council 2023 State of the Industry Conference, Fort Lauderdale, Florida | CFTC (https://www.cftc.gov/PressRoom/SpeechesTestimony/opabehnam30).

[6] For a list of proposed rulemakings and orders published in the Federal Register in 2022, *see* Proposed Rules - CFTC (https://comments.cftc.gov/FederalRegister/Proposed.aspx) and Orders and Other Announcements for 2022 - CFTC (https://comments.cftc.gov/FederalRegister/OrdersAndAnnouncements.aspx?Type=ListAll&Year=2022).

[7] *See* Rostin Behnam, Chairman, CFTC, Keynote Address of Chairman Rostin Behnam at the ABA Business Law Section Derivatives & Futures Law Committee Winter Meeting (Feb. 3, 2023), Keynote Address of Chairman Rostin Behnam at the ABA Business Law Section Derivatives & Futures Law Committee Winter Meeting | CFTC (https://www.cftc.gov/PressRoom/SpeechesTestimony/opabehnam31).

[8]CFTC, Statement on ION and the Impact to the Derivatives Markets (Feb. 2, 2023), CFTC Statement on ION and the Impact to the Derivatives Markets | CFTC (https://www.cftc.gov/PressRoom/SpeechesTestimony/cftcstatement020223).

[9] *See* CFTC, Commitments of Traders, Commitments of Traders Special Announcement as of March 3, 2023, https://www.cftc.gov/MarketReports/CommitmentsofTraders/index.htm (https://www.cftc.gov/MarketReports/CommitmentsofTraders/index.htm).

[10] *See* Behnam, *supra* note 4, Testimony of Chairman Rostin Behnam Regarding "Why Congress Needs to Act: Lessons Learned from the FTX Collapse" at the U.S. Senate Committee on Agriculture, Nutrition, and Forestry.

[11] *See* Press Release Number 8613-22, CFTC, CFTC Releases Annual Enforcement Results (Oct. 20, 2022), CFTC Releases Annual Enforcement Results | CFTC (https://www.cftc.gov/PressRoom/PressReleases/8613-22).

[12] In a similar vein, one of the major findings of all of the U.S. federal financial regulators in the Financial Stability Oversight Council's "Report on Digital Asset Financial Stability Risks and Regulation" is that "[A] regulatory gap exists in spot markets for crypto-assets that are commodities and not securities." Financial Stability Oversight Counsel, Report on Digital Asset Financial Stability Risks and Regulation at 88 (Oct. 2022), https://home.treasury.gov/system/files/261/FSOC-Digital-Assets-Report-2022.pdf (https://home.treasury.gov/system/files/261/FSOC-Digital-Assets-Report-2022.pdf)

[13] Section 342 of the Dodd-Frank Act, codified at 12 U.S.C. 5452, required the Departmental Offices of the Department of the Treasury, the Office of the Comptroller of the Currency (OCC), the Board of Governors of the Federal Reserve System (Board), each of the Federal reserve banks, the Federal Deposit Insurance Corporation (FDIC), the National Credit Union Administration (NCUA), the Bureau of Consumer Financial Protection (CFPB), the Federal Housing Finance Agency (FHFA), and the Securities and Exchange Commission(SEC) to each establish an Office of Minority and Women Inclusion (OMWI) to be responsible for all matters of the agency relating to diversity in management, employment, and business activities. The Act also instructed each OMWI Director to develop standards for assessing the diversity policies and practices of entities regulated by the respective agency.

[14] CEA § 23(g), 7 U.S.C 26(g).

[15] Commodity Futures Trading Commission Whistleblower Program, CFTC's Whistleblower Program | Whistleblower.gov (https://www.whistleblower.gov/).

[16] *See* CEA section 23(g)(2); 7 USC 26(g)(2).

[17] Rostin Behnam, Statement Before the U.S. Senate Committee on Agriculture, Nutrition, and Forestry (July 27, 2017), Testimony_Behnam.pdf (senate.gov) (https://www.agriculture.senate.gov/imo/media/doc/Testimony_Behnam.pdf).

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