

Public Statements & Remarks

Opening Statement by Chairman Heath P. Tarbert Before Historic Joint SEC-CFTC Open Meeting

October 22, 2020

It is an honor to be here today at what is a historic moment. This is the first ever joint open meeting of the Securities and Exchange Commission (SEC) and Commodity Futures Trading Commission (CFTC) to vote on a final rule in our shared 45-year history. Despite the close relationship between our two agencies and the jurisdictional overlap between certain of the products we regulate, we have never formally gathered together—in this case virtually—to adopt a joint rule. I am happy that with today's meeting this is no longer the case. I hope coming together today will bode well for future relations between our agencies. I want to thank Chairman Clayton and the rest of the Commissioners—both at the SEC and the CFTC—for making this joint meeting happen.

Historical Background

Since the 1930s, securities and futures products have been subject to separate regulatory regimes in the United States. This is because, at their core, the SEC and the CFTC monitor different markets with different market participants. While certain securities markets, such as securities options, facilitate the transfer of risk, the SEC is primarily focused on capital formation. By contrast, the CFTC concentrates its efforts on risk mitigation, with a specific focus on America's agricultural and energy producers—the farmers, ranchers, distributors, refineries, and end users of financial products who traditionally have been the core focus of the CFTC.^[1]

Indeed, the unique capital formation role of certain securities markets has informed the manner in which our two regimes have developed and, in part, explains differences between the regulatory structures of the SEC and the CFTC.^[2] This distinction is also reflected in our Commissions' reporting lines to Congress. While the banking and financial services committees have jurisdiction over the SEC, the CFTC falls under the jurisdiction of the agriculture committees. The characteristics of the markets we regulate go a long way toward explaining how the two agencies are overseen, and why we sometimes take a different approach to regulation—or at least see regulatory issues through different lens.

I recognize some critics have maintained that the U.S. financial regulatory system is fragmented, inefficient, and too often plagued with petty turf battles.^[3] Some have even maintained that the United States has a “Balkanized structure of financial regulation,”^[4] which gives rise to a “crazy-quilt structure of fragmented authority.”^[5] It is quite true that, in contrast with the United States, many countries have only one market regulator, not two.^[6] Some countries even have a single consolidated market and prudential regulator. And our federalist system in which states have separate authority over and above the federal government also likely appears bizarre relative to most countries.

However, we must keep in mind that the United States has the biggest, deepest, and most liquid financial markets in the world. Accordingly, it is appropriate that we have two market regulators—one, the SEC, that focuses on capital formation and another, the CFTC, that focuses on risk-mitigating hedging. Rather than being a crazy-quilt of fragmented authority, there is a compelling logic to our regulatory structure.

Importance of Continued Communication and Collaboration

It is true that in the past there have been instances where our agencies have disagreed over the characterization of products, for example, whether a particular product is a security or a futures contract. This has led, in some cases, to the point of litigation.^[7] It was inevitable that disputes and friction have arisen, and I expect that will continue to be true in the future. After all, brothers and sisters do fight! Given the complexity of modern financial products, we are often forced to decide, in the unforgettable words of Judge Easterbrook of the Seventh Circuit Court of Appeals, “whether tetrahedrons belong in square or round holes.”^[8]

Although litigation may have been a way to give market participants clarity on how products are regulated, our agencies also have a history of cooperation to resolve jurisdictional disputes. Most notably for today’s meeting, the SEC and CFTC Chairmen signed the Shad-Johnson Accord in 1981, which provided for joint jurisdiction over single stock futures and narrow-based stock indices, with broad-based indices remaining under the CFTC’s exclusive jurisdiction.^[9] The Shad-Johnson Accord was subsequently codified by Congress through amendments to the CEA and the federal securities laws,^[10] and then later revised substantially in the Commodity Futures Modernization Act of 2000 (“CFMA”).^[11] The CFMA established the structure for joint regulation by the SEC and CFTC of the trading of U.S. futures on single securities as well as on narrow-based security indexes.

In the last decade, since the enactment of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act”),^[12] our agencies have tried hard to work together because we know the American people are depending on us. We have held joint roundtables on a variety of topics important to market participants,^[13] and established the Joint CFTC-SEC Advisory Committee on Emerging Regulatory Issues.^[14] We have also generally consulted and coordinated on the implementation of Title VII of the Dodd-Frank Act. In the past year, we have continued the tradition of collaboration,^[15] while taking it to the next level. Going forward, in those few specific areas with a potential for overlap or conflict, I believe we should be all the more conscious of our need to work together. Continued communication and coordination between the SEC and the CFTC will benefit both agencies as we confront the opportunities and challenges presented by our evolving markets.

Today, we are going to talk about two topics that are emblematic of the overlapping jurisdiction of our two agencies and that demonstrate our mutual commitment to regulatory clarity. These important issues are right at the intersection of SEC-CFTC jurisdiction: Security Futures Margin and Portfolio Margining.

Security Futures Margin—Jumpstarting the Market

We are considering whether to adopt rule amendments to align the minimum margin required on security futures with other similar financial products. This rule has been in the works for a long time. Since the CFMA lifted the ban on trading security futures and established a framework for the joint regulation of these products by our Commissions, this market has admittedly struggled to develop. For those of you who do not know, the market for securities futures has not taken off in the United States as it has in other jurisdictions, such as Europe.

I am pleased to support this rule because it represents our joint effort to do what we can, under the current statutory scheme, to make regulation of the security futures market more efficient by adjusting the margin requirements. My hope is that the final rule will be the first of a number of steps we can take to help jumpstart this market. The goal should be to create a regulatory regime for security futures that will enable these products to flourish in the United States as they do elsewhere in the world.

Portfolio Margining Request for Comment

Today we are also considering whether to publish a request for comment on all aspects of the portfolio margining of uncleared swaps, non-cleared security-based swaps, and related positions—including on the merits, benefits, and risks of portfolio margining these types of positions, and on any regulatory, legal, and operational issues associated with portfolio margining them. Portfolio margining is of central importance to market participants who are dually-registered with the SEC and the CFTC and have customers who hold positions in separate accounts without the ability to cross-margin the positions.

This request for comment is actually the direct result of efforts by SEC Chairman Clayton and my predecessor, former CFTC Chairman J. Christopher Giancarlo. Chairmen Clayton and Giancarlo asked the staffs of the SEC and CFTC to conduct market outreach and seek further input from the public regarding these issues surrounding portfolio margining.^[16] I am pleased to support this request for comment because I think it will enable our respective staffs to prepare a thoughtful recommendation on actions our two Commissions may take to facilitate portfolio margining.

Conclusion

I want to close by again thanking Chairman Clayton and the rest of the Commissioners—both at the SEC and the CFTC—for participating in this joint meeting. It is a sign of our close and continued communication and collaboration, which I trust will extend long into the future. Finally, I hope we do not have to wait another 45 years to get together again!

[1] See Heath P. Tarbert, *Why the CFTC is the Most Important Regulator You've Never Heard Of*, Fox Bus. (Jul. 29, 2019), available at: <https://www.foxbusiness.com/financials/why-the-cftc-is-the-most-important-regulator-youve-never-heard-of>. The Commodity Exchange Act (“CEA”), which has been amended and expanded numerous times since 1936, is the primary federal statute governing U.S. derivatives markets. In 1974, Congress amended the CEA and created the CFTC as a new independent federal regulatory agency. In so doing, Congress transferred authority over the futures markets previously exercised by the Commodity Exchange Authority—the CFTC’s predecessor agency in the Department of Agriculture—to the CFTC. See U.S. Department of the Treasury, A FINANCIAL SYSTEM THAT CREATES ECONOMIC OPPORTUNITIES: CAPITAL MARKETS (Oct. 2017) (“Treasury Report”) at 112, available at: <https://www.treasury.gov/press-center/press-releases/Documents/A-Financial-System-Capital-Markets-FINAL-FINAL.pdf>.

[2] See A Joint Report of the SEC and the CFTC on Harmonization of Regulation (Oct. 16, 2009), available at: <https://www.cftc.gov/sites/default/files/stellent/groups/public/@otherif/documents/ifdocs/opacftc-secfinaljointreport101.pdf>.

[3] See, e.g., Mark Frederick Hoffman, *Decreasing the Costs of Jurisdictional Gridlock: Merger of the Securities and Exchange Commission and the Commodity Futures Trading Commission*, UNIVERSITY OF MICHIGAN JOURNAL OF LAW REFORM (1995), available at: <https://repository.law.umich.edu/mjlr/vol28/iss3/8/>; Roberta Romano, *The Political Dynamics of Derivative Securities Regulation*, THE YALE JOURNAL OF REGULATION (1997), available at: <https://digitalcommons.law.yale.edu/yjreg/vol14/iss2/2/>; Kai Kramer, *Aren't We Still in the "Garden of the Forking Paths"?* A Comment on Consolidation of the SEC and CFTC, HOUSTON BUSINESS AND TAX LAW JOURNAL (2004), available at: <https://heinonline.org/HOL/LandingPage?handle=hein.journals/houbtalj4&div=12&id=&page=>; Commissioner Elisse B. Walter, “Principles to Help Guide Financial Regulatory Reform,” Remarks Before the Institute of International Bankers (Mar. 2, 2009), available at: <https://dart.deloitte.com/USDART/ov-resource/df80c3f1-3f20-11e6-95db-fd72c9dd5c99.html>; U.S. Government Accountability Office (GAO), *Clearer Goals and Reporting Requirements Could Enhance Efforts by CFTC and SEC to Harmonize Their Regulatory Approaches*, Report to Congressional Committees, GAO-10-410 (Apr. 2010), available at: <https://www.gao.gov/products/GAO-10-410>.

[4] See Commissioner Elisse B. Walter, “Principles to Help Guide Financial Regulatory Reform,” *supra* note 3.

[5] See John C. Coffee Jr. & Hillary A. Sale, REDESIGNING THE SEC: DOES THE TREASURY HAVE A BETTER IDEA? (Working Paper 08-51) (Nov. 2008), available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1309776.

[6] See, e.g., Treasury Report, *supra* note 1 (The division between the SEC and CFTC, which regulate securities and derivatives markets, respectively, is a unique feature of the U.S. financial regulatory system. By contrast, other major market centers typically have a single markets regulator with jurisdiction over both securities and derivatives markets. In recent years, regulation of U.S. securities and derivatives markets has increasingly overlapped as financial products and the market participants who trade them have converged.).

[7] See, e.g., *Board of Trade of the City of Chicago vs. Securities and Exchange Commission*, 677 F.2d 1137 (7th Cir. 1982); *Chicago Mercantile Exchange vs. Securities and Exchange Commission*, 883 F.2d 537 (7th Cir. 1989); *Board of Trade of the City of Chicago vs. Securities and Exchange Commission*, 187 F.3d 713 (7th Cir. 1999).

[8] *Chicago Mercantile Exchange vs. Securities and Exchange Commission*, 883 F.2d at 539.

[9] The Shad-Johnson Jurisdictional Accord, among other things, prohibited futures trading on single stocks, as well as on stock indexes that did not meet specific requirements. See GAO, CFTC AND SEC ISSUES RELATED TO THE SHAD-JOHNSON JURISDICTIONAL ACCORD, GAO/GGD 00-89 (Apr. 2000), available at: <https://www.gao.gov/new.items/gg00089.pdf>.

[10] See Futures Trading Act of 1982, Pub. L. No. 97-444, 96 Stat. 2294 (1983); Act of Oct. 13, 1982, Pub. L. No. 97-303, 96 Stat. 1409.

[11] Commodity Futures Modernization Act of 2000, Pub. L. No. 106-554, app. E, 114 Stat. 2763.

[12] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010). The author served as Special Counsel to the U.S. Senate Banking Committee from 2009-2010 during the debates leading up to enactment of the Dodd-Frank Act.

[13] A list of Dodd-Frank Public Roundtables is available at: <https://www.cftc.gov/LawRegulation/DoddFrankAct/Dodd-FrankPublicEvents/index.htm>.

[14] See Press Release, Joint CFTC-SEC Advisory Committee on Emerging Regulatory Issues to Meet on Monday, May 24, 2010 (May 17, 2010). See also Joint CFTC-SEC Advisory Committee on Emerging Regulatory Issues, 77 Fed. Reg. 27444 (May 10, 2012).

[15] Here I particularly want to mention former SEC Chairman Mary Shapiro, who was previously Chairman of the CFTC. Her experience at both the SEC and the CFTC gave her a unique perspective on the relationship between the two agencies that greatly facilitated communication between the agencies.

[16] See SEC Chairman Jay Clayton and CFTC Chairman J. Christopher Giancarlo, Joint Statement on CFTC-SEC Portfolio Margining Harmonization Efforts (June 27, 2019), available at: <https://www.cftc.gov/PressRoom/SpeechesTestimony/jointcftcsecportfoliomargining062719>.

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