

Derivatives Alert

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CFTC and SEC Approve Revised Memorandum of Understanding on Information Sharing

On June 29, 2018, the U.S. Commodity Futures Trading Commission (CFTC) and the U.S. Securities and Exchange Commission (SEC, and together the Commissions) announced that the Commissions approved a memorandum of understanding (2018 MOU) regarding coordination and information sharing between the Commissions. CFTC Chairman Christopher Giancarlo observed that the 2018 MOU “will enhance our oversight efforts and reduce unnecessary complexity, and lessen costs on both regulators and market participants.”¹

The 2018 MOU² updates and supersedes an earlier MOU that the Commissions executed regarding areas of “common regulatory interest” in 2008 (2008 MOU).³ The 2018 MOU is largely consistent with the 2008 MOU, but has some important differences, including the following:

- **The 2018 MOU addresses the expanded jurisdictions of the Commissions as a result of Dodd-Frank.**⁴ Dodd-Frank authorized the CFTC to regulate the U.S. swaps market, which makes up approximately 95 percent of the overall U.S. over-the-counter (OTC) derivatives market and covers interest rate swaps, index credit default swaps (CDS), foreign exchange (FX) swaps, certain types of equity swaps, and other commodity swaps (including swaps on energy and metals).⁵ The SEC has parallel authority over the U.S. security-based swaps market, which is about 5 percent of the overall U.S. OTC derivatives market and consists primarily of swaps on individual securities or loans.⁶

¹ Press Release, [CFTC and SEC Announce Approval of New MOU](#), CFTC (June 29, 2018).

² CFTC and SEC, [Memorandum of Understanding Between the U.S. Securities and Exchange Commission and the U.S. Commodity Futures Trading Commission Regarding Coordination in Areas of Common Regulatory Interest and Information Sharing](#), (June 2018) [hereinafter “2018 MOU”].

³ CFTC and SEC, [Memorandum of Understanding Between the U.S. Securities and Exchange Commission and the U.S. Commodity Futures Trading Commission Regarding Coordination in Areas of Common Regulatory Interest](#) (Mar. 11, 2008); CFTC and SEC, [Addendum to CFTC-SEC Memorandum of Understanding Regarding Coordination in Areas of Common Regulatory Interest: Principles Governing the Review of Novel Derivative Products](#) (Mar. 11, 2008). The 2018 MOU does not supersede the Commissions’ 2004 MOU regarding oversight of security futures. CFTC and SEC, [Memorandum of Understanding Between the U.S. Securities and Exchange Commission and the U.S. Commodity Futures Trading Commission Regarding Oversight of Security Futures Product Trading and the Sharing of Security Futures Product Information](#) (Mar. 17, 2004).

⁴ The Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111–203, 124 Stat. 1376 (2010) [hereinafter “Dodd-Frank”].

⁵ U.S. Dep’t of the Treasury, [A Financial System That Creates Economic Opportunities: Capital Markets](#), Oct. 2018, [hereinafter “Treasury Second Report”] at 117.

⁶ *Id.*

Derivatives Alert

- **The 2018 MOU provides greater detail on procedures related to sharing information.** These procedural topics include (i) exchanging supervisory information, including information regarding examinations; (ii) maintenance of information; and (iii) use of shared information in examinations, civil cases, research or any other activities.⁷
- **The 2018 MOU clarifies its scope vis-a-vis other agreements between Commission staff.** With respect to the enforcement agendas of the Commissions, the 2018 MOU acknowledges the Commissions' ongoing practice of "sharing information between their enforcement divisions, pursuant to customary access requests and grants" and makes clear that the 2018 MOU will not change any existing practices or agreements between those divisions.⁸

The Commissions expect to cooperate by means of ongoing informal consultations, periodic meetings, written requests and other practical arrangements.⁹

The 2018 MOU is notable as much for its messaging as for its content in the wake of calls to review existing financial regulations with a focus on minimizing rules and streamlining regulations. In February 2017, President Trump issued an executive order¹⁰ that authorized the U.S. Treasury Department (Treasury) and other agencies to prepare a report reviewing "the extent to which existing laws, treaties, regulations, guidance . . . promote the Core Principles [for financial regulation]"¹¹ set out by the administration.¹²

In keeping with its authorizing order, the first Treasury report — which reviewed regulations on banks, savings associations and credit unions¹³ — and the second report — which covered capital markets¹⁴ — made numerous recommendations on improving

⁷ 2018 MOU at 4, 6-8.

⁸ *Id.* at 4.

⁹ *Id.* at 3.

¹⁰ Exec. Order No. 13772, [Presidential Executive Order on Core Principles for Regulating the United States Financial System](#), Feb. 3, 2017.

¹¹ The relevant principles include: "foster[ing] economic growth and vibrant financial markets through more rigorous regulatory impact analysis that addresses systemic risk and market failures, such as moral hazard and information asymmetry," "mak[ing] regulation efficient, effective, and appropriately tailored," and "restor[ing] public accountability within Federal financial regulatory agencies and rationaliz[ing] the Federal financial regulatory framework." See *id.* at s. 1.

¹² See *id.* at s. 2.

¹³ U.S. Dep't of the Treasury, [A Financial System That Creates Economic Opportunities: Banks and Credit Unions](#), June 2017, ["Treasury First Report"] at 10, 123, 132; see also Press Release, [Summary of Recommendations for Regulatory Reform](#), U.S. Dep't of the Treasury (June 12, 2017).

¹⁴ See generally Treasury Second Report, *supra* note 5; see also, Fact Sheet, ["A Financial System That Creates Economic Opportunities Capital Markets"](#), U.S.

regulatory efficiency by reducing or harmonizing existing regulations. The second report directly addressed the regulatory responsibilities of the Commissions¹⁵ and recommended that "[t]he roles of the SEC and CFTC, and the management of regulatory overlaps and areas for harmonization, [be] evaluated."

¹⁶The second report further suggested that the Commissions make the review of how the swaps and security-based swaps markets are regulated a "high priority."¹⁷

The 2018 MOU seemingly addresses these Treasury recommendations directly in its preamble, in stating:

The SEC and CFTC recognize that enhanced coordination and cooperation concerning issues of common regulatory interest is necessary in order to foster market innovation and fair competition and to promote efficiency in regulatory oversight . . . The SEC and CFTC further recognize that through increased coordination and cooperation, the agencies can facilitate the introduction of novel derivative products or other products to market users and investors, and enhance the functioning of the underlying markets.¹⁸

This MOU, together with the CFTC's July 3, 2018, announcement that Chairman Giancarlo named former SEC lawyer Matthew Daigler as his senior counsel,¹⁹ could be understood to signify a more collaborative approach by the Commissions. Enhancing the Commissions' harmonization efforts could be helpful to market participants in a number of existing and emerging joint regulatory areas, including the following:

- **Trade Reporting.** The CFTC and SEC swap transaction reporting rules are each very prescriptive, which has traditionally created problems for market participants in addressing the different requirements set out by each Commission.²⁰

Dep't of the Treasury (last visited July 3, 2018).

¹⁵ Treasury Second Report at 116-147. Though the first report focused on the bank regulatory regime and, in that context, recommended greater regulatory harmonization, it included the CFTC and the SEC in its conclusion that "[t]he regulators' existing approach to coordination has not worked and, as a result, banks have had difficulty obtaining clear, consistent guidance." Treasury First Report at 73-74.

¹⁶ Treasury Second Report at 9.

¹⁷ Treasury Second Report at 126-127.

¹⁸ 2018 MOU at 1.

¹⁹ Press Release, [CFTC Chairman Giancarlo Names Matthew A. Daigler Senior Counsel](#), CFTC (July 3, 2018).

²⁰ Treasury Second Report at 126.

Derivatives Alert

- **Product Categories.** Market participants have similarly voiced concerns regarding the “swap,” “security-based swap” and “mixed swap” definitions and called for the Commissions to provide clearer descriptions of the products captured by each term.²¹
- **Virtual Currencies.** Both the CFTC²² and SEC²³ have asserted jurisdiction over virtual currencies, under their respective

²¹ *Id.* at 126-127.

²² See *The Commodity Futures Trading Commission: Effective Enforcement and the Future of Derivatives Hearing Before the S. Comm. on Ag., Nutrition and Forestry*, 113th Cong. 36-60 (2010) (testimony of Timothy Massad, Chairman, CFTC), <https://www.agriculture.senate.gov/imo/media/doc/S.%20Hrg.%20113-640%20-%20THE%20COMMODITY%20FUTURES.pdf> (“The CEA defines the term commodity very broadly so that in addition to traditional agricultural commodities, metals, and energy, the CFTC has oversight of derivatives contracts related to Treasury securities, interest rate indices, stock market indices, currencies, electricity, and heating degree days, to name just a few underlying products. Derivative contracts based on a virtual currency represent one area within our responsibility.”) Chairman Giancarlo and other CFTC commissioners have subsequently reiterated this conclusion. See, e.g., CFTC, Speeches and Testimony, [Keynote Address by Commissioner Brian Quintenz Before the DC Blockchain Summit](#), (Mar. 7, 2018); *Virtual Currencies: The Oversight Role of the U.S. Securities and Exchange Commission and the U.S. Commodity Futures Trading Commission Hearing Before the S. Comm. on Banking, Housing and Urban Affairs*, 115th Cong. (2018) (testimony of J. Christopher Giancarlo, Chairman, CFTC), <https://www.cftc.gov/PressRoom/SpeechesTestimony/opagiancarlo37>; Speeches and Testimony, [Remarks of Chairman J. Christopher Giancarlo to the ABA Derivatives and Futures Section Conference, Naples, Florida](#), CFTC (Jan. 19, 2018); CFTC, Speeches and Testimony, [Chairman Giancarlo Statement on Virtual Currencies](#), (Jan. 4, 2018); CFTC, Speeches and Testimony, [Giancarlo Commends SEC Chairman Clayton on ICO Statement](#), (Dec. 11, 2017).

²³ *Virtual Currencies: The Oversight Role of the U.S. Securities and Exchange Commission and the U.S. Commodity Futures Trading Commission Hearing Before the S. Comm. on Banking, Housing and Urban Affairs*, 115th Cong. (2018) (testimony of Jay Clayton, Chairman, SEC), <https://www.banking.senate.gov/imo/media/doc/Clayton%20Testimony%202-6-18.pdf> (“But by and large, the structures of [Initial Coin Offerings] that I have seen involve the offer and sale of securities and directly implicate the securities registration requirements and other investor protection provisions of our federal securities laws.”).

authorities to regulate commodities²⁴ and securities offerings.²⁵ The joint regulation over virtual currencies necessarily requires the Commissions to interpret the scope of their jurisdiction over the virtual currency market.

Greater collaboration between the Commissions in these and other areas may forestall or at least reduce the number of instances in which the Commissions offer differing approaches that affect market participants who are subject to regulation by both.

²⁴ *In re Coinflip, Inc.*, CFTC No. 15-29, [2015-2016 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 33,538, (Sept. 17, 2015).

²⁵ Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934: The DAO, Securities Act Release No. 81207 (July 25, 2017), <https://www.sec.gov/litigation/investreport/34-81207.pdf>; *In re Munchee Inc.*, Securities Act Release No. 10445, Fed. Sec. L. Rep. (CCH) ¶ 81,866 (Dec. 11, 2017), <https://www.sec.gov/litigation/admin/2017/33-10445.pdf>.

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