Professional Perspective

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For the first time, the CFTC has charged a violation under Rule 1.6, its Dodd–Frank "anti-evasion" rule, which prohibits "conduct[ing] activities outside the United States," including "structuring entities" abroad, to "willfully evade or attempt to evade" any provision of the Commodity Exchange Act as enacted under Title VII, Subtitle A, of the Dodd–Frank Act, or regulations promulgated thereunder.

The CFTC's first use of Rule 1.6, in an enforcement action against Binance, comes at a time when, according to press reports, digital-asset companies are leaving the US in part to avoid regulatory burdens and uncertainty here. According to the US Chamber of Commerce, the regulatory uncertainty in the US means that "digital-asset companies have no choice but to consider the possibility of relocating or refocusing abroad, abandoning U.S. operations in favor of countries with more favorable regulatory environments."

The confluence of these developments raises the question whether companies that decide to leave the US should be mindful of the CFTC's anti-evasion rule.

In promulgating its anti-evasion rule, the CFTC offered some guidance—albeit none that is clear-cut—on whether it viewed the rule as applying to companies that decide to operate abroad to avoid US regulatory burdens, explaining that it would not consider "transactions, entities, or instruments structured in a manner solely motivated by a legitimate business purpose to constitute willful evasion" under the rule.

As for what constitutes a "legitimate business purpose," the CFTC asserted that businesses will "naturally weigh a multitude of costs and benefits," including "applicable regulatory obligations," in making business decisions, and that "a person's specific consideration of regulatory burdens, including the avoidance thereof, is not dispositive that the person is acting without a legitimate business purpose in a particular case." The CFTC also advised that, in assessing whether unlawful evasion had occurred, it would consider whether the company was engaged in fraud, deceit, or unlawful activity—but the CFTC made clear that it did not believe those factors are "prerequisites to an evasion finding."

It stands to reason that one cannot "evade" a law with which he has no predicate duty to comply, a concept that is supported by the Supreme Court's interpretation of the IRS's tax evasion statute, on which the CFTC's anti-evasion rule was partially based. Both provisions prohibit "willful" evasion, which the court has interpreted to mean evasion of a "known duty." *Cheek v. United States*, 498 U.S. 192, 201 (1991).

If one has no duty under the CFTC's rules to begin with, there is no duty evaded, and no basis for an anti-evasion charge. Notably, there is a judicially established presumption that the CEA, like other US statutes, does not apply extraterritorially, and most provisions of the CEA do not provide the clear indication of extraterritorial application needed to allow the CFTC to rebut this presumption. That said, the CFTC could argue that its jurisdiction is extraterritorial with regard to swaps, at least to the extent that the swaps at issue "have a direct and significant connection with activities in, or effect on, commerce of the United States." *See* 7 U.S.C. § 2(i). But typically, without some US nexus in the conduct itself, the duties imposed by the CEA would not reach a foreign digital-asset company operating abroad, even one that used to operate in the US.

Thus far, in charges brought in the digital-asset space, the CFTC's enforcement program seems to have stayed within these boundaries. The CFTC has brought enforcement actions against foreign digital-asset companies for engaging in regular business activities only where such companies have interacted with US customers, such as in cases involving violations of the CFTC's rules requiring registration or on-exchange trading. For example, in bringing and settling an enforcement action against Bitfinex for operating an unregistered futures exchange on which it was dealing in leveraged digital-asset products, the Commission held the company liable for engaging in off-exchange futures transactions with US customers and ordered the company to set up controls to prevent US persons from utilizing its services and products.

Tellingly, the Commission did not suggest in that case that it could impose such restrictions on the company's ability to offer its services and products to non-US persons. Similarly, in other actions brought against foreign-operated digital-asset companies for violating registration or on-exchange trading requirements, the CFTC has premised liability on those companies' dealings with US customers.

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Two CFTC commissioners have similarly focused on dealings with US customers in addressing when digital-asset companies need to concern themselves with the applicability of CFTC rules. In a recent interview, for instance, Chairman Rostin Behnam noted that participants in the digital-asset DeFi space should "know as much as they can about what the Commodity Exchange Act requires and what is required of them if they're going to offer futures options or swaps to U.S. customers" and commented that it is "incumbent on individuals to understand and appreciate that if you're going to offer derivatives to U.S. customers, there is a very well developed and mature legal base and requirements for complying with the law."

Similarly, when the CFTC announced its charges against Binance in March, Commissioner Kristin Johnson noted, "Legislative history and judicial precedent have long established that regulatory enforcement should not be constrained by 'form over substance' and make plain the application of the CEA and CFTC regulations to activity when U.S. persons are solicited and agree to participate."

Indeed, in the *Binance* case—the Commission's first and only enforcement action to date under Rule 1.6—the CFTC has brought suit against a digital-asset company that it alleges knowingly dealt with US customers. The CFTC has not specified which provisions it contends were evaded, or whether its theory is simply based on evasion of CFTC jurisdiction. Nevertheless, the complaint contains allegations suggesting that the CFTC considers two factors to be pertinent.

First, the CFTC asserts that Binance knew it was servicing US customers in ways that would subject it to the CFTC's jurisdiction and actively took measures to conceal that truth, such as by taking a "public stance" that it "never had any U.S. users," keeping information regarding the company's US customers away from "guys who have to deal with U.S. regulators," and replacing "the U.S. value for certain data fields in Binance's internal database with the value 'UNKWN.'"

Second, the CFTC alleges that Binance took measures to avoid knowledge that it was dealing with US customers. For example, the complaint cites Binance's alleged "lack of effective KYC procedures or a CIP that would enable it to determine the true identity of its customers," reliance on customers "self-certify[ing] that they were not a U.S. person" when logging in from a US IP address, and creation of a "no KYC loophole" for customers operating within certain withdrawal limits, despite awareness that many such customers "'could be U.S. citizens in reality.'"

In sum, given the geographic limits on the CFTC's jurisdiction and its prior guidance, a digital-asset company setting up legitimate operations abroad will have a strong argument to make against a Rule 1.6 allegation, so long as it does not deal with US customers. In assessing Rule 1.6 liability, the CFTC presumably will consider steps a company has taken to prevent US customer access, as well as any conduct it believes was intended to deceive or mislead as to facts that could trigger regulatory duties under the CEA.

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