

# More Joint SEC-CFTC Actions Raise Concerns Over 'Piling On'

By **Elizabeth Gray and Abigail Edwards** (December 16, 2019)

On July 11, 2018, the U.S. Securities and Exchange Commission and U.S. Commodity Futures Trading Commission entered into a memorandum of understanding regarding coordination in areas of common regulatory interest and information sharing, updating and enhancing a 2008 memorandum of understanding between the two agencies.[1]



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Both agencies lauded the July 2018 memo, citing the need for enhanced coordination in today's interrelated markets and noting their commitment to working together to streamline rulemaking, oversight and enforcement for the benefit of all market participants.[2]

Since signing the July 2018 memo, the SEC and CFTC have issued a number of joint statements, including clarification of the treatment of swaps that insured depository institutions enter into with customers;[3] an alert warning investors to scrutinize investment opportunities through websites related to digital assets;[4] a statement outlining concerns about the pursuit of opportunistic strategies in the credit derivatives market;[5] and a statement on activities involving digital assets.[6]



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Additionally, the SEC and CFTC announced a joint proposal in July 2019 to align the minimum margin required on security futures with other similar financial products,[7] and the CFTC released a statement in June 2019 publicly congratulating the SEC on its adoption of final rules regarding security-based swap dealers and transactions.[8]

Since the July 2018 memo, joint SEC-CFTC enforcement actions have also increased and that trend is likely to continue. The increase in such joint actions raises questions regarding the efficiencies and benefits of joint civil enforcement actions as well as importance of the agencies proceeding fairly and avoiding piling on.

## Joint Enforcement Proceedings — DOJ Committed to Reducing “Piling On”

Entities in highly regulated spaces have historically faced enforcement proceedings from both civil and criminal authorities — enforcing different regulations/statutes and imposing distinct types of liability (i.e. civil v. criminal). Not infrequently, the DOJ will coordinate with either the SEC or the CFTC in bringing parallel enforcement actions.

In those circumstances, the two enforcement actions pose unique risks that penalties and undertakings will extend beyond what is necessary to rectify the harm or deter future violations, particularly when it comes to monetary penalties. This practice is colloquially known as “piling on.”

Recognizing those risks and in an effort to reduce piling on, on May 9, 2018, Rod Rosenstein, then-DOJ deputy attorney general, announced that the DOJ would adopt a new policy for the resolution of joint enforcement cases.[9] Accompanying the announcement was a memorandum, which noted that, going forward, the DOJ should consider the totality of punishments imposed by the DOJ, other law enforcement agencies and regulators.[10]

In doing so, the new policy discourages piling on. The DOJ also reiterated its intent to continue working with other agencies, including the CFTC and SEC, to ensure that a fairer penalty scheme is implemented going forward.[11]

The May 2018 memorandum contained two provisions that have since been included in the September 2018 update to the Justice Manual (formerly the U.S. Attorneys' Manual), which provides guidance for investigatory, charging, and sentencing decisions.[12] The Justice Manual calls for the DOJ, when resolving a case with a company where multiple DOJ divisions and/or outside bodies are investigating the same misconduct, to coordinate to avoid piling on the company — in particular by considering the punishments that have already or will be imposed by the other bodies, "with the goal of achieving an equitable result." [13]

Since then, the DOJ has followed the updated guidance on piling on when undertaking parallel enforcement proceedings with the SEC and the CFTC. For example, on July 5, 2018, the SEC instituted civil proceedings against Credit Suisse for violating the Foreign Corrupt Practices Act.[14]

That same day, the DOJ announced that it had concluded its investigation into Credit Suisse with a nonprosecution agreement where Credit Suisse agreed to pay a criminal fine.[15] The enforcement was in response to Credit Suisse, over the course of several years, employing the relatives of government officials in Asia in exchange for various benefits, including business for the bank.[16]

Although the SEC ordered Credit Suisse to pay disgorgement and prejudgment interest, a total of \$29 million, the SEC did not impose a civil penalty because the DOJ had already imposed a \$47 million criminal fine. The SEC, for its part, has identified such coordination with law enforcement as one of its continuing areas of focus going into 2020 and beyond.[17]

On Nov. 7, 2019, the DOJ and the CFTC announced parallel settlement agreements with Tower Research Capital LLC.[18] Tower agreed to pay the DOJ \$67.4 million in criminal monetary penalties, criminal disgorgement and victim compensation in connection with its spoofing scheme — where a company bids or offers on a CFTC-registered market with the intent to cancel the bid or offer before execution.[19] The DOJ counted toward the criminal monetary penalty and criminal disgorgement any payments made to the CFTC, which imposed a \$24.4 million civil penalty, while any payment owed to the CFTC was offset by any payment made to the DOJ.[20]

### **Joint SEC-CFTC Enforcement Actions**

The May 2018 DOJ memo has positively reduced the unintended consequence of piling on. The guidance, however, does not bind the joint enforcement actions between the SEC and the CFTC, and concerns regarding both civil enforcement agencies continuing to "pile on" remain.

Increased joint SEC-CFTC enforcement is consistent with the CFTC's public promise to work closely with any agency conducting a parallel investigation, to ensure that any monetary penalty they bring against a company "appropriately accounts for any imposed by any other enforcement body," and to "give dollar-for-dollar credit for disgorgement or restitution payments" when the CFTC imposes its own disgorgement or restitution.[21] Although the SEC has not issued a statement regarding parallel investigations, recent trends indicate the two agencies have been coordinating more frequently.

Prior to the 2018 SEC-CFTC memo, the SEC and CFTC had brought one joint enforcement action in 1993, one in 1994 and three more joint enforcement actions between 1995 and mid-2018.

In the 18 months since the July 2018 memo, which is “intend[ed] to continue [the two agencies’] ongoing practice of sharing information between their enforcement divisions,”[22] the agencies have already brought three joint enforcement actions. Prior to the July 2018 memo, the CFTC published its first enforcement manual in May 2018, which provides guidance for its staff in investigating and pursuing wrongdoing.[23]

The promulgation of the CFTC enforcement manual moves the CFTC enforcement program in closer alignment with the SEC’s, which first published its enforcement manual in 2008.[24]

### **Pre-July 2018 Memo**

SEC/CFTC joint enforcement actions during the last 25 years have been sporadic, with a total of five joint enforcement actions having been brought between 1993-2017. The SEC and CFTC brought parallel enforcement actions against Kemper Corporation in 1993 and against Bankers Trust Security Corporation in 1994 for fraud.[25]

In each action, the company had overlapping obligations to the SEC and CFTC: payment owed to each agency would be satisfied by a single act of compliance with either order, and each order required the company to retain an independent consultant, but both orders could be fulfilled by hiring one consultant.

For example, in the Kemper case, the CFTC’s order explained that “[p]ayment of the \$9.2 million settlement funds shall jointly satisfy the requirements of this undertaking and the requirements of the SEC Order.”[26] Similarly, in joint actions against JP Morgan, in 2015 for failure to disclose conflicts of interest, and Banc de Binary, in 2016 for illegally signing investors to an options trading platform, the SEC and CFTC shared each company’s disgorgement payments and a single monitor oversaw both payments.[27]

These, along with a 2010 action against Crown Forex for fraud where both agencies were plaintiffs and received their requested remedy — the defendant was ordered to surrender assets and pay restitution to a variety of individuals and private entities — were the extent of joint SEC-CFTC enforcement until 2018.[28]

### **Recent SEC-CFTC Joint Enforcement Actions**

On Sept. 27, 2018, three months after the July 2018 memo, the SEC filed charges against international bitcoin-funded securities dealer 1Broker and its CEO. The SEC, alleging that 1Broker sold securities without meeting discretionary investment thresholds required by federal law, sought permanent injunctions, disgorgement plus interest and monetary penalties.[29]

The same day, the CFTC brought a parallel action with similar charges.[30] In March 2019, 1Broker announced that it settled with the SEC and CFTC without admitting or denying the factual allegations.[31] Although the settlements were made simultaneously, 1Broker was liable for two separate penalties: \$990,000 to the CFTC (including certification that 1Broker repaid \$570,000 worth of bitcoins to U.S. customers) and \$53,000 to the SEC.[32] Neither settlement recognized the penalty that was paid to the other civil enforcement agency.[33]

About a year later, on Sept. 4, 2019, the SEC and CFTC jointly announced a \$20 million penalty against Options Clearing Corporation to settle charges of failure of implement policies to manage risks as required by U.S. law and SEC and CFTC rules.[34] Although the agency orders were separate, each referenced the same conduct and contained identical statements emphasizing the collaboration that OCC accorded each agency.[35]

The monetary penalties imposed by the SEC and the CFTC were separate — a \$15 million payment to the SEC and \$5 million to the CFTC — and neither order recognized the payment made to the other agency.[36]

On Oct. 31, 2019, the SEC and CFTC simultaneously announced settlement of charges against XBT Corp.[37] The SEC charged that XBT Corp. sold unregistered security-based swaps using bitcoins, and did so without registering on a national exchange.[38] The CFTC charged XBT Corp. for failing to register as a futures commission merchant.[39] The settlements imposed separate penalty payments, of just under \$132,000 to the SEC and \$100,000 to the CFTC.[40] Neither the SEC nor CFTC order mentioned payment to the other agency.

## **Conclusion**

Although older joint SEC-CFTC enforcement actions recognized that payments to one agency would satisfy the obligation to the other — presumably thereby avoiding piling on — the more recent 2018–2019 enforcement actions did not. Rather, each settlement imposed separate penalties to each agency, functionally assessing two penalties for the same misconduct.

This appears to indicate that companies could receive double punishment, especially as neither the SEC nor the CFTC are bound by the DOJ's anti-piling-on policy. In contrast to the SEC and the CFTC, the DOJ, when pursuing criminal enforcement against a company, has avoided piling on by coordinating with the SEC and/or CFTC to ensure that the combined civil and criminal penalties are not excessive, such as in the Tower and Credit Suisse matters.

With respect to joint SEC-CFTC enforcement actions, the risk of piling on remains present. Both the SEC and the CFTC are bringing civil enforcement actions for the same underlying conduct. Without adopting their own anti-piling-on policy, the SEC and the CFTC risk double punishing companies for the same conduct.

Additionally, these duplicative enforcement matters raise questions about whether an agency would be better served devoting its resources to new investigations rather than penalizing a company that has already been subjected to other civil enforcement.[41]

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[1] U.S. Commodity Futures Trading Commission, CFTC and SEC Announce Approval of New MOU, available at <https://www.cftc.gov/PressRoom/PressReleases/7745-18> (June 28, 2018).

[2] Id.

[3] Securities and Exchange Commission, Joint Statement on the IDI Exception to the Swap Dealer Definition, available at <https://www.sec.gov/news/public-statement/joint-statement-sec-and-cftc-swap-dealer-definition> (Dec. 13, 2018).

[4] U.S. Commodity Futures Trading Commission, CFTC, SEC Issue Investor Alert, available at <https://www.cftc.gov/PressRoom/PressReleases/7917-19> (Apr. 26, 2019).

[5] Securities and Exchange Commission, Joint Statement on Opportunistic Strategies in the Credit Derivatives Market, available at <https://www.sec.gov/news/public-statement/update-june-2019-joint-statement-opportunistic-strategies-credit-derivatives> (June 24, 2019, updated Sept. 19, 2019).

[6] Securities and Exchange Commission, Joint Statement on Activities Involving Digital Assets, available at <https://www.sec.gov/news/public-statement/cftc-fincen-secjointstatementdigitalassets> (Oct. 11, 2019).

[7] Securities and Exchange Commission, CFTC and SEC Invite Public Comment on a Joint Proposal to Align Margin Requirements for Security Futures With Requirements for Similar Financial Products, available at <https://www.sec.gov/news/press-release/2019-125> (July 9, 2019).

[8] U.S. Commodity Futures Trading Commission, CFTC Chairman Giancarlo Congratulates SEC on Adopting Final Rules Establishing Capital Requirements for Security-Based Swap Dealers and Margin for Uncleared Security-Based Swap Transactions, available at <https://www.cftc.gov/PressRoom/PressReleases/7941-19> (June 21, 2019).

[9] U.S. Department of Justice, Deputy Attorney General Rod Rosenstein Delivers Remarks to the New York City Bar White Collar Crime Institute, available at <https://justice.gov/opa/speech/deputy-attorney-general-rod-rosenstein-delivers-remarks-new-york-city-bar-white-collar> (May 9, 2018).

[10] U.S. Department of Justice, Policy on Coordination of Corporate Resolution Penalties at 1, available at <https://www.justice.gov/opa/speech/file/1061186> (May 9, 2018).

[11] Id.

[12] U.S. Department of Justice, Policy on Coordination of Corporate Resolution Penalties, available at <https://www.justice.gov/opa/speech/file/1061186> (May 9, 2018).

[13] U.S. Department of Justice, Justice Manual, §§ 1-12.100, 9-28.1200, available at <https://www.justice.gov/jm/justice-manual> (2018).

[14] In re Credit Suisse Group, Admin. Proc. File No. 3-18571, available at <https://www.sec.gov/litigation/admin/2018/34-83593.pdf> (July 5, 2018).

[15] U.S. Department of Justice, Credit Suisse NPA, available at <https://www.justice.gov/opa/press-release/file/1077881/download> (July 5, 2018).

[16] *Id.* at 2.

[17] Securities and Exchange Commission, Enforcement Division Annual Report, available at <https://www.sec.gov/files/enforcement-annual-report-2019.pdf> (Nov. 6, 2019).

[18] U.S. v. Tower Research Capital LLC, Deferred Prosecution Agreement, Criminal No. 19-cr-819 (S.D. Tex. Nov. 6, 2019), available at <https://www.justice.gov/opa/press-release/file/1215851/download>; U.S. Department of Justice, Tower Research Capital LLC Agrees to Pay \$67 Million in Connection With Commodities Fraud Scheme, available at <https://www.justice.gov/opa/pr/tower-research-capital-llc-agrees-pay-67-million-connection-commodities-fraud-scheme> (Nov. 7, 2019); U.S. Commodity Futures Trading Commission, CFTC Orders Proprietary Trading Firm to Pay Record \$67.4 Million for Engaging in a Manipulative and Deceptive Scheme and Spoofing, available at <https://www.cftc.gov/PressRoom/PressReleases/8074-19> (Nov. 7, 2019).

[19] U.S. v. Tower DPA at 7; 7 U.S.C. § 6c(a)(5)(C).

[20] U.S. Commodity Futures Trading Commission in re Tower Research Capital LLP, Order Instituting Proceedings Pursuant to Section 6(c) and 6(d) of the Commodity Exchange Act, Making Findings, and Imposing Remedial Sanctions, available at <https://www.cftc.gov/media/2986/enftowerresearchorder110619/download> (Nov. 6, 2019); U.S. v. Tower Research Capital LLC, Deferred Prosecution Agreement, Criminal No. 19-cr-819 (S.D. Tex. Nov. 6, 2019), available at <https://www.justice.gov/opa/press-release/file/1215851/download>.

[21] The CFTC's statement on the matter reads in full: "When we investigate in parallel with other enforcement authorities, we will work closely with them to avoid duplicative investigative steps. To the extent the CFTC brings an action that includes a monetary penalty, we will ensure that our penalty appropriately accounts for any imposed by any other enforcement body. And when the CFTC imposes disgorgement or restitution, we will give dollar-for-dollar credit for disgorgement or restitution payments in connection with other related actions." U.S. Commodity Futures Trading Commission, Remarks of CFTC Director of Enforcement James M. McDonald at the American Bar Association's National Institute on White Collar Crime, available at <https://www.cftc.gov/PressRoom/SpeechesTestimony/opamcdonald2> (Mar. 6, 2019).

[22] U.S. Commodity Futures Trading Commission, 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, at 4, available at [https://www.cftc.gov/sites/default/files/2018-07/CFTC\\_MOU\\_InformationSharing062818.pdf](https://www.cftc.gov/sites/default/files/2018-07/CFTC_MOU_InformationSharing062818.pdf) (June 28, 2018).

[23] U.S. Commodity Futures Trading Commission, CFTC's Division of Enforcement Issues First Public Enforcement Manual, available at <https://www.cftc.gov/PressRoom/PressReleases/7925-19> (May 8, 2019).

[24] Securities and Exchange Commission, Enforcement Manual, available at <https://www.sec.gov/divisions/enforce/enforcementmanual.pdf> (Nov. 28, 2017); Securities and Exchange Commission, Enforcement Division Annual Report, available

at <https://www.sec.gov/files/enforcement-annual-report-2019.pdf> (Nov. 6, 2019); Harvard Law School Forum on Corporate Governance and Financial Regulation, SEC Adopts Enforcement Manual, available at <https://corpgov.law.harvard.edu/2008/11/05/sec-adopts-enforcement-manual/> (Nov. 5, 2008).

[25] *In re Kemper Financial Services, Inc.*, CFTC Docket No. 94-3 (Oct. 20, 1993); *In re BT Securities Corporation*, CFTC Docket No. 95-2 (Dec. 12, 1994).

[26] *In re Kemper* at \*11 n.4.

[27] *In re JPMorgan Chase Bank*, Admin. Proc. File No. 3-17008, available at <https://www.sec.gov/litigation/admin/2015/33-9992.pdf> (Dec. 18, 2015); *Securities and Exchange Commission v. Banc de Binary Ltd., et al.*, No. 2:13-CV-00993-RCJ-VCF, available at <https://www.sec.gov/litigation/litreleases/2016/lr23481.htm> (D. Nev. Civ. Feb. 23, 2016).

[28] *United States Securities and Exchange Commission v. Crown Forex*, Civil No. 09-3333 (D. Minn. Jan. 25, 2010).

[29] *Securities and Exchange Commission v. 1Pool Ltd.*, Case 1:18-cv-02244, available at <https://www.sec.gov/litigation/complaints/2018/comp-pr2018-218.pdf> (D.D.C. Sept. 27, 2018).

[30] *Commodity Futures Trading Commission v. 1Pool Ltd.*, Case 1:18-cv-02243, available at <https://www.cftc.gov/sites/default/files/2018-09/enf1poolpatrickajeltakecomplaint092718.pdf> (D.D.C. Sept. 27, 2018).

[31] *1Broker, US Lawsuits Settled*, available at <https://1broker.io/?c=en/content/blog&id=89> (March 4, 2019).

[32] *Commodity Futures Trading Commission v. 1Pool Ltd.*, Consent Order for Permanent Injunction, Civil Monetary Penalty, and Other Equitable Relief, Case 1:18-cv-02243-TNM at 14, 15, 16 (D.D.C. Mar. 4, 2019); *Securities and Exchange Commission v. 1Pool Ltd.*, Final Judgment as to Defendants, Case 1:18-cv-02244-TNM at 3 (D.D.C. Mar. 4, 2019).

[33] *Commodity Futures Trading Commission v. 1Pool Ltd.*, Case 1:18-cv-02243-TNM (D.D.C. Mar. 4, 2019); *Securities and Exchange Commission v. 1Pool Ltd.*, Case 1:18-cv-02244-TNM (D.D.C. Mar. 4, 2019).

[34] U.S. Securities and Exchange Commission, SEC and CFTC Charge Options Clearing Corp. With Failing to Establish and Maintain Adequate Risk Management Policies, available at <https://www.sec.gov/news/press-release/2019-171> (Sept. 4, 2019); U.S. Commodity Futures Trading Commission, SEC and CFTC Charge Options Clearing Corp. with Failing to Establish and Maintain Adequate Risk Management Policies, available at <https://www.cftc.gov/PressRoom/PressReleases/8000-19> (Sept. 4, 2019).

[35] U.S. Securities and Exchange Commission *in re OCC*, Order Instituting Administrative and Cease-and-Desist Proceedings Pursuant to Sections 19(h) And 21c of the Securities Exchange Act Of 1934, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order, available at <https://www.sec.gov/litigation/admin/2019/34-86871.pdf> (Sept. 4, 2019); U.S. Commodity Futures Trading Commission *in re OCC*, Order Instituting Proceedings Pursuant to Section 6(c) and 6(d) of the Commodity Exchange Act, Making Findings, and Imposing Remedial Sanctions, available

at <https://www.cftc.gov/media/2396/enfoptionsclearingorder090419/download> (Sept. 4, 2019).

[36] SEC OCC OIP at 22; CFTC OCC OIP at 7.

[37] U.S. Securities and Exchange Commission, SEC Charges International Security-Based Swaps Dealer That Targeted U.S. Investors, available at <https://www.sec.gov/news/press-release/2019-226> (Oct. 31, 2019); U.S. Commodity Futures Trading Commission, CFTC Charges Foreign Trading Platform for Failing to Register with the CFTC, <https://www.cftc.gov/PressRoom/PressReleases/8068-19> (Oct. 31, 2019).

[38] U.S. Securities and Exchange Commission in re XBT Corp, Order Instituting Administrative and Cease-and-Desist Proceedings Pursuant to Sections 19(h) And 21c of the Securities Exchange Act Of 1934, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order, available at <https://www.sec.gov/litigation/admin/2019/33-10723.pdf> (Oct. 31, 2019);

[39] U.S. Commodity Futures Trading Commission in re XBT Corp., Order Instituting Proceedings Pursuant to Section 6(c) and 6(d) of the Commodity Exchange Act, Making Findings, and Imposing Remedial Sanctions, available at <https://www.cftc.gov/media/2926/enfxbtcorpsarfirstglobalcredit103119/download> (Oct. 31, 2019).

[40] SEC XBT Order at 7; CFTC XBT Order at 4.

[41] U.S. Department of Justice, Deputy Attorney General Rod Rosenstein Delivers Remarks to the New York City Bar White Collar Crime Institute, available at: <https://justice.gov/opa/speech/deputy-attorney-general-rod-rosenstein-delivers-remarks-new-york-city-bar-white-collar> (May 9, 2018).