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Survey of Select Topics and Regulatory Developments

By

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This paper surveys some of the recent regulatory developments that have impacted many commodity market participants and Commodity Futures Trading Commission ("CFTC") registrants. Discussed below are: (i) the CFTC's rule amendments to CFTC Regulation 4.7; (ii) National Futures Association ("NFA") rules and reminders related to ongoing membership requirements and filing procedures; (iii) a review of NFA's most recent survey of common deficiencies for its members; (iv) an overview of Congressional discussions and attempts to pass legislation regulating digital assets, including House passage of the Financial Innovation and Technology for the 21st Century Act ("FIT 21"), the recent introduction of Stablecoin legislation, and other developments in the digital assets space; and (v) recent enforcement actions, and regulatory and other initiatives by the CFTC and the Securities and Exchange Commission ("SEC").

I. CFTC Amendments to Rule 4.7

Background

In September 2024, the CFTC amended Rule 4.7[1] to double the monetary thresholds of the portfolio requirement for a "qualified eligible person" ("QEP"). The CFTC also adopted its proposal to permit managers of Rule 4.7 funds of funds to follow an alternative schedule for periodic reporting. The agency did not adopt the portions of the proposal that would have imposed new disclosure and recordkeeping requirements similar to those currently required for

[1] *See* 89 Fed. Reg. 78793 (Sept. 26, 2024).

commodity pool operators ("CPOs") and commodity trading advisors ("CTAs") that do not avail themselves of the Rule 4.7 exemption.

The CFTC originally adopted Rule 4.7 in 1992 to better align its rules with the SEC's Regulation D and SEC rules concerning sophisticated investors. The portfolio requirement monetary thresholds in Rule 4.7 had not been updated since the rule was first adopted. In October 2023, the CFTC proposed amendments to Rule 4.7 that would have: (1) doubled the monetary thresholds of the portfolio requirements for a QEP; (2) required CPOs operating pools and CTAs advising accounts under Rule 4.7 to deliver, and regularly update, an offering memorandum or disclosure document, which would include performance information and a break-even table, conflicts of interest, risks and information regarding fees and expenses; and (3) codified the ability of CPOs of 4.7 funds of funds to follow an alternative periodic account statement reporting schedule.[2] Many of the comments to the proposal supported increasing the monetary thresholds. The commenters also, however, generally opposed the CFTC's proposed disclosure regime for Rule 4.7 CPOs and CTAs. While the final rule does not include amendments to the disclosure obligations, the CFTC noted that it will continue to consider the issue and other regulatory alternatives.

The final amendments to Rule 4.7:

- *Double the monetary thresholds of the portfolio requirements for a QEP*—The final rule amendments increase the "securities and other investments" amount and the "initial margin and option premiums" amount in Rule 4.7(a)(1)(v) to $4,000,000 and $400,000, respectively, to reflect the effects of inflation since Rule 4.7 was adopted.

- *Codify the ability of CPOs of 4.7 funds of funds to follow an alternative periodic account statement reporting schedule*—The final rule amendments permit CPOs of funds of funds to distribute monthly account statements within 45 days of each month-end. This allows CPOs of 4.7 pools that are funds of funds additional time to receive and gather account statement information and to ensure that their pool participants receive more frequent and accurate reporting.

The effective date of the final rule was November 25, 2024. The compliance date for the increased portfolio requirement thresholds is March 26, 2025. The optional monthly account statement reporting schedule for funds of funds CPOs is available to CPOs as of the effective date, November 25, 2024.

[2] *See* 88 Fed. Reg. 70852 (Oct. 12, 2023).

II. NFA Rules and Reminders

NFA Adopts New Rule on Filing Procedures for Member Questionnaire

NFA's new Compliance Rule 2-52 became effective on October 15, 2024. Rule 2-52 mandates new filing procedures for NFA's Member Questionnaire (the "Questionnaire," formerly known as the Annual Questionnaire). Rule 2-52 requires more frequent filings under certain circumstances and, in most cases, requires a listed principal who is also a registered associated person ("AP") to submit any required filing.

Filing and Update Requirements

NFA requires submission of a Questionnaire when a CFTC registrant becomes a member of NFA, and at least annually thereafter. The Questionnaire includes information regarding a member's business and commodity interest activities, and NFA uses the information provided in the Questionnaire in connection with its risk monitoring systems and oversight responsibilities. The current filing obligations with respect to the Questionnaire, as set forth in NFA Bylaw 301, require each member to submit the Questionnaire on an annual basis, and provide that a failure to make the filing will be deemed a request to withdraw from NFA membership.

For all member categories (other than swap dealers and major swap participants),[3] an individual who is both a listed principal and registered as an AP of the member will be required to review, sign and submit the Questionnaire. This new mandate may require certain members to change their submission practices. The submitter will also be required to certify that the answers and information provided in the Questionnaire are materially true, complete and accurate.

Reminder to Notify NFA of Certain CPO or Pool Distress Events

NFA adopted a rule in 2021 to require CPOs to notify NFA upon the occurrence of certain events indicating that a pool may be in distress.[4] Citing then recent market volatility across asset classes, NFA issued a notice in March 2022, reminding NFA members of their obligation to file any required notices in accordance with NFA Compliance Rule 2-50.[5] Pursuant to Rule 2-50, a CPO experiencing any of several "reportable events" must notify NFA by 5:00 p.m. (U.S.) Central Time on the following business day. Importantly, notice to investors is not sufficient.

The notice requirement is designed to assist NFA in identifying CPOs and commodity pools that may be faced with adverse financial situations, and thus potentially unable to meet their

[3] Because swap dealers and major swap participants do not have registered APs, Rule 2-52 would require a principal of such entity to review, sign and submit the Questionnaire.

[4] NFA Compliance Rule 2-50; *see* NFA Notice to Members I-21-15 (Apr. 13, 2021), https://www.nfa.futures.org/news/newsNotice.asp?ArticleID=5346; NFA Notice to Members I-21-20 (June 29, 2021), https://www.nfa.futures.org/news/newsNotice.asp?ArticleID=5377; Proposed NFA Compliance Rule 2-50 and related Interpretive Notice entitled NFA Compliance Rule 2-50: CPO Notice Filing Requirements (Mar. 5, 2021), https://www.nfa.futures.org/news/PDF/CFTC/Proposed-CR-2-50-and-Interp-Notc-CPO-Notice-Filing-Requirements.pdf.

[5] *See* NFA Notice I-22-10 (Mar. 11, 2022), https://www.nfa.futures.org/news/newsNotice.asp?ArticleID=5455.

obligations. It is also worth noting that the SEC recently adopted amendments to Form PF that will require large hedge fund advisers to report information on Form PF related to certain key events, including certain "distress" events, within 72 hours, and require advisers to private equity funds to report certain other information quarterly.[6]

Under Compliance Rule 2-50, any of the following events would be reportable by the CPO of the relevant commodity pool:

- The pool is unable to meet a margin call;
- The pool is unable to satisfy redemption requests in accordance with the pool's governing documents;
- The CPO suspends investor withdrawals or redemptions; or
- A swap counterparty of the pool asserts that the pool is in default.

Rule 2-50 is accompanied by an interpretive notice that clarifies that the rule applies with respect to commodity pools for which the CPO has a reporting requirement to NFA (e.g., Rule 4.7 and full Part 4 pools).[7]

NFA Survey of Common Deficiencies and Member Reminders

In February 2024, NFA released a survey of common deficiencies as an educational tool for its members.[8] NFA highlighted the following requirements and common deficiencies for members:

- *Self-Examination Questionnaire*—Each member is required to review its business on an annual basis, and in accordance with the most recent Self-Examination Questionnaire available on NFA's website.[9]
- *Digital Assets*—Members that engage in activities related to digital assets or their derivatives must comply with disclosure requirements specified in Interpretive Notice 9073.
- *Third-Party Service Providers*—Members must adopt and implement written policies and a supervisory framework designed to provide oversight with respect to any third-party service provider to which a member outsources a regulatory function. The supervisory

[6] *See* https://www.willkie.com/-/media/files/publications/2023/sec_adopts_amendments_to_form_pf_to_enhance_private_fund_reporting.pdf.
[7] *See* NFA Interpretive Notice 9080 – NFA Compliance Rule 2-50: CPO Notice Filing Requirements (June 30, 2021), https://www.nfa.futures.org/rulebook/rules.aspx?Section=9&RuleID=9080.
[8] *See* NFA Notice to Members I-24-04 (Feb. 12, 2024), https://www.nfa.futures.org/news/newsNotice.asp?ArticleID=5621.
[9] *See* https://www.nfa.futures.org/members/self-exam-questionnaire.html.

framework must address activities that include initial risk assessment, onboarding due diligence, ongoing monitoring, and termination. Members are also required to maintain records sufficient to demonstrate compliance with this supervisory requirement.

- *Cybersecurity*—Members are required to establish and maintain a written information systems security program, or ISSP, governing a firm's cybersecurity protocol. Additionally, members must notify NFA upon the occurrence of certain cyber-related incidents via NFA's Cyber Notice Filing System. Cybersecurity training is required for employees both upon hiring and on an annual basis.

- *4.7 Exemption*—CPO members who operate pools under CFTC Rule 4.7 are required to submit a notice of claim exemption with NFA before offering or selling participation in the exempt pool if the claimed relief encompasses relief under 4.7(b)(1). If the relief is restricted to that provided under 4.7(b)(2), (3), and (4), the notice must be filed with NFA before the pool enters into its first commodity interest transaction. CTA members seeking relief under Rule 4.7 for offerings to QEPs must file the notice of claim for exemption before entering into an agreement to direct or guide the customer's commodity interest account.

- *Eligibility for Membership*—In accordance with NFA Bylaw 301, NFA will consider a member's failure to have at least one principal that is registered as an AP to be a request for withdrawal from NFA membership.

- *Pool Financial Reporting; Notification Requirements*—NFA highlighted a number of notice reporting requirements for members, including: (1) notice with respect to a distress event, (2) changes in fiscal year end (for a year end other than the calendar year end), (3) changes in the CPO's independent CPA that has been engaged to audit pool financial statements, (4) extension requests with respect to filing a pool's financial statement, and (5) notices regarding a pool's cessation of trading, including an update to the Questionnaire and a final audit filing.

- *Calculation of Financial Ratios; Annual and Periodic Reports*—NFA provided a reminder that CPOs and CTAs must use the accrual method of accounting and GAAP (or another internationally recognized accounting standard) when computing financial ratios. Subject to a few exceptions, members must release an annual report certified by an independent public accountant to pool participants within 90 days of the pool's fiscal year end. Members must also submit Pool Quarterly Reports ("Form PQR") containing information about the firm and its pools, within 60 days of each calendar quarter end. NFA assesses fines on CPOs for late filings.

- *Pool Relationships; Pool Account Statements*—CPO members operating umbrella-series structures must list the umbrella entity with NFA on its Questionnaire, marking it as such, and claim exemptions at the umbrella level. NFA cautioned CPO members to take special care when establishing relationships in the Questionnaire between master funds and feeder funds, umbrella funds and series, registered investment companies and controlled foreign

corporations, and parent pools and trading subsidiaries. Additionally, with a few exceptions, CPO members are required to deliver monthly or quarterly account statements to pool participants within 30 days of the end of a monthly or quarterly period.

- *CPO Beneficial Ownership Reporting Requirements*—Effective January 1, 2024, pursuant to the Corporate Transparency Act (the "CT Act"), reporting companies were expected to be required to file beneficial ownership information ("BOI") with FinCEN, subject to certain exemptions. A pooled investment vehicle, including a commodity pool, would be considered a reporting company with a BOI reporting obligation unless it qualifies for an exemption under the CT Act.[10] It should be noted, however, that on December 3, 2024, the U.S. district court for the Eastern District of Texas issued a nationwide preliminary injunctions pausing enforcement of the CT Act.[11] The government has since appealed the decision to the Fifth Circuit Court of Appeals,[12] though, as of the date of this writing the case, and ultimate fate of the CT Act, remains unresolved.

III. Current Digital Asset Activity

Digital Asset Market Structure Proposed Legislation (Financial Innovation and Technology for the 21st Century Act)

On July 20, 2023, U.S. House of Representatives Members Glenn Thompson, French Hill, Dusty Johnson, Tom Emmer, and Warren Davidson introduced H.R. 4763, the Financial Innovation and Technology for the 21st Century Act ("FIT 21"),[13] co-sponsored by Chairman Patrick McHenry.[14] On May 22, 2024, the House passed FIT 21.[15] FIT 21 aims to establish a comprehensive statutory framework for the regulation of digital assets. The key objectives of the proposed legislation are to:

- Strengthen the market by protecting digital asset projects;

[10] *See* NFA Notice to Members I-24-20 (Dec. 3, 2024), https://www.nfa.futures.org/newsnotices/newsArticle.aspx?MT=&Topic=&AllYrs=0&Year=2024&ArticleID=5697 and NFA Notice to Members I-23-23 (Dec. 5, 2023), https://www.nfa.futures.org/news/newsNotice.asp?ArticleID=5599. FinCen issued a final rule, effective January 1, 2024, implementing the Corporate Transparency Act's BOI reporting requirement. This new rule aims to combat illicit financial activities while minimizing the burden on entities conducting business in the U.S.

[11] *See* Texas Top Cop Shop v. Garland, No. 4:24-cv-00478-ALM (E.D. Tex Dec. 3, 2024).

[12] *See* Texas Top Cop Shop v. Garland ECF No. 32, No. 4:24-cv-00478-ALM (E.D. Tex Dec. 5, 2024).

[13] *See* Financial Innovation and Technology for the 21st Century Act (May 22, 2024), https://www.congress.gov/118/bills/hr4763/BILLS-118hr4763eh.pdf.

[14] On June 6, 2023, Willkie Farr & Gallagher Senior Counsel and former CFTC Chairman J. Christopher Giancarlo provided testimony before the U.S. House Committee on Agriculture, addressing the future of digital assets and the need for regulatory clarity with respect to digital asset spot markets: https://docs.house.gov/meetings/AG/AG00/20230606/116051/HHRG-118-AG00-Wstate-GiancarloJ-20230606.pdf.

[15] *See* House Passes Financial Innovation and Technology for the 21st Century Act with Overwhelming Bipartisan Support (May 22, 2024), Financial Services Committee, https://financialservices.house.gov/news/documentsingle.aspx?DocumentID=409277.

- Outline clearer roles for the SEC and CFTC in the digital assets space. Under the bill, the SEC would regulate digital assets that are a part of an investment contract or digital-asset securities, while the CFTC would regulate digital assets that are considered digital commodities;

- Establish a process to allow the secondary market trading of digital commodities if they were initially offered as part of an investment contract; and

- Improve consumer protection without inhibiting innovation by strengthening transparency and accountability with market participants.

Although FIT 21 may be altered as legislative negotiations proceed, it offers insight into perspectives on digital asset regulation in the House of Representatives. McHenry has also sponsored legislation designed to establish a comprehensive legal framework for the offer and sale of payment stablecoins.[16]

Responsible Financial Innovation Act and Stablecoin Act

In addition, having previously introduced the broader Responsible Financial Innovation Act (the "RFIA") in 2023, Senators Cynthia Lummis and Kirsten Gillibrand more recently introduced a new stablecoin bill in April 2024.[17] The Lummis-Gillibrand Payment Stablecoin Act aims to balance consumer protection and innovation and combat illicit finance by creating a clear regulatory framework for stablecoin issuers and users. To enhance oversight and mitigate the risk of illicit activities, the proposed legislation would require stablecoin issuers to maintain one-to-one reserves and prohibit unbacked, algorithmic stablecoins. The Stablecoin Act would also preserve the dual banking system by establishing both federal and state regulatory regimes for stablecoin issuers and address custody issues by mandating that crypto assets held in a custodial account be maintained on an off-balance sheet basis and by imposing comprehensive third-party risk management requirements on service providers.

As of January 20, 2025, Republicans will control both houses of Congress, and the White House. Additionally, the new administration is expected to appoint an "AI and crypto czar," and looking forward, there may be more of a coordinated effort to pass some form of crypto regulatory legislation. While FIT 21 and the RFIA may be reintroduced in some form, whether the CFTC becomes the primary regulator tasked with crypto oversight remains an open question, and will ultimately depend on the final form of any crypto legislation.

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[16] *See* Clarity for Payment Stablecoins Act of 2023 (July 27, 2023), https://www.congress.gov/118/meeting/house/116295/documents/BILLS-118-HR4766-M001156-Amdt-3.pdf.

[17] *See* Lummis, Gillibrand Introduce Bipartisan Landmark Legislation to Create Regulatory Framework for Stablecoins (Apr. 17, 2024), Cynthia Lummis Senator for Wyoming, https://www.lummis.senate.gov/press-releases/lummis-gillibrand-introduce-bipartisan-landmark-legislation-to-create-regulatory-framework-for-stablecoins/#:~:text=Protects%20consumers%20by%20requiring%20stablecoin,preserves%20the%20dual%20banking%20system.

Other Crypto News

ETFs

The market for crypto and other digital assets continues to develop. Large financial institutions have signaled increased interest in crypto-related businesses. After rejecting several applications for a Bitcoin exchange-traded fund ("ETF") the SEC approved the first spot Bitcoin ETF on January 10, 2024.[18] In addition, on May 23, 2024, the SEC approved rule changes that permitted the listing and trading of spot Ether ETFs,[19] and the applications for eight Ether ETFs were approved. As a response to the SEC's announcement, the market price of cryptocurrencies such as Bitcoin and Ethereum improved throughout the first half of 2024, and remained at all-time highs into December 2024.[20]

Oversight and Enforcement

The CFTC and SEC have continued to engage in oversight of crypto exchanges and digital assets. In March 2023, the CFTC charged Binance Holdings Ltd. ("Binance") and its founder Changpeng Zhao with willful evasion of federal law and operating an illegal digital asset derivatives exchange (discussed below), followed by similar SEC charges in June 2023.[21] Also in June 2023, the SEC filed charges against Coinbase, Inc. ("Coinbase"), alleging the company operated as an unregistered securities exchange, broker and clearing agency.[22] In March 2024, Judge Katherine Polk Failla of the U.S. District Court for the Southern District of New York ruled against Coinbase's motion to dismiss the lawsuit.[23]

In the wake of the FTX scandal,[24] federal agencies filed multiple charges against FTX and Sam Bankman-Fried. On December 13, 2022, the CFTC filed charges against Bankman-Fried, FTX, and Alameda, alleging the defendants engaged in fraud and material misrepresentations in

[18] *See* SEC Statement on the Approval of Spot Bitcoin Exchange-Traded Products (Jan. 10, 2024) https://www.sec.gov/news/statement/gensler-statement-spot-bitcoin-011023.

[19] *See* SEC Approves Rule Change to Allow Creation of Ether ETFs (May 23, 2024), CNBC, https://www.cnbc.com/2024/05/23/sec-approves-rule-change-to-allow-creation-of-ether-etfs.html.

[20] *See* June 2024 Crypto Market Outlook Forecast (June 3, 2024), Forbes Advisor, https://www.forbes.com/advisor/investing/cryptocurrency/crypto-market-outlook-forecast/.

[21] *See* CFTC Press Release 8680-23 (Mar. 27, 2023), https://www.cftc.gov/PressRoom/PressReleases/8680-23; SEC Press Release 2023-101 (June 5, 2023), https://www.sec.gov/news/press-release/2023-101; SEC Press Release 2023-101 (June 5, 2023), https://www.sec.gov/news/press-release/2023-101.

[22] *See* SEC Press Release 2023-102 (June 6, 2023), https://www.sec.gov/news/press-release/2023-102.

[23] *See* Coinbase Loses Most of Motion to Dismiss SEC Lawsuit (Mar. 27, 2024), Yahoo Finance, https://finance.yahoo.com/news/coinbase-loses-most-motion-dismiss-141113062.html?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuZ29vZ2xlLmNvbS8&guce_referrer_sig=AQAAAHIY_mu9qnOKl3UA3IYvinwa9LlGP7Hw5PgDks0ibmfMFtK7iI7qXd7-1PeWFIsOexGm3-NPSL-ypeo0WMk03bx4-fBdyTFWyRaZpz_NMbdWFZJVJJohK4bNGMx-9sFuYLACAx3RuDniGu1FViSwfgh3_RWPECObsIa0nGmbRLlx.

[24] *See* Why Did FTX Collapse? (Nov. 10, 2022), The New York Times, https://www.nytimes.com/2022/11/10/technology/ftx-binance-crypto-explained.html; The FTX Collapse Explained (Nov. 18, 2022), NBC News, https://www.nbcnews.com/tech/crypto/sam-bankman-fried-crypto-ftx-collapse-explained-rcna57582.

connection with the sale of digital commodities in interstate commerce, resulting in the loss of over $8 billion in FTX customer deposits.[25] Bankman-Fried was ultimately convicted on all counts on November 2, 2023. He was sentenced to 25 years in prison and ordered to pay $11 billion in forfeiture on March 28, 2024.[26]

IV. CFTC Registration; Enforcement and Litigation

CFTC v. Ikkurty (No. 22-CV-02465; N.D. Ill.)

On July 1, 2024, the U.S. District Court for the Northern District of Illinois granted summary judgment to the CFTC in *CFTC v. Ikkurty* (No. 22-CV-02465; N.D. Ill.), ordering over $83.7 million in restitution and $36.9 million in disgorgement jointly and severally against Sam Ikkurty and his companies.[27] The court found that Ikkurty and his companies committed multiple violations of the Commodity Exchange Act ("CEA") and CFTC regulations, including fraud and failure to register as CPOs. Notably, this order not only held that Bitcoin and Ethereum are commodities within the jurisdiction of CFTC but also extended this classification to two lesser-known cryptocurrencies, OHM and Klima, reasoning that these "cryptocurrencies share a 'core characteristic' with 'other commodities whose derivatives are regulated by the CFTC,' namely, that they are 'exchanged in a market for a uniform quality and value.'"[28]

CFTC v. Donelson (No. 23-1809; USCA, Seventh Circuit)

On September 5, 2024, the U.S. Court of Appeals, Seventh Circuit, affirmed in part, and reversed in part, the U.S. District Court for the Northern District of Illinois prior grant of summary judgment against Long Leaf Trading Group ("LLTG") and James Donelson. Specifically, the Seventh Circuit remanded to the district court to reconsider whether the exemption from CTA registration in CFTC Rule 4.14(a)(6) was applicable to LLTG.

LLTG, a registered introducing broker ("IB"), provided trade recommendations related to commodities markets to its customers, yet did not provide its customers with disclosures related to CTA activity. James Donelson was the CEO of LLTG. The CFTC, following an investigation into LLTG's practices, filed a civil enforcement action against LLTG and Donelson, and others, charging options fraud, CTA fraud, fraudulent advertising by a CTA, failure to register as a CTA, failure to provide CTA disclosures, and failure to register as APs. The CFTC moved for summary judgment in November 2021, and the district court granted summary judgment on all counts, except the count related to AP registration. Donelson appealed the district court's grant of summary judgment.[29]

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[25] *See* CFTC Press Release 8638-22 (Dec. 13, 2022), https://www.cftc.gov/PressRoom/PressReleases/8638-22.
[26] *See* U.S. Department of Justice Office of Public Affairs Press Release 24-366 (Mar. 28, 2024), https://www.justice.gov/opa/pr/samuel-bankman-fried-sentenced-25-years-his-orchestration-multiple-fraudulent-schemes.
[27] *See* CFTC Press Release 8931-24 (July 3, 2023), https://www.cftc.gov/PressRoom/PressReleases/8931-24.
[28] Commodity Futures Trading Comm'n v. Ikkurty, No. 22-CV-02465, 2024 U.S. Dist. LEXIS 115458, at *13 (N.D. Ill. Jul. 1, 2024).
[29] *See* Commodity Futures Trading Commission v. Donelson, No. 23-1809 (7th Cir. 2024).

The district court found that LLTG acted as a CTA, and failed to register. Donelson claimed that LLTG was exempt from CTA registration under CFTC Rule 4.14(a)(6), which provides registration relief to a registered introducing broker that provides trading advice "solely in connection with its business as an introducing broker." The Seventh Circuit remanded the case to the district court, indicating that the district court should first determine whether the exemption is applicable under the facts of the Donelson case. The Seventh Circuit opinion suggested that the application and availability of the exemption would turn on whether LLTG provided commodity trading advice to any non-brokerage customers. In remanding, the Seventh Circuit summarized as follows:

> The record contains much evidence of the trading advice Long Leaf provided to its brokerage customers through . . . its trading programs. But we have not located any evidence of Long Leaf providing trading advice to non-brokerage customers. Nor have we located any evidence of Long Leaf providing advice on matters not within the scope of its role in soliciting or accepting buy/sell orders for commodities. . . . We cannot say that, in the light most favorable to Donelson, the evidence shows that Long Leaf provided trading advice outside its business as an introducing broker. But a deeper review consistent with the text of Regulation 4.14(a)(6) might reveal new evidence that does so demonstrate.

The CFTC has long held that registration in one category (for example, as an IB), does not necessarily satisfy registration in another CFTC registration category (as a CTA). The availability and applicability of the CTA registration exemption for IBs requires, in addition to IB registration, that any trading advice be solely in connection to the registrant's business as an IB. The court's reasoning here implies that if the facts ultimately support a finding that LLTG provided any commodity-related trading advice to a non-brokerage customer, Rule 4.14(a)(6) would be unavailable to LLTG, notwithstanding its registration as an IB.

SEC and CFTC Adopt Amendments to Form PF

In February 2024, the SEC and the CFTC jointly adopted amendments to Form PF. The amount of information required to be included on Form PF has been expanded. Amended Form PF will (i) increase reporting requirements of large hedge fund advisers and qualifying hedge funds, (ii) expand reporting on basic information about advisers and the private funds they advise, (iii) require more detailed information about the investment strategies, counterparty exposures, and trading and clearing mechanisms employed by hedge funds, and (iv) generally require large hedge fund advisers to report information on a disaggregated basis for master-feeder funds and parallel funds.[30] Notably, in a change from the proposal, the SEC and the CFTC did not adopt a

[30] *See* https://www.willkie.com/-/media/files/publications/2024/03/sec_and_cftc_adopt_substantial_amendments_to_form_pf.pdf#:~:text=The%20Amendments%20amend%20Form%20PF,as%20Form%20PF%20currently%20requires.

definition of "digital assets," though the amendments do require hedge fund advisers to report certain information about digital assets.

Certain of the changes in the amendments overlap with disclosures currently included in CFTC Form CPO-PQR, such as information regarding withdrawals and redemptions, identifying sub-asset classes and portfolio exposures, counterparty exposures, and providing monthly performance information. The amendments also will make certain timing changes that more closely align Form PF with Form CPO-PQR. While these changes may be thematically consistent with the information already provided in Form CPO-PQR, the presentation between the forms continues to differ.

SEC Amends Regulation S-P to Bolster Cybersecurity Requirements

On May 16, 2024, the SEC announced the adoption of amendments to Regulation S-P that expand data security and breach notification obligations for covered institutions.[31] The NFA has for a number of years required its members to adopt and enforce an "information systems security program" or "ISSP," including an incident response plan.[32] The SEC proposed the amendments to Regulation S-P in March 2023, stating that the proposals are necessary due to changes in technology and the ways that companies collect, use, share, and secure data about their customers. Covered institutions have either 18 or 24 months (depending on whether they are a "large entity," as defined by the SEC) to comply with these and other aspects of the amended Regulation S-P after it is published in the Federal Register.

Specifically, amended Regulation S-P covers four key points:

- Expands the scope of information to which Regulation S-P applies via the new term "customer information;"
- Requires covered institutions to develop, implement, and maintain written policies and procedures for an incident response program that is "reasonably designed to detect, respond to, and recover from unauthorized access to or use of customer information;"
- Establishes a notification requirement in the event of unauthorized access to sensitive customer information; and
- Imposes service provider due diligence and oversight requirements.

Notably, certain private funds and private fund advisers may already be subject to existing cyber-related rules and to the reporting obligations of other federal agencies and member organizations. NFA members are required to promptly report cyber incidents to NFA under certain

[31] *See* https://www.willkie.com/-/media/files/publications/2024/05/the_sec_amends_regulatons_s-p_to-bolster_cybersecurity_requirements.pdf.

[32] *See* NFA Interpretive Notice 9070, NFA Compliance Rules 2-9, 2-36 and 2-49: Information Systems Security Programs (eff. Mar. 1, 2016).

circumstances, including where a notice is provided to customers as required by state or federal law.[33] The SEC noted that private funds may be subject to the FTC Safeguard Rule's breach notification requirements.

CFTC Advisory on the Use of AI

On December 5, 2024, CFTC Staff issued an advisory on the use of artificial intelligence ("AI") by CFTC-registered entities and registrants (the "AI Advisory").[34] The CFTC had previously issued a request for public comment on the use of AI in markets regulated by the CFTC on January 25, 2024.[35] The AI Advisory, while recognizing the potential use cases and benefits of AI related to registrants and the derivatives markets, reminds registrants and market participants that they must maintain compliance with CFTC rules and regulations notwithstanding "whether they choose to deploy AI or any other technology, either directly or by a third-party service provider." Registrants and market participants should assess the risks associated with the use of AI, and ensure that policies and procedures are updated to reflect the use of AI. While the CFTC recognizes that AI can offer cost reduction and enhanced efficiency and performance, it also acknowledges the potential risks associated with AI, such as risks related to market manipulation, fraud, governance, data quality, privacy, bias, and consumer protection.[36]

The AI Advisory provides a non-exhaustive list of regulatory requirements that may be impacted by the use of AI, including:

- **DCM, SEF and SDR** order processing and trade matching, market surveillance and systems safeguards;
- **DCO** system safeguards, member assessment and interaction, and settlement; and
- **FCM, SD, CPO, CTA, IB, RFED and AP**, risk assessment and risk management, compliance and recordkeeping and customer protection.

CFTC Staff further indicated that it intends to maintain an ongoing dialogue with registrants and market participants, included in routine exams, regarding the use of AI, and continue to consider and evaluate the need for AI regulation and further guidance. Commissioner Johnson, in a Public Statement related to the AI Advisory, reiterated her call for heightened civil monetary penalties to deter fraudulent actors, and proposed the creation of an

[33] *See* https://www.willkie.com/-/media/pwa/articles/client-alerts/20181214-nfatorequirecyberbreachreporting.pdf.
[34] *See* CFTC Letter No. 24-17, CFTC Staff Advisory: CFTC-Registered Entities and Registrants; Use of Artificial Intelligence in CFTC-Regulated Markets (Dec. 5, 2024).
[35] *See* CFTC Press Release 8853-24 (Jan. 25, 2024), https://www.cftc.gov/PressRoom/PressReleases/8853-24.
[36] *See, e.g.,* AI: Decoded: A Dutch Algorithm Scandal Serves a Warning to Europe – The AI Act Won't Save Us (Mar. 30, 2022), Politico, https://www.politico.eu/newsletter/ai-decoded/a-dutch-algorithm-scandal-serves-a-warning-to-europe-the-ai-act-wont-save-us-2/.

interagency task force that develops benchmarks and guidelines for the use and regulation of AI in the financial services industry.[37]

[37] *See* Statement of Commissioner Kristin N. Johnson on Future-Proofing Financial Markets: Assessing the Integration of Artificial Intelligence in Global Derivatives Markets (Dec. 5, 2024), https://www.cftc.gov/PressRoom/SpeechesTestimony/johnsonstatement120524; and, Speech of Commissioner Kristin Johnson: Building A Regulatory Framework for AI in Financial Markets (Feb. 23, 2024), https://www.cftc.gov/PressRoom/SpeechesTestimony/opajohnson10.