

An hourglass with blue sand is centered in the frame against a solid blue background. The sand is flowing from the top bulb to the bottom bulb. The hourglass is made of clear glass, and the sand is a vibrant blue color. The lighting is soft, creating a slight shadow of the hourglass on the background.

This webinar will begin shortly.

FIA



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CTA, IB or SEF?

**IT'S A BIRD, IT'S A PLANE, IT'S A
SEF!**

23 February 2023



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Summary

- *The webinar will cover the CFTC Division of Market Oversight SEF Advisory issued in September 2021 and related CFTC enforcement orders including last fall's order against Asset Risk Management, and the practical implications of those actions for CTAs, IBs, and their clients.*
- *The speakers will discuss the Advisory and enforcement orders in the context of the CFTC's SEF rulemaking, and how the line has become blurred between swap execution services that CTAs and IBs may perform for clients and trading platforms that are regulated in a very different manner as organized markets.*
- *The speakers will highlight special regulatory issues and compliance challenges now facing CTAs and IBs (along with other CFTC registrants) and their clients.*
- *Finally, the speakers will briefly describe SEC and ESMA rulemaking proposals to expand the elements defining certain types of organized markets to encompass use of communication protocols.*

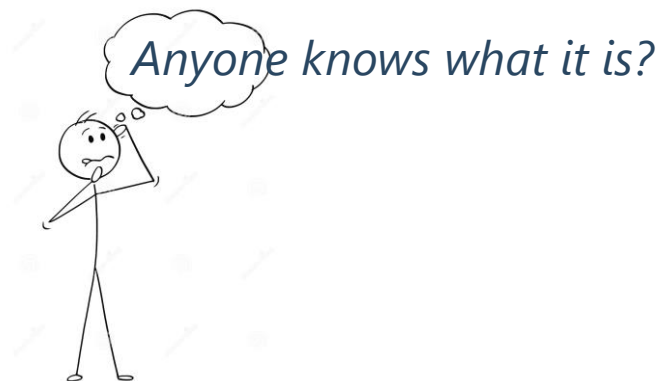


Agenda of Topics

1. SEF Definition: CEA definition and CFTC guidance in 2013
2. DMO 2021 SEF Advisory
3. Symphony and ARM Enforcement Orders
4. Procedural Concerns
5. Implications for CTAs, IBs and Others
6. Balancing of Policy Considerations
7. SEC and ESMA proposals to broaden definitions of organized markets to include communication protocols



1. SEF Definition





SEF Regulations

- Before Dodd Frank there existed a commodity exchange (designated contract market – DCM) and a variety of regulated, semi-regulated and exempted trading venues – all of these (except for DCM) were rolled into one.
- Dodd Frank added the definition of the swap execution facility (SEF) to the Commodity Exchange Act (CEA).
- In 2013 the CFTC implemented its final SEF rule that further defined SEFs.
- In 2018 the CFTC proposed but subsequently formally withdrew its proposed amendments to: (i) significantly expand the scope of a SEF; (ii) as well as qualify other market participants (such as CTAs, IBs) as SEFs.
- In September 2021 the CFTC's Division of Market Oversight (DMO) issued an advisory that essentially codified and seems to go beyond the 2018 withdrawn proposed SEF rule by asserting that the CFTC had applied its 2018 interpretation all along since 2013.



SEF Definition

- The 2013 SEF rule (codified as Part 37 of CFTC regulations) requires an entity to register as a SEF if it qualifies as:
 - *A trading system or platform in which **multiple participants** have the **ability to execute** or trade swaps by accepting bids and offers made by **multiple participants** in the facility or system, **through any means of interstate commerce**, including any trading facility, that – (A) **Facilitates the execution** of swaps between persons; and (B) is not a designated contract market.*
- 2013 adopting release provides guidance, but contains no discussion at all on whether traditional brokerage activities of IBs or CTAs could make them SEFs. Even **acknowledges** in places that brokerage activities could co-exist. Also stated that one-to-one and one-to-many (single dealer) are **not** SEFs.



Other Related Definitions

- “**Designated Contract Market**” (DCM) – is not defined, but referred to in § 5 of the CEA as a “board of trade.”
- A “**Board of Trade**” is defined as – any organized exchange or a “trading facility.”
- An “organized exchange” is not defined, but “**Trading Facility**” is defined.
- A “**facility**”, “**system**”, “**trading system**”, or “**platform**” as used in the SEF definition are not defined.



Not surprising there is some confusion regarding what exactly is a SEF



Two conceptual views on what is a SEF

The Broad Interpretation

- Congress could have said that a SEF is a “trading facility” or a “board of trade”, but instead it only referred to “... , *including any trading facility, ...*” meaning that the concept of a SEF is broader
- Because not exclusively a “trading facility”, exclusions in its definition (§ 1a(51)(B)) do not apply (a negotiation facility, or acceptances of bids of offers are not binding)
- Instead of stating “execute or trade” Congress chose “*ability to execute or trade*”
- Instead of “physical or electronic” (as for “trading facilities”) refers to “*any means of interstate commerce*”
- “*facilitates the execution of swaps*” is broader than “executes” swaps

The Narrow Interpretation

- There needs to be an interaction between *multiple participants* in accepting bids and offers made by other multiple participants
- Reference to a “*trading facility*” is not a list, but a qualifier for the entire definition because logically executing through a “trading facility” is one of the “means of interstate commerce” – otherwise the language is redundant
- Even though a SEF is not equal to a “trading facility”, the exclusions should apply because the terms “facility” and “system” are used in the “trading facility” definition
- A SEF needs to be a “*trading system*” or “*platform*” or a “*facility*” in plain meaning of these terms
- “facilitates the execution of swaps” is only a part of the definition



A Two-Step Process to Comply as SEF

- First, an entity ***must meet the definition of a SEF*** (deliberately or inadvertently) (CEA § 5h(a)(1) and CFTC Part 37.3(a)(1)).
 - Second, it needs to make ***a compliance decision***:
 - If the entity wants to become a registered SEF, it must comply with a set of CFTC requirements to become eligible for SEF registration; or
 - If the entity does not want to become a SEF, it must stop acting as a SEF (or face CFTC's enforcement action).
- **The focus of our discussion today – the blurred line between entities that do not believe they are SEFs and SEFs.**



Pre-trade Price Transparency vs. Trade Execution Requirement

- SEFs ***promote pre-trade*** price transparency
 - No registration to solely provide post-trade processing
 - Required execution methods for Required Transactions
- When it adopted the SEF Rules in 2013, CFTC acknowledged that CEA Sections 2(h)(8) and 5h(d)(2) narrow the SEF registration requirement.
 - 2(h)(8): The 2-step process to designate swaps that must be traded on a SEF (absent an exclusion)
 - 5h(d)(2): “[f]or all swaps that are not required to be executed through a swap execution facility . . . such trades may be executed through any other available means of interstate commerce[,]”
- The CFTC in 2013 for the avoidance of doubt added Footnote 88 clarifying that an entity could qualify as a SEF even if it trades swaps that are not required to be cleared or traded on a SEF.



On SEF vs. Flexibility to Trade Off-SEF

78 FR 33483 (2013):

“The Commission also clarifies that swap transactions that are not subject to the CEA section 2(h)(8) trade execution requirement may be executed on either a registered SEF (i.e., a facility that meets the SEF definition) or an alternative entity that is not required to register as a SEF (e.g., see one-to-many system or platform discussion below). This clarification is consistent with the Commission’s acknowledgement in the SEF NPRM that swap transactions that are not subject to the CEA section 2(h)(8) trade execution requirement would not have to be executed on a registered SEF.”

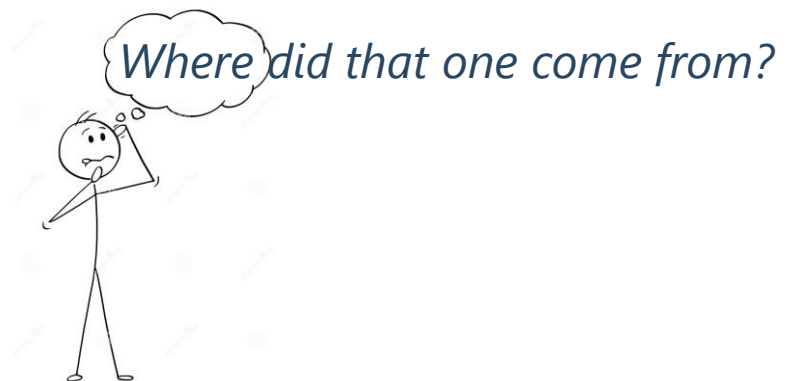


Registered Entities vs. Registrants

- Registered entities (CEA and Rule 1.3): DCMs, SEFs, DCOs, SDRs
 - DCMs and SEFs as organized markets with SRO responsibilities and open access requirements.
- Registrants (CFTC Rule 1.3): CPO, CTA, FCM IB, LTM, floor broker, floor trader, MSP, RFED, SD, or an AP of any of the foregoing (other an SD or MSP).
 - Must belong to NFA
 - Actively engage with clients to provide specialized services
- CEA does not contemplate that a single entity could be both a registered entity and a registrant. The regulatory approaches are incompatible and redundant.



2. DMO SEF Advisory





CFTC Staff Advisory “Clarifies” Activities Potentially Triggering SEF Registration Requirement

- **September 29, 2021: CFTC Letter No. 21-19.** CFTC’s DMO issued a Staff Advisory “clarifying” that “certain trading activities may trigger compliance with the SEF registration requirement in the [CEA] and CFTC regulations.”
- Issued the same day the CFTC filed (and concurrently settled) charges against an entity that offered trading-related electronic communication services for failing to register as a SEF.
- Defendant’s platform described as “a technological tool for automated [RFQ] workflow for interest rate and cross currency swaps,” which enabled “multiple swap market participants to select swap product parameters, such as swap type, clearing preference, tenor, and notional size to populate RFQs.”



When an Entity Might Need to Register as a SEF According to Staff Advisory

Entities that are:

- (1) facilitating trading or execution of swaps through one-to-many or bilateral communications;
- (2) facilitating trading or execution of swaps not subject to the trade execution requirement in CEA § 2(h)(8);
- (3) providing non-electronic means for the execution of swaps; or
- (4) currently registered with the CFTC in some other capacity, such as a CTA or an IB, if its activities fall within the SEF definition.

No discussion on what is a “trading system”, “platform” or “facility”.

Summary Interpretation of SEF Rules

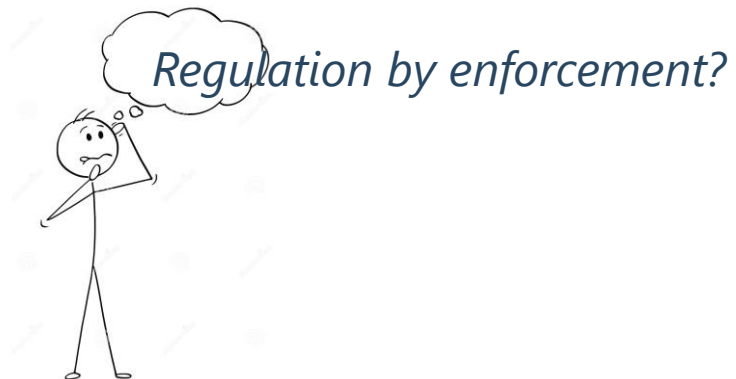
Existing Version (2013)

- *"multiple participants"*
- *"have the ability"*
- *"through any means of interstate commerce"*
- *"trading facility or platform"*
- the rule is self-effectuating

Advisory Version (2021)

- *"bilateral, or one-to-one, or one to many communications"*
- *"chat function"* Deemed to facilitate the execution of swaps
- *"facilities offering non-electronic methods of trading"*
- *"registered entities"*
- *"relevant facts and circumstances"* FN 16 advises to reach out to the CFTC for further clarification if a "facility for trading or processing of swaps" is a SEF and required to register

3. Enforcement and Registration Orders





The Symphony Settlement

Sept. 29, 2021 In re Symphony Communication Services, LLC

- Settlement issued on the same day as the Advisory
- Not registered in any capacity with the Commission (not that this matters)
- Symphony operated a communications platform - the "SPARC Tool"
- Multiple swap market participants could prepare and send RFQ messages to multiple others.
- Parties could negotiate and confirm prices via the SPARC Tool.
- The CFTC found that Symphony should have been registered as a SEF or a DCM.



AEGIS SEF Order of Registration

- **July 20, 2022. AEGIS SEF, LLC Registration as a Swap Execution Facility**
- “The CFTC issued the order under Section 5h of the Commodity Exchange Act (CEA) and CFTC Regulation 37.3(b). After review of AEGIS SEF’s application and associated exhibits, the CFTC determined AEGIS SEF demonstrated its ability to comply with the CEA provisions and CFTC regulations applicable to SEFs.”
 - “It has been over 10 years since the Dodd-Frank Act was passed. We must finally take action to fix unworkable rules by codifying “perpetual” no-action relief through notice-and-comment rulemaking as required by the Administrative Procedure Act. We must be as demanding on ourselves as we are on our registered entities and registrants—we must put in the hard work to comply with the letter of the law.”
Commissioner Pham
 - Both Commissioners Pham and Mersinger demanded that CFTC follows proper rulemaking procedures instead of ad hoc letters or advisories.



The ARM Settlement

Sept. 26, 2022 In re Asset Risk Management LLC

- Registered CTA providing advice to oil and natural gas producers to mitigate price risks.
- Clients could ask ARM to obtain pricing for a particular type of commodity swap.
- ARM would check with the one or more counterparties with whom the client had an agreement
- If ARM had discretion, it could approve the transaction.
- If ARM did not have discretion, ARM might join the client on a call to agree the terms of the deal.
- The CFTC found that ARM operated a multiple-to-multiple trading system that should have been registered as a SEF.



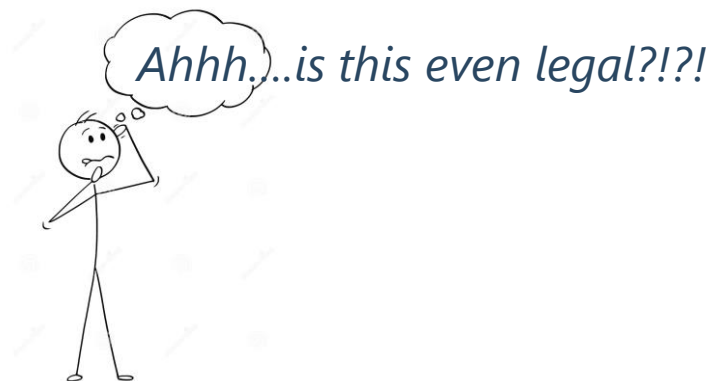
Significance of ARM Precedent

From the ARM press release –

- “Failing to register as required by the CEA impairs the CFTC’s ability to monitor swap markets and threatens the integrity of the industry,” said Acting Director of Enforcement Gretchen Lowe. “The Division of Enforcement will continue to bring actions against firms that are operating unregistered swap execution facilities, including those offering non-electronic methods of trading.”
- The Advisory p 3 states: “The SEF definition is not limited to a specific method of execution on the facility. Thus, facilities that . . . offer only non-electronic methods of trading may [be] a SEF.”



4. Procedural Concerns





Cost-Benefit Considerations: CEA Section 15(a)

- CFTC must consider costs and benefits of the regulations it adopts.
- SEF Advisory: No cost-benefit analysis.
- Cannot piggyback on the analysis in the 2013 rulemaking; that applied to a narrower interpretation of the SEF registration requirement.
 - No analysis on costs to IBs, CTAs or others outside the SEF registration requirement articulated in the 2013 Part 37 adopting release.
 - Discussion presupposed firms that had to register knew who they were, had platforms for trading swaps in place, and “the additional costs of modifying a platform to comply with the Commission’s regulations to implement the statute represent a relatively modest proportion of these costs.”



Potential APA Issues with Staff Advisory

- Staff Advisory is controversial from an Administrative Procedure Act (APA) perspective, given that the Staff Advisory addresses some of the same issues the unenacted – and **officially withdrawn** – 2018 proposed rule sought to address, without notice-and-comment rulemaking.
- Although an agency can change an interpretation without notice and comment rulemaking, that must be done by the agency itself, i.e., not its staff.
- In addition to procedural issues, there is the substantive question whether the staff interpretation is a reasonable interpretation of the statutory SEF definition.



Potential APA Issues with Staff Advisory, cont'd

- **2013 SEF rule:**

- “The Commission continues to believe that a one-to-many system or platform on which the sponsoring entity is the counterparty to all swap contracts executed through the system or platform would not meet the SEF definition in section 1a(50) of the Act and, therefore, would not be required to register as a SEF under section 5h(a)(1) of the Act.”

- **2021 DMO Staff Advisory:**

- “[A] facility may satisfy the multiple-to-multiple prong even if (i) the facility permits only bilateral, or “one-to-one,” communications, and (ii) multiple participants cannot simultaneously request, make or accept bids and offers from multiple participants. Similarly, a facility may satisfy the multiple-to-multiple prong if the facility permits only “one-to-many” communications from which multiple participants can initiate a one-to-many communication.”

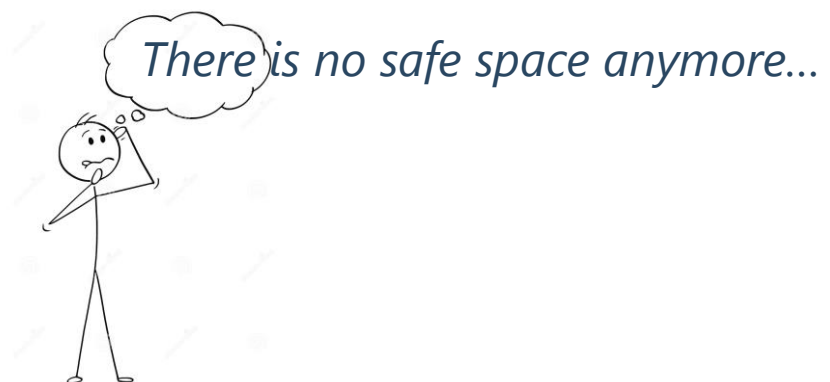


Potential Retroactive Application of Staff Advisory

- From DMO's perspective, the September 2021 Staff Advisory was a clarification of the CFTC's interpretation of the SEF definition in the original 2013 SEF rule.
- Given that perspective, the CFTC could take the position that the newly "clarified" interpretation of the rule has retroactive application.
- The CFTC's Division of Enforcement could bring enforcement actions against facilities that believed they were in compliance with the 2013 SEF registration rule but would now fall within the definition of a SEF as interpreted in the Staff Advisory.



5. Implications for CTAs, IBs and Others





Commodity Trading Advisor

- Generally, any person who
 - For compensation or profit
 - Advises others
 - As to the value of or the advisability of trading in commodity interests, including futures, options on futures, swaps
- Generally, a CTA is subject to
 - Disclosure
 - Recordkeeping
 - Fitness Standards
 - May not hold customer funds
 - Customer must open account with FCM; establish swap counterparty relationship(s)



Common CTA activities

- A CTA generally advises multiple customers, pursuant to one or more trading strategies.
- Each CTA customer may have multiple trading accounts at FCMs, and may have ISDA (or other OTC swap) documentation in place with more than one swap dealer.
- CFTC Rules exempt a CTA from registration as an introducing broker where the CTA's execution services are on behalf of the CTA's advisory clients.
 - No per-trade compensation.
- In other words, execution is incidental to the CTA activity.
- Clients expect their CTA to obtain the best available price
 - Basically necessitates obtaining multiple quotes
- The CTA is not a principal in the transaction.



Commodity Pool Operator

- Generally, any person who
 - Solicits funds or other property for
 - An investment trust, syndicate or similar form of enterprise
 - For the purpose of trading in commodity interests, including futures, options on futures and swaps
 - CPO can be CTA to its own pools
- Generally, CPO is subject to
 - Disclosure
 - Reporting
 - Recordkeeping
 - Fitness Standards
 - May hold customer funds in the name of a pool (bank, brokerage accounts)
 - Pool has trading account with FCM for futures
 - Pool trades swaps via SEF or OTC
 - Periodic and annual reporting to investors and NFA
 - Prohibitions on certain loans
 - Certain notification requirements to NFA



Common CPO activities

- Like a CTA, a CPO may operate and advise multiple customers in the form of commodity pools.
- Pools may have different strategies,
 - but at times, establish similar positions
- Each commodity pool may have multiple trading accounts at FCMs, and may have ISDA (or other OTC swap) documentation in place with more than one swap dealer.
- CFTC Rules exempt a CPO from registration as an introducing broker where the CPO's execution services are on behalf of the pools it operates.
- In other words, execution is incidental to the CPO activity.
- Pool investors expect the pool's CPO/CTA to obtain the best available price
 - basically necessitates obtaining multiple quotes
- The CPO is not a principal in the transaction.



Introducing Broker

Generally, any person who—

- is engaged in soliciting or in accepting orders for—
- the purchase or sale of commodity interests, including
 - futures
 - option on futures
 - swaps
- And who does not hold customer funds

Generally, IBs are subject to

- Risk Disclosure
- Capital Requirements
- Recordkeeping
- Fitness Standards
- Restrictions against holding customer funds
- Requirements with respect to introducing accounts to an FCM or swap counterparty



Common IB Activities

- IBs assist their customers in executing transactions in commodity interests.
- IBs generally are compensated for each transaction that they help effect.
- Customers expect their IBs to have multiple relationships in the market, which helps to source better pricing for the customers.



Addressing the Activities of IBs

- The Staff Advisory's fourth "clarification" specifically notes that SEF registration might be required of entities such as commodity trading advisors (CTAs) and introducing brokers (IBs).
- Not the first time CFTC has suggested that IBs might be acting as unregistered SEFs.
 - In 2018, the CFTC proposed but never finalized a rule that would have similarly interpreted the SEF registration requirement – and thus, in practice, what constitutes a SEF. This proposed rule also focused, in part, on the activities of IBs.



Addressing the Activities of IBs

2018 (unenacted) rule proposal:

“Given that these interdealer brokers [registered as IBs] operate trading systems or platforms outside of the SEF regulatory framework that are very similar to the activity that occurs on trading systems or platforms that are located within interdealer brokers’ registered affiliated SEFs, the Commission believes such activity would be more appropriately subject to a SEF-specific regulatory framework.”

“[T]he Commission proposes that swaps broking entities, including interdealer brokers, that offer a trading system or platform in which more than one market participant has the ability to *trade* any swap with more than one other market participant on the system or platform, shall register as a SEF or seek an exemption from registration pursuant to CEA section 5h(g).”



Real-life stories...

- *Example 1.* A non-US facility designed to provide to US and non-US participants: (a) a space for its participants to post **non-binding bids** and offers for further off-facility execution; and (b) **ability to chat** and discuss the bids and offers before 2018 registered as an IB. Today it is almost certain it would have been required to register as a SEF.
- *Example 2.* A registered swap dealer that runs a back-to-back book of swaps with multiple counterparties who have visibility at available prices **acts as a riskless principal**. Under The Advisory will likely qualify as a SEF.
- *Example 3.* A registered SEF provides a side functionality to allow participants to chat electronically and, among other things, discuss prices on the SEF. It is questionable whether the **“chat” functionality** should be rolled into SEF’s CLOB / RFQ system.
- *Example 4.* A registered CTA provides pricing for swaps and advises on markets trends and offers a service to **assist customers in connecting with multiple swap dealers** to execute these swaps. It is unclear whether this CTA is not a SEF.



Implications for CFTC Registrants

- Can't be both a registrant and a registered entity.
- Registered entities are regulated in a very different way and subject to requirements that are incompatible to the businesses that registrants perform.
 - Open access.
 - SRO responsibilities.
- May have to cease providing brokerage services that other CFTC rules seem to permit.
- Not seeking best prices for clients is contrary to a CTA's fiduciary obligations to its clients.
- Degradation of services provided to clients.
- Unnecessary costs for clients if pre-arranged trades have to be brought to a SEF for confirmation/post-trade processing.
- Risk of enforcement action for relying on 2013 statements as to what triggers the SEF registration requirement.

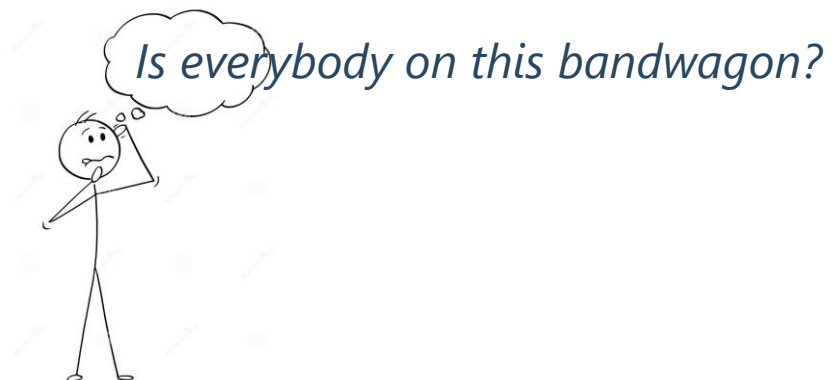


Implications for Market Participants

- Legal uncertainty / confusion around how they should execute their swap transactions.
- May be forced to execute swaps on a SEF that are not subject to the trade execution requirement as a cost to using the services of an IB or CTA.
 - Will incur unwanted/ unnecessary costs to trade on a SEF with no offsetting benefits.
 - Could harm execution quality if trading counterparties do not participate on the SEF.
- Could lose valuable execution support provided by their CTAs and IBs, when they may not have the resources or operational set up to contact their trading counterparties to negotiate and execute swap transactions.



6. Balancing of Policy Considerations – Other Regulators





The new regulatory focus

- SEC and CFTC have recently engaged in a coordinated effort to re-conceptualize what constitutes:
 - A regulated **trading facility** and
 - A regulated **participant** in the market
- These efforts are prompted by the rapidly changing market infrastructure and the advent of the blockchain technology, new digital assets, the drive toward retailification of commodity and derivatives markets and the proliferation of decentralized finance (DeFi).
- Both the SEC and the CFTC need additional regulatory tools to police the digital assets markets.
- The European Securities and Markets Authority (ESMA) and regulators in Asia are engaged in similar efforts.



Overview of SEC's ATS and BD Proposals

- On January 26, 2022 the SEC proposed a rule (Proposal ATS) to:
 1. **Expand the definition of "exchange"** in § 3(a)(1) of the Securities Exchange Act of 1934 (the Exchange Act) by amending § 3b-16 under the Exchange Act; and
 2. Re-propose previous amendments to expand Regulation Alternative Trading Systems (ATS) for government and other securities, required disclosures, filings and fair access.
- On March 28, 2022, the SEC proposed rules to significantly **expand the scope of the broker-dealer definition** (Proposal B-D) and further extend its reach to electronic trading systems not already captured by Proposal ATS.
- On April 6, 2022, the SEC proposed rules on security-based execution and registration and regulation of security-based swap execution facilities. Notably:
 - "the [SEC] preliminarily believes that it should harmonize as closely as possible with the CFTC on foundational terms such as "trading facility," "electronic trading facility," and "order book" because the CFTC's reliance on these terms over several years has created understanding of what type of functionality a SEF must offer."



Existing Definition of “Exchange”

- § 3(a)(1) of the Exchange Act defines an “exchange” as:
 - [A]ny organization, association, or group of persons, whether incorporated or unincorporated, which constitutes, maintains, or provides a **market or facilities** for **bringing together purchasers and sellers** of **securities** or for otherwise performing with respect to securities the functions commonly performed by a stock exchange as that term is generally understood, and includes the market place and the market facilities maintained by such exchange.”
- Rule § 3b-16 further expanded the scope of “exchange” in 1998 in response to technological changes to cover entities that:
 - Bring together the **orders** for securities of **multiple buyers and sellers**, and
 - **Use established, non-discretionary methods** (whether by providing a trading facility or by setting the rules) under which such **orders** interact with each other, and the buyers and sellers entering such orders agree to the terms of a trade.
[existing version of the rule]

Critical Revisions to Rule § 3b-16

Existing Version

- **"orders"**
- "any firm indication of a willingness to buy or sell a security, as either principal or agent, including any bid or offer quotation, market order, limit order, or other priced order" § 3b-16(c)
- **"multiple buyers and sellers"**
- The multi-to-multi requirement not to capture single dealer platforms or bulletin boards
- **"trading facility or setting rules"**
- **"use"**
"established, non-discretionary methods" arguably excluding discretionary methods

Proposed Version

- **"trading interest"**
 - "an order... or ***any non-firm indication*** of a willingness to buy or sell a security that identifies at least the security and either quantity, direction (buy or sell), or price."
- **"multiple"**
 - Deleted to make sure that RFQ systems will be captured
- **"... or communication protocols..."**
 - To capture RFQ systems, indication of interest (IOI) platforms, stream axes, conditional order systems, negotiation chat systems
- **"makes available"**
 - To capture communication protocol systems as well as 3rd party systems functioning as exchanges or providing a marketplace for execution or transactions



Impact of Proposed Revisions to Rule § 3b-16

- The expanded definition of “exchange” will now capture: *RFQ platforms, IOI platforms, chat or communication protocol systems or messaging platforms.*
- The expanded definition also captures **functions collectively performed** by various 3rd party participants, such as, DeFi systems, or systems facilitating digital asset blockchain transactions
 - (so long as these transactions involve securities).
- All existing platforms need to be **re-examined for compliance**, including those relying on the “old” definition of “exchange”.
- If the rule becomes effective, many additional platforms will need to register as: (i) exchanges or (ii) broker-dealers and comply with Reg ATS.



Proposal B-D

- As a companion to Proposal ATS, the SEC also sought to expand the scope of broker-dealer designation by further defining the phrase “**as part of regular business**” for purposes of the statutory definition of “dealer” and “government securities dealer” under § 3(a)(5) and § 3(a)(44) of the Exchange Act.
- Entities that qualify as “dealer” must register as “broker-dealers” and become SRO members.
- The focus of the proposal is to capture entities whose trading activities has the **effect** of providing liquidity in the market, even though they may not intend to be broker-dealers.
- If enacted, the effect will be to capture entities that:
 - Day traders who routinely make roughly comparable purchases and sales of similar securities;
 - Traders who routinely express “trading interests” at or near best available prices on both sides of the market and that are communicated to other market participants; and
 - Traders who earn revenue primarily from capturing bid-ask spreads.



ESMA's Opinion on the Trading Venue Perimeter

- On Feb. 2, 2023, European Securities and Markets Authority (ESMA) after a year-long consultation and review of market participants' comments, published its final guidance that provides a comprehensive discussion of what constitutes a trading venue. The Opinion considered, defined and described the following concepts:
 - "definition of a multilateral system" (a system or facility), "multiple third-party buying and selling interests", "interaction between trading interests", scope of technology providers and communication tools, request-for-quote systems, systems that pre-arrange transactions.

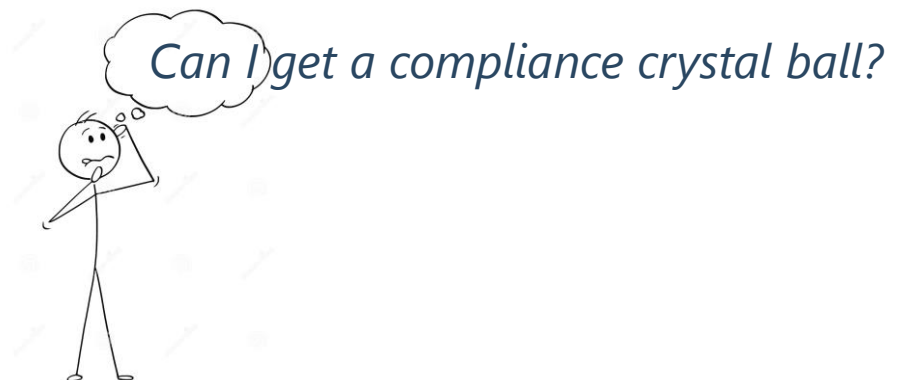


DeFi Platforms also in the Crosshairs

- The first of the clarifications in the SEF advisory as to what activities could trigger SEF registration --- “facilitating trading or execution of swaps through one-to-many or bi-lateral communications” --- is cause for concern not only for IBs but also for the burgeoning DeFi industry.
- Looser conception of the “multiple-to-multiple” requirement could snag DeFi protocols that facilitate one-to-many communications.
- January 3, 2022, In re Polymarket, CFTC found that a DeFi blockchain operated prediction market was unregistered as a DCM or a SEF.
- The Digital Commodities Consumer Protection Act (DCCPA) introduced by Senators Stabenow and Boozman on Aug. 3, 2022. Recent markup.
 - “(24) DIGITAL COMMODITY TRADING FACILITY.— 27 “(A) IN GENERAL.—The term ‘digital commodity trading facility’ means a trading facility ~~that facilitates the execution or trading of~~ **on or through which** digital commodity trades between persons. **are executed.** “(B) Exclusion.—The “(B) EXCLUSIONS.—The term ‘digital commodity trading facility’ does not include a person solely because that person— “(i) validates digital commodity transactions; or “(ii) **develops or publishes software.**”;



7. Conclusions





Takeaways from Registration and Enforcement Orders

- Any platform or facility (registered or unregistered) offering a chat function (even one-on-one) that provides ability to execute swaps would be under scrutiny
- CTAs could be reluctant to transact in OTC markets and introduce customers to bilateral transactions
- Forces SEFs to operate as trade confirmation and reporting facilities
- Forcing CTAs to become SEFs could interfere with their roles as fiduciaries to customers
- Calls into question other intermediary models, such as riskless principals acting as swap dealers or give up brokers

FIA

I am still confused....





Thank you for joining us today!

Upcoming Events & Webinars:



DeFi and Other FI
10:00 – 11:00 AM ET



Law & Compliance Division Conference
Washington, DC