

The Role of Supervisory Failure Claims in the Regulatory Toolkit
A perspective on the potential interplay between Exchange and CFTC enforcement claims

Futures Industry Association
Commodities Conference
Exchange Market Regulation Workshop
October 6, 2025

On March 11, 2025, Acting Chairman Caroline Pham spoke to the priorities of the Commodity Futures Trading Commission (“Commission” or “CFTC”) under her leadership, re-affirming her belief that “it was time for the CFTC to get back to the basics.”ⁱ From an enforcement perspective, this meant “expeditiously resolv[ing]” matters regarding compliance violations, “such as recordkeeping, reporting, or other compliance violations without customer harm or market abuse” to “free up DOE staff to pursue fraudsters and scammers and seek recoveries for victims, whether through disgorgement, restitution, or other measures.”ⁱⁱ Over an ensuing “30-day compliance and remediation initiative or enforcement sprint,”ⁱⁱⁱ the CFTC did just that. In a keynote address on May 15, 2025, Pham catalogued the Agency’s progress, noting that “[i]n only four months, [the Division of Enforcement] dispositioned 50% (representing several hundreds) of its open enforcement matters, including preliminary investigations, investigations, and litigation.”^{iv} And, in response to the compliance initiative, “[o]f approximately two dozen firms that expressed interest in participating in the enforcement sprint, over five matters are, or will soon be, in circulation for a Commission vote on the administrative settlement orders.” Pham’s clarion call spoke to the *areas* of anticipated enforcement focus under her leadership, but it did not necessarily reveal the CFTC’s *philosophy* for policing conduct in its markets. The distinction is potentially a meaningful one given the enforcement program under the previous administration.^v

On October 17, 2023, the CFTC released an enforcement advisory on penalties, monitors and admissions (“2023 Advisory”).^{vi} In connection with the release, then Chairman Rostin Behnam announced, “[a]s our guiding statute sets forth goals of preserving market integrity and protecting the public, it is our duty to ensure that every enforcement action aims to elevate compliance and optimize deterrence.”^{vii} Then Director of Enforcement, Ian McGinley, added, “[a]ccountability and minimizing

future misconduct are important Commission and Division objectives. We cannot keep seeing the same entities before us with the same problems.”^{viii} In a speech that same day, McGinley spoke to the need to set monetary penalties for violations of the Commodity Exchange Act (“CEA”) sufficiently high to combat the perception that enforcement penalties are simply the “cost of doing business.”^{ix} As he explained, “[t]oday, we are announcing that the Division intends to prioritize recidivism as a significant aggravating factor under our existing penalty guidance. This means that recidivists can expect the Division to recommend increased penalties, so that we do not keep seeing the same entities with the same problems.”^x Indeed, “[r]ecidivism will be a significant factor that will influence whether the Division will recommend a corporate compliance Monitor or Consultant.”^{xi}

Bringing this philosophical approach to life, the CFTC announced a settlement with three financial institutions for swaps reporting violations, just weeks prior to the 2023 Advisory. The CFTC charged one of the settling banks \$30 million for “failing to diligently supervise a wide range of its swap dealer activities, and for unprecedented failures regarding swap data reporting and disclosure of PTMMs in violation of multiple sections of the Commodity Exchange Act . . .”^{xii} While the fine was notable, perhaps more significant was the portrayal of the activities in question. In a concurring statement, then Commissioner Christy Goldsmith Romero stated,

I am significantly concerned that [Respondent] is a repeat defendant in federal enforcement cases. [Respondent] has a long history of violating federal laws, getting caught, and then settling with federal agencies . . . These enforcement actions evidence [Respondent]’s culture of non-compliance. Instead of creating a culture where [Respondent] invests in stronger controls and supervision, and then regularly reviews those controls and supervision to ensure that it is not violating the law, [Respondent] has created a culture of being a repeat federal defendant. I am concerned that each settlement for each specific illegal act may be viewed by the defendant in a silo, without painting a larger picture of the failure of corporate culture that is evidenced by repeated enforcement cases. I am also concerned that the defendant may view paying the penalty as a cost of doing business.^{xiii}

Good or bad, fair or unfair, the CFTC's philosophical approach was unambiguous:

- Simply paying the penalty for violations of the CEA and CFTC rules will not suffice;
- Instead, embed and promote a culture that understands and demands compliance with market rules; and
- Build a robust supervisory infrastructure designed not only to detect potential violations once they have happened, but also to promote an approach to doing business designed to deter violations from happening in the first place.

And, arguably, the obligation of diligent supervision / supervisory failure claim was now the tip of the CFTC enforcement spear. Indeed, according to the CFTC's 2023 enforcement results, (i) the Agency collected approximately \$500 million in penalties and disgorgement during Fiscal Year 2023, (ii) nearly 4 out of every 5 dollars collected came from a supervision-related claim, and (iii) the supervision-related claims were often connected to systematic issues and inadequate policies and procedures and vulnerabilities to recidivism.^{xiv}

In the same period, CFTC-regulated futures exchanges were actively reminding participants about their supervisory obligations when trading on the exchanges, and more routinely combining supervisory failure claims with underlying exchange rule infractions in disciplinary actions. For example, in July 2024, the Chicago Mercantile Exchange ("CME") issued a market regulation advisory notice ("MRAN") focused on supervisory obligations, stating,

All parties subject to the jurisdiction of the Exchange pursuant to Rule 418 ("Consent to Exchange Jurisdiction") must take reasonable measures to prevent violations of Exchange rules. Such parties have a duty to develop and diligently enforce supervisory programs that are reasonably designed to detect and deter violations of Exchange rules. The supervisory programs must be commensurate with the party's business model, organizational structure, geographical coverage, and other factors including the size and complexity of the party's Exchange-related activities.^{xv}

At first blush, the MRAN could be read as a general reminder to exchange participants of the obligation and importance of diligent supervision. But, the notice was more robust. Among other things, market regulation staff emphasized the need to:

- Consider the size and nature of activity of the firm and dedicate corresponding resources to the firm’s supervisory and compliance activities;
- Train employees on all Exchange rules pertinent to the party’s market activity, at a minimum, and continue to train employees based on “observations from the party’s own compliance monitoring and inquiries from regulators” where warranted;
- “[I]mpose measures designed to prevent violations after having been notified or alerted of potential conduct inconsistent with Exchange rules; and
- Take remedial action when aware of conduct inconsistent with Exchange rules either through independent identification or through notice from the Exchange, including Exchange inquiries, letters of warning, summary fines, or administrative surcharges.”^{xvi}

In other words, the supervisory obligations of deterrence, detection and remediation are not static requirements. They are continuing obligations that should evolve and respond to changes in relevant rules, trader behavior, and market conditions. Remediation similarly cannot be reactive – that is prompted only by exchange inquiries and concerns raised about potential rule violations; rather, remediation must be a proactive obligation, triggered not only by notice from the Exchange of a potential issue, but also by independent awareness of or concern about potential rule violations.

Advisories issued by ICE Futures US (“ICE”) regarding supervisory obligations of exchange participants evinced a similar thematic approach. ICE Rule 4.01 provides that “(a) [e]very person shall diligently supervise the Exchange-related activities of such Person’s employees and agents . . . [and] (b) [e]ach firm shall establish, administer and enforce supervisory systems, policies and procedures, based on the nature and size of its Exchange-related activities, which are reasonably designed to achieve compliance with Exchange Rules.” ICE added paragraph (b) to Rule 4.01 in January 2020, and in an

advisory announcing the amendment, the market regulation department expanded on the expectations of exchange participants in this regard:

- Adoption of written supervisory policies, alone, is not sufficient to discharge a firm’s supervisory duty under Rule 4.01(a);
- Detailed written policies are a *starting point*, such policies, standing alone, do little to instill *culture of compliance* without other measures like training, monitoring and enforcement of those policies; and
- A participant doing business on the Exchange should, at a minimum, endeavor to: (i) *periodically* train its employees/agents regarding Exchange Rules and Rule changes; (ii) regularly monitor its employees/agents activities for compliance with both its internal policies and procedures and Exchange Rules; (iii) review and investigate any apparent issues; and (iv) take corrective action to address any identified instances of noncompliance by its employees/agents.^{xvii}

While the market regulation team recognized that the reasonableness of any program will depend on the size and nature of the firm’s Exchange activity, still the directive to promote good behavior in addition to rooting out potentially bad behavior was evident. A summary review of disciplinary notices across US exchanges confirms that they meant it. For example, ICE Futures US fined participants for violations of Rules 4.01(a) and (b) on 23 separate occasions between 2024-2025.

Against this collective backdrop, it seems reasonable to ask what the philosophical approach to enforcement is under the current Commission; how changes, if any, potentially impact the regulation and enforcement of markets for commodities and related financial derivatives; and whether the CFTC’s approach is similar to / distinct from that of the exchange market regulation teams? In recent years, the CFTC made a concerted push to go beyond policing alleged bad behavior, and to focus on shaping good behavior, *i.e.* a “culture of compliance,” through imposition of heightened fines and penalties, including monitors and consultants, for sometimes “technical” rule violations such as recordkeeping and reporting.^{xviii} In almost every instance, a technical rule violation was paired with a supervisory failure claim. In this way, these enforcement actions appeared to be less about the fact that an

applicable rule had been violated, and more about what the rule violation said regarding the respondent's alleged approach to doing business in the markets regulated by the CFTC. And, the supervisory failures often went beyond a failure to detect or prevent the violation or to implement a sufficiently robust system of governance and controls to prevent such failures; instead the failure more often could be characterized as respondent's unwillingness or inability to promote a compliant approach to operating in the markets.

However, with the Commission's return "to the basics," including its commitment to pursue fraudsters and scammers and to seek recoveries for victims and, apparently, to de-emphasize recordkeeping, reporting, or other compliance violations without customer harm or market abuse, it remains to be seen whether the philosophy of enforcement has similarly shifted back to policing bad behavior (including supervisory failures that contributed to such behavior) and away from promoting good behavior by combatting technical rule violations and supervisory gaps that supposedly contributed to the rule violations.

And even if market participants can correctly chart a course regarding anticipated CFTC priorities and enforcement, they must still align their behavior with the expectations of the exchanges, which entities continue in their role as an epicenter for risk management and price discovery. Perhaps different from the CFTC, whose regulatory focus and agenda may adjust with the change of administrations, the mandate of the exchanges remains squarely tied to the core principles outlined in the CEA and the goal of market integrity and price discovery founded on prices free from manipulation and abuse. Like the enforcement division in the prior administration, the exchange market regulation departments have recognized the need for a dynamic compliance and supervisory system – one which evolves with changing rules, markets and trader behavior and promotes an expectation of compliance.

At least publicly, the exchanges have expressed no intention to shift course and their respective enforcement programs do not evidence any de-emphasis on the expectation of diligent supervision, but time will tell.

ⁱ Keynote Address by Acting Chairman Caroline D. Pham, Futures Industry Association, BOCA50, <https://www.cftc.gov/PressRoom/SpeechesTestimony/opapham13> (March 11, 2025).

ⁱⁱ *Id.*

ⁱⁱⁱ *Id.*

^{iv} 100 Days: Keynote Address by Acting Chairman Caroline D. Pham, 39th ISDA Annual General Meeting,” <https://www.cftc.gov/PressRoom/SpeechesTestimony/opapham15> (May 15, 2025).

^v On February 25, 2025, the CFTC issued *Enforcement Advisory on Self-Reporting, Cooperation, and Remediation*, Release No. 9054-25, <https://www.cftc.gov/PressRoom/PressReleases/9054-25>. Footnote 3 to this advisory states, “[t]he Advisory is the Division’s sole policy on self-reporting, cooperation, and remediation. The previously announced policies, including those contained in six different Division advisories as well as in the Division’s Enforcement Manual, are no longer the policy of the Division.”

^{vi} *Enforcement Advisory, Advisory Regarding Penalties, Monitors and Consultants, and Admissions in CFTC Enforcement Actions*, Division of Enforcement, October 17, 2023.

^{vii} *CFTC Releases Enforcement Advisory on Penalties, Monitors and Admissions*, <https://www.cftc.gov/PressRoom/PressReleases/8808-23> (October 17, 2023).

^{viii} *Id.*

^{ix} Remarks of Enforcement Director Ian McGinley at the New York University School of Law Program on Corporate Compliance and Enforcement: “The Right Touch: Updated Guidance on Penalties, Monitors, and Admissions,” <https://www.cftc.gov/PressRoom/SpeechesTestimony/opamcginley2> (October 17, 2023).

^x *Id.*

^{xi} *Id.*

^{xii} *CFTC Orders Three Financial Institutions to Pay Over \$50 Million for Swap Reporting Failures and Other Violations*, <https://www.cftc.gov/PressRoom/PressReleases/8801-23> (Sept. 29, 2023).

^{xiii} *Concurring Statement of CFTC Commissioner Christy Goldsmith Romero*, <https://www.cftc.gov/PressRoom/SpeechesTestimony/romerostatement092923c> (Sept. 29, 2023).

^{xiv} See CFTC Release No. 8822-23, <https://www.cftc.gov/PressRoom/PressReleases/8822-23>, (November 7, 2023).

^{xv} CME MRAN RA2403-5 (July 1, 2024).

^{xvi} *Id.*

^{xvii} *Advisory on Duty to Supervise, ICE Futures U.S.*, https://www.ice.com/publicdocs/futures/Advisory_-_Duty_to_Supervise.pdf?_hsenc=p2ANqtz-Hngn3EkePKBfbPUg0shhC6kkvBTCkh_9D8x162rW6jN81fs-sniiYv2JcKZjMqBcLHSpY (December 19, 2019) (emphasis supplied).

^{xviii} See, e.g., *In re J.P. Morgan Securities LLC*, CFTC Docket No.- 24-07 (May 23, 2024) (CFTC fined J.P. Morgan \$200 million for alleged supervision failures related to surveillance of billions of client orders on a U.S. designated contract market); *CFTC Orders 11 Financial Institutions to Pay over \$710 million for Recordkeeping and Supervision Failures for Widespread Use of Unapproved Communication Methods*, <https://www.cftc.gov/PressRoom/PressReleases/8599-22> (Sept. 27, 2022).