



Miller Strategic Partners LLP  
[MillerStrategic.co](http://MillerStrategic.co)

January 30, 2024

**Key Issues and Themes from the ABA Derivatives & Futures Law Committee Winter Meeting (Naples, Florida)**

---

**Please feel free to reach out with any questions or if we may otherwise support you in any way.**

**Key Contacts:**

Ryne Miller, Partner (New York)  
212 542 3268  
[ryne@millerstrategic.co](mailto:ryne@millerstrategic.co)

William Schroeder, Partner (New York)  
718 508 2051  
[bill@millerstrategic.co](mailto:bill@millerstrategic.co)

---

*Last week we attended the always fantastic winter meeting of the Derivatives & Futures Law Committee of the Business Law Section of the American Bar Association (in Naples, Florida). Held for decades, the winter meeting brings together the leading in-house and outside counsel practitioners of commodities, futures, and derivatives law, along with leading U.S. and global regulators, for three days of interactive sessions discussing policy, regulatory, legislative, and enforcement developments relevant to the derivatives industry. Below we summarize key themes and items of interest from the January 2024 meeting. Of course, notes are no substitute for the robustness and depth of discussions that are available to those attending the conference. We offer these as a helpful “refresh” on the topics discussed.*





## Miller Strategic Partners LLP

[MillerStrategic.co](http://MillerStrategic.co)

### **Enforcement Themes**

*Trade Conduct Enforcement; Cross-Market Spoofing; Litigated Cases.*

- The CFTC's Division of Enforcement remains focused on trade conduct issues, such as manipulation, spoofing, disorderly trading, wash trading, front running, *etc.* And while spoofing enforcement matters are happening with less frequency (attributed largely to the increased focus on this issue by compliance, surveillance, and monitoring teams), much attention was given to more sophisticated or complex forms of spoofing, such as cross market, cross product, or cross broker spoofing.
- *See, e.g.*, the CFTC's enforcement action in the U.S. District Court for the Northern District of Illinois against David Skudder, Global Ag LLC, and Nesvick Trading Group LLC ([LINK](#)) for spoofing including "cross-market spoofing—i.e., spoofing in one market to benefit a position in another market, where the price of the two markets is correlated."
- The CFTC continues its litigation against John Patrick Gorman III, a swaps trader at a global investment bank that was charged in 2021 ([LINK](#)) with engaging in a scheme to deceive and to manipulate the price of an interest rate swap between a bond issuer and the bank. According to the CFTC: "Gorman, who was located in Japan at the time, knew that the [interest rate] swap [in connection with a bond issuance] would be more profitable to the bank, at the expense of the issuer, if the [SEF] screen reflected a lower price for 10-year swap spreads. Gorman therefore traded to manipulate the price of 10-year swap spreads by selling 10-year swap spreads to move the price down on the screen during the pricing of the bond and swap. Although he spoke to the issuer during the pricing call about the price, Gorman did not disclose that he was himself trading to move the price of 10-year swap spreads down." Gorman was also alleged to have deleted relevant messages, including on WhatsApp, after receiving a CFTC request for those messages - the CFTC's focus on traders using non-approved messaging applications and/or self-deleting messaging applications remained a key topic of discussion. While certain aspects of the CFTC's case have been narrowed by a court, based on jurisdictional issues, the lawsuit continues.
- The CFTC also continues to litigate a similar bond connected interest rate swap manipulation case brought in 2019 against trader Christopher Rivoire ([LINK](#)).
- Separately, an administrative law panel discussed the major questions doctrine, the waning vitality of the Chevron doctrine, the ability of the CFTC to continue issuing No-Action letters, and the impact on regulatory agencies of the uncertainty surrounding administrative law judges.



## Miller Strategic Partners LLP

[MillerStrategic.co](http://MillerStrategic.co)

*CFTC's October 2023 Enforcement Advisory on Penalties, Monitors and Admissions ([LINK](#))*

- The CFTC is increasing its focus on the topic of recidivism and what it views as repeat violators - and the Division of Enforcement is looking for increased penalties on such actors. Many in the industry have had questions about the potential for an unfair impact on a large regulated firm which, due to size and scope of activities, may find that it has multiple violations over some given time period. In this context, there appears to be some acknowledgement from the CFTC that recidivism is facts and circumstances dependent, and that a single firm may have unrelated and entirely separate enforcement matters that do not justify an increase in penalties based solely on the fact of multiple violations. The CFTC would look at, for example, whether the conduct was by the same group or business, and whether the violative conduct was of the same type as prior violations.
- Negative factors in a settlement could include supervision functions operating at a less than expected level; having no written procedures; doing no audit or monitoring of procedures; and having procedures that lack specificity.
- With respect to compliance training, there is an expectation that the training is not just forwarding exchange rules and disciplinary matters to the business team. There needs to be actual training sessions and the use of case study examples.
- The CFTC does expect an increasing use of monitors or consultants, but there are factors that can mitigate against this (for example, in connection with misconduct, having already undertaken a remediation review and implemented remedial measures; similarly, being subject to robust regulation and oversight by other regulators is relevant).
- On the topic of cooperation credit, the CFTC looks for “material cooperation”, above and beyond that which is mandated as a matter of CFTC rules (for example, engaging in proper recordkeeping and providing those records to the CFTC upon request is not material cooperation - it is compliance with basic rules).
- With respect to requiring “admissions of wrongdoing”, the CFTC is aware of the increasing exposure of a firm to third party litigation when an admission is made, and the CFTC should take this into account when seeking an admission in a settlement.

*Additional Enforcement Panel Notes.*

- ICE Futures US reminds market participants of its block trading and pre-hedging guidance (*see* Q 24 of the ICE Futures US Block Trading FAQ, here: [LINK](#)). On block trades, firms must disclose when acting as a principal, there can be no execution or broker fees (if acting as a principal), and firms cannot say “working an order” and also take a trade as principal. More generally, the disclosure of acting as a principal (versus a



## Miller Strategic Partners LLP

[MillerStrategic.co](http://MillerStrategic.co)

broker) is expected to be made on a trade by trade basis rather than as a blanket statement in relationship formation documents.

- Notwithstanding case law developments (*see, e.g.*, the recent 5th Circuit decision in the CFTC v. EOX case, reversing a prior jury decision in favor of the CFTC and instead holding that the trader at issue did not have adequate notice of the CFTC's interpretations of its material non-public information rules and rules related to trading ahead of customer orders), the CFTC's enforcement efforts continue with a major focus on issues such as MNPI, misappropriation of information, breach of duties of confidentiality, and inappropriate information use or sharing by traders, brokers, tippers and tippees.
- The CFTC and the exchanges are seeing a large number of substantial reporting violations with issues such as misreporting (for example, open interest misreports), missing fields or incorrect fields (for example, the trader ID rules at the exchanges for fields such as Tag 50), improper reporting, and failures to adequately supervise the reporting function.
- Artificial intelligence is becoming an enforcement focus, particularly around actual frauds (and individual stouting guaranteed returns, *etc.*). In time, the CFTC will also be expected to be asking firms to describe their control environments (risk management, development, testing, supervision) related to their use of AI tools.
- The CFTC continues to consider bringing enforcement proceedings against individuals as well as entities.

### **Cybersecurity and Artificial Intelligence (AI) Themes**

- A major theme at the conference was the CFTC's *Notice of Proposed Rulemaking: Operational Resilience Framework for Futures Commission Merchants, Swap Dealers, and Major Swap Participants* ([LINK](#)). In this context, the CFTC will be looking for registered firms to increase their controls environment focus on IT security, business continuity, disaster recovery, generally accepted practices, periodic reviews (including at the senior level), training, 24 hour incidence notifications (acknowledging that determining the threshold for when this notice is required is key), internal escalation, and customer notification.
  - The CFTC does expect to allow for a consolidated group approach to these matters, where the CFTC registered business is only one component of a larger enterprise business.
  - Relevant factors going into an operational resilience review will include size, nature of business, and where a company stands versus international best standards.



## Miller Strategic Partners LLP

[MillerStrategic.co](http://MillerStrategic.co)

- Evaluating third party service providers and determining which are critical will also be important.
- With respect to AI, as noted above, the CFTC is already focused on enforcement.
  - In parallel, the CFTC released last week a general request for “public comment on the use of artificial intelligence (“AI”) in markets regulated by the Commission, as well as the implications of such use or adoption” ([LINK](#)), and the CFTC released a consumer advisory on AI scams ([LINK](#)). Commissioner Kristin N. Johnson also issued a thoughtful and lengthy written statement regarding the CFTC’s RFC on AI ([LINK](#)).
  - Similarly, the CFTC views the use of AI as analogous to the use of any third party vendor or software, and any use of AI should look to the CFTC’s operational resilience proposal for guidance on best practices and expectations around development, testing, supervision, and risk management.
  - Interestingly, the CFTC and NFA both already use AI in surveillance and monitoring. They use it for predictive analytics, including via machine learning and natural language processing.
- There was also a spirited discussion related to ethical considerations with respect to AI and the utilization of ChatGPT or similar natural language processing tools driven by AI.

### **Diversity, Equity, Inclusion, and Accessibility**

- A powerful panel discussed the importance of diversity to our profession, to markets, and to society.
- The panel also looked at potential challenges based on recent court decisions, litigation, and legislative efforts.
- Conference attendees were encouraged to make their own professional story one of empowerment of others and a continuous push towards the value that comes from treating others as fellow humans. Attendees were encouraged to avoid the temptation to get drawn into news soundbites and headlines disassociated with the on-the-ground human realities of our actual daily lives.
- Diversity as a goal and the concept of a group and individual responsibility to create paths for opportunity for others was championed by the panel.

### **Digital Assets**



## Miller Strategic Partners LLP

[MillerStrategic.co](http://MillerStrategic.co)

- Approximately 50% of the CFTC's 2023 enforcement cases were digital asset related - and the CFTC expects digital assets to be an ongoing part of its enforcement docket.
- However, the absence of clear and express federal regulation of the spot market remains the major open issue. The CFTC Chairman stated expressly, in his keynote remarks (which are available to the public, here: [LINK](#)) his view that: "Not a single federal regulator has been granted authority by Congress over the cash markets for digital assets." And he added his continuing support for legislation: "The concerns I have publicly voiced for the better part of six years regarding the digital asset commodity spot market have only become magnified. The need for federal legislation over cash market digital assets has never been more critical, and I will continue my call for action."
- At the same time, while panelists discussed various digital asset legislative proposals, addressing in varying parts market structure, market regulation, and money laundering concerns, no one placed a meaningful likelihood on the prospect of legislation passing this year. Still, policy advocates remain fully engaged in the long running process of drafting and refining that is likely to result in digital asset legislation at some point, eventually.
- Interestingly, some observed that perhaps the EU digital asset legislative efforts - under MiCA - came too quickly and risk being largely outdated before their initial effective dates later this year (given that MiCA focused largely on initial coin offering type practices, much of which is not reflective of current market practices).
- Legislative and regulatory efforts for the digital asset industry in Hong Kong, Singapore, the UK, Dubai, and Abu Dhabi were recognized as positive momentum (versus a still largely stagnant U.S. approach).
- Tokenization of traditional assets was marked as a positive growth area that is almost certain to continue - the ultimate integration of traditional markets, participants, and assets, into decentralized finance use cases, will almost certainly count tokenization as a major catalyst point.

### **The Great Market Structure Debate of 2024 Continues - Vertical Integration and Direct to Retail Leveraged Trading**

- Four major market structure questions were posited and discussed:
  - Can a DCM / DCO have common ownership w/ FCM? And if so, how to address staff sharing, conflicts of interest, the conflict of the DCO being a Self Regulatory Organization for its affiliate or subsidiary?





## Miller Strategic Partners LLP

[MillerStrategic.co](http://MillerStrategic.co)

- Can an exchange DCM/DCO group open accounts directly with retail, without all FCM obligations being performed? And is the answer different for a fully collateralized model versus a margin model?
- May a DCM/DCO group do auto liquidation? Beyond that, may auto-liquidation be combined with a non-recourse margin model?
- Can an exchange/clearing group own a trading firm / market maker? What are the expectations around conflicts, separations, governance, etc.?
- Each question remains under active industry and CFTC discussion and dialogue.
- Several panels marked a continuing discussion of the idea that was thrust into the CFTC public discussion circuit in 2022 - whether retail traders should be permitted to be direct members / users of a derivatives clearing organization (“DCO”) without being intermediated by a broker or futures commission merchant (“FCM”).
- The CFTC continues to work through this postulate in real time, with various rulemakings and proposed rulemakings (*see, e.g.*, the CFTC proposed rules around the segregation of customer funds held by a DCO, [LINK](#)).
- Without trying to answer these questions in this note, we observe that the major issues and questions that are under active discussion are around these types of questions:
  - Whether the Commodity Exchange Act and CFTC rules adopted thereunder imply (or directly and expressly require) that non-institutional traders should go through a FCM? Even if the statute and rules do not require or even imply a FCM, should not serious public consideration, comment, and perhaps even rulemaking be done first, prior to letting such a non-intermediated market structure go forward?
  - Whether the bankruptcy treatment of a DCO member is sufficiently different than the bankruptcy treatment of a FCM customer such as to warrant legislative changes?
  - Are conditions in a DCO order (where the DCO allows retail members / users) a sufficient regulatory tool, or are rules or even statutory requirements a necessary prerequisite?
  - Arguably, a DCO is not technically subject to the Bank Secrecy Act KYC and AML requirements for customers. A FCM is subject to these requirements. Can a DCO undertake a know-your-customer and anti-money-laundering program voluntarily? Effectively?



## Miller Strategic Partners LLP

[MillerStrategic.co](http://MillerStrategic.co)

### **Voluntary Carbon Markets**

- The CFTC continues an emphasis on the integrity of the market and the importance of industry-led risk management (and the adoption of compliance and supervisory programs within firms in this industry, even in the absence of express rules).
- The CFTC acknowledges its rulemaking limitations on the spot market but also seems to have a greater willingness to rely on its fraud and manipulation authority as broader tools, here (versus in, for example, spot agricultural markets).
- Solving for double counting is a major focus of the regulators looking at these markets.
- The CFTC's proposed guidance for exchanges listing voluntary carbon credit derivatives is currently open and closes February 16 (see [LINK](#)).
- There was also a discussion regarding ethical considerations with regard to providing counsel related to the promotion and marketing of ESG related products.

### **CFTC Reauthorization**

- The CFTC is periodically reauthorized by Congress, and the last time that happened was in 2008. Technically, the CFTC has been "unauthorized" for several years. However, Congress continues to appropriate funding for the CFTC, and so the agency continues its work.
- The Senate Agriculture Committee (along with the House Agriculture Committee) would lead any new reauthorization legislative efforts, and they could potentially look to include Commodity Exchange Act updates at the same time. Some suggested CEA changes could be around the themes of persistent CFTC funding (particularly for enforcement and in the context of government shutdowns) and funding the CFTC's whistleblower rewards program (which has been a key source of many CFTC enforcement cases on digital assets).





Miller Strategic Partners LLP  
[MillerStrategic.co](http://MillerStrategic.co)

---

**About us:**

Miller Strategic Partners LLP is a law firm headquartered in New York City. We advise traditional and emerging financial markets companies, trading firms, and individuals and executives. We specialize in responding to governmental and regulatory inquiries, internal investigations, commercial disputes, and trading and markets regulatory advice.

MSP is a law firm member of the Futures Industry Association.

---

**Key Contacts:**

Ryne Miller, Partner (New York)  
[ryne@millerstrategic.co](mailto:ryne@millerstrategic.co)

William Schroeder, Partner (New York)  
[bill@millerstrategic.co](mailto:bill@millerstrategic.co)

---

© 2024 Miller Strategic Partners LLP. Attorney Advertising. Prior results do not guarantee a similar outcome.