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CFTC Seeks Comment on Crypto Asset Transactions and Event Contracts, FinCEN Withdraws Unhosted Wallet Rule and Prediction Markets Litigation Continues

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The CFTC issued an advanced notice of proposed rulemaking seeking public comment on its proposed fit-for-purpose rules for crypto assets subject to the Commodity Exchange Act. The CFTC also published a notice of proposed rulemaking that proposes providing additional market clarity by expressly further defining the term “swap” to include event contracts.

On the prediction markets front, Ohio, 38 other states and the District of Columbia filed an amicus brief urging the U.S. Supreme Court to grant New Jersey gaming officials’ petition for a writ of certiorari. The states argue that a “direct, but messy, split has emerged among the federal courts of appeals,” and that only the Supreme Court can resolve whether the Commodity Exchange Act preempts state sports-gambling laws. In addition, a CFTC-registered intermediary offering event contracts filed its opening brief in the 2nd Circuit arguing that the event contracts, including sports-event contracts, are swaps within the CFTC’s exclusive jurisdiction.

FinCEN announced the withdrawal of two proposals. The first was its December 2020 proposal on recordkeeping, verification and reporting for certain transactions involving unhosted wallets. The second was its October 2023 finding and proposed special measure under Section 311 of the USA PATRIOT Act, which would have treated international convertible virtual currency mixing as a class of transactions of primary money laundering concern.

Regulatory Updates

CFTC Seeks Public Comment on Advanced Notice of Proposed Rulemaking Relating to Regulation Crypto Asset Transactions and Regulation Crypto Asset Markets

- On Oct. 5, the CFTC issued an [advanced notice of proposed rulemaking](#) (ANPRM) seeking public comment on its proposed fit-for-purpose rules for crypto assets subject to the Commodity Exchange Act (CEA). The ANPRM key highlights are:
 - The preliminary interpretation that an agreement or contract entered into or offered to a retail participant on a leveraged or margined basis, or financed by the offeror, counterparty or a person acting in concert with the offeror or counterparty on a similar basis, is subject to the CEA retail commodity transaction section even if the customer declines the offer and pays in full, unless the transaction falls within a recognized exception (e.g., actual delivery).

- The key exception to Section 2(c)(2)(D) involves the actual delivery of a commodity within 28 days. The ANPR offers the preliminary view that “actual delivery” means transfer of the crypto asset to the purchasing customer’s digital wallet, but it does not include a book transfer.
- The ANPR also contemplates a new subcategory of designated contract market, called a “crypto asset market” or CAM, and discusses how the CFTC core principles apply to a purpose-built market for digital asset transactions.
- The ANPRM follows CFTC’s Sept. 17 [submission of the proposal](#) to the Office of Information and Regulatory Affairs.
- Comments are due 60 days after publication in the Federal Register and will inform the CFTC’s consideration of whether and how to proceed with the rulemaking.

CFTC Seeks Public Comment on Notice of Proposed Rulemaking Concerning the Inclusion of Certain Event Contracts in the Definition of Swap

- On Oct. 9, the CFTC published a [notice of proposed rulemaking](#) that proposes providing additional market clarity by expressly further defining the term “swap” to include event contracts, including those based on sports, politics, cultural and weather-related events. The proposal notes these contracts are financial instruments that are commonly known to the trade as swaps and proposes to resolve any ambiguity regarding these contracts.
- Comments are due 30 days after publication in the Federal Register.

CFTC Issues Interim Final Rule Excluding Casino-Style Gambling Products From the Swap Definition

- On Oct. 9, the CFTC published an [interim final rule](#) codifying its longstanding position that casino-style gambling products, including sportsbook wagers and casino games, are excluded from the definition of “swap.” The CFTC issued the rule the same day as its proposal to include certain event contracts in the swap definition.
- The rule takes effect upon publication in the Federal Register, and comments are due 30 days after publication.

CFTC Issues No-Action Letter for DCMs Regarding Converting Existing Perpetual-Style Broad-Based Security Index Futures Into True Perpetual Futures

- On Oct. 3, the CFTC’s Division of Market Oversight [issued a no-action letter](#) for designated contract markets (DCMs) seeking to convert their existing perpetual-style broad-based security index futures contracts into true broad-based security index perpetual futures. Under the letter, DCMs may remove expiration dates from their existing broad-based security index futures perpetual-style futures contracts and implement these amendments to convert them into true broad-based security index perpetual futures contracts effective upon the satisfaction of certain customer protection and procedural conditions in the letter. These include soliciting feedback from market participants with open positions; providing advance notice and an opportunity to exit positions; offering appropriate risk disclosures; and ensuring that no other material contract terms are modified. DCMs must also file the amendments under CFTC Regulations 40.5 or 40.6 and certify compliance with all conditions.
- The no-action positions in [CFTC Staff Letter No. 26-29](#) expire on Oct. 20.

FinCEN Withdraws Proposed Rules on Unhosted Wallets and Convertible Virtual Currency Mixing

- On Oct. 5, FinCEN [announced the withdrawal](#) of two proposals. The first was its December 2020 [proposal on](#) recordkeeping, verification and reporting for certain transactions involving unhosted wallets. The second was its October 2023 [finding and proposed special measure](#) under Section 311 of the USA PATRIOT Act, which would have treated international convertible virtual currency

mixing as a class of transactions of primary money laundering concern. Both withdrawals took effect Oct. 6.

- FinCEN stated that it withdrew the proposals after considering public comments, as part of the Administration's deregulatory agenda and ongoing efforts to ensure digital asset regulations are fit-for-purpose. In particular, there was significant industry pushback regarding both rules based on a lack of clear scope definition and the impracticality of compliance based on the operations of the cryptocurrency sector.
- The extended time period from the date of publication without further action from FinCEN suggests that these rules were unlikely to proceed regardless.

Additional Updates

Prediction Markets Updates

- On Oct. 7, Ohio, 38 other states and the District of Columbia [filed an amicus brief](#) urging the U.S. Supreme Court to grant New Jersey gaming officials' petition for a writ of certiorari (No. 26-299). The petition seeks review of the 3rd Circuit's decision holding that sports-event contracts traded on a CFTC-registered designated contract market are swaps and that state gaming laws regulating them are preempted. The states argue that a "direct, but messy, split has emerged among the federal courts of appeals," and that only the Supreme Court can resolve whether the Act preempts state sports-gambling laws. They also argue that prediction markets' "aggressive theory of preemption" threatens state sovereignty and state protections against problem gambling.
- On Oct. 7, a CFTC-registered intermediary offering event contracts [filed its opening brief](#) asking the 2nd Circuit to reverse the U.S. District Court for the District of Connecticut's Aug. 10 denial of a preliminary injunction against Connecticut's enforcement of state law against its event contracts. The brief argues that the event contracts, including sports-event contracts, are swaps within the CFTC's exclusive jurisdiction under the Commodity Exchange Act, and that the Act expressly and impliedly preempts Connecticut law. The CFTC filed an amicus brief supporting the appeal, arguing that the event contracts are swaps under the plain text of the Commodity Exchange Act.
- On Oct. 2, the federal District Court for the Northern District of Illinois [granted in part](#) a platform's motion for preliminary injunction finding that the CEA likely preempts Illinois state law because another company's contracts at issue are likely swaps.

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