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# SEC Submits Custody Rule Amendments, SEC-CFTC Swap Definition Comment Period Closes, OCC and FDIC Finalize Definition of ‘Unsafe or Unsound Practice’ and Prediction Markets Litigation Expands

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The SEC submitted proposed amendments to its custody rules to the White House Office of Information and Regulatory Affairs, clarifying the framework for the custody of crypto assets by investment advisers and investment companies. The CFTC proposed to eliminate the order book requirement for permitted transactions on swap execution facilities. The comment period on the joint SEC-CFTC request for comment on derivatives product definitions closed Aug. 24, having drawn submissions from exchange operators, trade associations and tribal gaming organizations focused largely on whether sports-related event contracts fall within the swap definition. Prediction markets litigation continued to expand across multiple forums, including a new state enforcement action in Connecticut and the filing of cross-motions in the suit against Kentucky.

## Regulatory Updates

### SEC Submits Custody Rule Amendments to White House for Review

- On Aug. 25, the SEC submitted a proposed rule titled “Amendments to the Custody Rules” to the Office of Information and Regulatory Affairs. The text of the proposal is not yet public. The Unified Agenda entry for the rulemaking (RIN 3235-AN46) states that the proposal would improve and modernize the regulations around custody of investment adviser client assets and fund assets, including to address crypto assets. The agenda lists October 2026 as the target date for a notice of proposed rulemaking.

### OCC and FDIC Finalize Definition of ‘Unsafe or Unsound Practice’ and Revise Supervisory Communication Standards

- On Aug. 27, the OCC and FDIC issued a joint final rule defining “unsafe or unsound practice” for purposes of Section 8 of the Federal Deposit Insurance Act and revising the framework for issuing matters requiring attention (MRAs) and other supervisory communications.

- Under the final rule, the OCC and FDIC will only issue an MRA in a report of examination for a practice, act or failure to act that is contrary to generally accepted standards of prudent operation and that either has caused, or could reasonably be expected to cause, material harm to the bank's financial condition or a material risk of loss to the Deposit Insurance Fund, or that constitutes an actual violation of a banking law or regulation.

- To implement the final rule, the OCC proposed revisions to its Policies and Procedures Manuals governing enforcement actions (PPM 5310-3) and MRAs (PPM 5400-11). PPM 5310-3 sets forth the three OCC guiding principles when considering bank enforcement actions — escalation, tailoring and focusing corrective actions on those essential to address specific deficiencies. PPM 5400-11 requires that the OCC limit MRAs in reports of examinations to "substantive" violations, defined as those whose nature, duration, frequency or severity could meaningfully affect the bank or its customers and that fall within one of five enumerated categories. Comments are due 30 days after Federal Register publication.

- The two actions narrow the nonfinancial grounds on which examiners may criticize a bank's relationships with lawful customers, a recurring question for institutions serving digital asset businesses.

**CFTC Requests Comment on Proposal to Remove Order Book Requirement for Permitted Transactions**

- On Aug. 20, the CFTC issued a notice of proposed rulemaking that would amend Commission regulation § 37.3(a)(2) to remove the requirement that a swap execution facility offer an order book for permitted transactions. The Commission noted that order books for permitted transactions, unlike those for required transactions, have rarely been used. In practice, an order book displays prices and is visible to all other users of the platform. The proposal was published in the Federal Register on Aug. 26 at 91 FR 55030, with comments due on or before Sept. 25.

**Comment Period Closes on Joint SEC-CFTC Request for Comment on Derivatives Product Definitions**

- The comment period on the joint SEC-CFTC request for comment on derivatives product definitions, issued June 18 and published at 91 FR 37873, closed Aug. 24. The request sought input on the swap and security-based swap definitions, the scope of certain exclusions from the swap definition, the treatment of mixed swaps and of novel or emerging products, and jurisdictional and interpretive questions. The updates to the derivatives product definitions will impact regulatory oversight of these financial products.

- The comment period drew submissions from exchange operators, trade associations and tribal gaming organizations focused largely on whether sports-related event contracts fall within the swap definition.

**<u>Additional Updates</u>**

**Prediction Markets Litigation Expands**

- On Aug. 26, the Connecticut Attorney General filed suit against a prediction markets platform, alleging violations of the Connecticut Unfair Trade Practices Act on the theory that the platform's sports event contracts constitute unlicensed sports wagering under state law. The platform removed the action to the U.S. District Court for the District of Connecticut.

- On Aug. 24, in the CFTC's suit against Kentucky officials, the CFTC and the Department of Justice argued that state enforcement actions against designated contract markets and a state tax on prediction market transaction fees interfere with the CFTC's exclusive jurisdiction over event contracts. Kentucky responded that preemption alone does not constitute an injury in fact sufficient to establish standing.

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