



Interview with
Jonathan Marcus

**General Counsel of the U.S. Commodity
Futures Trading Commission**

INTERVIEW BY JOHN OKRAY AND RACHEL V. ROSE

Jonathan Marcus became general counsel of the U.S. Commodity Futures Trading Commission (CFTC) in 2013, after serving as the CFTC's deputy general counsel for litigation. Before joining the CFTC, Marcus was counsel at Covington & Burling LLP, where he was a member of the Supreme Court and Appellate Litigation Practice. Prior to that, Marcus served at the U.S. Department of Justice (DOJ) as an assistant to the solicitor general, arguing five cases for the United States in the Supreme Court. He also served in the Appellate Section of the DOJ's Criminal Division, where he briefed and argued numerous cases in the federal courts of appeals. Marcus began his legal career as a law clerk for Judge José A. Cabranes of the U.S. Court of Appeals for the Second Circuit. Marcus graduated magna cum laude from Yale University in 1990 and obtained his J.D. from Yale Law School in 1994.

Q: Please share with us your background and how your career evolved into your current role.

A: I came to the U.S. Commodity Futures Trading Commission (CFTC) with a background in appellate litigation. After graduating from Yale Law School in 1994, I clerked for Judge José Cabranes on the United States Court of Appeals for the Second Circuit. The following year, I began practicing law at Williams & Connolly LLP in Washington, D.C. After obtaining great litigation experience there, my interest in criminal law and appellate work led me in 1998 to accept a position in the Appellate Section of the Criminal Division of the U.S. Department of Justice. In that role, I briefed and argued numerous criminal cases in the Federal Courts of Appeals. My appellate docket expanded in 2004 to include civil cases when I joined the Office of the Solicitor General as an assistant to the solicitor general, arguing and winning five cases in the Supreme Court. I returned to private practice in 2007 and continued to specialize in appellate litigation at Covington & Burling LLP. The CFTC entered the picture in 2011, when I learned about an opening in the Office of General Counsel (OGC). CFTC's OGC was looking for a litigation deputy with strong appellate experience, both because that office serves as the appellate shop for the Division of Enforcement and because the agency was anticipating that it would face legal challenges to the major swaps rules being adopted to implement the new Dodd-Frank Wall Street Reform and Consumer Protection Act. After accepting the deputy position in June 2011, I served for nearly two years and handled a wide array of litigation matters, including leading the agency's defense against challenges to our Dodd-Frank swaps rules. In April 2013, the CFTC appointed me general counsel. In my current role, I advise the CFTC on a wide range of matters, including rulemakings, interpretations and orders, litigation and enforcement issues, pending legislation, and laws of general applicability such as appropriations, labor and employment, and ethics.

Q: What type of persons and activities fall under the jurisdiction of the CFTC?

A: The CFTC has jurisdiction over derivatives transactions—futures, swaps, and commodity options. We also have jurisdiction over retail trading in foreign currencies. As for persons, the CFTC regulates intermediaries, such as futures brokers (known as futures commission merchants), swap dealers, commodity trading advisers, and operators of commodity trading funds (known as commodity pools). We also regulate trading platforms for swaps (swap execution facilities (SEFs)) and futures (designated contract markets (DCMs)), as well as clearing houses (derivatives clearing organizations (DCOs)).

Q: Would you explain the difference between over-the-counter and exchange-traded swaps?

A: Over-the-counter swaps are executed bilaterally between counterparties. Before the enactment of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, swaps were executed bilaterally. Under Dodd-Frank, many swaps are now exchange-traded on CFTC regulated trading platforms, namely SEFs or DCMs. CFTC rules require that certain swaps be cleared through a clearing house. The so-called clearing mandate today applies to many interest rate and credit default swaps. The CFTC has proposed expanding the types of interest rate swaps that must be cleared. Swaps that are required to be cleared and are made available to trade on a SEF or DCM must be executed on such a platform. Additionally, with only limited exceptions, swaps are generally required to be margined. Margins for cleared swaps are set by clearing houses under standards prescribed in CFTC rules. CFTC rules for margin for uncleared swaps began to take effect in September 2016 and will be phased in over the next few years. Finally, all swaps, regardless of where they are executed or whether they are cleared, must be reported to swap data repositories (SDRs).

Q: What types of swaps does the Securities and Exchange Commission (SEC) have jurisdiction over and which types of swaps does the CFTC have purview over and why?

A: The split in jurisdiction between the SEC and CFTC on swaps resembles the general pattern for jurisdiction over futures and options. The CFTC has exclusive jurisdiction over the vast majority of futures contracts, including those on broad-based security indexes; the SEC has jurisdiction over options on securities, and the CFTC and SEC share jurisdiction over futures on single stocks and narrow-based security indexes. Similar to this pattern, the SEC has jurisdiction over security-based swaps, which are swaps on certain

individual securities, like single stock credit derivatives, or swaps on narrow-based indexes. Security-based swaps make up a very small percentage of all swaps. The CFTC has jurisdiction over swaps, as that term is defined in Dodd-Frank, including swaps on broad-based security indexes. The swaps under the CFTC's jurisdiction include interest rate swaps, which make up about 75 percent of all swaps, foreign exchange swaps, credit derivative swaps on broad-based indexes, and commodity swaps. The statutory definitions of the terms "swap" and "security-based swap" are complex. The CFTC and SEC issued joint guidance on these definitions that was published in the Federal Register on Aug. 13, 2012.¹

Q: The CFTC has been running television ads on SmartCheck. Would you please expand on what SmartCheck is and what the impact has been for the CFTC and the public?

A: SmartCheck is a national outreach campaign designed to help consumers avoid financial fraud and educate them about smarter investing. The CFTC launched the SmartCheck campaign on Nov. 19, 2014, in furtherance of some of its responsibilities under the Dodd-Frank Act. The focus of the campaign is to encourage the public to conduct background checks on their financial professionals using several free databases available through SmartCheck.gov. The CFTC promotes the campaign through print, radio, TV, and online commercials, social media, public events, and partnerships with state regulatory entities. To date, a total of more than 100,000 background checks have been performed through the SmartCheck website, with more than a 34 percent month-over-month average increase in such checks since the launch of the campaign.

Q: What is the status of the CFTC reauthorization bill? What would the legislation do to improve the agency's operations and protect the public and the markets?

A: As you might expect, the CFTC staff is very involved with the reauthorization process. The OGC and the other divisions of the CFTC, together with the Office of Legislative Affairs, work closely with the staff of our oversight committees, the Senate Agriculture Committee and the House Agriculture Committee, to provide technical assistance on a wide variety of provisions and possible amendments to the Commodity Exchange Act. The House passed a CFTC reauthorization bill in June 2015. More recently, the Senate Agriculture Committee reported its version to the Senate in May 2016. Many of the provisions of the bills are identical or nearly so. The House bill includes some provisions that have no analogue in the Senate Agriculture Committee bill, including provisions on cost-benefit analysis, cross-border jurisdiction, and CFTC organization and operations. We look forward to working with Congress to improve this legislation as it moves toward its conclusion.

With only a short time left in this Congress, it's unclear whether the reauthorization bill will make any further progress this year. If a CFTC reauthorization bill doesn't become law this year, the process will have to start from the beginning next year when the 115th Congress convenes in January 2017.

The fact that the reauthorization bill is not finished yet doesn't mean that the CFTC is idle. Dodd-Frank gave us a lot to do. The CFTC is working to address market developments and risks. Among other things, the CFTC is working on rules on position limits, regulation of automated trading, and cybersecurity testing requirements for DCOs, DCMs, SEFs, and SDRs. While our authorization needs to be updated, we still have a lot on our plate.

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Q: What is the interplay between the National Futures Association (NFA) and the CFTC? Is it analogous to the relationship between the Financial Industry Regulatory Authority (FINRA) and the SEC?

A: The CFTC and NFA enjoy a strong working relationship. Our interaction is cooperative and wide ranging. The NFA is the only futures association currently registered with the CFTC. Its membership includes more than 4,000 firms and 57,000 individuals. As the self-regulatory organization for the derivatives industry, the NFA functions similarly to FINRA in the securities space. It performs a number of functions that advance the CFTC's mission, including market oversight, examinations, and enforcement.

The NFA promulgates rules that support and complement the regulatory framework established by the CFTC. The NFA screens new CFTC registrants, facilitates regulatory reporting by market participants, investigates potential rules violations, and helps resolve investor disputes. Since the passage of Dodd-Frank, which greatly expanded the CFTC's mission, the agency has delegated significant additional responsibility to the NFA. For example, the NFA now helps resolve swap valuation disputes, and the NFA receives data directly from SDRs to support its market supervision and compliance functions. The NFA has been a reliable partner, assisting the CFTC in fulfilling its responsibilities to maintain safe and strong markets, to mitigate systemic risk, and to combat fraud and abuse.

Q: What accomplishment are you most proud of?

A: Winning the Investment Company Institute (ICI) case² in the U.S. Court of Appeals for the D.C. Circuit, a case I argued shortly after becoming CFTC general counsel. As I noted previously, the CFTC

faced several challenges to our rules implementing the Dodd-Frank Act, but the ICI and the Chamber of Commerce's challenge to the CFTC's rule reasserting oversight of registered investment companies trading a substantial amount of derivatives was the only case decided by the court of appeals. And the D.C. Circuit established a critical precedent for the CFTC in that case, especially with respect to the CFTC's rulemaking obligation to consider costs and benefits under § 15(a) of the Commodity Exchange Act (CEA).

The court rejected ICI's argument that § 15(a) imposed exacting requirements on the CFTC with respect to quantifying the costs of its rules. The court held that the agency had no obligation to "measure the immeasurable" or to conduct "rigorous, quantitative economic analysis." The court also ruled that the agency was justified in adopting the rule based on limited data, observing that such limitations exist "in practically any regulatory endeavor."

This ruling was crucial. Given the success industry previously had in upending SEC rules for cost-benefit deficiencies, I believe industry viewed CEA § 15(a) as fertile ground for derailing Dodd-Frank reforms. The *ICI* decision sent a message that the CFTC has done its job when it explains the costs and benefits in light of the factors set forth in § 15(a) based on information reasonably available. It was especially rewarding to obtain this result via an opinion by Judge David B. Sentelle, who had authored one of the key cost-benefit decisions invalidating an SEC rule subjecting fixed annuity contracts to SEC regulation and who was on the panel that decided *Business Roundtable*, which vacated another SEC rule for cost benefit failures one month after I joined the CFTC. ☺



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Endnotes

¹77 Fed. Reg. 48208 (Aug. 13, 2012).

²*Investment Co. Inst. & Chamber of Commerce v. U.S. Commodity Futures Trading Comm'n*, No. 12-5413 (June 25, 2013).

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