



# **– Double Trouble (or More): Effectively – Navigating Parallel Investigations, Domestic and Cross-Border**

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# CFTC Cooperation with Other Entities

The Commodity Exchange Act authorizes the CFTC to cooperate with other federal, state, and local agencies and foreign agencies in conducting its investigations.

“The commission may cooperate with any Department or agency of the Government, any State, territory, district, or possession, or department, agency, or political subdivision thereof, any foreign futures authority, any department or agency of a foreign government or political subdivision thereof, or any person.” Section 8(a)(2) of the CEA, 7 U.S.C. § 12(a)(2).

The CFTC has entered Memoranda of Understanding (MOUs) with authorities in more than 20 international jurisdictions.

E.g., **Dubai** (Dubai Financial Services Authority (DFSA)), **France** (Opérations de Bourse (COB)), **Germany** (Bundesaufsichtsamt für den Wertpapierhandel (BAWe)), **Singapore** (Monetary Authority of Singapore (MAS)), **Hong Kong** (Securities and Futures Commission (SFC)), **The Netherlands** (Government of Kingdom of Netherlands), and **United Kingdom** (Financial Conduct Authority (FCA), Department of Trade and Industry (DTI), Financial Conduct Authority (FCA), Prudential Regulation Authority (PRA), and Bank of England (BOE)).

Memoranda of Understanding: Cooperative for Enforcement Purposes, CFTC,  
<https://www.cftc.gov/International/MemorandaofUnderstanding/mouCooperativeEnforcement.html>.



# CFTC Assistance to Foreign Authorities

The CFTC also has authority to use its investigation powers on behalf of foreign futures authorities. It may conduct an investigation, including the use of its compulsory powers, on behalf of appropriate foreign authorities.

“On request from a foreign futures authority, the Commission may ... provide assistance in accordance with this section if the requesting authority states that the requesting authority is conducting an investigation which it deems necessary to determine whether any person has violated, is violating, or is about to violate any laws, rules or regulations relating to futures or options matters that the requesting authority administers or enforces. ... Such assistance may be provided without regard to whether the facts stated in the request would also constitute a violation of the laws of the United States.”

Section 12(f)(1) of CEA, 7 U.S.C. § 16(f)(1); *see also* Regulations 11.1 and 11.2, 17 C.F.R. 11.1, 11.2.



# CFTC Referrals to U.S Department of Justice (DOJ)

The CEA authorizes the CFTC to refer matters to DOJ for potential criminal prosecution.

“In lieu of bringing actions pursuant to this section, the Commission may request the Attorney General to bring the action.” Section 6c(f) of the CEA, 7 U.S.C. § 13a-1(f).

“In conducting investigations ... the Commission shall continue, as the Commission determines necessary, to request the assistance of and cooperation with the appropriate Federal agencies in the conduct of such investigations, including undercover operations by such agencies.”

Section 12(a) of the CEA, 7 U.S.C. § 16(a).



# CFTC Referrals to DOJ

In a recent three-year period, the CFTC filed **46 actions** in parallel with federal criminal authorities.

These parallel investigations have been especially prevalent in the areas of:

1. Market manipulation and the use of manipulative devices;
2. Digital assets;
3. Anti-corruption;
4. Misappropriation/insider trading;
5. Sanctions.



# Parallel Investigation Examples

## Celsius Network, LLC and Alexander Mashinsky

Complaint, *CFTC v. Celsius Network, LLC and Alexander Mashinsky*, Case No. 23-cv-6008 (S.D.N.Y. July 13, 2023).

- **Fraud:** Section 6(c)(1) of the CEA, 7 U.S.C. § 9(1); 17 C.F.R. § 180.1(a)(1)-(3).
- **Fraud and Deceit by CPOs and APs of CPOs:** Section 4o(1)(A)-(B) of the CEA, 7 U.S.C. § 6o(1)(A)-(B)
- **Failure to Register as a CPO and AP of a CPO:** Sections 4k(2) and 4m(1) of the Act, 7 U.S.C. §§ 6k(2), 6m(1)
- **Failure to Provide Pool Disclosure Documents:** 17 C.F.R. § 4.21

Indictment, *USA v. Alexander Mashinsky and Roni Cohen-Pavon*, Case No. 23-cr-347 (S.D.N.Y. July 11, 2023).

- **Securities Fraud:** 15 U.S.C. §§ 78j(b) and 78ff; 17 C.F.R. § 240.10b-5; 18 U.S.C. § 2
- **Commodities Fraud:** 7 U.S.C. §§ 9(1) and 13(a)(5); 17 C.F.R. § 180.1; 18 U.S.C. § 2
- **Wire Fraud:** 18 U.S.C. §§ 1343 and 2
- **Conspiracy to Manipulate the Price of CEL:** 18 U.S.C. § 371
- **Fraudulent Scheme to Manipulate the Price of CEL:** 15 U.S.C. §§ 78j(b), 78ff; 17 C.F.R. § 240.10b-5; 18 U.S.C. § 2
- **Market Manipulation of CEL Token:** 15 U.S.C. §§ 78i(a)(2), 78ff; 18 U.S.C. § 2
- **Wire Fraud – CEL Token Manipulation:** 18 U.S.C. §§ 1343 and 2

DOJ entered non-prosecution agreement with Celsius.



# Parallel Investigation Examples

## Binance and Changpeng Zhao

Complaint, *CFTC v. Zhao et al.*, Case No. 23-cv-01887 (N.D. Ill. Mar. 27, 2023).

- **Failure to Implement Anti-Money Laundering Procedures:** 17 C.F.R. § 42.2
- **Anti-Evasion:** 17 C.F.R. § 1.6
- **Execution of Futures Transactions on an Unregistered Board of Trade:** Section 4(a) of the CEA, 7 U.S.C. § 6(a), or, alternatively, Section 4(b) of the CEA, 7 U.S.C. § 6(b) and 17 C.F.R. 48.3
- **Illegal Off-Exchange Commodity Options:** Section 4c(b) of the CEA, 7 U.S.C. § 6c(b); 17 C.F.R. § 32.2
- **Failure to Register as a Futures Commission Merchant:** Section 4d of the CEA, 7 U.S.C. § 6d
- **Failure to Register as a Designated Contract Market or Swap Execution Facility:** Section 5h(a)(1) of the CEA, 7 U.S.C. § 7b-3(1); 17 C.F.R. § 37.3(a)(1)
- **Failure to Diligently Supervise:** 17 C.F.R. § 166.3

Information, *USA v. Binance Holdings Ltd.*, Case No. 23-cr-00178-RAJ-1 (W.D. Wash. Nov. 14, 2023).

- **Conducting an Unlicensed Money Transmitting Business:** 18 U.S.C. §§ 1960(a), 1960(b)(1)(B) and 2; 18 U.S.C. § 3571(d)
- **Conspiracy to Maintain an Effective Anti-Money Laundering Program:** 18 U.S.C. § 371 and 2; 18 U.S.C. § 3571(d)

Information, *USA v. Zhao*, Case No. 23-cr-00179-RAJ 1 (W.D. Wash. Nov. 14, 2023).

- **Failure to Maintain an Effective Anti-Money Laundering Program:** Bank Secrecy Act, 31 U.S.C. § 5311 *et seq.*



# Parallel Investigation Examples

## BitMEX

*CFTC v. HDR Global Trading Ltd. et al.*, Case No. 20-cv-8132 (S.D.N.Y. Oct. 1, 2020).

- **Execution of Futures Transactions on an Unregistered Board of Trade:** Violations of Section 4(a) of the Act, 7 U.S.C. § 6(a) (2018), or, alternatively, Section 4(b) of the Act, 7 U.S.C. § 6(b) and Regulation 48.3, 17 C.F.R. 48.3 (2019)
- **Illegal Off-Exchange Commodity Options:** Violations of Section 4c(b) of the Act, 7 U.S.C. § 6c(b) (2018), and Regulation 32.2, 17 C.F.R. § 32.2 (2019)
- **Failure to Register as a Futures Commission Merchant:** Violation of Section 4d of the Act, 7 U.S.C. § 6d (2018)
- **Failure to Register as a Designated Contract Market or Swap Execution Facility:** Violations of Section 5h(a)(1) of the Act, 7 U.S.C. § 7b-3(1) (2018), and Regulation 37.3(a)(1), 17 C.F.R. § 37.3(a)(1) (2019)
- **Failure to Supervise:** 17 C.F.R. § 166.3
- **Failure to Implement Anti-Money Laundering Procedures:** 17 C.F.R. § 42.2

*Information, USA v. HDR Global Trading Ltd.*, Case No. 24-cr-00424-JGK (S.D.N.Y. July 10, 2024).

- **Violations of the Bank Secrecy Act:** 31 U.S.C. § 5311, *et seq.*
  - Failure to Implement Anti-Money Laundering Program
  - False Statements to a Foreign Bank

*Indictment, USA v. Hayes et al.*, Case No. 20-cr-00500 (S.D.N.Y. Sept. 21, 2020).

- **Violation of the Bank Secrecy Act:** 31 U.S.C. § 5311, *et seq.*
- **Conspiracy to Violate the Bank Secrecy Act:** 31 U.S.C. §§ 5318, 5322.





# Parallel Investigation Examples

## Freepoint Commodities LLC

*In re* Freepoint Commodities LLC, CFTC Docket No. 24-02 (Dec. 14, 2023).

- **Misappropriation of MNPI:** Section 6(c)(1) of the CEA (7 U.S.C. § 9(1)); 17 C.F.R. § 180.1(a)(1)–(3)

*USA v. Freepoint Commodities LLC*, Case No. 23-cr-224 (D. Conn. Dec. 14, 2023).

- **Conspiracy to Violate the Foreign Corrupt Practices Act:** 15 U.S.C. § 78dd-2; 18 U.S.C. § 371

*\*DOJ and Freepoint entered a deferred prosecution agreement, and DOJ charged several individuals with criminal FCPA violations in the District of Connecticut.*



# Parallel Investigation Examples

## Classic Energy LLC and Matthew D. Webb

Order Instituting Proceedings and Imposing Remedial Sanctions, *In re* Matthew D. Webb and Classic Energy, LLC, CFTC Docket No. 21-09 (June 14, 2021).

- **Fraudulent Scheme and Misappropriation of MNPI:** Section 6(c)(1) of the CEA (7 U.S.C. § 9(1)); 17 C.F.R. § 180.1(a)(1), (3)
- **Fictitious Sales:** Section 4c(a) of the CEA, 7 U.S.C. § 6c(a)(1)-(2)
- **Participation in a Brokerage Kickback Scheme:** Section 4b(a)(1) of the CEA, 7 U.S.C. § 6b(a)(1)(A); Section 6(c)(1) of the CEA, 7 U.S.C. § 4(c)(1); 17 C.F.R. § 180.1(a)(1) and (3)

Information, *USA v. Webb*, Case No. 4:21-cr-233 (S.D. Tex. Apr. 30, 2021).

- **Conspiracy to Commit Commodities Fraud, Wire Fraud, and Violation Various Provisions of CEA:** 18 U.S.C. § 371
- Other individuals charged and sentenced to prison time



# Timing Considerations

- Courts will sometimes stay charged CFTC actions if there is a parallel DOJ action.
  - Courts more reluctant to do so when there is only a DOJ investigation, and not yet an indictment or formal charges.
  - Assume there is a DOJ investigation behind the scenes, and that DOJ and the CFTC are coordinating.
  - Individuals have Fifth Amendment rights they can exercise – but doing so can often lead to an adverse inference.



# Production of Information

The CFTC may request information from market participants under the CEA.

Section 4g(a) of the CEA, 7 U.S.C. § 6g(a), requires futures commission merchants, introducing brokers, floor brokers, and floor traders to maintain books and records related to their business and “keep such books and records open to inspection by any representative of the Commission or the United States Department of Justice.”

Section 5h(f)(10) of the CEA, 7 U.S.C. § 7b-3(f)(10) imposes similar obligations on swap participants.



# Production of Information

The CEA authorizes the CFTC to share confidential information with any department or agency of the federal government or a State or any political subdivision thereof or any foreign government or any political subdivision thereof.

“Upon the request of any department or agency of the Government of the United States, acting within the scope of its jurisdiction, the Commission may furnish to such department or agency any information in the possession of the Commission obtained in connection with the administration of this chapter. ... Upon the request of any department or agency of any State or any political subdivision thereof, acting within the scope of its jurisdiction, any foreign futures authority, or any department or agency of any foreign government or any political subdivision thereof, acting within the scope of its jurisdiction, the Commission may furnish to such foreign futures authority, department or agency any information in the possession of the Commission obtained in connection with the administration of this chapter.

Section 8(3) of the CEA, 7 U.S.C. § 12(e).

The CEA also permits such sharing with registered entities, NFA, or any SRO.

The Commission is authorized to communicate to the proper committee or officer of any registered entity, registered futures association, or self-regulatory organization as defined in section 3(a)(26) of the Securities Exchange Act of 1934 [15 U.S.C. 78c(a)(26)] ... the full facts concerning any transaction or market operation, including the names of parties thereto, which in the judgment of the Commission disrupts or tends to disrupt any market or is otherwise harmful or against the best interests of producers, consumers, or investors, or which is necessary or appropriate to effectuate the purposes of this chapter.

Section 8a(6), 7 U.S.C. 12a(6).



# Production of Information – Government Sharing

- CFTC and other agencies can share materials with DOJ, and do not necessarily have to inform document producers that they are doing so.
- DOJ is more limited in what they can share, since DOJ primarily obtains information through the grand jury and other protected means.
- DOJ and CFTC have to be careful not to use the other agency as a “stalking horse” – can lead to problems in their investigations.
  - *U.S. v. Bases* (N.D. Ill.) – DOJ and CFTC sharing deepened DOJ’s discovery obligations.
- Counsel need to be strategic in document productions and assume there are other agencies lurking behind.
- Consider carefully evidence received by DOJ and CFTC from foreign authorities and the processes of those authorities – issues can arise



# Consequences of False Statements in Investigations

- Dealings with the government, including statements to them and to SROs, as well as document productions, must be complete and accurate.
  - 7 U.S.C. § 13(a)(4) – *United States v. Zhao* (N.D. Ill.); Section 6(c)(2) of CEA, 7 U.S.C. § 9(2).
- False statements can be the basis for civil or criminal liability.
- SROs also have taken action for less than fulsome or accurate document productions, e.g., CME-20-1282-BC (08 September 2023 ).



# Production of Information

- Be aware of hurdles affecting production of evidence from abroad
- Personal data transfer issues can arise, *e.g.*, GDPR
- Blocking statutes can prevent production of evidence, *e.g.*, Switzerland, France
- Improper production can carry criminal and civil liability
- US authorities will expect “work arounds” to be found





# Testimony

CFTC has authority to subpoena witnesses to give sworn testimony to investigate possible violations of: (1) the CEA or the rules, regulations or orders adopted by the Commission pursuant to it and (2) the “laws, rules or regulations relating to futures or options matters administered or enforced by a foreign futures authority.” 17 C.F.R. § 11.2(a).

“[T]he [CFTC’s] Director may obtain evidence through voluntary statements and submissions, through exercise of inspection powers over boards of trade, reporting traders, and persons required by law to register with the Commission, or when authorized by order of the Commission, through the issuance of subpoenas.” 17 C.F.R. § 11.2(a).

“The Commission or any member of the Commission or of its staff who, by order of the Commission, has been authorized to issue subpoenas in the course of a particular investigation may issue as subpoena directing the person named therein to appear before a designated person at a specified time and place to testify or to produce documentary evidence, or both, relating to any matter under investigation.” 17 C.F.R. § 11.4(a).



# Testimony

If a witness is appearing voluntarily to testify before the CFTC, the staff cannot compel the witness to answer any questions.

If a witness is appearing to testify pursuant to a subpoena compelling his or her testimony, he or she may refuse to answer questions by invoking his or her right against self-incrimination.

“[A] witness testifying or otherwise giving information in an investigation may refuse to answer questions on the basis of the right against self-incrimination granted by the Fifth Amendment of the Constitution of the United States.”

17 C.F.R. § 11.7(d)(1).



# Whistleblowers

The CFTC's Whistleblower Program was created under Section 748 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, 7 U.S.C. § 26.

Between 2010 and 2023, the CFTC has issued 41 orders granting whistleblower awards totaling nearly \$350 million.



# Whistleblowers – CFTC

*“Insiders have some of the most valuable evidence about illegal activity in our markets.”*

*“Whistleblower programs are growing across the federal government – for good reason. They lead to credible and actionable tips from corporate insiders, speeding up our investigations and resolutions. ... About 30 to 40% of our actions involve Whistleblowers. ... So the proof is in the pudding with respect to our Whistleblower program – we actively seek out whistleblowers to report your misconduct, and we heavily incentivize them to do so promising potentially massive payouts.”*

Ian McGinley, CFTC Director of the Division of Enforcement

*“Today’s awards show how whistleblowers can act as force multipliers for the CFTC’s enforcement efforts.”*

- Christina McGlosson, Former Acting Director of the Whistleblower Office, CFTC



# Whistleblowers – DOJ

- New DOJ whistleblower pilot program unveiled earlier in 2024
- The program incentivizes whistleblowers to come forward for specific categories of conduct, including financial institution anti-money laundering, foreign corruption involving *non-issuers* (i.e. outside SEC jurisdiction), and domestic corruption.
- DOJ has stated that there has been robust reporting and new matters are being opened.
- Expect to see a new trend of investigations and charged cases in this space.



# Whistleblowers – non-U.S. regulators

- No equivalent whistleblower incentives in other relevant countries for matters likely to be parallel with CFTC investigations or actions
- Many countries have whistleblower protection legislation which must be complied with
- Identify any constraints early and manage expectations of authorities in a transparent way



# Potential Resolution

- During the Trump Administration, DOJ instituted an “anti piling on” policy which has remained in place.
- This policy means that DOJ will work with other agencies to coordinate penalties.
- Companies should seek such coordination – understanding it may mitigate the effects of multiple resolutions.



# Other Issues with Non-U.S. Regulators

- Identify conflicts in process and procedures early
- Legal privilege: not available in some jurisdictions, and is different to US in others – important to identify and manage differences, particularly where litigation risk exists
- Productions to authorities: can differ widely, both in terms of compelled productions and cultural expectation – again, can cause difficulties where litigation risk exists.
- Compelled testimony: can cause difficulties, e.g., SFO and FCA compel testimony and interview transcripts can be made available to other subjects prior to being provided to foreign authorities
- Settlement terms: can conflict, e.g., FCA will not agree “non admission” settlements





# Thank you for joining us today!

## Upcoming Webinar:



**Trends in ETD Trading Q3 2024**  
09:30 – 10:30 AM ET



**Commodities Enforcement Trends and Developments**  
10:00 – 11:00 AM ET



**Self-Reporting in the Age of Whistleblowers**  
10:00 – 11:00 AM ET

**FIA**

The logo consists of the letters 'F', 'I', and 'A' in a bold, sans-serif font. The 'F' is dark grey. The 'I' is dark grey. The 'A' is formed by overlapping shapes: a light green triangle on the left, a darker green triangle on the right, and a blue triangle at the bottom. The background features large, overlapping geometric shapes in light green, light blue, and white.