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## CFTC ENFORCEMENT TRENDS FROM FY 2024

*In FY 2024 the CFTC continued its aggressive enforcement agenda with ever-increasing civil monetary penalties for industry participants. It embraced new methods of rule interpretation and enforcement areas while receiving criticism from sitting Commissioners and suffering losses in the court system. This criticism and losses will present challenges for the CFTC and the industry as we look to the future.*

By Elizabeth Davis and Michael McDonald \*

In Fiscal Year 2024, the Commodity Futures Trading Commission's ("CFTC") Division of Enforcement ("Division") continued its aggressive agenda in enforcing the Commodity Exchange Act ("CEA") and CFTC regulations by pursuing actions ranging from altcoins to lean hogs. In the process, the steep penalty amounts assessed by the agency continued to increase, while the scope of the CFTC's jurisdictional reach broadened. However, this push has encountered challenges, including increasingly critical dissents from CFTC Commissioners Caroline Pham and Summer Mersinger along with recent litigation setbacks, which highlight the complexities involved in the Division's expanded enforcement efforts.

### RECENT CASES

During this past fiscal year, the CFTC intensified its enforcement actions across various areas, focusing particularly on its mainstays of fraud, market manipulation, swaps reporting, recordkeeping, and registration violations. This period witnessed a notable increase in penalty amounts, reflecting the CFTC's commitment to safeguarding market integrity and protecting investors.

Market manipulation and trade practice actions saw rigorous enforcement during this period. Trafigura faced a \$55 million penalty for manipulating fuel oil benchmarks and trading gasoline based on non-public information.<sup>1</sup> Trafigura was alleged to have obtained material non-public information from an employee of a Mexican trading entity, which included the Mexican trading entity's pricing formulas and information related to the total expected import volumes of gasoline, types, and anticipated destination ports. Trafigura was found to be reckless in not knowing that the information had been transmitted to them in violation of the Mexican trading entity's duties to his employer in violation of CEA Section 6(c)(1) and Regulation 180.1(a)(1). The company was also found to have allegedly created an artificially high value of the USGC HSFO benchmark by engaging in heavy bidding and buying of physical fuel oil in the Platts Market-on-Close ("MOC") daily trading window against its physical position, which tended to increase prices paid in the window and benefitting the company's long derivatives position.

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<sup>1</sup> *In re Trafigura Trading LLC*, CFTC Dkt. No. 24-08 (June 17, 2024).

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Attempted price manipulation was also the subject of a CFTC action against TOTSAs TotalEnergies Trading SA. In that action, TOTSAs was alleged to have sold physical Eurobob (“EBOB”) gasoline at artificially low prices during the Argus price determination window to benefit a short EBOB futures position that priced to the Argus benchmark, in violation of CEA Section 6(c)(1) and Regulation 180.1(a)(1).<sup>2</sup>

On the trade practice front, the CFTC penalized Raizen Energia, an energy company, as well as its sugar merchant affiliate, the amount of \$750,000 for engaging in 44 wash sales and non-competitive transactions by executing exchange for physical (“EFP”) transactions involving sugar futures contracts traded on ICE Futures in violation of CEA Sections 4c(a)(1) and (2)(A) and Regulation 1.38(a).<sup>3</sup>

Moreover, in conjunction with the SEC, the CFTC continued its enforcement efforts related to off-channel communications, as well as for registration and recordkeeping violations, aiming to ensure that all market participants adhere to the necessary regulatory standards. For example, Canadian Imperial Bank of Commerce (“CIBC”) faced a significant \$30 million penalty for failing to maintain required records in violation of Sections 4s(f)(1)(C), 4s(g)(1) and (3), and 4s(h)(1)(B) of the CEA.<sup>4</sup> In the order, the CFTC found that from at least 2018, CIBC failed to stop employees, including those at senior levels, from communicating using unapproved communication methods, including messages sent via personal text. CIBC was required to keep certain of these written communications because they related to the firm’s CFTC-registered business. These written communications generally were not maintained and preserved by CIBC, and CIBC generally

would not have been able to provide them promptly to the CFTC, if and when, requested.

The CFTC (and the SEC in a parallel case) also brought an enforcement action against Piper Sandler Hedging Services making charges similar to those in the CIBC case, and further found that some of the same supervisory personnel responsible for ensuring compliance with the firm’s policies and procedures themselves used non-approved methods of communication to engage in business-related communications, in violation of firm policy.<sup>5</sup> The firm agreed to pay a civil monetary penalty of \$2,000,000 to settle the charges. Together, the CFTC and SEC have collectively brought in over \$474 million in fines from off-channel communication violations.

Similarly, the CFTC’s actions against swap dealers continued. Over the last year, the CFTC has imposed more than \$60 million in penalties on six registered swap dealers in connection with swap data reporting violations. For instance, on October 1, 2024, the CFTC settled charges with Barclays over allegations that from 2018 through 2023, Barclays failed to correctly report, or failed to timely report, approximately 5 million swap transactions in violation of the CEA and CFTC regulations. The reporting failures during the relevant period included misreporting due to the use of a duplicate swap identifier, incorrect reporting of primary economic terms, misreported time stamps, errors in connection with continuation data reporting, and late reporting.<sup>6</sup> Barclays agreed to a civil monetary penalty of \$4 million to settle the charges. The CFTC also settled charges against swap execution facilities (“SEFs”), BGC Derivative Markets, L.P. and GFI Swaps Exchange, LLC, for failing to properly report data related to thousands of swap transactions and violating

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<sup>2</sup> *In re TOTSAs TotalEnergies Trading SA*, CFTC Dkt. No. 24-19 (Aug. 27, 2024).

<sup>3</sup> *In re Raizen Energia SA*, CFTC Dkt. No. 24-15 (Aug. 19, 2024).

<sup>4</sup> *In re Canadian Imperial Bank of Commerce*, CFTC Dkt. No. 24-28, (Sept. 24, 2024). *See also In re Canadian Imperial Bank of Commerce*, SEC Admin. Proc. File No. 3-22160 (Sept. 24, 2024).

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<sup>5</sup> *In re Piper Sandler Hedging Servs. LLC*, CFTC Dkt. No. 24-26, (Sept. 23, 2024). *See also In re Piper Sandler Hedging Servs. LLC*, SEC Admin. Proc. File No. 3-21994 (Aug. 14, 2024).

<sup>6</sup> *In re Barclays Bank PLC*, CFTC Dkt. No. 24-39 (Oct. 1, 2024).

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SEF Core Principles, and against BGC SEF for violating a prior CFTC order.<sup>7</sup>

A consistent trend seen throughout all of the CFTC's enforcement actions this past fiscal year is the continued steady upward increase in the amount of civil monetary penalties. In addition to the massive penalties imposed in the off-channel communication and swaps reporting cases discussed above, increased penalties were also seen in the fraud and anti-manipulation space. For instance, the high-profile case against FTX Trading Limited resulted in the bankruptcy court ordering payment of a staggering \$12.7 billion as restitution and disgorgement for misappropriating customer funds<sup>8</sup>. The CFTC also brought an action that resulted in K.E.L. Enterprises being ordered by a federal court to pay over \$13 million for running a fraudulent forex scheme as an unregistered commodity pool operator.<sup>9</sup> The CFTC also continued pursuing fraud cases in the digital asset space. For example, the CFTC filed a civil enforcement action against Debiex for engaging in a fraudulent scheme using romance scam tactics to misappropriate \$2.3 million from victims. The scheme involved soliciting funds for digital asset trading under false pretenses.<sup>10</sup>

The trend of increased penalties will likely continue, especially considering the CFTC's enforcement advisory issued in October 2023. The advisory noted that, in addition to seeking admissions and imposition of monitors, the enforcement staff will seek harsher penalties, especially for recidivists.<sup>11</sup>

## NOVEL ENFORCEMENT ACTIONS

This year also witnessed the agency tackling novel cases embracing new methods of rule interpretation and enforcement. The CFTC significantly expanded its reach into new areas and theories, reflecting a proactive approach to evolving market dynamics. In addition to traditional enforcement matters, the CFTC ventured into

complex areas such as digital asset trading and compliance within decentralized finance (“DeFi”) protocols. It is clear that the CFTC is determined to maintain a robust and transparent marketplace, even amidst increasing complexity and scrutiny. Below are a few examples of novel approaches and theories of enforcement.

### **Position Limits**

On August 14, 2024, the CFTC ordered Vitol and its affiliate to pay a \$500,000 penalty for exceeding federal position limits on multiple occasions in 2022.<sup>12</sup> This action marks the first instance where the CFTC enforced position limits on aggregate positions held on multiple exchanges, specifically relating to contracts in West Texas Intermediate Crude Oil and CME Live Cattle Futures. Vitol had held positions in the CME Live Cattle Futures and aggregate futures equivalent position in the NYMEX WTI Options and IFED WTI Options in excess of the position limits in violation of CEA Section 4a(b) and Regulation 150.2.

### **Non-Disclosure Agreements**

As discussed above, Trafigura was penalized \$55 million for several violations, including trading gasoline based on non-public information and manipulating fuel oil benchmarks to benefit its derivatives positions in violation of CEA Section 6(c)(1) and Regulation 180.1(a)(1) and (3). Notably, this action against Trafigura marks the first action against an entity for impeding whistleblower communications for failing to include whistleblower carve-out language in its employment agreements in violation of Regulation 165.19(b).

### **DeFi Protocols**

The CFTC continues to expand its reach in the digital asset arena and has taken significant enforcement actions against DeFi protocols. While last fiscal year brought the CFTC's first enforcement action against a DeFi protocol, Ooki DAO, for registration and BSA violations, the Division has continued bringing registration cases against DeFi protocols.

In September 2023, the CFTC announced settlements against three separate DeFi protocols. The CFTC settled charges with ZeroEx, a firm that developed and deployed a blockchain-based digital asset protocol (the

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<sup>7</sup> *In re BGC Derivative Markets, L.P.*, CFTC Dkt. No. 24-35 (Oct. 1, 2024); *In re GFI Swaps Exchange, LLC*, CFTC Dkt. No. 24-38 (Oct. 1, 2024).

<sup>8</sup> *In re FTX Trading Ltd., et al*, Case No. 1:22-cv-10503-PKC (S.D.N.Y. Aug. 8, 2024).

<sup>9</sup> Consent Order, *CFTC v. Dwight A. Foster and K.E.L. Enterprises Inc.*, Case No. 2:23-cv-11552 (E.D. Mich. 2024).

<sup>10</sup> Complaint, *CFTC v. Debiex*, Case No. 2:24-cv-00117-DLR (D. Ariz. 2024).

<sup>11</sup> *CFTC Enforcement Advisory Regarding Penalties, Monitors and Consultants, and Omissions* (CFTC Oct. 17, 2023).

<sup>12</sup> *In re Vitol, Inc. and Vitol SA*, CFTC Dkt. No. 24-14 (Aug. 14, 2024).

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Ox Protocol) and a front-end application called Matcha that offered users the ability to trade digital assets through use of various blockchains. Among the digital assets permitted to trade on Matcha were multiple tokens, developed and issued by a third party unaffiliated with ZeroEx, that provided traders approximately 2:1 leveraged exposure to digital assets such as ether and bitcoin. The CFTC found that these leveraged tokens were leveraged or margined retail commodity transactions and therefore could be offered only on a registered exchange in accordance with the CEA and CFTC regulations.<sup>13</sup> ZeroEx agreed to a civil money penalty of \$200,000 and to cease and desist in order to settle the charges with the CFTC. Simultaneously, the CFTC also settled charges with two other DeFi protocols, Opyn<sup>14</sup> and Deridex,<sup>15</sup> over similar charges that both firms failed to register as a SEF or Designated Contract Market (“DCM”), failed to register as a futures commission merchant (“FCM”), and illegally offered leveraged and margined retail commodity transactions in digital assets while operating a blockchain-based DeFi trading platform. Opyn and Deridex were each assessed a civil monetary penalty in the amount of \$250,000 and \$100,000, respectively, to resolve the charges with the CFTC.

### **Digital Asset Platforms**

The CFTC also initiated its first enforcement action using what Commissioner Pham has dubbed a “novel U.S. location test,” which could impose new FCM requirements on U.S. brokers by considering any non-U.S. entity dealing in futures or options as subject to U.S. regulations based on its connections to the United States. This case was brought against Falcon Labs, an unaffiliated intermediary allegedly facilitating U.S. customers’ access to digital asset derivatives trading without registering as an FCM.<sup>16</sup> Operating under Seychelles law from October 2021 to March 2023, Falcon Labs was charged with having acted as a “prime broker” and creating customer accounts without identifying information for the exchanges. Consequently, Falcon Labs was ordered to cease operations as an unregistered FCM and to pay \$1,179,008 in disgorgement and a \$589,504 civil penalty, which was reduced due to its cooperation and improvements in Know Your Customer (“KYC”) procedures. Commissioner Pham dissented regarding

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<sup>13</sup> *In re ZeroEx, Inc.*, CFTC Dkt. No. 23-41 (Sept. 7, 2023).

<sup>14</sup> *In re Opyn, Inc.*, CFTC Dkt. No. 23-40 (Sept. 7, 2023).

<sup>15</sup> *In re Deridex, Inc.*, CFTC Dkt. 23-42 (Sept. 7, 2023).

<sup>16</sup> *In re Falcon Labs Ltd.*, CFTC Dkt. No. 24-07 (May 13, 2024).

the CFTC’s creation of this novel U.S. location test and expressed concerns about the lack of statutory authority for this approach and its implications for cross-border regulation, warning of potential overreach in asserting jurisdiction over non-U.S. entities based solely on their U.S. ties.

### **Voluntary Carbon Credit Market Fraud**

Following announcements of its Environmental Fraud Task Force and whistleblower alert in the carbon markets,<sup>17</sup> the CFTC brought its first action alleging fraud in the voluntary carbon credit market during this fiscal year. On October 2, 2024, the CFTC filed a complaint in the Southern District of New York against Kenneth Newcombe while settling charges with CQC Impact Investors LLC and against Jason Steele over allegations of fraud and false, misleading, or inaccurate reports relating to voluntary carbon credits.<sup>18</sup> The SEC and DOJ brought parallel actions against these respondents.<sup>19</sup> This proceeding is the first CFTC action for fraud in the voluntary carbon credit market, which has been subject to increased scrutiny over the past year.

### **DISSENTING OPINIONS**

During this past fiscal year, the increasingly critical dissents issued by Commissioners Pham and Mersinger have brought significant attention to the CFTC’s enforcement practices, highlighting concerns about fairness, transparency, and regulatory clarity.

In her dissent in the *Raizen Energia* matter, Commissioner Pham expressed her disagreement with the agency’s handling of self-reporting and cooperation credit.<sup>20</sup> She criticized the CFTC for failing to acknowledge Raizen’s self-reported violations related to wash trading, characterizing this approach as a “bait-and-switch.” Commissioner Pham argued that the standards for receiving cooperation credit appear impossible to meet or have been applied arbitrarily,

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<sup>17</sup> *CFTC Whistleblower Alert: Blow the Whistle on Fraud or Market Manipulation in the Carbon Markets* (CFTC June 20, 2023).

<sup>18</sup> *In re CQC Impact Investors LLC*, CFTC Dkt. No. 24-37 (Sept. 30, 2024); *In re Jason Steele*, CFTC Dkt. No. 24-37 (Sept. 30, 2024).

<sup>19</sup> *United States v. Kenneth Newcombe and Tridip Goswami*, Case No. 24-cr-567 (S.D.N.Y. Oct. 2, 2024).

<sup>20</sup> Statement of Commissioner Caroline D. Pham on Self-Reporting and Cooperation Credit in Enforcement Actions to *In re Raizen Energia SA*, CFTC Dkt. No. 24-15 (Aug. 19, 2024).

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which could deter companies from voluntarily disclosing violations if they do not receive appropriate recognition for their cooperation. Commissioner Pham also noted recent CFTC matters where reporting six months after the initial discovery of a potential non-compliance issue where an internal review had not been considered “prompt” self-reporting, but contended that “it is more appropriate to consider whether the self-report was made promptly after a firm makes a determination in good faith that a material non-compliance issue has occurred, not from when the potential issue was discovered.” Commissioner Pham also recommended including a safe harbor from false statement charges if self-reported information is later supplemented or corrected.

The dissenting views of Commissioners Pham and Mersinger were further emphasized in the *Trafigura* matter, where both Commissioners questioned the CFTC’s interpretation of Regulation 165.19(b), which prohibits impeding whistleblower communications. They argued that Trafigura did not actively impede reporting to the CFTC as required by the regulation and criticized the agency for effectively “regulating by enforcement” when it imposed new requirements on non-disclosure agreements (“NDAs”) without prior notice or guidelines. Commissioner Pham specifically noted that the settlement order excessively altered employment agreements, while Commissioner Mersinger highlighted inconsistencies with the regulation’s intent. Their dissents reflect broader concerns about overreach and the lack of clarity in the CFTC’s enforcement approach, suggesting that such actions may dissuade companies from self-reporting if their cooperation is not recognized. Commissioner Pham even noted that the matter was put to a vote before she had a chance to review the evidence to determine if there was a reasonable basis for the charges, providing “yet another example of why I have called for a GAO study on the CFTC’s internal procedures.”<sup>21</sup>

Commissioner Pham also dissented from the CFTC’s settlement order in the *TOTSA* matter, characterizing the CFTC’s case as based on weak evidence and a “textbook example of policymakers with no industry experience second-guessing commercial business decisions in a bubble.”<sup>22</sup> In her dissent, Commissioner Pham suggested that enforcement staff engaged in

“gamesmanship” by failing to disclose to the Commission a white paper and accompanying expert reports submitted by TOTSA that together provided “potential reasons for legitimate physical gasoline transactions and commercial hedging activity” and a potentially “legitimate basis for [TOTSA’s] trading activity that is consistent with its commercial business in the gasoline and energy markets.”

Similarly, both Commissioners Mersinger and Pham were critical of the lack of guidance on what constitutes a “business record,” emphasizing the need for clarity to avoid regulatory uncertainty in the *Piper Sandler Hedging Services LLC* case. As discussed above, in *Piper Sandler*, the firm was fined for failing to maintain and preserve records that were required to be kept under CFTC recordkeeping requirements, and failing to diligently supervise matters related to its business as a CFTC registrant.<sup>23</sup>

These tensions are not limited to specific cases; they also resonate with the CFTC’s ongoing enforcement strategy, particularly considering the recent *Loper Bright* ruling which overturned the long-standing doctrine of deference afforded an agency’s interpretation of the law because a statute is ambiguous under the Administrative Procedure Act.<sup>24</sup> The CFTC has been active in pursuing enforcement actions against unregistered FCMs, including digital asset intermediaries like Falcon Labs, emphasizing the importance of registration under the CEA. Commissioner Mersinger also issued a dissenting statement to the three DeFi actions described above,<sup>25</sup> expressing her concern over the CFTC’s “Enforcement First” approach in a novel enforcement area where the CFTC should instead be first engaging with the public. As the CFTC continues its “regulation by enforcement” approach in the digital asset space given the legislative void in this area, these dissents, taken together with the Supreme Court’s holding in *Loper Bright*, will present challenges for the Division.

Overall, the increasing critical dissents from Pham and Mersinger highlight significant challenges the CFTC faces in its enforcement efforts, as it navigates the

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<sup>21</sup> Statement of Commissioner Caroline D. Pham in *In re Trafigura Trading LLC*, CFTC Dkt. No. 24-08 (June 17, 2024).

<sup>22</sup> Dissenting Statement of Commissioner Caroline D. Pham on Commercial End-User Enforcement Action to *In re TOTSA TotalEnergies Trading SA*, CFTC Dkt. No.2 4-19 (Aug. 27, 2024).

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<sup>23</sup> *In re Piper Sandler Hedging Services LLC*, CFTC Dkt. No. 24-26, (Sept. 23, 2024).

<sup>24</sup> *Loper Bright Enterprises v. Raimondo*, 144 S.Ct. 2244 (2024), overruling *Chevron U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837 (1984).

<sup>25</sup> Dissenting Statement of Commissioner Summer K. Mersinger Regarding Enforcement Actions Against: 1) *Opyn, Inc.*; 2) *Deridex, Inc.*; and 3) *ZeroEx, Inc.* (Sept. 7, 2023).

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complexities of regulatory compliance while aiming to maintain market integrity.

## LITIGATION SETBACKS

The Division is also dealing with challenges stemming from notable litigation setbacks. This underscores the challenges regulatory bodies face in enforcing compliance while navigating complex legal landscapes. One significant case involves Kalshi, a derivatives exchange that sought to offer politically focused futures contracts. U.S. District Court Judge Jia M. Cobb ruled in favor of Kalshi, asserting that the CFTC had “exceeded its statutory authority” by preventing the platform from launching these contracts. This ruling has the potential to allow U.S. citizens to legally wager on election outcomes for the first time in a century, a development that raises substantial concerns about national security and election integrity, which the CFTC argued were valid reasons for its prohibition. Recently, the U.S. Court of Appeals for the District of Columbia Circuit (reviewing the district judge’s order in favor of Kalshi) denied the CFTC’s motion for a stay pending appeal thus permitting Kalshi to offer its platform for the public to place bets on the outcome of upcoming U.S. congressional elections.<sup>26</sup> The ongoing legal battle highlights the difficulties the agency faces in balancing regulatory oversight with innovation in the evolving market of political prediction.

Additionally, the CFTC’s legal troubles have extended to its ongoing litigation against My Forex Funds, where a motion for sanctions was filed against the agency’s staff.<sup>27</sup> This motion, submitted by Traders Global Group Inc., alleged that CFTC staff made false statements in court over a six-month period to secure a restraining order against the defendants. The accusations have raised serious concerns regarding the integrity and conduct of the Division, prompting Commissioner Pham to express her apprehensions about the alleged misconduct.<sup>28</sup> The motion called for an

evidentiary hearing to explore these claims further and assess their impact on the rights of the defendants. This situation underscores significant tensions between regulatory enforcement and procedural fairness, illustrating the complexities that regulatory agencies like the CFTC must navigate in their efforts to enforce compliance while ensuring due process.

These litigation setbacks reflect a broader trend within regulatory enforcement, where agencies are increasingly challenged by evolving market practices and the legal frameworks surrounding them. As the CFTC continues to assert its authority in complex cases like *Kalshi*, it must also grapple with the implications of these legal challenges on its credibility and effectiveness as a regulatory body. The outcomes of these cases will likely influence how the CFTC adapts its strategies and approaches in the future, highlighting the ongoing struggle to maintain regulatory integrity while fostering innovation in rapidly changing markets.

## THE ROAD AHEAD

As the CFTC navigates the complexities of regulatory enforcement amidst an evolving financial landscape, it faces both opportunities and challenges, especially with the upcoming presidential election and possible changes to the Commission’s composition. Despite recent litigation setbacks, including critical rulings in high-profile cases like *Kalshi* and ongoing controversies surrounding its enforcement practices, the agency remains committed to an aggressive enforcement agenda. Looking forward, it is expected that the CFTC will continue to assert its authority and expand its regulatory reach, particularly in emerging areas such as digital asset trading and DeFi, while also striving to address the dissenting opinions of its commissioners and enhance the transparency and fairness of its enforcement actions. This balancing act will be crucial in maintaining market integrity and investor confidence in a rapidly changing environment. ■

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<sup>26</sup> *KalshiEX LLC v. CFTC*, Case No. 24-5205 (D.C. Cir. Oct. 2, 2024).

<sup>27</sup> *CFTC v. Traders Global Group Inc., et al.*, Case No. 3:23-cv-11808 (D.N.J. 2024).

<sup>28</sup> Statement of Commissioner Pham on Filing of Complaint in *CFTC v. Traders Global Group* (July 3, 2024).