Overview

On October 24, 2019, the House Agriculture Committee (Committee) released a discussion draft for a bill to reauthorize appropriations for the Commodity Futures Trading Commission (CFTC or Commission) through fiscal year 2025. The bill has no listed sponsors or cosponsors, but the Committee’s online release of the draft suggests a bipartisan mark-up is forthcoming. The Senate Committee on Agriculture, Nutrition & Forestry held hearings in June on a CFTC reauthorization package, yet it has not released a companion bill of its own.

The CFTC, the primary US regulator for futures and swap markets, is statutorily authorized by the Commodity Exchange Act (CEA). Since the CFTC’s creation in 1974, Congress has reauthorized the Commission seven times. It was last reauthorized in 2008. At the end of the 2013 fiscal year, however, the CEA expired, and since then Congress has attempted, but failed, to reauthorize the agency. The CFTC has, nonetheless, continued to operate under expired authorization and receive funding through the appropriations process.

The draft discussion bill released by the Committee attempts to account for a variety of market and regulatory developments since 2008. It includes a variety of amendments to the CEA that would give the CFTC the jurisdiction and tools needed to keep pace with the derivatives market today. The below summarizes certain key provisions from the discussion draft.

Sec. 105: Detailing and Resource Sharing

Sec. 105 of the discussion draft: (1) gives the CFTC access to the expertise of the full federal government; and (2) recognizes the increasingly international nature of the derivatives market. Sec. 105 provides that the CFTC may accept funds, facilities, and services from all other federal agencies and departments, and also allows the CFTC to accept details from officials or employees of foreign government agencies. By enabling the Commission to draw upon the knowledge of individuals outside of the agency, the provision may help to alleviate some of the resource constraints facing the agency, as noted repeatedly by recent Chairmen in Congressional testimony.

Sec. 109: Digital Commodities
Sec. 109 reflects the Committee’s belief that there are certain gaps in the CFTC’s regulatory oversight with respect to nascent cryptocurrency markets. Specifically, the provision directs the Commission to promulgate rules for exchanges and swap execution facilities (SEFs) “detailing the content and availability of trade and trader data and other information” that the registered platform must be able to access from the referenced cash markets and data sources in order to prevent market disruption and monitor trading.

Sec. 110: System Safeguards
The amendments in Sec. 110 focus on ensuring that the systems of DCMs clearinghouses, SEFs, and swap data repositories (SDRs) are adequately protected from cyber threats. It instructs the CFTC to implement procedures and controls to ensure systems are “reliable, secure, and resilient;” “have adequate scalable capacity;” and “maintain the confidentiality, integrity, and availability of the data they contain.”

Sec. 112: Applicability of Prohibitions on Fraud, Manipulation, and Disruptive Trading to Activities Outside the United States
The proposed changes in Sec. 112 of the discussion draft to Section 6 of the CEA appear designed to authorize the CFTC and the Department of Justice to prosecute violations of the CEA’s antifraud and anti-manipulation provisions for activity occurring outside the United States that has a “reasonably foreseeable substantial effect” within the United States. What specific activity this would reach will require judicial interpretation as to what effect is “reasonably foreseeable” and what is a “substantial” effect. The standard, though, is similar to the terms of the extraterritorial reach of antifraud provisions of the Securities Exchange Act of 1934 for actions brought by the Securities and Exchange Commission.

Sec. 117: Aiding and Abetting
The proposed changes to the aiding and abetting provisions in Section 13(a) of the CEA appear to loosen the scienter element of the offense. Under Section 13(a), those who willfully cause another to violate the CEA will be held responsible as if they committed the violation themselves. The discussion draft expands this section to include those who recklessly provide substantial assistance to others.

Sec. 118: Modernization of Authority of the Commission to Conduct Research, Development, Demonstration, and Information Programs
Sec. 118 is both broad and far-reaching, as it attempts to make up for time lost since the last CFTC reauthorization in 2008. This section requires, among other things, that the CFTC establish and maintain research programs that further the mission of the Commission. While the specific areas of research required and permitted vary, the intent is clear and reiterated repeatedly: the Commission is to study, “emerging technologies, technological advances, and innovations.” Facilitating the Commission’s understanding of emerging technologies appears to be a priority of both Congress and the agency. In that regard, the release of the discussion draft coincided with the Commission’s announcement that LabCFTC would be elevated as an independent operating office within the agency.

Sec. 120: Elimination of the Double-Sided Confirmation Requirement for Swap Data Repositories
Sec. 120 relaxes the current requirements for an SDR to confirm the accuracy of data submitted to it. Currently, an SDR must confirm the data with both parties to the swap. If this provision is enacted, an SDR would have to confirm the accuracy of swap data with one counterparty to the swap, rather than both counterparties. The counterparty would be required to comply with any request for confirmation on data accuracy. Particularly in terms of an SDR’s regulatory obligations, this provision may streamline the process of verifying the accuracy of swap data.

Sec. 123: Government Accountability Office Study on Aluminum Markets
Sec. 123, instructs the Comptroller General of the United States to study aluminum markets domestically and globally. The study would need to cover both the limits and successes of policy, as well as the general way the markets function. Findings would be required to be compiled and delivered to the Senate and House Agriculture Committees within 180 days of the reauthorization’s enactment. This provision may be a response to the various allegations regarding improper operation and manipulation among certain aluminum warehouses in the United States.