Regulation of Derivatives - Fall 2016
Georgetown University Law Center
LAWG-2054-11 (CRN#: 29963)
LAWJ-2054-11 (CRN#: 29964)

Course Description
This course will focus on history and current regulation of derivatives in the United States, primarily financial and commodity futures, options, and swaps markets. Topics include the jurisdiction of the U.S. Commodity Futures Trading Commission (CFTC) and the U.S. Securities and Exchange Commission (SEC) as it applies to derivatives, analysis of commodities and applicable securities statutes and regulations, registration and regulation of commodity market participants, administrative and injunctive enforcement powers involving violations of the Commodity Exchange Act, developments in self-regulation, and foreign market access. Overview of Dodd-Frank Act of 2010 and current derivatives market regulation and reform in the U.S. and overseas. Most importantly, in addition to teaching the black letter law and derivatives and commodities industry practices, professors will stimulate an active and creative discussion in class of current topics in derivatives regulation and risk mitigation generally.

Course Materials / Textbook
Reading materials will be available through Course Materials Distribution Site at the Law Center or for individual download and printing from Canvas. In addition, professors will distribute additional reading materials in hard copy in class. Each class will feature a PowerPoint presentation that will cover the entire class materials for each class session and will be posted to Courseware before the next class. This syllabus can be used as a course outline for students’ reference. The syllabus is organized by several modules while each class may include several modules with the reading assignments relating to each module. Students will be expected to read or skim (as appropriate) their required reading materials. These materials will be expected as the basis for discussion in each class.

Meeting Times and Places
Thursdays 11:10 am – 1:10 pm. The final paper is due on December 23, 2016 (i.e., you have one more week to work on the papers after the exams). Class meets in room McDonough 160.

Course Grading
Your final grade for this 2-credit course will be based on a take-home paper that must be at least 15 pages in length; there is no extra credit for the length of the paper, but thoughtful, publication-ready and well researched papers will be viewed with preference. The focus in grading the
papers will be: (a) identification of an interesting and relevant issue; (b) grasp of the relevant area of law and citation to relevant sources of law; (c) analytical discussion; and (d) suggested solutions to an issue or an insightful conclusion. Professors will distribute suggested paper topics in the middle of the semester. Active participation in class is encouraged (e.g., questions, comments, observations or volunteering to cover a particular case/topic) and will count for a ½ grade increase for the final grade. There is no downside to participation – we do not lower your grade for lack of participation (i.e., there is no extra credit for being an A-type personality!).

CLASS 1 – September 1

Overview and Introduction to Energy and Commodities Regulation – Why these Markets Matter: A Brief History of Commodities Regulation, the Commodity Exchange Act (CEA), the Rise of the Commodity Futures Trading Commission (CFTC), State Versus Federal Jurisdiction; the Financial Crisis and the Passage of the Dodd-Frank Act of 2010. The first class will review expectations for the course, the course outline and reading materials, expectations for class participation, grading policy and other course logistics.

1. Introduction.

(a) History of derivatives regulation
   (i) From Mesopotamia to today

(b) Purposes of derivatives
   (i) E.g., agricultural commodity exchange in Ethiopia
   (ii) E.g., the cap and trade emissions programs in the US and the EU
   (iii) E.g., the LME and aluminum prices for soda cans

(c) The Grain Futures Act of 1922

(d) The Commodity Exchange Act of 1936 (CEA)

(e) The Commodity Futures Trading Commission (CFTC)

(f) Federal preemption
   (i) State bucket shop laws
   (ii) First federal cases on commodities

(g) Federal regulators, concurrent jurisdiction over commodities
   (i) CFTC,
(ii) SEC,

(iii) Prudential Regulators (The Fed, Treasury, OCC, FDIC),

(iv) FERC,

(v) EPA,

(h) Self-Regulatory Organizations (SROs)

(i) The NFA and FINRA,

(ii) Exchanges (SEFs and DCMs)

(i) State Regulators

(i) Insurance

(ii) Banking

Required Reading:

Roundtree v. Smith, 108 U.S. 269, 276 Supreme Court (1883). [skim]

Board of Trade v. Christie Grain & Stock Co., 198 U.S. 236 (1905). [skim]


Board of Trade of City of Chicago v. Olsen, 262 U.S. 1 (1923). [skim]

Commodity Exchange Act, 7 U.S.C. §1(a) (9), (19), (20), (29), (36), (47), (51). [skim]

Optional Reading:

CFTC Website, Education Center, Basics of Futures Trading and the Economic Purpose of Futures Markets and How they Work.
http://www.cftc.gov/ConsumerProtection/EducationCenter/economicpurpose

Senate Report Legislative History of the CEA (pages 1-10)

The Grain Futures Act of 1922


(a) Market before 2008 (CFMA 2000)

(b) Financial crisis of 2008
(c) The Pittsburg Declaration of September 2009
   (i) Clearing
   (ii) Trading
   (iii) Reporting
   (iv) Margining
(d) The Dodd Frank Act of 2010
(e) The global effort to reregulate derivatives

Required Reading:
Sen. Lincoln Floor Statement, colloquy after the passage of the Dodd-Frank Act (July 15, 2010) (S5920-23).

Optional Reading:

CLASS 2 – September 8

Discussion of Risk Management and Mitigation Generally. This class will focus on how risk mitigation techniques have evolved during the history of mankind and how various regulatory regimes handle risk mitigation. We will compare SEC’s, FERC’s Insurance Regulators and Commodity Regulators’ techniques to risk mitigation.

CLASS NOTE: Suggested paper topics will be distributed in class by instructors.

   (a) Risk, uncertainty, unpredictability and volatility
   (b) Theories on human risk management
   (c) Emergence of statistical and mathematical analysis
   (d) Basics of statistical analysis
   (e) Modern risk management techniques, algo trading
4. **Choice of Risk Management Instruments**
   
   (a) Managing risks with securities products
   
   (b) Managing risks with insurance products
   
   (c) Managing risks with physical energy products
   
   (d) Managing risks with commodity products

5. **Legitimate Business Purpose**
   
   (a) Gambling vs. Hedging or Speculation
   
   (b) Providing liquidity
   
   (c) Mitigating commercial risks

**Required Reading:**


[Enron California Cases].

*CFTC v. Co Petro Mktg. Group*, 680 F.2d 573 (9th Cir. 1982).

[Cases on gambling and hedging].

**Optional Reading:**


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**CLASS 3 – September 15**

**Defining Commodity and a Commodity Interest.** These definitions are at the core of US federal commodities regulation and are critical to the understanding of CFTC’s jurisdiction. We
will examine various types of contracts subject to CFTC’s jurisdiction and note regulatory implications of these distinctions.

6. **Commodity.**

   (a) Defining "commodity" – Sec. 1a(9) CEA

   (b) Implications of classifying something as a “commodity”

   (c) Agricultural commodity – Sec. 1a(9) CEA; 17 CFR 1.3(zz)
      
      (i) Corn

      (ii) Wheat

      (iii) Hemp

   (d) Excluded commodity – Sec. 1a(20) CEA
      
      (i) Currencies

      (ii) Weather derivatives

      (iii) Interest rates

      (iv) S&P 500

      (v) Events

   (e) Exempt commodity – Sec. 1a(19) CEA
      
      (i) Gold

      (ii) Copper

      (iii) Natural gas

      (iv) Crude oil

      (v) Ethanol

   (f) “Catch-all” commodity
      
      (i) Bitcoin

      (ii) Crypto currencies

   (g) “Bootstrapped” commodity
      
      (i) A product that becomes commodity if there is a swap on it
(h) Non commodity – Sec. 1a(9) CEA

(i) Onions

(ii) Movie ticket receivables

(i) Security

(j) Traditional banking products

7. **Commodity Interest.**

(a) Importance of classification

(i) CFTC’s jurisdiction

(A) Non-exclusive jurisdiction with respect to manipulation of any “commodity in interstate commerce”; and

(B) Exclusive jurisdiction for “commodity interests” – Sec. 2(a)(1) CEA

(b) Significance pre- and post-Dodd Frank

(c) Contract types

(i) Spots

(ii) Forwards

(iii) Futures – Sec. 1a(9), (13) and (27) CEA

(iv) Swaps – Sec. 1a(47) CEA

(v) Options – Sec. 1a(36) CEA

(vi) Other

(A) Event contracts – Sec. 5c(c)(5)(C) CEA

(B) Contracts for differences

(C) Binary options

**Required Reading:**

*In the Matter of: Coinflip, CFTC (2015)*

*CFTC v. Co Petro Mktg. Group, 680 F.2d 573 (9th Cir. 1982).*


_In re Grainland Cooperative_, CFTC Docket No. 97-01 (Opinion and Order, Nov. 2003) (hedge to arrive contracts; futures v. forwards)

_CFTC v. Zelener_, 373 F.3d 861 (7th Cir. 2004).


Commodity Exchange Act, 7 U.S.C. §1(a) (9), (13) (19), (20), (27), (29), (36), (47), (51), Sec. 2(a)(10; Sec. 5c(c)(5)(C); 17 CFR 1.3 (zz) [skim]

Optional Reading:


Key Statutory Provisions: Commodity Exchange Act, 7 U.S.C. §1a(47) (definition of swap and forward contract exclusion); §2(d)-(h) (characterization and exemptions)

CFTC, Policy Statement Concerning Swap Transactions, 54 FR 30694 (July 21, 1989)


_CFTC v. Noble Metals Int’l, Inc.,_ 67 F.3d 766, 772 (9th Cir. 1995).


_CFTC v. Erskine_, et. al. (6th Cir. 2008).

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**CLASS 4 – September 22**

**Hedging and Speculation** – participates’ behavior in derivatives and commodities markets broadly falls into one of the two categories – hedging or speculation (or providing liquidity); discuss characteristics and differences and regulatory implications of each.

8. **Hedging and Speculation.**

(a) Significance in discriminating between hedging and speculation

(i) Hedging for purposes of clearing, margining, position limits
(b) Hedging
   (i) Bona fide hedging – Sec. 4a(c) CEA
   (ii) Mitigation of commercial risks

(c) Speculation
   (i) Providing liquidity and making markets

(d) Introduction to position limits – Sec. 4a(a) and (b) CEA

(e) Hedging and speculation in the EU for comparison

(f) CEA Sec. 4a; Preamble to CFTC Position Limits Rule.

(g) Implications in Commodity Pools – CFTC Reg. 4.13(a)(3) exemption.

Required Reading:
[to be assigned]

Optional Reading:
[to be assigned]

CLASS 5 – September 29

Physical Energy Purchase and Sale Agreements and Hedging Instruments, CFTC-
Regulated Contracts Generally: The Distinction Between Forward Contracts, Spots, Swaps,
Options and Futures Contracts, Fundamentals of Hedging, Types and Uses of Energy
Derivatives, Recharacterization Risk, Anti-Avoidance Authorities under the CEA.

   (a) Forwards
      (i) Volumetric optionality
      (ii) Pricing optionality
   (b) Trade options - CFTC Rule 32.3, 17 CFR 32.3
   (c) Specific trading practices
      (i) Foreign Exchange (Spot)
      (ii) Crude oil trading
(A) Brent interpretation

(iii) Electricity trading

(A) Cooperatives

(B) Regional Transmission Organizations (RTOs) and Independent Systems Operators (ISOs)

(C) FTRs and ARRs

(D) Capacity contracts

(iv) Base metals

(v) Gold, silver and platinum

(vi) Emissions, cap and trade, and RECs (The Paris Agreement)

(vii) Agricultural contracts (e.g., hedge to arrive contracts)

(d) Delivery of a commodity

(i) E.g., allocated metals and unallocated

(ii) Retail participants and delivery – Sec. 2(c)(2)(D)(ii) CEA

(e) Service contracts and commercial agreements

(f) Hedge to arrive contracts

(g) CEA Sec. 2(c)(2)(D)(ii);

10. Trading in Financial Commodities.

(a) Financial contracts revisited

(i) Futures – Sec. 1a(13), (9) and (27) CEA

(ii) Options – Sec. 1a(36) CEA

(iii) Swaps – Sec. 1a(47) CEA

(b) Forex and Currency

(i) Retail forex – Sec. 2(c)(2)(B) CEA

(ii) The Treasury exemption – Sec. 2(c)(1) CEA
(iii) Foreign exchange forwards and foreign exchange swaps – Sec. 1a(24) and (25) CEA; Sec. 1a(47)(E) and (F); Sec. 1b CEA

(iv) Zelener – Rolling Spot and NDFs

(c) Interest rates (IRS) – Sec. 1a(47)(A)(iii)(I) CEA

(d) Credit default swaps (CDS) – Sec. 1a(47)(A)(iii)(XV) CEA

(e) Event and Prediction Contracts – Sec. 5c(c)(5)(C) CEA

(f) Bitcoin and crypto currencies

(g) Financial innovation and FinTech

(i) The change in how commodities trade: from pit to the iPad

(ii) Algorithmic and high frequency trading

(iii) Future for entrepreneurship and the changing business practices

Required Reading:

Sections 1a(9), (13), (24), (25), (27), (36), (47) of the CEA; Sec. 1b of the CEA; Sec. 2(c) of the CEA.


Nagle v. ADM Investor Services Inc., 217 F. 3d 436 (7th Cir. 2000)

CFTC v. Zelener, 373 F. 3d 861 (7th Cir. 2004)

Dunn v. CFTC, 519 US 465 (1997)

CFTC Final Rule on Trade Options; 81 Fed. Reg. 14966 (Mar. 21, 2016) [skim]

Optional Reading:


Commodity Exchange Act, 7 U.S.C. §1(a) (9), (19), (20), (29), (36), (47), (51).
Energy Futures and Exchange or Platform Trading of Commodity Interest Contracts: The Requirement That Futures Be Traded On Regulated Exchanges; Exchange Rules; Speculation and Position Limits; Delivery, “Futurization” and “Swapification”; Swap Execution Facilities (SEFs) and Trading of Swaps.

CLASS NOTE: Students to discuss briefly what topics they have picked for papers and why.

   (a) Execution vs. negotiation (defining a “Trading Facility”)
   (b) Organic development of exchanges
      (i) Spot and forward exchanges
      (ii) Futures exchanges
   (c) Purposes of exchange trading
      (i) Hedging
      (ii) Price discovery
   (d) Designated contract markets (DCM) – Sec. 1a(6), (37), (51) CEA, Sec. 5 CEA
      (i) Mandatory Execution on exchanges – Sec. 4(a) CEA
(A) Agency vs. principal model

(ii) Clearing introduction

(iii) Margining of open positions

(A) Initial margin

(B) Variation margin

(e) Swap execution facilities (SEF)- Sec 1a(50) CEA, Sec. 5h CEA

(i) Single dealer platforms

(ii) Made Available to Trade – MAT Sec. 2(h)(8) CEA; 17 CFR Part 37.10

(f) Algorithmic and electronic trading

(i) Evolution from the pit trading

(ii) Regulation AT

(g) Foreign Platforms

(i) Foreign Boards of Trade (FBOT) Sec. 4(b) CEA

(ii) Foreign Swap Execution Facility Sec. 5h(g) CEA; QMTF No Action Letter

(h) CEA Sec. 1a(6),(37),(50), (51); Sec. 2(a); Sec. 2(h)(8); Sec. 4(b); Sec. 5h and 5h (g).

Required Reading:

*CFTC v. Amaranth Advisors, LLC and Brian Hunter*, Complaint for Injunctive and Other Equitable Relief and Civil Monetary Penalties under the Commodity Exchange Act, (July 25, 2007)


Yieldbroker, CFTC No Action Letter 16-52 (May 15, 2016)

Optional Reading:

Core Principles and Other Requirements for Designated Contract Markets, CFTC Final Rule, RIN 3038-AD09 (June 19, 2012) [skim]


The Role of Market Speculation in Rising Oil and Gas Prices: A Need to Put the Cop Back on the Beat, S. Prt. No. 109-65, 109th Congress, 2nd Sess (June 27, 2006).


Key Statutory Provisions: Commodity Exchange Act, 7 U.S.C. §§1a(9), 1a(13), 1a(27), 1a(47) (Definition of Regulated Contracts); §§4(a), 4(c) (Exchange Trading Requirement).


CLASS 7 – October 13

Bankruptcy, Derivatives, Clearing and ISDA Documentation. The US Bankruptcy Code and treatment of derivatives in insolvency; Clearing methodology and mitigation of risks via a central clearing counterparty; Emergence of ISDA documentation; Mandatory Clearing and the End-user exception; Role of Clearing Houses as a Central Counterparties; Exchanges of Futures for Swaps (EFS) and Exchanges of Futures for Physicals (EFP); Bookouts, Master Netting Agreements and Set-offs; Margining.
12. **Bankruptcy and Derivatives and Commodities.**

(a) The *ipso facto* clause

(b) Definitions in the US Bankruptcy Code

(i) Spot

(ii) Forward agreement

(iii) Swap agreement

(iv) Master netting agreement

(v) Commodity contract

(c) Close-out provisions

(d) Netting and settlement

(i) ISDA netting opinions

(e) Collateral treatment

(f) Part 190 of CFTC regulations

(g) Segregation and Custody

(h) FCM bankruptcies

(i) MF Global

(ii) Peregrine

(iii) Lehman Brothers

13. **Clearing, Margining and Collateral Management.**

(a) Why clearing was invented

(b) Mechanics of clearing

(c) Clearing members
(d) Accounts used

(e) Regulation of Derivatives Clearing Organizations (DCOs) – Sec.1a(15) CEA, Sec. 5b CEA
   (i) Capital and the waterfall
   (ii) Too big to fail analysis
   (iii) Systemically significant institutions

(f) Exemption from DCO designation
   (i) Settlement and netting facilities
   (ii) Blockchain

(g) Clearing through DCMs

(h) Clearing mandate under the Dodd-Frank Act – Sec. 2(h)(2) CEA, 17 CFR Part 50
(i) Clearing models compared
   (i) US vs EU
   (ii) Futures vs Swaps

(j) Collateral management
   (i) Futures,
   (ii) Cleared Swaps,
   (iii) Un-Cleared Swaps

(k) The End-User Exception – Sec. 2(h)(7) CEA; 17 CFR Part 39.6

Required Reading:

*In re Lehman Brothers Holdings Inc., Case No. 08-13555 (JMP) (Bankr. SDNY May 5, 2010) (“Swedbank”)*

*In re Newedge USA, LLC*, CFTC Docket No: 12-06, (June 9, 2012).


Optional Reading:

*MF Global* Litigation

Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants, CFTC Proposed Rule, (June 29, 2015)

IOSCO report on margin requirements, 

CFTC Statutory Interpretation Concerning Forward Transactions, 55 Fed. Reg. 39188, September 25, 1990 (“CFTC’s Brent Interpretation”)


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**CLASS 8 – October 20**

**Over-the-Counter Energy Swaps:** What is a Swap?; De-regulation to Regulation -- the Path From the Commodity Futures Modernization Act of 2000 to the Dodd-Frank Act of 2010, Documentation of Swaps; Futurization and Swapification of markets; Margin.

14. **Swaps Regulation.**

(a) Swaps and security-based swaps (SBS) – Sec. 1a(47) and 1a(42); SEA Sec. 3(a)(68)

(b) History of swaps emergence

(c) ISDA and documentation of Swaps

(d) Capacity to enter into a swap

(e) Business conduct standards
(i) Internal; and

(ii) External

(f) Reporting

   (i) Real-time and Regulatory – Sec. 2(a)(13) CEA

   (ii) Swaps data repositories (SDRs) – Sec. 1a(48) CEA; Sec. 21 CEA

(g) Mandatory clearing – Sec. 2(h) CEA; 17 CFR Part 50

(h) Mandatory trading- Sec. 2(h)(8) CEA

(i) Margin

15. **SEC Regulation of Derivatives.**

(a) Security-based swaps (SBS) – Sec. 1a(42) CEA and Sec. 3(a)(68) SEA

(b) Narrow-based security indices vs broad-based – Sec. 1a(35) CEA

(c) Exemption from registration

(d) Security futures and single stock futures – Sec. 1a(44) CEA

(e) Security based swap agreements (SBSA) – Sec.

(f) SBS Reporting

(g) Registration

(h) SEFs / SBSEFs

(i) Capital and margin

(j) Clearing

   (i) Clearing agencies (CFTC and SEC)

Required Reading:


Commodity Exchange Act, 7 U.S.C. 1a(47); Dodd-Frank Act section 721 [skim]

ICE Report on Conversion of Swaps Into Futures (2012)
https://www.theice.com/publicdocs/ICE_Swaps_to_Futures_FAQ.pdf

CFTC Enforcement Action in Connection with Conversion of Swaps into Futures (September 3, 2013)
http://www.cftc.gov/PressRoom/PressReleases/6679-13

Optional Reading:


CFTC, Concept Release, 63 FR 26114 (May 12, 1998).

United States v. Radley, 632 F.3d 177 (5th Cir. 2011)

Excerpts from CFTC and SEC, Further Definition of “Swap,” “Security-Based Swap,” and “Security-Based Swap Agreement”; Mixed Swaps; Security based Swap Agreement Recordkeeping, 76 FR 48207 (May 23, 2011) (pp. 48207-48227). Note that Dodd-Frank Act Rulemakings may be found at:

IOSCO report on margin for OTC swaps (September, 2013):
http://www.bis.org/press/p130902.htm

July 15, 2010 CONGRESSIONAL RECORD—SENATE (Senator B. Lincoln Colloquy – pages 2 through 6)

CLASS 9 – October 27

Regulation of Participants in Commodities Markets: Indicia of Swap Dealing and Swap Dealers (DSs) and distinction from traders, Major Swap Participants (MSPs), Futures
Commission Merchants (FCMs), Introducing Brokers (IBs), Eligible Contract Participants (ECPs,) Registration Requirements; Customer Protections and Internal Business Conduct Standards; Customer Protection.

16. **Intermediaries and Participants.**

(a) Registration – Sec. 4d, e, f, k, m, n, s of CEA

(b) Capital

(c) Supervision

(i) Defining an SRO

(ii) Membership at the SROs

(iii) SRO requirements distinguished from CFTC

(d) Participants

(i) Floor Broker and Floor Trader – Sec. 1a(22) and (23) CEA; Sec. 4e CEA

(A) Regulation AT and the new definition of Floor Broker

(ii) Eligible Contract Participant (ECP) – Sec.1a(18)

(iii) End-user

(iv) Major Swap Participants (MSP) – Sec. 1a(33)

(e) Intermediaries

(i) Introducing Brokers (IB) – Sec. 1a(31) CEA

(ii) Retail forex dealers (RFED) - NFA

(iii) Futures Commission Merchant (FCM) – Sec. 1a(28) CEA; Sec. 4d and f CEA

(iv) Swap dealers (SD) – Sec. 1a(49) CEA; Sec. 4s CEA

(A) *De minimis* exemption

(B) Capital

(C) Volker Rule and Basel Impact on SDs

(D) Business conduct standards (external and internal)
(E) Disclosures

(v) Associated persons (Aps)

(vi) Part 30.10 brokers

(vii) Foreign brokers and 3.10(c)(3) exemption

Required Reading:


*Sam Wong and Son v. New York Mercantile Exchange*, 735 F.2d 653 (2d Cir. 1984)


*CFTC v. Banc De Binary LTD* (aka Binary Options LTD), (June 5, 2013)

Commodity Exchange Act, 7 U.S.C. §1(a) (12), §5, §5b, §5h and §21. [skim]

Optional Reading:


Registration of Intermediaries, Final Rule 77 FR 51898 (Oct. 29, 2012)

*In re FXDirectDealer*, LLC, CFTC Docket 13-34 (September 18, 2013)

*Prestwick Capital Management v. Peregrine Financial Group*, 727 F. 3rd 646 (7th Cir. 2013)


**Other Energy Market Registrants**: Regulation of Commodity Pools, Commodity Pool Operators (CPOs) and Commodity Trading Advisors (CTAs); Exemptions from Registration as CPO; Brief Discussion of SEC regulation of Investment Companies and differences from CFTC’s regulation; Energy Equity Funds and Operating Companies; Customer Protection.

17. **Commodity Pools.**
(a) Defining "commodity pool" – Sec. 1a(10) CEA
(b) Commodity Pool Operators (CPO)- Sec. 1a(11) CEA
(c) Commodity Trading Advisers (CTA)- Sec.1a(12) CEA
(d) Registration requirement – Sec. 4m and 4n CEA
(e) Required disclosures
(f) Exemptions and exclusions
(g) Harmonization with the SEC
(h) Sec. 1a(10), (11) and (12) CEA; Sec. 4m and 4n CEA;

Required Reading:

CFTC v. Savage, 611 F.2d 270 (9th Cir. 1979).

Commodity Trend Serv. v. CFTC, 149 F.3d 679 (7th Cir. 1998)

Goldstein v. SEC, 451 F. 3d 873 - Court of Appeals, Dist. of Columbia Circuit 2006

Investment Company Institute v. CFTC., 891 F. Supp. 2d 162, 172 (D.D.C. 2013);
Investment Company Institute v. CFTC, 720 F 3d 370 (DC Cir. 2013)

Optional Reading:

Applicable Statutory Provisions: Commodity Exchange Act, 7 U.S.C. §§4d(a)(1), 4e, 4f, 4k, 4m, 4n (Registration of Commodity Professionals)

CFTC Regulations, Part 4 (Registration Exemptions)


CLASS 10 – November 3

Enforcement Under the Commodity Exchange Act: Disruptive Trading Practices, Market Manipulation, Fraud and Insider Trading, Criminal liabilities, Private Rights of Action; Parallels with FERC’s and SEC’s enforcement authorities
18. **CFTC Enforcement Generally.**

(a) General purposes behind derivatives trading

   (i) Legitimate business purposes

   (ii) Impact on the market theory

(b) Traditional CFTC authorities

(c) Expanded CFTC authorities under the Dodd-Frank

(d) Fraud – Sec. 4b, 4o, 9, 13 CEA

(e) Manipulation and attempted manipulation

(f) Insider trading

(g) Ponzi schemes

(h) Private cause of action – Sec. 22 CEA

**Required Reading:**

*General Foods Corp. v. Brannan*, 170 F.2d 220 (7th Cir. 1948)

*Cargill Inc. v. Hardin*, 452 F.2d 1154 (8th Cir. 1971)


*In re Dynegy Marketing & Trade, and West Coast Power LLC*, Order Instituting Proceedings, Making Findings and Imposing Remedial Sanctions (Dec. 18, 2002)


*In re Barclays PLC*, CFTC Docket No. 15-24 (May 2015)


**Optional Reading:**

Chairman Gensler NY Times Op Ed on LIBOR Scandal: [http://www.cftc.gov/PressRoom/SpeechesTestimony/gensleropinion080812](http://www.cftc.gov/PressRoom/SpeechesTestimony/gensleropinion080812)
Prohibition on the Employment, or Attempted Employment, of Manipulative and Deceptive Devices and Prohibition on Price Manipulation, Final Rule, 76 FR 41398 (July 14, 2011)


FERC Order to Show Cause, Energy Transfer Partners, Docket No. IN06-002, (July 26, 2007).

Applicable Statutory Provisions: Commodity Exchange Act, §4c(a)(5), §6(c), (d) and §9(a) (manipulation), §22 (private rights).


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**CLASS 11 – November 10**

**Enumerated Enforcement Authorities** – Discuss specific causes of action in addition to fraud and manipulation; authorities traditionally used by the CFTC under the CEA and the authorities provided under the Dodd-Frank Act, such as disruptive trading practices.

19. **Specific Enforcement.**

(a) Wash sales – Sec. 4c(a) CEA

(b) Self-Trading distinguished

(c) Corners and squeezes – Sec. 9(a)(2)

(d) Aiding and abetting– Sec. 13 CEA

(e) False Reporting cases – Sec. 9(a)(2) and 6(c)(1)(A) CEA

(f) Duty to supervise

(g) Failure to register

(h) Front running

(i) Churning
Disclosures
Retail commodity fraud – Sec.
Disruptive trading practices – Sec. 4c(5) CEA
   Spoofing,
Violating bids and offers

Required Reading:
Rosenthal & Co. v. CFTC, 802 F.2d 963 (7th Cir. 1986)
In the Matter of James R. Burgess, 2006 WL 237509 (CFTC)(Optioneer case)
In the Matter of Lincolnwood Commodities Inc. of California, 1984 CFTC Lexis 773 (CFTC)

CLASS 12 – November 17

Extraterritoriality / Cross Border; Part 30 of CFTC Regulations: Cross Border Application of CFTC rules to Global Firms and Foreign Entities Transacting with US Persons; Discussion of Global Trends in Commodities


(a) Traditional CFTC’s jurisdictional reach
   (i) Trading on non-US exchanges (Foreign Boards of Trade – FBOTs)
   (ii) Clearing on non-US DCOs
   (iii) Offering brokerage services in the US from the overseas
   (iv) Part 30.10 broker
   (v) Part 30.7 accounts
   (vi) Offering foreign futures products in the US
   (vii) Reporting to the CFTC (Form 40)

(b) Cross-Border Regulations under the Dodd Frank
   (i) US Person
(ii) Non-US SD and aggregation and *de minimis* threshold

(iii) Entity vs Transactional requirements

(iv) Mutual recognition and substituted compliance

**Required Reading:**

Final Exemptive Order Regarding Compliance With Certain Swap Regulation, CFTC Final Order, RIN 3038-AD85, (Jan. 7, 2013) [skim]

Interpretive Guidance and Policy Statement Regarding Compliance With Certain Swap Regulations, CFTC Rule, RIN 3038-AD85 (July 26, 2013) [skim]


Initial Response to District Court Remand Order in SIFMA v. CFTC, RIN 3038-AE27, (March 10, 2015)

**Optional Reading:**

International Initiatives and publications:

Part 30 of CFTC Rules and Regulations
http://www.ecfr.gov/cgi-bin/text-idx?SID=e74a13e7f2320240064783d8ddb2378a&node=17:1.0.1.1.23&rgn=div5

CFTC Q&A regarding Foreign Boards of Trade, Fact sheet, and the final rule

**21. European and Other Regulations.**

(a) Implementation of the Pittsburgh Declaration

(b) EMIR and MiFID

   (i) Clearing

   (ii) Trading

   (iii) Reporting

   (iv) Collateral margining
(c) Asia and Singapore
(d) Australia
(e) EU and CFTC agreements on mutual recognition
(f) [READING MATERIALS]

CLASS 13 – December 1

22. Class Summary

(a) Q&A
(b) Discuss Class Papers

CLASS NOTE: Seminar final papers are due December 23, 2015

[The End]