GOVERNING FOR IMPACT

MEMORANDUM

The CFTC's Climate-Finance Efforts and the Major Questions Doctrine

Commodity Futures Trading Commission
April 2023

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I. Introduction

In June 2022, the Commodity Futures Trading Commission (CFTC) issued a request for information (RFI) "to better inform its understanding and oversight of climate-related financial risk as pertinent to the derivatives markets and underlying commodities markets."[1] The CFTC is one of several regulatory agencies working to address climate-related financial risks present within the financial system. Given its unique role in regulating derivatives and commodity markets, the CFTC is working to ensure that the private sector can effectively use those products to address their own climate-related risks. Because such risks threaten both the nation's financial stability and private sector operations, it is imperative the CFTC continue this important work.

The CFTC has yet to propose any new initiatives beyond the RFI, but opponents have already claimed that any resulting rulemakings will violate the "major questions doctrine" (MQD),[2] as articulated in the 2022 case *West Virginia v. EPA*.[3] This memo primarily explains why those claims misconstrue the Supreme Court's MQD inquiry. The appendix undertakes its own, more rigorous, MQD analysis, and concludes that actions the agency may take in the wake of the RFI are unlikely to run afoul of the doctrine.

II. Background

Derivatives and the CFTC

Derivatives are financial contracts for which "prices are determined by, or 'derived' from, the value of some underlying asset, rate, index, or event"[4] and are used by people and corporations in the financial and real economies to manage their risks and effectively plan for the future. For example, farmers use derivatives to focus on raising crops and livestock, rather than worrying about market fluctuations.

Recognizing a "national public interest" in guaranteeing well-functioning derivatives markets,[5] Congress enacted the Commodity Exchange Act (CEA) and created the CFTC to:

- "protect[] the innocent individual investor … from being misled or deceived,"[6]
- "prevent undue speculation,"[7]
- "promote responsible innovation and fair competition,"[8]
- "deter and prevent … disruptions to market integrity,"[9]

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[1] 87 Fed. Reg. 34856, 56 (June 8, 2022) (henceforth *CFTC RFI*).
[2] Letter from Attorney General Patrick Morrisey, West Virginia, *et al.* to Chair Rostin Behnam, CFTC, re: Comments on the CFTC's "Climate-Related Financial Risk RFI" by the Attorneys General of the States of West Virginia, Alabama, Alaska, Arizona, Arkansas, Georgia, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Montana, Nebraska, North Dakota, Ohio, Oklahoma, South Carolina, Texas, Utah, Virginia, and Wyoming (Oct. 7, 2022), comments.cftc.gov/PublicComments/ViewComment.aspx?id=70868&SearchText= (henceforth *Attorney General Letter*). *See also id.* ("if CFTC uses its regulatory authority over exchange-traded derivatives1 to try to address climate change, that effort would constitute the kind of 'extravagant statutory power' that the Supreme Court addressed in *West Virginia*.").
[3] *See* W. Virginia v. Env't Prot. Agency, 142 S. Ct. 2587 (2022) (henceforth, *W. Virginia*).
[4] FINANCIAL CRISIS INQUIRY COMMISSION, THE FINANCIAL CRISIS INQUIRY REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON THE CAUSES OF THE FINANCIAL AND ECONOMIC CRISIS IN THE UNITED STATES 45-46 (2011), fcic.law.stanford.edu/report/.
[5] 7 U.S.C. § 5. *See also id.* ("It is the purpose of this chapter to serve the public interests … through a system of effective self-regulation of trading facilities, clearing systems, market participants and market professionals under the oversight of the Commission.").
[6] CFTC v. R.J. Fitzgerald & Co., 310 F.3d 1321, 1329 (11th Cir. 2002).
[7] Hunter v. FERC, 711 F. 3d 155, 157 (D.C. Cir. 2013).
[8] 7 U.S.C. § 5.
[9] *Id.*

- "ensure the financial integrity of all transactions … and the avoidance of systemic risk."[10]

As the D.C. Circuit has noted, the CFTC retains "regulatory jurisdiction over a wide variety of markets in futures and derivatives,"[11] including, per the agency's organic statute, the authority "to make and promulgate such rules and regulations as, in the judgment of the Commission, are reasonably necessary to effectuate any of the provisions or to accomplish any of the purposes of" the CEA[12] and to enforce its provisions.[13]

Beyond its general grant of rulemaking authority, the CFTC also possesses specific authorities to regulate certain entities and types of financial transactions:

- *Market Participants*. Participants in the derivatives markets can generally be divided into three categories: large traders, advisors, and brokers. All participants must register with the CFTC before operating,[14] and must abide by CFTC recordkeeping and reporting rules.[15] For large traders and brokers — known as swaps dealers (SDs), major swaps participants (MSPs), and futures commission merchants (FCMs) — the CFTC may write regulations to ensure their financial health.[16] The CFTC may also promulgate business conduct standards for SDs and MSPs,[17] and regulations as to how advisors — known as commodity pool operators (CPOs) and commodity trading advisors (CTAs) — provide disclosures to customers.[18]

- *Trading Platforms*: There are two relevant types of trading platforms: exchanges and clearinghouses. All must register with the CFTC before operating.[19] Exchanges — known as swap execution facilities (SEFs) and designated contract markets (DCMs) — must "minimize sources of operational risk" to ensure their continued operation with minimal downtime[20] and follow acceptable business practices.[21] Clearinghouses — known as derivatives clearing organizations (DCOs) — must (1) maintain "adequate financial … resources[]" to meet their obligations in the event their largest clearing member were to fail,[22] (2) maintain eligibility standards for clearing members,[23] and (3) collect margin from clearing members.[24] Requirements for SEFs, DCMs, and DCOs are subject to CFTC regulations.[25]

- *Contracts*: Beyond market participants and platforms, the CFTC regulates derivatives contracts themselves. The agency may write rules and bring enforcement actions to address fraud and manipulation in derivatives and commodity spot markets,[26] may implement and enforce position

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[10] *Id.*
[11] Investment Co. Inst. V. CFTC, 720 F. 3d 370, 372 (D.C. Cir. 2013).
[12] 7 U.S.C. § 12a. *See also* CFTC v. Schor, 478 U.S. 833, 845 (1986) (noting with regard to this provision, "[a]n agency's expertise is superior to that of a court when a dispute centers on whether a particular regulation is 'reasonably necessary to effectuate any of the provisions or to accomplish any of the purposes' of the Act the agency is charged with enforcing; the agency's position, in such circumstances, is therefore due substantial deference.").
[13] *See* 7 U.S.C. § 6b-1.
[14] *See id.* § 6s(a) (for SDs and MSPs), § 6f(a) (for FCMs), § 6n(1) (for CPOs and CTAs).
[15] *See id.* § 6s(f) (for SDs and MSPs), § 6f(c) (for FCMs), § 6n(3) (for CPOs and CTAs).
[16] *See, e.g.*, *id.* § 6s(b), (d)-(e) (providing that the CFTC may write "rules that limit [SDs' and MSPs'] activities," including but not limited to restricting the risks that they take, imposing capital and margin requirements); § 6f(b)-(c) (providing that FCMs must meet "such minimum financial requirements as the Commission may by regulation prescribe as necessary to insure his meeting his obligation as a registrant" and conduct risk assessments as directed).
[17] *See id.* § 6s(h).
[18] *See id.* § 6n(1)-(4).
[19] *See id.* §§ 7a-1(a) (providing that DCOs must register); 8(a) (same for DCMs and SEFs).
[20] *Id.* §§ 7(d)(20), 7b-3(f)(14).
[21] *See id.* § 7a-2(a) (allowing the CFTC to define acceptable business practices).
[22] *Id.* § 7a-1(c)(2)(B)(i).
[23] *See* id. § 7a-1.
[24] *See id.*
[25] See *id.* §§ 7(d)(1)(A)(ii), 7b-3(f)(1)(A)(ii), 7a-1(c)(2)(A)(i).
[26] *See id.* § 9. *See also* CFTC v. McDonnell, 287 F. Supp. 3d 213, 227 (E.D.N.Y. 2018) ("CFTC does not have regulatory authority over simple quick cash or spot transactions that do not involve fraud or manipulation.") (internal citations removed).

limits,[27] and may deny new instruments from trading on an exchange.[28] The CFTC may also decide which swaps must be centrally cleared[29] and enact regulations as it "determines to be necessary" to prevent evasion of that clearing requirement.[30]

Climate-Related Financial Risks and Climate-Related Financial Instruments

Climate-related financial risks are "risks to the financial system and its participants from the impacts of climate change."[31] Climate change has the capacity to inflict significant financial losses on market participants in the form of both physical risks, or harms "to people and property arising from acute, climate-related disaster events,"[32] and transition risks, or "stresses to certain institutions or sectors arising from the shifts in policy, consumer and business sentiment, or technologies associated with the changes necessary to limit climate change."[33] The Financial Stability Oversight Council (FSOC)[34] declared climate-related financial risks "an emerging threat to the financial stability of the United States."[35] In a 2021 report, FSOC issued 35 recommendations to regulators under four broad subjects.[36] In response, the nation's financial regulators have undertaken efforts to address the climate-related financial risks present within their sections of the financial system.[37]

Beyond climate-related financial risks generally, a number of financial instruments, regulated by the CFTC, exist to help the private sector address their own climate risks. Climate-related derivatives allow traders to hedge their risks, and include: water futures, which fluctuate based on climate-exacerbated droughts;[38] weather derivatives, which hedge against high-probability, low-risk events such as the temperature in a certain location exceeding some threshold;[39] and catastrophe bonds, which address low-probability, high-risk events related to natural disasters.[40] Relatedly, voluntary carbon offsets (VCOs) are used by individuals and corporations to claim reductions in their net greenhouse gas emissions. Offsets are "tradable 'rights' or certificates linked to activities that lower the amount of carbon dioxide (CO_2) in the atmosphere."[41] Regulation of climate-related derivatives and VCOs is important to ensure that purchasers receive coverage as intended.

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[27] *See id.* § 6a.
[28] *See id.* § 7a-2(c)(3)(B)(ii).
[29] *See id.* § 2(h)(1)(A).
[30] *Id.* § 2(h)(7)(E).
[31] FINANCIAL STABILITY OVERSIGHT COUNCIL, REPORT ON CLIMATE-RELATED FINANCIAL RISK 3 n.9 (2021), home.treasury.gov/system/files/261/FSOC-Climate-Report.pdf (henceforth *FSOC Report*).
[32] *Id.* at 12. For financial markets, physical risks include damage to office buildings, damage to the computers that operate exchanges, and reduced worker productivity.
[33] *Id* at 13. For financial markets, transition risks include losses as fossil fuel infrastructure investments lose valuable due to new government policies and changes in consumer demand for products produced by net-zero-aligned companies.
[34] *See* 12 U.S.C. § 5322 (creating FSOC and charging it with "respond[ing] to emerging threats to the stability of the United States financial system")
[35] *FSOC Report* at 3.
[36] *See generally id.*
[37] *See* Office of the Comptroller of the Currency, Principles for Climate-Related Financial Risk Management for Large Banks, www.occ.gov/news-issuances/bulletins/2021/bulletin-2021-62a.pdf; 87 Fed. Reg. 19507; 87 Fed. Reg. 75267; 87 Fed. Reg. 21334; 87 Fed. Reg. 36654.
[38] *See Hedging with Water Futures*, CME GROUP (May 26, 2021), www.cmegroup.com/education/articles-and-reports/hedging-with-water-futures.html.
[39] *See* The Canadian Derivatives Institute, *Hedging against climate risks using weather derivatives*, INVESTMENT EXEC., (Sept. 10, 2021), www.investmentexecutive.com/inside-track_/the-canadian-derivatives-institute/hedging-against-climate-risks-using-weather-derivatives/.
[40] *See* CFTC No Action Letter No. 14-152 (Dec. 18, 2014), www.cftc.gov/node/213266.
[41] Angelo Gurgel, *Carbon Offsets*, MIT CLIMATE PORTAL (Sept. 11, 2020), climate.mit.edu/explainers/carbon-offsets.

The CFTC's Request for Information

The CFTC issued its RFI in June 2022 "to better inform its understanding and oversight of climate-related financial risk as pertinent to the derivatives markets and underlying commodities markets."[42] The RFI covered 10 topics divided into 34 multi-part questions. Eight topics related specifically to the regulation of registered entities, market participants, and markets generally[43]; and two related to streamlining the CFTC's internal operations or making them more effective.[44] Most questions sought to inform the CFTC about "how climate-related financial risk may affect … the soundness of the derivatives markets" and "how market participants use the derivative markets to hedge and speculate on various aspects of physical and transition risk."[45] Only a few questions related to how the CFTC should "adapt its oversight of the derivatives markets," such as those asking "how registrants and registered entities may need to adapt their risk management frameworks" and for information about "new or amended derivative products created to hedge climate-related financial risk."[46]

Based on the questions posed, one can imagine the CFTC taking any of nine possible actions in three broad categories (in addition to operational or capacity-building activities not subject to legal challenge):

Regulating Trading Platforms and Market Participants

- Update disclosure requirements to include information about climate-related aspects of listed derivatives products, reported transactions, and/or open positions.[47] These could be tailored[48] and focus on governance, strategy, risk management, and metrics and targets.[49]
- Require incorporation of climate stress tests into risk management processes.[50]
- Require implementation of risk management policies that address climate-related risk,[51] including clearing members' and their clients' climate-related risks.[52]
- Change minimum capital and liquidity requirements.[53]

Product Regulation

- Update or implement rules to better enable trading of derivatives products that are used to manage or facilitate price discovery of climate-related financial risks.[54]
- Update or implement rules to promote market integrity in climate-affected products.[55]

Voluntary Carbon Markets

- Create a registration framework for voluntary carbon market participants.[56]
- Enact rules to enhance the integrity of voluntary carbon markets.[57]
- Conduct oversight of voluntary carbon markets to address fraud and manipulation.[58]

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[42] *CFTC RFI* at 34856.
[43] Those topics are Data, Scenario Analysis and Testing, Risk Management, Disclosure, Product Innovation, Voluntary Carbon Markets, Digital Assets, and Financially Vulnerable Communities.
[44] Those topics are Public-Private Partnerships/Engagement, Capacity and Coordination.
[45] *CFTC RFI* at 34858.
[46] *Id.* at 34858.
[47] *See id.* at 34858 (Question 2).
[48] *See id.* at 34859 (Question 15).
[49] *See id.* (Question 14). *See also id.* (Question 17).
[50] *See id.* (Question 7).
[51] *See id.* (Questions 8, 9, and 10).
[52] *See id.* (Question 11).
[53] *See id.* (Question 12).
[54] *See id.* (Question 18).
[55] *See id.* (Question 19).
[56] *See id.* at 34860 (Question 24).
[57] *See id.* (Question 22).
[58] *See id.* (Question 23).

III. Rebutting Major Questions Doctrine critiques

The MQD traces its lineage to a pair of cases at the turn of the millennium.[59] Starting in 2021, however, the Supreme Court began deploying a more aggressive version of the doctrine, culminating in *West Virginia v. EPA*.[60] In that opinion, Chief Justice John Roberts articulated a two-step test for resolving "certain extraordinary cases" in which "both separation of powers principles and a practical understanding of legislative intent make us 'reluctant to read into ambiguous statutory text' the delegation claimed to be lurking there."[61]

First, a court must assess whether a given exercise of regulatory power poses a major question. It does so by assessing "the history and breadth of the authority that [the agency] has asserted, and the economic and political significance of that assertion."[62] Put differently: skepticism is due, the Court suggested, when an agency (1) claims "to discover in a long-extant statute an unheralded power" that (2) represents "a transformative expansion in its regulatory authority."[63] Some indicators that an agency might be acting in such a manner include: regulating outside of its traditional sphere of expertise;[64] seeking to draw new classes of entities into its regulatory orbit;[65] diverging from its regulatory antecedents;[66] and upsetting the traditional balance of federal-state powers.[67] The Supreme Court has also suggested that an agency may be attempting to impermissibly expand its regulatory authority when it cites an "ancillary provision" of a statute "designed to function as a gap filler," and "rarely … used in the preceding decades," to justify its action.[68]

Second, in the event a court determines that a given agency action does pose a major question, that action will only survive if the government can point to "clear congressional authorization" for its interpretation, which requires "something more than a merely plausible textual basis."[69]

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[59] *See, e.g.*, Gonzales v. Oregon, 546 U.S. 243 (2006); FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000).

[60] *See* Alabama Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485 (2021); Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., Occupational Safety & Health Admin., 142 S. Ct. 661 (2022); and *W. Virginia*.

[61] *W. Virginia*, at 2609, quoting Utility Air Group v. EPA, 573 U.S. 302, 324 (2014).

[62] *Id.* at 2608 (internal citations omitted).

[63] *Id.* at 2610, quoting *Utility Air*, 573 U.S. at 324 (internal citations omitted). Importantly, Justice Gorsuch's opinion, styled as a concurrence, and which seems to suggest that any one of several indicia — for example, an agency "claim[ing] the power to resolve a matter of great political significance" or "seek[ing] to intrude into an area that is the particular domain of state law" — would be sufficient to independently trigger MQD scrutiny, received the support of only one other justice, and so does not constitute binding precedent. *See W. Virginia*, at 2620 (internal citations omitted).

[64] *See, e.g.*, King v. Burwell, 576 U.S. 473, 486 (2015) ("It is especially unlikely that Congress would have delegated this decision to the IRS, which has no expertise in crafting health insurance policy of this sort."); *W. Virginia*, at 2623 (2022) ("skepticism may be merited when there is a mismatch between an agency's challenged action and its congressionally assigned mission and expertise"); Gonzales v. Oregon, 546 U.S. 243, 269 (2006) ("The deference here is tempered by the Attorney General's lack of expertise in this area and the apparent absence of any consultation with anyone outside the Department of Justice who might aid in a reasoned judgment.").

[65] *See* Util. Air Regul. Grp. v. E.P.A., 573 U.S. 302, 324 (2014) ("The power to require permits for the construction and modification of tens of thousands, and the operation of millions, of small sources nationwide falls comfortably within the class of authorizations that we have been reluctant to read into ambiguous statutory text").

[66] *See* Alabama Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485, 2489 (2021) ("This claim of expansive authority under § 361(a) is unprecedented. Since that provision's enactment in 1944, no regulation premised on it has even begun to approach the size or scope of the eviction moratorium."); Food & Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 157 (2000) ("the consistency of the FDA's prior position bolsters the conclusion that when Congress created a distinct regulatory scheme addressing the subject of tobacco and health, it understood that the FDA is without jurisdiction to regulate tobacco products and ratified that position").

[67] *See* Alabama Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485, 2489 (2021) ("The moratorium intrudes into an area that is the particular domain of state law: the landlord-tenant relationship").

[68] *W. Virginia*, at 2610.

[69] *W. Virginia*, at 2609 (internal citations omitted).

Critics are wrong to suggest the MQD will apply to CFTC rulemakings that result from the RFI.

Some opponents of financial regulation have criticized the CFTC for issuing the RFI and have argued that any initiatives which result from it will flout the MQD. But such critics have misconstrued *West Virginia*.

Most prominently, a group of 21 red-state attorneys general wrote a letter stating that the "CFTC is abandoning its mandates in favor of the present administration's political goals by assuming the mantle of an environmental regulator."[70] At one point, the attorneys general claim that the CFTC would be exercising "extravagant statutory power," of the kind impermissible under the MQD, were it to undertake the activities contemplated in the RFI because exchange-traded derivatives contracts have such a large notional value. Citing data showing that U.S. exchanges traded "15.4 billion derivatives contracts … worth nearly $100 trillion in traded value" in 2021,[71] the attorneys general claim that regulations by the CFTC would "have a substantial economic impact."[72]

But the total size of a regulated market is the wrong way of determining "economic significance" under the MQD. Rather than taking notice of the aggregate size of a regulated market, the test instead looks to the *change* in private-sector expenditures resulting from the regulation, including whether the rule "would result in substantial compliance costs."[73] Indeed, by the attorneys general logic, *any* CFTC regulation of the derivatives market would implicate the MQD.[74]

The attorneys general also claim that "Congress has already considered whether CFTC's power should encompass climate policy[,] and it rejected such an expansion" when it considered but declined to enact the American Clean Energy and Security Act of 2009 (colloquially known as "Waxman-Markey"), a bill designed to transition the U.S. to a net zero carbon economy.[75] It is true that the Supreme Court has suggested that the MQD may apply when an agency promulgates a policy that Congress has considered and expressly rejected.[76] However, neither this bill nor any other that Congress has considered and rejected would have directed the CFTC to promulgate any of the rules contemplated in the RFI. Waxman-Markey's CFTC-related provisions would only have provided the agency with the authority to regulate energy commodity derivatives, credit default swaps, and other over-the-counter derivatives — not "climate policy."[77] And although it did not enact Waxman-Markey, Congress did ultimately grant the agency those same authorities in the Dodd-Frank Act.[78] In short, Congress has never rejected any legislation requiring the CFTC to address climate-related financial risks.

Finally, the attorneys general claim that "any CFTC policy or rulemaking that would aim to produce an 'orderly transition to a low-carbon economy' would constitute a 'fundamental revision' of" the CEA, because climate change is "an area far afield from the Commission's traditional realms of expertise."[79] But, of course, the CFTC necessarily regulates across a broad range of issue areas. Overseeing derivatives and futures markets requires the agency to regulate financial products relating to crypto assets, interest rates, currencies, agriculture, livestock,

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[70] *See Attorney General Letter*. *See also* Letter from Reps. Byron Donalds & Don Bacon to Chairman Rostin Behnam, CFTC (Sept. 16, 2022), https://bit.ly/3SSl3n8 ("Although the request is being presented as a neutral fact-finding endeavor designed to reduce risk and ensure financial integrity, the supplemental information subsections suggest the CFTC is seeking justification to expand its jurisdictional scope and take part in the Biden administration's Green New Deal push."); Letter from David R. Burton, Senior Fellow in Economic Policy, The Heritage Foundation to Christopher Kirkpatrick, Secretary, CFTC (Aug. 8, 2022), comments.cftc.gov/PublicComments/ViewComment.aspx?id=69530&SearchText= ("the CFTC does not have the authority to impose regulations that have as their objective environmental regulation and the mitigation of climate change").
[71] *Id.*
[72] *Id.*
[73] Daniel Deacon & Leah Litman, *The New Major Questions Doctrine*, 109 VA. L. REV. (forthcoming 2023).
[74] Recall that the Supreme Court has noted the doctrine should only apply in "certain extraordinary cases." *W. Virginia*, at 2609.
[75] *Id.*; *see also* H.R. 2454, 111th Cong. (2009).
[76] *W. Virginia*, at 2164 ("we cannot ignore that the regulatory writ EPA newly uncovered conveniently enabled it to enact a program that, long after the dangers posed by greenhouse gas emissions had become well known, Congress considered and rejected multiple times") (internal quotations and citations removed).
[77] *Id.* §§ 351, 354, 355.
[78] *See generally* Dodd-Frank Wall Street Reform and Consumer Protection Act Title VII, Pub. L. No. 111-203 (2010).
[79] *Id.* (internal citations removed).

weather, precious metals, energy — and, yes, climate. This is not a function of the CFTC seeking to aggrandize its own powers; rather, market participants currently offer financial products that either expressly hedge against climate transition risks or that possess risk profiles that will change alongside a warming climate. For example, one exchange offers a suite of weather-related instruments, including several that relate to average daily temperature[80] or water price,[81] and previously listed contracts related to snowfall and rainfall across the United States.[82]

New regulatory initiatives cognizant of the realities of a warming climate, then, do not aim to achieve a certain quantity of emissions reductions, but rather seek to ensure the safety and integrity of derivatives and futures markets — the CFTC's core charge. In short, so long as it acts with the purpose of effectuating its legal mandates and complies with existing statutory and analytical requirements, the existence of second-order effects that could affect greenhouse gas emissions does not mean those actions will constitute violations of the MQD.[83]

IV. Conclusion

The CFTC's RFI marks a prudent step for a regulator aiming to ensure the safety and integrity of derivatives and futures markets amid a changing climate. Critics who have claimed that any subsequent regulation would violate the MQD have deeply misconstrued the landmark case announcing the doctrine.

In contrast to the haphazard MQD analysis conducted by the attorneys general, we provide a more rigorous application of the doctrine in the Appendix, below; while a comprehensive analysis will of course depend on the specifics of any forthcoming rulemakings, it is likely that future regulatory efforts the CFTC might pursue will not implicate the doctrine.

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[80] CME Group, *Weather Products*, www.cmegroup.com/trading/weather/.

[81] CME Group, *Nasdaq Veles California Water Index*, www.cmegroup.com/markets/equities/nasdaq/nasdaq-veles-california-water-index.html.

[82] CME Group, *Delisting of the Snowfall and Rainfall Binary Options Contracts* (Dec. 2, 2013), www.cmegroup.com/tools-information/lookups/advisories/ser/SER-6935.html.

[83] The attorneys general also argue in their letter that, if the CFTC required registrants and regulated entities to address their climate-related financial risks (including addressing capital and liquidity requirements), "the CFTC would violate Congress's express instruction not to regulate underlying assets." *Attorney General Letter*. According to the letter, "disclosures about who owns or emits carbon from other derivatives markets would regulate carbon and impact its price. Carbon derivatives traders would gain awareness over carbon ownership and trading and adjust their own strategies accordingly. … If the CFTC starts changing how much risk must be offset because of GHG emissions, supply and demand for carbon will change. … [A]ny attempt to regulate carbon under the guise of risk disclosure necessarily extends beyond the Commission's authority." It is true that the CEA clearly prohibits the CFTC from directly regulating the commodities underlying derivatives, but that does not constitute a prohibition on any regulatory actions that might affect those commodities, as the attorneys general suggest. By that faulty logic, even uncontroversial CFTC requirements already in place would be impermissible. Disclosures and various financial requirements often affect market behavior, but that is not constitute direct regulation of those customers or their purchases. For example, the CFTC requires DCOs to maintain a minimum level of high-quality liquid assets, such as U.S. Treasury bonds, subject to a formula. *See* 17 C.F.R. § 39.11. If the CFTC were to change this formula such that DCOs had to acquire additional Treasury bonds, it would *not* be the same as regulating Treasury bonds directly. Similarly, were the CFTC to require DCOs to hold more capital in response to new calculations about clearing members' climate risks, that would not constitute direct carbon regulation.

Appendix

As previously noted, there are approximately three categories of regulation the CFTC might pursue in the wake of its RFI:

(1) regulations of trading platforms and market participants;
(2) direct regulation of certain financial products under the agency's jurisdiction;
(3) and regulations designed to ensure the integrity of voluntary carbon markets.

Though a thorough analysis will have to wait for a specific rulemaking proposal from the agency, below we explain why those categories of regulation are unlikely to merit MQD scrutiny. To assess potential policies under the MQD, we focus on the two core inquiries of the first part of the doctrine's test: (1) whether the actions at issue are "unheralded" or "unprecedented"; and (2) whether the actions at issue would work to fundamentally transform the agency's statutory powers.[84]

As a threshold matter, the CFTC possesses the statutory authority "to make and promulgate such rules and regulations as, in [its] judgment … , are reasonably necessary to effectuate any of the provisions or to accomplish any of the purposes of" the CEA.[85] As the Supreme Court noted with reference to *this exact provision*, "[a]n agency's expertise is superior to that of a court when a dispute centers on whether a particular regulation is 'reasonably necessary to effectuate any of the provisions or to accomplish any of the purposes' of the Act the agency is charged with enforcing; the agency's position, in such circumstances, is therefore due substantial deference."[86] Although it is important to keep this general grant of rulemaking authority in mind, all actions the CFTC may take pursuant to the RFI are also specifically authorized by additional statutory provisions.

CFTC efforts to ensure derivatives markets can function safely in light of climate-related risks would not pose a major question.

Climate-related financial risks are inherent in every financial market, including those regulated by the CFTC. The CFTC can act to address these and other predictable consequences of climate-related financial risks on the derivatives markets without triggering MQD scrutiny.

Such regulations could place familiar obligations on actors already subject to CFTC oversight. For example, sellers of weather derivatives (akin to insurance providers) could have balance sheets that are negatively correlated with the risks against which they are insuring, such that businesses may enter contracts only to find that their counterparties have gone bankrupt just as disaster strikes and payouts come due. This is not unprecedented: in the years before the 2007-8 financial crisis, many businesses entered into derivatives contracts with AIG to hedge their risks; yet AIG failed before those contracts could be paid out. To forestall a repeat of that experience, the CFTC could impose climate-related disclosures and prudential regulations on market participants and trading platforms, including: requiring CPOs and CTAs to disclose to clients the climate risks

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[84] For a brief overview of the MQD test *see supra* at 6. *See also* GOVERNING FOR IMPACT, THE MAJOR QUESTIONS DOCTRINE: GUIDANCE FOR POLICYMAKERS (Nov. 2022), www.governingforimpact.org/wp-content/uploads/2022/11/MQD_Medium_templated_FINAL.pdf; Letter from Governing for Impact to General Services Administration regarding FAR Proposed Regulation, "Disclosure of Greenhouse Gas Emissions and Climate-Related Financial Risk" (Feb. 10, 2023), www.governingforimpact.org/wp-content/uploads/2023/02/Federal-Contractor-Climate-Disclosure.pdf (henceforth, *GFI FAR Comment*). Because we conclude that none of the potential policies are likely to pose a major question under the doctrine's first step, we do not proceed to the test's second step (determining whether the agency's interpretation of its statute has been clearly authorized by Congress).
[85] 7 U.S.C. § 12a.
[86] CFTC v. Schor, 478 U.S. 833, 845 (1986).

inherent in particular investments; requiring SDs and MSPs to address climate risks with increased capital or margin requirements; or requiring SEFs and DCMs to address physical risks to their operations.

Further, entire derivatives markets would be at risk if DCOs failed for *any* reason, including as a result of climate-related risks. Derivatives markets rely heavily on central clearing — the process by which an intermediary stands between two parties to a contract such that if one fails to complete their end of the transaction, the intermediary will — to avoid crises when markets deteriorate. Today, the vast majority of swaps are cleared by DCOs, meaning that if DCOs fail to adequately address their climate-related risks, all financial markets may be put at risk. The CFTC may wish to ensure that traders make DCOs aware of their climate risks, ensure that DCOs' algorithms for measuring risks and collecting margin take climate change into account, or conduct examinations of DCOs to ensure they are capable of addressing climate-related risks.

Addressing climate-related financial risks is neither "unheralded" nor "unprecedented."

New regulation of this kind would follow a well-trod regulatory path, as the CFTC has an extensive history of using its statutory authorities to impose analogous requirements in similar contexts — a fact which weighs in favor of the agency under the MQD.

Markets rely on information to function effectively. To address situations where sellers of derivatives (such as weather derivatives) may be unable to payout when needed, Congress requires all registrants to provide disclosures about their risks. For example, Section 4s of the CEA provides that SDs and MSPs must "make such reports as are required by the Commission by rule or regulation regarding the transactions and positions and financial condition of [those transactions and positions]" and directs the CFTC to "establish such other standards and requirements as [it] may determine are appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of" the CEA.[87] Similarly, section 4n of the CEA provides that CPOs must "regularly furnish statements of account to each participant in his operations … in such form and manner as may be prescribed by the Commission."[88]

Using these authorities, the CFTC has implemented risk disclosures that allow traders to make informed decisions about whether to trade with a particular counterparty. The CFTC requires SDs and MSPs to disclose to counterparties the "material risks of the particular swap, which may include market, credit, liquidity, foreign currency, legal, operational, and any other applicable risks," and the "material incentives and conflicts of interest that the [SD] or [MSP] may have." It also allows counterparties of SDs and MSPs to "request and consult on the design of a scenario analysis to allow the counterparty to assess its potential exposure in connection with the swap."[89] Similarly, the CFTC has required that CPOs provide to pool participants a "discussion of the principal risk factors of participation in the offered pool," including risks relating to volatility, leverage, liquidity, counterparty creditworthiness," and other risks.[90] In sum, were the CFTC to implement climate-related disclosure requirements, it would be building atop these existing regulations.

Further, because mere disclosure of risks is insufficient to ensure a well-functioning market, Congress has required that the CFTC implement a variety of prudential regulations that ensure the derivatives markets operate smoothly.[91] These regulations govern, among others, large traders' and trading platforms' "prudential requirements," "minimum capital requirements," and "minimum initial and variation margin requirements" of

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[87] 7 U.S.C. § 6s
[88] *Id.* § 6n
[89] 17 C.F.R. § 23.431.
[90] *Id.* § 4.24.
[91] *See* Edward V. Murphy, *Who Regulates Whom and How? An Overview of U.S. Financial Regulatory Policy for Banking and Securities Markets*, CONGRESSIONAL RESEARCH SERVICE (Jan. 30, 2015), sgp.fas.org/crs/misc/R43087.pdf (defining prudential regulation as "monitoring and regulating the risks that a specific firm engages in").

traders selling coverage;[92] exchanges' system safeguards and efforts to address specific "sources of operational risk;"[93] DCOs' "financial, operational, and managerial resources;"[94] eligibility standards for clearing members;[95] and algorithms for measuring risks and collecting margin.[96] The CFTC routinely makes use of these authorities. It has, for example, issued extensive capital and margin requirements for SDs, MSPs, and DCOs;[97] detailed system safeguard requirements for SEFs, DCMs, and DCOs;[98] and imposed regulations governing DCOs' models that determine the amount of margin required to be collected when entering into swaps.[99] The CFTC also regulates eligibility standards for DCO clearing members and requires DCOs to conduct stress tests monthly.[100] And, perhaps most importantly, the CFTC conducts regular examinations of DCOs to ensure they are fully managing their risks,[101] including subjecting DCOs to stress tests to ensure their continued operation during times of crisis.[102] Efforts to adjust these regulations to reflect climate-related financial risks would therefore hardly constitute a new regulatory front.

Addressing climate-related financial risks is not a "transformative expansion" of the CFTC's regulatory authority.

The Supreme Court has set a high bar for deciding that some assertion of authority is "transformative," a threshold that future CFTC proposals on this issue are unlikely to meet.

The Supreme Court has previously noted that an agency acting outside of its traditional area of expertise is one indication that it is seeking to fundamentally revise its regulatory charter. For example, in *West Virginia*, the Court found that EPA's interpretation of the statute at issue would pose an "assertion[] of 'extravagant statutory power over the national economy'" in part because the interpretation provided that the agency, "and it alone," would be tasked with "deciding how Americans will get their energy" — a task beyond the agency's traditional remit.[103] Likewise, in *FDA v. Brown & Williamson Tobacco Corp.*, the Court denied FDA's assertion that it could "regulate, and even ban, tobacco products" that individual Americans used every day because, among other things, the FDA was subjecting, for the first time, "an industry constituting a significant portion of the American economy" to regulations impose significant net costs on producers.[104] By contrast, here the CFTC would be regulating well-within its wheelhouse — ensuring the soundness of derivatives markets — and based on a lengthy history of past rulemaking.

Another indication that an agency action may pose a major question arises when an agency seeks to draw a number of new entities under its regulatory umbrella. In *Utility Air Regulatory Group v. EPA,* the Court declined to accept an EPA interpretation that "would have given it permitting authority over millions of small sources, such as hotels and office buildings, that had never before been subject to such requirements."[105] The Court noted that under EPA's proposed regulation, "annual permit applications would jump from about 800 to nearly 82,000; annual administrative costs would swell from $12 million to over $1.5 billion; and decade-long delays

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[92] 7 U.S.C. § 6s(b), (d), (e). Subsections (d) and (e) provide that the CFTC may not impose prudential, capital, and margin requirements on entities for which there is already a prudential regulator, implying that the CFTC may impose those requirements on other entities. See also *Id.* § 6f (CEA prohibits FCMs from registering they "meet[] such minimum financial requirements as the Commission may by regulation prescribe as necessary.")
[93] 7 U.S.C. §§ 7(d)(20), 7b-3(f)(14).
[94] *Id.* § 7a-1(c)(2)(B)
[95] *Id.*
[96] *See id.*
[97] *See* 17 C.F.R. §§ 23.154., 39.11.
[98] *See id.* §§ 37.1401, 38.1051, 39.18.
[99] *See id.* § 23.154.
[100] *See id.* § 23.154, *See id.* § 39.11.
[101] *See, e.g.*, *CFTC Divisions Announce Examination Priorities*, CFTC Release No. 7869-19 (Feb. 12, 2019), www.cftc.gov/PressRoom/PressReleases/7869-19 ("DCR examines derivative clearing organizations (DCOs) including those that have been designated as systemically important by the Financial Stability Oversight Council.")
[102] *See, e.g.*, CFTC, CCP Supervisory Stress Tests: Reverse Stress Test and Liquidation Stress Test (Apr. 2019), www.cftc.gov/system/files?file=2019/05/02/cftcstresstest042019.pdf.
[103] *W. Virginia*, at 2609, quoting Utility Air Regulatory Group v. EPA, 573 U. S. 302, 324 (2014).
[104] FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000).
[105] *Id.*, noting *Utility Air*, 573 U. S. at 310, 324.

in issuing permits would become common, causing construction projects to grind to a halt nationwide."[106] By contrast, the types of regulations proposed here will only apply to entities that the CFTC already regulates.

While there is some debate as to whether a rule's economic magnitude factors into a MQD analysis,[107] even if we presume for the sake of argument that it does, the likely compliance costs resulting from new CFTC proposals will pale in comparison to those of past actions deemed major questions. Those costs have figured in the billions or tens of billions of dollars annually.[108] By contrast, new CFTC regulations would affect a very limited number of registered entities and registrants: there exist just 105 swaps dealers,[109] 15 DCOs,[110] 16 DCMs,[111] 21 SEFs,[112] and 61 FCMs.[113] Rules could require those 52 trading platforms to undertake analyses of and spend capital to address their physical climate risks in the same ways that platforms must for other physical risks under existing regulations. Disclosure requirements would affect fewer than 1,250 registered CPOs and 1,310 registered CTAs.[114] Although it is impossible to precisely project compliance costs without knowing specifically what the CFTC will propose, potential CFTC disclosures on registrants are likely to be similar to those proposed by the SEC for investment advisers.[115] The SEC has estimated that complying with new filing requirements would cost at most $2,780 per year for each filer. Applying this number to the 2,728 CFTC registrants and registered entities results in a total cost of roughly $7.6 million — orders of magnitude less than the billions at issue in other instances where the Court has found regulatory action to constitute a major question.

Finally, unlike the "little-used backwater" of a statutory provision at issue in *West Virginia*,[116] the CFTC would promulgate any new regulations in this category pursuant to longstanding, conspicuous statutory authority. The CFTC has been regulating derivatives markets since its creation in 1974; doing so constitutes the agency's core mission.[117] And as noted above, the agency has exercised its power under the relevant statutory provisions on numerous occasions over the years.

CFTC efforts on climate-related and -affected products are not major questions.

Many businesses are turning to derivatives to address the risks stemming from climate change, including water futures, weather derivatives, and catastrophe bonds that are used explicitly to hedge climate risks. Given their increasing importance, the CFTC may decide that climate-related derivatives need special attention to ensure that they are not being manipulated and truly offer the protection that businesses expect. Additionally, many derivatives are based on climate-affected commodities and may face heightened volatility as a result.[118] For example, research shows that not only will global climate change "reduce [corn] yields throughout the world,"

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[106] *Utility Air*, 573 U.S. at 322 (2014).
[107] *See* Natasha Brunstein & Donald L. R. Goodson, *Unheralded and Transformative: The Test for Major Questions After* West Virginia, 47 WM. & MARY ENV'T L. & POL'Y REV. (forthcoming 2023) at 3–4.
[108] *See GFI FAR Comment* at 13 (examining MQD cases and noting that rule would have imposed billions of dollars in costs).
[109] *See* Provisionally Registered Swap Dealers, CFTC, www.cftc.gov/IndustryOversight/Intermediaries/SDs/index.htm.
[110] *See* Derivatives Clearing Organizations (DCO), CFTC, https://sirt.cftc.gov/sirt/sirt.aspx?Topic=ClearingOrganizations.
[111] *See* Trading Organizations - Designated Contract Markets (DCM), CFTC, https://sirt.cftc.gov/SIRT/SIRT.aspx?Topic=TradingOrganizations.
[112] *See* Trading Organizations - Swap Execution Facilities (SEF), CFTC, https://sirt.cftc.gov/SIRT/SIRT.aspx?Topic=SwapExecutionFacilities.
[113] *See* NFA Membership Totals, Nat'l Futures Ass'n, www.nfa.futures.org/registration-membership/membership-and-directories.html.
[114] *See id.*
[115] 87 Fed. Reg. 36654.
[116] *W. Virginia*, at 2613.
[117] 7 U.S.C. § 5(b) ("It is the purpose of this chapter to serve the public interests … through a system of effective self-regulation of trading facilities, clearing systems, market participants and market professionals under the oversight of the Commission").
[118] *See CFTC RFI* at 34861 (statement of Commissioner Christy Goldsmith Romero) ("Commodities markets have been impacted by significant climate disasters such as wildfires, hurricanes, flooding, and other disaster events that have caused devastating financial losses to farmers, ranchers, and producers — losses that impact our derivatives markets.").

but also projects "dramatic increases in the variability of corn yields from one year to the next."[119] Similarly, "extreme weather events and unusual seasonal patterns have impacted both gas demand and supply," which is "a harbinger of more volatility to come as the world copes with the impacts of climate change and accelerates its transition to clean energy."[120] Not only does this volatility harm those in the real economy who rely on commodities like corn or transport fuel, but it also affects investors within those commodity pools. The CFTC may conclude that additional action is necessary to reduce excess volatility stemming from derivatives trading. With the usual caveat that a thorough legal analysis requires a specific policy proposal, it seems unlikely such action would pose a major question.

Facilitating trading in climate-related and -affected products is neither "unheralded" nor "unprecedented."

Maintaining a well-functioning derivatives market, thereby enabling companies to voluntarily hedge risks, is a core CFTC charge — including when those derivatives relate to the climate. The CFTC could take a range of actions to further this statutorily assigned mission that would closely track antecedent rulemakings, including anti-fraud measures, central clearing requirements, and even strict position limits.

In a CEA section titled "Prohibition regarding manipulation and false information," Congress charged the CFTC with promulgating regulations and bringing enforcement actions to eliminate fraud.[121] Indeed, addressing fraud and market manipulation was the chief reason the CEA was originally enacted.[122] The CFTC has subsequently written anti-manipulation regulations,[123] and brings enforcement actions many times each year.[124] To the extent the CFTC finds markets for climate-related products are being manipulated or retail traders are being defrauded, it may bring new enforcement actions to stop illicit behavior or, to the extent existing anti-fraud requirements are insufficient, build atop this foundation to impose new rules.

Further, to the extent that the CFTC becomes concerned that major sellers of weather or climate derivatives may fail, it could require that those derivatives be centrally cleared.[125] Congress gave the CFTC this authority after the 2008 financial crisis, and it further directed the agency to "prescribe rules … as [it] determined … to be necessary to prevent evasions of the mandatory clearing requirements."[126] Using this authority, the CFTC has required many different classes of swaps be centrally cleared, including fixed-to-floating swaps, basis swaps, forward rate agreements, overnight index swaps, and both North American and European untranched CDS indices.[127] Were the CFTC to require, for example, particular weather derivatives to be cleared on the grounds that doing so would help ensure the integrity of those contracts, it would be following strong precedent.

Lastly, the CFTC may take action to reduce volatility in derivatives of climate-affected commodities, as it has with other derivatives, by implementing strict position limits. Because the way climate change is likely to affect many commodity derivatives is through heightened volatility and increased difficulty in predicting prices,[128] the CFTC could impose position limits — essentially an anti-monopoly measure that limits the percentage of open

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[119] Hannah Hickey, *Warmer climate will dramatically increase the volatility of global corn crops*, STANFORD EARTH MATTERS MAGAZINE (June 11, 2018), earth.stanford.edu/news/warmer-climate-will-dramatically-increase-volatility-global-corn-crops.
[120] Jason Bordoff, *Why This Energy Crisis is Different*, FOREIGN POLICY (Sept. 24, 2021), www.foreignpolicy.com/2021/09/24/energy-crisis-europe-gas-coal-renewable-prices-climate/.
[121] *See* 7 U.S.C. § 9.
[122] *See* Commodity Exchange Act, Pub. L. No. 74-675 (noting that the description of the Act is, among other things, "to curb manipulation").
[123] 17 C.F.R. § 180.1.
[124] *See* CFTC, CFTC Releases Annual Enforcement Results (Oct. 20, 2022), www.cftc.gov/PressRoom/PressReleases/8613-22 (noting that "the CFTC filed 82 enforcement actions" in fiscal year 2022).
[125] 7 U.S.C. § 2(h)(2).
[126] *Id.* § 2(h)(4).
[127] *See* 17 C.F.R. § 50.4.
[128] *See CFTC RFI* at 34861 (statement of Commissioner Christy Goldsmith Romero) ("Commodities markets have been impacted by significant climate disasters such as wildfires, hurricanes, flooding, and other disaster events that have caused devastating financial losses to farmers, ranchers, and producers—losses that impact our derivatives markets.").

contracts one party may hold — to reduce that volatility. Since 1936, Congress has prohibited excessive speculation in derivatives markets; and since the agency's creation in 1974, the CFTC has had the authority to limit the volume of derivative contracts that any one speculator may hold to keep that derivative-driven volatility to a minimum.[129] The CFTC used this authority most recently in 2020 to set position limits for a number of highly-traded commodities;[130] if the CFTC finds that existing limits on an individual commodity derivative are not sufficiently stringent to address heightened volatility in light of climate change, it has already exercised the authority it would use to reduce that limit further.[131]

Facilitating trading in climate-related and -affected products would not mark a "transformative expansion" of the CFTC's regulatory authority.

As noted above, the bar for concluding under the MQD that an exercise of agency authority is "transformative" is high; many of the rationales outlined in the preceding section — explaining why the agency would be acting within its traditional area of expertise, that it would not be drawing new entities under its regulatory reach, and that the provisions at issue cannot be considered "little-used backwater[s]" or "ancillary" — apply to this category of potential actions as well.[132]

The economic significance factor also favors the agency in this area of potential regulation. Today, the number of instruments that help manage climate-related risks is quite small and the volume of trading is nearly zero. For example, one of the largest exchanges, CME, offers a single water-based instrument, the Nasdaq Veles California Water Index, which maintains open interest only in the single digits (that is, less than 10 persons are invested in the instrument at any one time).[133] CME also offers weather futures with open interest in the hundreds or thousands of contracts,[134] but those positions are minimal compared to those of more widely traded derivatives that trade hundreds of thousands of times daily and have open interest nearing one million contracts.[135] Given their small volumes, no action the CFTC could take regarding these contracts could impose costs at the level required to merit MQD scrutiny.

The volume of climate-*affected* products is larger, but changes would still not rise to the level of a major question. Take, for example, position limits, which prevent individual traders from gaining monopolies on open positions in any one instrument in a manner that allows the trader to manipulate the price. If the CFTC were to reduce the position limit on CBOT-listed soybean futures from 27,300 contracts, the current legal limit,[136] to 20,000 contracts, then one would have lost the chance to make, *at most*, roughly $26 million, based on price volatility year to date.[137] Even then, it is likely that other traders would step in to trade those contracts; because the major questions analysis is based on the change in total private-sector activity and not just losses to specific individuals, it is doubtful that limiting some speculators from entering into too many contracts would have a net private-sector effect at all.

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[129] *See* 7 U.S.C. § 6a. *See also* 17 C.F.R. § Part 150.
[130] *See* 86 Fed.Reg. 3236 (Jan. 14, 2021).
[131] *See id.* § 6a.
[132] *See supra* at 11-12.
[133] CME Group, *Nasdaq Veles California Water Index Futures - Volume & Open Interest*, www.cmegroup.com/markets/equities/nasdaq/nasdaq-veles-california-water-index.volume.html.
[134] *See, e.g.*, CME Group, *Weather Futures and Options* (Mar. 17, 2023), www.cmegroup.com/daily_bulletin/current/Section24_Weather_Futures_And_Options.pdf.
[135] *See, e.g.*, CME Group, *Interest Rate Futures* (Mar. 17, 2023), www.cmegroup.com/daily_bulletin/current/Section09_Interest_Rate_Futures.pdf.
[136] 17 C.F.R. Appendix E to Part 150.
[137] Year to date, prices for soybean continuous contracts have ranged between 1470.75 cents per bushel at the low end to 1544.00 cents per bushel at the high end. *See* Google Finance, *Soybean Continuous Contract* (accessed on March 20, 2023), www.google.com/finance/quote/ZSW00:CBOT?window=YTD. Contracts are 5,000 bushels. *See* CME Group, *Soybean Futures - Contract Specs*, www.cmegroup.com/markets/agriculture/oilseeds/soybean.contractSpecs.html. If a trader bought low and sold high, they could have made $3,662.50 profit per contract (73.25 cents x 5,000). That's $26,736,250 for 7,300 contracts.

CFTC efforts to address the integrity of voluntary carbon offsets, their markets, and their derivatives are not major questions.

Voluntary carbon offsets (VCOs) are "tradable 'rights' or certificates linked to activities that lower the amount of carbon dioxide (CO_2) in the atmosphere" and are used by individuals and corporations to claim reductions in their net greenhouse gas emissions.[138] VCOs are commodities and are therefore subject to CFTC oversight. Although demand for VCOs is increasing as more companies wish to become net zero, verification that these VCOs are permanent, additional, and do not have leakage is an acute problem; at the moment, it is practically impossible for purchasers to "realistically verify on their own that the promised reduction in emissions is occurring."[139] As one CFTC commissioner explained, "concerns about transparency, credibility, and greenwashing may hamper the integrity and growth of these markets."[140]

Although VCOs are relatively new, actions the CFTC could take to address the integrity of VCOs, their markets, and their derivatives — such as restricting derivatives that may not result in actual delivery of VCOs that truly offset emissions; enforcing anti-fraud statutes against project developers; and overseeing VCO registries and brokers — mimic the efforts the CFTC takes to ensure the integrity of any novel market, and so would not pose major questions.

Ensuring the integrity of voluntary carbon offsets, their markets, and derivatives is neither "unheralded" nor "unprecedented."

To ensure effective derivatives markets that benefit the real economy, Congress has authorized the CFTC to delist derivative contracts that fail to deliver useful commodities. The CEA provides that DCMs "shall list [for trade] only contracts that are not readily susceptible to manipulation" and shall "protect markets and market participants from abusive practices committed by any party," and reiterates the ability of the CFTC to regulate DCMs pursuant to its rulemaking authority.[141] The CEA also permits the CFTC to approve or deny DCMs' rules (including which contracts they list for trade)[142] and "to alter or supplement the rules of a [DCM] insofar as necessary or appropriate."[143]

The CFTC has previously used this statutory authority to ensure that contracts involving actual delivery of commodities are useful to the real economy. Its regulations require DCMs to "have the capacity and responsibility to prevent manipulation, price distortion, and disruptions of the delivery … process."[144] It has provided extensive guidance about how DCMs are to draft physically-settled contracts, including ensuring that contracts "meet[] the risk management needs of prospective users" and implement "quality standards" so that end users receive the commodities they expect.[145] Given that actual delivery of some VCOs may not result in receipt of usable offsets,[146] were the CFTC to, for example, prohibit the listing and trading of VCO derivatives until it has engaged in a thorough and formal review to ensure that delivered VCOs are usable, it would not be "unprecedented."

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[138] Angelo Gurgel, *Carbon Offsets*, MIT CLIMATE PORTAL (Sept. 11, 2020), climate.mit.edu/explainers/carbon-offsets.
[139] Alex Fredman and Todd Phillips, *The CFTC Should Raise Standards and Mitigate Fraud in the Carbon Offsets Market*, CTR. FOR AM. PROG. (Oct. 7, 2022), www.americanprogress.org/article/the-cftc-should-raise-standards-and-mitigate-fraud-in-the-carbon-offsets-market/.
[140] *CFTC RFI* at 34861 (statement of Commissioner Christy Goldsmith Romero).
[141] 7 U.S.C. § 7.
[142] 7 U.S.C. § 7a-2.
[143] *Id.* § 12a(7).
[144] 17 C.F.R. § 38.250.
[145] 17 C.F.R. Appendix C to part 38.
[146] *See, e.g.*, Katie Kouchakji, *Do renewables need carbon markets?*, ENERGY MONITOR (April 5, 2022) www.energymonitor.ai/policy/carbon-markets/do-renewables-need-carbon-markets (quoting the CEO of the largest registry as saying they sold offsets based on projects where they later "came to the conclusion that they were no longer additional").

Nor would it be "unheralded" for the CFTC to use its statutory authority to address fraud and manipulation in the creation and trading of VCOs. The CEA makes it "unlawful for any person, directly or indirectly, to use or employ, or attempt to use or employ, in connection with any … contract of sale of any commodity in interstate commerce … any manipulative or deceptive device or contrivance, in contravention of such rules and regulations as the Commission shall promulgate."[147] The CFTC has previously used this authority to write rules[148] and bring enforcement actions to stop activities involving fraud and manipulation — including the false reporting of information[149] — in novel commodities when there are derivatives available for trade of those commodities. For example, it has enforced prohibitions against manipulating the cryptocurrency Bitcoin[150] and against the reporting of false information in the creation of the index LIBOR.[151] To be sure, this authority does not allot the CFTC boundless authority to regulate all facets of VCO markets. But it would hardly be "unprecedented" for the CFTC to enforce the CEA's prohibitions against fraud and manipulation in the creation of VCOs — especially given that false reporting is precisely the type of activity for which it brought cases for LIBOR manipulation.

Similarly, given the CFTC's history of enforcing these same prohibitions against commodity brokers, it may use the same anti-fraud authorities to oversee VCO registries and brokers. Registries and brokers may serve as traders themselves or may serve simply as "delivery points" where VCO ownership is transferred from one owner to another when a futures contract is settled. The CFTC has long identified delivery points as important to determining the price of commodities and has subjected them to regulatory scrutiny.[152] The CFTC just last year brought an enforcement action against a precious metals dealer for selling "fraudulently overpriced" silver.[153] The CFTC would be following a well-laid path were it to write regulations about what constitutes fraud and manipulation in the sale of VCOs, and require registries and brokers to comply with those rules.

Finally, it would not be "unheralded" for the CFTC to work with the VCO industry to develop a voluntary regulatory regime through a CFTC-registered self-regulatory organization (SRO). When creating the CFTC in 1974, Congress expected the industry to engage in self-regulation with oversight by the agency,[154] and it enacted a provision allowing "any association of persons" to register with the CFTC as an SRO.[155] These SROs are required to have rules governing their members that are approved by the CFTC,[156] and the CFTC may use its rulemaking authority to add or subtract to SROs' rulebooks.[157] Supplementing the CFTC's authority to write regulations governing fraud and manipulation in the cash markets, an SRO would permit industry members to voluntarily abide by CFTC standards of conduct for VCO brokers and regulations regarding the operations and listing standards of VCO registries, thereby ensuring heightened standards for VCO markets. Although the CFTC could not compel membership in a new SRO, VCO registries and brokers would likely find membership compelling: joining would provide industry members with a full regulatory framework, which would guarantee compliance with the CEA's prohibition against fraud or manipulation and allow them to advertise that fact to customers.

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[147] 7 U.S.C. § 9. *See also* CFTC v. McDonnell, 287 F. Supp. 3d 213, 227 (E.D.N.Y. 2018) ("CFTC does not have regulatory authority over simple quick cash or spot transactions that do not involve fraud or manipulation. This boundary has been recognized by the CFTC. It has not attempted to regulate spot trades, unless there is evidence of manipulation or fraud.") (internal citations removed).
[148] *See, e.g.*, 17 C.F.R. § 180.1.
[149] 7 U.S.C. § 9.
[150] *See* CFTC v. McDonnell, 287 F. Supp. 3d 213, 227 (E.D.N.Y. 2018) ("Where a futures market exists for a good, service, right, or interest, it may be regulated by CFTC, as a commodity, without regard to whether the dispute involves futures contracts").
[151] *See, e.g.*, In the Matter of Citibank, N.A., CFTC Docket No. 16-17 (2016).
[152] *See* ISDA, *Voluntary Carbon Markets: Analysis of Regulatory Oversight in the US* 10-13 (June 2022), www.isda.org/a/93WgE/Voluntary-Carbon-Markets-Analysis-of-Regulatory-Oversight-in-the-US.pdf.
[153] *See, e.g.*, CFTC, *The CFTC and 27 State Securities Regulatory Agencies Charge Los Angeles Area Precious Metals Dealer in Ongoing $68 Million Fraud Targeting the Elderly* (Feb. 1, 2022), www.cftc.gov/PressRoom/PressReleases/8489-22.
[154] *See* Heath P. Tarbert, *Self-Regulation in the Derivatives Markets: Stability Through Collaboration*, 41 NORTHWESTERN J. OF INT'L L. & BUS. 175, 181-82 (discussing legislative history).
[155] 7 U.S.C. § 21.
[156] *See id.* § 21(b).
[157] *See id.* § 12a(7).

Ensuring the integrity of voluntary carbon offsets, their markets, and derivatives is not a "transformative expansion" of the CFTC's regulatory authority.

Once again, the points made in previous sections about assessing whether those categories of action represented a "transformative expansion" of regulatory authority largely apply here as well.[158] A final word on the economic significance of the potential regulations mentioned in this section: the possible effects that CFTC regulations could have on VCO markets is small compared to those activities the Supreme Court has previously declared major questions. In 2021, total annual trading in the market globally was roughly $1 billion.[159] The derivatives markets for VCOs are even smaller; of the two major derivatives exchanges in the U.S., one (CME) lists just three instruments with roughly 25,000 open contracts at any one time and the other (ICE) lists no VCO derivatives at all.[160] In short, it is difficult to conceive of a regulatory action that could result in compliance costs anywhere near the thresholds that have previously qualified agency action for major questions scrutiny.[161]

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[158] *See supra* at 11-12.
[159] CARBON MARKET YEAR IN REVIEW 2021, REFINITIV at 26, www.refinitiv.com/content/dam/marketing/en_us/documents/gated/reports/carbon-market-year-in-review-2022.pdf.
[160] CME Group, *CBL Global Emissions Offset Futures - Volume & Open Interest* (accessed Mar. 20, 2023), www.cmegroup.com/markets/energy/emissions/cbl-global-emissions-offset.volume.html; CME Group, *CBL Nature-Based Global Emissions Offset Futures - Volume & Open Interest* (accessed Mar. 20, 2023), www.cmegroup.com/markets/energy/emissions/cbl-nature-based-global-emissions-offset.volume.html; CME Group, *CBL Core Global Emissions Offset (C-GEO) Futures - Volume & Open Interest* (accessed Mar. 20, 2023), www.cmegroup.com/markets/energy/emissions/cbl-core-global-emissions-offset-c-geo.volume.html.
[161] *See supra* at 12.

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