

# What's Next For The CFTC After The Election

By **Matthew Kulkin, Matthew Beville and Megan O'Flynn** (November 18, 2024)

A new president, coupled with Republican control of the U.S. Senate and the U.S. House of Representatives — with a number of House races still pending — will fundamentally alter the operation of the executive branch and independent regulatory agencies like the U.S. Commodity Futures Trading Commission, and will have significant implications for the rest of the federal government as well.

## **A change in commission leadership is likely.**

While President-elect Donald Trump has not made any public statements about CFTC leadership, we can reasonably expect Chairman Rostin Behnam to resign on or before Jan. 20th, and to be replaced by one of the two Republican commissioners as acting chairwoman.

While we do not know who Trump might nominate to serve as chair, we do not expect it to be a day-one nomination. In recent years, only Gary Gensler was nominated on Jan. 20, 2009 (during the financial crisis), while CFTC acting Chairman Christopher Giancarlo was nominated on March 14, 2017, and Behnam was nominated on Sept. 13, 2021. Both Giancarlo and Behnam served as acting chairman during the pendency of their nominations.

The future of the four current commissioners is more complicated. The two Democratic commissioners, Christy Goldsmith Romero and Kristin Johnson, have been nominated to new posts pending Senate confirmation: chair of the Federal Deposit Insurance Corp. and U.S. Department of the Treasury assistant secretary for financial institutions, respectively. However, Senate Banking Committee Chairman Sherrod Brown, D-Ohio, has said he's unsure if the committee will be able to vote on the nominations by the end of this congressional session.[1]

By contrast, either of the Republican commissioners, Summer Mersinger and Caroline Pham, may serve as acting chairwoman under Trump or be nominated by the president to lead the CFTC. Either could also serve the Trump administration in a different capacity, including senior roles at the prudential banking regulators, the U.S. Securities and Exchange Committee, or the Treasury Department.

If there are commissioner vacancies in 2025, while the timeline for confirmations can vary, a time frame of three to six months from nomination to confirmation would be in line with recent experience. Johnson and Goldsmith Romero were nominated in September 2021 and confirmed in March 2022, and Commissioners Mersinger and Pham were nominated in December 2021 and confirmed in March 2022. The Senate Agriculture Committee, which receives and considers CFTC nominations, has historically taken up nominations in bipartisan pairs or packages, which can expedite their consideration by the full Senate.

Whether the CFTC has a full slate of commissioners could affect the commission's activity in



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2025. The CFTC has specific quorum and Sunshine Act requirements that make it more difficult for commissioners to deliberate or carry out the CFTC's mission with less than a full complement of commissioners. If CFTC commissioner seats are vacated, we would expect the CFTC rulemaking and enforcement agenda to temporarily slow while nominations work through the confirmation process.

### **Commission rulemaking could progress on some pending proposals.**

In the recent past, the level of the commission's rulemaking activity in the transition period between a presidential election and an inauguration has varied. For example, in the period between President Joe Biden's November 2020 election and January 2021 inauguration, when the CFTC was under Republican leadership, the commission adopted 14 final rules and did not propose any new ones. During the period between Trump's November 2016 election and January 2017 inauguration, when the CFTC was under Democratic leadership, the commission adopted four final rules and proposed two rule amendments.

The shift to Republican leadership in the White House in 2025 may result in a push from the current commission to propose or finalize rules during the lame-duck transition period. Of course, any action will require the support of a majority of the commissioners, and any regulations finalized could be subject to reversal under the Congressional Review Act, which empowers Congress to review and potentially overturn recent federal agency rules of the previous administration through a joint resolution and signature by the president.

Of the many items Behnam set as the CFTC's goals in early 2023, many have been addressed through proposed or final rulemaking, guidance, and information requests. These include adopting final rules on reporting requirements and trading facilities, as well as finalizing guidance relating to the listing of voluntary carbon credits on CFTC-regulated exchanges.

The CFTC currently has proposed rules pending related to the protection of customer funds, operational resilience, governance and the mitigation of conflicts of interest for designated contract markets and swap execution facilities, and event contracts. The first two proposed rules may see final rulemaking activity over the next few months, as they had bipartisan support when proposed.

Finalizing the governance and conflicts of interest proposal will be more difficult as it did not have strong support across the commission when proposed. Further, approval of the CFTC's proposed event contracts rule seems extremely unlikely, given the party-line vote on the proposal, the significant public comment and the CFTC's pending U.S. Court of Appeals for the D.C. Circuit appeal of a Sept. 6 district court ruling against the CFTC in favor of Kalshi on this issue that remains pending.

### **CFTC enforcement actions will continue in line with traditional priorities.**

Ahead of the inauguration and into 2025, we expect that the CFTC's Division of Enforcement's day-to-day activities will remain largely the same. The commission will continue to enforce the Commodity Exchange Act in line with its traditional enforcement priorities.

The incoming administration is unlikely to change the CFTC's treatment of enforcement actions related to fraud and manipulation, misappropriation of customer funds, and the offering of leveraged commodities — including crypto — to retail customers by unregistered entities.

We also expect little change regarding its view of whether enforcement actions are necessary for systemic reporting or supervisory issues, though the incoming administration may rethink the commission's recent inclination to impose significant penalties in nonfraud matters. Market participants facing CFTC investigations falling into these more traditional enforcement categories should not necessarily expect the upcoming change in administration to have a significant impact on the resolution of these kinds of matters.

Commissioner departures and a shift of power in the White House and Congress to the Republicans, however, could have a significant impact on the CFTC's attempts to bring more ambitious and novel enforcement actions in the months ahead. In the situation where one or two Democratic commissioners leave the agency, just one or two Democratic commissioners and two Republican commissioners would remain, and the commission would be unable to approve any new enforcement actions without the support of at least one Republican commissioner.

Given the number of vocal dissents by the Republican commissioners, we expect that a deadlocked or divided CFTC would be especially sensitive to proposed enforcement actions that are viewed as particularly novel or could be deemed "regulation by enforcement."

For example, both Mersinger and Pham dissented from the CFTC's September action against Uniswap Labs because they believed that the commission would be better served by adopting rules to regulate decentralized finance protocols, rather than bringing an enforcement action against an organization that had tried to comply with the law.[2] Similarly, Pham strongly dissented from the CFTC's August action against TOTSA TotalEnergies Trading SA because enforcement staff allegedly disregarded the significant evidence demonstrating the legitimacy of the respondent's conduct, including several expert reports, without sufficient basis.[3]

Given this posture, we expect the commission will likely table its more aggressive enforcement theories in the near term. While this may not derail existing investigations, it could slow the pace of matters, given that the Division of Enforcement may encounter difficulty obtaining CFTC approval to settle actions or bring litigated charges.

With a likely change in the leadership and makeup of the commission, and the inauguration of Trump, the focus of the CFTC's enforcement agenda will evolve in 2025 and beyond, though the exact path of change is not clear. A change of course could be particularly salient in the crypto space, given the president-elect's promise to make the U.S. the "crypto capital of the planet." [4]

We expect that while the policing of crypto scams and the offering of leveraged crypto-assets to retail customers will likely continue to the extent that such actions are in line with the agency's traditional enforcement priorities, more novel applications of commission regulations against crypto market participants by the Division of Enforcement will likely decrease.

### **Congressional transition will have an impact on the CFTC.**

The results of the election and unilateral Republican control of government will have consequences for how the 118th Congress ends, and for what the CFTC can expect as the 119th Congress begins.

Prior to the election, leaders in the House and Senate hoped to reach a bipartisan

breakthrough compromise to enact the Financial Innovation and Technology for the 21st Century Act, or FIT21, a first-of-its-kind legislation to create a U.S. regulatory regime for digital assets. An agreement could still be reached in the lame-duck session, but several postelection headwinds blow against it.

For one, the incoming Trump administration made digital asset policy a priority during the campaign, and therefore incoming Trump officials may seek an opportunity to work with Congress and place their own imprint on this transformative legislation. Second, a compromise would require agreement from the Biden administration, as well as Congress, including leaders on the agriculture committees as well as the House Financial Services Committee and Senate Banking Committee. As crypto industry supporters invested significantly in campaign efforts opposing Sen. Sherrod Brown's failed reelection bid in Ohio, securing his support to reach consensus on the legislation may prove challenging.

The 119th Congress will also bring important changes that affect the CFTC. The change in political control of the Senate will lead to a new chair of the Agriculture Committee, presumably Sen. John Boozman, R-Ark. In addition, the retirement of Sen. Debbie Stabenow, D-Mich., will mean a new Democrat leader for the committee.

Republican control of the Senate will ease the confirmation process for Trump's nominees for the CFTC and other agencies. At the same time, full Republican control of Congress will create opportunities to utilize the Congressional Review Act process to reverse recent Biden administration regulations, and might lead to efforts to restrict agency funding for programs and policies that Republicans oppose, such as those related to climate change, and diversity, equity and inclusion.

If Congress does not enact FIT21 by the end of this year, lawmakers will be forced to start again in the new term, although they will be able to build on the positive momentum seen on the bill during the 118th Congress. Ultimately, following the attention it received during the election and the increased focus last Congress, we expect to see crypto policy continue to be a priority in the new Congress.

In addition to crypto policy, the incoming Trump administration may also work with Congress to legislate on a wide range of issues under the CFTC's purview, including the regulation of event contract markets. It is, however, unlikely that the Trump administration will build on the Biden administration's work on the impact of climate on financial markets or voluntary carbon credit derivatives markets.

## **Key Takeaways**

As discussed above, many aspects of the CFTC's work will continue as usual in the near term leading up to and shortly following Trump's inauguration. In particular, we expect to see continued enforcement actions in line with commission priorities, the potential finalization of some outstanding proposed rules and staff action relating to market operations.

However, likely vacancies and changes in leadership at the commission will affect rulemaking and enforcement activity in the coming months until new commissioners are nominated and confirmed. Following Trump's inauguration, the priorities of his administration and those of the new Republican-led House and Senate have the potential to alter the CFTC's priorities and the regulatory framework for the agency in 2025 and beyond, particularly with respect to the agency's oversight of crypto.

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[1] See Politico, "Sherrod Brown: Unclear whether FDIC chair nominee will advance" (Nov. 12, 2024), available at <https://subscriber.politicopro.com/article/2024/11/brown-path-for-biden-fdic-pick-00189157>.

[2] Dissenting Statement of Commissioner Summer K. Mersinger Regarding Settlement with Uniswap Labs (Sept. 4, 2024); Dissenting Statement of Commissioner Caroline D. Pham on DeFi Enforcement Action Involving Uniswap Protocol (Sept. 4, 2024).

[3] Dissenting Statement of Commissioner Caroline D. Pham on Commercial End-User Enforcement Action (August 27, 2024).

[4] See Associated Press, "Trump's new crypto business could create more conflicts if he's elected president" (Sept. 5, 2024), available at <https://apnews.com/article/trump-harris-elections-crypto-cryptocurrency-treasury-blockchain-29df24818d03e557c6c434533052b33c>.