U.S. Chamber of Commerce

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February 16, 2024

Christopher Kirkpatrick
Secretary
Commodity Futures Trading Commission
Three Lafayette Center, 1155 21st Street NW
Washington, DC 20581

Re: Commission Guidance Regarding the Listing of Voluntary Carbon Credit Derivative Contracts

Dear Secretary Kirkpatrick:

The U.S. Chamber of Commerce ("Chamber") Center for Capital Markets Competitiveness ("CCMC") welcomes this opportunity to comment on the proposed guidance issued by the Commodity Futures Trading Commission ("CFTC") regarding the listing of voluntary carbon credit ("VCC") derivatives contracts ("Proposed Guidance").

The Chamber recognizes the potential of voluntary carbon markets ("VCMs") and VCC derivatives contracts to enable emissions reductions across all sectors of the economy. Businesses will increasingly depend upon robust voluntary offset markets to meet ambitious climate commitments. The Chamber believes that practical, flexible, predictable, and durable market-based solutions and mechanisms are at the core of efforts to address climate risk and are reflected in the actions of the Chamber's members. Promoting private sector innovation across industry sectors will be central to solving climate change. As VCMs continue to expand, regulators and market participants alike will have to contemplate baseline transparency and anti-manipulation standards that help bolster confidence in these markets.

We also note that the subject of the Proposed Guidance is a relatively nascent and developing market, and the private sector is already undergoing efforts to provide greater transparency of VCC derivatives contracts. The CFTC should be careful not to establish new regulations where none are needed and, more importantly, to avoid imposing substantial new rules under the guise of regulatory "guidance." Any efforts that circumvent the Administrative Procedure Act and other standards applicable to federal agency rulemaking only serve to undermine confidence in the very markets the CFTC is seeking to strengthen.

The Chamber has previously provided our views on initiatives intended to support the growth and integrity of VCMs. For example, the Chamber strongly supported the bipartisan Growing Climate Solutions Act which was signed into law by President Biden at the end of 2022.[1] This legislation will expand access to VCMs for end-users, including farmers, ranchers, and forest landowners.

The Chamber also provided comments to the draft codes of conduct issued by Voluntary Carbon Markets Integrity Initiative ("VCMI") to outline our principles with regard to VCMs.[2] These priorities include:

- Be inclusive in allowing broader participation of industrial sectors. The oil and gas, cement, steel, and other hard-to-abate industrial sectors should have a seat at the table in considering any framework for voluntary carbon markets. Achieving net zero as a country and across the globe is not possible without their participation.

- Create additional approaches to meet emissions and disclosure requirements. There is a wide variation in the maturity of emissions reporting capabilities and reduction solutions. A potential on-ramp as companies gain expertise and experience is needed.

- Provide the most flexibility possible in allowing pathways to net zero. Companies will require innovation that does not yet exist at scale in critical elements of the energy transition, climate, and sustainability continuum to get beyond 80% of net zero. Companies will need all possible emerging solutions, including energy efficiency, carbon capture, utilization, storage, and nature-based approaches.

To date, the CFTC has taken a deliberative approach towards examining its role and authority regarding VCMs and carbon credit derivatives contracts. The CFTC has held two public meetings on VCMs – in June 2022 and July 2023 – and also issued a request for information ("RFI") on climate-related financial risk in June 2022. The Chamber appreciates that the CFTC is soliciting ongoing public feedback and engaging with market participants on these critical issues rather than taking a regulate-first approach that could have harmful consequences.

At the same time, the CFTC must remain mindful of its statutory obligations and, importantly, the statutory limitations that apply to the CFTC's authority, particularly on issues as wide-ranging as climate change and emissions reductions by

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[1] S. 1251 / H.R. 2820 (117th Congress).
[2] U.S. Chamber letter to Voluntary Carbon Markets Integrity Initiative (August 12, 2022).

the private sector. In our comment letter to the CFTC on the climate-related financial risk RFI:

> *The Chamber notes that Congress has passed no law designating the CFTC as a regulator of climate change policy, and Congress has not directed the CFTC to issue any rulemaking that has the purpose of addressing climate change. The CFTC's authority to regulate is primarily confined to its jurisdiction under the Commodity Exchange Act (CEA) and the CFTC's mission to promote the integrity, resilience, and vibrancy of the U.S. derivatives markets through sound regulation. Any efforts by the CFTC that relate in any way to climate change must be constrained by these boundaries.*[3]

Whether in relation to carbon credit derivatives contracts or any other area dealing with climate risk, any new standards or regulations adopted by the CFTC must be tethered to the agency's statutory authority and the CFTC's mission.

Proposed Guidance

In his statement accompanying the release of the Proposed Guidance, Chairman Behnam stated that the CFTC should ensure that the developing derivatives markets for decarbonization must have "integrity, adhere to basic market regulatory requirements, and remain resilient as we most certainly will continue to experience extreme and dramatic weather events that will impact pricing and volatility."[4] Chairman Behnam further stated that the Proposed Guidance is "not intended to modify or supersede existing statutory or regulatory requirements, or existing Commission guidance that addresses the DCMs' listing of derivatives contracts…"[5] These are well-reasoned objectives and should continue to serve as a guide for the CFTC as it develops any new guidance or regulations.

The Proposed Guidance includes several factors that designated contract markets ("DCMs") should consider pursuant to CFTC regulations and statutory responsibilities under the Commodity Exchange Act ("CEA") that factor into the listing of VCC derivatives contracts. The Core Principle compliance considerations outlined in the Proposed Guidance include 1) A DCM shall only list derivative contracts that are not readily susceptible to manipulation; 2) A DCM shall monitor a derivative contract's terms and conditions as they relate to the underlying commodity market; and 3) A

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[3] U.S. Chamber letter to the CFTC in response to its RFI on Climate-Related Financial Risk (October 6, 2022), available at https://www.centerforcapitalmarkets.com/wp-content/uploads/2022/10/221006_Chamber-Comments_ClimateRelatedFinancialRisk_CFTC.pdf?.

[4] Statement of Chairman Rostin Behnam on the Proposed Commission Guidance Regarding the Listing of Voluntary Carbon Credit Derivatives Contracts (December 4, 2023), available at https://www.cftc.gov/PressRoom/SpeechesTestimony/behnamstatement120423.

[5] *Id.*

DCM must satisfy the product submission requirements under Part 40 of the CFTC's regulations and CEA Section 5c(c).

As it considers the application of these Core Principles to VCC derivatives contracts, the CFTC should avoid applying prescriptive new requirements that could fall outside the CFTC's remit and which may not be applicable to other types of derivatives contracts. Establishing a checklist of things that a DCM should consider when listing VCC derivatives contracts could be read as a *de facto* new mandate i.e., a new regulation that should go through a formal notice-and-comment rulemaking process pursuant to the APA.

Additionally, by establishing new expectations for DCMs, we are concerned that the Proposed Guidelines could potentially provide the CFTC with an on-ramp to reach into the underlying VCC market i.e., the spot market – a market where the CFTC's authority is limited to addressing fraud and manipulation. The Proposed Guidance is somewhat silent on this potential outcome even though it could lead to the CFTC intervening – directly or indirectly – with the spot market.

The CFTC should also further clarify the expectations it is setting for DCMs in terms of oversight of registries that track emissions mitigation projects. As the Proposed Guidance describes, registries "[serve]" as a central repository for tracking certified mitigation projects or activities and their associated VCCs."[6] It is unclear under the Proposed Guidance whether DCMs would be required to establish an ongoing monitoring system for registries, or even if DCMs and other entities would have to analyze individual emissions mitigation projects being tracked by particular registries. If that were the case, then the Proposed Guidance would extend beyond a clarification of existing law and instead establish novel obligations on DCMs that can only be promulgated through notice-and-comment rulemaking.

Enforcement of Proposed Guidance

We would also ask that the CFTC clarify how it intends to implement and enforce the Proposed Guidance, if adopted. Does the CFTC intend for the new guidance to effectively have the force of law, and would DCMs and other market participants be expected to update their internal procedures and oversight mechanisms in order to comply with the guidance? Will the ability of a DCM to bring other products to market be impacted by how well the CFTC believes the DCM is complying with the guidance?

These are not merely hypothetical scenarios; the CFTC has previously brought enforcement cases against market participants based upon alleged violations of CFTC

[6] 88 Fed. Reg. 89413.

guidance.[7] Further explanation from the CFTC about its plans to implement and enforce the Proposed Guidance is warranted.

Conclusion

The Chamber welcomes the iterative process employed by the CFTC so far to examine VCC derivatives contracts and the CFTC's role in overseeing this market. While the objectives of greater transparency and integrity are worth pursing, it is critical that the CFTC limit any adopted guidance to clarifications of existing law and to avoid adopting new regulatory mandates through guidance as opposed to a formal rulemaking. The Chamber looks forward to continuing to work with the CFTC on this important issue.

Sincerely,

K. Malinconico

Kristen Malinconico
Director
Center for Capital Markets Competitiveness
U.S. Chamber of Commerce

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[7] CFTC Orders Texas Commodity Trading Advisor to Pay $200,000 for Failing to Register as a Swap Execution Facility (September 26, 2022), available at https://www.cftc.gov/PressRoom/PressReleases/8596-22.