



Swap Dealer Enforcement Actions

A 11 Year Summary (2012-2023)

April 2024

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Executive summary

Qualitative & quantitative overview of report

Executive summary

Analysis of Commodities Future Trading Commission (“CFTC” or “Commission”) **enforcement actions data since the Swap Dealer regime began** highlights a significant trend towards **greater regulatory scrutiny** in recent years.

Since Swap Dealer (“SD”) registration began, pursuant to reforms enacted in the Dodd-Frank Act, the industry has seen \$1.3bn in total monetary penalties, of which **\$1.14bn has been imposed on firms in the two-year period from 2022-2023**.

Quantitative analysis illustrates the **key drivers behind the surge in enforcement actions and regulatory fines**:

- the 2022 industry wide sweep of **Recordkeeping and Supervisory** enforcement actions continued into 2023
- 2023 has seen a substantial increase in monetary penalties associated with **Reporting and External Business Conduct**.

Recent CFTC comments also indicate a shift in approach for the Division of Enforcement (“DoE”), most notably in imposing **harsher penalties and mandating the use of 3rd party monitors**.

This report dives further into rules covering Recordkeeping, Pre-hedging, and Pre-trade Mid-Market Marks (“PTMMM”), **providing insights into recent challenges faced by firms**.

Prompted by these lessons, we **outline key considerations for Boards and Senior Management**, across both risk and business functions, to **respond to the continued increase in regulatory pressures**.

Swap Dealer enforcement actions have totalled over **\$1.3bn** since the regime began.

\$1.14bn was the total monetary penalties across the two-year period spanning 2022 and 2023

\$430m was the cost of non-compliance for Swap Dealers in 2023 alone

\$100m is the largest cost of Swap Dealer non-compliance for a single firm

56 enforcement actions taken across **7** countries covering **47** unique registered Swap Dealers

CFTC Enforcement Actions Overview

Evaluating Enforcement Action Data since the Swap Dealer Regime began in 2012

Overview of CFTC division of enforcement actions

Evaluating 11 years of enforcement action data provides a unique insight into industry trends and regulatory risk

Background

The CFTC provides ongoing regulation of the U.S. derivatives markets and, through its Division of Enforcement ("DOE"), **detects, investigates and prosecutes violations** of Commodities Exchange Act ("CEA") and **CFTC regulations**.

In our [previous publication](#), we **provided an overview of enforcement actions** across the 10-year period from 2012-2022 since the CFTC regime went live. This publication will shift focus to more recent trends over the previous two years, which have seen **a dramatic increase in monetary penalties**, with firms facing **\$1.14bn in total fines across the 2-year period**.

In line with our previous publication, CFTC actions have been categorized into rule areas, to **illustrate the focus points for the CFTC**, and highlight the key drivers behind the significant **increase in regulatory fines across 2022 and 2023**. Illustrated below is this recent increase in the **total cumulative monetary penalty across 11 years** five (5) jurisdictions.

Note: The first year CFTC issued an enforcement action was in 2015, thus the graphs below reflect the enforcement actions starting in 2015 through 2023.

Fig. 1 Cumulative Monetary Penalty by Region (Illustrative)

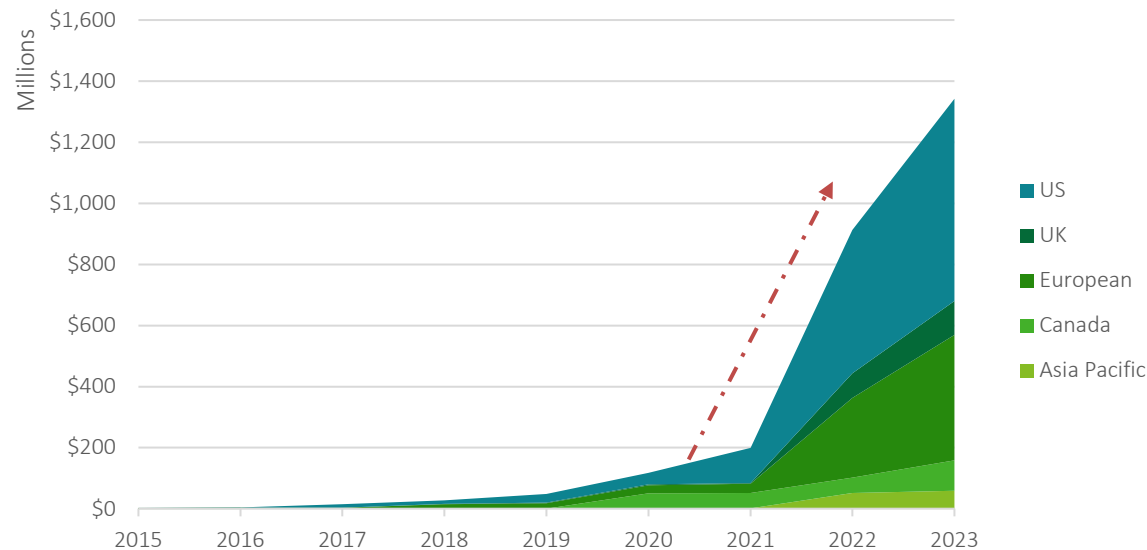
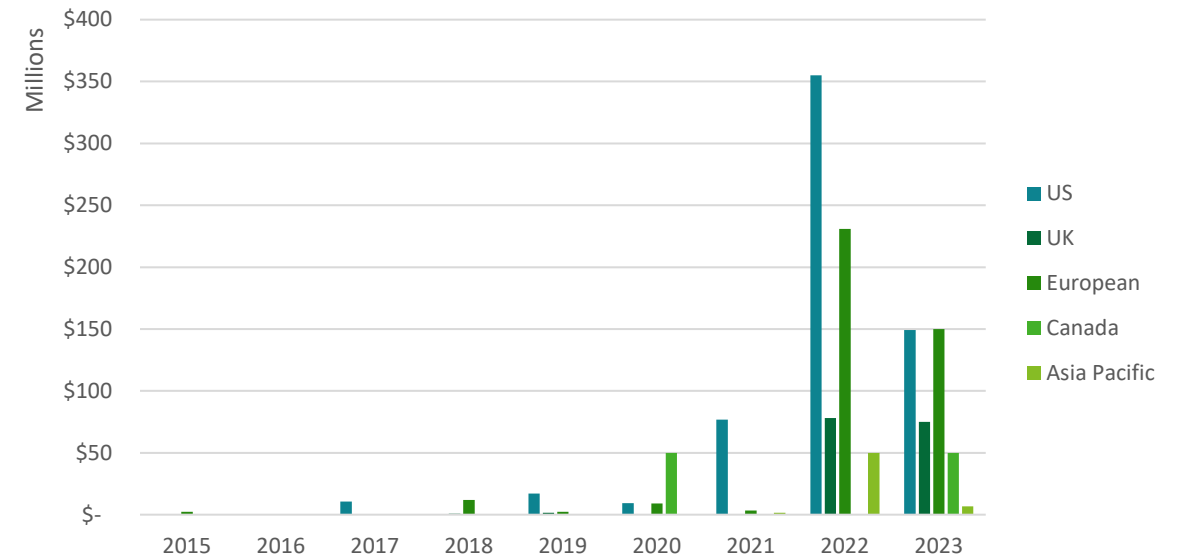


Fig. 2 Monetary Penalty Distribution by Region (Illustrative)



Source data taken from CFTC Division of Enforcement website: [Division of Enforcement | CFTC](#) and [CFTC Requests Public Input on Simplifying Rules | CFTC](#). Data covers the period 2015-2023.

This analysis captures enforcement actions at the "firm" level, i.e., a single enforcement action against one firm, may capture multiple Swap Dealer registrants. Enforcement actions taken against a firm capturing additional types of CFTC registrants have been included, for example, a single action taken against Firm X in relation to its Swap Dealer and Futures Commission Merchant registrants have been included. General enforcement actions for unlawful trading practices for the purpose of market manipulation which do not expressly capture Swap Dealer regulations have been excluded (event where such action was taken against a Swap Dealer).

Overview of CFTC division of enforcement actions

Evaluating 11 years of enforcement action data provides a unique insight into industry trends and regulatory risk

Key Findings

Analysis of the enforcement actions data across the 11-year period enables insights into CFTC focus areas, to identify the **cost of non-compliance** to individual swap dealers, which rule areas are **commonly being targeted**, and **when actions are most frequently** brought against firms.

Fine Amount

Average fine amount each year has increased steadily by approx. \$3.7m per year since the regime went live, to an average of \$31m in 2023.

\$31m

the average SD monetary penalty in 2023

Focus Areas

Supervision is consistently the most fined rule area, as the CFTC widely uncovers supervisory failings upon conducting investigations into other rule areas.

33%

of total enforcement actions include a breach of Supervision rules

Timing of Actions

Enforcement actions and fines are typically imposed on firms in the third quarter of the year.

61%

of enforcement actions take place in the 3rd quarter

Source data taken from CFTC Division of Enforcement website: [Division of Enforcement | CFTC](#) and [CFTC Requests Public Input on Simplifying Rules | CFTC](#). Data covers the period 2013-2023.

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Fig. 3 Enforcement Actions by Rule Area

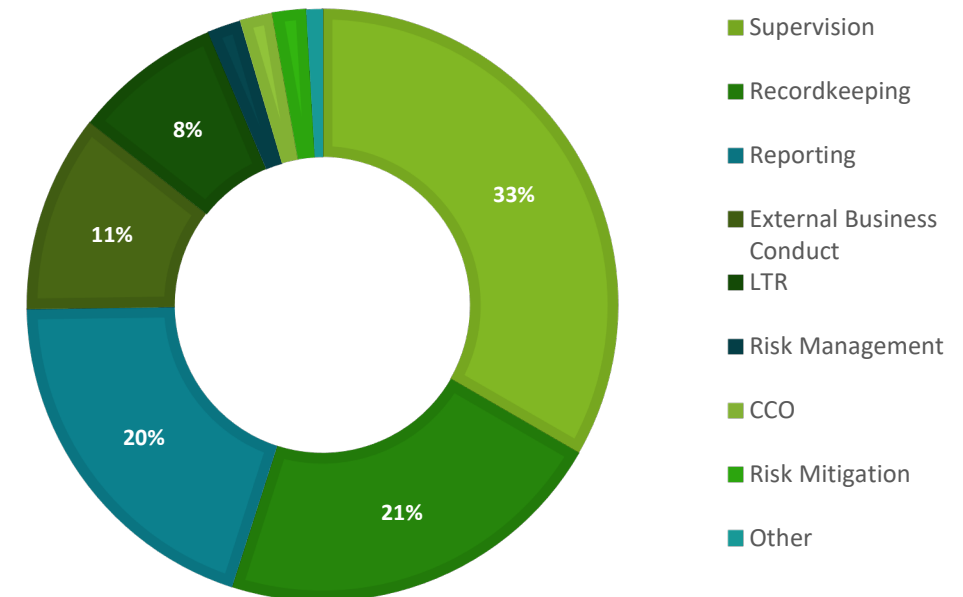
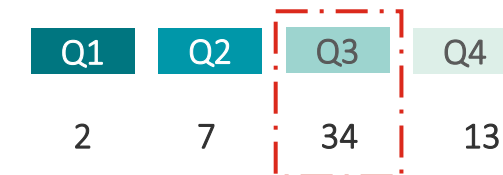


Fig 4. Quarterly Timing of Actions¹



¹Quarter 3 typically includes an increase in the number of enforcement actions handed out by the CFTC, as the CFTC's fiscal year ends on the 30th of September

2023 Look Back

Analysis of 2023 CFTC Enforcement Actions

2023 Focus Areas

Analysis of 2023 enforcement actions and CFTC communications indicate a shift in the approach for the DoE

Overview

Our in-depth analysis extends to individual rules, to enable a **deep dive into the specific areas** that firms are struggling to get right. Findings for 2023 indicate that, in keeping with prior years, **CFTC Rules 43.3 and 45.3 continue to be a challenge for firms in meeting their reporting obligations**, while recordkeeping and supervision breaches persist as a common double finding in DoE investigations. Contrary to prior years, 2023 has seen a spike in non-compliance with both the **fair communications rule 23.433** and **disclosure of material information rule 23.431** (PTMMMs).

2023 Comparative Analysis: rules breached

Top 10 CFTC Rules Breached in 2023

Rule Description	CFTC Rule	2013-2022	2023	Total
Diligent supervision	23.602	25	+10	35
Regulatory records; retention and production.	1.31	12	+8	20
Daily trading records	23.202	14	+8	22
Records of commodity interest and related cash or forward transactions.	1.35	11	+7	18
Required records	23.201	13	+7	20
Supervision	166.3	13	+6	19
Disclosures of material information	23.431	6	+4	10
Communications - fair dealing.	23.433	2	+4	6
Method and timing for real-time public reporting	43.3	14	+3	17
Swap data reporting: Creation data	45.3	14	+3	17

Commentary



Source: Commodity Futures Trading Commission, Enforcement Action publications dating from 2013 – 2023, date accessed December 2023, analysis conducted December 2023, Source data taken from CFTC Division of Enforcement website: [Division of Enforcement](#) | [CFTC](#)

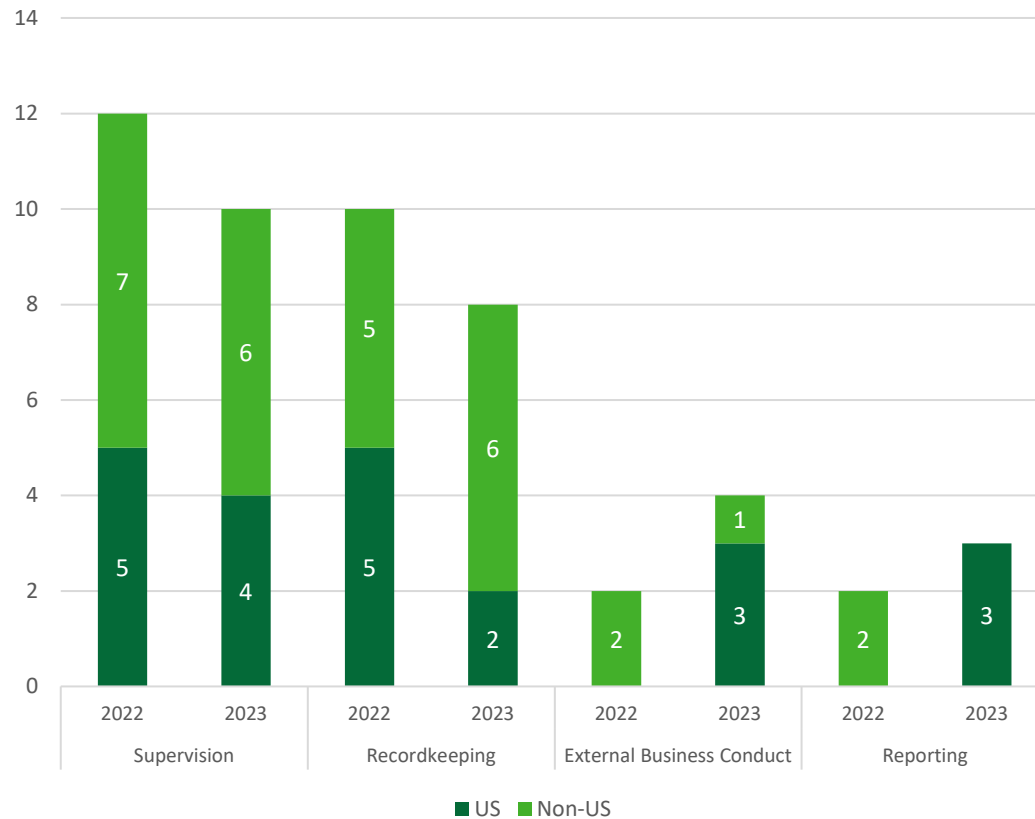
2022 – 2023 Trends

Analysis of CFTC Enforcement Actions across the Two-year Period

2022 & 2023 Enforcement Actions Breakdown

Analysis illustrates the number of violations across CFTC rule areas during the two-year period, broken down across umbrella firm jurisdiction and size

Summary of Rule Area Breaches 2022 vs 2023²



²The Summary of rule breaches table is based on enforcement actions handed out and bifurcated for each individual rule area (i.e. a single enforcement action may cover supervision, recordkeeping, and reporting and would be represented across each rule area in the graph above).



Firm Categorizations

- Data analyzed from enforcement actions for the period 2022 to 2023 has been illustrated by the distribution of CFTC rule violations categorization to the right.
- Analysis identifies the key drivers behind the **\$1.14bn in regulatory penalties across the two years**.
- Firms are generally grouped by their **corporate umbrella home jurisdiction** as enforcement actions are generally handed out by the CFTC at the group level for firms that have Swap Dealers in multiple jurisdictions.
- For example, a UK subsidiary of a US firm would generally be captured as part of an overall action taken against the US firm.



Commentary

- While the number of actions across the two periods are closely matched for US and non-US firms (12 for US vs 14 for non-US firms), **typically actions against non-US firms covered a greater number of rule areas**.
- Compared to US firms, **non-US firms see a higher total monetary penalty across 2022 and 2023** (\$641m vs \$504m), and a higher average penalty of \$46m vs \$42m.
- 2022 & 2023 both have resulted in increased breaches in **supervision, recordkeeping, reporting and external business conduct across both geographies**. LTR, risk mitigation, risk management and CCO rule areas have seen no fines in 2022 or 2023.
- As mentioned earlier, large volume of **supervision and recordkeeping rule actions occurred in 2022**, following an industry wide sweep that highlighted **widespread incidences of unapproved communications**.
- PTMMM disclosure, fair communications, and real time reporting** were the main drivers to increases in external business conduct and reporting breaches in 2023.

2022 & 2023 Trends

Dashboard of selected metrics highlights year-on-year trends observed in CFTC enforcement actions. CFTC communications indicate a shift in approach from the CFTC.

2022 and 2023 Trends and Recent CFTC Communications

Analyzing quantitative trends, alongside direct communications from CFTC staff, can provide insight into **industry-wide control deficiencies and regulatory focus areas**. Taking a closer look at comparative figures across these two years, we have seen a **16% increase in actions in 2023**. While the average and total penalty seen in 2023 has decreased from the 2022 peak (driven by the industry wide series of recordkeeping actions), the figures remain **significantly higher than the previous average of \$6.6m and total fines of \$199m across the period from 2013-2021**. These figures demonstrate a **ramp up in enforcement actions and monetary penalties** and are consistent with recent speeches from the CFTC officials, which indicate a **firm change in approach to achieve accountability and decrease future misconduct**.

Qualitative Analysis

Overview	2013-2021	2022	2023	Total	Trend
Enforcement Actions	30	12	14	56	▲
Monetary Penalty	\$199m	\$714m	\$431m	\$1,344m	▼
Average Monetary Penalty	\$16.2m	\$59m	\$31m	\$28.9m	▼

Rule Area Analysis	2013-2021	2022	2023	Total	Trend
Reporting	\$50m	\$9.2m	\$53m	\$112m	▲
External Business Conduct	\$77m	\$9.2m	\$52m	\$139m	▲
Recordkeeping	\$141m	\$705m	\$355m	\$1,201m	▼
Supervision	\$185m	\$714m	\$389m	\$1,288m	▼

Recent Comments from the CFTC Division of Enforcement Highlight a Shift in Approach

- 1
- Following the recent increase in reporting rule breaches, a speech by CFTC Commissioner Kristin N. Johnson in Sept. 2023 discussed the regulators’ focus on the importance of **‘mitigating against systemic risks that threaten to introduce crises, through creating and implementing data reporting rules’**.
- 2
- An October 2023 speech by CFTC Director Ian McGinley indicates a shift in approach from the Commission in three key areas:
 - **‘In certain matters, particularly involving recidivism, our penalties are increasing.**
 - **We are imposing compliance Monitors and Consultants as part of our settlements.**
 - **And we are requiring admissions in our settlements’.**
- 3
- CFTC Commissioner Christy Goldsmith Romero issued a supporting statement to Ian McGinley’s announcement in October, stating that **‘where penalties are too low, they risk becoming a cost of doing business’**. The Commissioner stresses the importance of using penalties to deter firms from non-compliance, stating that **‘where many are engaging in the same illegal behavior, the threat to market integrity is particularly serious, and the deterrence effect of penalties must reflect that’**.

Source: Commodity Futures Trading Commission, Enforcement Action publications dating from 2013 – 2023, date accessed December 2023, analysis conducted December 2023, Source data taken from CFTC Division of Enforcement website: [Division of Enforcement | CFTC](#)

Rule Area Spotlights

Deep Dive into Specific Areas of Regulatory Scrutiny

Recordkeeping spotlight

Findings from analysis of swap dealer CFTC enforcement actions

Recordkeeping



- Infractions related to recordkeeping and supervision in 2023 saw an overall decrease from the record amount handed out in 2022. However, the CFTC remained diligent in handing out fines ranging from \$5.5 to \$75 million totaling \$355.5 million.
- The CFTC continued its efforts from 2022 on enforcing the use of unapproved communication methods. Of the \$355.5 million in recordkeeping and supervision related infractions, \$305 million were due to firm's use of unapproved messaging systems such as personal text message and WhatsApp messaging.
- The CFTC has now surpassed \$1 billion in infractions handed out specifically related to the use of unapproved communication methods.

Recordkeeping/supervision enforcements by year (Illustrative)



Typical failures from firms

1

Failure to supervise communication methods

2

Failure to maintain required records

Recordkeeping reason for focus



- Recordkeeping requirements are a key to the Commission's oversight of Swap Dealers and **disregard of these principles severely threatens the Commission's ability to effectively and efficiently conduct examinations and investigations** and provide oversight of the swap dealer market.
- After the last two years of continued investigation into firm's messaging practices, the CFTC notes, "The Commission's message could not be more clear – recordkeeping and supervision requirements are fundamental, and **registrants that fail to comply with these core regulatory obligations do so at their own peril.**"
- The emphasis the CFTC has put on recordkeeping, reporting, and supervision should **motivate firms to self-examine their existing environments** to confirm there is adequate oversight and key controls in place.

Actions to consider



- Firms should confirm control environments address and resolve key issues the CFTC has repeatedly enforced related to communication methods. Some examples include but are not limited to:
- **Controls for eComm surveillance and lexicon pattern monitoring**
 - **Annual training on Firm approved and unapproved communication methods**



Firms should confirm there is adequate lines of defense oversight and risk management over sales and trading activity with an emphasis on **appropriate review, monitoring, and escalation of unapproved communication methods** such as through messaging apps, personal text, and Signal.

Business Conduct spotlight

Findings from analysis of swap dealer CFTC enforcement actions

Pre-trade hedging (1/2)

Case Study



The practice of **pre-trade hedging** came under the spotlight in 2023 with the CFTC issuing its first enforcement action related to this practice against a firm that had been engaging in forwards over a two-year period.



Before the firm provided the spot, and executed the swap with the client, **the firm's anticipated exposure against the client was hedged by trading minutes or seconds before.**



The CFTC concluded that by trading in this manner, **the firm likely at times contributed to moving the spot against the client, meaning the client may have entered the swap at a less favorable rate than what was available, and this trading activity was not adequately disclosed to the client.**

Regulations Breached (17 CFR)

By engaging in trading that might disadvantage clients without adequate disclosure to them, the firm violated the Standards relating to disclosure of material information, communicating in a fair and balanced manner, and diligent supervision.

Impact

- The firm's trading activity likely contributed to economically disadvantaging the client, while allowing the firm to hedge its exposure at a more favorable rate.
- The firm did not adequately disclose to its clients that it traded at times in this manner.

Wider Regulatory Focus

- In July 2023, the **European Securities and Markets Authority (ESMA)** published its report on **pre-trade hedging**, assessing the legitimacy of the practice, based on feedback received from market participants.
- ESMA concluded that **pre-hedging is a voluntary market practice which might give rise to abusive behaviors or conflicts of interests.**
- **ESMA does not currently see a clear reason to ban pre-hedging** but has highlighted a **case-by-case approach should be adopted when assessing whether the practice is appropriate** (e.g., conflict of interest, etc.) and determining the risks.

Focus Area



- **Pre-trade hedging represents a potential emerging trend** and area of focus for regulators
- The **complexity and divided market opinions** surrounding the practice demonstrates the potential ongoing challenges firms will face
- **ESMA's endorsement of adopting a case-by-case approach** towards pre-trade hedging highlights that there is no clear-cut solution
- **Firms should be closely monitoring whether adequate disclosure of material information is being made** to clients and whether communications to clients are being done in a transparent manner regarding pre-trade activity

Business Conduct spotlight

Findings from analysis of swap dealer CFTC enforcement actions

Pre-trade hedging (2/2)



Key Considerations

- **Case-by-case assessment** of swaps and pre-trade activity to ascertain what disclosures may be required
- **Disclosure of material information** that allows the counterparty to assess the risks of the swap, the characteristics of the swap, and whether there are any potential conflicts of interest or material incentives in relation to the swap dealer
- **Confirming communications** with a counterparty are done in a **fair and balance manner**
- **Diligent firm supervision** and **established controls** are key to adhering to these standards

Relevant actions to help mitigate infractions related to pre-trade hedging/pre-trade activity may include:

Training

Training should be provided to in-scope traders in relation to pre-trade hedging and its implication on conflicts of interest and material client disclosures.

This should include examples of when client disclosures are required.

Review of Client Disclosures

Periodic sample testing should be performed on pre-trade hedging activities to confirm that the required client disclosure had been issued to the client.

Review & Approval

Pre-trade hedging strategies should be reviewed and approved prior to any such activities taking place. The review should include consideration of whether client disclosures are required, and any conflict-of-interest concerns (including whether the client would be economically disadvantaged by the activity). Relevant disclosures should be issued to the client prior to any pre-trade hedging activities taking place.

Review of Client Comms

A sample of client communications should be periodically reviewed (at least monthly) to confirm they are delivered in a **fair and balanced manner**. This should include clients for which a pre-trade hedging strategy is in place.

Business Conduct spotlight

Findings from analysis of swap dealer CFTC enforcement actions

Pre-trade mid-market marks (“PTMMMs”)

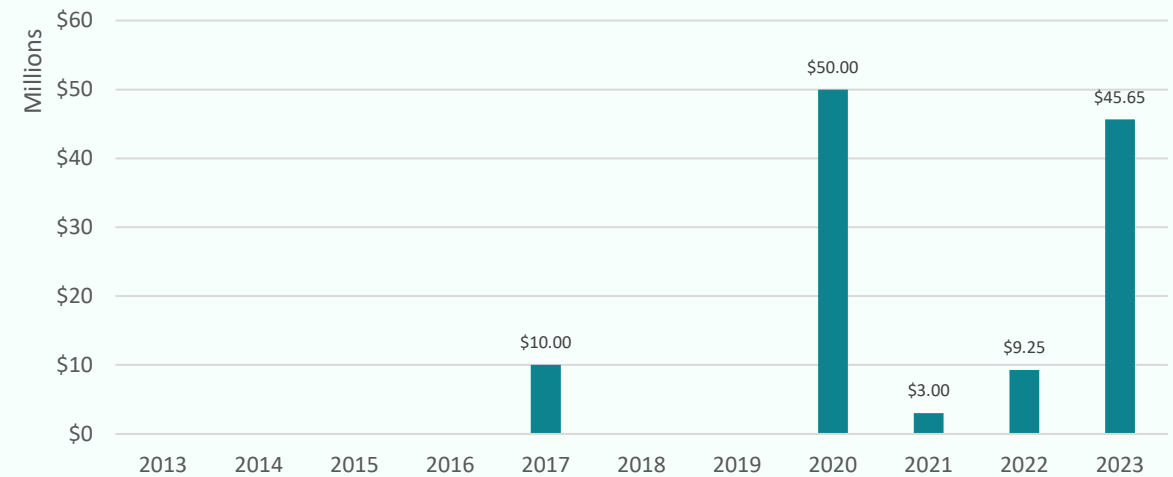


- Infractions related to PTMMMs in 2023 **increased substantially from 2022** in the overall monetary penalty amount from \$9.25m to \$45.65m.
- Three enforcement orders were issued to firms who failed to maintain adequate supervision and controls. This resulted in **inadequate disclosure of information or disclosure of inaccurate information to clients concerning PTMMMs**.
- In one instance, the CFTC deemed a firm had **failed to communicate to clients in a fair and balanced manner**.
- Whilst there were nuances between the enforcement actions - one firm had deliberately constructed an artifice to mislead clients on PTMMMs, versus another firm who did not understand the full scope of products which required PTMMM disclosure – each enforcement action underlines the **ongoing challenges and failings for firms in this area**.

NOTE:

This is an area with observed consistent challenges for firms

PTMMM/supervision enforcements by year (illustrative)



Pre-trade mid-market mark focus area



- Pre-trade mid-market mark violations are highlighted due to a resurgence, with monetary penalties reaching a **similar level seen in 2020**.
- The substantial fines reiterate the **importance of acting in good faith and providing accurate information** to counterparties.
- The CFTC has also shown the **importance of cooperating and providing accurate information in relation to CFTC investigations or examinations**.
- Bad actors, failing to comply with the CFTC’s process, have paid heavier infraction penalties and have damaged firm’s reputation as a registered swap dealer.

Actions to consider



Firms should confirm they have an adequate control environment in place to mitigate potential failings regarding PTMMM reporting. Controls to help adhere to compliance standards may include:

- **Compliance testing** - on a periodic basis Compliance reviews a sample of in-scope trades
- **Training** – periodic (at least annual) training covering business conduct standards
- **Review of protocol elections** – review of counterparty protocol elections for accuracy
- **Accuracy review** – periodic review of PTMMM accuracy, including calculation methodology
- **Review of quote/PTMMM spread** – periodic review of the spread between quotes and PTMMM should be performed to confirm potential incentives are not occurring

Key Takeaways

Key takeaways

Findings from analysis of swap dealer CFTC enforcement actions

Key takeaways

1 Division of Enforcement shift in approach towards harsher penalties

The **increasing trend in enforcement actions and monetary penalties** continued into 2023, with \$430m in fines imposed on firms during the year, taking the total across the 11-year period to over \$1.3bn. **87% of the total monetary penalties since the regime began have been imposed in the past two years alone**, supporting the CFTC communications that the regulator will take **stricter action particularly for repeat incidences of non-compliance**.

2 Recurring regulatory pain points

We continue to observe frequent breaches of the same rule areas, which in turn have prompted the CFTC to increase **regulatory pressure on ‘recidivist’ firms**. 2023 saw a rise in non-compliance with **rules covering pre-hedging and PTMMM disclosures**, and we recommend firms review controls in place to **mitigate business conduct violations**. Recordkeeping, Reporting and Supervision persist, and firms should confirm suitable oversight and risk management is in place to **avoid increasing regulatory risk**.

3 Despite substituted compliance, failures and violations persist

Since December 2013, the CFTC has issued a number of **Comparability Determinations for Substituted Compliance Purposes**.

Whilst the rules covered by jurisdiction or region, as an example, **compliance failures from EU and UK registered firms persist**, with 5 instances of those firms facing enforcement actions in 2023.

Appendix

Rule Allocations

Rule Allocations

The table below categorizes the CFTC swap dealer rules into rule areas that are subsequently used in our analysis in the previous slides.

Rule Area	CFTC Rule	Reg Title
Recordkeeping	1.31	Regulatory records; retention and production.
	1.35	Records of commodity interest and related cash or forward transactions
	23.201	Required Records
	23.202	Daily trading records
	23.203	Records; retention and inspection
	23.502	Portfolio reconciliation
Reporting	43.3	Method and timing for real-time public reporting
	43.4	Swap transaction and pricing data to be publicly disseminated in real-time
	45.3	Swap data reporting: Creation data.
	45.4	Swap data reporting: Continuation data
	45.5	Unique transaction identifiers
	45.6	Legal entity identifiers
	45.13	Required Data Standards
	45.14	Correcting errors in swap data and verification of swap data accuracy
	46.3	Data reporting for pre-enactment swaps and transition swaps
	46.4	Unique identifiers
	46.11	Reporting of errors and omissions in previously reported data
LTR	23.204	Reports to swap data repositories
	20.4	Reporting Entities
	20.5	Series S Filings
	20.6	Maintenance of books and records
	20.7	Form and manner of reporting and submitting information or filings.
External Business Conduct	23.402	General provisions.
	23.431	Disclosures of Material Information
	23.433	Communications - fair dealing
CCO	3.3	Chief compliance officer
Supervision	23.602	Diligent Supervision
	166.3	Supervision
Risk Management	23.600	Risk Management Program for swap dealers and major swap participants
	23.603	Business continuity and disaster recovery
Other (Trade Execution)	37.9	Methods of execution for required and permitted transactions

Contacts

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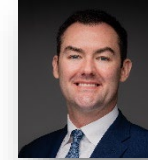
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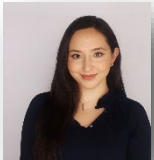
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