

Corporate & Financial Weekly Digest

December 9, 2011 by [Kenneth M. Rosenzweig](#)

CFTC Issues Interpretation of Dodd-Frank Anti-Fraud Authority

Co-authored by [Kevin M. Foley](#), [Maureen C. Guilfoile](#), [Christopher H. Mendoza](#), and [Christian B. Hennion](#).

Amendments made to the Commodity Exchange Act by the Dodd-Frank Wall Street Reform and Consumer Protection Act (the Dodd-Frank Act) require that an agreement, contract or transaction in any commodity that is entered into with, or offered to, a non-eligible contract participant or non-eligible commercial entity on a leveraged, margined, or financed basis must be conducted on a regulated exchange and be subject to the Commodity Futures Trading Commission's anti-fraud authority, unless actual delivery of the commodity is made within 28 days. The CFTC has issued an interpretation of the term "actual delivery" containing guidance on how the CFTC will construe this requirement.

The CFTC interpretation, which is subject to public comment, indicates that the CFTC will determine whether actual delivery has occurred using a functional approach and examining how the agreement, contract, or transaction is marketed, managed, and performed (instead of relying solely on the language used in the agreement, contract, or transaction). Relevant factors include ownership, possession, title, and physical location of the commodity purchased or sold (both before and after execution of the agreement, contract, or transaction); the nature of the relationship between the buyer, seller, and possessor of the commodity purchased or sold; and the manner in which the purchase or sale is recorded and completed.

The CFTC will accept public comments for 60 days from the date of publication in the Federal Register. The CFTC has indicated that it will take "appropriate action" if public comments demonstrate a need to modify the interpretation. A copy of the interpretation may be found [here](#).