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CFTC Issues Final Guidance Regarding the Listing of Voluntary Carbon Credit Derivative Contracts

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The Commodity Futures Trading Commission withdrew its Guidance Regarding the Listing of Voluntary Carbon Credit Derivative Contracts on September 10, 2025. Please see our client alert regarding the withdrawal for additional details. *This update provides a high-level summary of meaningful similarities and differences between the CFTC's proposed and final guidance regarding the listing of voluntary carbon credit derivative contracts.* On September 20, 2024, the Commodity Futures Trading Commission (the CFTC or the Commission) approved final guidance (the VCC Guidance)[1] outlining factors for consideration by CFTC-regulated exchanges, such as designated contract markets (DCMs) and swap execution facilities,[2] regarding the listing for trading of voluntary carbon credit (VCC) derivative contracts.[3] The CFTC did not depart significantly from its proposed guidance on the same topic, issued on December 4, 2023 (the VCC Proposal), and focused on key considerations when addressing certain requirements in the Commodity Exchange Act (the CEA) and CFTC regulations applicable to the design and listing of such contracts. This update provides a high-level summary of meaningful similarities and differences between the VCC Proposal and the VCC Guidance.[4] **Overview** The VCC Guidance does not establish new obligations for DCMs or modify or supersede the existing regulatory framework regarding the listing of derivative products by DCMs. Rather, it provides the CFTC's views and guidance on factors potentially relevant to its evaluation of DCM compliance and outlines matters for consideration by a DCM when designing and listing a VCC derivative contract. In the context of VCC derivatives, the VCC guidance applies the already applicable "DCM Core Principles"[5] to VCC derivatives contracts. In particular, DCM Core Principle 3, a requirement that a DCM only list for trading contracts that are not readily susceptible to manipulation, and DCM Core Principle 4, a requirement that a DCM prevent manipulation, price distortion and disruptions of the physical delivery or cash-settlement process through market surveillance, compliance and enforcement practices and procedures, form the foundation of the VCC Guidance. The VCC Guidance also addresses product submission requirements under Part 40 of the CFTC's regulations and CEA section 5c(c), insofar as such requirements relate to VCC derivatives. **The CFTC and Voluntary Carbon Markets** The VCC Guidance represents the "culmination of over five years of work" and the first time that a U.S. financial regulator has issued "regulatory guidance for contract markets that list financial contracts aimed at providing tools to manage risk, promote price discovery, and foster the allocation of capital towards decarbonization efforts," according to Commissioner Behnam, who detailed many of the CFTC's efforts in its supporting statement.[6] According to the VCC Guidance, more than 150 derivative contracts on mandatory emissions program instruments are listed on DCMs[7] and 29 derivative contracts on voluntary carbon market products had been listed for trading by DCMs as of August 2024,[8] up from 18 as of November 2023[9] (only three of which currently have open interest).[10] The VCC Guidance sits alongside many initiatives, both public and private, designed to encourage standards in VCC derivatives markets and promote transparency and liquidity. There is no primary regulator of the VCC markets; however, the CFTC has regulatory authority over environmental commodity derivatives, as established in a joint product definition rulemaking with the Securities Exchange Commission following the passage of the Dodd-Frank Wall Street Reform and Consumer

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Protection Act.[11] Although the CFTC does not have regulatory authority over the spot trading of VCCs, it has enforcement authority over fraud and manipulation in the spot VCC market.[12] The VCC Guidance should also be understood in the context of the U.S. federal government's efforts to promote enhance VCC derivatives markets.[13] But the proper role of the federal government, and the CFTC itself, in VCC derivatives markets remains unsettled. For example, Commissioner Mersinger issued a dissenting statement on the VCC Guidance, stating that it "is a solution in search of a problem," constituting "guidance on an emerging class of products that have very little open interest and comprise a miniscule percentage of trading activity on CFTC-regulated DCMs" that includes "veiled attempts to propagate controversial political ideologies."[14] Commissioner Mersinger stated that the inclusion of Environmental and Social Governance compliance and Net Zero goals in the VCC Guidance was misplaced, calling such focus "a backdoor attempt to inject and memorialize certain political ideologies into CFTC regulatory decisions."[15] **CFTC Guidance for DCMs Regarding the Listing of VCC Derivative Contracts** The VCC Guidance focuses mainly on physically-settled VCC derivative contracts. However, like in the VCC Proposal, the CFTC noted that its discussion of "VCC commodity characteristics for consideration by a DCM in connection with the design and listing of a physically-settled VCC derivative contract[] would also be relevant for cash-settled derivative contracts that settle to the price of a VCC, unless otherwise noted."[16] **1. *A DCM Shall Only List Derivative Contracts That Are Not Readily Susceptible to Manipulation*** The CFTC maintained the position it put forth in the VCC Proposal that, at a minimum, a DCM should address quality standards, delivery points and facilities, and inspection provisions in the design of a VCC derivative contract and that addressing such criteria in the contract's terms and conditions will assist in promoting accurate pricing and reducing susceptibility to manipulation. In addition to maintaining its position, the CFTC explained in the VCC Guidance that industry-recognized standards for high-integrity VCCs can assist in preventing manipulation and that DCMs should consider identifying the standards program and related crediting program in the contract's terms and conditions.

A. Quality Standards

The VCC Guidance follows the VCC Proposal in recommending that a DCM should consider transparency, additionality, permanence and risk of reversal, and robust quantification of emissions reductions or removals when addressing quality standards in connection with the design of a VCC derivative contract. In addition to what the CFTC set forth in the VCC Proposal, it recognized that:

> a DCM may determine that it is appropriate to consider, when addressing quality standards in connection with derivative contract design, whether the crediting program for underlying VCCs has implemented measures to help ensure that credited mitigation projects or activities: (i) meet or exceed best practices on social and environmental safeguards, and (ii) would avoid locking in levels of [greenhouse gas ("GHG")] emissions, technologies or carbon intensive practices that are incompatible with the objective of achieving net zero GHG emissions by 2050.[17]

The CFTC substantively revised its recommendations with respect to transparency and additionality, as described immediately below, but carried forward its proposed recommendations with respect to permanence and risk of reversal and robust quantification of emissions reductions or removals.

- **Transparency**. The CFTC supplemented the VCC Proposal on transparency to provide that the terms and conditions of a *physically-settled* VCC derivative contract should "clearly identify what is deliverable under the contract."[18]
- **Additionality**. The CFTC refined the VCC Proposal on additionality, explicitly declining to define the term,[19] to provide that a DCM should consider "whether the crediting program for underlying VCCs has procedures in place to test for

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additionality" and whether such procedures "provide reasonable assurance that GHG emission reductions or removals will be credited only if they are additional."[20]

B. Delivery Points and Facilities

The CFTC maintained its position set forth in the VCC Proposal that a DCM should consider a crediting program's governance, tracking mechanisms and measures to prevent double-counting when addressing delivery procedures.

C. Inspection Provisions – Third Party Validation and Verification

In the VCC Guidance, the CFTC indicated that a DCM should look for "reasonable assurances" that crediting programs are validating and verifying credit mitigation projects and activities appropriately, replacing the VCC Proposal's guidance that DCMs should *directly consider* a crediting program's policies and procedures. In the VCC Proposal, the CFTC proposed that a DCM should consider "how the crediting programs for the underlying VCCs require validation and verification that credited mitigation projects or activities meeting the crediting program's rules and standards."[21] The CFTC revised that recommendation in the VCC Guidance and indicated that a DCM consider "whether there is reasonable assurance that the crediting programs for the underlying VCCs have up-to-date, robust and transparent procedures for validating and verifying that credited mitigation projects or activities meet the crediting program's rules and standards,"[22] including "whether there is reasonable assurance that the crediting program's procedures reflect best practices with respect to third party validation and verification."[23] **2. *A DCM Shall Monitor a Derivative Contract's Terms and Conditions as They Relate to the Underlying Commodity Market.*** With respect to monitoring the terms and conditions of a physically-settled VCC derivative contract, the VCC Proposal and Guidance both stated that a DCM should (i) ensure that the underlying VCC reflects the latest certification standard applicable for that VCC and (ii) maintain rules that require its market participants to keep certain records and make them available to the DCM upon request. **3. *A DCM Must Satisfy the Product Submission Requirements Under Part 40 of the CFTC's Regulations and CEA Section 5c(c).*** The VCC Guidance and the VCC Proposal both maintained that that product submissions should be complete and thorough and include:

- "[A]n 'explanation and analysis' of the contract and the contract's 'compliance with applicable provisions of the [CEA], including core principles and the Commission's regulations thereunder.'"[24]
- "[T]hat the explanation and analysis of the contract 'either be accompanied by the documentation relied upon to establish the basis for compliance with applicable law, or incorporate information contained in such documentation, with appropriate citations to data sources[.]'"[25]
- "[I]f requested by Commission staff, . . . any 'additional evidence, information or data that demonstrates that the contract meets, initially or on a continuing basis, the requirements' of the CEA or the Commission's regulations or policies thereunder."[26]

Conclusion The VCC Guidance, like the VCC Proposal, is non-binding and limited to exchange-traded VCC derivative contracts. However, it suggests implications for the over-the-counter VCC derivatives market and VCC spot markets. More generally, the VCC Guidance is the CFTC's latest effort to promote structure and standards and influence the development of global VCC markets. [1] See "CFTC Approves Final Guidance Regarding the Listing of Voluntary Carbon Credit Derivative Contracts," Release No. 8969-24, Sept. 20, 2024. Previously, the CFTC issued proposed guidance and a request for public comment regarding the listing for trading of voluntary carbon credit derivative contracts on December 4, 2023. The request for comment elicited approximately 90 comments from derivatives exchanges, industry and trade associations, carbon credit rating agencies and

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standard setting bodies, among others, during a 75-day public comment period. Our client update on the VCC Proposal is available at https://www.gibsondunn.com/cftc-issues-proposed-guidance-regarding-the-listing-of-voluntary-carbon-credit-derivative-contracts/. [2] The CFTC stated that, while the VCC Guidance "focuses on the listing of VCC derivative contracts by DCMs, the Commission believes that the factors outlined for consideration also would be relevant for consideration by any SEF that may seek to permit trading in swap contracts that settle to the price of a VCC, or in physically-settled VCC swap contracts." VCC Guidance, Pre-Print Version at 82. [3] The statement of support by the Chairman and statement of dissent by Commissioner Mersinger are available at https://www.cftc.gov/PressRoom/PressReleases/8969-24. [4] Further information on the VCC Proposal can be found In Gibson Dunn's previous alert, available at: https://www.gibsondunn.com/cftc-issues-proposed-guidance-regarding-the-listing-of-voluntary-carbon-credit-derivative-contracts/ [5] *See, e.g.*, https://www.cftc.gov/LawRegulation/DoddFrankAct/Rulemakings/DF_12_DCMRules/index.htm [6] Statement of Support of Chairman Rostin Behnam on the Commission's Final Guidance Regarding the Listing of Voluntary Carbon Credit Derivatives Contracts (September 20, 2024), *available at* https://www.cftc.gov/PressRoom/SpeechesTestimony/behnamstatement092024. [7] *See* VCC Guidance, Pre-Print Version at 14-15. [8] *See* Id. at 15. [9] *See* Commission Guidance Regarding the Listing of Voluntary Carbon Credit Derivative Contracts; Request for Comment, 88 Fed. Reg. 89410, 89414 (December 27, 2023). [10] *See* VCC Guidance, Pre-Print Version at 15. [11]Further Definition of "Swap," "Security-Based Swap," and "Security-Based Swap Agreement"; Mixed Swaps; Security-Based Swap Agreement Recordkeeping; Final Rule, 77 Fed Reg 48208, 48233-48235 (August 13, 2012). ("An agreement, contract or transaction in an environmental commodity may qualify for the forward exclusion from the "swap" definition set forth in section 1a(47) of the CEA, 7 U.S.C. 1a(47), if the agreement, contract or transaction is intended to be physically settled.") [12] See 7 U.S.C. § 9; 17 CFR § 180.1. [13] See e.g., Gibson Dunn's previous client alert on the Biden-Harris Administration's Joint Statement of Policy and new Principles for Responsible Participation in Voluntary Carbon Markets, available at: https://www.gibsondunn.com/us-department-of-treasury-releases-joint-policy-statement-and-principles-on-voluntary-carbon-markets/ [14] Dissenting Statement of Commissioner Summer K. Mersinger on Guidance Regarding the Listing of Voluntary Carbon Credit Derivative Contracts (September 20, 2024), *available at* https://www.cftc.gov/PressRoom/SpeechesTestimony/mersingerstatement092024. [15] Id. [16] VCC Guidance, Pre-Print Version at 81. [17] Id. at 86. [18] Id. at 86. [19] Id. at 88. [20] Id. at 87. [21] Commission Guidance Regarding the Listing of Voluntary Carbon Credit Derivative Contracts; Request for Comment, 88 Fed. Reg. 89410, 89419 (December 27, 2023). [22] VCC Guidance, Pre-Print Version at 94. [23] Id. at 95. [24] Id. at 98 (quoting 17 CFR 40.2(a)(3)(v) (for self-certification) and 40.3(a)(4) (for Commission approval)). [25] Id. [26] Id. at 98 (quoting 17 CFR 40.2(b) (for self-certification) and 40.3(a)(10) (for Commission approval)).

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