PUBLIC STATEMENTS & REMARKS

Dissenting Statement of Commissioner Dan M. Berkovitz Regarding the Extension of Open Comment Periods

April 10, 2020

I dissent from today's extensions of comment periods for several pending proposed rulemakings because the extensions are *too short*. Market participants and the public need more time to be able to provide high-quality comments on pending CFTC rulemakings in light of the disruptions resulting from the novel coronavirus pandemic.

Public comments serve a critical role in the Commission's rulemaking deliberative process on regulations that will impact market participants and safeguard derivatives markets for years to come. Not providing the public sufficient time to obtain additional perspective and develop meaningful comments in these extraordinary times is bad public policy.

The Commission should afford market participants and interested members of the public comment periods substantially longer than the standard periods that apply absent these extraordinary circumstances. At a minimum, the Commission should extend all pending comment periods by 60 days. The two-week and two-day extensions granted by the Commission today are inadequate.

The pandemic has disrupted—and destroyed—life across the country. To date, the coronavirus has killed more than 12,800 Americans.[1] The projected toll is expected to be much larger.[2] Nearly 300 million Americans (over 90 percent of the population) are under stay-at-home orders.[3] Nearly 10 million workers have filed jobless claims during the past two weeks.[4] Schools are closed. Non-essential travel is forbidden. By no means can the current circumstances be described as—or treated as—business-as-usual.

So far, the financial markets have been resilient and have performed their intended functions of price discovery and risk management. Our market infrastructures—exchanges, clearinghouses, and swap execution facilities—have met the challenges posed by record volatility and volumes. Market participants have continued to provide essential risk management tools to American companies to help them maintain operations through this time of national crisis.

I commend the work done by the CFTC staff in monitoring these markets and for taking appropriate action to ensure market participants can continue to access the markets while observing social distancing requirements. I also commend the Chairman and the agency's executive leadership team for enabling all of us at the CFTC to telework and carry out the mission of the agency from safe locations in accordance with state and federal requirements and guidelines.

The COVID-19 related regulatory relief granted by the CFTC over the past few weeks is clear recognition that the pandemic has disrupted normal operations of market participants. Many functions cannot be performed in a timely manner due to physical displacements and other extraordinary demands on market participants. Just three weeks ago, on March 17, 2020, in CFTC Letter No. 20-02, CFTC staff observed, "[d]isruptions in transportation and limited access to facilities and support staff as a result of the COVID-19 pandemic could hamper efforts of market participants to meet their regulatory obligations." The staff noted that no-action relief has been requested "where compliance is anticipated to be particularly challenging or impossible because of displacement of firm personnel from their normal business sites due to [social distancing] and closures . . . ."[5] Subsequent staff no-action relief letters similarly recognized the difficulties that market participants face in complying with CFTC requirements and requests.

To accommodate these extraordinary circumstances, the CFTC has granted relief from a variety of CFTC recordkeeping, reporting, and registration requirements. Specifically, the CFTC has granted relief from requirements to: time-stamp records;[6] record oral conversations;[7] furnish Chief Compliance Officer Annual Reports to the Commission prior to September 1, 2020;[8] register as an Introducing Broker (IB);[9] submit annual compliance reports and fourth quarter financial reports prior to September 1, 2020;[10] comply with audit trail requirements;[11] file Form CPO-PQR pursuant to regulation 4.27;[12] submit commodity pool annual reports due on or before April 30, 2020;[13] distribute periodic account statements to pool participants due on or before April 30, 2020;[14] register as an IB (for foreign brokers acting under specified circumstances);[15] and register as a Major Swap Participant prior to September 30, 2020.[16]

The Commission's refusal to grant meaningful rulemaking comment period extensions stands in contrast to its swift recognition of requests by market participants for relief from the Commission's reporting and registration regulations. It is not clear why the Commission believes that market participants who state that it is difficult to comply with fundamental reporting or registration requirements nonetheless will be able to evaluate proposed rules and prepare comments with minimal delay.

Today's extension of two weeks for the position limits rulemaking—a rule that has been a decade in the making—is insignificant given the scope and magnitude of the proposed changes to the existing position limits rules. Further, the commodity markets have experienced unprecedented price movements and stresses over the past several weeks and commenters and the Commission would be well-served to review and take into account how the markets performed in this environment in fashioning and considering public comments. There is no compelling reason to require public comments on a position limits rule that has been ten years in the making without fully considering how the market has performed in the recent conditions of extreme stress.

The two extensions of two days for the swap reporting rulemakings are not meaningful. In fact, they are almost disrespectful to the many industry professionals that are attempting to meet the Commission's comment deadlines under unprecedented circumstances. Typically, comment periods are measured in days. These extensions can be measured in hours. I doubt any market participant will find these extensions of any benefit.

It is unreasonable to require market participants to prepare comments on complex rulemakings at the same time they are struggling to comply with fundamental recordkeeping, reporting, and registration obligations. The Commission should extend these comments periods by at least 60 days.

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[1] Worldometer, Coronavirus Cases, as of April 8, 2020, available at https://www.worldometers.info/coronavirus/country/us/.

[2] *See generally* http://www.healthdata.org/.

[3] Philip Bump, *Nearly all Americans are under stay-at-home orders. Some may have come too late.*, Washington Post, Mar. 2, 2020, available at https://www.washingtonpost.com/politics/2020/04/02/nearly-all-americans-are-under-stay-at-home-orders-some-may-have-come-too-late/.

[4] Rebecca Rainey and Norman McCaskill, *'No words for this': 10 million workers file jobless claims in just two weeks*, Politico, Apr. 2, 2020,available at https://www.politico.com/news/2020/04/02/unemployment-claims-coronavirus-pandemic-161081.

[5] CFTC Letter No. 20-02.

[6] *Id*. (members of Designated Contract Markets (DCMs) and swap execution facilities (SEFs)); CFTC Letter No. 20-03 (futures commission merchants and IBs); CFTC Letter No. 20-04 (Floor Brokers); CFTC Letter No. 20-05 (Retail Foreign Exchange Dealers); CFTC Letter No. 20-06 (swap dealers).

[7] CFTC Letter No. 20-03; CFTC Letter No. 20-04; CFTC Letter No. 20-05; CFTC Letter No. 20-06; CFTC Letter No. 20-07 (SEFs).

[8] CFTC Letter No. 20-03; CFTC Letter No. 20-06.

[9] CFTC Letter No. 20-04.

[10] CFTC Letter No. 20-08 (SEFs).

[11] CFTC Letter No. 20-09 (DCMs, to the extent noncompliance is caused by displacement resulting from the COVID-19 pandemic response).

[12] CFTC Letter No. 20-11 (relief permits Small or Mid-Sized CPOs to file the required annual reports, and Large CPOs to file quarterly reports for the first quarter 2020, up to 45 days later than required by regulation).

[13] *Id*.

[14] *Id*.

[15] CFTC Letter No. 20-12.

[16] CFTC Letter No. 20-10.

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