

Public Statements & Remarks

Concurring Statement of Commissioner Dan M. Berkovitz on Interim Final Rule Extending Uncleared Swap Margin Compliance Date to Address COVID-19 Pandemic Related Issues

May 28, 2020

I concur with issuing the interim final rule to extend by one year the initial swap margin compliance deadline for "Phase V" financial entities that is currently set for September 1, 2020 ("IFR").

As I have stated previously, the Commission should be reluctant to extend compliance deadlines when a long lead-in period has been provided. The 2020 compliance date for the swap margin rule was originally set in January 2016. However, the COVID-19 pandemic is significantly impacting business operations just as the negotiation and implementation of the initial margin agreements and processes for Phase V are in full swing leading up to the September 1, 2020 deadline. These activities can be time consuming and require substantial human interaction given the need to negotiate terms and third party custodial agreements, and agree on margin calculation methods. Accordingly, while many firms were undertaking this process, it appears that a substantial amount of work remained for Phase V firms just as the COVID-19 pandemic erupted.

With respect to the length of the extension, the progress of the pandemic and speed at which work operations will normalize is uncertain. As discussed in the IFR, on April 3, 2020, the Basel Committee on Banking Supervision and Board of the International Organization of Securities Commissions ("BCBS/IOSCO") amended its existing margin policy framework to extend the relevant comparable compliance date to September 1, 2021.^[1] While the Commission is not obligated to follow this framework, doing so when reasonable and on the same timeline as other regulators will reduce the likelihood of regulatory arbitrage. Given that the existing September 1, 2020 compliance date is fast approaching, and recognizing the benefits of international cooperation on this issue, I will support the one-year extension as provided in the IFR.

At the same time, it is critical that we continue to emphasize the importance of requiring margin for uncleared swaps. During the 2008 financial crisis, when margin for uncleared swaps was not required, American International Group ("AIG") would have failed as a result of its pending default on swaps that, according to AIG personnel, only months earlier presented little or no risk exposure for AIG. The Federal Reserve System and the U.S. Department of the Treasury provided over \$180 billion of support to prevent that outcome.^[2] A default by AIG would have substantially damaged its swap counterparties and left other market participants uncertain as to the knock-on effects of that default.

Requiring margin for uncleared swaps is a critical part of our regulatory framework that was put in place to help prevent another financial crisis. Uncleared swaps activity remains vigorous. The requirement to post initial margin helps mitigate systemic risk and reduce counterparty contagion and related effects by ensuring that collateral is available to offset losses from the default of counterparties. In response to the 2008 financial crisis, the Dodd-Frank Act required that the Commission establish minimum initial and variation margin regulations for certain swaps entered into by swap dealers.^[3] The need for margin was also recognized by the G20 nations when the G20 directed the BCBS/IOSCO to establish the swap margin policy framework for global implementation of margin requirements.^[4]

The IFR notes that Phase V is estimated to cover about eight percent of the swap trading activity for firms that may be subject to the margin requirements, and therefore that the uncollateralized swaps entered into by the entities in this phase “pose less risk to the financial markets than the risk posed by uncleared swaps entered into by entities that have already come into the scope of IM compliance.”^[5] While literally correct, this statement only relates to *relative* risk with respect to other swap activities and says nothing about the absolute known or unknown risk posed by the swap activity covered by the Phase V extension. The Commission’s statement regarding this relative risk should not be misinterpreted to provide justification for any further extensions or exceptions from the margin requirements for these entities.

[1] The BCBS/IOSCO was directed to establish a policy framework for implementation of margin requirements globally. See G20 Information Centre, Cannes Summit Final Declaration, <http://www.g20.utoronto.ca/2011/2011-cannes-declaration-111104-en.html>.

[2] See Interpretive Guidance and Policy Statement Regarding Compliance with Certain Swap Regulations, 78 FR 45292, 45293-94 (July 26, 2013).

[3] Commodity Exchange Act section 4s(e).

[4] G20 Information Centre, Cannes Summit Final Declaration, <http://www.g20.utoronto.ca/2011/2011-cannes-declaration-111104-en.html>.

[5] IFR, Section II.

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