SPEECHES & TESTIMONY

Statement of Dissent by Commissioner J. Christopher Giancarlo on the Cross-Border Application of the Margin Requirements

May 24, 2016

I respectfully dissent from the final rule on the cross-border application of margin requirements for uncleared swaps.

In September 2009, the leaders of the G-20 countries agreed to launch a framework for "strong, sustainable and balanced global growth" to generate "a durable recovery that creates the good jobs our people need."[1] The agreement included a commitment "to take action at the national and international level to raise standards together so that our national authorities implement global standards consistently in a way that ensures a level playing field and avoids fragmentation of markets, protectionism, and regulatory arbitrage."[2]

In keeping with that agreement, representatives of more than 20 regulatory authorities, including the CFTC, participated in consultations with the Basel Committee on Banking Supervision ("BCBS") and the Board of the International Organization of Securities Commissions ("IOSCO") to develop an international framework setting margin standards for uncleared derivatives ("BCBS-IOSCO framework").[3] That 2013 framework stresses the importance of developing consistent requirements across jurisdictions to avoid conflicting or duplicative standards.

Today, instead of recognizing and building upon the strong foundation for mutual recognition of foreign regulatory regimes created by the G-20 commitments and the BCBS-IOSCO framework, as well as the CFTC's own history of using a principles-based, holistic approach to comparability determinations,[4] the Commission is adopting a set of preconditions to substituted compliance that is overly complex, unduly narrow and operationally impractical.

First, the rule establishes a complicated matrix of potential cross-border counterparties under which substituted compliance is either not permitted, is partially permitted, or is fully permitted, depending upon the category in which the particular transaction fits. Next, where permitted, the CFTC will conduct an "element-by-element" analysis of CFTC and foreign margin rules under which a transaction may be subject to a patchwork of U.S. and foreign regulation.[5] The CFTC will follow this "element-by-element" approach instead of assessing a foreign authority's margin regime as a whole.

In response to commenters who observed that today's approach will undermine the BCBS-IOSCO framework, the Commission acknowledges that consistency with the framework is necessary, but argues that the framework leaves certain elements open to interpretation by each regulator, including the CFTC.[6] For these elements, the Commission undertakes to use an outcome-based analysis, but will also engage in a fact-specific inquiry of each legal and regulatory provision that corresponds to each element.

In effect, the Commission's approach is somewhat principles-based, except when it is rules-based and somewhat objective, except when it is subjective.

Today's muddled methodology invites foreign regulators to respond in kind. It may well set us off down the same protracted, circuitous and uncertain path that the CFTC and the European Union took in the context of U.S. central counterparty clearinghouse equivalence. The approach is impractical, unnecessary and contrary to the cooperative spirit of the 2009 G-20 Pittsburgh Accords.[7]

Rather than conducting a granular rule-by-rule comparison, the CFTC should focus on whether a foreign regulator's margin regime, in the aggregate, provides a sufficient level of

risk mitigation in connection with the execution of uncleared swaps. The BCBS-IOSCO framework does just that. Compliance with it should be straightforward and unconditional to prevent the "fragmentation of markets, protectionism, and regulatory arbitrage" that global regulators were charged to avoid.

As confusing as this rule is, what is important is not that hard to understand. American workers need quality American jobs. They need them in factories, farms and offices across the United States. The businesses that employ them want to sell their goods and services both here and abroad. To succeed globally, American businesses need U.S.-based financial institutions to support them around the world with competitively priced risk management services.

Unfortunately, this complicated rule will make it harder for U.S. financial institutions to compete globally and serve American businesses. When businesses are placed at a competitive disadvantage, they hire fewer workers. With over 94 million Americans now out of the workforce,[8] that is unacceptable. Therefore, I oppose this rule—it's that simple.

[1] G-20 Leaders' Statement, The Pittsburgh Summit, Preamble at par. 13 (Sept. 24-25, 2009).

[2] *Id.* at par. 12.

[3] Margin Requirements for Non-centrally Cleared Derivatives (Sept. 2013), *available at* http://www.bis.org/publ/bcbs261.pdf, revised Mar. 2015, *available at* http://www.bis.org/bcbs/publ/d317.pdf.

[4] The CFTC has a long history of working collaboratively with foreign regulators to facilitate cross-border business. For example, under Commission Regulation 30.10, adopted in 1987, if the CFTC determines that a foreign regulatory regime offers comparable protections to U.S. customers transacting in foreign futures and options, and there is an appropriate information-sharing arrangement in place, the CFTC has allowed foreign brokers to comply with their home-country regulations in lieu of Commission regulations. Similarly, since 1996 the Commission has permitted direct access by U.S. customers to foreign boards of trade ("FBOTs") without requiring the FBOT to register with the CFTC as a derivatives contract market ("DCM"). In determining the comparability of the foreign regulatory regime the Commission does not engage in a line-by-line examination of the foreign regulator's approach to supervising the FBOT it regulates. Rather, the Commission conducts a principles-based review to determine whether the foreign regime supports and enforces regulatory oversight of the FBOT and its clearing organization in a substantially equivalent manner as that used by the CFTC in its oversight of DCMs and clearing organizations. *See* Registration of Foreign Boards of Trade, 76 FR 80674, 80680 (Dec. 23, 2011).

[5] Such a result would be antithetical to element seven of the BCBS-IOSCO framework, which requires that there be no application of duplicative or conflicting margin requirements to the same transaction or activity. The framework advises that "[w]hen a transaction is subject to two sets of rules (duplicative requirements), the home and the host regulators should endeavor to (1) harmonize the rules to the extent possible or (2) apply only one set of rules, by recognizing the equivalence and comparability of their respective rules." BCBS-IOSCO framework at 23.

[6] In footnote 232 of the preamble the Commission cites, for example, the definition of "derivative," the list of assets eligible to post as collateral, the degree to which margin would be protected under the local bankruptcy regime, and how transactions with affiliates are treated.

[7] I am also concerned about the Commission's unwillingness to delay the cross-border application of its margin rules until after it has made comparability determinations. This will bring into the CFTC's regulatory ambit many cross-border transactions over which U.S. jurisdiction is inappropriate and an undue drain on precious regulatory resources.

[8] Bureau of Labor Statistics, *The Employment Situation—April 2016*, U.S. DEPARTMENT OF LABOR, May 6, 2016, **http://www.bls.gov/news.release/empsit.nr0.htm**.

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