Public Statements & Remarks

Statement of Chairman Heath P. Tarbert in Support of Final Rule on Alternative Compliance for Non-U.S. Clearinghouses

September 17, 2020

Nations have borders, but markets rarely do. That is certainly the case with the global derivatives markets.

For more than a century, U.S. derivatives markets have provided hedging and price discovery opportunities not only for Americans but also to individuals and businesses from abroad. In the 21st century, these markets involve participants domiciled in the Americas, Europe, Asia and elsewhere each and every day. And the clearinghouses that provide the credit risk management services for our exchanges have members and ultimate customers from around the world. The same is true for clearinghouses based in, for example, Europe. So the question that has naturally arisen is how the home regulator of the clearinghouse-which in the United States we refer to as a derivatives clearing organization (DCO)-should work with regulators in home jurisdictions of the DCO's members and customers.

When it comes to international regulatory comity, I find the concept of the "categorical imperative" of the great philosopher Immanuel Kant instructive.[1] Basically, Kant asks us to consider what would happen if everyone was bound by the same regulation-that is, we should take a particular obligation (imperative) and make it universal (categorical). If the result is chaos, then it is probably not a good regulation. Therefore, if every jurisdiction mandated that its own detailed, domestic DCO regulations applied to every foreign DCO that accepted its members or customers from that domestic jurisdiction, the result would likely be a mishmash of duplicative or contradictory regulations at best. At worst, the result would be market fragmentation, because DCOs might not accept members or customers from certain jurisdictions.[2] Neither result is good for the integrity, resilience, and vibrancy of global derivatives markets. Consequently, such an approach cannot be considered sound regulation.

Today we are finalizing a rule that meets the categorical imperative-a rule for non-U.S. DCOs that we would hope foreign jurisdictions would impose on U.S.DCOs in return. Specifically, I am pleased to support today's final rule for Registration with Alternative Compliance for Non-U.S. DCOs under Parts 39 and 140 of our regulations. This rule is a significant step in building an effective, efficient and cooperative international regulatory framework for the oversight of DCOs operating in the international derivatives markets. The alternative compliance rule takes a principles-based approach, and also reflects deference in the form of international regulatory cooperation. The rule recognizes that certain foreign regulatory systems can mirror the requirements of the CFTC's Core Principles for DCOs, but not necessarily all our detailed rules implementing those Core Principles. Provided that a foreign regulatory system produces similar outcomes to the CFTC's Core Principles, it makes sense to afford it flexibility in how to do it. The rule acknowledges that, while a foreign jurisdiction may take a different route, it can still reach the same endpoint.

In terms of the particulars, the final rule allows a DCO organized outside the United States to comply with our Core Principles through compliance with its home country's regulatory regime, provided:

1. The CFTC determines that compliance by the DCO with its home country regulatory regime constitutes compliance with the Core Principles set forth in section 5b(c)(2) of the Act;
2. The DCO is in good regulatory standing in its home jurisdiction;
3. The DCO does not pose a substantial risk to the U.S. financial system; and
4. A memorandum of understanding or similar arrangement satisfactory to the CFTC is in effect with the DCO's home country regulator.

As we vote to adopt this rule today, our approach is already bearing fruit. I am pleased to note that the European Union has finalized its Delegated Acts addressing EU oversight of DCOs domiciled abroad. The Delegated Acts take a similar approach as does our final rule, [3] insofar as they allow non-EU clearinghouses to meet EU requirements by following their home jurisdiction's rules if the EU determines those rules are designed to have equivalent outcomes. In short, both the United States and European Union are recognizing our respective national borders without being unduly confined by them.

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[1] "Act only according to that maxim whereby you can, at the same time, will that it should become a universal law." Immanuel Kant, *Grounding for the Metaphysics of Morals* (1785) [1993], translated by James W. Ellington (3rd ed.).

[2] See CFTC Chairman J. Christopher Giancarlo, Cross-Border Swaps Regulation Version 2.0: A Risk-Based Approach with Deference to Comparable Non-U.S. Regulation (Oct. 1, 2018), at 34 (noting that "overlapping regulation and supervision create inefficiencies that limit the ability and increase the costs of U.S. persons accessing non-U.S. CCPs and hamper the growth of the global economy"), available at https://www.cftc.gov/sites/default/files/2018-10/Whitepaper_CBSR100118_0.pdf.

[3] *European Commission* **C(2020)4892:** Commission delegated regulation supplementing regulation (EU) No 648/2012 with regard to the criteria that ESMA should take into account to determine whether a central counterparty established in a third-country is systemically important or likely to become systemically important for the financial stability of the Union or of one or more of its Member States.

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