Public Statements & Remarks

Opening Statement of Commissioner Rostin Behnam before the Meeting of the Commodity Futures Trading Commission

October 15, 2020

The last time we gathered as a Commission to discuss position limits I used some of my time to speak a bit about the award winning movie, Ford v Ferrari.[1] At that point, we were nearing the airing of the 92nd Academy Awards and this action-packed drama had earned four nominations—not to mention the distinction of being one of the few films I actually saw in a theater. For those of you who have not found it in one of your quarantine movie queues, Ford v Ferrari tells the true story of American car designer Carroll Shelby and British-born driver Ken Miles who built a race car for Ford Motor Company—the GT40—and competed with Enzo Ferrari's dominating, iconic red racing cars at the 1966 24 Hours of Le Mans.[2] I used the film and racing metaphors throughout my speaking and written statements to highlight serious concerns that the proposed amendments to the CFTC rules addressing position limits (the Proposal) signified yet one more instance where the Commission seemed to be comfortable with deferring core, congressionally mandated duties to others and calling it a victory.[3]

We are here today to finalize the Proposal. In just short of nine months, we have come to terms with life during a global pandemic complete with economic turmoil and pockets of historic market volatility. Amid the mere 60-day open comment period following the Proposal's publication in the Federal Register (graciously extended by 16 days to May 15th in light of the pandemic[4]), on April 20th, the price of the West Texas Intermediate crude oil futures contract (WTI contract), a key benchmark in the energy and financial markets, experienced an unprecedented collapse one day prior to the last day of trading and expiration for May delivery.[5] Defying market mechanics, the price of the contract fell from $17.73 per barrel at market open, to a closing settlement price of negative $37.63—with the price dropping approximately $40 in the last 20 minutes of trading.[6] And, while we are still in recovery, with great fanfare after almost 10 years, the Commission is going to establish the position limits regime required under the Dodd-Frank Act. I am reminded again of Ken who, at the 1966 24 Hours of Le Mans, went against his gut, giving way and leaving behind a milestone in car racing that to this day remains elusive.

If you haven't seen the movie, this is a spoiler alert: Ken did not win Le Mans in '66. While he was one and a half laps ahead of two other GT40s, he was asked to slow down so that the three Fords in the lead would cross the finish line in a dead heat formation. Ken lost his well-deserved win because the 24 Hours of Le Mans awards the victory to the car that covers the greatest distance in 24 hours. In the event of a tie, the rules provided that the car that had started farther down the grid had traveled the greater distance. Ken's GT40 had started in the grid 60 feet ahead of the GT40 driven by Bruce McLaren and Chris Amon, who were the declared winners.[7]

In the film, Ken seems to accept his loss with quiet dignity. However, in reality he was fully aware that in many respects, he had been robbed. From what I've read, Ken likely articulated his feelings a bit more colorfully.[8]

The point is that bringing something across the finish line doesn't always equate to a success. As detailed in my questions today and written statement, I believe that by going against our Congressional mandate and clear statutory intent by overly deferring to the exchanges, we have relinquished a claim to victory in this final position limits rule, which in many ways has itself felt like the CFTC's version of the 24 hours of Le Mans. Therefore, I will go with my gut and not be part of the formation in supporting this final rule.

Before turning to the other matters before the Commission today, I do wish to acknowledge and thank the Commission staff who worked on the Proposal, today's final rule, and every related study, matter, and undertaking to support it for the better part of 10 years. You were the design team, the engineers, the production team and the pit crew. You kept us on course at a pace set by our Chairman, and you have performed at the top of your field.

There are two other final rules before the Commission today, and I am pleased to say that I will be supporting both.

First, the Commission will vote to extend by one year the implementation schedule for the margin requirements for uncleared swaps (CFTC Margin Rule) by postponing the compliance date for the final phase, known as phase 6, to September 1, 2022. Throughout the various regulatory maneuvers this year that resulted in bifurcating the final compliance phase and will ultimately extend the implementation schedule by two years, the Commission addressed transition risks associated with implementation of the CFTC Margin Rule as well as the circumstances of the COVID-19 pandemic with workable, targeted solutions aimed at ensuring our policies remain intact. As we have now passed the ten-year anniversary of the Dodd-Frank Act, it is clear that the risks that the CFTC Margin Rule seeks to address have not morphed into anything of lesser concern—and indeed, it may be quite the opposite.

I expect that covered entities will work diligently in the time they have been given to come into compliance. We are collectively working towards goals of continuity, resiliency, and normalcy. The Commission's open engagement and willingness to address appropriate concerns—a hallmark of our agency—ought not to be tread upon or used to undermine core reforms at a time when the very relief we have provided addresses market volatility and stress.

I would like to commend the ongoing work of our CFTC staff in demonstrating its analytical expertise in evaluating and validating the need for the sixth phase of compliance and for the two-year extension of the implementation schedule. I would also like to thank you all for working towards regulatory harmonization with respect to margin for uncleared swaps by engaging in significant data-driven efforts with our domestic and international counterparts through the BCBS/IOSCO Working Group on Margining Requirements (WGMR).

Second, the Commission will vote on a final rule revising, among other things,[9] the conditions for the registration exemption under Commission regulation 3.10(c) available to non-U.S. commodity pool operators or "CPOs" (the 3.10 Exemption). The amendments expand the 3.10 Exemption to non-U.S. commodity pool operators or "CPOs" who operate both qualifying offshore commodity pools and other commodity pools. More specifically, going forward, a non-U.S. CPO may claim the 3.10 Exemption with respect to a qualifying offshore commodity pool, while maintaining another exemption from CPO registration, relying on an exclusion, or even registering as a CPO, with respect to its operation of other commodity pools—a practice known as "stacking." Such non-U.S. CPOs may also utilize a safe-harbor with respect to offshore commodity pools that take certain actions to prevent participation by U.S. persons, and may receive seed money from U.S. affiliates during the initial capitalization period of such off-shore pools without impacting their eligibility for the 3.10 Exemption.

The amendments to the 3.10 Exemption stem from two separate rulemaking proposals that spanned a roughly four-year period and, among other things, address policy positions that were ripe for consideration. As amended, the 3.10 Exemption will further reflect the increasingly global nature of this space and clarify the Commission's approach with respect to its oversight of foreign intermediaries that are not engaged in commodity interest activities on behalf of U.S. customers.

This final rule is brief in its delivery—less than one tenth the length of the final rule on position limits, but it reflects many years of staff experience and familiarity with the Commission's historical positions and reasoning in addressing material policy issues raised by appropriately balancing the financial interests of foreign intermediaries and their customers with our commitment to the financial integrity of U.S. markets and U.S. customer protection.

I greatly appreciate the time and consideration that the staff of the Division of Swap Dealer and Intermediary Oversight (DSIO) gave to my comments and concerns throughout this rulemaking. I also wish to thank the Office of General Counsel (OGC) staff for ensuring that we consistently adhere to the letter and spirit of the Commodity Exchange Act and Commission regulations.

Getting back to the topic on most of your minds, Ford v. Ferrari ended up taking home two Academy Awards for Best Sound Editing and Best Film Editing.[10] Like today's final rules amending the CFTC Margin Rule and the 3.10 Exemption, the film exhibited the finest editing and preservation of the aesthetic in multiple disciplines. It ultimately lost Best Picture to Parasite,[11] a dark comedy thriller. I will stop there with my comparisons.

In closing, I want to again thank the Chairman for his commitment to crossing the finish line on so many rules intended to implement core Dodd-Frank Act reforms. As a five-member Commission, our goal is always to reach consensus. However, like Ken Miles learned, consensus may not always equate to a victory or the success you were aiming for. We can disagree on various aspects of the proposals before us, and nevertheless commit to moving forward. We will do that today. The important part is that we provide transparency through presentation and debate.

Back in '66, by holding back, Ken lost the win at Le Mans, which denied him the "Triple Crown" of endurance racing: the 24 Hours of Daytona, the 12 Hours of Sebring, and the 24 Hours of Le Mans. No driver has won all three races in the same year,[12] and Ken missed out because he was part of a team and Ford had been good to him.[13] He committed and moved forward without the victory that should have been his because he was the best driver that day. I am committed to vote and move forward, even if it means giving up the triple crown of the day. But I won't go against my gut.

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[1] FORD V FERRARI (Twentieth Century Fox 2019).

[2] Ford v Ferrari, FOX MOVIES, https://www.foxmovies.com/movies/ford-v-ferrari (Last visited Oct. 13, 2020).

[3] Rostin Behnam, Statement of Dissent by Commissioner Rostin Behnam, Position Limits for Derivatives; Proposed Rule (Jan. 30, 2020), https://www.cftc.gov/PressRoom/SpeechesTestimony/behnamstatement013020; Position Limits for Derivatives, 85 FR 11596, 11734 (proposed, Feb. 27, 2020).

[4] *See* Press Release Number 8146-20, CFTC, CFTC Extends Certain Comment Periods in Response to COVID-19 (Apr. 10, 2020), https://www.cftc.gov/PressRoom/PressReleases/8146-20; Extension of Currently Open Comment Periods for Rulemakings in Response to the COVID-19 Pandemic, 85 FR 22690, 22691 (Apr. 23, 2020).

[5] *See* Statement of Commissioner Dan M. Berkovitz on Recent Trading in the WTI Futures Contract before the Energy and Environmental Markets Advisory Committee Meeting (May 7, 2020), https://www.cftc.gov/PressRoom/SpeechesTestimony/berkovitzstatement050720 .

[6] *See* Bloomberg News, *The 20 Minutes that Broke the U.S. Oil Market,* BLOOMBERG (Apr. 25, 2020), https://www.bloomberg.com/news/articles/2020-04-25/the-20-minutes-that-broke-the-u-s-oil-market?sref=DzeLiNol.

[7] Press Release, Ford Division News Bureau, For Immediate Release at 8 (July 5, 1966), made available in PDF at Wikipedia, the Free Encyclopedia, 1966 24 Hours of Le Mans, at https://en.wikipedia.org/wiki/1966_24_Hours_of_Le_Mans.

[8] Matthew Phelan, *What's Fact and What's Fiction in Ford v. Ferrari*, SLATE (Nov. 18, 2019), https://slate.com/culture/2019/11/ford-v-ferrari-fact-vs-fiction-le-mans-ken-miles.html.

[9] Additional amendments to Commission regulation 3.10(c) incorporate previously issued staff no-action relief and clarify when the clearing of commodity interest transactions through a registered futures commission merchant ("FCM") is required as a condition the exemptions in newly renumbered Commission regulations 3.10(c)(2), (3), and (4) applicable to foreign intermediaries (FCMs, introducing brokers, and commodity trading advisors), and that the exemptions are generally available to foreign intermediaries acting on behalf of both foreign located persons and international financial institutions.

[10] Laura Sky Brown, *Ford v Ferrari Movie Wins Two Awards on Oscars Night*, CAR AND DRIVER (Feb. 10, 2020), https://www.caranddriver.com/news/a30496982/ford-v-ferrari-movie-nominated-best-picture-oscar/.

[11] *Id.*

[12] Martin Raffauf, *Porsche and the Triple Crown of endurance racing*, PORSCHE ROAD & RACE (Dec. 7, 2018), https://www.porscheroadandrace.com/porsche-and-the-triple-crown-of-endurance-racing/.

[13] Phelan, *supra* note 8.

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