Public Statements & Remarks

Opening Statement of Commissioner Dan M. Berkovitz at July 22 Commission Meeting

We Must Preserve the Protections of the Dodd-Frank Act

July 22, 2020

Ten years ago yesterday, President Barack Obama signed into law the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act"). Drafted in the midst of the most severe financial crisis and economic recession since the 1930s, the Dodd-Frank Act created a new, comprehensive framework for regulating swap markets. The absence of swap market regulation and transparency had helped to cause the crisis. Over the past decade, the CFTC has worked diligently to develop regulations to implement the Dodd-Frank framework.

We have made much progress. Today, our derivatives markets are stronger and more resilient as a result of the CFTC's regulations, as well as their effective implementation by many market participants.

Unfortunately, our progress is now threatened. Today, the Commission is considering the first of three major rules that will address—and in one case, re-address—core Dodd-Frank Act requirements. These new rules will not provide the protections Congress intended. Rather, they are designed to either confirm the status quo or cut back existing protections. There is never a good time to weaken good financial regulations; it is particularly bad timing to do it in the middle of a pandemic that poses clear and present dangers to the economy.

Financial markets are currently facing their greatest challenges since the 2008 crisis. The Covid-19 pandemic has wreaked havoc on American businesses and households. Nearly 18 million Americans are unemployed.[1] Companies in sectors as diverse as restaurants, auto rentals, clothing, dairy, and energy have filed for bankruptcy. Businesses in many other industries such as travel, transportation, and recreation are severely threatened. Over the past few months the derivatives markets have experienced unprecedented volatility and price extremes.

Although it would be premature to declare success with respect to the current crisis, so far, despite bankruptcies, volatility, and uncertainty, the derivative markets have continued to perform their essential functions. American companies have been able to rely on and have confidence in the integrity of derivatives markets to manage the extraordinary risks arising from the pandemic. During these volatile markets, high levels of swap clearing and reporting have facilitated market confidence and price discovery.

The safeguards that Congress and the CFTC have built into the markets over the past ten years have made our markets stronger today. Banks are better capitalized due to increased capital requirements. Swap markets are more robust due to the clearing mandate, margin requirements, and other new rules for uncleared swaps. The trade execution mandate and real-time public reporting requirements have increased swap market efficiency and transparency for buy-side firms. Regulatory swap data reporting provides critical data to regulators. Our cross-border guidance has controlled risk coming into the U.S. from swap activities overseas.

The three new rulemakings that will soon be voted on by the Commission will jeopardize this progress. Today, the Commission will vote on a final rule claiming to implement the Dodd-Frank Act's mandate that the CFTC impose capital requirements upon swap dealers and major swap participants that are not subject to a prudential regulator. Tomorrow, the CFTC will consider a rule governing how the CFTC's swap regulations apply to cross-border swap activity. And third, the CFTC staff is working to finalize a new position limits rule covering swaps for the first time, as required by Congress.

In their current form, these three rulemakings suffer from a common deregulatory bias that is inconsistent with Congressional directives in the Dodd-Frank Act. They reflect an overarching determination to ensure that the CFTC's rules will impose only minor, if any, costs upon the financial industry, and will not require any significant changes to existing industry practices. The proposals reflect excessive deference to industry self-regulatory bodies and foreign regulators. They acquiesce to industry requests to roll back existing requirements.

The final swap dealer capital rules we will consider today are not based upon the risks of uncleared swaps, as the law requires, but rather are based on existing capital requirements for futures commission merchants and banks. The Commission acknowledges that there will be little or no need for most affected swap dealers to raise new capital under this rule.

The cross-border rules we will consider tomorrow will permit U.S. banks and other swap dealers to avoid the CFTC's rules by booking their swaps in affiliates overseas, while still negotiating the swaps in the U.S. and placing all the risk at their U.S. parents. At the same time, these rules will expand the ability of foreign banks to operate in the U.S. and pose risks to U.S. markets while avoiding CFTC regulation of those activities.

The proposed position limits rules would allow much more speculation in our commodity markets, without effective limits. We have repeatedly seen how speculative activity can destabilize commodity derivatives markets. The proposed rule would increase current limits, which have worked well over the decades, to accommodate this type of harmful activity.

The desire of the agency's majority is apparent. Last week the Financial Times, based on an interview with the Chairman, characterized the Commission's upcoming agenda as "several new rules that would move the CFTC back from the aggressive regulatory positions staked out by [the Chairman's] Democratic predecessors under the Obama administration."[2] "We've pared back our extraterritorial application of our swap dealer regime," the Chairman is quoted as saying.[3] The Financial Times also quoted the Chairman as stating that the financial industry has been "yearning for" the regulations the agency will be considering.[4]

A global pandemic is no time to weaken our financial regulations. Rather, we must work to ensure that our financial markets remain at least as robust and resilient as they have been over the previous decade in order to successfully meet the challenges of tomorrow and the next decade.

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[1] U.S. Department of Labor, Bureau of Labor Statistics, The Employment Situation—June 2020, available at https://www.bls.gov/news.release/pdf/empsit.pdf.

[2] Kadhim Shubber, Financial Times, *US regulator investigates oil fund disclosures* (July 15, 2020), available at https://www.ft.com/content/1e689137-2d1f-4393-a18f-fe0da02141cc.

[3] *Id*.

[4] *Id.*

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