Public Statements & Remarks

Statement of Commissioner Dan M. Berkovitz Regarding Amendments to the Swap Data Reporting Rules

September 17, 2020

Introduction

I support today's final rules amending the swap data reporting requirements in parts 43, 45, 46, and 49 of the Commission's rules (the "Reporting Rules"). The amended rules provide major improvements to the Commission's swap data reporting requirements. They will increase the transparency of the swap markets, enhance the usability of the data, streamline the data collection process, and better align the Commission's reporting requirements with international standards.

The Commission must have accurate, timely, and standardized data to fulfill its customer protection, market integrity, and risk monitoring mandates in the Commodity Exchange Act (CEA).[1] The 2008 financial crisis highlighted the systemic importance of global swap markets, and drew attention to the opacity of a market valued notionally in the trillions of dollars. Regulators such as the CFTC were unable to quickly ascertain the exposures of even the largest financial institutions in the United States. The absence of real-time public swap reporting contributed to uncertainty as to market liquidity and pricing. One of the primary goals of the Dodd-Frank Act is to improve swap market transparency through both real-time public reporting of swap transactions and "regulatory reporting" of complete swap data to registered swap data repositories (SDRs).[2]

As enacted by the Dodd-Frank Act, CEA section 2(a)(13)(G) directs the CFTC to establish real-time and comprehensive swap data reporting requirements, on a swap-by-swap basis. CEA section 21 establishes SDRs as the statutory entities responsible for receiving, storing, and facilitating regulators' access to swap data. The Commission began implementing these statutory directives in 2011 and 2012 in several final rules that addressed regulatory and real-time public reporting of swaps; established SDRs to receive data and make it available to regulators and the public; and defined certain swap dealer (SD) and major swap participant (MSP) reporting obligations.[3]

The Commission was the first major regulator to adopt data repository and swap data reporting rules. Today's final rules are informed by the Commission's and the market's experience with these initial rules. Today's revisions also reflect recent international work to harmonize and standardize data elements.

PART 43 Amendments (Real-time Public Reporting)

Benefits of Real Time Public Reporting

Price transparency fosters price competition and reduces the cost of hedging. In directing the Commission to adopt real-time public reporting regulations, the Congress stated "[t]he purpose of this section is to authorize the Commission to make swap transaction and pricing data available to the public in such form and at such times as the Commission determines appropriate *to enhance price discovery*."[4] For real-time data to be useful for price discovery, SDRs must be able to report standardized, valid, and timely data. The reported data should also reflect the large majority of swaps executed within a particular swap category. The final Reporting Rules for part 43 address a number of infirmities in the current rules affecting the aggregation, validation, and timeliness of the data. They also provide pragmatic solutions to several specific reporting issues, such as the treatment of prime broker trades and post-priced swaps.

Block Trade Reporting

The Commission's proposed rule for block trades included two significant amendments to part 43: (1) refined swap categories for calculating blocks; and (2) a single 48-hour time-delay for reporting all blocks. In addition, the proposed rule would give effect to increased block trade size thresholds from 50% to 67% of a trimmed (excluding outliers) trade data set as provided for in the original part 43. The increases in the block sizing thresholds and the refinement of swap categories were geared toward better meeting the statutory directives to the Commission to enhance price discovery through real-time reporting while also providing appropriate time delays for the reporting of swaps with very large notional amounts, i.e., block trades.

Although I supported the issuance of the proposed rule, I outlined a number of concerns with the proposed blanket 48-hour delay. As described in the preamble to the part 43 final rule, a number of commenters supported the longer delay as necessary to facilitate the laying off of risk resulting from entering into swaps in illiquid markets or with large notional amounts. Other commenters raised concerns that such a broad, extended delay was unwarranted and could impede, rather than foster, price discovery. The delay also would provide counterparties to large swaps with an information advantage during the 48-hour delay.

The CEA directs the Commission to provide for both real-time reporting and appropriate block sizes. In developing the final rule the Commission has sought to achieve these objectives.

As described in the preamble, upon analysis of market data and consideration of the public comments, the Commission has concluded that the categorization of swap transactions and associated block sizes and time delay periods set forth in the final rule strikes an appropriate balance to achieve the statutory objectives of enhancing price discovery, not disclosing "the business transactions and market positions of any person," preserving market liquidity, and providing appropriate time delays for block transactions. The final part 43 includes a mechanism for regularly reviewing swap transaction data to refine the block trade sizing and reporting delays as appropriate to maintain that balance.

Consideration of Additional Information Going Forward

I have consistently supported the use of the best available data to inform Commission rulemakings, and the periodic evaluation and updating of those rules, as new data becomes available. The preamble to the final rules for part 43 describes how available data, analytical studies, and public comments informed the Commission's rulemaking. Following press reports about the contents of the final rule, the Commission recently has received comments from a number of market participants raising issues with the reported provisions in the final rule. These commenters have expressed concern that the reported reversion of the time delays for block trades to the provisions in the current regulations, together with the 67% threshold for block trades, will impair market liquidity, increase costs to market participants, and not achieve the Commission's objectives of increasing price transparency and competitive trading of swaps. Many of these commenters have asked the Commission to delay the issuance of the final rule or to re-propose the part 43 amendments for additional public comments.

I do not believe it would be appropriate for the Commission to withhold the issuance of the final rule based on these latest comments and at this late stage in the process. The Commission has expended significant time and resources in analyzing data and responding to the public comments received during the public comment period. As explained in the preamble, the Commission is already years behind its original schedule for revising the block thresholds. I therefore do not support further delay in moving forward on these rules.

Nonetheless, I also support evaluation and refinement of the block reporting rules, if appropriate, based upon market data and analysis. The 30-month implementation schedule for the revised block sizes provides market participants with sufficient time to review the final rule and analyze any new data. Market participants can then provide their views to the Commission on whether further, specific adjustments to the block sizes and/or reporting delay periods may be appropriate for certain instrument classes. This implementation period is also sufficient for the Commission to consider those comments and make any adjustments as may be warranted. The Commission should consider any such new information in a transparent, inclusive, and deliberative manner. Amended part 43 also provides a process for the Commission to regularly review new data as it becomes available and amend the block size thresholds and caps as appropriate.

Cross Border Regulatory Arbitrage Risk

The International Swaps and Derivatives Association, Inc. (ISDA) and the Securities Industry and Financial Markets Association (SIFMA) commented that higher block size thresholds may put swap execution facilities (SEFs) organized in the United States at a competitive disadvantage as compared to European trading platforms that provide different trading protocols and allow longer delays in swap trade reporting. SIFMA and ISDA commented that the higher block size thresholds might incentivize swap dealers to move at least a portion of their swap trading from United States SEFs to European trading platforms. They also noted that this regulatory arbitrage activity could apply to swaps that are subject to mandatory exchange trading. Importantly, European platforms allow a non-competitive single-quote trading mechanism for these swaps while U.S. SEFs are required to maintain more competitive request-for-quotes mechanisms from at least three parties. The three-quote requirement serves to fulfill important purposes delineated in the CEA to facilitate price discovery and promote fair competition.

The migration of swap trading from SEFs to non-U.S. trading platforms to avoid U.S. trade execution and/or swap reporting requirements would diminish the liquidity in and transparency of U.S. markets, to the detriment of many U.S. swap market participants. Additionally, as the ISDA/SIFMA comment letter notes, it would provide an unfair competitive advantage to non-U.S. trading platforms over SEFs registered with the CFTC, who are required to abide by CFTC regulations. Such migration would fragment the global swaps market and undermine U.S. swap markets.[5]

I have supported the Commission's substituted compliance determinations for foreign swap trading platforms in non-U.S. markets where the foreign laws and regulations provide for comparable and comprehensive regulation. Substituted compliance recognizes the interests of non-U.S. jurisdictions in regulating non-U.S. markets and allows U.S. firms to compete in those non-U.S. markets. However, substituted compliance is *not* intended to encourage—or permit—regulatory arbitrage or circumvention of U.S. swap market regulations. If swap dealers were to move trading activity away from U.S. SEFs to a foreign trading platform for regulatory arbitrage purposes, such as, for example, to avoid the CFTC's transparency and trade execution requirements, it would undermine the goals of U.S. swap market regulation, and constitute the type of fragmentation of the swaps markets that our cross-border regime was meant to mitigate. It also would undermine findings by the Commission that the non-U.S. platform is subject to regulation that is as comparable and comprehensive as U.S. regulation, or that the non-U.S. regime achieves a comparable outcome.

The Commission should be vigilant to protect U.S. markets and market participants. The Commission should monitor swap data to identify whether any such migration from U.S. markets to overseas markets is occurring and respond, if necessary, to protect the U.S. swap markets.

PART 45 (Swap Data Reporting), PART 46 (Pre-enactment and Transition Swaps), and PART 49 (Swap Data Repositories) Amendments

I also support today's final rules amending the swap data reporting, verification, and SDR registration requirements in parts 45, 46, and 49 of the Commission's rules. These regulatory reporting rules will help ensure that reporting counterparties, including SDs, MSPs, designated contract markets (DCMs), SEFs, derivatives clearing organizations (DCOs), and others report accurate and timely swap data to SDRs. Swap data will also be subject to a periodic verification program requiring the cooperation of both SDRs and reporting counterparties. Collectively, the final rules create a comprehensive framework of swap data standards, reporting deadlines, and data validation and verification procedures for all reporting counterparties.

The final rules simplify the swap data reports required in part 45, and organize them into two report types: (1) "swap creation data" for new swaps; and (2) "swap continuation data" for changes to existing swaps.[6] The final rules also extend the deadline for SDs, MSPs, SEFs, DCMs, and DCOs to submit these data sets to an SDR, from "as soon as technologically practicable" to the end of the next business day following the execution date (T+1). Off-facility swaps where the reporting counterparty is not an SD, MSP, or DCO must be reported no later than T+2 following the execution date.

The amended reporting deadlines will result in a moderate time window where swap data may not be available to the Commission or other regulators with access to an SDR. However, it is likely that they will also improve the accuracy and reliability of data. Reporting parties will have more time to ensure that their data reports are complete and accurate before being transmitted to an SDR.[7]

The final rules in part 49 will also promote data accuracy through validation procedures to help identify errors when data is first sent to an SDR, and periodic reconciliation exercises to identify any discrepancies between an SDR's records and those of the reporting party that submitted the swaps. The final rules provide for less frequent reconciliation than the proposed rules, and depart from the proposal's approach to reconciliation in other ways that may merit future scrutiny to ensure that reconciliation is working as intended. Nonetheless, the validation and periodic reconciliation required by the final rule is an important step in ensuring that the Commission has access to complete and accurate swap data to monitor risk and fulfill its regulatory mandate.

The final rules also better harmonize with international technical standards, the development of which included significant Commission participation and leadership. These harmonization efforts will reduce complexity for reporting parties without significantly reducing the specific data elements needed by the Commission for its purposes. For example, the final rules adopt the Unique Transaction Identifier and related rules, consistent with CPMI-IOSCO technical standards, in lieu of the Commission's previous Unique Swap Identifier. They also adopt over 120 distinct data elements and definitions that specify information to be reported to SDRs. Clear and well-defined data standards are critical for the efficient analysis of swap data across many hundreds of reporting parties and multiple SDRs. Although data elements may not be the most riveting aspect of Commission policy making, I support the Commission's determination to focus on these important, technical elements as a necessary component of any effective swap data regime.

Conclusion

Today's Reporting Rules are built upon nearly eight years of experience with the current reporting rules and benefitted from extensive international coordination. The amendments make important strides toward fulfilling Congress's mandate to bring transparency and effective oversight to the swap markets. I commend CFTC staff, particularly in Division of Market Oversight and the Office of Data and Technology, who have worked on the Reporting Rules over many years. Swaps are highly variable and can be difficult to represent in standardized data formats. Establishing accurate, timely, and complete swap reporting requirements is a difficult, but important function for the Commission and regulators around the globe. This proposal offers a number of pragmatic solutions to known issues with the current swap data rules. For these reasons, I am voting for the final Reporting Rules.

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[1] *See* CEA section 3b.

[2] Dodd-Frank Wall Street Reform and Consumer Protection Act, section 727, Pub. L. 111–203, 124 Stat. 1376 (2010) (the "Dodd-Frank Act"), available at https://www.gpo.gov/fdsys/pkg/PLAW-111publ203/pdf/PLAW-111publ203.pdf.

[3] Swap Data Recordkeeping and Reporting Requirements, 77 FR 2136 (Jan. 13, 2012); and Swap Data Repositories: Registration Standards, Duties and Core Principles, 76 FR 54538 (Sept. 1, 2011).

[4] CEA section 2(13)(B) (emphasis added).

[5] In my dissenting statement on the Commission's recent revisions to it cross-border regulations, I detailed a number of concerns with how those revisions could provide legal avenues for U.S. swap dealers to migrate swap trading activity currently subject to CFTC trade execution requirements to non-U.S. markets that would not be subject to those CFTC requirements.

[6] Swap creation data reports replace primary economic terms (PET) and confirmation data previously required in part 45. The final rules also eliminate optional "state data" reporting, which resulted in extensive duplicative reports crowding SDR databases, and often included no new information.

[7] The amended reporting deadlines are also consistent with comparable swap data reporting obligations under the Securities and Exchange Commission's and European Securities and Markets Authority's rules.

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