

Public Statements & Remarks

Statement of Chairman Heath P. Tarbert in Support of Extending the Phase 5 Initial Margin Compliance Deadline

May 28, 2020

If there were no uncertainty, there would be no derivatives markets. Indeed, the CFTC is in the business of regulating markets that enable market participants to hedge their risks. But there are some exogenous events that come but once a century—a so-called Black Swan—which even prudent risk management can neither foresee nor adequately prepare for. The United States and much of the world is now facing such an event in the form of the COVID-19 (coronavirus) pandemic.

Two months ago, the Commission voted to extend the compliance schedule for initial margin requirements for uncleared swaps for those entities with the smallest swaps portfolios.^[1] This extension split Phase 5 of the schedule in two, creating a new Phase 6 composed of entities with swaps portfolios between \$8 billion and \$50 billion in average aggregate notional amount (“AANA”).

The Commission deferred the compliance deadline for entities in this new Phase 6 for one year. This was due to the complex operational burdens these entities will face and the fact these entities account for less than 3 percent of total uncleared swaps AANA.^[2] Phase 5—which comprises entities with larger swaps portfolios^[3]—remained subject to the prior compliance deadline.

These timelines did not factor in the most severe economic downturn the world has witnessed since the Great Depression. Today we are doing so. Accordingly, I support our interim final rule (“IFR”) deferring the compliance date for the Commission’s initial margin requirements for uncleared swaps in response to the coronavirus pandemic. This rule would provide a one-year extension for Phase 5 entities, which would otherwise become subject to initial margin requirements in just three months, on September 1, 2020. I believe issuing this IFR is appropriate from both a substance and a process perspective.

Need for the Extension

First, allow me to explain the *substance* of why an extension is necessary. As everyone listening is painfully aware, we are in the midst of a global pandemic. Economies across the world have largely shut down in response to social distancing needs. Market volatility has reached historic levels. Financial firms, like so many other organizations, have been forced into a near-total remote-working posture. These extraordinary market conditions and operational shifts demand that financial firms—including those regulated by the CFTC—devote an inordinate amount of time and resources to day-to-day operational, business continuity, and risk-management efforts.

Preparation for compliance with initial margin requirements requires procuring compliant documentation; setting up custodial arrangements; and establishing internal processes for the calculation, collection, and posting of initial margin, among other things. These steps are both time intensive and resource intensive. For many firms, the intense effort necessary to meet the imminent compliance deadline would divert focus and resources from their respective coronavirus responses. Moreover, working from home has made it difficult to access required legal and operational documentation and communicate with counterparties.

Recognizing these concerns, the Basel Committee on Banking Supervision and International Organization of Securities Commissions have jointly extended their initial margin compliance schedule. Several BCBS/IOSCO members have already taken steps to implement this relief.

As I have said before, the CFTC's margin rules are a key systemic risk mitigant. However, the market participants receiving an extension under this IFR have some of the smallest uncleared swaps portfolios. Indeed, Phase 5 entities collectively represent only 8 percent of total AANA across all margin phases.

We must balance the critical need to marshal scarce operational resources for pandemic response against the relatively small risks posed by a one-year compliance delay. The circumstances here weigh clearly in favor of being consistent with our international counterparts in granting the extension.

Need for an Interim Final Rule

Now, I will address the *process* for granting this extension. I have made very clear in the past that I believe the Commission should regulate via notice-and-comment rulemakings where possible. This gives the public a voice in the regulatory process and provides the agency the benefit of commenters' expertise and experience. Indeed, since I joined the CFTC last July, we have issued 11 final rules and 15 proposed rules, not counting the two we are voting on today.

However, as I have said before, there are certain circumstances in which prior notice and comment is not an ideal regulatory vehicle. Congress recognized this in the Administrative Procedure Act. For example, the statute makes clear that agencies need not engage in the prior notice-and-comment process where doing so would be "impracticable, unnecessary, or contrary to the public interest." In those circumstances, agencies may issue an interim final rule—that is, a rule that is effective after issuance without further public comment and agency response. The public may comment on the IFR after it becomes effective, and the agency may issue a revised final rule if those comments warrant changes to the IFR.

Here, providing a public comment period before issuing the extension would be both impracticable and contrary to the public interest. Challenges related to the coronavirus pandemic have already become dire. And because the current deadline for Phase 5 firms is only three months away, initial margin preparation demands are extremely pressing right now. If we opened even the shortest permissible comment period and incorporated those comments into a final rule, any relief issued likely would already be moot. Although we are soliciting comments on the IFR, we believe that Phase 5 entities need relief that is effective now in order to maintain focus on the real business continuity and risk-management issues they are facing today.

By contrast, because the Phase 6 compliance date is not until September 2021, the CFTC will address an extension for Phase 6 through the traditional notice-and-comment rulemaking process. However, I recognize the importance of clarity and certainty for Phase 6 market participants. So I expect we will issue a proposed rule in that regard in the very near term and proceed with that rulemaking as expeditiously as possible.

As previously demonstrated by our staff's coronavirus-related no-action relief,^[4] the CFTC stands ready to do whatever is necessary to help regulated entities weather the current crisis. I hope today's compliance schedule extension will help give firms the capacity they need to do so.

[1] Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants, 85 Fed. Reg. 19,878 (published in the *Federal Register* Apr. 9, 2020) ("March 2020 IM Rule").

[2] Statement of CFTC Chairman Heath P. Tarbert in Support of Extending Relief for Initial Margin Requirements for Uncleared Swaps (Mar. 18, 2020), <https://www.cftc.gov/PressRoom/SpeechesTestimony/tarbertstatement031820> (citing Richard Haynes, Madison Lau, & Bruce Tuckman, Office of the Chief Economist, CFTC, *Initial Margin Phase 5* (Oct. 2018)).

[3] As a result of the March 2020 IM Rule, Phase 5 is now made up of entities with \$50 billion to \$750 billion in AANA.

[4] These no-action letters are available at <https://www.cftc.gov/coronavirus>.

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