August 21, 2017

Amir Zaidi
Director
Division of Market Oversight
Commodity Futures Trading Commission
Three Lafayette Center
1155 21st Street, NW
Washington, DC 20581

Re: Review of the Swap Data Reporting Rules in Parts 43, 45, and 49 of the CFTC's Regulations.

Dear Mr. Zaidi,

Better Markets Inc.[1] appreciates the opportunity to comment on the above-captioned review ("Review"), undertaken by the Commodity Futures Trading Commission ("CFTC" or "Commission") and the Division of Market Oversight ("DMO").

The Review raises significant concerns that its objective is to weaken the regulatory regime that the Commission carefully crafted and previously adopted to ensure that our swaps markets are as stable, transparent, and fair as possible. We urge just the opposite approach. As the Commission and the DMO conduct the Review and consider new rules in this area, they must always adhere to the letter and spirit of the Dodd-Frank Act reforms, and wherever possible, they should enhance the regulations governing swap data reporting rather than dilute them in the name of streamlining the requirements and minimizing industry costs. In addition, the Commission and the DMO should explain what prompted this review in the first instance, as the record lacks transparency, shedding no light on that important issue. And as the Review proceeds, the Commission and the DMO should seek input from a much broader spectrum of stakeholders, not only market participants with their own self-interest in curtailing regulation.

[1] Better Markets is a non-profit, non-partisan, and independent organization founded in the wake of the 2008 financial crisis to promote the public interest in the financial markets, support the financial reform of Wall Street, and make our financial system work for all Americans again. Better Markets works with allies—including many in finance—to promote pro-market, pro-business, and pro-growth policies that help build a stronger, safer financial system, one that protects and promotes Americans' jobs, savings, retirements, and more.

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BACKGROUND

On July 10, 2017, the DMO announced that it would "begin a comprehensive review of the swap data reporting regulations found in Parts 43, 45, and 49 of the Commission's Regulations."[2]

The Announcement stated that the review would focus on "changes to existing regulations and guidance with **two goals** in mind: "(a) to ensure that the CFTC receives accurate, complete, and high quality data on swaps transactions for its regulatory oversight role; and (b) to streamline reporting, reduce messages that must be reported, and right-size the number of data elements that are reported to meet the agency's priority-use cases for swaps data."[3]

The Announcement was accompanied by a roadmap setting forth a general plan and timeline for completing the review, adopting final rules, and achieving full industry implementation. The target completion date is the end of 2019.

The Announcement also explained that the DMO plans to engage "with all types of entities involved in the swaps reporting process," including swap dealers, swap data repositories, and others involved in the swaps industry.[4]

Missing from the Announcement was any explanation of what inspired the review process or whether specific problems or concerns had arisen with the comprehensive set of rules governing swaps data reporting that are already in place. Moreover, there was no mention of any engagement during the review process with non-industry stakeholders such as the public at large or public interest advocates.

COMMENTS

I. The Commission should use the review process to improve and strengthen the swaps reporting regime within the parameters of the Dodd-Frank Act, rather than weaken the rules under the guise of fostering economic prosperity.

On its face and by virtue of its context, the Announcement raises a serious concern that the true objective of the Review is one of reducing or weakening the regulations that the Commission carefully considered and put in place to implement the Dodd-Frank reforms governing swaps data reporting. While the Announcement includes language indicating that the Review will ensure that the CFTC receives accurate and complete data for regulatory oversight purposes, it also frames the goals of the Review in unmistakably de-regulatory terms. For example, included among its principal objectives is to "streamline reporting," to

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[2] *See* Commodity Futures Trading Commission, Office of Market Oversight, Letter 17-33, Review of Swap Reporting Rules in Part 43,45, 49 of Commission Regulations, (July 10, 2017) ("Announcement").

[3] *Id* at 1.

[4] *Id.*

"reduce messages that must be reported," and to "right-size" the number of data elements that must be reported. Elsewhere, the Announcement explains that the review will explore whether "delayed reporting deadlines will improve data quality," and it further states that the DMO "hopes to maximize efficiency in swaps reporting."

Some of these words and phrases are explicitly de-regulatory; others are often used as benign-sounding code words for attempts at weakening rules to reduce the costs and burdens on industry, without sufficient regard for the essential role that the rules perform in protecting the public interest.

The context in which the rule review was announced unfortunately supports these concerns. For example, in a speech in March of this year, CFTC Chairman Giancarlo highlighted the importance of the derivatives markets in our economy, but then offered a strikingly de-regulatory declaration, asserting that "today, America's derivatives markets are struggling, in some cases, under the weight of flawed and excessive regulation . . . The overly prescriptive regulation of American derivatives markets is a part and parcel of over-regulation of the U.S. economy that thwarts revival of American prosperity.[5] The American people have entrusted the Trump Administration to turn the tide of over-regulation."[6]

The Chairman's enthusiasm for de-regulation is also apparent in his willingness to follow the edicts of multiple Presidential executive orders that call for major de-regulatory steps—even though the orders do not apply to the Commission. Two examples stand out. In E.O. 13777, President Trump ordered all executive branch agencies to appoint "Regulatory Reform Officers" to oversee implementation of the Administration's de-regulatory agenda. In response, the Chair announced in his March speech that, "to move forward [under the Executive Order], our first step is to reduce excessive regulatory burdens."[7] He further explained that "Although not strictly bound by the executive order, I am today announcing the launch of Project KISS, . . . which will be an agency wide review of CFTC rules, regulations, and practices to make them simpler, less burdensome, and less costly."[8]

In another extraordinary action, the President issued E.O. 13771, which requires all executive branch agencies to eliminate two rules for every single new rule adopted, and to ensure that the costs of any new rule are entirely offset by the repeal of existing rules, without any regard to the benefits of the new or previously adopted rules.[9] Here again the Chairman announced that the Commission would "embrace" that directive—even though it

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[5] Christopher Giancarlo, Remarks of Acting Chairman J. Christopher Giancarlo before the 42nd Annual International Futures Industry Conference, (Mar. 15, 2017) http://www.cftc.gov/PressRoom/SpeechesTestimony/opagiancarlo-20.

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] Reducing Regulation and Controlling Regulatory Costs, Exec. Order No. 13,771, 82 Fed. Reg. 9339 (Feb. 3, 2017).

appears to be unconstitutional and unlawful;[10] even though it is certain to inflict widespread harm by forestalling and eliminating rules that protect Americans' health and welfare; and even though it is not binding on any independent agency such as the Commission.

This de-regulatory approach is a profound mistake, especially if it is applied to the derivatives markets. First, it risks ushering in a return to derivatives markets that are prone to instability, crisis, and investor abuse. The unregulated swaps markets were at the heart of the 2008 financial crisis, and the reforms in Title VII of the Dodd-Frank Act were among the most important that Congress adopted. The swaps data reporting requirements are a key component, and they play a critical role in maintaining open, competitive, and more stable markets. As we explained in one of our comment letters:

> The financial markets are founded on information: who owes what to whom, when, and under what circumstances. However, the financial crisis demonstrated that the swaps markets had no functional system to keep track of the mountain of transaction and accounting data. It was this lack of transparency and understanding of the vast network of swap exposures that fueled the tremendous panic around the global financial crisis and frustrated any regulatory efforts to contain or mitigate it.[11]

The regulation of these important markets must remain strong, not return to the days when oversight was non-existent or weak. The perils of de-regulating our financial markets, including derivatives specifically, are the subject of increasing alarm. As Federal Reserve Vice Chair Stanley Fischer said in responding to calls for looser capital and liquidity requirements on banks:

> I am worried that the US political system may be taking us in a direction that is very dangerous . . . . It took almost 80 years after 1930 to have another financial crisis that could have been of that magnitude. And now, after 10 years everybody wants to go back to a status quo before the great financial crisis. And I find that really, extremely dangerous and extremely short-sighted.[12]

A recent New York Times editorial tied these concerns specifically to the need for **more** oversight and transparency in the derivatives markets, not less:

> De-regulation led to the financial crash of 2008. It's safe to assume that repeating the mistake will lead to the same result. . . . It's entirely possible that the system is more fragile than the Fed's stress tests indicate. . . . The

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[10] *See* Am. Compl. for Declaratory and Injunctive Relief, *Public Citizen v. Trump*, 1:17-cv-00253-RDM (D.D.C. Apr. 21, 2017).

[11] Better Markets, Inc., Comment Letter on Amendments to Swap Data Recordkeeping and Reporting Requirements for Cleared Swaps, (Oct. 30, 2015) *available at* https://bettermarkets.com/rulemaking/better-markets-comment-letter-cftc-sdr-rules.

[12] Abhinav Ramnarayan, *Fed's Fischer Says Move to Unwind Bank Regulation 'Dangerous*,' Reuters (Aug. 17, 2017), https://www.reuters.com/article/us-usa-fed-fischer-idUSKCN1AX0PK.

> difference is largely attributable to regulators' differing assessment of the risks posed by derivatives, the complex instruments that blew up in the financial crisis and that still are a major part of the holdings of big Amercian banks. . . . But without continued bank regulation, and heightened vigilance of derivatives, in particular, the good fortune of bank investors and bank executives is all too likely to come at the expense of most Americans, who do not share in bank profits but suffer severe and often irreversible setbacks when deregulation leads to a bust.[13]

The costs of the 2008 financial crisis have been well-documented, with conservative estimates showing that it destroyed at least $20 trillion in gross domestic product.[14] In more human terms, it threw millions of Americans into long-term unemployment or underemployment, cast over 15 million homes into foreclosure, and obliterated $19 trillion in wealth, including retirement savings.[15] That economic destruction and all that comes with it is what we can expect if the de-regulatory agenda of the new Administration takes hold at the Commission and the other financial regulatory agencies.

The threat of de-regulation extends not only to the stability and transparency of our financial markets, but also to investor protection. Reuters recently reported that "retail currency brokers are considering operating in the United States after a nearly seven-year absence, if President Trump is able to carry through on his pledge to deregulate the financial markets. . . . Key players in the vast retail market are gearing up for a hopeful re-entry." This is alarming because the so-called FX market, which is overseen by the Commission, has an infamous history as a breeding ground for fraudulent schemes that inflicted huge losses on countless individual retail investors. The Commission knows this full well, as it battled against these illegal enterprises for decades. De-regulation means open season once again on investors.

The call for de-regulation is deeply flawed for yet another reason. It not only raises the risk of crisis—which utterly destroys the very economic growth and prosperity its advocates seek—it also offers nothing in return. Put another way, financial regulation is not in fact stifling economic growth, so repealing it does nothing to justify the heightened risk of crisis, fraud, and abuse that comes with weaker rules.

Advocates for de-regulation have offered no persuasive evidence that financial regulation is harming economic growth and prosperity. In fact, the evidence points the other way. For example, bank lending rates, revenues, and profits are robust, having risen to or approached all-time highs. Increased capital requirements actually support lending. As

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13 R. M. Schneiderman, Did Deregulation Cause the Credit Crisis?, New York Times, (Oct. 8, 2008) https://economix.blogs.nytimes.com/2008/10/08/did-deregulation-cause-the-credit-crisis/?mcubz=0.

14 Better Markets, The Cost of Crisis, $20 Trillion and counting (July, 2015), available at https://www.bettermarkets.com/sites/default/files/Better%20Markets%20-%20Cost%20of%20the%20Crisis.pdf.

15 *Id.*

Thomas Hoenig, Vice Chairman of the Federal Deposit Insurance Corporation, recently explained in a letter to the leadership of the Senate Banking Committee, "I can only caution against relaxing current capital requirements and allowing the largest banks to increase their already highly leveraged positions. **The real economy has little to gain, and much to lose, by doing so**."[16]

Furthermore, despite heated rhetoric about a supposed reduction in market liquidity arising from the Volcker rule, the data do not support this claim. A case in point is a study that the Securities and Exchange Commission ("SEC") recently released finding no empirical evidence consistent with the hypothesis that liquidity in the U.S. Treasury markets has deteriorated after the regulatory reforms, including the Volcker rule, were put in place.[17] The report reached a similar conclusion about the corporate bond market, observing that trading activity has increased since the reforms were adopted and that transaction costs have remained low or actually decreased. And even if in some isolated markets, some dampening impact of regulation were persuasively demonstrated—something we have not yet seen—the solution would not be to reflexively de-regulate, insofar as the overall benefit of a safer financial system, less prone to crisis and better at serving the real economy, would overshadow any such effects.

The bottom line is that de-regulation is both unnecessary and dangerous. This is certainly true with respect to the derivatives markets, and the swaps reporting requirements in particular. The Commission and the DMO should bear these facts and this history foremost in mind as the Review proceeds, and if anything, they should strengthen the swaps reporting regime, not dilute it.

II. Whenever considering changes to the swaps reporting rules, the Commission should always act to promote the letter and spirit of the Dodd-Frank Act.

As the Commission proceeds with the Review, it must adhere to the letter and spirit of Title VII of the Dodd-Frank Act governing the regulation of swaps. With respect to some issues, the statute is clearly mandatory. For example, it requires real-time reporting for swaps.[18] Thus, while the Announcement suggests that the review will explore whether "delayed reporting deadlines will improve data quality," and will "evaluate real-time reporting regulations," the obligation to ensure real-time reporting is not subject to change in whatever subsequent rulemaking the Commission may undertake.[19]

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16 Letter from Thomas Hoenig to the Leadership of the Senate Banking Committee, (July 31, 2017) https://www.fdic.gov/about/learn/board/hoenig/hoenigletter07-31-2017.pdf (emphasis added).

17 Sec. & Exch. Comm'n, Report to Congress on Access to Capital and Market Liquidity (Aug. 2017) https://www.sec.gov/files/access-to-capital-and-market-liquidity-study-dera-2017.pdf.

18 *See* 7 U.S.C. § 2(a)(H)(13)(A) (2012).

19 Announcement at 1.

Even where the statute affords some discretion in implementation, the Commission should always seek to promote the policy objectives underlying the statutory framework. Those goals include the establishment of swaps markets that are stable, transparent, liquid, fair, and subject to robust Commission oversight. Those goals do not include minimizing costs or burdens on the industry. Our prior comment letters to the Commission and the SEC set forth a number of the important features that the swaps reporting rules should contain, including these prescriptions:

- Complete information on all transactions should be made available to market participants, regulators, and the public alike;
- The reporting requirements must apply to the constituent components of seemingly complex swaps so that market participants can no longer perpetuate a shadow market surrounding bespoke swaps;
- Data must be reported in a uniform format that is practically useful to market participants and the Commission;
- Reporting periods must be truly real-time, and actually shortened, not lengthened;
- The delay periods governing block trades should be minimized to what is truly essential and the size thresholds should be similarly high to minimize opacity in the market; and
- There must be no preferential data access.[20]

The Commission must bear these principles in mind as it proceeds. This is especially true as to the specific issues to be re-examined in the review process that appear to be incompatible with the statutory text, its purposes, and the characteristics of a sound reporting regime listed above. As a matter of law and sound public policy, "reducing messages," "right-sizing the number of data elements," "harmonizing data fields with foreign regulators," and re-evaluating "real-time reporting obligations" must not come at the expense of a robust reporting regime.

III. **The Commission should maximize transparency as the review process unfolds, and it should elicit the views from a broader cross section of stakeholders, not just market participants.**

As noted at the outset of this letter, the Announcement offers no explanation of what inspired the review process or whether specific problems or concerns had arisen with the comprehensive set of rules governing swaps data reporting that are already in place. In fact, the only statement on point simply notes that the Review "is separate from 'Project KISS' launched by the Commission on May 3, 2017."[21] Moreover, there was no mention of any engagement during the review process with non-industry stakeholders such as the public at large or public interest advocates.

[20] *See generally* https://bettermarkets.com/rulemaking, for the archive of all Better Markets comment letters submitted to the CFTC and the SEC regarding swaps and security-based swaps reforms, including data reporting.

[21] Announcement at 1.

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The Commission should immediately correct both of these omissions. First, it should explain the basis for the review, including, for example, any and all complaints, information, or urgings received from members of industry or their representatives, on which the Commission or the DMO relied in deciding to conduct the Review.

Second, as part of the review process, the Commission and the DMO should actively seek input from a wide variety of perspectives, including public interest advocates and experts from the industry with a pro-regulatory, pro-transparency, and pro-market integrity perspective. The Commission's current de-regulatory bias, coupled with the de-regulatory views of many in the industry, must be counter-balanced with contrary viewpoints, to ensure that any changes to the swaps data reporting regime adhere to the law and better promote market stability, transparency, and fairness.

CONCLUSION

We hope these comments are helpful as you pursue the Review.

Sincerely,

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