May 22, 2020

Via Electronic Submission

Mr. Christopher Kirkpatrick
Secretary of the Commission
Commodity Futures Trading Commission
1155 21st Street, NW
Washington, DC 20581

Re: Real-Time Public Reporting Requirements, RIN 3038–AE60[1]

Dear Mr. Kirkpatrick:

The Healthy Markets Association[2] appreciates the opportunity to object to the above-referenced Proposal.

In particular, we object to revisions that would: (1) implement a uniform 48-hour delay in reporting of all block trades, and (2) modify the definition of block trades. Both sets of revisions would significantly undermine market transparency to the detriment of market integrity, resiliency, and vibrancy.[3]

48-Hour Reporting Delay

In establishing the swaps reporting statutory framework, Congress defined "real time reporting" to mean "report data relating to a swap transaction, including price and

[1] *Real Time Public Reporting Requirements,* CFTC, 85 Fed. Reg. 21516 (Apr. 17, 2020), *available at* https://www.cftc.gov/sites/default/files/2020/04/2020-04405a.pdf ("Proposal").

[2] The Healthy Markets Association is an investor-focused not-for-profit coalition working to educate market participants and promote data-driven reforms to market structure challenges. Our members, who range from a few billion to hundreds of billions of dollars in assets under management, have come together behind one basic principle: Informed investors and policymakers are essential for healthy capital markets. To learn more about Healthy Markets or our members, please see our website at http://healthymarkets.org.

[3] Unfortunately, the Proposal appears to be reflective of a trend of Commision actions that are facially inconsistent with the Commission's mission, insufficiently supported by the facts and analysis, and designed to promote and protect the financial interests of a small subset of market participants -- at the expense of investors.

volume, as soon as technologically practicable after the time at which the swap transaction has been executed."[4]

However, Congress also permitted the Commission to write rules to "specify the criteria for determining what constitutes a large notional swap transaction (block trade) for particular markets and contracts [and] to specify the appropriate time delay for reporting large notional swap transactions (block trades) to the public."[5] In purported reliance on that exemptive authority, the Proposal would dramatically expand the definition of a block trade, and then implement a significant delay in the dissemination of information related to those trades.

This Proposal is, in many ways, simply a massive expansion of a prior exemption. When adopting the Block Trade Rule,[6] the Commission took the view that liquidity providers in large swaps trades

> may be deterred from becoming counterparties to outsize swap transactions if STAPD is publicly disseminated before liquidity providers can adequately offset their positions … [and that] [i]f a liquidity provider agrees to execute an outsize swap transaction, it likely will charge the counterparty the additional cost associated with hedging this transaction.[7]

Based on this theory, the Commission then established time delays for block trades, but promised to continue examining the potential "effects of increased transparency on post-trade liquidity in the context of block trades and LNOFs."[8]

At a very basic level, we fundamentally disagree with the presumption that one set of market participants should be permitted to consistently trade while in possession of material, non-public information--whether for 15 minutes or 48 hours. The logic underpinning the existing exemption assumes that policymakers should favor the block trade intermediaries over investors or other trading firms. Why should a bulge bracket bank, for example, be permitted to engage in a swap trade with an investor while it knows far more accurate pricing information than that investor or the public, merely because the bank engaged in a still-secret block trade with another party the day before? Why, as a matter of regulatory policy, should the Commission favor a large bank's profits and hedging risks over those of a pension fund (or market integrity)?

When the statute was enacted, the swaps markets were fundamentally different than they are today. They were less transparent, less electronic, and less robust. One of the main drivers of these changes, which have driven up liquidity and down trading costs for

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[4] 7 U.S.C. 2(a)(13)(A).
[5] 7 U.S.C. 2(a)(13)(E).
[6] Procedures to Establish Appropriate Minimum Block Sizes for Large Notional Off-Facility Swaps and Block Trades, CFTC, 78 Fed. Reg. 32866 (May 31, 2013) (''Block Trade Rule''), available at
[7] Proposal, at 21533.
[8] Proposal, at 21533.

investors and other market participants, has been the dramatic enhancement of pricing information for swaps.

Now, the Commission is proposing to turn its back on these advancements, and re-introduce opacity, risks, and costs for investors and other market participants. The Proposal to delay the dissemination of "block trades" gives rise to several concerns, including that it would:

(1) Have a discriminatory impact on market participants and misuse of inside information;
(2) Remove the ability of other market participants to have essential price references;
(3) Potentially iden spreads and decrease posted public, available liquidity;
(4) Create an impediment to best execution and quality transaction cost analysis;
(5) Potentially increase volatility in times of market stress;
(6) Potentially lead to a consolidation of trading at the largest dealers;
(7) Introduce disclosure asymmetries across related financial products; and
(8) Rely on inadequate evidentiary support.

None of these concerns are adequately addressed in the Proposal.

Discriminatory Impact on Market Participants and Potential Misuse of Inside Information. At a very basic level, the initial Block Trade Rule and the Proposal are based on the premise that one set of market participants (providers of block liquidity) should be favored over all other market participants and market integrity. Put simply, the Proposal would simply favor the largest dealers, and perhaps a handful of the largest investors, over other market participants. For 48 hours, only the parties to a "block" transaction (and those whom they care to privately share that valuable information), would be aware of the trade. The dealer would know the price at which it had just transacted, but others would not. Could it then use that material, non-public information to trade in the markets? In fact, the Commission expressly contemplates that the purpose would be to permit such trading.

Could a party to a swap with delayed reporting and dissemination tip others to trade on that information? This is not only discriminatory, but raises significant questions about market integrity. In fact, we find it troubling that the Proposal makes no effort to reconcile how this trading by informed market participants (likely with un-informed market participants) during the newly created blackout period would be permissible under its insider trading framework.

Loss of Price References for Market Participants. Most market participants would lose an incredibly valuable reference point--not just for the swap traded, but for similarly situated financial instruments. This could impact evaluative pricing tools, such as those offered by third parties, and relied upon by many market participants – not just in the

pricing of those specific swaps but other financial products where those prices are used in evaluating fair values.

Further, a failure to provide swaps pricing data on the trade date will also impede the quality of end-of-day valuations for financial products, such as registered investment companies, that may be impacted by the not-yet-disclosed prices. Similarly, valuations used to perform daily mark-to-market and associated variation margin payments may be impaired for both cleared and uncleared swaps. The same may be true for initial margin calculations.

Put simply, all investors, regulators looking to assess appropriate risk controls, and others would not be aware of the important valuation reference point. This could lead to executions for other investors at materially worse than the new, secret market prices. Or it could lead to the creation of significant risks for market participants and the markets overall. Again, none of these considerations are meaningfully addressed in the Proposal.

Wider Spreads and Decreased Posted Liquidity. Market makers and other market participants -- particularly those in the electronic markets -- would be unaware of significant trades for 48 hours. The impact here is not only when the block is the only "relevant" price on the day but also because the delay distorts the observed swaps daily high or low price.

This could leave market makers and investors subject to dramatically increased risk. Typically, market makers respond in such increased risk scenarios by decreasing the size of offerings available and widening the spreads. For example, suppose a large bank dealer engages in a block trade that is not reported for 48 hours. It would know the price at which it had just transacted a large block, but others would not. Then suppose the dealer starts aggressively trading that swap and related financial products in the various markets. It could, for example, sweep market makers' quotes and make near-guaranteed profits at the expense of the uninformed market makers and investors. To mitigate the risk of catastrophic losses, we would expect market makers in such scenarios to decrease the size of their posted liquidity and widen the spreads.

Impedes Best Execution and Transaction Cost Analysis. The Proposal's delay would make it very difficult for firms to engage in meaningful transaction cost analysis thus hampering best execution obligations. This is particularly true in markets that are, like equities and fixed income markets, becoming increasingly time-sensitive, with real-time changes in prices coming over periods measured in fractions of a second, seconds, or minutes. In today's increasingly transparent swaps market, a delay of two days is an

eternity. The proposal also runs directly counter to most financial regulator's recent efforts to reduce transaction costs and enhance best execution.[9]

Increased Volatility and Decreased Liquidity in Times of Stress. A delay could exacerbate systemic risks and volatility. Again, without real-time transparency into block trades, market participants (including both investors and dealers) may withdraw from markets in perceived times of stress. In these cases when participants want more information, they would have less. Thus, the lack of references could lead to less-liquidity, not more. This risk is likely exacerbated as these markets become increasingly electronic. Market makers would likely have to respond in times of stress by even further widening spreads or withdrawing from the market entirely, as fears of a large, unknown trade could materially change the values of swaths of underlying securities.

Consolidation of Trading. If large trades are kept secret from the majority of market participants and regulators for up to 48 hours, investors and market participants will increasingly turn to those who are most likely to have more complete information. That will necessarily be just the handful of largest bond dealing banks. As a result, they will be able to make more informed markets and more profitable trades than other brokers or dealers--leading to further consolidation of bond market trading.

Introduce Disclosure Asymmetries Across Related Financial Products. The Proposal would impose 48-hour disclosure delays in the swaps markets, while ignoring the reporting and disclosure obligations in directly and indirectly related financial products. For example, a credit ETF trade may be reported to the tape or a corporate bond trade may be reported to TRACE, but information related to a swap transaction that may be used by one of those counterparties to hedge its risks from those trades may be delayed for 48 hours. Why? How does this outcome further market integrity or promote liquidity in the CFTC's regulated market? Similarly, the futures markets are not subject to a similar reporting delay. The Proposal does not explore, much less analyze, the impact on markets and various market participants that may result from having truly real time reporting of transactions in some financial products while denying most -- but not all -- market participants information related to transactions in swaps that are intended to provide similar or related financial exposures.

Inadequate Evidentiary Support. If the Commission has engaged in a thorough examination of effects of time delays generally, the currently existing time delays, or the proposed 48-hour delay, we are unaware of it. Such detailed analysis certainly isn't contained in the Proposal. In fact, the Proposal is nearly completely devoid of evidentiary support for either the objective or the methods taken to achieve that

[9] See, e.g., FINRA, *Best Execution: Guidance on Best Execution Obligations in Equity, Options and Fixed Income Markets*, Reg. Notice 15-46, Nov. 2015, *available at* https://www.finra.org/sites/default/files/notice_doc_file_ref/Notice_Regulatory_15-46.pdf.

objective. Interestingly, the Proposal seems to heavily rely on a comment letter from the Financial Services Roundtable that

> anecdotal evidence suggests that data mining is pervasive, and that market participants have reported repeated instances in which markets have moved away from them shortly after beginning to execute large transactions as part of a hedging strategy.[10]

Further, there is also almost no information regarding the specific choices made. For example, why is the delay 48 hours, as opposed to some other number of minutes, hours, days, or weeks? What are the perceived benefits and likely outcomes for the different delay period options? Further, the Commission is essentially consolidating various delay periods into one 48-hour delay period. Why? Could it be that some transactions may still warrant a delay while other types of transactions do not? Could it be that different types of transactions in different types of financial products still warrant delays of different time horizons? Or could it be that given the facially discriminatory impact of the delay and negative impacts on other market participants, no delay is appropriate? These and other preferences in the Proposal must be examined and supported for the Commission to meet its obligations under the Administrative Procedures Act. None of them are addressed with specificity.

We also note that calls to obfuscate trading activity are not new, or unique to swaps. For example some market participants have similarly pressed for the introduction of delayed "block trade" reporting in fixed income securities. For example, in lobbying for a pilot program to introduce a block trade reporting delay, JPMorgan Chase explained:

> Providers of liquidity accept heightened risk when transacting in block trades, and these trades are immediately disclosed to the market with masked trade sizes. We believe as a result of this immediate disclosure, broker dealers now prefer smaller trade sizes on average, particularly for less liquid and lower rated bonds. This changes the risk/reward for the broker dealers and is reflected in their pricing. Similarly, we observe that asset managers at times can experience challenges in transacting large trade sizes. We believe that it is important to study whether increases in the delay of public disclosure for block trades, as well as in the dissemination caps, would support larger trade sizes and tighter pricing, which would make the market more effective and be beneficial to market participants.[11]

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[10] Proposal, at 21534 (citing to Financial Services Roundtable, at 27).

[11] Letter from Sandra E. O'Conner, JPMorgan Chase, to Brent J. Fields, SEC, June 29, 2018, *available at* https://www.sec.gov/comments/265-30/26530-3974442-167144.pdf ("JPMorgan Chase Letter").

Of course, these perceived concerns are based on theory and conjecture, not objectively observed facts. Nevertheless, in response to pressure to impose a new anti-transparency regime, in April 2019, FINRA proposed adopting a pilot program to revise its TRACE requirements to increase the dollar thresholds for what qualifies as a block trade, but then institute a 48-hour delayed dissemination regime for that information.[12] We objected, as did other trade groups (e.g., CFA Institute[13] and Bond Dealers of America[14]), investors (e.g., T. Rowe Price,[15] AQR Capital Management,[16] Vanguard,[17] Federated Investors,[18] and San Bernadino County Government[19]), trading firms (e.g., Citadel[20]), and experts (e.g., Larry Harris). It has not been implemented. The objections articulated in those objections to FINRA also largely apply to the Proposal as well, and we urge you to consider them.

Put simply, implementing a reporting delay is contrary to the purposes of the CEA and contrary to the public interest. Further, the proposed reporting delay is also insufficiently supported to fulfill the Commission's obligations under the Administrative Procedures Act.

Block Trade Definition

The Proposal would establish a very expansive definition of a block trade, which is tailored for individual assets. But rather than tying the definition of a block trade to the materiality of the risk (including as a function of the trade size), the Proposal bizarrely ties the definition exclusively to perceived liquidity of the markets for particular assets, and then subjects all such trades to a potential 48-hour reporting delay.

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[12] FINRA, *Trade Reporting and Compliance Engine (TRACE): FINRA Requests Comment on a Proposed Pilot Program to Study Recommended Changes to Corporate Bond Block Trade Dissemination*, Regulatory Notice 19-12, (Apr. 2019), *available at* https://www.finra.org/sites/default/files/notice_doc_file_ref/Regulatory-Notice-19-12.pdf.

[13] Letter from Kurt Schacht and James Allen, CFA Institute, to Marcia Asquith, FINRA, Aug. 30, 2019, *available at* https://www.finra.org/sites/default/files/2019-09/19-12_CFA-Institute_Comment.pdf.

[14] Letter from Mike Nicholas, Bond Dealers of America, to Marcia Asquith, FINRA, June 11, 2019, *available at* https://www.finra.org/sites/default/files/2019-06/19-12_BDA_Comment.pdf.

[15] Letter from Michael Grogan, et al, T. Rowe Price, to Marcia Asquith, FINRA, June 11, 2019, *available at* https://www.finra.org/sites/default/files/2019-06/19-12_TRowePrice_comment.pdf.

[16] Letter from Isaac Chang and Richard Grant, AQR to Marcia Asquith, FINRA, June 11, 2019, *available at* https://www.finra.org/sites/default/files/2019-06/19-12_AQR_Comment.pdf.

[17] Letter from Gregory Davis, Vanguard, to Marcia Asquith, FINRA, June 11, 2019, *available at* https://www.finra.org/sites/default/files/2019-06/19-12_Vanguard_Comment.pdf.

[18] Letter from Michael Granito, Federated Investors, to Marcia Asquith, FINRA, June 11, 2019*, available at* https://www.finra.org/sites/default/files/2019-06/19-12_Federated-Investors_Comment.pdf.

[19] Comment from Parth Bhatt, San Bernadino County Government, to FINRA, Apr. 17, 2019, *available at* https://www.finra.org/sites/default/files/2019-09/19-12_Parth-Bhatt_comment.pdf.

[20] Letter from Stephen Berger, Citadel, to Marcia Asquith, FINRA, June 11, 2019, *available at* https://www.finra.org/sites/default/files/2019-06/19-12_Citadel_Comment.pdf.

For example,

> for CDSs, the new swap categories would no longer be based on observed spreads with multiple tenor groups, but would be based on well-defined products (e.g., CDXIG, CMBX, iTraxx) for a single tenor range between four to six years (designed to pick up the most actively traded five year on-the-run CDS product). All other CDS products which do not fall into these defined product groups, or defined product tenor, would have a new block size of zero.[21]

The net result of this approach is to make it so that “fully one-third of all trades within a category could be block trades subject to reporting delays.”[22] This result is facially inconsistent with the purposes of the CEA generally and the swaps reporting regime in particular.

With such a significant percentage of trades currently qualifying as “block trades,” non-dealer market participants would be at a persistent informational disadvantage, which will almost certainly result in higher transaction costs and lower liquidity for them. However, as with the proposed reporting delay, the Proposal offers no consistent framework for how its “block trade” determinations were made, nor does it offer any economic analysis of the impacts of its decisions.

To be clear, to take action, the Commission must identify its interest in taking an action, review alternative options, and establish why its approach is reasonably related to achieving its intended objectives. How is exempting huge swaths of swaps trading from timely reporting beneficial to market integrity? How does it impact different market participants? How do different “block trade” definitions and levels across different asset classes impact risks and costs for various market participants? How would those changes impact market liquidity and resiliency? None of these questions are asked, much less answered, in the Proposal.

Just because the Proposal may allow some market participants to increase their revenues or reduce their hedging costs by explicitly permitting them to trade while in possession of material, non-public information about a previously executed, but

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[21] Proposal, at 21555.
[22] Statement of Comm’r Dan Berkowitz, Proposal at 21576.

not-yet-reported, transaction doesn't mean that such an objective is consistent with the CEA or CFTC's mission.

If the Commission is to comply with its procedural obligations, it must engage in a more thorough identification of the perceived problems it wishes to address, evaluate alternative approaches, and support the path it chooses. Simply relying on anecdotal evidence from a tiny subset of market participants that most stand to benefit from opacity is facially inadequate.

Conclusion

We urge the Commission to abandon the above-referenced proposals, which are contrary to the intent of the CEA, the "integrity, resilience, and vibrancy of the U.S. derivatives markets,"[23] and the Commission's procedural requirements under the Administrative Procedures Act.

Thank you for your consideration. Should you have any questions or would like to discuss these matters further, please contact me at (202) 909-6138.

Sincerely,

Tyler Gellasch
Executive Director

[23] *CFTC Mission Statement*, CFTC, *available at* https://www.cftc.gov/About/Mission/index.htm.