Consumer Federation of America

January 10, 2017

Re: Oppose H.R. 238

Dear Representative,

I am writing on behalf of the Consumer Federation of America (CFA)[1] to ask you to oppose "The Commodity End User Relief Act" (H.R. 2289), which the House is expected to vote on this week. This legislation would cripple the Commodity Futures Trading Commission (CFTC) from effectively overseeing and regulating commodities and derivatives markets, leaving consumers exposed to fraud, manipulation, and abusive practices, and putting the safety and stability of the U.S. financial system at risk. The language in this bill is substantially similar to the language offered in the CFTC reauthorization bill introduced last Congress, which the Obama Administration strongly opposed because it undermined the efficient functioning of the agency and offered no solution to address the persistent inadequacy of the agency's funding.[2] We urge you to resist this continued attack on the CFTC by voting against this misguided and harmful legislation.

First, this bill would freeze the CFTC's budget at $250 million for the next five years. This is a drop in the bucket and is severely inadequate to properly oversee the roughly **<u>$500 trillion</u>** swaps market.[3] Appropriating this little to the CFTC doesn't reflect the vast changes that have recently occurred to the market or to the CFTC's role in overseeing the market. For example:

- The CFTC is responsible for the market surveillance of highly sophisticated and diverse, often high-frequency trading strategies, some of which can be predatory and manipulative;
- The CFTC is responsible for ensuring compliance with new margin requirements for uncleared swaps of swap dealers and major swap participants that are not prudentially regulated entities;
- The CFTC is responsible for ensuring the proper registration and operation of a new type of regulated trading venue, known as swaps execution facilities, which are designed to ensure pre-trade transparency;
- The CFTC is responsible for monitoring risks at individual clearinghouses, clearing members, and large traders, and for ensuring that transactions that should be centrally cleared in fact do so;
- The CFTC is responsible for monitoring post-trade transparency via swap data repositories, which provide real-time data on transactions and positions.

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[1] CFA is a non-profit association of nearly 300 national, state, and local pro-consumer organizations. It was formed in 1968 to represent the consumer interest through research, advocacy and education.

[2] https://www.whitehouse.gov/sites/default/files/omb/legislative/sap/114/saphr2289r_20150602.pdf

[3] Measured by gross notional outstanding http://www.cftc.gov/MarketReports/SwapsReports/L1GrossExpPT

The CFTC must have sufficient resources to properly undertake these and other important efforts. However, the budget in this bill is irresponsibly inadequate in this regard. It ensures that the agency will be out-gunned and over-matched by the financial behemoths with seemingly limitless resources that it is responsible for overseeing.

Second, this bill would impose an unreasonable assortment of new, onerous cost-benefit analysis requirements on the CFTC that are likely to make agency action next to impossible. While we certainly agree that agencies should understand the nature and scope of the problem they are intending to solve when they engage in rulemaking, carefully analyze available alternatives, and consider the costs of the various alternatives as well as their relative effectiveness in determining a course of action, these are things the CFTC is already required to do, and in fact does. Under the Commodity Exchange Act, the CFTC already has a statutory mandate to evaluate the costs and benefits of its actions in light of numerous considerations, including the protection of market participants and the public, efficiency, competitiveness, financial integrity, price discovery, and sound risk management practices. This bill, however, would add seven new considerations, several of them ill-defined, for the CFTC to undertake, bringing the total number to twelve. The practical effect of these new requirements is a further tilting of the regulatory process in favor of adopting an approach that best benefits industry rather than the public.

The new cost-benefit analysis requirements also are likely to result in increased opportunities for industry opponents to thwart CFTC regulations through legal challenges. Any time an industry participant objects to new rules, it will have several new bases for a lawsuit, and it will seek to defeat those rules by claiming that the agency did not undertake a proper economic analysis. Armed with such strong ammunition, industry-supported lawsuits seeking to dismantle any new regulations are almost certain to be successful, regardless of their merits, a problem again made worse by the agency's lack of funding to effectively defend against such suits.

This legislation also subverts the CFTC's authority to regulate foreign derivatives activities that have a direct and significant effect on U.S. commerce. As our nation has learned painfully and repeatedly from the collapses of Long Term Capital Management, AIG, and Lehman Bros., and from the JPMorgan London Whale trading debacle, even when derivatives contracts are booked through a foreign subsidiary of a U.S. financial institution, the risks of those derivatives often flow back to the United States, threatening the U.S. economy and potentially putting U.S. taxpayers on the hook for any resulting losses. Former CFTC Chair Gary Gensler has highlighted the risks that can accrue from overseas derivatives' being out of reach of U.S. regulators. He said, "Failing to bring swaps market reform to transactions with overseas branches and overseas affiliates guaranteed by U.S. entities would mean American jobs and markets would likely move offshore, but, particularly in times of crisis, risk would come crashing back to our economy."[4]

That is why the CFTC must have broad authority to regulate overseas derivatives when they put our national economic interests in peril. Currently the CFTC allows a foreign host country's regulations to substitute for U.S. regulations *only after* the CFTC has made a finding

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[4] http://www.cftc.gov/PressRoom/SpeechesTestimony/genslerstatement122112

that the foreign host country's regulations are comparable to U.S. rules. However, this bill would create a presumption that each of the eight foreign jurisdictions with the largest swaps markets automatically have swaps rules that are considered to be comparable to and as comprehensive as U.S. swaps requirements. Switching the presumption will subjugate the CFTC's authority and expertise on the matter. Furthermore, combining the reversed presumption and overwhelming cost-benefit analysis requirements could mean that the CFTC is effectively thwarted from applying the appropriate regulatory safeguards to certain foreign derivatives transactions. As a result, the CFTC's ability to protect the U.S. economy from the dangers resulting from foreign derivatives transactions could be impaired.

Derivatives markets affect the U.S. economy in profound ways, and the risks that derivatives pose to the U.S. economy are well-known. The Dodd-Frank Act brought meaningful reforms to increase transparency and accountability in the derivatives markets and provided the CFTC the necessary authority to properly oversee and regulate the market. This legislation would put those reforms at risk and hamper the CFTC's ability to adequately protect consumers, market participants, and the U.S. economy. We cannot afford to suffer the grave consequences of another derivatives-driven financial crisis, but this legislation makes it more likely that we will. Accordingly, we urge you to oppose H.R. 238.

Sincerely,

Micah Hauptman
Financial Services Counsel