Consumer Federation of America

April 28, 2014

Dear Representative,

We are writing on behalf of the Consumer Federation of America (CFA) to ask you to oppose "The Customer Protection and End User Relief Act" (H.R.4413). This legislation would hamstring the Commodity Futures Trading Commission (CFTC) from effectively overseeing and regulating commodities and derivatives markets, leaving consumers exposed to fraud, manipulation, abusive practices and putting the safety and stability of the U.S. financial system at risk.

First, this bill would impose an assortment of new, onerous cost-benefit analysis requirements on the CFTC which are likely to delay and obstruct agency action. 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. Section 203 of the bill would add six new considerations that the CFTC would have to evaluate, and require that a new Office of the Chief Economist provide qualitative and quantitative analysis to justify the agency's actions. Included in the new economic analysis regime is a requirement to evaluate the costs of complying with the proposed regulation, provide a methodology for quantifying the costs, assess available alternatives to direct regulation, and, determine whether, in choosing among alternative regulatory approaches, those alternatives maximize the net benefits, which likely will mean adopting an approach that best benefits industry. Essentially what the CFTC will be required to do is undertake an in-depth, burdensome economic analysis for each regulation it proposes and compare its proposal to every conceivable alternative. Such a framework likely will create insurmountable barriers that cripple the agency from putting forth rule proposals and finalizing them in a timely manner so as to effectively protect market participants and the overall economy.

The new cost-benefit analysis requirements also are likely to result in increasing opportunities to thwart CFTC regulations through legal challenges. The practical effect of the new heightened requirements will be that 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 by considering, and then disposing of, all the possible theoretical alternatives. It is reasonable to believe that armed with such strong ammunition, industry-supported lawsuits seeking to dismantle any new regulations will be successful, a problem made worse by the agency's lack of funding to effectively defend against such suits.

In addition to the onerous cost-benefit analysis requirements, this legislation provides industry participants other opportunities to challenge CFTC rules in court. For example, Section 212 of the bill would allow "a person aggrieved by the final rule" to introduce additional evidence that had not been previously presented during the official notice and comment process. This subverts the notice and comment process, as industry participants who plan to contest a rule will have an incentive to withhold evidence, and only then offer that evidence during a lawsuit, so as not to give the CFTC an appropriate opportunity to analyze the evidence and respond accordingly. Such tactics could be used for further delay and impede agency action.

This bill also includes a radical expansion of judicial authority, granting courts new powers to "modify" the CFTC's rules when they are challenged. Traditionally, when reviewing a regulation, courts can either uphold or overturn an agency's action. However, under Section 212 of the legislation, courts will be allowed to re-write the CFTC's regulations, second-guessing the agency's expertise on complex matters. This will convert courts from their well-established role as deciders of law into "armchair regulators." By morphing the judicial branch into a quasi-executive branch whose decisions can supersede the CFTC's, Section 212 also raises constitutional separation of powers questions.

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 recent 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 U.S., threatening the U.S. economy and potentially putting U.S. taxpayers on the hook for any resulting losses. That is why Dodd-Frank gave the CFTC broad authority to regulate overseas derivatives when they put our national economic interests in peril. Pursuant to that cross-border framework, the CFTC allows a foreign host country's regulations to substitute for U.S. regulations *only after* the CFTC has made a finding that the foreign host country's regulations are comparable to U.S. rules. However, Section 369 of the bill would create a presumption that a foreign host country's regulations should apply *unless* the CFTC determines that those regulations are not "broadly equivalent" to U.S. regulations, and in each instance, requires the CFTC to submit a written report to Congress articulating the basis for the agency's determination. Switching the presumption will subjugate the CFTC's authority, with the default position allowing a foreign country's rules to apply, then requiring the CFTC to prove why they should not apply. Combining the reversed presumption, required Congressional report, and overwhelming cost-benefit analysis requirements, the CFTC will be forced to overcome daunting and possibly insurmountable hurdles if this legislation is adopted. As a result of this legislation, the agency's ability to protect the U.S. economy from the dangers resulting from foreign derivatives transactions will 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. However, 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-laced financial crisis, but this legislation makes it more likely that we will. Accordingly, we urge you to oppose this bill.

Sincerely,

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