

2018

**My Thoughts and Reflections on the Tenth Anniversary of the  
2008 Financial Crisis and Other Current Matters**

Ronald Filler

# MY THOUGHTS AND REFLECTIONS ON THE TENTH ANNIVERSARY OF THE 2008 FINANCIAL CRISIS AND OTHER CURRENT MATTERS

BY PROFESSOR RONALD FILLER

It seems like just yesterday that we were all expressing our thoughts and reflections on the 5<sup>th</sup> anniversary of the Dodd-Frank Act (“DFA”) for the FDLR. Yet, now, some three years later, to be honest, not much more has changed. We really still do not know at this time, its true impact and whether Messrs. Dodd and Frank did the right thing then or not.

One policy change has occurred. President Trump issued an Executive Order early in his presidency that required all agencies, including the CFTC, to re-evaluate all of its regulations and make changes where needed to make it easier and less costly to comply with them. We have seen proposed changes to the Volcker Rule and some other minor legislative changes but I doubt if Title VII of the DFA will change in any material way over the next several years. I am not saying such legislative changes are not needed, they are, but that Title VII carries little to no political weight or interest.

However, with respect to regulatory changes at the CFTC, that exercise is still a work in progress. More importantly, ten years after DFA, we still await what the net capital requirements are for swap dealers. That should have been the very first regulation right after the registration requirements were adopted in 2011. Today, there are approximately 104 swap dealers and that number has remained fairly constant over the past several years but all are still provisionally registered. Amazing!!

I note the two Executive Orders issued by President Trump in 2017 regarding the financial markets and how regulatory reforms should occur. As to what legislative and regulatory changes should not occur, I am still a big believer in how OTC clearing can and does reduce systemic risks. Therefore, I supported then, and still do today, the mandatory clearing requirement imposed on OTC derivatives under Title VII. Obviously, such a belief depends on clearinghouses setting the proper initial performance risk levels and in providing the requisite financial resources to ensure their financial integrity. Having served on several

CCP Boards and CCP Risk Advisory Committees during my 35+ years in this great industry, I really do believe that the CCPs will always do the right thing, I also do hope that I will never be proven to be wrong on this belief.

I was formerly a critic in the way the CFTC had initially administered its duties and obligations following the passage of Dodd-Frank. While I strongly applaud and admire its success in adopting the 60+ regulations required by the DFA, I did not agree at all with the process the CFTC had applied. New and highly complex regulations were hastily enacted, many with as little as 60 days' notice of their effective date. Such haste has resulted in the issuance of hundreds of no-action letters, some just hours before the effective date, on so many of them. My views have changed dramatically on this issue. I commend Chair Giancarlo on making great progress and focusing on key issues. His two major white papers have provided important insight as to how and what the CFTC needs to focus on now and over the next few years.

Moreover, whatever happened to the global harmonized approach that all G-20 countries agreed to in September 2009 in Pittsburgh? Granted, everyone else outside the US took a slower, some would argue a more considered, path and therefore missed the December 2012 deadline agreed to in Pittsburgh. And, yes, some countries still have not taken any action. So what? OTC derivatives are a global business. All of the top 15 firms in this business have offices and affiliates around the globe. Many are major non-US banks with affiliates in the US. The DFA anticipated a better risk management approach to ensure, to the extent possible, that we would never have another major bank failure, and, more importantly, never ever require another bailout. The legislation specifically recognized the need for a greater harmonized regulatory approach relating to OTC derivatives and gave the regulators great latitude in designing the operating framework. The worse thing to occur, and it has occurred, is the infighting between Europe and the US and the contest about whose regime will be triumphant. Harmonization is not about winning. It's called sharing. It's also called comparability within proper parameters. Hopefully, the CFTC and the European Commission will realize the need to agree to share and accept comparability between the US and EU.

I know that the CFTC has recently confirmed the *de minimus* amount of \$8 billion for determining whether a swap dealer needs to be registered. A swap dealer with notional amounts of swaps of \$8 billion will not have any impact on the swaps markets if that firm failed. Finally, can someone please explain to me how \$7.999 billion of trading of OTC derivatives is *de minimis* and does not require that swap dealer to register with the CFTC whereas \$8.0 billion qualifies as having a “direct and significant effect on the U.S. economy” as required by Section 721. It’s a direct and significant test, not either one. I grew up in a small country town in NW Tennessee so I guess my math background is not as sophisticated as those who live in Washington but I always thought that the U.S. economy is quite large. This must have simply been a typographical error as the CFTC probably meant to add 2-3 zeros to the end of that \$8.0 billion number.

I have now spent 35+ years in this great industry. I have been truly blessed and honored to know some very great and wonderful people. I have taught a law school course on the CEA and CFTC and industry regulations, customs and practices since 1977, first at the Chicago Kent College of Law, then later at Brooklyn Law School, the University of Illinois College of Law and now at New York Law School. It was called Commodities Law in 1977 but has been renamed as Derivatives Law just to show others that I can adjust. I have co-authored a treatise on Derivatives Law with my good friend, Prof. Jerry Markham. In fact, that was a dream that I had for over 35 years. I speak each year all over the globe on current legislative and regulatory policies and publish several papers each year. Finally, I do not know an actual number but I’m guessing that over 150 of my former law students now work in this great industry. I call them “Filler’s Army” and that army is still growing each and every year. You see, I have been truly blessed. That’s the real truth.

Professor Ronald Filler  
New York Law School

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