

[Securities Regulation Daily Wrap Up, CFTC NEWS AND SPEECHES— Commissioner Behnam criticizes Chairman Giancarlo’s self-certification approach, \(Feb. 9, 2018\)](#)

Securities Regulation Daily Wrap Up

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In recent remarks before an FIA/SIFMA Asset Management Group gathering in California, Commissioner Rostin Behnam sharply criticized a modified approach advocated by CFTC Chairman J. Christopher Giancarlo to address the exchange self-certification of new virtual currency futures contracts. Notably, Behnam serves as the sponsor of the Commission’s Market Risk Advisory Committee (MRAC), which met at the end of January for the stated purpose of providing an open dialogue regarding the CFTC’s regulatory self-certification process for new products.

In the recent aftermath of self-certification and listing of Bitcoin-related contracts by the CME and the CBOE Futures Exchange, LLC, in early December 2017, [Chairman Giancarlo has called for exchanges](#), as part of a heightened review process going forward, to disclose to CFTC staff what steps they have taken in their capacity as self-regulatory organizations to gather and accommodate appropriate input from concerned parties, including trading firms and FCMs. The chairman adopted this approach in response to the FCM community’s open dismay and assertion that it was not afforded a meaningful opportunity to provide input and comment in connection with the recent CME and CBOE Futures Exchange launches.

In [his speech at FIA/SIFMA forum](#), Behnam shared his view that "ultimately, the CFTC received sharp criticism from large market participants, and responded after self-certification with the ad-hoc adoption of an informal ‘heightened review’ process." Some of Behnam’s specific issues and disagreements with agency’s approach follow.

The CFTC inappropriately relied upon the self-certification process for the Bitcoin futures products.

Behnam stated, "I unequivocally support the self-certification process; however, I believe, specifically with respect to the Bitcoin contracts, the CFTC should have exercised its existing authority to accept voluntary product submissions for review and approval—by the entire Commission, instead of self-certification." However, Behnam did not point to any legal authority by which the CFTC could have forced the exchanges to proceed with a voluntary product submission procedure. In fact, Chairman Giancarlo has previously [made the point](#) that, with the exception of a fraudulent self-certification, "[n]either statute nor rule would have prevented CME and CFE from launching their new products before public hearings could have been called."

The Commission’s heightened review process is insufficient. Behnam believes that elements of the CFTC’s heightened review process are lacking, specifically those concerning exchanges’ duties, as self-regulatory organizations, to consult with futures commission merchants, liquidity providers, and end-users prior to listing new products. The commissioner noted that "[o]ur job in this process would be no more than to receive a disclosure of the steps taken to gather and accommodate appropriate input from concerned parties."

The CFTC self-certification approach muddled the record. Behnam stated that "the [heightened review] approach presents itself as a hybrid between the somewhat ministerial act of self-certification and the more fulsome evaluation underlying Commission approval." He continued, "[t]his approach muddled the record, left major market participants out of the conversation and ill-prepared to serve their clients, and raised concerns that this will be the new status quo. In the end, I think many market participants were left scratching their heads, and the public was left in the dark."

The regulator brings value to the new contract approval process. Behnam observed that several MRAC participants said that any process beyond that contained in the self-certification rules amounted to a bureaucratic stall, undermining innovation and the free market approach. Behnam flatly rejected this notion, asserting, "These statements seem to presume that our political motivations as Commissioners inhibit our ability to provide sound judgement, to be held accountable, and to protect our markets to our fullest capabilities within our authority. Further, they suggest that the voluntary submission and approval process may be obsolete. I hope that really is not where we are."

He added, "To be clear, I'd like to believe that there are facts and circumstances that evoke the desire to have the regulator involved, and that our expertise and experience is a value added. Even if the only purposes we serve—beyond satisfying ourselves that new products comply with the Commodity Exchange Act (and Commission regulations), and are not readily susceptible to manipulation—is to bring transparency to the process, level the playing field in terms of information, and provide a public forum for open dialogue."

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