SPEECHES & TESTIMONY

Statement of CFTC Commissioner Rostin Behnam on the Final Rule amending the De Minimis Exception to the Swap Dealer Definition—Swaps Entered into by Insured Depository Institutions in Connection with Loans before the Public Meeting

March 25, 2019

Thank you Mr. Chairman. I would like to start by thanking all of the Commission staff who worked to make today's meeting possible – both those who will be presenting at the table today and those who provided the knowledge and analysis supporting their statements. I will keep this statement brief as I have submitted a statement for publication with the final rule.

Albert Einstein said that, "A clever person solves a problem. A wise person avoids it."

Today, the Commission is voting to finalize a rule that purports to resolve longstanding concerns with the IDI loan-related swap exclusion referred to in today's final rule as the "IDI Swap Dealing Exclusion." The IDI Swap Dealing Exclusion codifies part of the statutory swap dealer definition in section 1a(49)(A) of the Commodity Exchange Act that was jointly adopted with the Securities and Exchange Commission as paragraph (5) to the regulatory swap dealer definition. This is not to be confused with the IDI De Minimis Provision being finalized today, which establishes an alternative to the exclusion, absent SEC coordination, that in purpose and effect, revises the scope of activity that constitutes swap dealing.

There is no doubt that the Commission was clever in choosing how to address longstanding concerns that the IDI Swap Dealing Exclusion is unnecessarily restrictive, lacks clarity, and limits the ability of IDIs to serve their loan customers through the unilateral exercise of its authority with respect to the de minimis exception. However, there is also little doubt in my mind that being clever does not make one correct, and I will not be voting in favor of the IDI De Minimis Provision. The uncertainties embodied in the IDI De Minimis Provision deprive IDIs and their customers the legal certainty and clarity intended by Congress and may result in increased risk for market participants and perhaps contribute to systemic risk. The Commission would have been wise to avoid creating this rambling IDI exemption that will now sit awkwardly beside the IDI Swap Dealing Exclusion in the Commission regulations. These regulations are a marker of our inability to engage and collaborate with our fellow regulators towards a more practical and legally sound solution. As an independent agency, the Commission should use its expertise to act within its authority; and not abuse ill-defined powers to create loopholes. Our agencies are better than that. And more importantly, our stakeholders deserve it.

There has been a concerted effort these last few weeks to window dress. However, any suggestion that this relief is surgically targeted to "small and midsize banks" and their end-user customers is unfounded. The IDI De Minimis Provision refrains from imposing any limitations on size or structure of eligible IDIs or their customers. Nor does it cap or require affirmative verification of the aggregate gross notional amount of swaps entered into by an IDI for which it will rely on the IDI De Minimis Provision. I do not mean to suggest at all that size should be deterministic of whether an IDI should be able to avail itself of relief related to swap activities in connection with loan origination. Indeed, Congress did not set such limitations on the exclusionary language in CEA section 1a(49)(a). However, taken in the context of the unrestricted nature of the rule before the Commission today, as it relates to the relationship between swaps activity and loan origination and absence of any caps, I am extremely concerned about the potential systemic risk implication to our financial markets.

Small, midsize, and large IDIs should not be considered swap dealers or required to register as swap dealers with regard to swap activities related to loan origination with customers because Congress has determined that such activities—subject to the joint interpretation of the CFTC and SEC—are not swap dealing activities warranting oversight by the Commissions; not because such activities are swap dealing activities which the Commission unilaterally has determined to overlook. I believe that IDIs deserve the fullest application of the exclusion provided by Congress in section 1a(49)(A) of the Commodity Exchange Act. An exemption or exception leaves IDIs within the crosshairs of future Commission action should political headwinds or shifting policy dispose it to again alter the rules or its interpretation of the Act. I stand by my now several prior statements and continue to believe that the Commission should have worked with the SEC to jointly amend the IDI Swap Dealing Exclusion to more accurately address swap activities inherent to credit risk management encompassed by loan origination in the commercial lending space.