

SPEECHES & TESTIMONY

Statement of Commissioner Rostin Behnam on Proposed Amendments to the Commission's Regulations Relating to Certain Swap Data Repository and Swap Data Reporting Requirements

April 25, 2019

I respectfully concur with the Commodity Futures Trading Commission's (the "Commission" or "CFTC") approval of its proposed rule regarding amendments to the Commission's Regulations Relating to Certain Swap Data Repository and Swap Data Reporting Requirements (the "Proposal").

In 2011, the Commission adopted part 49 of the Commission's Regulations^[1] to implement the requirements of section 21 of the Commodity Exchange Act (the "Act" or "CEA").^[2] Section 21 describes the registration regime for and operation of swap data repositories ("SDRs") by setting out applicable registration rules, data standards, duties, core principles, and requirements regarding confidentiality and chief compliance officers as envisioned by Congress in the Dodd-Frank Act to implement the key trade reporting provisions laid out at the 2009 G20 Pittsburgh Summit.^[3] Similarly, part 49 builds out a regulatory framework aimed at ensuring the legal and operational stability and soundness of SDRs in support of post-trade transparency in the swaps market. The Proposal aims to improve upon the quality, accuracy, and completeness of swap data reported to the Commission via SDRs and generally follows a plan laid out in the Commission's 2017 Roadmap to Achieve High Quality Swap Data.^[4] This Proposal purports to be the first step in following that Roadmap. While true, I prefer to view this as a part of the Commission's ongoing duties to regularly review its Regulations to increase efficiencies and avoid unintended consequences, and to be certain that our SDR rules further the goals of increasing transparency and identifying risk.

As I have stated several times during my tenure as a Commissioner, as we engage in strategic regulatory decisions, our policy goals from 2010 remain unchanged. As we endeavor to provide surgical flexibility and a more principles-based approach, I will continue to oppose any roll backs of Dodd-Frank initiatives.^[5] While I do not believe that today's Proposal would be considered a rollback per se, I would like to call attention to a section of the Proposal where we deviate from the language of section 21 regarding the role of the chief compliance officer ("CCO") at an SDR.

Section 21(e)(2)(C) affirmatively requires an SDR's CCO, in consultation with the board of directors or similar body, to "resolve any conflicts of interest that may arise." The Commission's current part 49 rules mirror the language of the CEA exactly. Regulation 49.22(d)(2) affirmatively requires an SDR's CCO to "resolve any conflicts of interest that may arise," using precisely the same language as the Act.

However, today's Proposal would amend 49.22(d)(2) in a way that deviates from the plain language of the statute. While the statute requires that CCOs actually resolve any conflicts of interest, today's Proposal would simply require a CCO to take "reasonable steps" to resolve any conflict of interest. In addition, the Proposal would only apply to "material" conflicts of interest. Neither this new reasonableness standard nor this new materiality standard appear in the language of the statute. My concern is that adding these new standards may deviate from Congressional intent. This potentially dilutes the CCO's obligation to address conflicts of interest, but perhaps more importantly, it dilutes the CCO's *ability* to do so. Under the language of the Act and the current Regulation, a CCO can point to their statutory obligation in working to resolve conflicts of interest. Imposing a new reasonableness standard may have the real world impact of making it more difficult for a CCO to actually resolve conflicts of interest.

I note that the same statutory language appears elsewhere in the Act regarding CCO resolution of conflicts of interest at other types of Commission registrants, and the Commission has issued a final rule implementing the same new reasonableness and materiality standards regarding CCOs of futures commission merchants, swap dealers and major swap participants.^[6] The Commission also has recently proposed adding these new standards for CCOs of swap execution facilities.^[7] However, in contrast, this week the Commission is issuing amendments to the Part 39 regulations for Derivatives Clearing Organizations (“DCO”) (the “Part 39 Proposal”). Current regulation 39.10(c)(2)(ii) requires a DCO’s CCO to resolve conflicts of interest. Regulation 39.10(c)(2)(ii) exactly follows the language of Section 5b(i)(2)(C). While the Part 39 Proposal makes amendments to 39.10, the Commission does not alter the CCO’s current duty to resolve conflicts of interest. In other words, for DCOs the Commission is choosing to maintain the statutory language. I believe that this may be the more appropriate approach for CCOs generally.

The Commission has, of late, begun a practice of re-interpreting statutory provisions with a somewhat flippant regard for their underlying purpose and rationales in order to lessen the burdens that are rarely substantiated by anything more than a call for change. While it is not out of the ordinary for an independent agency to reexamine whether its regulatory approach remains fit for purpose, I believe that we should be mindful that our role is not to bend too easily to unsupported claims of burden or complexity. This is particularly true when the re-interpretation seems to be at odds with the express language of the statute itself. I look forward to reading the comments on this CCO issue. I am particularly interested to learn whether various stakeholders believe that the statute itself is diluted by the addition of the reasonableness and materiality standards to CCO obligations in this and other rulemakings.

[1] Swap Data Repositories: Registration Standards, Duties and Core Principles, 76 FR 54538 (Sept. 1, 2011).

[2] 7 U.S.C. 24a.

[3] *Id.*

[4] Roadmap to Achieve High Quality Swap Data, *available at* http://www.cftc.gov/idx/groups/public/@newsroom/documents/file/dmo_swapdataplan071017.pdf.

[5] Rostin Behnam, Commissioner, U.S. Comm. Fut. Trading Comm’n, Remarks of Rostin Behnam before FIA/SIFMA Asset Management Group, Asset Management Derivatives Forum 2018, Dana Point, California (Feb. 8, 2018), <https://www.cftc.gov/PressRoom/SpeechesTestimony/opabehnam2>.

[6] Chief Compliance Officer Duties and Annual Report Requirements for Futures Commission Merchants, Swap Dealers, and Major Swap Participants, 83 FR 43510 (Aug. 27, 2018).

[7] Swap Execution Facilities and Trade Execution Requirement, 83 FR 61946 (Nov. 30, 2018).