

SPEECHES & TESTIMONY

September 16, 2019

Concurring Statement of Commissioner Rostin Behnam Regarding the Proposed Rule on Public Rulemaking Procedures

I respectfully concur with the Commodity Futures Trading Commission's (the "Commission" or "CFTC") proposal to amend part 13 of the Commission's Regulations (the "Proposal"). The Proposal aims to succinctly and unambiguously confirm that the Commission's rulemaking process is governed by the Administrative Procedure Act ("APA").

As explained in the Proposal, the provisions of part 13 were originally adopted in 1976 as a replacement for the Rules of Practice of the CFTC's predecessor agency, the Commodity Exchange Authority, which would remain in effect "unless and until" terminated, modified, or suspended by the CFTC.^[1] In condensing the APA framework into part 13, the CFTC perhaps went further than needed to both ensure the public's awareness of the new agency's purview and to provide it the clearest understanding of the means to initiate and participate in the rulemaking process. However unnecessary it may seem at today's point in the digital age, directly providing interested persons a truncated version of the applicable operating rules so that they may exercise their rights to participate in the rulemaking process and hold their regulators accountable was laudable. Eager to effectuate its mandate and build its regulatory footprint, the Commission clearly understood the value in ensuring the barriers to participation were few.

I am pleased today that the Commission has chosen to publish the Proposal for public comment. The removal of the part 13 regulations viewed as duplicative of the APA's statutorily prescribed procedures for agency rulemakings and adjudications—which is almost part 13 in its entirety—could be accomplished without engaging the public in notice-and-comment on grounds that such regulations are strictly technical and administrative in nature. However, the Commission has recognized the importance of ensuring that as we move forward in improving the efficacy of our regulations, they remain current and reflective of our statutory mandate, which includes adhering to process and providing transparency. Whereas here we are preparing to remove the rules setting forth the Commission's interpretation as to the application of the requirements of the APA with regard to information rulemaking^[2]—with the intent to rely exclusively and unambiguously on the APA, it will be useful to hear from the public as to whether there remain matters of importance that ought to be considered before we move forward.

This Proposal is consistent with the Department of Treasury's October 2017 Report on Capital Markets in which it encouraged the CFTC to make full use of its ability to solicit public comment in order to better signal to the public what information may be relevant.^[3] To say that the various provisions of part 13 are unnecessary does not mean they are useless. To the extent part 13 may in some instances accord more elaborate procedures than the APA sets as the minimum, I hope that the Commission is alerted thereto.

While I have some concerns about the guidance and plainly written information to be lost upon the almost wholesale elimination of part 13, I am pleased that the Chairman and the Commission staff will be publishing a primer on the Commission's rulemaking process to ensure that our governing procedures remain accessible to all interested persons.

[1] Commodity Futures Trading Commission Act of 1974, Pub. L. No. 93-463, § 411, 88 Stat. 1389, 1414 (1974)

[2] See 5 U.S.C. 553.

[3] U.S. Department of the Treasury, *A Financial System That Creates Economic Opportunities: Capital Markets* at 218 (Oct 2017), <https://www.treasury.gov/press-center/press-releases/Documents/A-Financial-System-Capital-Markets-FINAL-FINAL.pdf>.