

Public Statements & Remarks

Statement of Commissioner Dan M. Berkovitz Regarding Part 190 Bankruptcy Regulations, Supplemental Proposal

September 17, 2020

The part 190 rulemaking supplemental notice of proposed rulemaking (Supplemental NPRM) addresses a potential unintended outcome of the original NPRM identified in a number of comments on the proposal. These comments stated that certain provisions in the original proposed rule related to the bankruptcy of a derivatives clearing organization (DCO) could have significant, unintended and detrimental impacts on various market participants with contracts cleared at the DCO. The Supplemental NPRM presents new, alternative provisions governing DCO bankruptcy that are intended to avoid these impacts. In issuing the Supplemental NPRM, the Commission seeks public comment on these alternative provisions.

I support the issuance of this Supplemental NPRM because it will provide all interested persons with an opportunity to comment on the alternative provisions formulated by the Commission. This alternative approach was not set forth in the proposal. Providing the public with notice and opportunity to comment on rules being considered by the Commission is not only a basic legal requirement for agency rulemaking, but it is sound public policy as well. Public input from all interested persons is critical to sound regulation.

Under the Administrative Procedure Act, the provisions in a final rule must be reasonably foreseeable and a logical outgrowth of the provisions in the proposal.^[1] The NPRM must contain more than a passing reference or question about an issue; the proposal must be sufficiently descriptive for members of the public to evaluate and comment on the approach being considered. The Supplemental NPRM meets that standard.

I look forward to reviewing all perspectives on these alternative provisions.

^[1] See, e.g., *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1402-03 (9th Cir. 1995).