

SPEECHES & TESTIMONY

Statement of Concurrence by Commissioner Rostin Behnam Regarding Proposed Rule on Swap Execution Facilities

January 30, 2020

I respectfully concur in the Commission's proposal to amend certain swap execution facility (SEF) requirements and real-time reporting requirements. A little more than a year ago, the Commission issued a proposal that would have constituted a complete overhaul of the existing regulatory framework for SEFs.^[1] As I stated in my concurrence to the 2018 SEF proposal, I do not believe that such an overhaul is necessary.^[2] However, despite my opposition to the overhaul, I supported issuing the SEF proposal for public comment because it contained several policy changes which separately warranted further consideration. Market participants have spent a great deal of resources to build systems and businesses that comply with our existing SEF rules. Fundamental changes amounting to an overhaul of the entire system should only be done in circumstances where there is a regulatory concern that necessitates action.^[3] Accordingly, in the past I have suggested we should focus on targeted reforms, such as codifying existing no-action relief for SEFs.^[4] I warned that we should not allow issues with the broader vision of the 2018 SEF proposal to distract us from making targeted changes.^[5]

Today, the Commission proposes to limit changes to our existing SEF rules, specifically focusing on the codification of long-standing no-action relief regarding package transactions, error trades, and block trades. While I support today's proposal, I do have some concerns where I think we deviate from the path of targeted codification. The provisions in today's proposal regarding package transactions and block trades basically mirror the existing no-action relief.^[6] However, the proposal regarding error trades does not.^[7]

DMO currently provides no-action relief from the required methods of execution under § 37.9 for trades intended to resolve error trades.^[8] The existing relief provides a number of conditions, including a requirement that a SEF determine (either prior to execution or within 24 hours after) that an error has occurred. Among other things, the no-action relief requires that a SEF have error trade rules that account for whether a transaction cancellation or price adjustment will adversely impact market integrity or facilitate market manipulation or other illegitimate activity.^[9] None of these conditions appear in the error trade rules proposed today, and under the proposal SEFs will no longer have any obligation to determine whether a trade is an error trade – the determination can instead be left entirely to the parties to the trade. I look forward to comments regarding whether this “principles-based” approach goes too far and fails to give market participants sufficient clarity regarding error trades.

I support targeted, thoughtful reform of our SEF regulations, and I particularly applaud staff's efforts to provide market participants with greater legal certainty through the codification of our existing no-action relief. I look forward to the comments.

^[1] Swap Execution Facilities and Trade Execution Requirement, 83 FR 61946 (proposed Nov. 30, 2018).

^[2] Rostin Behnam, Statement of Concurrence of Commissioner Rostin Behnam Regarding Swap Execution Facilities and Trade Execution Requirement (Nov. 5, 2018), <https://www.cftc.gov/PressRoom/SpeechesTestimony/behnamstatement110518a>.

[3] Rostin Behnam, Sowing the Seeds of Success in 2020, Remarks of CFTC Commissioner Rostin Behnam at the 2019 ISDA Annual General Meeting, Grand Hyatt Hong Kong, Hong Kong (Apr. 9, 2019), <https://www.cftc.gov/PressRoom/SpeechesTestimony/opabehnam13>

[4] *Id.*

[5] *Id.*

[6] See CFTC No-Action Letter No. 17-55, Re: Extension of No-Action Relief from Sections 2(h)(8) and 5(d)(9) of the Commodity Exchange Act and from Commission Regulations 37.3(a)(2) and 37.9 for Swaps Executed as Part of Certain Package Transactions (Oct. 31, 2017); CFTC No-Action Letter No. 17-60, Re: Extension of No-Action Relief for Swap Execution Facilities from Certain “Block Trade” Requirements in Commission Regulation 43.2 (Nov. 14, 2017).

[7] See CFTC No-Action Letter No. 17-27, Re: No-Action Relief for Swap Execution Facilities and Designated Contract Markets in Connection with Swaps with Operational or Clerical Errors Executed on a Swap Execution Facility or Designated Contract Market (May 30, 2017); CFTC No-Action Letter No. 20-01 (“NAL No. 20-01”), Re: Supplemental No-Action Relief for Swap Execution Facilities and Designated Contract Markets in Connection with Swaps with Operational or Clerical Errors Executed on a Swap Execution Facility or Designated Contract Market (Jan. 8, 2020).

[8] NAL 17-27.

[9] *Id.*