

SPEECHES & TESTIMONY**Opening Statement of Commissioner Rostin Behnam before the Open Commission Meeting on June 4, 2018
June 4, 2018**

Thank you Mr. Chairman. I would like to start with a very big thank you to 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 worked tirelessly behind the scenes.

I am very pleased to be here this morning for the Commission's first open meeting since 2016. I am optimistic that this will be the first of many public meetings, as the Commission begins to move to propose and implement important rules such as the ones we are discussing today. I came to the Commission in September of 2017 with great excitement and anticipation about the chance to roll up my sleeves and participate in this endeavor. Last October, when we moved the phase in date for the de minimis threshold back another year, I said that we should have dealt with this issue then. I am glad that the day is finally here to discuss the de minimis threshold in a public forum, and begin the process of engaging with the public and market participants to hopefully formulate a final rule on this important issue, and finally provide long needed regulatory certainty.

Also on the schedule for today is a final rule amending Part 49 of the Commission's regulations regarding swap data access. The Fixing American's Surface Transportation Act of 2015 ("FAST Act") modified CEA section 21 to remove a requirement that entities requesting access to SDR swap data execute a confidentiality and indemnification agreement. In January 2017, the Commission issued proposed amendments to Part 49 related to the FAST Act removing references to the previously required indemnification agreement. I am very happy that we are discussing a final rule today, nearly two and a half years after passage of the FAST Act and nearly a year and a half after our own proposal. I am hopeful that this is an indicator that we will be addressing some long outstanding proposals and issues in the coming months. I also want to compare this to our timeline for the de minimis threshold and point out that the indemnification rule has taken us more than 16 months to go from proposal to final rule, on a rule where we address one industry comment that was 9 pages in length. Making strong, effective final rules takes a lot of time and hard work, as staff can attest. I am not saying that we have moved too slowly on indemnification – I think we have moved at an appropriate pace, and I know that staff was working hard throughout the past 16 months. My point is that this is how long good rulemaking often takes. We have our work cut out for us on de minimis if we want to get a final rule done by October.

The longest item on our agenda for today is proposed amendments to the Volcker Rule – the rules under Section 13 of the Bank Holding Company Act (Part 75 of our regulations) related to prohibitions and restrictions on proprietary trading. Under the statute, authority for developing the regulations is divided among the Fed, the FDIC, the OCC, the SEC, and the CFTC. Last week, the Fed, the FDIC, and the OCC all voted to issue the same proposed amendments that we vote on today. Following the 2008 financial crisis, Congress adopted Title VII of Dodd-Frank, which improved transparency through mandatory clearing and exchange trading of standardized swaps, and comprehensive recordkeeping and reporting requirements. The Volcker Rule is one of the core reforms in response to the financial crisis. My concern is that our action may encourage a return to the risky activities that led to the financial crisis, or perhaps further consolidate power among a few financial institutions.

I would like to close my opening remarks the same way I started them – by thanking Commission staff for their hard work – both on these rules and in their daily work despite limited resources. I look forward to the presentations.

Indemnification Statement

I want to thank staff for their presentation, answers, and hard work on this rule. As I said in my opening marks, reforms established in 2009 by the G20 leaders and later included in Title VII of Dodd-Frank have shed much needed light on the previously unregulated swaps market. The CFTC, and our foreign counterparts, are in a much better position to consider and evaluate data, and ultimately identify market risk as a result of today's final rule. Additionally, today's final rule will further enhance our position by making it easier for regulators to share data. Greater access to data and cooperation among regulators, domestically and internationally, furthers the goal of transparency established by the G20 leaders in 2009 and codified in Dodd-Frank, and is a critical tool in preventing future financial disruptions, big and small.

I do, however, want to briefly highlight the additional responsibilities the Division of Market Oversight will inherit because of this rule. The CFTC has dedicated staff who will never say that a job cannot be done, regardless of budget constraints. However, this rule creates additional responsibilities for an agency that is operating on a shoestring budget. I am hopeful that Congress will provide us with the budget we need fulfill our mission, and be the best regulator we can possibly be.

Volcker Rule Statement of Commissioner Rostin Behnam

I want to thank staff for their presentation, answers, and hard work on this rule. As I said in my opening remarks, my biggest concern is that our action today will encourage a return to the risky activities that led to the financial crisis, and perhaps further consolidate trading activity into a few institutions. However, as I have often stated, I am a strong believer that regulators, myself included, must constantly evaluate the efficacy of the rules we implement and enforce. The Volcker Rule is no exception. Regulators must strive to ensure that our rules protect customers, and the public more broadly; but, also allow market participants to operate and conduct their business in an efficient manner with clear rules of the road.

On page 15 of the 494 page document before us today, it says "[w]ith this proposal, and based on experience gained over the past few years, the Agencies seek to simplify and tailor the implementing regulations, where possible, in order to increase efficiency, reduce excess demands on available compliance capacities at banking entities, and allow banking entities to more efficiently provide services to clients, consistent with the requirements of the statute." Simply put, we are trying to make things clearer and easier for banking entities. My concern is that we are missing the mark here. In fact, we are actually further complicating the Volcker rule and calling it simplification.

Where once there was one set of rules for all banking entities, there will now be three categories of banking entities with different rules for each. Banking entities with Significant trading assets and liabilities, banking entities with Limited trading assets and liabilities, banking entities in between with Moderate trading assets and liabilities. We will have different ways of calculating assets and liabilities depending on which tier we are establishing, treating foreign banking organizations differently depending on whether we are considering them for a limited or significant designation. And then at the end, when we have determined what bucket each bank is in, there is still a safety valve that will allow regulators to move the entity into a different bucket under Regulation 75.20. Let me be perfectly clear – I support the idea that regulators will be able to determine that a banking entity with limited or moderate trading assets and liabilities may be treated as a banking entity with significant trading assets and liabilities where the size or complexity of their activities or risk of evasion does not warrant a presumption of compliance. If we are going to have this unnecessarily complex tapestry, the backstop in Regulation 75.20 is imperative. But I question whether we should have this complex tapestry at all.

There are other potential issues here that give me pause. The expansion of what constitutes risk-mitigating hedging activities potentially provides a method to evade oversight. Specifically here at the CFTC, we need to think very carefully about how the definition of hedging activity in the proposal compares to our definitions of hedging activity in the context of other critical rules like the de minimis threshold or position limits. I look forward to hearing from the commenters on this important issue.

I also find that I am a little befuddled as to exactly what a presumption of compliance is, at least in the context of this rule. It seems clear to me from the rule that the idea is not that a bank with limited trading assets and liabilities is actually any less likely to violate the Volcker rule by engaging in prohibited proprietary trading. Instead, the idea behind today's rule is to reduce the impact of the Volcker rule's restrictions on banks below the \$10 billion threshold. That may be a laudable goal and the right result, but it also is one that ultimately may require a statutory change. What we should not be doing is presuming compliance for entities that we don't think are any more likely to be compliant than other entities that do not receive the presumption.

Finally, I would like to talk a little bit about process. Back in 2014, when we issued the original final Volcker Rule Regulations, Commissioner Scott O'Malia wrote a dissent lamenting the process that led to the vote. He pointed out that he only received a near final draft for review six days before the vote, that no term sheet or other information was provided to aid in digesting a massive document, that he had only received a partial draft three weeks before the vote, etc. He said "I am disappointed that today's vote on the final rule is besmirched by the purposeful circumvention of measured review by each Commissioner's office." Four years later, the story is largely the same. My office received a near final draft for review five days before the agencies began voting on these rules. Like Commissioner O'Malia, I first received a partial draft three weeks before voting began. Worse, I was blocked from the process – I was told in no uncertain terms that the document we were seeing had been negotiated by the agencies (including the CFTC, without my input), and that essentially what I was seeing was a fait accompli.

Some may hear me say this and think "good." That's what's good for the goose is good for the gander. That the transgressions of past Chairmen should be felt by new Commissioners. My message is that we are better than this. I came to this Agency ready to roll up my sleeves and work – together with the Chairman and Commissioner Quintenz – to make our rules better. I remain optimistic that we can find ways to do so. The more viewpoints are represented in our deliberations, the better the outcomes will be for our markets.

Unfortunately, the concerns I have outlined, and my exclusion from the process, leave me unable to support this proposal. I look forward to hearing from the commenters on my concerns and I'm sure many others, and I hope that we can have a fulsome dialogue that leads to agreement on a sensible final rule.

De Minimis Exception Statement (Amendments to Swap Dealer Registration De Minimis Exception)

As I mentioned during my opening statement, I arrived at the Commission ready to participate in discussions and ultimately a rulemaking to amend the de minimis exception and set a threshold where the facts and data takes us—be it \$8 billion, \$3 billion, or some other amount of swap dealing activity. All along, I have been open to hearing from Commission staff regarding their analysis of the swap data repository data and have been very impressed and intrigued by our own Office of Chief Economist's proposal to use entity-netted notional amounts (ENNs) as an alternative risk-focused measurement of the swaps market. I have prepared by meeting with stakeholders, reviewing the paper trail created since the finalization of the swap dealer and other entity definitions in 2012, and reflecting on the dominance this issue played during my six years as counsel on the Senate Agriculture, Nutrition, and Forestry Committee. In other words, I prepared for and anticipated the contents of today's Proposal to be both consistent with this record and mindful of the tremendous time constraint that the Commission and the stakeholders are working under. Additionally, I assumed that the Commission would fully observe all requirements to collaborate and consult with our fellow regulators and avoid the temptation to use this particular rulemaking vehicle as an opportunity to simultaneously address matters ancillary to the critical, time sensitive issues before the Commission following two deferrals of the phase-in termination date.

When first briefed on the contours of this Proposal, I committed to reviewing the supporting data and analysis in support of setting the aggregate gross notional amount threshold for the de minimis exception at \$8 billion in swap dealing activity entered into by a person over the preceding 12 months. Early on, I agreed with Commission staff that, with sufficient data as support, it was appropriate to expand and clarify activities excluded from the de minimis threshold for the insured depository institution ("IDI") exclusion and financial hedging. These issues represented longstanding, well-reasoned concerns. At the time, I also agreed that we should codify existing no-action relief related to the de minimis exception for swaps resulting from portfolio compression exercises and swaps between non-US counterparties and international financial institutions based in the United States. Regarding Commission staff proposals to clarify calculation methodologies for "notional amount" for certain swaps and give the Director of the Division of Swap Dealer and Intermediary Oversight unfettered authority to issue notional amount calculation guidance, I immediately indicated my concerns, having neither been confronted by market participants with such issues, nor informed of the Commission's practice in providing such guidance or any rationale for delegating Commission authority to a division director. I immediately thought about how this specific delegation would have been viewed under old agency leadership; or conversely, how will it be viewed in the future under new leadership. I was also skeptical of initial Commission staff recommendations to include seeking comments on ancillary issues pitched as changes to the de minimis threshold.

Though not entirely unreceptive to considering other changes to the de minimis threshold, given the looming deadline for automatic termination of the phase-in period, I do not believe the Commission or the industry should be expending precious time and resources on ancillary matters that could be considered in a separate rulemaking(s), or discussed more exhaustively within different CFTC venues. When adopting the regulatory mechanism for altering the requirements of the de minimis exception by rule or regulation, the Commission stated that, in determining whether to exercise its authority, it intended to focus on whether the de minimis exception results in a swap dealer definition that encompasses too many entities whose activities are not significant enough to warrant full regulation; or, alternatively, whether it leads to “an undue amount of dealing activity to fall outside of the ambit of the Title VII regulatory framework, or leads to inappropriate reductions in counterparty protections (including protections for special entities).” It is not clear that the Commission is observing this well-reasoned and forward thinking strategy to preserve the purpose of the de minimis exception and limit the temptation to engage in regulatory overreach. As it is, I have serious concerns regarding the Commission’s apparent intent to use its authority to revise the de minimis threshold as a measure to alter the “swap dealer” and perhaps even the “swap” definitions in contravention of a statutory obligation to do so jointly with the Securities and Exchange Commission (“SEC”).

Although I remained open-minded to supporting today’s Proposal, I cannot. The Proposal was rushed, and based upon review of the three “complete” drafts my office received between May 24th and June 1st, it seems Commission staff has been more focused on addressing the ancillary matters than on addressing concerns I consistently expressed throughout the last several weeks. These concerns do not represent points of partisan policymaking nor do they seek to detract from the Chairman’s message. Rather, my concerns focus on matters of both legal sufficiency and permissibility and on concerns that we will miss our deadline and be forced to issue yet another order extending the termination of the phase-in period to address the new and completely avoidable legal and policy issues created by today’s Proposal. These concerns include: (1) the Proposal’s breadth; (2) the Commission’s decision to address the IDI and hedging exclusions as exceptions from the de minimis threshold calculation instead of engaging with the SEC to address them as exclusions from dealing activity; (3) the creation and immediate delegation of authority to issue notional calculation guidance, absent any kind of Commission exploration or deliberation; and (4) the Proposal’s apparent reliance on the Commission’s authority to change the requirements of the de minimis threshold to seek comment on potential changes outside the scope of that authority.

I thank Commission staff for their hard work and presentation. I will submit my written dissent for publication in the Federal Register

[1]
(file:///Z:/Media/DRAFT%20press%20releases/2018%20Speeches,%20Testimony,%20Events%20etc/behnamstatement060418-CMS.doc#_ftnref1) RICHARD HAYNES, JOHN ROBERTS, RAJIV SHARMA & BRUCE TUCKMAN, ENNS: A MEASURE OF THE SIZE OF THE INTEREST RATE SWAP MARKETS (Jan. 2018), *available at*
https://www.cftc.gov/sites/default/files/idc/groups/public/@economicanalysis/documents/file/oce_enns0118.pdf

[2]
(file:///Z:/Media/DRAFT%20press%20releases/2018%20Speeches,%20Testimony,%20Events%20etc/behnamstatement060418-CMS.doc#_ftnref2) CFTC Staff Letter No. 12-62, No-Action Relief: Request that Certain Swaps Not be Considered in Calculating Aggregate Gross Notional Amount for Purposes of the Swap Dealer De Minimis Exception for Persons Engaging in Multilateral Portfolio Compression Activities (Dec. 21, 2012), *available at*
<https://www.cftc.gov/sites/default/files/idc/groups/public/@llettergeneral/documents/letter/12-62.pdf>
(<https://www.cftc.gov/sites/default/files/idc/groups/public/@llettergeneral/documents/letter/12-62.pdf>); CFTC Staff Letter No. 18-13, No-Action Position: Relief for Certain Non-U.S. Persons from Including Swaps with International Financial Institutions in Determining Swap Dealer and Major Swap Participant Status (May 16, 2018), *available at*
<https://www.cftc.gov/sites/default/files/idc/groups/public/%40llettergeneral/documents/letter/2018-05/18-13.pdf>
(<https://www.cftc.gov/sites/default/files/idc/groups/public/%40llettergeneral/documents/letter/2018-05/18-13.pdf>).

[3]
(file:///Z:/Media/DRAFT%20press%20releases/2018%20Speeches,%20Testimony,%20Events%20etc/behnamstatement060418-CMS.doc#_ftnref3) Further Definition of “Swap Dealer,” “Security-Based Swap Dealer,” “Major Swap Participant,” “Major Security-Based Swap Participant” and “Eligible Contract Participant,” 77 FR 30596, 30634-35 (May 23, 2012).