

Securities Regulation Daily Wrap Up, CFTC NEWS AND SPEECHES— CFTC approves final swap dealer de minimis threshold level; disagreement prevails over proposed SEF and trade execution rules, (Nov. 5, 2018)

Securities Regulation Daily Wrap Up

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By [Brad Rosen, J.D.](#)

The first Sunshine Act meeting attended by the current slate of CFTC commissioners revealed a mixed picture of positions and opinions among its members. In its first [order of business](#), the Commission unanimously approved the final rule amending the [de minimis exception to the swap dealer definition](#) by keeping the threshold unchanged at \$8 billion. On a 4-1 vote, the Commission also approved the proposed rule amendments to [regulations on swap execution facilities \(SEFs\) and the trade execution requirement](#), the [vehement dissent](#) of Commissioner Dan Berkovitz notwithstanding. He asserted this type of oversight looked very much like the "light-touch" approach to regulation that was discredited by the financial crisis. Lastly, the Commission unanimously approved putting forth a request for public comment regarding the [practice of "post-trade name give-up" on SEFs](#).

The commissioners weigh in. Each of the commissioners had plenty to say in connection with the events of the day. Chairman Giancarlo [offered remarks](#) on the swap dealer de minimis rule as well as regarding the proposed SEF rule and request for comments. [Commissioner Quintenz](#) offered his remarks as did [Commissioner Stump](#). Commissioner Behnam provided an [opening statement](#), as well as a [statement of concurrence](#) regarding the proposed SEF rule and execution requirements. Commissioner Dan Berkovitz also provided [a statement](#) on the final swap de minimis rule.

Permanent \$8 billion de minimis exception to the swap dealer definition approved. With today's action, the Commission approved the amendment to the definition of the term "swap dealer" to set the permanent aggregate gross notional amount (AGNA) threshold for the de minimis exception at \$8 billion in swap dealing activity entered into by a person over the preceding 12 months. Based on analysis of the data, as well as comments by market participants, an \$8 billion threshold would help ensure that nearly all swap transactions as measured by AGNA, or transaction count, benefit from the protections set forth in the Commission's swap dealer regulations, and advance the public policy interests of promoting competition, encouraging new swap market participants, and increasing efficiency for market participants. A swap transaction would still have to comply with the CFTC's mandatory clearing, trade execution, and reporting requirements, subject to certain exceptions and whether or not a swap involves a registered swap dealer as a counterparty.

SEF, trade execution requirement, and request for comment indicate a new direction. The rule proposal, which amends existing requirements and proposes new requirements pertaining to swap execution facilities (SEFs) and the trade execution requirement, include the adoption and/or codification of many existing staff guidance documents and staff no-action relief letters. Additionally, the Commission is considering a request for comment on the practice of post-trade name give-up for intended-to-be-cleared swaps that are executed on SEFs.

The proposed rules would apply the statutory SEF registration requirement to certain swaps broking entities, including interdealer brokers, and aggregators of single-dealer platforms. Domestic swaps broking entities would receive a six-month delay from the SEF registration requirement. Foreign swaps broking entities would receive a two-year delay from the SEF registration requirement.

The proposed rules would also amend the SEF registration requirement to clarify that entities that meet the SEF definition would be required to register as a SEF, irrespective of whether the swaps that they list for trading are subject to the trade execution requirement. The proposed rules would also eliminate the "made available to trade" (MAT) determination process for SEFs and DCMs and establish a new approach based on a revised interpretation of the trade execution requirement in the CEA . The trade execution requirement would apply to swaps that are both:(1) subject to the clearing requirement; and (2) listed by a SEF or DCM for trading.

Commissioner Berkovitz takes a stand. In issuing his dissent to the proposed rule, Berkovitz asserted, "This Proposal is a fundamental overhaul of the SEF regulatory regime. The changes create a trading system that is so flexible that all swaps traded on SEFs—including the most liquid—could be traded the same way they were before the Dodd-Frank reforms were adopted." Berkovitz noted that the proposal would also allow the largest dealers to establish separate dealer-to-dealer liquidity pools through exclusionary access criteria. He noted that competition would be reduced and price transparency diminished. He concluded "This is not what Congress intended when it passed the Dodd-Frank Act."

The comment period for the proposed rule will run for 75 days and begin when it is published in the Federal Register. Both Commissioners Berkovitz and Behnam expressed their reservations that not enough time was being afforded for comments, and observed that most complex rules are provided at least 90 days for comment.

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