SPEECHES & TESTIMONY

Dissenting Statement of Commissioner Dan M. Berkovitz on De Minimis Exception to the Swap Dealer Definition—Swaps Entered into by Insured Depository Institutions in Connection with Loans to Customers

March 25, 2019

I respectfully dissent from today's rulemaking, which excludes from counting toward the de minimis threshold swaps entered into by insured depository institutions ("IDIs") in connection with loans ("Final Rule").

The Final Rule violates both substantive and procedural provisions of the Dodd-Frank Act. Substantively, the unlimited amount of swap dealing allowed under this provision is not the "**de minimis** quantity" that Congress intended for the Commission to permit without triggering swap dealer registration. Nor should such an unlimited amount of unregistered dealing be permitted by the Commission.

Procedurally, the Final Rule evades the requirement imposed by Congress that the term "swap dealer" be defined or amended only through joint rulemakings with the Securities and Exchange Commission ("SEC"). The Final Rule expands the provision in the swap dealer definition that provides that swaps entered into by an IDI in connection with a loan are not considered swap dealing ("IDI Swap Dealing Exclusion").[1] It does this not by amending the IDI Swap Dealing Exclusion itself, but rather by awkwardly stuffing this new expanded exclusion into the de minimis provision. The transparent purpose of this drafting sleight-of-hand is to circumvent the will of Congress that "swap dealer" be defined only through joint rulemakings with the SEC.

I am not opposed to considering reasonable, incremental changes to the current IDI Swap Dealing Exclusion if they serve the intended public policy goals and are accomplished in the manner prescribed by law. The IDI Swap Dealing Exclusion effectively prevents swap dealer registration from impeding the ability of IDIs to engage in limited swap dealing as a part of their core loan origination business. But experience has shown[2] that some of the conditions in the IDI Swap Dealing Exclusion may be too restrictive and are not achieving the goals set by Congress.[3]

The Final Rule, however, is not a limited expansion of the IDI Swap Dealing Exclusion that primarily will aid smaller banks, but rather a wholesale expansion that primarily will benefit larger banks. The provision is a wolf in sheep's clothing. In the guise of helping small and mid-size banks, it opens the door for large banks to undertake an unlimited amount of swap dealing with loan customers **without** registering as swap dealers. This change both violates the clear intent behind regulating swap dealers and carelessly introduces risk into the financial system by allowing non-de minimis unregulated swap dealing.

I am concerned that smaller banks will be negatively impacted by the Final Rule. The larger banks that will benefit most from this rule—likely large regional and some national commercial banks—compete with smaller banks for loan business from main street companies. The larger institutions have the resources to develop expansive swap dealing capabilities. The smaller banks, which typically operate in one state and may only have a few branches, do not have the resources to establish competitive swap businesses. The larger banks that do may crowd out their smaller brethren. The end result could be less competition and more concentration in local lending markets.

Not De Minimis Swap Dealing By Any Measure

- **No Limit on Notional Amount of Swap Activity**

In defining the term "swap dealer," Congress directed the CFTC and the SEC to jointly further define swap dealer (more on that later), and excepted from registration entities engaging in a de minimis quantity of swap dealing. CEA section 1a(49)(D) provides:

> The Commission shall exempt from designation as a swap dealer an entity that engages in a de minimis **quanti** swap dealing in connection with transactions with or on behalf of its customers. The Commission shall promulg regulations to establish factors with respect to the making of this determination to exempt.[4]

The CTFC, together with the SEC, jointly further defined the term "swap dealer."[5] As directed, the Commissions created paragraph (4), dedicated solely to establishing the de minimis quantity of swap dealing activity in which an entity may engage without having to register as a swap dealer (the "De Minimis Exception").[6]

In November 2018, the Commission unanimously approved setting this maximum de minimis **quantity** threshold at $8 billion. This $8 billion threshold basically applied to all types of dealing swaps. Now, less than four months later, the Final Rule removes this threshold limitation for one particular class of swaps—swaps entered into by IDIs with customers in connection with loans. Under the Final Rule, an IDI can enter into an unlimited quantity of swaps with its borrowers and not be required to register as a swap dealer.[7] That is not what Congress intended when it provided an exemption from registration for a "de minimis quantity of swap dealing."
The preamble to the Final Rule reveals the true nature of the new "IDI De Minimis Provision." It is an unlimited exclusion from counting towards dealing, rather than a de minimis provision that counts the amount of swaps against a pre-defined maximum limit (i.e., a de minimis quantity as specified by the statute). The preamble states, "[a]ny swap that meets the requirements of the IDI Swap Dealing Exclusion would also meet the requirements of the IDI De Minimis Provision."[8] This conflation of the two provisions makes it clear that the Final Rule is in fact a full exclusion. A so-called "de minimis" exception for a particular class of swaps that does not contain a numerical limit on the quantity of swaps excepted amounts to a full exclusion of that class of swaps.

The Commission provides no distinct rationale separate from the purpose for the IDI Swap Dealing Exclusion for why the $8 billion aggregate threshold it enacted four months ago is no longer applicable to these swaps executed by IDIs. Although a federal agency has the discretion to change its rules and regulations in light of new information, the agency must provide a reasoned explanation for a change in course.[9] It must study the problem **before** it issues the regulation.[10] Here, the Commission has provided no reasoned explanation for why this particular class of swaps presents any different or lesser risk than any other type of swap that is subject to a numerical aggregate limit. The Commission has not provided any analysis or reasoned estimate of the aggregate amount of swap dealing activity that would be excluded under the new IDI De Minimis Provision. In the absence of any estimate of the aggregate amount of activity that would be excluded under this new provision, it is arbitrary for the Commission to declare that such activity can be considered "de minimis."

In explaining this shift, the preamble to the Final Rule introduces a "qualitative" standard, which it asserts meets Congress's requirement that the CFTC define a de minimis "quantity" of swap dealing.[11] It suggests that "not all de minimis factors [shall] be stated in numerical terms, so long as the impact on the regulatory scheme for [swap dealers] is sufficiently modest."[12] The preamble then claims that the amount of swap dealing that will be permitted by the Final Rule can be considered de minimis because it is "sufficiently modest in light of the total size, concentration and other attributes of the applicable markets" and "would not appreciably affect the systemic risk, counterparty protection, and market efficiency considerations of regulation."[13]

This rationale is deficient for several reasons. First, the Commission has presented no quantitative estimate of the total amount of swap dealing, either by IDIs singly or by all IDIs in the aggregate, that could be excluded from swap dealing regulation under the Final Rule.[14] The Commission has presented data only on the **current** amount of IDI loan-related activity that would fall under the IDI Swap Dealing Exclusion provision in the Final Rule.[15] In the absence of any estimate as to the **additional** amount of swap dealing that would be excluded under the Final Rule, the Commission has no basis to conclude the total excluded amount of swap dealing is "sufficiently modest," whether on an absolute or relative basis, for any particular IDI, or all IDIs in the aggregate. To address this problem, the preamble states that the Commission's Office of the Chief Economist will, within three years, study whether the swaps should be capped to qualify for the de minimis provision. This approach is tantamount to studying where the cows have gone **after** opening the barn door.

Second, this approach is inconsistent with the approach taken four months ago in the de minimis rule, where the Commission determined that registration was warranted for entities engaged in $8 billion or more of swap dealing activity. This Final Rule will allow an entity to engage in more than $8 billion of swap dealing activity, yet not register as a swap dealer. The rationale that is proffered in today's rulemaking—that the total amount of unregistered dealing that will be permitted is modest in light of the total size of the market—was rejected in the prior de minimis rulemaking when suggested by commenters who advocated raising the de minimis level to $20 billion, $50 billion, or $100 billion.[16] To the extent that the Commission relies on policy considerations based on the IDI Swap Dealing Exclusion for excluding IDI swaps from counting as dealing swaps, then the policy exception appropriately belongs as part of that IDI Swap Dealing Exclusion—which must be accomplished through joint rulemaking.

The preamble to the Final Rule further states that the amendment "(1) supports a clearer and more streamlined application of the De Minimis Exception; (2) provides greater clarity regarding which swaps need to be counted towards the [notional] threshold; and (3) accounts for practical considerations relevant to swaps in different circumstances."[17] Yet the Final Rule does none of these things. The Final Rule replaces one IDI provision with two—an IDI Swap Dealing Exclusion, which excludes swaps from being considered dealing, and a new IDI De Minimis Provision, which considers the swaps as dealing but then says that if the swaps meet various criteria and conditions, they don't count toward the de minimis threshold. Is that more clear or streamlined? I don't think so.

- **Contrary to Swap Dealer Registration Requirements and De Minimis Exception**

The Final Rule fails to advance the policy goals set forth in the Dodd-Frank Act for regulating swap dealers. Congress recognized that over the counter swaps contributed significantly to the 2008 financial crisis.[18] In the Dodd-Frank Act Congress directed the CFTC to implement a regime of swap dealer registration and regulation to manage the risks arising from swap dealer activities.

The Commission has adopted a variety of requirements to implement this statutory mandate.[19] CFTC swap dealer regulations require registered swap dealers to have detailed risk management programs for their swap activities; pay or collect both initial and variation margin to offset exposures on swaps; must follow numerous customer facing rules such as providing disclosures and meeting swap documentation requirements; and must follow numerous internal business conduct standards designed to reduce risk, increase transparency and protect counterparties.

None of these requirements or market protections will apply to an unregistered IDI engaged in loan-related swap dealing under the Final Rule, no matter how much loan-related swap dealing is done by the IDI. It is entirely possible that IDIs that are currently registered as swap dealers may de-register and then continue to conduct their loan-related dealing activities in an unregistered status under this exception.

To appreciate how the Final Rule undermines the current regulatory structure, consider the extensive swaps activity an IDI will be able to undertake under the Final Rule. Let's start with subparagraph (4)(i)(C)(*2*)(*i*).

Subparagraph (4)(i)(C)(*2*)(*i*) states:

> (2) Relationship of swap to loan.
>
> (i) The rate, asset, liability or other term underlying such swap is, or is related to, a financial term of such loan, w
> includes, without limitation, the loan's duration, rate of interest, the currency or currencies in which it is made an
> principal amount; or
> . . . .

Although this provision is essentially identical to the completely separate paragraph (5)(B)(*1*) of the existing IDI Swap Dealing Exclusion, the notional value of swaps entered into under that Exclusion in connection with originating a loan currently is capped at 100% of the amount of the loan outstanding. Under the Final Rule, there is no cap. Therefore, under subparagraph (4)(i)(C)(*2*)(*i*), an IDI could enter into an interest rate swap, a currency swap, and a swap that effectively changes the duration of the loan, and each one could have a notional amount greater than the amount of the loan.

Furthermore, the language of the Final Rule could be read to permit an IDI to offer unlimited swaps to the borrower so long as they meet the loose standard of being "**related to a financial term** of such loan." This standard could potentially allow a host of other types of swaps that can be quite sophisticated in nature. For example, under the Final Rule, a loan customer could enter into a yield curve flattener or steepener swap for the rate on the loan in addition to the other swaps, or could execute many swaps over time on relative changes in the payment currencies for the loan with no notional amount limit.[20] The IDI and borrower could enter into swaps with notional amounts that are multiples of the amount of the loan. There is no limit; it could be ten times the loan amount or more. These swaps can be executed at any time between the signing of a commitment for the loan and the maturity date for the loan.

Turning to subparagraph (4)(i)(C)(*2*)(*ii*), it states:

> (2) Relationship of swap to loan.
> . . . .
> (ii) Such swap is permissible under the insured depository institution's loan underwriting criteria and is commerc
> appropriate in order to hedge risks incidental to the borrower's business (other than for risks associated with an
> excluded commodity) that may affect the borrower's ability to repay the loan.[21]

Subparagraph (4)(i)(C)(2)(*ii*) omits the language that is in the existing IDI Swap Dealing Exclusion that the swaps must be "required" as a condition of the loan, which provides a clear connection to the **origination** of the loan. Instead, under subparagraph (4)(i)(C)(2)(*ii*) of the Final Rule, the swaps must merely be (1) **permissible** under the IDI's loan underwriting criteria, and (2) commercially reasonable to hedge risks **incidental** to the borrower's business that may affect the ability to repay the loan.

Under this provision, any legal swap related to a risk that is not an excluded commodity; that is not expressly prohibited in the IDI's loan underwriting criteria; and that is a hedge of any risk incidental to the business that arises at any time subsequent to entering into the loan, would not be counted toward the de minimis threshold. There also is no requirement that the amount of these types of hedging swaps bear any rational relationship to the outstanding amount of the loan. As an example, an IDI could make a ten-year $10 million loan to an airline and then, two years later, enter into a five-year jet fuel swap with the airline for a notional amount of $5 billion. Similarly, an IDI could make a loan to an integrated oil and gas company for the construction of a new office building, and then enter into commodity swaps, without limit, to hedge the company's global oil and gas exploration, production and sales. Because these risks are incidental to the borrower's business and could affect its ability to repay its obligations, including the loans, under the Final Rule none of these swaps would be counted toward the de minimis threshold.

In addition, the Final Rule is not limited to IDIs with commercial end-user customers. An IDI can claim the exception for swaps in connection with loans to financial entities customers such as hedge funds and commodity pools, among others.

In response to the above analysis of paragraphs (4)(i)(C)(2)(*i*) and (*ii*), it may be asserted that most IDIs primarily offer loans to commercial firms, not financial firms, and would enter into hedging swaps only in very limited amounts directly related to the amounts of the loans. If, indeed, this is standard commercial practice and sound risk management by IDIs, then I would prefer the CFTC's regulation to reflect such sound risk management practices rather than rely on the self-restraint of IDIs to limit their loan-related swap risks. This is the fundamental purpose of swap dealer regulation. We have learned our lesson the hard way that industry self-regulation does not always work.

- **No Demonstrated Need for this Provision**

The Final Rule goes beyond what IDIs have stated they need. In response to the question in the notice of proposed rulemaking[22] as to whether the aggregate notional amount of loan-related swaps could exceed the amount of the loan, a few commenters described specific circumstances regarding loans where swaps could exceed the **outstanding** amount of the loan.[23] The circumstances presented were very limited and involved construction or other types of loans in which the full loan amount is disbursed in increments over time, but an interest rate swap is executed at the initial disbursement in a notional amount equal to the full amount of the loan.[24] The Final Rule presents no actual facts, data, or comments justifying the removal of the notional amount cap in the IDI Swap Dealing Exclusion, particularly in the context of the de minimis swap dealing provision.

In fact, the record before the Commission in this rulemaking is to the contrary. As previously noted, comments to the Proposal informed the Commission of limited circumstances in which the notional amount of interest rate swaps could exceed the outstanding amount of a loan, not the full amount of the loan. The preamble to the Final Rule does not address why it is necessary for the rule to go beyond the circumstances presented by the commenters, in response to a specific request by the Commission for any such information.

Additionally, the no-action relief currently in effect for one IDI pertaining to swap activity in connection with originating a loan contains several significant limitations that are not found in the Final Rule.[25] Two of the specific restrictions in NAL-18-20 are: (1) the client of the IDI "must be a small or medium-sized commercial entity, which for purposes of the relief is an entity with annual revenues of under $750 million"; and (2) the aggregate amount of the loans that can be excluded under the relief may not exceed $1.5 billion at any time during the relief period.[26] In other words, NAL-18-20 provides a cap of $1.5 billion on the aggregate notional amount of IDI loan-related swaps permitted by the letter that may be outstanding at any one time. There is no indication in the public record that the IDI operating under NAL-18-20 is unduly constrained by these limitations.

Joint Rulemaking is Required

In addition to its various substantive infirmities, I cannot vote today to adopt this rule because it violates a mandate from Congress to define the term "swap dealer" jointly with the SEC. By wholly excluding all IDI De Minimis Provision swaps from counting towards the de minimis threshold, the CFTC is in effect amending the definition of the term "swap dealer." Under our Congressional mandate, neither the CFTC nor the SEC can alone amend this definition.[27] For the reasons discussed below, the Final Rule may not be adopted unilaterally by the CFTC.

- **Congressional Definition of "Swap Dealer"**

Congress recognized that implementing the Dodd-Frank Act could only be accomplished with coordination amongst the multiple federal financial agencies involved. Title VII of the Dodd-Frank Act directed these financial agencies to consult with one another and, in specific circumstances, engage in joint rulemaking. [28]

The direction from Congress is clear that the term "swap dealer" must be defined jointly by the CFTC and SEC, and that any amendments to that definition must be accomplished through joint rulemaking as well. Section 712(d)(1) of the Dodd-Frank Act specifies that the CFTC and the SEC—jointly, and in consultation with the Board of Governors—"shall further define" the term "swap dealer," among others. Section 712(d)(2) provides that the CFTC and SEC must jointly adopt "such other rules regarding such definitions" as the CFTC and SEC determine are necessary, in the public interest, and for the protection of investors.

- **Joint Definition of "Swap Dealer"**

In accordance with Section 712(d)(1), the CFTC and the SEC jointly adopted the CFTC Regulation further defining the term swap dealer, among other terms. As directed by CEA section 1a(49)(D), the Commissions together drafted paragraph (4)—the De Minimis Exception—to establish the quantity of swap dealing activity in which a person may engage without having to register as a swap dealer.[29] Although implemented jointly, the Commissions provided that the CFTC, alone, could "by rule or regulation change the requirements of the De minimis exception described in **paragraphs (4)(i) through (iv)** of this definition."[30] The two Commissions also adopted paragraph (5), the IDI Swap Dealing Exclusion.[31] Unlike paragraph (4), the IDI Swap Dealing Exclusion in paragraph (5) does not contain any language permitting the CFTC to amend it unilaterally.

- **Inconsistent with Congressional Intent**

Today, the Commission majority evades the joint rulemaking requirement by improperly shoehorning changes to the IDI Swap Dealing Exclusion, which cannot be done singly, into the De Minimis Exception. A comparison of the Final Rule text with that of paragraph (5) confirms that the new IDI De Minimis Provision is an amendment to the IDI Swap Dealing Exclusion under another name.[32] The preamble to the Final Rule explicitly acknowledges that "any swap that meets the requirements of the IDI Swap Dealing Exclusion would also meet the requirements of the IDI De Minimis Provision."[33] But calling it a different name—i.e., de minimis—does not alter its essential nature as an exclusion for IDI swaps.

This drafting hocus-pocus is inconsistent with the CEA, which requires changes to the IDI exclusion to be accomplished through joint rulemakings with the SEC.[34]

The preamble claims that this legerdemain is permissible because the amendments are only "factors" for determining which swaps need to be counted towards an IDI's de minimis calculation[35] and the CFTC may unilaterally set such "factors." This is a smokescreen. The CFTC may only promulgate regulations individually to "establish factors with respect to the making of this determination to exempt." The words "this determination" refer to the quantity determination in the preceding sentence of the subsection: "[t]he Commission shall exempt from designation as a swap dealer an entity that engages in a de minimis quantity of swap dealing in connection with transactions with or on behalf of its customers."[36] In other words, the "factors" referred to in the second sentence are factors to be used by the Commission to determine the numerical quantity for the exemption created in the first sentence. The direction to establish factors does not create a distinct directive authorizing the CFTC to independently determine what constitutes swap dealing.[37] If it did, the de minimis provision could swallow the whole swap dealer definition.

For these reasons, the De Minimis Exception to the swap dealer definition is an improper vehicle through which to expand the type of IDI swaps that are considered to have been made in connection with originating loans to a customer. This expansion can be done only through a joint rulemaking with the SEC.

- **Lack of Consultation**

The failure to adopt the Final Rule jointly is not the only procedural defect. Section 712(a)(1) of the Dodd-Frank Act also requires that prior to the commencement of any rulemaking, the "Commission" shall "consult and coordinate" to the extent possible with the SEC and the prudential regulators to ensure the consistency and comparability that Congress envisioned when creating the new swap regulatory framework. The preamble to the Final Rule claims that the "Commission" consulted with the SEC and the prudential regulators during the preparation of this adopting release.[38] However, the "Commission" is a five-member body, each member of which votes to approve CFTC rulemakings, enforcement actions, and other activities as specified by the CEA. The Commission itself was not informed of, and did not participate in, the substantive contents of any such consultation in connection with this rulemaking. This does not appear to conform with the spirit of the Dodd-Frank consultation requirement.

Conclusion

Voltaire famously commented "[t]his body which was called and which still calls itself the Holy Roman Empire was in no way holy, nor Roman, nor an empire."[39] Likewise, the provision that the Commission majority calls the "IDI De Minimis Provision" is not an IDI Provision and is in no way de minimis.

Following the rule of law is critical to maintaining a robust, safe, and integrated financial regulatory system that inspires confidence for both market participants and the public at large. The rule of law applies no less to us as regulators than to the persons we regulate. The Final Rule adopted by the Commission today is inconsistent with the requirements of the Commodity Exchange Act for the regulation of swap dealers and violates the Dodd-Frank Act as to the process for amending those regulations. I therefore dissent.

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[1] 17 CFR 1.3, definition of Swap dealer, paragraph (5).
[2] CFTC Staff Letter No. 18-20, No-Action Relief for Excluding Certain Loan-Related Swaps from Counting toward the Swap Dealer Registration De Minimis Threshold ("NAL 18-20") (Aug. 28, 2018), available at https://www.cftc.gov/sites/default/files/idc/groups/public/%40lrlettergeneral/documents/letter/2018-08/18-20.pdf.
[3] or example, the time period within which swaps can be entered into in connection with the loan may need to be expanded.
[4] 7 U.S.C. 1a(49)(D) (emphasis added).
[5] 17 CFR 1.3, definition of Swap dealer.
[6] 17 CFR 1.3, definition of Swap dealer, paragraph (4).
[7] In the preamble to the Final Rule, the Commission acknowledges that having no relationship to the loan amount is problematic. When discussing the 5% minimum on syndicated loan participations, the Commission rejects commenters' requests to remove the minimum on the grounds that allowing IDIs with an "immaterial 'connection' to the loan (such as $0.01)" would be inappropriate. See Final Rule, Preamble at 40. Yet the Commission sees no such minimum connection required for loans made directly by an IDI. Although the sham provision in the Final Rule would hopefully prevent this from happening in the worst cases, any meaningful loan amount likely would not be viewed as a sham.
[8] Final Rule, Preamble at 14.
[9] See, e.g., New York v. United States Dep't of Commerce, 351 F. Supp. 3d 502, 518 (S.D.N.Y. 2019) ("[T]he [Administrative Procedure Act ("APA")] does not say . . . that an agency cannot adopt new policies or otherwise change course. But the APA does require that before an agency does so, it must consider all important aspects of a problem; study the relevant evidence and arrive at a decision rationally supported by that evidence; comply with all applicable procedures and substantive laws; and articulate the facts and reasons—the real reasons—for that decision.").
[10] Id. As noted below, in this instance the Commission has committed to study the issue after it issues the regulation.
[11] See Final Rule, Preamble at 51.
[12] Id. at 52, see also id. at 17 (citing SD Adopting Release) (reiterating the conclusion reached in the preamble to the SD Adopting Release that "[t]he de minimis exception should allow amounts of swap dealing activity that are sufficiently small that they do not warrant registration to address concerns implicated by SD regulations.") (emphasis added).
[13] Id. at 21.
[14] The de minimis clause in the statute references a de minimis quantity by "an entity," not in the aggregate across the entire industry.

[15] As part of its comment letter, the American Bankers Association (ABA) submitted an analysis prepared by NERA Economic Consulting, "Cost-Benefit Analysis of the CFTC's Swap Dealer De Minimis Exception Definition." NERA estimated that removing the date restrictions on the IDI Exclusion would result in an additional 15% of swaps transaction notional volume. NERA did not provide an estimate of the increase in volume that would result from the "permissible" expansion of the provision to include swaps to hedge the borrower's business risks that may affect the borrower's ability to repay the loan, which is discussed in the next section.
[16] Adopting Release, De Minimis Exception to the Swap Dealer Definition, 83 FR 56666, 56677-56678 (Nov. 13, 2018).
[17] Final Release, Preamble at 11.
[18] See generally Financial Crisis Inquiry Report: Final Report of the National Commission on the Causes of the Financial and Economic Crisis in the United States, Financial Crisis Inquiry Comm'n (2010).
[19] See 17 CFR Part 23.
[20] Thankfully, the majority has clarified that swaps for speculative and investment purposes would not be includable under paragraph (4)(i)(C)(2). See Final Rule, Preamble at 32.
[21] Note that this paragraph is expressly limited to hedging swaps. The lack of such language in paragraph (4)(C)(2)(i) illustrates that non-hedging swaps are intended to be permitted under that provision.
[22] Notice of proposed rulemaking, De Minimis Exception to the Swap Dealer Definition, 83 FR 27444 (June 12, 2018) ("Proposal").
[23] See, e.g., comment letter from Citizens Financial Group, Inc., at 6 (Aug. 10, 2018); comment letter from Capital One Financial Corporation, at 3 (Aug. 13, 2018) ("[A] customer may enter a forward starting swap to hedge future draws under a loan. In these cases, the notional amount of the forward starting swap will exceed the principal amount of the loan until future draws are made on that loan."); and comment letter from M&T Bank, at 3 (Aug. 10, 2018) ("This circumstance could arise in construction lending when the project had not advanced sufficiently such that the loan was fully funded, yet the loan had been hedged with a forward-starting or accreting interest rate swap having a notional amount that anticipated the future and higher loan balance."). These and other comment letters submitted in response to the Proposal are available at https://comments.cftc.gov/PublicComments/CommentList.aspx?id=2885.
[24] See Final Release, Preamble, section II.B.6.
[25] See NAL-18-20.
[26] Id.
[27] The heads of the two agencies are also not free to decide between themselves when joint rulemaking is required. See Joint Statement from Chairmen Giancarlo and Clayton on the IDI Exception to the Swap Dealer Definition (Dec. 13, 2018), https://www.cftc.gov/PressRoom/SpeechesTestimony/giancarlostatement121318; see also Bd. of Trade of City of Chicago v. SEC, 677 F.2d 1137, 1142 n.8 (7th Cir. 1982) ("While this case was pending, the CFTC and SEC filed with us a copy of a news release announcing their provisional agreement purportedly resolving the jurisdictional dispute at issue in this case. . . . Although Congress has provided that the CFTC 'maintain communications' with the SEC regarding CFTC activities that 'relate' to SEC responsibilities . . . and that the CFTC 'may cooperate' with the SEC . . . the two agencies cannot thereby enlarge or relinquish their statutory jurisdictions. . . . The role of the agencies remains basically to execute legislative policy; they are no more authorized than are the courts to rewrite acts of Congress.")
[28] See, e.g., Dodd-Frank Act, Hearing on H.R. 4173, H.R. Rep. No. 111-517 at 358 (June 24, 2010) (Senator Gregg: "[W]e should try and push these various entities to joint activity because they have such overlap in their responsibilities. So to get the SEC and the CFTC and the Federal Reserve in the same room on these issues is really critical."); id. at 357 (Senator Reed: [I]f . . . [the CFTC] decides a swap is different than what it is today, then that changes definitions that have been jointly arrived at, or definitions or jurisdiction or responsibility to the SEC.").
[29] 17 CFR 1.3, definition of Swap dealer, paragraph (4).
[30] 17 CFR 1.3, definition of Swap dealer, paragraph (4)(v) (emphasis added).
[31] 17 CFR 1.3, definition of Swap dealer, paragraph (5).
[32] The Final Rule adds a section to the De Minimis Exception that tracks the precise structure and language of paragraph (5)'s IDI Swap Dealing Exclusion, only it revises key words that significantly broaden the exclusion.
[33] Final Rule, Preamble at 14.
[34] The Commission majority's intent to use the de minimis provision as an end-run around the joint rulemaking requirement is evident from the language in the Proposal. The Proposal states:

> The Commission is not at this time proposing to amend the IDI Swap Dealing Exclusion in paragraph (5) of the SD Definition. As disc above, pursuant to requirements of section 712(d)(1) of the Dodd-Frank Act, the CFTC and SEC jointly adopted the IDI Swap Dealing Exclusion in paragraph (5) as part of the definition of what constitutes swap dealing activity. Rather than proposing to revise the scope activity that constitutes swap dealing, the Commission is proposing to amend paragraph (4) of the SD Definition, which addresses the minimis exception. (footnote omitted).

Proposal, 83 FR at 27458-59. The Commission then makes it abundantly clear that this de minimis exception is in fact an expansion of the IDI Swap Dealing Exclusion: "The IDI De Minimis Provision would have requirements that are similar to the IDI Swap Dealing Exclusion, but would encompass a broader scope of loan-related swaps." Id. at 27459.
[35] Final Rule, Preamble at 15.
[36] 7 U.S.C. 1a(49)(D).
[37] See also Statement of Commissioner Dan M. Berkovitz, De Minimis Exception to the Swap Dealer Definition, 83 FR 56666, 56692-93 (Nov. 13, 2018).
[38] Final Release, Preamble at 52.

[39] Voltaire, “An essay on universal history, the manners, and spirit of nations, from the reign of Charlemaign to the age of Lewis XIV,” Chapter 70 (1756).