

[Securities Regulation Daily Wrap Up, TOP STORY—CFTC votes to approve proposed swap dealer rule despite vigorous opposition by Democratic commissioners, \(Dec. 19, 2019\)](#)

Securities Regulation Daily Wrap Up

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The Commission approved one final rule and two proposed rules, while one of those proposed rules led to rancorous debate and strident dissents at a recent open meeting of the Commodity Futures Trading Commission.

On the very day that a Democratic House of Representatives impeached a Republican President, Democratic and Republican commissioners clashed at the [CFTC's open meeting](#) over a proposed rule titled *Cross-Border Application of the Registration Thresholds and Certain Requirements Applicable to Swap Dealers and Major Swap Participants*. Commissioner Dan Berkovitz, a Democrat who is concerned the proposed rule would significantly weaken the CFTC's existing regulatory framework, pushed back hard when Chairman Tarbert, a Republican, sought to limit his time to raise questions about the proposal. "I am not agreeing to time limits," proclaimed Berkovitz. The commissioner added, "The most important thing is not to move things along, but to get things right."

When Commissioner Brian Quintenz, a Republican, had the floor, he noted that in Congress, one of the most august deliberative bodies in the world, members are typically limited to five minutes for questions or comments. "We live in a world of limited time," stated the commissioner, a clear response to Berkovitz, although he did not mention his name. The contested proposed rule passed by a 3-2 vote on party lines.

Majority support for the cross-border proposal. In stating his support for the controversial cross-border proposal, [Chairman Tarbert](#) noted that since 2013, market participants have been relying on cross-border interpretive guidance which is technically not enforceable. He also observed that during the intervening years, a patchwork of staff advisories and no-action letters has supplemented the 2013 guidance. Accordingly, he believes with almost seven years of experience, it is high time for the Commission to bring finality to the issues the 2013 guidance and its progeny have addressed.

In the chairman's view, the proposed rule accomplishes finality and clarity by addressing the central question of when swap dealing activity outside the United States should trigger CFTC registration and other requirements. The answer to that question, according to Tarbert, is found in Section 2(i) of the Commodity Exchange Act, which provides that the CEA does not apply to swaps activities outside the U.S. unless (1) the activities have a "direct and significant connection with activities in, or effect on, commerce of the United States" or (2) where they run afoul of the Commission's rules or regulations that prevent evasion of Title VII. Remarks by [Commissioner Quintenz](#) and [Commissioner Stump](#) echo and support Chairman Tarbert's position.

Minority commissioners stridently oppose the cross-border proposal. Both Democratic commissioners issued sharp dissents to the cross-border proposal. [Commissioner Berkovitz](#), for his part, stated the proposal would create multiple loopholes for U.S. banks to evade the CFTC's oversight of their cross-border activity and pose risks to the U.S. financial system. He observed, "With a wink and a nod, U.S. banks could effectively guarantee their overseas swap dealing affiliates from losses while also enabling those affiliates to escape regulation as swap dealers." In his view, the proposal would enable U.S. banks to book their swap trades in unregistered foreign affiliates that would not be required to report their swaps in the United States, and would not be subject to U.S. capital, margin, and risk management requirements.

Commissioner [Behnam echoed his democratic colleague](#) stating, "Today's Proposal suggests that we can resolve all complexities in one fell swoop if we alter our lens, abandon our longstanding and literal interpretation of CEA section 2(i), and limit ourselves to a purely *risk-based approach*." He added, "I cannot support an approach that would limit our jurisdiction and consequently oversight directly in conflict with Congressional intent, and potentially expose the U.S. to systemic risk."

Other business proceeds without controversy. A greater sense of tranquility prevailed as the [commissioners unanimously approved](#) two other measures at the open meeting. In a final rule titled *Amendments to Derivatives Clearing Organization General Provisions and Core Principles*, the Commission amended certain regulations applicable to registered derivatives clearing organizations (DCOs). The amendments address certain risk management and reporting obligations, clarify the meaning of certain provisions, simplify processes for registration and reporting, and codify existing staff relief and guidance. Statements in support of the final rule were issued by [Chairman Heath Tarbert](#), [Commissioner Dan Berkovitz](#), and [Commissioner Brian Quintenz](#).

In a proposed rule titled *Prohibition on Post-Trade Name Give-Up on Swap Execution Facilities*, the Commission unanimously approved a proposal to amend Part 37 of CFTC's regulations to prohibit "post-trade name give-up" practices for swaps that are anonymously executed on a Swap Execution Facility (SEF) and are intended to be cleared. The proposed rule would also require SEFs to establish and enforce rules that prohibit any person from effectuating such a disclosure. A [joint statement](#) in support of the proposed rule was issued by Chairman Tarbert, Commissioner Behnam, and Commissioner Berkovitz. A separate statement of support was issued by [Commissioner Brian Quintenz](#).

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