

CFTC Staff Provides Time Limited De Minimis Relief to a Regional BHC and its IDI Subsidiaries

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Last week, the CFTC's Division of Swap Dealer and Intermediary Oversight ("DSIO") issued [time limited no-action relief](#) to a regional commercial bank holding company and its insured depository institution ("IDI") subsidiaries from having to count certain loan-related swaps toward its swap dealer *de minimis* threshold. Currently, an IDI is permitted to exclude from its *de minimis* threshold calculation swaps entered into with customers in connection with originating a loan, provided various conditions are satisfied (the "**IDI Exclusion**"). One of those conditions is that the swap be entered into no later than 180 days after the date of the execution of the applicable loan agreement or transfer of principal to the customer (the "**180 Day Requirement**"). The no-action relief would permit an IDI to exclude swaps from its *de minimis* threshold calculation during the relief period if the swap would satisfy the IDI Exclusion but for the 180 Day Requirement and the swap counterparty is an existing loan client whose annual revenues are under \$750 million. In addition, the aggregate notional amount of swaps entered into in reliance of the no-action relief must not exceed \$1.5 billion at any time during the relief period. The relief terminates on December 31, 2018, at which point the aggregate notional amount of dealing swaps entered into by the IDI and its affiliates (excluding any affiliate that is registered as a swap dealer) for the previous 12 months would need to be below the \$8 billion *de minimis* threshold or the requirement to register as a swap dealer would be triggered.

In the request for relief, the banking group represented that a meaningful number of its clients are small and medium-sized commercial entities that have long established relationships with the group and look to it and its IDI subsidiaries to help their overall capital and risk mitigation needs. Given historically low interest rates, many of those clients chose not to enter into swaps to hedge interest rate risks at the time of a loan. Due to recent changes in the interest rate environment, clients now wish to enter into swaps to hedge their loan-related risks. If outside the 180 day window, however, those swaps would not qualify for the IDI Exception. The banking group noted that this phenomenon was creating a temporary spike in demand for swaps that would not qualify for the IDI Exclusion and placed its IDI subsidiaries in the untenable position of either having to turn away those small and medium-sized commercial clients – who typically do not have established trading relationships with other swap dealers and may find it challenging to quickly find a cost effective alternative provider in an environment where speed is important due to fast changing interest rates – or be forced to breach the *de minimis* threshold and have to register as a swap dealer, even though their business models and swap dealing volumes would not make it commercially feasible to sustain such registration status. The letter pointed out that neither of these outcomes would be consistent with the CFTC's policy goal of supporting small and regional banks' ancillary dealing activities to meet end-users' risk mitigation needs.

Recently, the CFTC [proposed](#) a new exception to the *de minimis* threshold calculation that would have the effect of relaxing some of the conditions to the existing IDI Exclusion. If adopted as proposed, it would be possible for IDIs to exclude from their *de minimis* threshold calculation loan related swaps entered into more than 180 days following the execution of a loan agreement, provided the other specified conditions in the rule are satisfied.

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If you have any questions regarding the matters covered in this publication, please reach out to any of the lawyers listed below or your usual Davis Polk contact.

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