

Possible Priorities for a CFTC Chaired by Commissioner Giancarlo

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CFTC Chairman Timothy Massad announced this week that he will be stepping down on January 20. Commissioner J. Christopher Giancarlo, who is the sole Republican currently serving on the Commission, will take over on at least an interim basis.

During his term as a CFTC commissioner, Mr. Giancarlo has published white papers and issued public statements that may foreshadow the CFTC's priorities under the Trump administration and a Giancarlo chairmanship. He has generally been supportive of many of the swap market reforms embodied in Title VII of the Dodd-Frank Act; however, his public statements as Commissioner suggest that he believes there are several areas of swap regulation that could be the focus of reform. We briefly describe these areas and provide links to Commissioner Giancarlo's key public statements.

- **Swap Trade Execution.** Perhaps the area in which Commissioner Giancarlo has most vocally advocated for reform is the CFTC's swap trade execution rules. He has argued that these rules, including those governing trading on swap execution facilities (SEFs), are over-engineered, disproportionately modeled on the U.S. futures market, biased against human discretion and technological innovation and generally do not take into account the distinct liquidity and trading dynamics of the global swaps market. To address these concerns, he has argued for increased flexibility in SEF execution methods and the ways in which SEF markets may be structured. He has also argued that the CFTC should establish professional standards for personnel who exercise discretion in facilitating swap executions.
 - [White Paper, Pro-Reform Reconsideration of the CFTC Swaps Trading Rules: Return to Dodd-Frank](#)
- **Cross-Border Application of Swap Rules.** Commissioner Giancarlo has stated that “[t]he CFTC must do better to work with foreign regulators to implement global standards consistently in a way that ensures a level playing field and avoids market fragmentation, protectionism and regulatory arbitrage.” The CFTC, under a Giancarlo chairmanship, may engage in further efforts to coordinate with non-U.S. regulators on swap regulation. As part of these efforts, the CFTC may seek to adopt additional “substituted compliance” determinations, which allow market participants to comply with non-U.S. rules in lieu of CFTC requirements for swap transactions subject to multiple regimes. The cross-border application of swap rules and substituted compliance have been key talking points for Republicans. For example, the current draft of the Republican-sponsored [CHOICE Act](#) would require the CFTC to issue formal swap cross-border rules and to take steps to recognize non-U.S. regulatory regimes for substituted compliance purposes.
 - [Statement of Commissioner J. Christopher Giancarlo Regarding Final Response to District Court Remand Order in SIFMA, et al. v. CFTC](#)
 - [Statement of Dissent by Commissioner J. Christopher Giancarlo on the Cross-Border Application of the Margin Requirements](#)
- **FinTech.** Commissioner Giancarlo has encouraged financial regulators, including the CFTC, to “work closely with FinTech innovators to determine how rules and regulations should be adapted to enable 21st century technologies and business models.” He has also commended non-U.S. regulators for establishing programs that provide FinTech firms with sufficient latitude to develop and test innovative solutions without fear of enforcement action and regulatory fines. Under a Giancarlo chairmanship, the CFTC may seek to establish similar programs in the United States or engage in additional outreach to assist FinTech firms in understanding how the CFTC's regulatory regime may apply to their products and services.

- [Keynote Address of CFTC Commissioner J. Christopher Giancarlo before the ISDA's Trade Execution Legal Forum](#)
- [Keynote Address of Commissioner J. Christopher Giancarlo before the Markit Group, 2016 Annual Customer Conference New York](#)
- **Swap Dealer De Minimis Threshold.** CFTC rules exempt from swap dealer registration an entity that engages in a notional level of swap dealing that is below a specified de minimis threshold. The current threshold of \$8 billion is set to drop to \$3 billion in December 2018, absent CFTC action. Commissioner Giancarlo has advocated against reducing the threshold, stating that a “drop in the threshold would have the effect of causing many non-financial companies to curtail or terminate risk-hedging activities with their customers, limiting risk-management options for end-users and ultimately consolidating marketplace risk in only a few large swap dealers.” This view is consistent with other efforts to decrease regulatory burdens on smaller market participants that we are likely to see under the Trump administration.
- [Statement of Commissioner J. Christopher Giancarlo on the Swap Dealer De Minimis Exception Final Report](#)

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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