

CFTC Chairman Requests Additional Year to Evaluate the Swap Dealer De Minimis Threshold

October 11, 2017 | Client Update | 4-minute read

CFTC Chairman Giancarlo testified this morning that he intends to delay for an additional year a decision on whether to modify the currently effective swap dealer *de minimis* registration threshold of \$8 billion notional of dealing swaps.[1] This request follows on the heels of a recommendation by the U.S. Treasury, in its [report on capital markets](#), to maintain the *de minimis* threshold at the \$8 billion level and require that any future changes be subject to a formal rulemaking process. Chairman Giancarlo testified that he intends to present a proposal to the full CFTC to resolve this issue in the first half of 2018 and does not intend to further postpone the decision.

Under CFTC regulations, the swap dealer *de minimis* registration threshold would automatically decrease from \$8 billion to \$3 billion on December 31, 2017—absent a CFTC determination otherwise. Such a determination could include making the \$8 billion threshold level permanent, setting the notional threshold at a different level, or calculating the threshold in a different manner altogether. In October 2016, the CFTC issued an order that delayed the automatic reduction for one year, to December 31, 2018. A reduction of the threshold to \$3 billion notional would, based upon existing levels of swap activities, dramatically expand the number of entities that would need to register with the CFTC. The CFTC staff estimated in 2016 that a reduction in the *de minimis* threshold to \$3 billion would result in approximately 84 additional registered swap dealers—a 58% increase in the number of CFTC registered swap dealers—while capturing less than 1% of additional notional activity.[2]

If the CFTC were to act on Chairman Giancarlo's request, the current \$8 billion *de minimis* threshold would stay in effect until December 31, 2019. However, market participants would need to monitor their swap dealing activities against the lower \$3 billion threshold from January 2019 given the rolling 12-month look back required by the threshold calculation under CFTC regulation 1.3.

The extension, according to Chairman Giancarlo's testimony before the House Agriculture Committee, is meant to provide the CFTC with sufficient time to evaluate what action to take in coming to a final decision about whether to maintain—or modify—the *de minimis* threshold. Chairman Giancarlo has, , been supportive of eliminating or delaying the automatic drop of the *de minimis* threshold to \$3 billion. According to a issued concurrently with Chairman Giancarlo's testimony, CFTC Commissioner Quintenz was similarly critical of a reduction of the *de minimis* threshold to \$3 billion. As

previously reported by , he would be willing to consider a different swap dealer registration threshold that reflects the asset class and tenor of swaps and the number of counterparties—not only notional amounts—but that if the CFTC “is stuck using a notional value for the threshold, he’d prefer a higher level to a lower one.”

Commissioner Behnam does not support Chairman Giancarlo's request for the additional one year extension. He in a press release that “[a]dditional delays of the swap dealer *de minimis* threshold will only serve to prolong uncertainty for market participants and create market risk” and that “the Commission should take further action now or let the current rule take effect.” It is not clear from his statement whether Commissioner Behnam would support lowering the *de minimis* threshold. Commissioner Quintenz also stressed the urgency of the CFTC taking up this issue, stating that “too much uncertainty has surrounded the *de minimis* threshold's reduction and its damaging economic consequences” and that “it is well past time to address this issue head-on, finalize a rational and effective threshold, and provide the market with clarity.”

We expect that the swap dealer *de minimis* threshold will continue to be among the top agenda items for Chairman Giancarlo. If the one year extension is not approved, however, the CFTC may need to act in the next two months to avoid uncertainty for market participants who seek to manage their dealing activity based upon future threshold levels.

[1] The de minimis registration threshold is \$25 million in notional of dealing swaps with special entity counterparties.

[2] U.S. DEPARTMENT OF THE TREASURY, A FINANCIAL SYSTEM THAT CREATES ECONOMIC OPPORTUNITIES: CAPITAL MARKETS 139 (October 2017) STAFF OF THE U.S. COMMODITY FUTURES TRADING COMMISSION, SWAP DEALER DE MINIMIS EXCEPTION FINAL STAFF REPORT 21 (August 15, 2016)

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.

Annette L. Nazareth

+1 202 962 7075

annette.nazareth@davispolk.com

Gabriel D. Rosenberg

+1 212 450 4537

gabriel.rosenberg@davispolk.com

This communication, which we believe may be of interest to our clients and friends of the firm, is for general information only. It is not a full analysis of the matters presented and should not be relied upon as legal advice. This may be considered attorney advertising in some jurisdictions. Please refer to the firm's privacy notice for further details.