



Commodity Futures Trading Commission

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Commission Adopts Permanent \$8 Billion De Minimis Exception to the Swap Dealer Definition

The Commodity Futures Trading Commission adopted an amendment to the definition of the term “swap dealer” to set the permanent aggregate gross notional amount threshold for the de minimis exception at \$8 billion in swap dealing activity entered into by a person over the preceding 12 months.

Background

Section 1a(49) of the Commodity Exchange Act (“CEA”) defines the term “swap dealer” to include any person who: (1) holds itself out as a dealer in swaps; (2) makes a market in swaps; (3) regularly enters into swaps with counterparties as an ordinary course of business for its own account; or (4) engages in any activity causing the person to be commonly known in the trade as a dealer or market maker in swaps. The statute also requires the Commission to promulgate regulations to establish factors with respect to the making of a determination to exempt from designation as a swap dealer an entity engaged in a de minimis quantity of swap dealing.

Section 1.3 of the CFTC’s regulations further defines the term “swap dealer” and provides for a de minimis exception in paragraph (4) (“De Minimis Exception”). As adopted, the De Minimis Exception stated that a person shall not be deemed to be a swap dealer unless its swaps connected with swap dealing activities exceed an aggregate gross notional amount (“AGNA”) threshold of \$3 billion (measured over the prior 12-month period), subject to a phase-in period during which the AGNA threshold is set at \$8 billion. The phase-in period was originally scheduled to terminate on December 31, 2017. The termination date was extended, via successive orders, to December 31, 2019. Therefore, absent further Commission action, market participants would be required to begin counting towards a lower threshold on January 1, 2019.

Amendments to De Minimis Exception Adopted by the Commission

The amendment to the De Minimis Exception sets the aggregate gross notional amount threshold level at \$8 billion in swap dealing activity entered into by a person over the preceding 12 months.

Additionally, the amendment deletes a parenthetical clause in paragraph (4)(i)(A) referring to the period after adoption of the rule further defining the term “swap,” and removes and reserves paragraph (4)(ii) of the De Minimis Exception, which addresses the phase-in procedure and staff report requirements of the De Minimis Exception, since both of those provisions are no longer applicable. Adopting this amendment provides certainty and clarity to the marketplace regarding the AGNA threshold in the De Minimis Exception.

Based on analysis of the data, as well as comments by market participants, an \$8 billion threshold helps ensure that nearly all swap transactions (as measured by AGNA or transaction count) benefit from the protections set forth in the Commission’s swap dealer regulations, and advances the public policy interests of promoting competition, encouraging new swap market participants, and increasing efficiency for market participants. Further, subject to certain exceptions, whether or not a swap involves a registered swap dealer as a counterparty, the swap would still have to comply with the CFTC’s mandatory clearing, trade execution, and reporting requirements.