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U.S. COMMODITY FUTURES TRADING COMMISSION

OPEN MEETING OF THE COMMISSION

Monday, March 25, 2019

10:02 a.m.

CFTC Headquarters Lobby-Level Hearing Room

1155 21st Street, N.W.

Washington, D.C. 20581

BEFORE:

J. Christopher Giancarlo, Chairman

Brian D. Quintenz, Commissioner

Rostin Behnam, Commissioner

Dawn DeBerry Stump, Commissioner

Dan M. Berkovitz, Commissioner

ALSO PRESENT:

Christopher Kirkpatrick, Secretary of the Commission

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P R O C E E D I N G S

CHAIRMAN GIANCARLO: Good morning. This meeting will come to order. Thank you. It is a meeting of the Commodity Futures Trading Commission. And I would like to welcome members of the public, market participants, and members of the media, as well as those taking part on the phone or via webcast.

I would also like to ask for your patience with me this morning as I seem to have caught an awful cold, one flight too many, clearly.

Today, we meet to consider two important measures. The first is an interim final rule on margin requirements for uncleared swaps for swap dealers and major swap participants in light of Brexit. The second is a final rule regarding the de minimis exception to the swap dealer definition -- swaps entered into by insured depository institutions in connection with loans to customers. Other items that had initially

1 been noticed for this open meeting will be forthcoming
2 through seriatim and released over the next couple of
3 days.

4 As always, let me thank the great CFTC staff
5 for their work on today's rules and determinations and
6 what I am sure will be instructive presentations and
7 discussion. And I thank my fellow Commissioners,
8 Quintenz, Behnam, Stump, and Berkovitz, for their
9 engagement and thoughtfulness on these matters and
10 others that are moving through the Commission.

11 Turning to the first matter, as we well know
12 at the CFTC, trading markets crave certainty. Thus,
13 market regulators have a responsibility to avoid
14 creating market apprehension and doubt whenever
15 possible. At a time of heightened market uncertainty
16 caused by Brexit, this Commission has worked over the
17 past several weeks to bring clarity to participants in
18 global derivative markets by a series of separate
19 actions and statements with its regulatory counterparts
20 in London, Brussels, and Singapore.

21 Four weeks ago, the Commission and the Bank

1 of England, including the Prudential Regulation
2 Authority and the Financial Conduct Authority, issued a
3 statement regarding derivatives trading and clearing
4 activities between the United Kingdom and the United
5 States after the U.K.'s withdrawal from the European
6 Union. The statement assured market participants of
7 the continuity of derivatives trading and clearing
8 activities between the U.K. and the U.S. after the
9 U.K.'s withdrawal from the EU.

10 Today, the Commission takes another important
11 step to bring certainty to the global derivative
12 markets. Consistent with actions taken by U.S.
13 prudential regulators, we are providing regulatory
14 certainty regarding the transfer of uncleared legacy
15 swaps to facilitate global swaps market participants'
16 needs in the event that the U.K. withdraws from the EU
17 without a negotiated withdrawal agreement.

18 Soon, the Commission and the Financial
19 Conduct Authority intend to sign two memoranda of
20 understanding related to the U.K.'s withdrawal from the
21 EU. The two signed MOUs will update existing MOUs

1 originally signed in 2016 and 2013 to provide for
2 continued supervisory cooperation with respect to
3 certain firms and the derivatives and the alternate
4 investment fund industry. The signing of these
5 supervisory MOUs with the FCA will ensure continuity
6 and effective cross-border oversight of derivative
7 markets and market participants. These measures show
8 that the U.K. and the U.S. authorities are committed to
9 taking measures to ensure the U.K.'s withdrawal from
10 the EU in whatever form it takes will not create
11 regulatory uncertainty regarding derivative market
12 activity between the U.K. and the U.S. These measures
13 will help support financial stability and the sound
14 functioning of financial markets. They also will give
15 confidence to market participants about their ability
16 to trade and manage risk through these markets.

17 I compliment the DSIO staff for putting
18 together this interim final rule and request for
19 comment. And I commend them for the many hours of hard
20 work, the quality of that work, and their
21 thoughtfulness and engagement throughout. And I am

1 also very grateful to my fellow Commissioners for their
2 commitment and engagement on these critical actions.

3 Turning to the second matter, the Commission
4 will consider today the final rule for the de minimis
5 exception for swaps entered into by IDIs, insured
6 depository institutions, in connection with loans to
7 customers. We have received strong public support for
8 providing a narrowly tailored exception that promotes
9 the use of loan-related swaps in a commercially
10 practical and cost-effective manner. I believe the
11 joint statement I issued with SEC Chairman Clayton in
12 December was clear about the authority and intent to
13 address these types of swaps.

14 This final rule will increase efficiencies
15 and reduce the burdens for banks, particularly small
16 and regional banks, to enter into swaps with their end-
17 user loan customers without the added burden of
18 unnecessary regulation and associated compliance costs.
19 These important loan-related swaps allow borrowers to
20 minimize and hedge interest rate, currency, and
21 commodity risks and focus on growing their businesses

1 and, as a result, the economy. Similarly, lenders
2 benefit from these swaps by way of improved
3 creditworthiness of borrowers with an improved ability
4 to repay their loans.

5 The preamble to the final rule directs the
6 CFTC Office of Chief Economist to conduct a study after
7 three years of implementation. This study will examine
8 future trading data to see how the market has operated
9 under the rule. It will assist the future Commission
10 in considering whether there is a need for limitations
11 on IDI swaps activity and if so, at what levels. The
12 study is the result of a discussion I had with
13 Commissioner Berkovitz, who suggested adding limits to
14 the notional size of the swaps in connection with the
15 principal balance of the related loans.

16 The final rule before us does not set such
17 limits but requires the study and does not preclude the
18 Commission from setting limits in the future if deemed
19 appropriate based on the results of that study. I
20 believe in posing such limits at this time, however,
21 would be inappropriate without data on which to base

1 such limits and without supportive public comments. As
2 I have said many times before, I believe the CFTC
3 policy is best when it is driven by hard data and not
4 assumptions, but I do take seriously indeed the concern
5 about potential misuse of this rule in ways that are
6 not intended. The preamble makes clear that the
7 Commission expects that the swaps entered into by IDIs
8 are made in connection with and related to the
9 originating loan. For instance, a swap with a borrower
10 entering into it for speculative or investment purposes
11 not related to the loan would not be excepted by the
12 IDI from the de minimis calculation. And IDIs,
13 depository institutions, remain subject to prudential
14 supervision for all of their activities, including
15 swaps activities.

16 Finally, this rule does not remove the core
17 Dodd-Frank Act swaps requirements of clearing, post-
18 trade reporting, and mandatory trade execution, which I
19 fully support.

20 Again, I am pleased to see this rule
21 finalized. I do not intend to put before the

1 Commission any other de minimis exception during my
2 remaining time on the Commission. Nevertheless, staff
3 continues to study possible alternative metrics for the
4 calculation of the swap dealer de minimis threshold,
5 including possible risk-based approaches. And I expect
6 the results of that work will be reviewed by the
7 Commission under the next chairman and considered then
8 for further action.

9 In conclusion, I want to thank everyone at
10 the tables and those seated behind them for their fine
11 work on these rules and determinations. And I look
12 forward to their presentations and to hearing from my
13 fellow Commissioners.

14 I would now like to go to Commissioners for
15 their opening statements. And I will begin by
16 recognizing Commissioner Quintenz for his opening
17 remarks.

18 COMMISSIONER QUINTENZ: Thank you, Mr.
19 Chairman. And thank you for calling this open meeting
20 to consider two very important rules that are of great
21 significance to both the global and the domestic swaps

1 markets.

2 The first, as you described, provides the
3 market with much needed regulatory certainty in light
4 of a potential forthcoming Brexit. The second amends
5 the de minimis exception from swap dealer registration
6 for IDIs to ensure that Main Street banks will be able
7 to continue to serve the needs of their small- and
8 medium-sized commercial clients without registering as
9 a swap dealer. Of course, this rule addresses only one
10 of many potential improvements contemplated by the June
11 2018 proposal that should be ultimately finalized by
12 the Commission.

13 I am looking forward to hearing the
14 presentations, asking questions, giving fuller comments
15 on each rule at the conclusion of the staff
16 presentations, but ultimately supporting both rules. I
17 thank the staff very much for their hard work. Thank
18 you.

19 CHAIRMAN GIANCARLO: Thank you.

20 Commissioner Behnam?

21 COMMISSIONER BEHNAM: Thank you, Mr.

1 Chairman.

2 Before I start my prepared remarks, my
3 prepared opening, I do want to thank you and recognize
4 your leadership on the Brexit-related matters,
5 notwithstanding the obvious rulemaking we are
6 addressing this morning. There have been a number of
7 issues you have brought up. You have kept staff and
8 the Commission up-to-date on the changes, which is out
9 of our hand, right? We can only react, but do
10 appreciate your leadership. I think, of all U.S.
11 regulators, we are probably best prepared. And that
12 is, of course, because of you. So thank you. And I
13 look forward to asking questions and taking a vote on
14 that.

15 I want to thank all of the Commission staff
16 who worked to make today's meeting possible, both those
17 who will be presenting at the table today and those who
18 provided the knowledge and analysis supporting their
19 statements. I will keep this statement brief as I have
20 submitted a statement for publication with the final
21 rule.

1 Albert Einstein said, "A clever person solves
2 a problem. A wise person avoids it." Today, the
3 Commission is voting to finalize a rule that purports
4 to resolve longstanding concerns with the IDI loan-
5 related swap exclusion referred to in today's final
6 rule as the "IDI swap dealing exclusion."

7 The IDI swap dealing exclusion codifies part
8 of the statutory swap dealer definition in section
9 1a(49)(A) of the Commodity Exchange Act that was
10 jointly adopted with the Securities and Exchange
11 Commission as paragraph (5) to the regulatory swap
12 dealer definition. This is not to be confused with the
13 IDI de minimis provision being finalized today, which
14 establishes an alternative to the exclusion, absent SEC
15 coordination, that, in purpose and effect, revises the
16 scope of activity that constitutes swap dealing.

17 There is no doubt that the Commission was
18 clever in choosing how to address longstanding concerns
19 that the IDI swap dealing exclusion is unnecessarily
20 restrictive, lacks clarity, and limits the ability of
21 IDIs to serve their loan customers through the

1 unilateral exercise of its authority with respect to
2 the de minimis exception. However, there is also
3 little doubt in my mind that being clever does not make
4 one correct, and I will not be voting in favor of the
5 IDI de minimis provision this morning.

6 The uncertainties embodied in it deprive IDIs
7 and their customers the legal certainty and clarity
8 intended by Congress and may result in increased risk
9 for market participants and perhaps contribute to
10 systemic risk. The Commission would have been wise to
11 avoid creating this rambling IDI exemption that will
12 now sit awkwardly beside the IDI swap dealing exclusion
13 in the Commission regulations. These regulations are a
14 marker of our inability to engage and collaborate with
15 our fellow regulators towards a more practical and
16 legally sound solution. As an independent agency, the
17 Commission should use its expertise to act within its
18 authority and not abuse ill-defined powers to create
19 loopholes. Our agencies are better than that. And,
20 more importantly, our stakeholders deserve it.

21 There has been a concerted effort these last

1 few weeks to window dress. However, any suggestion
2 that this relief is surgically targeted to small and
3 midsize banks and their end-user customers is
4 unfounded. The IDI de minimis provision refrains from
5 imposing any limitation on size or structure of
6 eligible IDIs or their customers. Nor does it cap or
7 require affirmative verification of the aggregate gross
8 notional amount of swaps entered into by an IDI for
9 which it will rely on the IDI de minimis provision.

10 I do not mean to suggest at all that size
11 should be deterministic of whether an IDI should be
12 able to avail itself of relief related to swaps
13 activities in connection with loan origination.
14 Indeed, Congress did not set such limitations on the
15 exclusionary language in Commodity Exchange Act section
16 1a(49)(A). However, taken in the context of the
17 unrestricted nature of the rule before the Commission
18 today, as it relates to the relationship between swaps
19 activity and loan origination, and absent any caps, I
20 am extremely concerned about the potential systemic
21 risk implication to our markets.

1 Small, midsize, and large IDIs should not be
2 considered swap dealers or required to register as swap
3 dealers with regard to swaps activities related to loan
4 origination with customers because Congress simply has
5 determined that such activities, subject to the joint
6 interpretation of the CFTC and the SEC, are not swap
7 dealing activities warranting oversight by the
8 commissions, not because such activities are swap
9 dealing activities which the Commission unilaterally
10 has determined to overlook.

11 I believe that IDIs deserve the fullest
12 application of the exclusion provided by Congress in
13 1a(49)(A) of the Commodity Exchange Act. An exemption
14 or exception leaves IDIs within the crosshairs of
15 future Commission action should political headwinds or
16 shifting policy dispose it to again alter the rules or
17 its interpretation of the act. I stand by now my
18 several prior statements and continue to believe that
19 the Commission should have worked with the SEC to
20 jointly amend the IDI swap dealing exclusion to more
21 accurately address swap activities inherent to credit

1 risk management encompassed by loan origination in the
2 commercial lending space.

3 Thank you.

4 CHAIRMAN GIANCARLO: Commissioner Stump?

5 COMMISSIONER STUMP: Thank you, Mr. Chairman.
6 And thanks to the staff, who worked very diligently to
7 put all of these matters before us.

8 I have just returned from a trip to Europe.
9 I was in Europe last week, and I visited many of our
10 regulatory counterparts across many jurisdictions and
11 many market participants and infrastructure providers
12 who operate truly global businesses. The trip
13 reinforced my belief that every jurisdiction, including
14 the U.S., needs to recommit to the global coordination
15 envisioned at Pittsburgh in 2009, when global leaders
16 committed to work together to improve the system. The
17 alternative of duplicative supervision creates a new
18 web of regulatory vulnerabilities and serves to
19 complicate, not improve, the intended benefit of our
20 recent reforms.

21 I am, therefore, very pleased that several of

1 the items we had planned to address through today's
2 open meeting were able to be finalized through the
3 Commission's seriatim process, including the
4 comparability determinations for Japan's and
5 Australia's uncleared margin requirements. I believe
6 this reflects the CFTC's commitment to a practical,
7 outcomes-based approach to cross-border regulation of
8 our markets.

9 Furthermore, the Commission continues to
10 demonstrate its commitment to facilitating registrants'
11 preparations for Brexit and equipping the CFTC with the
12 tools it needs to cooperate with and obtain information
13 from U.K. authorities after Brexit. These are
14 important steps along the appropriate path forward for
15 the regulation of our global markets.

16 Thank you, Mr. Chairman.

17 CHAIRMAN GIANCARLO: Thank you, Commissioner
18 Stump.

19 Commissioner Berkovitz?

20 COMMISSIONER BERKOVITZ: Thank you, Mr.
21 Chairman. Good morning.

1 I would like to begin by thanking the
2 Commission staff. The CFTC has been particularly busy
3 lately on issues of global importance. The staff's
4 hard work and dedication to our mission allows us,
5 despite our size, to be one of the world's preeminent
6 financial regulatory agencies. In particular, I
7 appreciate your work on the issues we will be
8 discussing today, your consideration and incorporation
9 of many of my office's comments, and the time you have
10 spent with my staff in preparing for this meeting.

11 When the Chairman announced this meeting just
12 over a week ago, we had seven items on the agenda.
13 Fortunately, we were able to approve five of these
14 items ahead of today's meeting, including amendments to
15 Commission regulation 1.52, concerning requirements for
16 self-regulatory organizations; regulation 23.700,
17 concerning requirements for segregated margin for
18 swaps; margin comparability determinations for
19 Australia and Japan; and updates to memorandums of
20 understanding with the U.K.'s Financial Conduct
21 Authority in preparation for Brexit. So I am very

1 pleased we won't be here all day with these matters. I
2 thank the Chairman for your leadership on these matters
3 and my fellow Commissioners and their staffs for their
4 hard work and my staff as well for their very hard
5 work.

6 In addition, in the past couple of weeks, the
7 Commission has also exempted certain derivatives
8 trading venues in Singapore from registration as swap
9 execution facilities because they meet our
10 comparability standards; and has been taking steps with
11 the European Commission to ensure the continuity of
12 derivatives trading and clearing after the U.K.'s
13 withdrawal from the EU. And today, we will be voting
14 to maintain the legacy status of certain uncleared
15 swaps if those swaps need to be legally transferred due
16 to a no-deal Brexit.

17 These recent actions show that the CFTC's
18 cross-border regulatory approach that has now been in
19 place for over six years and implemented by several
20 successive commissions provides an appropriately
21 flexible framework for addressing the various cross-

1 border issues that the Commission faces in
2 international derivatives markets while simultaneously
3 minimizing the financial risks that could come back to
4 the U.S.

5 Finally, the other issue being voted on today
6 is an amendment to the de minimis exception to the swap
7 dealer definition, which excludes from counting towards
8 the de minimis threshold certain swaps entered into by
9 insured depository institutions, or IDIs. I will now
10 just briefly say that I plan to vote against this
11 amendment for both substantive and procedural reasons.
12 In my view, this amendment drives a truck through the
13 de minimis exception to the swap dealer registration
14 rule by permitting an unlimited quantity of swap
15 dealing by an IDI in connection with loans, and any
16 expansion of the IDI exclusion can be adopted only
17 through joint rulemaking with the SEC. I will address
18 these concerns in greater detail when we consider that
19 rule shortly.

20 Thank you.

21 CHAIRMAN GIANCARLO: Thank you, Commissioner

1 Berkovitz.

2 I would just like to briefly review today's
3 procedure. For each of the two items on today's
4 agenda, the staff will make presentations to the
5 Commission. After each presentation, I will then ask
6 for a motion to adopt the rule or item for
7 consideration. I will then open the floor to questions
8 from each of the Commissioners, followed by additional
9 statements from each of the Commissioners, if any.

10 Upon the close of the discussion on each
11 matter, the Commission expects to vote on the staff
12 recommendation as presented. All final votes conducted
13 in this public meeting shall be recorded votes. The
14 results of votes approving the issuance of rulemaking
15 documents will be included with those documents in the
16 Federal Register.

17 At this point, I would like to ask for a
18 motion, a unanimous consent motion, to allow staff to
19 make any technical corrections to the documents voted
20 on today prior to sending them to the Federal Register.

21 COMMISSIONER QUINTENZ: So moved.

1 COMMISSIONER BEHNAM: Second.

2 CHAIRMAN GIANCARLO: All in favor?

3 (Chorus of ayes.)

4 CHAIRMAN GIANCARLO: Any opposed?

5 (No response.)

6 CHAIRMAN GIANCARLO: Thank you. Without
7 objection, so ordered.

8 At this time, I would like to welcome the
9 following staff for their presentations on the interim
10 final rule proposal on margin requirements for
11 uncleared swaps for swap dealers and major swap
12 participants in light of Brexit. Mr. Kulkin, would you
13 introduce your team, please?

14 MR. KULKIN: Good morning, Mr. Chairman and
15 Commissioners. I am happy to introduce Frank Fisanich,
16 chief counsel from DSIO; Jake Chachkin, special
17 counsel, DSIO. Jake will be leading the presentation
18 this morning. Thank you.

19 CHAIRMAN GIANCARLO: Please proceed.

20 MR. CHACHKIN: Today, we are pleased to
21 present an interim final rule to amend the Commission's

1 margin requirements for uncleared swaps, the CFTC
2 margin rule. In an event commonly referred to as
3 Brexit, the United Kingdom may withdraw from the
4 European Union as soon as April 12th. Currently, there
5 is not a negotiated agreement for the U.K. to leave the
6 EU, and a no-deal Brexit will occur if the U.K. leaves
7 the EU without such an agreement.

8 One implication of a no-deal Brexit that is
9 relevant to the swaps market is that market
10 participants in the U.K., including swap dealers
11 subject to the CFTC margin rule, would not be able to
12 rely on the EU's passporting regime that currently
13 allows persons in the U.K. to enter into swaps with
14 persons in the EU.

15 While it is not anticipated that existing
16 swap contracts will be directly affected, the loss of
17 passporting may make it impossible to continue
18 carrying, servicing existing customers for the various
19 lifecycle events that occur during the life of the many
20 swap transactions. As a result, either party to swaps
21 involving U.K. and EU counterparties may wish to

1 transfer their side of the swap to another party to
2 avoid the issue raised by a no-deal Brexit. For
3 example, the U.K. party may wish to transfer the swap
4 to an affiliate in the EU that could rely on
5 passporting.

6 In addition, other market participants,
7 wherever they are located, may choose to engage in
8 other reorganizations or consolidations of their swaps
9 business in response to a no-deal Brexit. To
10 accomplish this, the swap dealers may be involved in
11 transfers of uncleared swaps that are not currently
12 subject to the CFTC margin rule or similar rules from
13 the prudential regulators because they were entered
14 into before the relevant compliance dates for those
15 rules. We refer to these as legacy swaps. However,
16 these swaps would currently lose their legacy status
17 and become subject to the CFTC margin rule if they were
18 amended to effect a transfer.

19 The interim final rule amends Commission
20 regulation 23.161 such that a legacy swap may be
21 transferred to a margin affiliate of the transferor or

1 its branch following a no-deal Brexit without losing
2 its legacy status. Any such transfer must be in
3 response to a no-deal Brexit, and any amendment to a
4 swap that is not necessary to accomplish this transfer
5 would cause the legacy swap to be ineligible for the
6 relief. In any event, to be eligible for relief,
7 parties may not modify certain terms of the swap --
8 financial terms, including an interest rate, the
9 maturity date, or the notional amount of the swap. And
10 the amendments generally must take effect during the
11 year following a no-deal Brexit. Absent a no-deal
12 Brexit, either because a withdrawal agreement is
13 reached or because a Brexit does not occur, the interim
14 final rule does not provide any relief.

15 The interim final rule is similar to an
16 interim final rule that the prudential regulators
17 issued recently. An important difference, however, is
18 the prudential regulators' rule provides only for
19 transfers from the U.K. to an affiliate in the EU or
20 the U.S.; whereas, the CFTC rule will provide for
21 transfers between any margin affiliate, wherever

1 located.

2 Staff recommends the Commission issue the
3 interim final rule, rather than the rule proposal,
4 given the short time until the Brexit deadline and
5 potential for market disruption.

6 Thank you for your attention. We would be
7 happy to discuss any questions you have.

8 CHAIRMAN GIANCARLO: Does that conclude your
9 presentation?

10 MR. CHACHKIN: Yes.

11 CHAIRMAN GIANCARLO: Thank you very much.

12 To begin our discussion and consideration of
13 this rulemaking, I would like to now entertain a motion
14 to adopt the Division of Swap Dealer and Intermediary
15 Oversight's interim final rule.

16 COMMISSIONER QUINTENZ: So moved.

17 COMMISSIONER BEHNAM: Second.

18 CHAIRMAN GIANCARLO: Thank you.

19 The motion is now before us. Commissioners
20 may question the presenters. I have no questions. I
21 invite Commissioner Quintenz.

1 COMMISSIONER QUINTENZ: Thank you, Mr.
2 Chairman. Again, thank you to the staff for your hard
3 work on this.

4 I just had one question as a point of
5 clarification. Is it accurate that the interim final
6 rule provides relief from margin requirements for an
7 uncleared legacy swap transferred to a counterparty
8 outside of the U.K. only if a no-deal Brexit occurs?
9 In other words, if such a transfer were to occur in the
10 absence of a no-deal Brexit, then would the
11 counterparties to that legacy swap be required to
12 margin the swap in accordance with CFTC regulations?

13 MR. CHACHKIN: Yes. The interim final rule
14 only provides relief in a no-deal Brexit scenario. So
15 if there is not a no-deal Brexit, a transfer of swap to
16 a new counterparty would constitute a new swap. And
17 that would be in scope for the margin requirements to
18 the CFTC margin rule.

19 COMMISSIONER QUINTENZ: Okay. Thank you very
20 much.

21 I have no further questions, Mr. Chairman.

1 CHAIRMAN GIANCARLO: Commissioner Behnam?

2 COMMISSIONER BEHNAM: Thank you, Mr.

3 Chairman. And thank you, staff, for your work on this.

4 One quick question. The prudential

5 regulators took action similar to this a few weeks ago,

6 I believe. Is that correct?

7 MR. CHACHKIN: Yes.

8 COMMISSIONER BEHNAM: And I think there is a

9 slight difference between the proposal before us today

10 and theirs. And if I am correct -- or correct me if I

11 am wrong, but the interim rule before us today would

12 permit transfers to any margin affiliate, no matter

13 where they are located, so long as it meets certain

14 conditions. In contrast, the prudentials only permit

15 transfers from the U.K. to an affiliate in the U.S. or

16 the EU. Is that correct?

17 MR. CHACHKIN: Yes, that is correct.

18 COMMISSIONER BEHNAM: And then can you just

19 briefly describe the distinction and why we are being a

20 little bit more flexible than the prudentials?

21 MR. CHACHKIN: Sure. So, as you note, the

1 prudential regulators' rule provides only for transfers
2 in the U.K. to an affiliate in the EU or the U.S. ;
3 whereas, the CFTC rule more broadly provides for
4 transfers between any margin affiliate or branch,
5 wherever located.

6 I would note the prudentials asked questions
7 about expanding the relief. And they may do so. So it
8 is not clear, similar to the way that we ask questions,
9 if their rules will be that different when finally
10 becoming applicable.

11 COMMISSIONER BEHNAM: That is fine. I
12 appreciate that.

13 MR. CHACHKIN: Okay. Thank you.

14 COMMISSIONER BEHNAM: Just a brief statement,
15 Mr. Chairman. Absent today's action by the Commission,
16 legacy-uncleared swaps transferred to a affiliate due
17 to a no-deal Brexit could be treated as new swaps and,
18 therefore, fully subject to the CFTC margin rule.
19 Subject to conditions, the interim final rule will
20 maintain the status quo for legacy uncleared swaps with
21 respect to our margin rules for such swaps. I am going

1 to thank staff again for their hard work on this rule,
2 which provides certainty to market participants
3 regarding the impacts of a no-deal Brexit on their
4 legacy swaps. So thanks to you.

5 And, again, thank you, Mr. Chairman, for your
6 leadership on this.

7 CHAIRMAN GIANCARLO: Thank you, Commissioner
8 Behnam.

9 Commissioner Stump?

10 COMMISSIONER STUMP: I have no questions.
11 Thank you all for your efforts. I am very supportive
12 of the interim final rule.

13 CHAIRMAN GIANCARLO: Commissioner Berkovitz?

14 COMMISSIONER BERKOVITZ: Thank you, Mr.
15 Chairman.

16 And thank you, Matt, Frank, and Jake, for
17 your work on this IFR and your responsiveness to the
18 comments and suggestions that I believe have helped
19 improve the IFR that we are voting on today.

20 I just have two questions. And this may be
21 very similar to Commissioner Quintenz's question. The

1 IFR I understand only applies to the legacy swaps that
2 are transferred solely in connection with a no-deal
3 Brexit?

4 MR. CHACHKIN: That is correct.

5 COMMISSIONER BERKOVITZ: And the IFR is not
6 intended to provide parties with an opportunity to
7 renegotiate the economic terms of the legacy swaps. Is
8 that correct?

9 MR. CHACHKIN: That is also correct.

10 COMMISSIONER BERKOVITZ: Thank you very much.

11 MR. CHACHKIN: Thank you.

12 CHAIRMAN GIANCARLO: Commissioner Berkovitz,
13 thank you.

14 Do any Commissioners wish to make a statement
15 on this before we go to a vote? Please proceed.

16 COMMISSIONER BERKOVITZ: Just have a brief
17 statement. I am going to be voting in favor of the IFR
18 for this relief. Although we do not yet know the date
19 of the U.K.'s withdrawal from the EU, the form it will
20 take, or even whether it will take place, market
21 participants worldwide are preparing for Brexit.

1 The Commission is committed to working with
2 our domestic and international partners to facilitate
3 regulatory continuity and provide stability to the
4 derivatives markets if and when Brexit occurs. Today's
5 action is a continuation of that effort. I commend the
6 Chairman and the Commission staff for their efforts to
7 address these and other Brexit-related cross-border
8 issues.

9 I note, in particular, that these actions are
10 all taken pursuant to and are consistent with the
11 existing regulations and guidance in place at the CFTC
12 governing cross-border activities.

13 The IFR will maintain the legacy status of
14 swaps that were executed prior to the relevant
15 compliance dates for the CFTC swap margin rule if those
16 swaps are legally transferred solely as a result of a
17 no-deal Brexit. The transfer of these swaps to
18 affiliates outside the U.K. would be needed so the
19 swaps can continue to be properly serviced under EU
20 law.

21 A no-deal Brexit would be the result of

1 political events beyond the control or anticipation of
2 the parties at the time they first enter into the
3 legacy swaps in question. Under these circumstances,
4 if the CFTC's margin rules were applied, the transfer
5 of these legacy swaps could entail significant
6 expenses, which could impede such transfers. The
7 failure to efficiently and effectively accomplish these
8 transfers could introduce new systemic risks globally.
9 The IFR release makes clear that legacy swap transfers
10 get relief solely if they are undertaken in connection
11 with a no-deal Brexit. The release and the questions
12 and answers make it clear that this IFR does not create
13 an opportunity for the parties to renegotiate the
14 economic terms of legacy swaps. Swaps that are amended
15 or renegotiated other than to the extent permitted by
16 the IFR would still be subject to the CFTC's margin
17 rules. These limitations are important as they prevent
18 abuse of the flexibility provided by the IFR.

19 And, again, I thank the staff and Chairman
20 and my fellow Commissioners.

21 CHAIRMAN GIANCARLO: Thank you, Commissioner

1 Berkovitz. And thank you for your compliments. I do
2 want to go right back to you and to my fellow
3 Commissioners on matters of great importance on the
4 international spectrum. This Commission has spoken
5 with one voice over the last several months in very
6 important matters giving market certainty to market
7 participants and letting overseas counterparts know
8 that when they deal with the CFTC, they deal with an
9 agency that can move properly, directly, and with one
10 voice. I think it has been really a mark of great
11 compliment to our agency, the work we have done with
12 regard to Brexit, with regard to EMIR 2.2, with regard
13 to recognition of overseas regulators. So I thank all
14 of you for your support on these matters.

15 I have no more comment to make on this
16 matter. I think at this time, we will go to a vote.
17 Are Commissioners prepared to vote?

18 (No response.)

19 CHAIRMAN GIANCARLO: Okay. Mr. Kirkpatrick,
20 would you please call the roll call?

21 SECRETARY KIRKPATRICK: The motion now before

1 the Commission is on the adoption of the interim final
2 rule on margin requirements for uncleared swaps for
3 swap dealers and major swap participants in light of
4 Brexit.

5 Commissioner Berkovitz?

6 COMMISSIONER BERKOVITZ: Aye.

7 SECRETARY KIRKPATRICK: Commissioner
8 Berkovitz votes aye.

9 Commissioner Stump?

10 COMMISSIONER STUMP: Aye.

11 SECRETARY KIRKPATRICK: Commissioner Stump
12 votes aye.

13 Commissioner Behnam?

14 COMMISSIONER BEHNAM: Aye.

15 SECRETARY KIRKPATRICK: Commissioner Behnam
16 votes aye.

17 Commissioner Quintenz?

18 COMMISSIONER QUINTENZ: Aye.

19 SECRETARY KIRKPATRICK: Commissioner Quintenz
20 votes aye.

21 Chairman Giancarlo?

1 CHAIRMAN GIANCARLO: Aye.

2 SECRETARY KIRKPATRICK: Chairman Giancarlo
3 votes aye.

4 Mr. Chairman, on this matter, the ayes have
5 five, the no's have zero.

6 CHAIRMAN GIANCARLO: Thank you.

7 At this time, I would like to welcome the
8 following staff for their presentation. Well, let me
9 first thank this staff. Thank you very much. Well
10 done. And now we will welcome to the table Amanda
11 Olear, Matt Kulkin again, Rajal Patel, and Jeffrey
12 Hasterok.

13 And, to begin our discussion and
14 consideration of this rulemaking, I will entertain a
15 motion to adopt the Division of Swap Dealer and
16 Intermediary Oversight's final rule.

17 COMMISSIONER QUINTENZ: So moved.

18 COMMISSIONER BEHNAM: Second.

19 CHAIRMAN GIANCARLO: Thank you. The motion
20 is before us.

21 I would just like to review procedure again.

1 We will do questions. What I would ask Commissioners
2 to do is hold their statements. We will complete the
3 questions. Once there are no further questions, then
4 we will go to statements, if that is all right. Fine.

5 So, Mr. Kulkin, would you have your team give
6 their presentations?

7 MR. KULKIN: Sure. And thank you again, Mr.
8 Chairman. Good morning, Commissioners.

9 The Division of Swap Dealer and Intermediary
10 Oversight recommends amending the swap dealer de
11 minimis exception by adding a new factor to remove from
12 counting towards the \$8 billion threshold swaps entered
13 into by insured depository institutions, or IDIs, in
14 connection with originating loans to customers. This
15 new factor was proposed by the Commission in June 2018
16 and supported by the public comments received. This
17 new factor will give small and mid-sized U.S. banks
18 much needed certainty and clarity related to our swap
19 dealer registration requirements. As a result, these
20 IDIs' commercial end-user loan customers will be able
21 to more easily manage loan-related risk through their

1 existing banking relationships.

2 Before I turn it over to the team to present
3 on the specifics, I want to first recognize Amanda
4 Olear, acting deputy director; Rajal Patel, associate
5 director; and Jeff Hasterok. I would also like to
6 recognize former DSIO deputy director Erik Remmler as
7 well as our Office of the General Counsel colleagues
8 Dan Davis, Carlene Kim, Mark Fajfar, and Paul
9 Schlichting, plus Office of the Chief Economist
10 colleagues Bruce Tuckman, Scott Mixon, and Steve Kane
11 for their significant contributions to today's release.
12 I would like to thank each of your offices and your
13 staffs for providing constructive feedback and
14 suggestions for our recommendations.

15 Amanda, Rajal, and Jeff will now lead the
16 discussion about the adopting release. But I want to
17 remind market participants that the adoption of this
18 new factor does not remove compliance obligations
19 related to certain of the Commission's swap market
20 rules, including our rules related to trade execution,
21 mandatory clearing, and swap data reporting. And IDIs,

1 of course, remain subject to supervision by their
2 primary banking regulator. I will now have Amanda
3 speak a little bit about the specifics of the rule
4 before you.

5 MS. OLEAR: Thank you, Matt.

6 Mr. Chairman and Commissioners, today's
7 adopting release amends the de minimis exception within
8 the swap dealer definition in the Commission's
9 regulations. The adopting release establishes an
10 additional factor in the de minimis threshold
11 determination for swaps entered into by IDIs in
12 connection with loans to customers. This amendment
13 originates with the definition of swap dealer in
14 section 1a(49) of the Commodity Exchange Act, which
15 explains what constitutes swap dealing activity and
16 also provides that the Commission shall promulgate
17 regulations to establish factors to exempt from
18 designation as a swap dealer an entity engaged in a de
19 minimis quantity of swap dealing.

20 CEA section 1a(49) further provides that in
21 no event shall an IDI be considered to be a swap dealer

1 to the extent it offers to enter into a swap with a
2 customer in connection with originating a loan with
3 that customer.

4 A number of policy considerations inform
5 today's amendment. As the Commission has stated, the
6 primary goals of regulating swap dealers include
7 reducing systemic risk; increasing counterparty
8 protections; and increasing market efficiency,
9 orderliness, and transparency. However, consistent
10 with Congressional intent, an appropriately calibrated
11 de minimis exception has the potential to advance other
12 interests, including increasing efficiency, allowing
13 limited swap dealing in connection with other client
14 services, encouraging new participants to enter the
15 market, and focusing regulatory resources.

16 Before handing this over to Jeff and Rajal, I
17 also want to highlight that we consulted with the SEC
18 and the prudential regulators in the preparation of
19 this release. In particular, we shared a number of
20 drafts of this adopting release and responded to
21 comments received.

1 I will now turn to Jeff to discuss the data
2 used to inform this rule amendment.

3 MR. HASTEROK: Thank you, Amanda.

4 Mr. Chairman and Commissioners, good morning.
5 This rule amendment relied on a detailed analysis of
6 2017 transaction data reported to swap data
7 repositories per Part 45 of Commission regulations and
8 demonstrates empirically driven policy-making.

9 Consistent with the June 2018 NPRM and the
10 November 2018 adopting release, we designed our
11 analysis to examine the swaps activity of likely swap
12 dealers. The analysis included a calculation of the
13 aggregate gross notional amount, or AGNA for short, of
14 swaps activity across interest rate, credit default,
15 foreign exchange, and equity swaps. We focused the
16 analysis for this adopting release on the swaps
17 activity of IDIs that may be most likely to be affected
18 by today's amendments, especially those IDIs with AGNAs
19 near now the finalized \$8 billion de minimis threshold.
20 We specifically evaluated IDIs with AGNAs of swap
21 activity within a variety of activity ranges, but

1 especially within the range of \$1 to \$50 billion. We
2 focused on the range of \$1 to \$50 billion because our
3 analysis showed that IDIs with larger AGNAs, outside of
4 this range, appear to have a significant amount of
5 activity unrelated to loan origination swaps. We
6 believe that today's amendments are most likely to
7 allow nonregistered, small and midsized IDIs with lower
8 AGNAs to expand their loan-related swap dealing
9 activities with their lending clients without incurring
10 the costs of swap dealer registration.

11 For transactions between two entities not
12 currently registered as swap dealers, but with at least
13 one of the entities being an IDI, the total AGNA was
14 approximately \$6-and-a-half billion to \$16-and-a-half
15 billion per range, depending on the range between \$1
16 and \$50 billion analyzed. So in percentage terms, in
17 relation to the market-wide total of \$221 trillion, the
18 \$6-and-a-half to \$16-and-a-half billion is equivalent
19 to 0.003 to 0.007 percent; so, in other words, less
20 than a basis point of the overall market. These totals
21 are indicative of a de minimis quantity of swaps

1 activity.

2 I will now turn to Rajal to discuss the
3 rationale for and the structure of this rule amendment.

4 MR. PATEL: Thank you, Jeff.

5 Mr. Chairman and Commissioners, I will start
6 by emphasizing that the policy objectives underlying
7 the de minimis exception, which Amanda discussed
8 earlier, are designed to encourage participation in
9 competition by allowing persons to engage in a de
10 minimis amount of dealing without incurring the costs
11 of registration and associated swap dealer regulations.

12 As additional background, in May 2012, the
13 commissions adopted, pursuant to the CEA, an IDI loan-
14 related swap exclusion in paragraph 5 of the swap
15 dealer definition, which I will refer to as the "IDI
16 swap dealing exclusion." However, we understand that
17 certain IDIs are restricting entering into loan-related
18 swaps because of the potential that these swaps would
19 not be eligible for the IDI swap dealing exclusion and,
20 therefore, would be counted towards an IDI's de minimis
21 threshold, potentially requiring the IDI to register as

1 a swap dealer and incur registration-related costs.

2 Market participants indicated that conditions
3 of this exclusion are not clear in all circumstances or
4 are too restrictive for the intended purpose. The
5 restrictions on loan-related swaps by IDIs may result
6 in reduced availability of swaps for the loan customers
7 of these IDIs, particularly small and mid-sized banks,
8 potentially hampering the ability of end-user borrowers
9 to enter into hedges in connection with their loans.

10 We believe that the IDI de minimis provision
11 advances the policy objectives of the de minimis
12 exception by allowing some IDIs to provide additional
13 hedging swaps to customers in connection with
14 originating loans. The amendment should also
15 facilitate an appropriate level of swap dealing in
16 connection with other client services and may encourage
17 more IDIs to participate in the swap market. Greater
18 availability of loan-related swaps may also improve the
19 ability of customers to hedge their loan-related
20 exposure.

21 I will now return our presentation back to

1 Matt.

2 MR. KULKIN: Mr. Chairman, that concludes the
3 staff presentation. We would be happy to answer your
4 questions.

5 CHAIRMAN GIANCARLO: Thank you, Mr. Kulkin.
6 Well presented.

7 We will now go to questions. And I will open
8 the floor up and beginning with Mr. Quintenz for
9 questions.

10 COMMISSIONER QUINTENZ: Thank you, Mr.
11 Chairman.

12 Amanda, could you reread the language in the
13 statute that discusses the de minimis exception?

14 MS. OLEAR: Thank you.

15 "The Commission shall exempt from designation
16 as a swap dealer an entity that engages in a de minimis
17 quantity of swap dealing in connection with
18 transactions with or on behalf of its customers. The
19 Commission shall promulgate regulations to establish
20 factors with respect to the making of this
21 determination to exempt."

1 COMMISSIONER QUINTENZ: Thank you.

2 So it appears to me -- in fact, I don't think
3 it appears. I think it is quite obvious and self-
4 evident that Congress constructed that language to
5 apply to an entity, not to the total universe of swaps
6 that fell outside of a registration regime. Said
7 differently, the language that discusses a de minimis
8 exception talks about the quantity of swaps that an
9 entity can deal in as being a de minimis quantity of
10 swaps in relation to the market, as opposed to the
11 amount of swaps being de minimis that would exist
12 outside of the registered swap dealer marketplace. Is
13 that correct?

14 MR. KULKIN: So, Commissioner, if I
15 understand your question, you are correct that the
16 recommendation before you today is a factor related to
17 the calculation of whether or not an entity exceeds the
18 de minimis threshold. We are talking about a factor in
19 that calculation, which is set forth by 1a(49)(D),
20 which Amanda just read. That is separate and apart
21 from 1a(49)(A), which talks about what is a swap dealer

1 and what a swap dealing -- this is solely a factor
2 related to what counts towards the threshold.

3 COMMISSIONER QUINTENZ: Right. A threshold
4 that applies to an entity, not a --

5 MR. KULKIN: Yes.

6 COMMISSIONER QUINTENZ: -- threshold that
7 tells us what size of the market we have to regulate.

8 MR. KULKIN: That is correct.

9 COMMISSIONER QUINTENZ: Okay. Mr. Kulkin,
10 you know that I have severe problems with notional
11 value being used as a metric or a threshold generally
12 and in this circumstance specifically, but if we are
13 going to compare apples to apples, could you remind
14 me -- and I think, Jeff, you had mentioned -- of the
15 total size of the swaps market that we are looking at?

16 MR. HASTEROK: \$221 trillion, sir.

17 COMMISSIONER QUINTENZ: Trillion, with a t?

18 MR. HASTEROK: With a t.

19 COMMISSIONER QUINTENZ: And our de minimis
20 threshold is a billion with a b?

21 MR. HASTEROK: Yes, with a b, 8 with a b.

1 COMMISSIONER QUINTENZ: So, even if we were
2 to adjust the size of the notional value of the swaps
3 market by the construct that our Office of the Chief
4 Economist has used and developed called entity-netted
5 notionals, where you net a long and a short exposure
6 only by entity and not generally and you adjust it for
7 duration, the size of the market that they are looking
8 at, which only consists of rates, FX, and sovereign and
9 corporate CDS, narrows down to 34 trillion, with a t.

10 By my calculations, an \$8 billion threshold
11 is only 0.0002 of that number. That is two ten-
12 thousandths. Does that sound like a de minimis amount
13 to you?

14 MR. KULKIN: Yes, Commissioner.

15 COMMISSIONER QUINTENZ: Does five ten-
16 thousandths sound like a de minimis amount to you?

17 MR. KULKIN: Yes, Commissioner.

18 COMMISSIONER QUINTENZ: I could go forward
19 asking more questions about what, really, a de minimis
20 amount is, but I think right now, we are in safe
21 territory and we have a lot of room to still remain in

1 safe territory.

2 Getting back to the scope of the number of
3 registered entities that we have, when prior CFTC
4 Chairman Gary Gensler testified in his nomination
5 hearing back in 2009, he stated that he thought 15 to
6 20 large financial institutions would ultimately
7 qualify for any new swaps regulatory regime. Matt, do
8 you know off the top of your head how many registered
9 swap dealers we currently have?

10 MR. KULKIN: We have 103 registered swap
11 dealers.

12 COMMISSIONER QUINTENZ: One hundred and
13 three?

14 MR. KULKIN: Yes, Commissioner.

15 COMMISSIONER QUINTENZ: Not 15?

16 MR. KULKIN: No, Commissioner.

17 COMMISSIONER QUINTENZ: One hundred and
18 three?

19 MR. KULKIN: Yes, Commissioner.

20 COMMISSIONER QUINTENZ: That is a 500 percent
21 margin of error. Following the adoption of this

1 amendment, how likely do you think that it is that any
2 of those 103 will de-register?

3 MR. HASTEROK: Thank you for your question,
4 Commissioner. We certainly focused our analysis on the
5 lower end of activity because we believe that that
6 range and that cohort is most likely to be affected by
7 this, but we certainly did not exclusively examine that
8 cohort. We looked at larger cohorts. We don't believe
9 that the largest money center banks are likely to de-
10 register because of this amendment. We feel that it is
11 most applicable to the smaller IDIs that are well-
12 positioned to take advantage of this and use it in
13 conjunction with their lending clients.

14 COMMISSIONER QUINTENZ: Okay. So in terms of
15 likelihood, would it be more likely that 50 swap
16 dealers de-register or a handful?

17 MR. KULKIN: So, Commissioner, based on the
18 analysis we performed, in this \$1 to \$50 billion AGNA
19 cohort, as Jeff calls it, there are 2 registered IDI
20 swap dealers. So we can't speculate as to who might or
21 might not de-register, but we are talking about a few,

1 at most.

2 COMMISSIONER QUINTENZ: Out of 103?

3 MR. KULKIN: Yes, Commissioner.

4 COMMISSIONER QUINTENZ: So that is still
5 about a 500 percent margin of error.

6 Matt, I wanted to talk to you quickly about
7 end-users. Have you heard any anecdotes of small
8 businesses who are customers of smaller and mid-sized
9 regional banks that have chosen not to hedge their risk
10 because their primary banking relationship fear is
11 getting caught up in the swap dealer registration
12 regime?

13 MR. KULKIN: So, Commissioner, what we
14 learned in the comment process is that there are end-
15 user borrower customers of insured depository
16 institutions where the IDI is monitoring its swap
17 dealing activity to make sure it stays below the \$8
18 billion so as to avoid registration and the swap dealer
19 regulations.

20 What we understand to be the case is that
21 some customers, if they are unable to get a swap to

1 hedge interest rate risk, commodity risk, currency risk
2 from their lending institution, they either have to
3 find a registered swap dealer to provide that risk and
4 it would be separate from the lending operation. You
5 would now have two commercial relationships or what is
6 often the case, as we understand it, is that the
7 borrower simply goes unhedged on their risk.

8 COMMISSIONER QUINTENZ: Is the second
9 actually occurring?

10 MR. KULKIN: We believe it is occurring, yes.

11 COMMISSIONER QUINTENZ: So today's amendments
12 would help assist those borrowers to not go unhedged,
13 keep their primary relationship?

14 MR. KULKIN: Yes, that is our understanding.
15 Especially most of the swaps activity that we are
16 talking about today is interest rate swaps activity
17 tied to a borrower having a floating-rate loan over
18 three to five years and wanting to lock in a fixed rate
19 to ensure from a cash flow perspective that they can
20 meet their obligations to their lender.

21 COMMISSIONER QUINTENZ: Okay. Thank you.

1 I just wanted to quickly finish with some
2 discussion of how you coordinated with the SEC. You
3 did coordinate with the SEC?

4 MR. KULKIN: Yes, Commissioner, and the
5 Federal Reserve, FDIC, and OCC.

6 COMMISSIONER QUINTENZ: Thank you.

7 Does the final rule affect the amount of
8 security-based swaps that were to be included by an IDI
9 in determining whether that IDI has to register?

10 MR. KULKIN: No, Commissioner. The
11 recommendations before you only deal with swap dealing
12 activity.

13 COMMISSIONER QUINTENZ: Okay. Thank you very
14 much. I have no more questions, Mr. Chairman.

15 CHAIRMAN GIANCARLO: Commissioner Behnam?

16 COMMISSIONER BEHNAM: Thanks, Mr. Chairman.
17 And thanks to the entire team for your presentation and
18 your work.

19 I will just take a step back to 2012, when
20 the Commission originally drafted a rule for swap
21 dealer definition. And we did, in fact, do it jointly

1 with the SEC. And that determination was made based
2 off of section 712 of Dodd-Frank, which in my mind is
3 fairly clear. So I won't repeat it. But now that we
4 are making a determination that IDI can be a de minimis
5 exclusion factor, can you help me walk through the sort
6 of evolution of thought from the 2012 decision, which I
7 think was fairly unanimous within the Commission, and
8 how we are now constructing a legal theory that is
9 based on a single word of a de minimis exception
10 language?

11 MR. KULKIN: Sure, Commissioner. Thank you.

12 So I won't repeat 1a(49)(D) because Amanda
13 read it a moment ago, but I would like to go back to
14 the joint adopting release that you referenced with the
15 SEC. And at that time, the commissions, plural, said,
16 "A joint" -- I will back up. In our adopting release
17 today, we write, the Commission writes, that "The
18 Commission continues to believe that, as stated in the
19 NPRM, quote -- and this is now citing the joint SEC-
20 CFTC definitional release -- "A joint rulemaking with
21 the SEC is not required with respect to de minimis

1 exception-related factors."

2 The adopting release today then says, "As
3 stated in the [swap dealer] definition adopting release
4 that was jointly adopted with the SEC" -- and, again,
5 this is a quote -- "CEA section 1a(49)(D)," with a
6 parenthetical reference to the corresponding provision
7 in the Exchange Act, "particularly states that the
8 Commission," meaning the CFTC because it is in the
9 singular, "may exempt de minimis dealers and promulgate
10 related regulations. We [] do not interpret the joint
11 rulemaking provisions of section 712(d) of the Dodd-
12 Frank Act to require joint rulemaking here, because
13 such an interpretation would read the term 'Commission'
14 out of 1a(49)(D) [and the corresponding Exchange Act
15 section], which themselves were added by the Dodd-Frank
16 Act."

17 Now going back to today's adopting release,
18 "Accordingly, the Commission believes that although the
19 definition of 'swap dealer' requires joint action, the
20 statute allows for the CFTC and the SEC to individually
21 determine the threshold and factors that exempt de

1 minimis swap dealers and security-based swap dealers
2 pursuant to section 1a(49)(D) and section 3a(71)(D) of
3 the Securities Exchange Act of 1934, respectively.”

4 COMMISSIONER BEHNAM: So, I mean, that
5 argument presumes, though, that the de minimis
6 exception goes beyond quantity, that the Commission
7 should consider characteristics of swap dealing
8 activities when it is interpreting 1a(49)(D), as
9 opposed to just purely in my mind what de minimis in
10 any context means, which is value, size, quantity.

11 MR. KULKIN: So, if I understand your
12 question, the joint adopting release also makes clear
13 that the Commission should set forth an objective
14 qualitative standard that is self-executing. And so
15 something that can be applied efficiently and with
16 predictability. It does not require a hard numerical
17 quantity and even the joint rulemaking from 2012 that
18 you just referenced indicates in that release that
19 alternative approaches might be appropriate. And so
20 this is an example of an alternative approach.

21 COMMISSIONER BEHNAM: So let's

1 hypothetically -- I am going to hypothetically for a
2 moment say I agree with you in terms of your
3 interpretation of subpart D. And we have had a lot of
4 conversations about Congressional intent. Why do you
5 think Congress would have created a specific carveout,
6 for lack of a better word, in 1a(49)(A) for IDIs, even
7 though it then would have intended for IDIs to be a
8 factor within 1a(49)(D)? To me, that seems a little
9 bit duplicitous. You are going to create an IDI
10 exemption in one place. Why would you then want it to
11 be a factor at a separate place?

12 MR. KULKIN: So, Commissioner, the factor
13 provision in 1a(49)(D) recognizes that there will be
14 instances where a de minimis quantity of dealing should
15 be permitted without swap dealer regulation or
16 registration. And these are the policy goals that
17 Amanda and Rajal just talked about in terms of
18 ancillary dealing in connection with another business,
19 new entrants into the market. And so when we look at
20 the factor requirement for a de minimis exception and
21 we run numbers and find ourselves looking at activity

1 that measures 0.003 to 0.007 percent of the
2 marketplace, we find that to be wholly within a de
3 minimis quantity, as set forth by the statute. And so
4 that is how we arrive at the recommendations for today.

5 COMMISSIONER BEHNAM: So the next step in
6 that sort of I think argument is I look at
7 1a(49)(A) -- and I appreciate the points about the size
8 of the market, the very small size of the market, and
9 the economic analysis. That all makes very clear sense
10 to me. But I do believe it needed or needs to be
11 bucketed in the de minimis quantity silo, for lack of a
12 better word. The issue I have is when I look at
13 1a(49)(A), Congress pretty clearly says that swaps
14 activity related to loan origination from an IDI is not
15 swap dealing. So -- and quoting it, "However, in no
16 event shall an IDI be considered a swap dealer." So by
17 creating a factor within the exception for an IDI, in
18 my mind, you are essentially forcing IDI-related swaps
19 activity into swap dealing when, in fact, Congress
20 intended for IDI-related swaps activity not to be
21 considered.

1 So, then, let's consider the compliance
2 officer at this regional bank who has to now I think
3 create two spreadsheets: one for its pure IDI loan-
4 associated swaps activity, which, again, Congress
5 intended it not to be swap dealing activity; and then
6 it is going to have -- and because the rule -- and I
7 agree with this, that the original rule from 2012 is
8 too restrictive, that there are certainly things that
9 we need to change as a Commission to reflect on what
10 was made in an unintentional way or was just made,
11 drafted poorly. But now they are going to have two
12 spreadsheets. And one is going to be the you are
13 excluded from swap dealer definition because it is an
14 IDI-related loan, but for the loans that don't fit
15 nicely into that 2012 rule, we are going to go into the
16 second spreadsheet and have a de minimis exemption.
17 And it is going to be considered swap dealing. But we
18 are just going to exempt it because it is de minimis.

19 MR. KULKIN: Commissioner, so, first, I would
20 point out that these IDIs are highly regulated
21 entities. We didn't receive anything in the public

1 comments from any of the IDIs suggesting that they
2 found this confusing or that they were worried about
3 the regulatory burden for calculating, as you suggest,
4 potentially two separate tracks. In fact, we are
5 pretty certain that they are currently monitoring their
6 IDI dealing activity. We expect them to continue to do
7 that, but the comments that we received didn't touch on
8 any potential confusion or overbearing burden. In
9 fact, we received the opposite. We received comments
10 that indicated that they would find this much more
11 easily implementable and easier to comply with and
12 then, in fact, have the added benefit of increased,
13 providing increased, hedging to their current customer
14 base.

15 COMMISSIONER BEHNAM: I appreciate that
16 response, but that seems like an obvious response from
17 a constituent in this certain circumstance. This won't
18 be a question, but I do think that it should be
19 emphasized it clearly states in the statute that IDI-
20 related swaps activity is not swap dealing. And
21 creating this proposal is essentially putting IDI-

1 related swaps activity into a de minimis exception and
2 de facto making it swap dealing, which is in my mind
3 contradictory to what Congress intended.

4 You mentioned the prudential regulators. And
5 I appreciate that. We have obviously market
6 participants who have multiple regulators. Can you
7 talk a little bit about how the oversight of our sister
8 regulators will sort of effectuate itself in what kind
9 of agreements or what kind of information do we know
10 about what the prudentials will do with respect to
11 these IDIs and these swaps activities?

12 MR. KULKIN: Sure. So I will start with the
13 Commission's component. And nothing in today's
14 recommendation impacts Part 43 or Part 45, the trade
15 reporting obligations, that market participants have to
16 trade repositories. But, as you noted, IDIs remain
17 subject to their primary bank regulator's supervision,
18 which means they have to conduct their business in a
19 manner consistent with safety and soundness principles.
20 They will continue to have examiners who evaluate their
21 risk management programs, look at their operations,

1 assess their capital adequacy, look at
2 collateralization. And then, of course, the banks will
3 report their swaps and call reports and other financial
4 reports that allow bank regulators to ensure that the
5 swaps activity and the loan activity are correlated.
6 And then we will still have the benefit of our SDR
7 reporting to look at positions.

8 COMMISSIONER BEHNAM: So notwithstanding the
9 SDR reporting, which you just mentioned, how are we
10 going to sort of monitor compliance with this
11 provision, both a de minimis provision and then, I
12 guess, the swap dealing exclusion as well?

13 MR. KULKIN: So it has always been the case
14 that the burden for calculating registration thresholds
15 and registering as a swap dealer is a burden that rests
16 with the registrant. And that will remain true after
17 today's rule.

18 COMMISSIONER BEHNAM: There was a 2016 final
19 staff report on the dealer de minimis exception
20 that -- and this is going back a little bit to my
21 earlier line of questioning, but I don't want to

1 oversee it here. The final report argued that the
2 scope of the IDI exclusion should be expanded because
3 of needed flexibility. As late as early 2018, which I
4 think is when I first started to engage with your
5 staff, the Commission noted that the constraints of the
6 statutory language limited to addressing IDI concerns
7 regarding the exclusion through joint action with the
8 SEC. And tell me if I am wrong, but this sort of
9 evolution of thought from as late as March of 2018 to
10 the NPRM in June of 2018 changed. What may have
11 changed?

12 And then, Amanda, I know you talked about
13 this. And, Matt, you may have, too, but a little bit
14 more on the discussions with the SEC and the prus about
15 this and what kind of conversations were had.

16 MR. KULKIN: So I will answer the second part
17 first. So since the June 2018 NPRM was published, we
18 have had a series of conversations with the SEC, the
19 Fed, FDIC, and OCC. We have shared a number of drafts
20 going back to the November adopting release setting the
21 de minimis threshold at \$8 billion through today. We

1 have shared a number of drafts of our rulemakings with
2 the SEC. We have received feedback from the SEC. We
3 have held calls with the SEC. And I don't mean just
4 the SEC but the FDIC, the Fed, and the OCC as well. We
5 have spoken with the staff at each of those agencies.
6 We have received feedback on our proposals as they have
7 evolved. And we have had a very good working
8 relationship with each of the agencies.

9 COMMISSIONER BEHNAM: And last question, the
10 Chairman mentioned the study that is being conducted
11 through the Office of the Chief Economist. And I think
12 thinking about that study and then also the language in
13 the proposal today that does not sort of cap swap
14 dealing activity, what was the logic in having the
15 study punted three years, as opposed to, you know,
16 creating some level of caps for activity reasonable,
17 right, like, again, going to my earlier point,
18 appreciating the fact that the 2012 rulemaking probably
19 is not in the right spot or where it needs to be in
20 order to incentivize our banking community to lend to
21 end-users, but why not set a cap at a reasonable level,

1 conduct a study, and then reconsider based on data we
2 receive over time?

3 MR. KULKIN: So, Commissioner, I think the
4 answer is we don't know what a reasonable level should
5 be or could be. It is not something we contemplated in
6 the NPRM. It's not something we've studied. It's not
7 something we've received comment on, but we hope
8 working with our colleagues in the Chief Economist's
9 Office, that once we have a better sense of what would
10 be reasonable if, in fact, a cap is appropriate, we can
11 then come back with those recommendations.

12 COMMISSIONER BEHNAM: I would just say, you
13 know, it might be hard, but, again, when I read the
14 language and we did not discuss about this, the
15 statute, specifically 1a(49)(A), "In no event shall an
16 IDI be considered to be a swap dealer to the extent it
17 offers to enter into a swap with a customer in
18 connection with originating a loan with that customer."
19 We did not talk about the permissible language, but it
20 is pretty clear to me. And I know we deal with this
21 issue in many contexts within this agency. Things are

1 not apples to apples. And we have to be principles-
2 based when it is appropriate. We have historically
3 been a principles-based regulator. But when Congress
4 expressly states in connection with originating a loan
5 with that customer, I don't think it should be very
6 hard to determine a cap on the amount of swaps activity
7 an IDI can enter into. And then that in my mind is
8 still a little bit flexible from the express language
9 of the statute, and then we can go afterwards, after a
10 thoughtful study, and say, "You know what? Maybe we
11 need to amend it at some point."

12 But, anyhow, thanks again to all of you for
13 your time, your patience, your hard work. I appreciate
14 it, of course. And thank you, Mr. Chairman.

15 CHAIRMAN GIANCARLO: Thank you.

16 Commissioner Stump, questions?

17 COMMISSIONER STUMP: I don't have any
18 questions with regard to the legal interpretation of
19 the statute, but just a point of clarification that you
20 can either dispute or validate. In this context, we
21 are talking about borrowers with insured depository

1 institutions. We are primarily talking about swaps of
2 a nature of interest rate swaps, commodity swaps, and
3 currency swaps. None of those are security-based
4 swaps. Is that accurate?

5 MR. KULKIN: That is correct, Commissioner.

6 COMMISSIONER STUMP: Therefore, none of them
7 are within the jurisdiction of the SEC, correct?

8 MR. KULKIN: That is correct.

9 COMMISSIONER STUMP: Thank you.

10 CHAIRMAN GIANCARLO: Thank you.

11 Commissioner Berkovitz, questions?

12 COMMISSIONER BERKOVITZ: Thank you, Mr.

13 Chairman. And I thank the staff again. So I want to
14 talk about something, clarify or just confirm the scope
15 of the final release and what type of swaps the release
16 permits. This deals with speculative or investment
17 swaps.

18 Let me quote from the preamble. The preamble
19 states, "If a borrower enters into a swap with an IDI
20 for speculative or investment purposes, the final rules
21 would not allow the IDI to exclude such swap from its

1 de minimis threshold calculation." So it seems clear
2 from the preamble that a swap that itself is entered
3 into for speculative or investment purposes, even
4 otherwise meeting the conditions, would not qualify.
5 Is that correct?

6 MR. KULKIN: That is correct.

7 COMMISSIONER BERKOVITZ: Thank you. I think
8 that is an excellent clarification. And I think that
9 makes the rule stronger. I very much support that.

10 So let me turn now to the nature of the swap,
11 to the nature of the customer. The provision permits
12 IDIs to enter into loan-related swaps with customers.
13 So let's say a hedge fund is engaged in speculative or
14 investment activities with respect to energy futures.
15 An IDI provides the hedge fund with a loan for those
16 activities. The IDI then enters into a swap to hedge
17 the risks incidental to the hedge fund's business.
18 Would that swap by the IDI be eligible for treatment
19 under the IDI de minimis provision?

20 MR. KULKIN: So, Commissioner, if I
21 understand the hypothetical you presented, you have an

1 insured depository institution entering into a loan
2 with a customer that has met its risk or credit
3 controls, it has met its safety and soundness
4 obligations with bank regulatory oversight, and it has
5 received probably some sort of collateral from the
6 borrower in order to establish the loan. That is sort
7 of the first step.

8 The second step would be that the loan would
9 need -- I'm sorry -- the swap would need to be in
10 connection with the loan. And so we look at things in
11 the adopting release like the rate, the asset, the
12 liability, other terms. We make sure that the swap
13 term does not extend past the duration of the loan. We
14 make sure in the adopting release, the swap needs to be
15 permitted under the right underwriting criteria. It
16 needs to be commercially appropriate. And all of those
17 pieces are designed to provide flexibility to the IDI,
18 again subject to prudential oversight, to facilitate
19 additional end-user hedging.

20 Again, you read the sentence from the
21 adopting release. If it is a speculative or investment

1 swap, that would not qualify for the exception.

2 COMMISSIONER BERKOVITZ: It is possible,
3 then, assuming the conditions that you laid out that
4 the IDI might have in terms of its operations, but it
5 is possible that a hedge fund would be a customer under
6 the rule?

7 MR. KULKIN: Again, if it meets all of those
8 criteria. And then the last thing I would point out is
9 in the regulation, there is a prohibition on sham loans
10 that are entered into for the purpose of allowing
11 speculative swaps activity.

12 COMMISSIONER BERKOVITZ: Okay. Thank you.

13 So it could be with a hedge fund assuming it
14 meets various conditions. Let me ask about limits in
15 the final rule. Subsection E in the current IDI
16 exclusion limits the aggregate notional amount of all
17 swaps entered into by a customer in connection with the
18 financial terms of the loan to be "not more than the
19 aggregate principal amount of the loan outstanding."
20 So my question is, does the final rule before us today
21 similarly cap the aggregate notional amount of swaps

1 entered into by a customer with an IDI to the
2 outstanding principal amount of the loan?

3 MR. PATEL: No it does not, but, as we have
4 discussed, we are going to conduct a study to assess
5 whether caps make sense.

6 COMMISSIONER BERKOVITZ: Okay. Thank you.

7 Let me ask a question. I know you have
8 talked about the data, and there is a table in the
9 final rule indicating various estimates of notional
10 activity by entities that may engage in these types of
11 swaps. And I think, Jeff, you had talked about the
12 data in that table 1. It comes from SDR data for 2017.
13 Is that correct?

14 MR. HASTEROK: That is correct. It is the
15 same data we used for the June 2018 NPRM and the
16 November 2018 adopting release when we set the de
17 minimis threshold to \$8 billion, Commissioner.

18 COMMISSIONER BERKOVITZ: Okay. Thank you.

19 And so does the final release contain any
20 data or estimate regarding the quantity of swap dealing
21 that unregistered IDIs might undertake in the future as

1 a result of the rule being adopted? Did you project
2 how much might increase as a result of the particular
3 changes?

4 MR. HASTEROK: Commissioner, no, the proposal
5 does not include such hypothesis.

6 COMMISSIONER BERKOVITZ: Okay. Thank you.

7 And another topic is the entities that would
8 potentially benefit. And, again, you talked about the
9 size of the various notional amounts of unregistered
10 dealers that there currently are who may be dealing in
11 IDI-excluded swaps. And the final release in several
12 places talks about small and midsized IDI. The final
13 rule says it would, "be beneficial primarily to small
14 and midsized IDIs." Does the final rule limit it to
15 small and midsized IDIs?

16 MR. KULKIN: No, Commissioner, it doesn't,
17 but when you correlate the dealing activity with the
18 size of the banks, we found that there is a connection
19 between lower AGNA levels and the size of the
20 depository institution.

21 COMMISSIONER BERKOVITZ: Thank you. Those

1 are all the questions I have.

2 CHAIRMAN GIANCARLO: I thank you.

3 Are there any further questions before we go
4 to statements?

5 (No response.)

6 CHAIRMAN GIANCARLO: No. So we will go to
7 Commissioners' statements. We will begin with
8 Commissioner Quintenz.

9 COMMISSIONER QUINTENZ: Thank you, Mr.
10 Chairman. And thank you again to the staff for your
11 hard work and your continued work on this topic.

12 I support today's final rule to amend the de
13 minimis exception to swap dealer registration to
14 include IDI loan-related factors. The amendments
15 facilitate IDIs' provision of hedging swaps to end-user
16 borrowers trying to mitigate the myriad of risks that
17 they face -- interest rate risks, currency risks,
18 commodity price risks facing their businesses every day
19 that relate to their loans. When Congress adopted the
20 definition of a swap dealer in the Commodity Exchange
21 Act, it recognized that small and medium-sized banks

1 play a crucial role in providing credit and risk
2 mitigation services to end-user borrowers.

3 In my view, today's amendments further
4 Congressional intent, better align the Commission's
5 swap dealer registration framework with the risk
6 mitigation needs of bank customers, and more accurately
7 reflect current market practices between IDIs and their
8 borrowers. By amending the de minimis exception from
9 swap dealer registration, the Commission is providing
10 small and regional banks with greater flexibility to
11 serve their customers' needs and greater regulatory
12 clarity about the types of de minimis swap dealing
13 activity they can engage in without triggering
14 registration.

15 I am also pleased, as we heard this morning,
16 that these amendments were completed with the full
17 coordination of the Securities and Exchange Commission
18 as well as with prudential regulators. These
19 amendments are absolutely essential to helping
20 rationalize the de minimis threshold and ensure that
21 end-users and Main Street businesses don't suffer from

1 an overly prescriptive, punitive, and far-reaching
2 regulatory regime that was initially meant to target
3 the largest financial entities.

4 The no-action letter recently issued by
5 Commission staff to a Main Street bank this past August
6 demonstrates the need to remedy the inadequacies of the
7 current de minimis regime to ensure that legitimate
8 client hedging activity is not artificially
9 constrained. Since that time, the Commission has
10 received similar requests for no-action relief from
11 other banks in order to meet their customers' needs.
12 These needs are especially acute in the light of a
13 rising interest rate environment. Many businesses who
14 have received credit over the last several years may
15 not have felt the need to hedge their interest rates
16 given that rates were low and stable. However, in a
17 rising rate environment, banks, IDIs should have the
18 flexibility to offer their customers hedging services
19 on those prior extensions of credit without
20 artificially falling into the swap dealer registration
21 regime.

1 I believe that today's final rule
2 appropriately addresses these concerns. However, as I
3 have said repeatedly and as I was saying this morning,
4 today's amendments are but one of many improvements to
5 the de minimis threshold contemplated by the June 2018
6 reproposal, which must be finalized.

7 As I have said repeatedly, notional value is
8 a poor measure of risk, a poor measure of activity, and
9 a meaningless measure of risk. Identifying a de
10 minimis quantity of a meaningless number still yields a
11 meaningless number. Therefore, by itself, notional
12 value is a deficient registration metric by which to
13 impose large policy costs and achieve substantial
14 policy objectives. But, yet, it is one that the CFTC
15 has repeatedly and inexplicably embraced in this
16 context.

17 I am encouraged that following the Chairman's
18 specific and public direction in November of 2018, for
19 which I am very grateful to him for his leadership,
20 staff continues to study both additional adjustments to
21 notional value that would better account for

1 differences between various products and alternative
2 risk-based registration metrics that could better align
3 the criteria of a de minimis threshold with the costs
4 of swap dealer regulation, particularly the largest
5 cost tied to mitigating systemic risk, such as capital
6 margin requirements, and to a better sense as to the
7 true size of the marketplace. The results of the staff
8 report will be critical to the Commission's continued
9 consideration of a more risk-sensitive swap dealer
10 registration threshold.

11 On that note, I would like to commend DSIO
12 staff for their hard work on finalizing these
13 amendments and their ongoing tireless efforts to
14 produce data analyses that the Commission can use to
15 further inform necessary improvements to our swap
16 dealer registration regime.

17 Thank you again for your time. I look
18 forward to supporting the rule. Thank you, Mr.
19 Chairman.

20 CHAIRMAN GIANCARLO: Commissioner Behnam?

21 COMMISSIONER BEHNAM: Thanks, Mr. Chairman.

1 There is no doubt in my mind that we have to
2 make changes to the IDI rule. As I said before, we are
3 now almost seven years past. And we have learned from
4 the market. We have learned from internal data that
5 the original drafting was not done appropriately. And
6 that is fine. You know, we are not going to get
7 everything right on the first time. I think this has
8 been a point of your leadership. And I think we have
9 done quite a few very, very important rule changes to
10 improve our rule set.

11 Also, listening to my fellow Commissioners,
12 there is no doubt in my mind that I think we agree on a
13 lot of things. There is a lot in this proposal that I
14 think is important, that is well-done, that is based on
15 data and facts and based on communications with our
16 stakeholders. And it keeps in mind what the purpose of
17 Dodd-Frank and Title VII was, as well.

18 But in my mind, as I have said before in my
19 opening statement and through my line of questioning, I
20 just don't think this is the way to do it. We need to
21 adhere to Congressional intent. And we need to adhere

1 in my mind to what is pretty clear statutory language
2 about how we go about amending the swap dealer
3 definition. And, despite your statements regarding
4 coordination, which I appreciate and, again, appreciate
5 all of the work of the staff with the SEC and with our
6 prudential regulators, coordination does not supplant
7 harmonization and ultimately joint rulemaking, which is
8 in my mind the way this needed to be done.

9 You know, I came here. I gave prepared
10 remarks a month or two after I was sworn in. And I
11 made it a point to very clearly express my desire to
12 work with the Chairman and find common-sense solutions
13 to unintended consequences and rules that were not
14 implemented appropriately, both because of mistake
15 potentially, but also because a new regime of swaps
16 regulation after the Dodd-Frank Act. And, as much as I
17 regret having to vote "no" today and telling the
18 stakeholders who care about this, these issues, I am
19 going to have to take the "no" vote because we have to
20 adhere to process. We have to adhere to the statute
21 that binds us. And we can't take shortcuts because it

1 is bad precedent and it becomes a slippery slope.

2 We had a number of no-action letter requests
3 coming in after the proposal from June. And I think
4 there were certainly alternate ways to approach this.
5 We could have granted no-action relief, conducted a
6 study, and aimed to do this in an appropriate way with
7 the SEC.

8 So, despite all of that, Mr. Chairman, thank
9 you for your leadership. Thank you to all of you for
10 the hard work you do. I appreciate your time. And I
11 appreciate you answering my questions. But I will be
12 taking a "no" vote today.

13 Thank you.

14 CHAIRMAN GIANCARLO: Thank you, Commissioner.
15 Commissioner Stump?

16 COMMISSIONER STUMP: I will be very brief. I
17 just wanted to remind everyone that the only other open
18 meeting I have participated in was the one in which we
19 finalized the de minimis threshold. And I suggested at
20 that time that all of my votes would be cast from a
21 view of how well we were doing. And I gave us a grade

1 of incomplete on de minimis, not because I didn't
2 support finalizing the threshold, but I just felt there
3 was more work to be done. Having worked within the
4 confines of this statute for a very long time, it is
5 quite confusing. It is complicated. And it provides
6 this agency a fair bit of discretion.

7 So I am very pleased that you all have worked
8 very hard and spent many hours with our colleagues not
9 only at the SEC, with the other regulators to ensure
10 that I can finally give us a complete grade on this
11 particular provision. And I will be voting in favor of
12 the provision.

13 CHAIRMAN GIANCARLO: Thank you.

14 Commissioner Berkovitz?

15 COMMISSIONER BERKOVITZ: Thank you, Mr.
16 Chairman.

17 I respectfully dissent from today's
18 rulemaking, amending the de minimis exception to the
19 swap dealer definition. The rule before us today
20 violates both substantive and procedural provisions of
21 the Dodd-Frank Act. Voltaire famously commented, "This

1 body, which calls itself the Holy Roman Empire, was in
2 no way holy, nor Roman, nor an empire." Likewise, the
3 final rule that is called "the IDI de minimis
4 provision" in the final release, is neither an IDI loan
5 provision, nor is it a de minimis provision.

6 The final rule is purportedly being adopted
7 under the Dodd-Frank provision, requiring that "The
8 Commission shall exempt from designation as a swap
9 dealer an entity that engages in" -- and here are the
10 key words, "a de minimis quantity of swap dealing" --
11 "a de minimis quantity of swap dealing."

12 But the final rule allows an IDI to exclude
13 an unlimited quantity of loan-related dealing swaps.
14 Under no circumstances can an unlimited quantity of
15 swaps be a de minimis quantity. The final rule allows
16 IDIs to avoid swap dealer registration and regulation,
17 despite engaging in unlimited swap dealing. This can't
18 possibly be what Congress intended with the de minimis
19 clause.

20 Turning to the rule's procedural failures,
21 the final rule evades the directive from Congress that

1 the term "swap dealer" be defined only through joint
2 rulemaking with the Securities and Exchange Commission.
3 In 2012, the CFTC and SEC jointly defined the term
4 "swap dealer." As directed by Congress, the two
5 commissions created the quantitative de minimis
6 exception in paragraph 4 of the definition. The
7 Commission separately created the IDI swap dealing
8 exclusion in paragraph 5. The IDI exclusion
9 effectively prevents swap dealer registration from
10 interfering with the core loan origination business of
11 banks. The final rule rewrites this IDI exclusion but
12 stuffs the rewrite into the de minimis provision.

13 In the proposed rule, the Commission
14 virtually acknowledged that this drafting hocus pocus
15 is being undertaken to circumvent the will of Congress
16 that swap dealing be defined only through joint
17 rulemakings with the SEC. To call an unlimited amount
18 of swap dealing de minimis takes a lot of chutzpah in
19 my view.

20 In November 2018, the Commission unanimously
21 approved setting the de minimis quantity threshold at

1 \$8 billion. The \$8 billion threshold applied to all
2 types of dealing swaps. Now, less than four months
3 later, the final rule removes this threshold limitation
4 for IDIs entering into loan-related swaps. This is not
5 what the Congress intended with an exemption from
6 registration for "a de minimis quantity of swap
7 dealing."

8 The preamble claims that the amount of swap
9 dealing permitted by the final rule is de minimis
10 because it is "sufficiently modest in light of the
11 total size, concentration, and other attributes of the
12 applicable markets." This rationale is deficient.
13 First, the Commission has presented no analysis of an
14 estimated amount of excluded swap dealing under the
15 final rule.

16 The Commission has presented data only on the
17 current amount of IDI loan-related activity under the
18 IDI swap dealing exclusion. In the absence of any
19 estimate of the total amount of swap dealing that will
20 be excluded under the final rule, the Commission has no
21 basis to conclude that this excluded amount is

1 "sufficiently modest."

2 To address the problem, the preamble states
3 that the Commission's Office of the Chief Economist
4 will, within three years, study whether the IDI swaps
5 should be capped to qualify for the de minimis
6 provision. This approach is like opening the barn door
7 today and three years later studying where the cows
8 went.

9 Second, this approach is inconsistent with
10 the approach taken just four months ago in the de
11 minimis threshold rulemaking. At that time, the
12 Commission determined that registration was warranted
13 if an entity engages in \$8 billion or more of swap
14 dealing activity.

15 The new de minimis provision of this final
16 rule will allow an entity to engage in more than \$8
17 billion of swap dealing and not register. The quote,
18 "sufficiently modest rationale," proffered in today's
19 rulemaking, including the numerical computations, that
20 \$8 billion compared to \$221 trillion, is small -- that
21 particular rationale was rejected in the prior de

1 minimis rulemaking when suggested by commenters who
2 advocated raising the level to \$20, \$50, or \$100
3 billion.

4 Let's now consider some of the unregulated
5 dealing that the final rule allows. Paragraph
6 (C)(2)(i) of the final rule includes swaps related to a
7 financial term of the loan. The clause is essentially
8 the same as the corresponding clause in the IDI swap
9 dealing exclusion. But, importantly, the IDI swap
10 dealing exclusion limits all swaps executed in
11 connected with the financial terms of the loan to a
12 notional amount equal to 100 percent of the loan
13 amount.

14 Under the final rule in what is supposed to
15 be a de minimis provision, there was no cap on such
16 swaps, either for a single loan or all such loans in
17 the aggregate. Under paragraph (C)(2)(i), an IDI could
18 enter into an interest rate swap, a currency swap, and
19 a swap that changes the duration of the loan or any
20 other type of swap related to the terms of the loan.
21 And each one could be greater than the amount of the

1 loan.

2 Turning to paragraph (C)(2)(ii), the final
3 rule has made the required connection to the loan much
4 more tenuous. It allows IDIs to enter into swaps that
5 are "permissible" under the IDIs' underwriting
6 criteria, as opposed to "required," which is the
7 condition under the current IDI exclusion, and
8 commercially reasonable to hedge risks incidental to
9 the borrowers' business.

10 As an example, an IDI can make a 10-year, \$10
11 million loan to an airline and then 2 years later enter
12 into a jet fuel swap with a notional value of \$5
13 billion or an IDI bank could enter into a loan with an
14 oil company for the construction of a new office
15 building and then enter into an unlimited amount of
16 commodity swaps to hedge the oil company's entire
17 portfolio of exploration, production, and sales. These
18 swaps would not count toward the IDIs' de minimis
19 threshold. This cannot possibly be the de minimis
20 quantity of swap dealing intended by Congress.

21 The preamble claims that the amendment

1 supports a clearer and more streamlined application of
2 the de minimis exception and provides greater clarity
3 as to which swaps need to be counted. The final rule
4 does the opposite. The final rule replaces one IDI
5 provision with two: an IDI swap dealing exclusion, in
6 which swaps are not considered dealing; and a new IDI
7 de minimis provision, which treats the swaps as dealing
8 but then says the swap that meets various criteria
9 isn't counted towards the de minimis threshold. Is
10 that more clear or streamlined? I don't think so.

11 In another respect, the final rule may be a
12 wolf in sheep's clothing. In the guise of helping
13 small and midsized banks, it opens the door for larger
14 banks to undertake an unlimited notional amount of swap
15 dealing with loan customers without registering as swap
16 dealers.

17 The handful of larger banks that will most
18 benefit, large regional or some national commercial
19 banks, compete with smaller banks for loan business
20 from Main Street companies. The larger institutions
21 have the resources to develop expansive swap dealing

1 capabilities. The smaller banks, typically operating
2 in one state, do not have the resources to do so. The
3 end result could be less competition in the local
4 lending markets. This is not what Congress intended
5 with the IDI exclusion.

6 In addition to its various substantive
7 infirmities, the Commission's vote today violates a
8 mandate from Congress to define or amend the term "swap
9 dealer" jointly with the SEC. Under section 712 of the
10 Dodd-Frank Act, "Defining or amending the term 'swap
11 dealer' must be accomplished through joint rulemaking
12 by the CFTC with the SEC."

13 And, as discussed, in 2012, the CFTC and SEC
14 jointly adopted the CFTC regulation, further defining
15 the term "swap dealer." The agencies adopted the de
16 minimis exception as paragraph 4 and separately the IDI
17 swap dealing exclusion as paragraph 5. Today, the
18 Commission majority is making changes to the IDI swap
19 dealing exclusion, which must be done jointly, and
20 jamming them into the de minimis exception. This is an
21 evasion of the joint rulemaking requirement mandated by

1 Congress.

2 A comparison of the final rule text with that
3 of paragraph 5, which is the IDI swap dealing
4 exclusion, as well as the Commission's own words
5 describing this provision, confirms that it really is
6 an amendment to the IDI swap dealing exclusion under
7 another name. The preamble to the final rule declares
8 that "Any swap that meets the requirements for the IDI
9 swap dealing exclusion would also meet the requirements
10 of the IDI de minimis provision."

11 In the proposed rule, the Commission stated,
12 "Rather than proposing to revise the scope of activity
13 that constitutes swap dealing, the Commission is
14 proposing to amend paragraph 4 of the SD definition,
15 which addresses the de minimis exception." The
16 Commission then went on to say in the proposal, "The
17 IDI de minimis provision would have requirements that
18 are similar to the IDI swap dealing exclusion but would
19 encompass a broader scope of loan-related swaps."
20 Calling it a "de minimis provision" does not alter its
21 essential nature as an exclusion for IDI loan-related

1 swaps. An exclusion for IDI loan-related swaps must be
2 done through joint rulemaking.

3 Let me just add that experience has shown
4 that some of the conditions I believe -- I agree some
5 of the conditions in the IDI swap dealing exclusion may
6 be too restrictive. I am not opposed to reasonable
7 incremental changes to the current IDI swap dealing
8 exclusion if the changes serve the public policy goals
9 and are adopted in a manner set forth by Congress, but
10 this is not what the rule before us today does.

11 Following the rule of law is critical to
12 maintaining a robust, safe, and integrated financial
13 regulatory system that inspires confidence for both
14 market participants and the public at large. The
15 United States' reputation as a rule-of-law nation is
16 part of what makes our markets so attractive around the
17 world.

18 The rule of law applies no less to us as
19 regulators than the persons we regulate. The rule
20 adopted by the Commission today is inconsistent with
21 the requirements of the Commodity Exchange Act for the

1 regulation of swap dealers and violates the Dodd-Frank
2 Act as to the process for amending those regulations.
3 I, therefore, dissent.

4 Thank you.

5 CHAIRMAN GIANCARLO: Thank you, Commissioner.

6 We have had a good discussion this morning
7 about legal authority, statutory interpretation, and
8 joint rulemaking. They are not unimportant concerns,
9 raised in good faith and seriousness and intelligence
10 by my colleagues. And I thank them.

11 We have also discussed how this proposal will
12 spare small and midsized banks from certain derivatives
13 requirements. That is true. And that indeed is
14 important for America's regional banks. But I suggest
15 to you that this proposal is far more important than
16 all of those concerns. This proposal will enable
17 small- and medium-sized commercial borrowers --
18 manufacturers, homebuilders, agricultural cooperatives,
19 community hospitals, and small municipalities to
20 conduct prudent business risk management, necessary
21 risk management that has been constricted under the

1 current rule. Let me explain.

2 I recently telephoned senior executives of
3 several regional banks to hear about the commercial
4 lending and swaps hedging practices. One bank
5 executive serving clients in the Mid-Atlantic explained
6 that his bank was the only bank service provider to
7 most of his small- and medium-sized business clients.
8 If his regional bank could not offer these smaller
9 businesses a fixed interest rate swap to hedge their
10 floating-rate loan borrowing, then these borrowers had
11 no means to hedge their exposure to rising interest
12 rates on their loans.

13 Another executive with a Southeastern bank
14 explained that regulatory limitations on his bank's
15 ability to offer swap hedging facilities to small- and
16 medium-sized borrowers meant that they remained exposed
17 to rising interest rates, putting them at risk of
18 having to curtail operations or lay off workers if
19 rates rose. Here is the point. The current situation
20 is pushing risk down into the real economy of jobs and
21 livelihoods, rather than mitigating risk to the

1 economy, as derivative market reforms were intended in
2 the first place.

3 Another executive with a bank headquartered
4 in Ohio said that greater regulatory flexibility would
5 allow his bank to be there for its clients, not only in
6 good times but in bad times of greater interest rate
7 volatility. It would allow his bank to provide
8 properly hedged lending, support good jobs, healthy
9 communities, and safe retirements in towns throughout
10 the Midwest.

11 I specifically asked each of these executives
12 if they would engage in more swaps dealing to compete
13 with Wall Street if this rule went through, and they
14 all laughed. Each of them said they had no intention
15 whatsoever to engage in that type of swaps dealing or
16 speculate in swaps. They said that their prudential
17 bank regulators would never allow them to do that. And
18 they made it clear that their intention was to use
19 swaps to mitigate the risk of floating-rate commercial
20 loans used to invest in their local communities -- and
21 nothing else.

1 And these conversations made clear to me that
2 today's proposed rulemaking is about much more
3 than -- as important as they are, of legal
4 technicalities, Congressional intent, joint rulemaking,
5 or even relief for small- and medium-sized banks. It
6 is not about the banks. It is about the people that
7 borrow money from them. It is about allowing America's
8 small business borrowers and job creators to conduct
9 prudent business risk management. It is about
10 investment in local communities and the real economy.
11 And it is about increasing prosperity and employing our
12 fellow Americans. And for me, things just don't get
13 more important than that.

14 Thank you very much. Are Commissioners
15 prepared to vote?

16 (No response.)

17 CHAIRMAN GIANCARLO: If so, Mr. Kirkpatrick,
18 would you take the roll?

19 SECRETARY KIRKPATRICK: The motion now before
20 the Commission is on the adoption of the final rule on
21 the de minimis exception to the swap dealer definition

1 for swaps entered into by insured depository
2 institutions in connection with loans to customers.

3 Commissioner Berkovitz?

4 COMMISSIONER BERKOVITZ: No.

5 SECRETARY KIRKPATRICK: Commissioner

6 Berkovitz votes no.

7 Commissioner Stump?

8 COMMISSIONER STUMP: Aye.

9 SECRETARY KIRKPATRICK: Commissioner Stump

10 votes aye.

11 Commissioner Behnam?

12 COMMISSIONER BEHNAM: No.

13 SECRETARY KIRKPATRICK: Commissioner Behnam

14 votes no.

15 Commissioner Quintenz?

16 COMMISSIONER QUINTENZ: Aye.

17 SECRETARY KIRKPATRICK: Commissioner Quintenz

18 votes aye.

19 Chairman Giancarlo?

20 CHAIRMAN GIANCARLO: Aye.

21 SECRETARY KIRKPATRICK: Chairman Giancarlo

1 votes aye.

2 Mr. Chairman, on this matter, the ayes have
3 three, the no's have two.

4 CHAIRMAN GIANCARLO: Thank you, Mr.
5 Kirkpatrick. Thank you, staff from DSIO.

6 Thank you, all participants in this meeting,
7 either here in the room or on the phone. And thank
8 you, my fellow Commissioners, for bringing to all of
9 these matters thoughtfulness, intelligence, clarity.
10 And it is remarkable how we continue to work together,
11 not always agreeing but in a respectful and a decent
12 tone, which I think our Americans, fellow Americans,
13 expect from us.

14 Well, thank you very much. With that, the
15 meeting will come to an end.

16 (Whereupon, at 11:45 a.m., the meeting was
17 adjourned.)

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