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COMMODITY FUTURES TRADING COMMISSION

17 CFR Part 1

Order Establishing a New De Minimis Threshold Phase-In Termination Date

AGENCY: Commodity Futures Trading Commission.

ACTION: Order.

SUMMARY: The Commodity Futures Trading Commission ("Commission" or "CFTC") is issuing an order ("Order"), pursuant to the Commission regulation establishing the de minimis exception to the swap dealer definition, to establish December 31, 2019 as the new de minimis threshold phase-in termination date.

DATES: Issued by the Commission on October 26, 2017.

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SUPPLEMENTARY INFORMATION:

I. Background

The Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act”)1 directed the CFTC and the U.S. Securities and Exchange Commission to jointly further define the term “swap dealer” and to include therein a de minimis exception.2 The CFTC’s further definition of swap dealer is provided in § 1.3(ggg).3 The de minimis exception therein provides that a person shall not be deemed to be a swap dealer unless its swap dealing activity exceeds an aggregate gross notional amount threshold of $3 billion (measured over the prior 12-month period), subject to a phase-in period during which the gross notional amount threshold is set at $8 billion.4 Absent further action by the Commission, the phase-in period is scheduled to terminate on December 31, 2018, at which time the de minimis threshold would decrease to $3 billion.5

When § 1.3(ggg) was adopted, establishing the $3 billion de minimis exception, the Commission explained that there was little swap dealing data available that could be used to guide it in setting a threshold level. The Commission expected that the implementation of swap data reporting may enable reassessment of the de minimis exception.6 Accordingly, in § 1.3(ggg), the Commission directed CFTC staff to issue a report, after a specified period of time, on topics relating to the de minimis exception “as appropriate, based on the availability of data and information.”7 Section 1.3(ggg) further provides that after giving due consideration to the report and any associated public comment, the Commission may by order establish a termination date for the phase-in period or propose through rulemaking modifications to the de minimis exception.8 Staff issued for public comment the Swap Dealer De Minimis Exception Preliminary Report on November 18, 2015 (“Preliminary Report”).9 After consideration of the public comments received, and further data analysis, staff issued the Swap Dealer De Minimis Exception Final Staff Report10 on August 15, 2016 (“Final Report,” and together with the Preliminary Report, the “Staff Reports”). The Staff Reports analyzed the available swap data in conjunction with relevant policy considerations to assess alternative de minimis threshold levels and other potential changes to the de minimis exception. The Staff Reports noted that the swap market data available, while much improved since § 1.3(ggg) was first adopted, was still somewhat limited in providing detailed information for assessing appropriate changes to the de minimis exception. For example, notional amounts could only be analyzed for the interest rate and credit default swap asset classes because, at the time, sufficient reliable notional data was not available for the other asset classes. As a further example, some of the data analyzed for the Staff Reports had significant quality issues. One of the “key issues” identified in the Final Report for Commission consideration was whether to delay reduction of the de minimis threshold to allow efforts to improve data quality to progress so that the Commission could better determine the appropriate de minimis threshold.11

In October 2016, the Commission issued an order, pursuant to § 1.3(ggg)(4)(ii)(C)(1), establishing December 31, 2018 as the de minimis threshold phase-in termination date, thereby extending the original phase-in period by one year (“October 2016 Order”).12 In the order, the Commission stated that the phase-in period extension provides additional time for further information to become available to more effectively reassess the de minimis exception.13 Given the twelve month lookback for calculating the swap dealing notional amount, a firm may need to start tracking its swap dealing activity on January 1, 2018 to determine whether its dealing activity would require it to register when the phase-in period ends on December 31, 2018.

5 Order Establishing De Minimis Threshold Phase-In Termination Date, 81 FR 71605, 71607 (Oct. 18, 2016).
6 See 77 FR at 30634, 30640.
7 See 17 CFR 1.3(ggg)(4)(ii)(B).
8 See 17 CFR 1.3(ggg)(4)(ii)(C).
II. New Phase-In Termination Date

As contemplated by the October 2016 Order, significant strides are being made in updating, improving, and reassessing the swap dealer definition, which will impact the swap data analysis currently underway.

Accordingly, the Commission believes that it is prudent to extend the phase-in period by one year. This extension will provide additional time for Commission staff to conduct data analysis regarding the de minimis exception, give market participants further clarity regarding when they will need to begin preparing for a change, if any, to the de minimis exception, and provide additional time for new Commission staff to become better apprised of issues relevant to this topic.

III. Conclusion and Order

For the reasons discussed above, and pursuant to its authority under § 1.3(ggg)(4)(i), the Commission is establishing December 31, 2019 as the new termination date for the de minimis threshold phase-in period. The Commission notes that prior to the termination of the phase-in period, the Commission plans to take further action regarding the de minimis threshold.

IV. Related Matters

A. Paperwork Reduction Act

The Paperwork Reduction Act ("PRA") imposes certain requirements on Federal agencies in connection with their conducting or sponsoring any collection of information as defined by the PRA. This Order does not impose any new recordkeeping or information collection requirements, or other collections of information that require approval of the Office of Management and Budget under the PRA.

B. Cost-Benefit Considerations

Section 15(a) of the Commodity Exchange Act ("CEA") requires the Commission to consider the costs and benefits of its actions before promulgating a regulation under the CEA or issuing certain orders. Section 15(a) further specifies that the costs and benefits shall be evaluated in light of five broad areas of market and public concern: (i) Protection of market participants and the public; (ii) efficiency, competitiveness, and financial integrity of futures markets; (iii) price discovery; (iv) sound risk management practices; and (v) other public interest considerations. In this section, the Commission considers the costs and benefits resulting from its determinations with respect to the Section 15(a) factors.
The Commission also considers policy objectives furthered by a *de minimis* exception, which include regulatory certainty, allowing limited ancillary dealing, encouraging new participants to enter the swap dealing market, and regulatory efficiency.  

Generally, the higher the *de minimis* threshold, the greater the number of entities that are able to engage in dealing activity without being required to register, which could increase competition and liquidity in the swap market. In addition, because competitive markets may be more efficient, a higher *de minimis* threshold might improve swap market efficiency. Further, the Commission notes that it has been suggested that a higher threshold could allow the Commission to expend its resources on entities with larger swap dealing activities warranting more oversight. An alternative view is that the *de minimis* threshold should be set based on policy independent of consideration of the Commission’s resources.

Extending the phase-in period by one year will delay realization of the policy benefits associated with the $3 billion *de minimis* threshold, but will also extend the policy benefits associated with a higher *de minimis* threshold. The additional time to adjust to the $3 billion *de minimis* threshold also would potentially increase regulatory certainty for some market participants. Given that the *de minimis* exception is subject to a 12-month look-back, extending the phase-in period to December 31, 2019 would allow entities that would potentially have to register as swap dealers additional time to adjust their activities and prepare for the compliance obligations related to swap dealer registration.

3. Section 15(a)  

Section 15(a) of the CEA requires the Commission to consider the effects of its actions in light of the following five factors. This Order will delay the potential costs and benefits discussed below by one year.

(i) Protection of Market Participants and the Public

Providing regulatory protections for swap counterparties who may be less experienced or knowledgeable about the swap products offered by swap dealers (particularly end-users who use swaps for hedging or investment purposes) is a fundamental policy goal advanced by the regulation of swap dealers. The Commission recognizes that the $3 billion *de minimis* threshold may result in more entities being required to register as swap dealers compared to an $8 billion threshold, thereby extending counterparty protections to a greater number of market participants. Further, swap dealer regulation is intended to reduce systemic risk in the swap market because registered swap dealers are subject to a broad range of requirements, including, *inter alia*, requirements applicable to internal and external business conduct standards, reporting and recordkeeping, risk management, posting and collecting margin, and chief compliance officer designation and responsibilities. Pursuant to the Dodd-Frank Act, the Commission has proposed or adopted regulations for swap dealers—including margin and risk management requirements—designed to mitigate the potential systemic risk inherent in the swap market. Therefore, the Commission recognizes that a lower *de minimis* threshold may result in more entities being required to register as swap dealers, thereby potentially further reducing systemic risk.

(ii) Efficiency, Competitiveness, and Financial Integrity of Markets

Other goals of swap dealer regulation are swap market transparency, orderliness, and efficiency. These benefits are achieved through regulations requiring, for example, swap dealers to keep trading records and report trades, provide counterparty disclosures about swap risks and pricing, and undertake portfolio reconciliation and compression exercises. Accordingly, the Commission notes that a lower *de minimis* threshold may have a positive effect on the efficiency and integrity of the markets.

However, the Commission also recognizes that the efficiency and competitiveness of the swap market may be negatively impacted if the *de minimis* threshold is set too low by potentially increasing barriers to entry that may stifle competition and reduce swap market efficiency. For example, if entities choose to reduce or cease their swap dealing activities so that they would not need to register if the *de minimis* threshold decreases to $3 billion, the number or availability of market makers for swaps may be reduced, which could lead to increased costs for potential counterparties and end-users through having to pay higher spreads when undertaking swap transactions or foregoing the benefits of engaging in certain swap transactions that they would otherwise have undertaken.

(iii) Price Discovery

The Commission preliminarily believes that a $3 billion *de minimis* threshold may discourage participation of new swap dealers and ancillary dealing. If there are fewer entities engaged in dealing, there may be a negative effect on price discovery.

(iv) Sound Risk Management

The Commission notes that a $3 billion *de minimis* threshold could lead to better risk management practices because a greater number of entities would be required by regulation to: (i) Develop and implement detailed risk management programs; (ii) adhere to business conduct standards that reduce operational and other risks; and (iii) satisfy margin requirements for uncleared swaps.

(v) Other Public Interest Considerations

The Commission has not identified any other public purpose considerations for this Order.

C. Antitrust Considerations

Section 15(b) of the CEA requires the Commission to take into consideration the public interest to be protected by the antitrust laws and endeavor to take the least anticompetitive means of achieving the objectives of the CEA, in issuing any order or adopting any Commission rule or regulation. The Commission does not anticipate that the Order discussed herein will result in anti-competitive behavior.

V. Order

In light of the foregoing, it is ordered, pursuant to the Commission’s authority under § 1.3(ggg)(4)(ii)(C)(1), that the *de minimis* threshold phase-in termination date shall be December 31, 2019.

The Commission retains the authority to condition further, modify, suspend, terminate, or otherwise restrict any of the terms of the Order provided herein, in its discretion.

Issued in Washington, DC, on October 26, 2017, by the Commission.

Christopher J. Kirkpatrick,  
Secretary of the Commission.

Appendix to Order Establishing a New *De Minimis* Threshold Phase-In Termination Date—Commission Voting Summary

On this matter, Chairman Giancarlo and Commissioner Quintenz voted in the affirmative. Commissioner Behnam voted in the negative.

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