
CFTC Proposes Three Rule Changes

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Summary: The Commodity Futures Trading Commission (“CFTC” or “Commission”) on June 4, 2018, in its first public meeting of the year, proposed three rule changes to the rules implementing the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (“Dodd-Frank Act”). The proposed changes would: 1) make permanent the \$8 billion notional value threshold for Swap Dealer registration; 2) amend the Volcker Rule; and 3) delete the indemnification requirement for U.S. and non-U.S. regulators who obtain information from Swap Data Repositories (“SDR”). These proposals generally are intended to provide greater certainty to the markets, apply a risk-based approach to certain swaps-related rules, and to streamline burdensome aspects of existing rules. They do not, however, constitute a departure from the broad outlines of the rules implementing the Dodd-Frank Act.

Summary and implications:

De Minimis Threshold. The proposal to make permanent the \$8 billion notional value threshold for Swap Dealer (“SD”) registration, in addition to providing greater certainty to the market, will likely encourage smaller firms that offer to enter swaps with counterparties in certain niche markets or with particular categories of customers to continue to provide liquidity to those markets and customers. If the Commission does not adopt this proposed rule as final, and consequently the de minimis threshold automatically decreases to \$3 billion notional value, it is likely that concentration in the swaps market will increase or that certain products will simply be less available. In addition to making permanent the \$8 billion notional threshold, the proposal will expand the exception for counting toward the threshold swaps to include Insured Depository Institutions (“IDI”) in connection with loans; make clear that hedges of financial commodities do not count toward the dealing threshold; and will exempt swaps entered into as part of a compression exercise from the dealing threshold. The goal of the Commission is to finalize the proposal by year-end.

Volcker Rule. Identical amendments to the Volcker Rule have been proposed by the prudential banking regulators, the Securities and Exchange Commission and the CFTC. Although the CFTC has not yet released the text of the amendments considered during its June 4 meeting, the text of the proposed amendments was released on May 30, 2018 by the banking regulators.¹ The proposed amendments will modulate the compliance requirements depending upon the amount of trading by covered entities, which include IDIs, their holding companies, certain foreign banking

organizations, and their affiliates. The proposed rule would create three regulatory tiers. Most CFTC-regulated Swap Dealers and Futures Commission Merchants (“FCM”) within the scope of the Volcker Rule fall within the highest tier and therefore will experience the least impact from relaxation of the requirements. However, the proposal’s preamble is expected to make clear that a bank-affiliate may clear swaps for others, giving greater certainty to FCMs in connection with their clearing activities. Proposed exclusions from the definition of “covered funds” may provide those entities covered by the Volcker Rule additional opportunities to operate pools or to provide services to funds.

Indemnification of non-U.S. SDRs. The Dodd-Frank Act previously included a provision requiring foreign and domestic regulators to indemnify SDRs and the Commission for any expenses arising from litigation relating to information provided by SDRs. Following a recent change in the Commodity Exchange Act removing that provision, the Commission is proposing to amend its rules to permit the sharing of data held by an SDR pursuant to a confidentiality agreement between a requesting regulator and the Commission. This change is likely to enhance cross-border regulatory cooperation and market surveillance.

The text of the proposed rules is expected to be available shortly.

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1. Available here. WilmerHale will publish a Client Alert devoted to this proposal shortly.
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