



CFTC Order Extends Application of Current De Minimis Threshold Until December 2019

Last week the Commodity Futures Trading Commission (“CFTC”) issued an order (the “De Minimis Order”)¹ that pushes back by one year the date on which the CFTC may lower its swap dealer de minimis threshold, the amount of swap dealing activity in a 12-month period that may require a swap market participant to register as a swap dealer. The De Minimis Order has the effect of preserving the de minimis threshold at its current level, \$8 billion in aggregate gross notional amount, until December 31, 2019. The order means that, at least until the end of 2019, no swap dealing entities will likely be required to register as regulated swap dealers on the basis of dealing activity of less than \$8 billion in notional amount over a 12-month period.

Over the longer run, it remains unclear whether the CFTC will lower the threshold and thus subject a larger number of entities to swap dealer regulation. CFTC regulations provide that, after an initial phase-in period, the de minimis threshold will fall to \$3 billion in aggregate gross notional amount, but they also provide that the CFTC may, after review, propose through its rulemaking process a different de minimis threshold.² The De Minimis Order provides that the end of the phase-in period will be December 31, 2019; a previous CFTC order (the “Previous Order”) provided that the phase-in period would end a year earlier, on December 31, 2018.³

The reasoning of the De Minimis Order is based on practicalities of swap market data, the CFTC’s consideration of possible changes to the de minimis threshold, and the nature of the de minimis threshold itself, which requires the aggregation of notional amounts over a 12-month period. The De Minimis Order notes that the CFTC expects in the near future to have “more detailed data analysis to inform its consideration of the possible modifications to the de minimis exception” but such modifications are not expected to become effective until some point in 2018, when the CFTC expects to complete an amendment of its existing rules relating to the de minimis threshold.⁴

That timing, the De Minimis Order states, coupled with the potential end of the phase-in period on December 31, 2018, as provided in the Previous Order, would create uncertainty for unregistered entities. Market participants would need to start counting their transactions at the beginning of 2018 without knowing the level of the de minimis threshold that would apply after the CFTC’s further consideration of the de minimis threshold. The De Minimis Order expresses the CFTC’s concern that, in view of that uncertainty, some entities might cut back on their dealing activities prior to January 2018 in order not to be required to register, and such “changes in behavior could lead to reduced competition, liquidity, and efficiency in the swap market, which may cause disruptions for the firms and their swap counterparties that might be unnecessary depending on the outcome of the continuing

¹ Order Establishing a New De Minimis Threshold Phase-in Termination Date, Oct. 26, 2017, available [here](#).

² See CFTC Rule 1.3(ggg)(4).

³ Order Establishing De Minimis Threshold Phase-in Termination Date, 81 Fed. Reg. 71605 (Oct. 18, 2016); see also CFTC Rule 1.3(ggg)(4).

⁴ De Minimis Order at 4.

assessment of the de minimis exception.”⁵ Accordingly, the De Minimis Order delays until December 31, 2019 the potential application of a lower de minimis threshold.

In a 2016 report, CFTC staff stated, based on data that the report described as flawed, that if the de minimis threshold were lowered to \$3 billion, dozens of additional entities trading in interest rate swaps and credit default swaps might be required to register as swap dealers, but the lower threshold would potentially result in “insignificant additional regulatory coverage” in terms of notional amounts, swap transactions and additional unique counterparties.⁶

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⁵ *Id.* at 5.

⁶ Swap Dealer De Minimis Exception Final Staff Report, a Report by Staff of the U.S. Commodity Futures Trading Commission Pursuant to Regulation 1.3(ggg), August 15, 2016, at 21, available [here](#).