

Derivatives Alert

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CFTC Proposes Swap Execution Facility Rule Amendments and Seeks Comments on Post-Trade Name Give-Up

On November 5, 2018, the Commodity Futures Trading Commission (CFTC or Commission) held its first open meeting with five commissioners since May 2013. At that meeting, the Commission approved (by a 4-1 vote) proposed amendments to the rules governing swap execution facilities (SEF) and the trade execution requirement (SEF Proposed Rules or Proposal). Chairman Christopher Giancarlo announced his intention to finalize revised SEF rules next year. Commissioner Brian Quintenz fully supported the SEF Proposed Rules. While Commissioners Rostin Behnam and Dawn DeBerry Stump voted for the Proposal, they both expressed some reservations. Commissioner Dan Berkovitz dissented, citing his concern that the SEF Proposed Rules would reduce price transparency and competition in the swaps market.

Given this lively dialogue, industry members have the opportunity through the public comment process to help shape the contours of the ultimate SEF rules. Comments on the SEF Proposed Rules are due 75 days after publication in the Federal Register.¹

The commissioners also unanimously requested public comment — without proposing a rule or advocating a position — on the practice of post-trade name give-up on SEFs for a swap that is executed anonymously on the SEF and is intended to be cleared (the Give-Up Release).² Chairman Giancarlo expressed an open mind regarding the advisability of restrictions on this practice and on what form a rule might take. Comments on the Give-Up Release are due 60 days after publication in the Federal Register.

SEF Proposed Rules

In a detailed release spanning about 700 pages, the CFTC proposed sweeping changes to the SEF rules. The CFTC aims to increase the number of swaps being traded on SEFs: (i) by expanding the number of swap execution platforms that must register as SEFs; (ii) by allowing a SEF to offer any means of execution for any swaps traded on

¹ The CFTC may extend the comment period. Commissioner Behnam, for example, noted that given the complexity and potentially substantial impacts of the Proposal, market participants should be given more than 75 days.

² Under this practice, some SEFs disclose the identity of each swap counterparty to the other after a trade has been matched anonymously on the SEFs.

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the SEF; and (iii) by requiring all swaps that must be cleared under the CFTC's clearing mandate to be executed on a SEF. At the same time, the CFTC proposes to afford a SEF more flexibility to choose which types of market participants may access the SEF's markets and market services.³

More SEF Registrants: The CFTC proposes that the SEF registration requirement apply to: swaps broking entities (such as interdealer brokers) that now facilitate multiple-to-multiple swaps trading that does not occur on SEFs, and trading systems or platforms that aggregate one-to-many systems (typically known as "single dealer platforms").⁴ The CFTC intends that many more swaps execution venues would have to register as SEFs under the Proposal.

More Allowed Means of Execution on a SEF: The CFTC would permit *any* swap executed on a SEF to be traded through *any* means of interstate commerce, including voice brokers. This would replace the current requirement that swaps subject to the trade execution mandate be traded through a central limit order book or by sending a request for quote to at least three unaffiliated market participants.

More Swaps Subject to the Trade Execution Mandate: The CFTC proposes to withdraw the current "made available to trade" determination⁵ for swaps to become subject to the trade execution mandate, a process that requires CFTC review and has rarely been utilized.⁶ Instead, any swap that is subject to the clearing mandate would automatically be required to be traded on a SEF or designated contract market (DCM) if the swap is listed for trading on at least one CFTC-registered SEF or DCM (except for certain commercial end user swaps, certain inter-affiliate swaps and certain package trades).⁷

More Segregation of Market Participants: The CFTC proposes to reinterpret the statutory impartial access requirement by allowing a SEF to elect which types of market participants may access the SEF's market and services. Among other things, the SEF's access criteria must be "transparent, fair and non-discriminatory and applied to all or similarly situated market participants."

For example, under the Proposal, a SEF could permit only dealers to access the SEF's markets and services — thereby excluding all end users (who would not be considered similarly situated to dealers).⁸

Less Prearranged Trading and Pre-Execution Communications: The CFTC proposes to facilitate a broader range of swaps trading activity on SEFs and promote pretrade price transparency by limiting prearranged trading and pre-execution communications that occur outside of SEFs. To that end, the Proposal would eliminate the following three exceptions to the prohibition on prearranged trading: (i) the time delay requirement under CFTC Regulation 37.9(b); (ii) block trades permitted by Part 43; and (iii) "other types of transactions" as certified or approved by the CFTC under Part 40. The Proposal would also prohibit pre-execution communications from occurring away from the SEF for swaps subject to the trade execution mandate (except for swaps that are part of certain package transactions⁹).

Give-Up Release

The CFTC requested comments regarding the use of the "post-trade name give-up" practice on SEFs for swaps that are intended to be cleared.¹⁰ Under this practice, the identity of each swap counterparty is disclosed to the other after a trade has been matched anonymously on a SEF.

Advocates of the practice claim that it helps liquidity providers allocate their bank capital more precisely and mitigates liquidity risk and the risk that traders will game the market.¹¹ Critics view the practice as anti-competitive, hindering liquidity and lacking credible justification; they also believe it can expose a market participant's trading intentions, strategies, positions or other sensitive information to competitors or dealers.¹²

The Give-Up Release asks whether — and how — the CFTC should limit the practice of post-trade name give-up and whether it should be subject to the choice of customers or SEFs.

³ In addition to the proposed changes highlighted here, the SEF Proposed Rules would introduce requirements for SEF trading specialists and amend regulations on straight-through processing requirements, swap documentation, SEF's self-regulatory oversight authority, product guidance, and financial resource and chief compliance officer requirements.

⁴ See CFTC Proposed Regulation 37.3(a); SEF Proposed Rules at 41-55.

⁵ See CFTC Regulation 37.10.

⁶ See CEA Section 2(h)(8), 7 U.S.C. § 2(h)(8). The trade execution mandate requires counterparties to execute swap transactions subject to the clearing requirement on a DCM or SEF, unless no DCM or SEF "makes the swap available to trade."

⁷ See Proposed CFTC Part 36.

⁸ See SEF Proposed Rules at 183.

⁹ The CFTC would consider a transaction to be a package transaction if (i) execution of each component transaction is contingent upon the execution of all other component transactions, and (ii) all component transactions are priced or quoted together as part of one economic transaction with simultaneous or near-simultaneous execution of all components. In order to qualify for an exception from the prohibition on pre-execution communications away from a SEF, a package transaction must include at least one component transaction that is not subject to the trade execution mandate.

¹⁰ See Give-Up Release at 1-3.

¹¹ See *id.* at 6-7.

¹² See *id.* at 5-6.