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PROPOSED SWAP DEALER CAPITAL REQUIREMENTS: THE CFTC'S LONG PATH TOWARDS A MORE RISK-BASED APPROACH

The CFTC's proposed minimum capital requirements for SDs and MSPs have met with criticism from industry on a variety of points. These include the use of initial margin, reliance on notional amounts, effect on smaller SDs, inconsistency with the SEC's proposed capital rule, duplicative reviews for internal capital models, and reporting requirements. The author reviews the proposal and the criticism, and suggests that, with likely improvements, the final rules will better achieve risk-based outcomes for required minimum capital.

By Katherine Cooper *

On December 2, 2016, the Commodity Futures Trading Commission re-proposed regulations setting capital requirements for swap dealers (“SDs”) and major swap participants (“MSPs”).¹ The Commission first proposed capital requirements for SDs and MSPs in 2011.² In light of the fact that the ensuing global consultation on the appropriate margin levels for uncleared swaps was ongoing, the Commission chose not to act on its 2011 proposed capital requirements.³ In December 2016, the Commission’s margin requirements were finalized and were being implemented. With margin standards in place – a key building block determining how SDs’ and

MSPs’ capital will be utilized – the Commission determined the time was right to re-propose capital requirements for SDs and MSPs.⁴ It reports that its December 2016 capital requirements are the product of consultations with the Federal Reserve Board, the Office of the Comptroller of the Currency, Federal Deposit Insurance Corporation, the Farm Credit Administration, and the Federal Housing Finance Agency (the “Prudential Regulators”), as well as the Securities and Exchange Commission.⁵

¹ *Capital Requirements of Swap Dealers and Major Swap Participants*, 81 Fed. Reg. 91252 (CFTC Dec. 16, 2016).

² *Capital Requirements of Swap Dealers and Major Swap Participants*, 76 Fed. Reg. 802 (CFTC May 12, 2011).

³ 81 Fed. Reg. at 91254.

⁴ Fact Sheet – Proposed Rules Regarding Capital Requirements for Swap Dealers and Major Swap Participants (CFTC Dec. 2, 2016) Available at: https://www.cftc.gov/sites/default/files/idc/groups/public/@newsroom/documents/file/sdcapital_factsheet120216.pdf.

⁵ 81 Fed. Reg. at 91254.

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